Environmental Appeal Board

2011/2012

Annual Report

APRIL 1, 2011 ~ MARCH 31, 2012

BRITISH COLUMBIA

Environmental Appeal Board

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Dear Ministers:
I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2011 through March 31, 2012.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

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Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2011/2012 fiscal year.

The Year in Review – Appeals

During the past year, the Board has continued to work towards reducing the number of appeals that proceed to a hearing. During this reporting period, I am pleased to note that while 39 new appeals were filed, 20 appeals were withdrawn or resolved during that same period. As a result, only seven appeals proceeded to a hearing on their merits and, of those, only five were the subject of an oral hearing.

Reducing Costs to Government

As the Chair of three tribunals, the Environmental Appeal Board, the Forest Appeals Commission and the Oil and Gas Appeal Tribunal, I have encouraged the "clustering" of tribunals with similar processes and/or mandates. As a result, the Board office now supports a total of eight administrative tribunals. This model has numerous benefits, not only in terms of cost savings, but also in terms of shared knowledge and information. Having one office provide administrative support for several tribunals gives each tribunal greater access to resources while, at the same time, reducing costs and allowing each tribunal to operate independently of one another.

Adding to these efficiencies, the Board is currently developing a number of policy documents to make the appeal process more accessible and understandable to the public, and is improving its joint information systems to facilitate further access and information sharing. The Board is also considering new appeal procedures that may further facilitate the early resolution of appeals. Should an appeal proceed to a hearing, the new procedures will ensure that the hearing proceeds as quickly and efficiently as possible.

Court Decisions Impacting the Board

When an appeal is not resolved prior to a hearing and the Board issues its decision on the appeal, a party may decide to seek a judicial review of the Board's decision in the BC Supreme Court. This can be a lengthy and costly process, in part, because the parties must spend time addressing the standard of review, which includes an assessment of the Board's expertise over the subject matter and the law at issue. The standard of review chosen by the court is important because it shapes how much the court will "defer" to the Board's findings. This year, two decisions of the Supreme Court of Canada helped clarify this matter.

In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court confirmed that a tribunal

should be shown deference when interpreting its own statute, and related statutes within its core function and expertise. It is my hope that these two judgments have helped to settle the standard of review question, and that the long term effect will be to reduce the time and expense of court proceedings in the future.

Board Membership

The Board membership experienced some changes to its roster of qualified professionals during the past year. I am very pleased to welcome three new members to the Board who will complement the expertise and experience of the outstanding professionals on the Board. These new members are Cindy Derkaz, Bruce Devitt and Jagdeep Khun-Khun.

I am very fortunate to have a Board that is comprised of highly qualified individuals who can deal with the various subjects that are heard by the Board. The current membership includes professional biologists, agrologists, engineers, foresters, and lawyers with expertise in the areas of natural resources and administrative law. These members bring with them the necessary expertise to hear appeals on a wide range of subject matters, from contaminated sites to hunting quotas and water licensing.

I would like to take this opportunity to thank all Board members and staff, for their hard work and dedication over the past year and for their continuing commitment to the work of the Board.

Alan Andison
Chair

Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period from April 1, 2011 to March 31, 2012.

The report provides an overview of the structure and function of the Board and how the appeal process operates. It contains statistics on appeals filed, hearings held and decisions issued by the Board within the report period. It also contains the Board's recommendations for legislative changes to the statutes and regulations under which the Board has jurisdiction to hear appeals. Finally, a selection of summaries of the decisions issued by the Board during the report period is provided, and sections of the relevant statutes and regulations are reproduced.

Decisions of the Environmental Appeal Board are available for viewing at the Board office, on the Board's website, and at the following libraries:

- Ministry of Environment Library
- University of British Columbia Law Library
- University of Victoria Law Library
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Database.

Detailed information on the Board's policies and procedures can be found in the Environmental Appeal Board Procedure Manual, which may be obtained from the Board office or viewed on the Board's website. If you have any questions or would like additional copies of this report, please contact the Board office. The Board can be reached at:

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The Board

The Environmental Appeal Board is an independent, quasi-judicial tribunal established on January 1, 1982 under the *Environment Management Act*, and continued under section 93 of the *Environmental Management Act*. As an adjudicative body, the Board operates at arms-length from government to maintain the necessary degree of independence and impartiality. This is important because it hears appeals from administrative decisions made by government officials under a number of statutes.

For the most part, decisions that can be appealed to the Board are made by provincial and municipal government officials under the following six statutes, the relevant provisions of which are administered by the Minister identified: the *Environmental Management Act* and the *Greenhouse Gas Reduction (Cap and Trade) Act*, administered by the Minister of Environment; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* administered by the Minister of Energy and Mines; and the *Integrated Pest Management Act*, the *Wildlife Act* and the *Water Act*, administered by the Minister of Forests, Lands and Natural Resource Operations. The legislation establishing the Board is administered by the Minister of Justice and Attorney General of BC.

The Board makes decisions regarding the legal rights and responsibilities of parties that appear before it and decides whether the decision under appeal was made in accordance with the law. Like a court, the Board must decide its appeals by weighing the evidence before it, making findings of fact, interpreting the legislation and the common law and applying the law and legislation to the facts.

In carrying out its functions, the Board has the powers granted to it under the above-mentioned statutes, as well as additional powers provided under the *Administrative Tribunals Act*, including the ability to compel persons or evidence to be brought before the Board. The Board also ensures that its processes comply with the common law principles of natural justice.

Appointments to the Board and the administration of the Board are governed by the *Administrative Tribunals Appointment and Administration Act*.

Board Membership

Board members are appointed by the Lieutenant Governor in Council (Cabinet) under section 93(3) of the *Environmental Management Act*. The members appointed to the Board are highly qualified individuals, including professional biologists, professional foresters, professional engineers and lawyers with expertise in the areas of natural resources and administrative law. These members apply their respective technical expertise and adjudication skills to hear and decide appeals in a fair, impartial and efficient manner.

The members are drawn from across the Province. Board membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members. The length of the initial appointments and any reappointments of Board members, including the chair, are set out in the *Administrative Tribunals Appointment and Administration Act*, as are other matters relating to the appointments. This *Act* also sets out the responsibilities of the chair.

The Board members during this report period were as follows:

The Board	Profession	From
Chair		
Alan Andison	Lawyer	Victoria
Vice-chair		
Robert Wickett	Lawyer	Vancouver
Members		
R. O'Brian Blackall	Land Surveyor	Charlie Lake
Carol Brown	Lawyer/CGA/Mediator	Sooke
Robert Cameron	Professional Engineer	North Vancouver
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Cindy Derkaz (from October 20, 2011)	Lawyer (retired)	Salmon Arm
W.J. Bruce Devitt (from October 27, 2011)	Professional Forester (retired)	Esquimalt
Tony Fogarassy	Geoscientist/Lawyer	Vancouver
Les Gyug	Professional Biologist	Westbank
James Hackett	Professional Forester	Nanaimo
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Jagdeep Khun-Khun (from October 20, 2011)	Lawyer	Vancouver
Gabriella Lang	Lawyer (retired)	Campbell River
Blair Lockhart	Lawyer/Geoscientist	Vancouver
Ken Long	Professional Agrologist	Prince George
David H. Searle, CM, QC	Lawyer (retired)	North Saanich
Douglas VanDine	Professional Engineer	Victoria
Reid White	Professional Engineer/Professional Biologist (ret.)	Telkwa
Loreen Williams	Lawyer/Mediator	West Vancouver

Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the rights and interests of people. It applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. This law has developed to ensure that officials make their decisions in accordance with the principles of procedural fairness/natural justice by following proper procedures and acting within their jurisdiction.

The Board is governed by the principles of administrative law and, as such, must treat all parties involved in a hearing before the Board fairly, giving each party a chance to explain its position.

Appeals to the Board are decided on a case-by-case basis. Unlike a court, the Board is not bound by its previous decisions; present cases of the Board do not necessarily have to be decided in the same way that previous ones were.

The Board Office

The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board.

The Board shares its staff and its office space with the Forest Appeals Commission, the Oil and Gas Appeal Tribunal, the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Hospital Appeal Board, the Industry Training Appeal Board and the Health Professions Review Board.

Each of these tribunals operates completely independently of one another. Supporting eight tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, reducing administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. If a member of the public requests information regarding an appeal, that information may be disclosed, unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*.

Parties to appeals should be aware that information supplied to the Board is subject to public scrutiny and review.

In addition, the names of the parties in an appeal appear in the Board's published decisions which are posted on the Board's website, and may appear in this Annual Report.

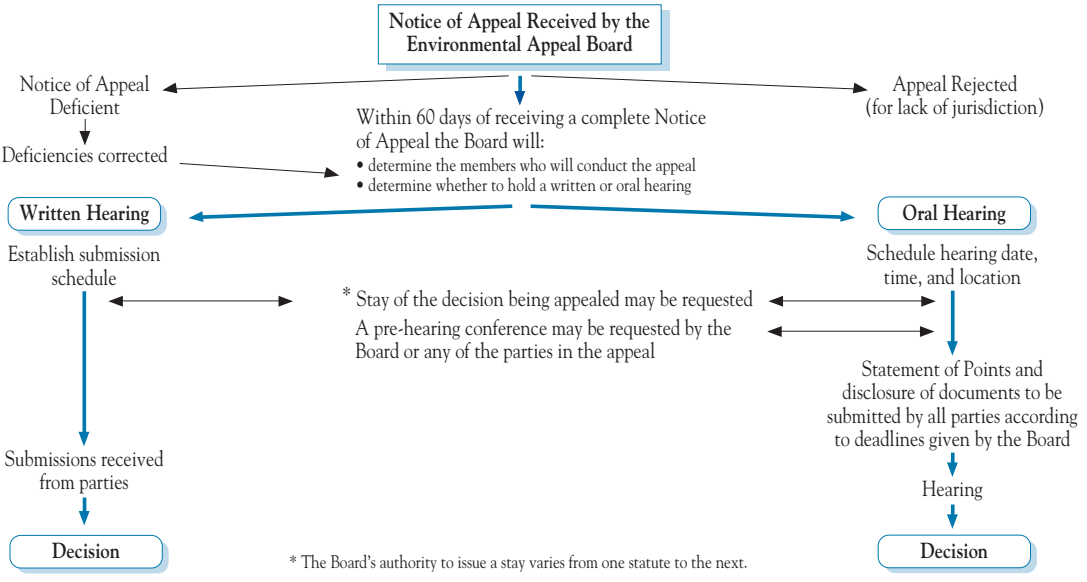
The Appeal Process

General Powers and Procedures of the Board

Part 8, Division 1 of the *Environmental Management Act* sets out the basic structure, powers and procedures of the Board. It describes the composition of the Board and how hearing panels may be organized. It also describes the authority of the Board to add parties to an appeal, the rights of the parties to present evidence, and the Board's power to award costs. Additional procedural details, such as the requirements for starting an appeal, are provided in the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82. The relevant portions of the *Act* and the *Regulation* are included at the back of this report.

In addition to the procedures contained in the *Act* and the *Regulation*, the Board has developed its own policies and procedures. These policies and procedures have been created in response to issues that arise during the appeal process, from receipt of a notice of appeal, to the hearing, to the issuance of a final decision on the merits. To ensure that the appeal process is open and understandable to the public, these policies and procedures have been set out in the Environmental Appeal Board Procedure Manual which is posted on the Board's website.

Finally, in order to determine what decisions are appealable to the Board, who can appeal the decisions, the time for filing an appeal, whether the Board can issue a stay of the decision under appeal, and what the Board's decision-making powers are with respect to the appeal, one must consult the individual statutes and regulations which provide the right of appeal to the Board. A summary of the appeal provisions in the individual statutes is provided in the chart on the next page.



The Basics: who can appeal, what can be appealed and when to appeal

As stated above, to determine what decisions are appealable to the Board, who can appeal the decisions and the time for filing an appeal, as well as the Board's power to issue a stay, the individual statutes and regulations which provide the right of appeal to the Board must be consulted. The following is a summary of the individual statutes and the provisions that answer these questions.

Environmental Management Act

The *Environmental Management Act* regulates the discharge of waste into the environment and the clean-up of contaminated sites in B.C., by setting standards and requirements, and empowering government officials to issue permits, approvals, operational certificates, and orders, and impose administrative penalties for non-compliance. Waste regulated by this Act includes air contaminants, litter, effluent, refuse, biomedical waste, and special wastes.

The decisions that may be appealed under the *Environmental Management Act* are set out in Part 8, Division 2. That division states that a person "aggrieved by a decision" of a director or a district director may appeal that decision to the Board. An appealable "decision" is defined as follows:

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed [under section 115(5), a director may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or

cancellation of the penalty, subject to the terms and conditions the director considers necessary or desirable.].

The time limit for filing an appeal of a decision is 30 days after notice of the decision is given.

The Board can order a stay of the decision under appeal.

Greenhouse Gas Reduction (Cap and Trade) Act

The *Greenhouse Gas Reduction (Cap and Trade) Act* requires operators of B.C. facilities emitting 10,000 tonnes or more of carbon dioxide equivalent emissions per year to report their greenhouse gas emissions to the government, and empowers government officials to impose administrative penalties for non-compliance.

Under this *Act*, certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 18 of the *Act [imposed administrative penalties: failure to retire compliance units]* or of the extent of that non-compliance, as set out in an administrative penalty notice;*
- the determination of non-compliance under section 19 of the *Act [administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;
- a decision under section 13(7) of the *Reporting Regulation [approval of alternative methodology for 2010]*; and
- a decision under section 14(2) of the *Reporting Regulation [approval of change of methodology]*.

According to the *Reporting Regulation*, B.C. Reg. 272/2009, the time limit for filing an appeal of a decision is 30 days after notice of the decision is given, and the Board may order a stay of the decision under appeal.

*Sections 18 and 19 of the *Act* are not yet in force.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels and to submit annual compliance reports to the government, and empowers government officials to impose administrative penalties for non-compliance.

Certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 11 of the *Act [imposed administrative penalties: fuel requirements]* or of the extent of that non-compliance, as set out in an administrative penalty notice;
- the determination of non-compliance under section 12 of the *Act [administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

- a refusal to accept an alternative calculation of carbon intensity under section 6 (3)(b)(iii) of the *Act [requirements for reduced carbon intensity]*; and
- a prescribed decision or a decision in a prescribed class.

According to the *Renewable and Low Carbon Fuel Requirements Regulation*, B.C. Reg. 394/2008, the time limit for commencing an appeal is 30 days after the decision is served. The Board is not empowered to order a stay of the decision under appeal.

Integrated Pest Management Act

The *Integrated Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application and disposal of pesticides in B.C. This *Act* requires permits to be obtained for certain pesticide uses, and requires certain pesticide applicators to be certified. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect, and it empowers government officials to impose administrative penalties for non-compliance.

Under this *Act*, the right of appeal (those with standing to appeal) is quite broad. The *Act* states that "a person" may appeal a decision under this *Act* to the Board. "Decision" is then defined as:

(a) making an order, other than an order under section 8 *[an order issued by the Minister of Environment]*;
(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;
(c) amending or refusing to issue, amend or renew a licence, certificate or permit;
(d) revoking or suspending a licence, certificate, permit or confirmation;
(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;
(f) determining to impose an administrative penalty; and
(g) determining that the terms and conditions of an agreement under section 23(4) have not been performed [under section 23(4), the administrator may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the administrator considers necessary or desirable].

The time limit for filing an appeal of a decision is 30 days after the date the decision being appealed is made.

The Board can order a stay of the decision under appeal.

Water Act

The *Water Act* regulates the diversion, use and allocation of surface water, regulates work in and about streams, regulates the construction and operation of ground water wells, and empowers government officials to issue licences, approvals, and orders.

The decisions that may be appealed under the *Water Act*, and the people who may appeal them, are set out in section 92(1) of the *Act*. The *Act* states that an order of the comptroller, the regional water manager or an engineer may be appealed to the Board by the person who is subject to the order, an owner whose land is or is likely to be physically affected by the order, or a licensee, riparian owner or applicant for

a licence who considers that their rights are or will be prejudiced by the order.

In addition, an order of the comptroller, the regional water manager or an engineer made under Part 5 *[Wells and Ground Water Protection]* or Part 6 *[General]* of the *Act* in relation to a well, works related to a well, ground water or an aquifer may be appealed to the Board by the person who is subject to the order, the well owner, or the owner of the land on which the well is located.

Finally, an order of the comptroller, the regional water manager or an engineer made in relation to a well drilling authorization under section 81 of the *Act* may be appealed to the Board by the person who is subject to the order, the well owner, the owner of the land on which the well is located, or a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

It should be noted that a licensee cannot appeal an order of the comptroller or a regional water manager to cancel a licence if the cancellation was because the licensee failed to pay the rentals due to the government for three years, or if the licence was cancelled on the grounds of failure to pay the water bailiff's fees for six months.

The time limit for filing an appeal is 30 days after notice of the decision is given.

The Board can order a stay of the decision under appeal.

Wildlife Act

The *Wildlife Act* regulates the use, allocation, ownership, import and export of fish and wildlife in B.C., and empowers government officials to issue licences, permits, certificates, and orders, and impose administrative penalties for non-compliance. Activities regulated by this *Act* include hunting, angling in non-tidal waters, guide outfitting, and trapping.

Under section 101.1 of the *Wildlife Act*, a decision of a regional manager or the director that affects a licence, permit, registration of a trapline or guiding territory certificate, or an application for any of those things, may be appealed by the person who is affected by the decision.

The time limit for filing an appeal under the *Wildlife Act* is 30 days after notice is given.

The Board can order a stay of the decision under appeal.

Starting an Appeal

For all appeals, an appellant must prepare a notice of appeal and deliver it to the Board office within the time limit specified in the relevant statute. The notice of appeal must comply with the content requirements of the *Environmental Appeal Board Procedure Regulation*. It must contain the name and address of the appellant, the name of the appellant's counsel or agent (if any), the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested. Also, the notice of appeal must be signed by the appellant, or on his or her behalf by their counsel or agent, and the notice must be accompanied by a fee of $25 for each action, decision or order appealed.

In addition, the Board requires a copy of the permit, licence, order or decision being appealed.

Generally, if the Board does not receive a notice of appeal within the specified time limit, the appellant will lose the right to appeal.

If the notice of appeal is missing any of the required information, the Board will notify the appellant of the deficiencies. The Board may refrain from taking any action on an appeal until the notice is complete and any deficiencies are corrected.

Once a notice of appeal is accepted as complete, the Board will notify the office of the

official who made the decision being appealed. The decision-maker will be the respondent in the appeal.

Parties and Participants to an Appeal

A party to an appeal has a variety of important rights: the right to present evidence, cross-examine the witnesses of the other parties, and make opening and closing arguments. The person who filed the appeal (the appellant) and the decision-maker (the respondent) are parties to the appeal.

In addition to the appellant and respondent, the Board may add other parties to an appeal. As a standard practice, the Board will offer party status to a person who may be affected by the appeal such as the person holding the permit or licence which is the subject of an appeal by another person. In addition, a person may apply to the Board to become a party to the appeal if he or she may be affected by the Board's decision. These additional parties are referred to as "third parties" to the appeal.

The Board also has the discretion to invite any person to be heard in the appeal, without making that person a party to the appeal. This may be done on the Board's initiative or as a result of a request. The Board refers to these people as "participants". If a person applies to participate in an appeal, the Board will decide whether the person should be granted participant status and, if so, the extent of that participation. In all cases, a participant may only participate in a hearing to the extent that the Board allows. It does not have the rights of a party.

Stays

A "stay" has the effect of postponing the legal obligation to implement all or part of the decision or order under appeal until the Board has held a hearing, and issued its decision on the appeal.

The Board has the power to stay all decisions under appeal, except for decisions appealed under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*. However, a stay is not granted in every case: it is an extraordinary remedy that a person must specifically apply for. For the Board to grant a stay, the applicant must satisfy a particular test. That test is described later in this report under the heading "Summaries of Decisions: Preliminary Applications".

Dispute Resolution

The Board encourages parties to resolve the issues underlying the appeal at any time in the appeal process. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences; and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Board for its approval. Alternatively, the appellant may withdraw his or her appeal at any time.

Pre-hearing Conferences

The Board, or any of the parties to any appeal, may request a pre-hearing conference. Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the spokespersons for the parties, one Board member and one staff member from the Board office. It will be less formal than a hearing and will usually follow an agenda, which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

Scheduling a Hearing

The *Environmental Appeal Board Procedure Regulation* requires the chair to determine, within 60 days of receiving a complete notice of appeal, which member(s) of the Board will hear the appeal and the type of appeal hearing. A hearing may be conducted by way of written submissions, an oral (in person) hearing, or a combination of both.

If the chair decides that the issues in the appeal can be fairly decided on the basis of written submissions, the chair will schedule a written hearing. Prior to ordering a written hearing, the Board may request the parties' input.

If the chair decides that an oral (in person) hearing is required in the circumstances, the chair must set the date, time and location of the hearing and notify the parties, the applicant (if different from the appellant) and any objectors (as defined in the *Environmental Appeal Board Procedure Regulation*). It may be held in the locale closest to the affected parties, at the Board office in Victoria or anywhere in the province.

Regardless of the type of hearing scheduled, the Board has the authority to conduct a "new hearing" on the matter before it. This means that the Board may hear the same evidence that was before the original decision-maker, as well as receive new evidence.

Written Hearings

If it is determined that a hearing will be by way of written submissions, the chair will invite all parties to provide submissions and will establish the due dates for the submissions. The general order of submissions is as follows. The appellant will provide its submissions, including its evidence, first. The other parties will have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

Oral Hearings

Oral (in person) hearings are normally scheduled in cases where there is some disagreement on the facts underlying the dispute; where there is a need to hear the parties' evidence and assess the credibility of witnesses.

To ensure the hearing proceeds in an expeditious and efficient manner, in advance of the hearing, the chair asks the parties to provide the Board, and each of the parties to the appeal, with a written Statement of Points (a summary of the main issues, evidence, witnesses, and arguments to be presented at the hearing) and all relevant documents.

Board hearings are less formal than hearings before a court. However, some of the Board's oral hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation and witnesses are subject to cross-examination. In addition, parties to the appeal may have lawyers representing them at the hearing, but this is not required. The Board will make every effort to keep the process open and accessible to parties not represented by a lawyer.

All hearings before the Board are open to the public.

Evidence

The Board has full discretion to receive any information that it considers relevant and will then determine what weight to give the evidence when making its decision.

Experts

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge".

The Board is not bound by the provisions relating to expert evidence in the B.C. *Evidence Act*. However, the Board does require that 60 days advance notice that expert evidence will be given at a hearing and that the notice include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing, and the facts on which the opinion is based.

Obtaining an Order for Attendance of a Witness or Production of Documents

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to make an order requiring the person to attend a hearing and give evidence. Also, if a person refuses to produce particular relevant documents in their possession, a party may ask the Board to order the person to produce a document or other thing prior to, or during, a hearing.

Section 93(11) of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act* provide the Board with the power to require the attendance of a witness at a hearing, and to compel a witness to produce for the tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

The Decision

To make its decision, the Board is required to determine, on a balance of probabilities, what occurred and to decide the issues raised in the appeal.

The Board will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing within a reasonable time following the hearing. Copies of the decision will be given to the parties, the participants, and the appropriate minister(s).

There is no right of appeal to the courts from a Board decision. Section 97 of the *Environmental Management Act* allows Cabinet to vary or rescind an order or decision of the Board if it is in the public interest to do so.

Alternatively, a party dissatisfied with a decision or order of the Board may apply to the B.C. Supreme Court for judicial review of the decision pursuant to the *Judicial Review Procedure Act*.

Costs

The Board also has the power to award costs. In particular, it may order a party to pay all or part of the costs of another party in connection with the appeal. The Board's policy is to only award costs in special circumstances.

In addition, if the Board considers that the conduct of a party has been frivolous, vexatious or abusive, it may order that party to pay all or part of the expenses of the Board in connection with the appeal.

Legislative Amendments Affecting the Board

During this report period, there were no legislative changes that affected the types of appeals the Board hears, or that affected the Board's powers or procedures.

Recommendations

There were no issues that arose in 2011/2012 that warrant a recommendation at this time.

Statistics

The following tables provide information on the appeals filed with the Board and decisions published by the Board during the report period. The Board publishes all of its decisions on the merits of an appeal, and most of the important preliminary and post-hearing decisions. The Board also issues hundreds of unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

Between April 1, 2011 and March 31, 2012, a total of 39 appeals were filed with the Board against 34 administrative decisions, and a total of 22 decisions were published. No appeals were filed or heard under the *Greenhouse Gas Reduction (Cap and Trade) Act* or the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

April 1, 2011 – March 31, 2012

Total appeals filed		**39**
Total appeals closed		**31**
Appeals abandoned or withdrawn		**12**
Appeals rejected, jurisdiction/standing		**8**
Hearings held on the merits of appeals:		
Oral hearings completed	5	
Written hearings completed	2	
***Total hearings held on the merits of appeals**		**7**
Total oral hearing days		**13**
Published Decisions issued:		
Final Decisions (excluding consent orders)		
Appeals allowed	3	
Appeals allowed, allowed in part	0	
Appeals dismissed	7	
Total Final Decisions		**10**
Decisions on preliminary matters		**9**
Decisions on Costs		**2**
Consent Orders		**1**
Total published decisions issued		**22**

▲

This table provides an overview of the total appeals filed, hearings held, and published decisions issued by the Board during the report period. It should be noted that the number of decisions issued and hearings held during the report period does not necessarily reflect the number of appeals filed for the same period, because the appeals filed in previous years may have been heard or decided during the report period.

It should also be noted that two or more appeals may be heard together.

Note:

* Most preliminary applications and post-hearing applications are conducted in writing. However, only the final hearings on the merits of the appeal have been included in this statistic.

Appeal Statistics by Act

	Environmental Management	Greenhouse Gas Reduction (Cap and Trade Act)	Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements Act)	Integrated Pest Management	Water	Wildlife	Total
Appeals filed during report period	5	0	0	0	17	17	39
Appeals closed during report period	9	0	0	0	13	9	31
Appeals abandoned or withdrawn	4				5	3	12
Appeals rejected jurisdiction/standing	1				5	2	8
Hearings held on the merits of appeals							
Oral hearings					4	1	5
Written hearings						2	2
Total hearings held on the merits of appeals							7
Total oral hearing days							13
Published decisions issued							
Final decisions	4				3	3	10
Costs decision					2		2
Preliminary applications	1				7	1	9
Consent Orders						1	1
Total published decisions issued							**22**

▲

This table provides a summary of the appeals filed, hearings held and published decisions issued by the Board during the report period, categorized according to the statute under which the appeal was brought.

Summaries of Board Decisions

April 1, 2011 ~ March 31, 2012

Appeal cases are not heard by the entire Board, they are heard by a "panel" of the Board. As noted earlier in this report, once an appeal is filed, the chair of the Board will decide whether the appeal should be heard and decided by a panel of one or by a panel of three members of the Board. The size and the composition of the panel (the type of expertise needed on a panel) generally depends upon the subject matter of the appeal and/or its complexity. The subject matter and the issues raised in an appeal can vary significantly in both technical and legal complexity. The chair makes every effort to ensure that the panel hearing an appeal will have the depth of expertise needed to understand the issues and the evidence, and to make the decisions required.

In terms of its decision-making authority, a panel has the power to confirm, vary or rescind the decision under appeal. In addition, under all of the statutes, a panel may also send the matter back to the original decision-maker with or without directions, or make any decision that the original decision-maker could have made and that the panel believes is appropriate in the circumstances. When an appellant is successful in convincing the panel, on a balance of probabilities, that the decision under appeal was made in error, or that there is new information that results in a change to the original decision, the appeal is said to be "allowed". If the appellant succeeds in obtaining some changes to the decision, but not all of the changes that he or she asked for, the appeal is said to be "allowed in part". When an appellant fails to establish that the decision was incorrect on the facts or in law, and the Board upholds the original decision, the appeal is said to be "dismissed".

Not all appeals proceed to a hearing and a decision by the Board. Some cases are withdrawn or abandoned by an appellant before a hearing. In other cases, an appellant's standing to appeal may be challenged, or the Board's jurisdiction over the appeal may be challenged, resulting in the Board dismissing the appeal in a preliminary decision. In addition, the Board is called upon to make a variety of other preliminary decisions, some which are reported and others that are not. Examples of some of the preliminary decisions made by the Board have been provided in the summaries below.

It is also important to note that many cases are also settled or resolved prior to a hearing. The Board encourages parties to resolve the matters under appeal either on their own or with the assistance of the Board. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a consent order and ask the Board to approve the order. The consent order then becomes an order of the Board. The Board has included a description of a consent order in the summaries.

The summaries that have been selected for this Annual Report reflect the variety of subjects and the variety of issues that come before the Board in any given year. The summaries have been organized into preliminary applications decided by the Board, and decisions on the merits of the appeal. The summaries of final decisions are further organized by the statute under which the appeal was filed. For a full viewing of all of the Board's published decisions and their summaries, please refer to the Board's website.

Preliminary Applications and Decisions

Jurisdictional Issues

For the Board to accept an appeal under the *Environmental Management Act*, the appealed matter must fall within the definition of "decision" under section 99 of the *Act*, and it must be made by a "director or district director". Over the years, there have been many cases in which the Board has been asked to determine, as a preliminary matter, whether the type of decision made meets the definition of appealable decision under section 99 of the *Act* and therefore, whether the Board has jurisdiction to hear the appeal.

Original Decision Invalid – Decision regarding Drinking Water Standards at a Remediated Contaminated Site

2011-EMA-004(a) BCR Properties Ltd. v. Manager, Risk Assessment and Remediation

Decision Date: November 10, 2011

Panel: Alan Andison

In this case, the Board was asked to decide whether the decision that was made met the definition of appealable decision under section 99, and whether the person who made the decision was a director or district director, and therefore authorized to make the decision at all. The background to the appeal is as follows.

BCR Properties Ltd. ("BCR") was remediating a contaminated site at former railyard located in Squamish, BC. As part of its remediation efforts, BCR applied to the director for a determination that drinking water use standards should not be applied to the site, and provided a technical rationale in support. Under the legislation, only a director is authorized to make this particular determination. If water is to be treated to "drinking water" standards, this means that the water can be used "for the purpose of consumption by humans": there are high standards. The Manager, Risk Assessment and Remediation, Ministry of Environment, responded to the application. Based on the rationale presented in the application, the Manager determined that the drinking water use standards would be applied to the site. BCR appealed the Manager's letter.

The Manager submitted that the letter was not appealable because, at all material times, she was not properly delegated to act as a director, and the letter did not constitute the "imposition of a requirement" under section 99 of the *Act*. The Board asked the parties to provide written submissions on these questions.

Although the Board found that the *Act* allows a director to delegate his or her powers to any person, the Board found that the terms and conditions of the delegation provided that the Manager was only delegated to act as a director so long as she remained within her "current capacity within government". At that time, her capacity in government was a Senior Contaminated Sites Officer, Land Remediation. Consequently, the Board concluded that the Manager was not acting in accordance with the terms and conditions of the delegation document when she signed the letter to BCR, and therefore, she was not acting as a director's delegate when she issued the letter.

After considering the nature of the decision in the letter, the Board found that the determination regarding water standards would have been appealable as "imposing a requirement" if it had been made by an authorized director. However, the Manager was

not properly authorized to make that determination. As this determination was invalid, BCR's application to the director remained outstanding. Therefore, the Board concluded that the director was still under an obligation to make a proper water use determination in relation to the site and sent the matter back to the Ministry with the direction that a director should make a determination on BCR's application.

Requests for Participant Status

Under section 94(1)(a) of the *Environmental Management Act*, the Board has the discretion to invite (add) any person to be heard in an appeal. This may be done on the Board's initiative or as a result of a request. Under this section, the Board may add a person as a "party" to the appeal, or as a "participant". Parties generally have more rights to call evidence and make submissions than a participant.

When deciding whether to add a person as a party or as a participant in an appeal, the Board will consider the timeliness of the application, the prejudice, if any, to the existing parties to the appeal, whether the applicant has sufficient interest in the proceeding, whether the interest of the applicant can be adequately represented by another party, the applicant's desired level of participation, whether allowing the application will delay or unduly lengthen the proceedings, and any other factors that are relevant in the circumstances.

First Nation Applies to Participate in Hearing to Protect Sensitive Caribou Habitat

2011-WIL-002(a) Colonial Coal Corporation v. Regional Manager (West Moberly First Nations, Applicant)

Decision Date: May 31, 2011

Panel: Alan Andison

In this case, the West Moberly First Nations ("West Moberly") applied to be added as a full party in a *Wildlife Act* appeal filed by Colonial Coal Corporation ("Colonial Coal").

Colonial Coal had appealed a decision of the Regional Manager, Recreational Fisheries and Wildlife Programs, refusing to issue a permit that would allow Colonial Coal to use motor vehicles to build access trails in an area closed to motor vehicles under the *Motor Vehicle Prohibition Regulation*. Colonial Coal intended to build approximately 9.2 kilometres of new trails and to reopen and modify 0.3 kilometres of existing trails to support its mineral exploration activities south-east of Tumbler Ridge, BC. Some of the proposed or existing trails were located above the elevation of 1400 metres. The Regional Manager refused to issue the permit on the grounds that the motor vehicles would be going through sensitive caribou habitat. West Moberly argued that it had a direct interest in the outcome of the appeal and, in particular, the potential impacts of Colonial Coal's permit application on caribou. It also stated that the Regional Manager did not consult with West Moberly prior to making his decision. On these grounds, West Moberly argued that it should be granted full party status.

Considering the factors above, the Board found that West Moberly had an interest in the health and population of the caribou herd at issue and that it may be affected by an activity that negatively affects the herd. Therefore, it could be impacted by the Board's decision on the appeal. The Board also found that West Moberly had, or appeared to have, relevant information on the caribou herd and on any impacts that a permit may have on its hunting and/or cultural rights. However, the Board had two concerns with West Moberly's application for full party status. The first concern was that the information that West Moberly had about the caribou herd may be a duplication of the evidence to be presented by the Regional Manager.

The Board's second concern was in relation to West Moberly's allegation that the Crown did

not consult with West Moberly about the permit application. The Board held that, if West Moberly intended to introduce evidence and make arguments regarding its right to hunt and the Crown's duty to consult and accommodate, it would significantly expand the scope and nature of the appeal. The Board noted that the appeal proceeding was limited to the grounds of appeal raised by Colonial Coal. Therefore, the Board held that it would not hear extensive evidence and submissions regarding the Crown's duty to consult and accommodate West Moberly.

The Board decided to allow West Moberly to make submissions respecting their rights, and the constitutional obligations that may be owed to them should Colonial Coal's appeal be successful. The Board ordered that those submissions would not include the opportunity to present evidence or ask questions (cross-examination). Accordingly, the Board allowed West Moberly to participate in the appeal on a limited basis.

The application was granted, in part.

Public Interest Environmental Program Applies to Participate in Water Hearing

2011-WAT-005(b) & 006(b) Chief Richard Harry in his own right and on behalf of the Xwémalhkwu First Nation v. Assistant Regional Water Manager (Bear River Consulting Ltd., Third Party/Licence Holder)

Decision Date: October 27, 2011

Panel: Alan Andison

The Environmental Law Centre is a non-profit society and public interest environmental law clinical program operated in partnership with the University of Victoria's Faculty of Law. It applied to participate in two appeals filed by Chief Richard Harry, in his own right and on behalf of the Xwémalhkwu First Nation, against two conditional water licences. The licences were issued to Bear River Contracting Ltd. (the "Licensee"). They allowed the Licensee to divert, use and store water from Bear River, and to construct certain works on the Licensee's land for the purposes of fire protection, industrial (residential lawn watering), industrial (bottling sales), and industrial (enterprise).

Bear River flows through the Licensee's land, and then through the First Nation's Indian Reservation No. 8 located at the mouth of the Bear River on Bute Inlet on the west coast of the mainland of British Columbia. The First Nation is involved in 4th stage treaty negotiations, and the Bear Bay area is within their claimed traditional territory. Chief Richard Harry and the First Nation appealed the licences on various grounds, including: the Ministry failed to provide adequate notice of the licence applications or the extent to which the First Nation's rights would be impaired, failed to hold a hearing with the First Nation before granting the licences, failed to adequately consult with or accommodate the First Nation as required by law, and failed to comply with the *Water Act*.

The Environmental Law Centre argued that the appeals raise issues of water law and policy that relate directly to its public interest-related mission, and that it had a valid interest in the issues raised by the appeals. It maintained that its interests and perspective were different from those of any party in the appeals, its participation would assist the Board, and that it would not cause duplication or undue delay in the proceedings. The Regional Manager and the Licence Holder objected to the application.

The Board found that the Environmental Law Centre had a valid interest in participating in the appeals. Specifically, the Board held that the Environmental Law Centre's interests were aligned with those of the Appellants, but its perspective was different from that of the Appellants, or any other party, given its mission and history of providing research and advocacy on water law issues. In addition, the Board

found that the Environmental Law Centre's expertise would enable it to make a well-informed contribution. However, the Board found that allowing it to participate may add complexity to the proceedings, and would add to the cost and length of the hearing. To some degree, it would also result in duplication of the Appellants' case, especially if both the Environmental Law Centre and Appellants were permitted to cross-examine Ministry witnesses. Based on those considerations, the Board decided to allow the Environmental Law Centre to submit a written legal argument and make oral opening and closing submissions, but did not to allow it to cross-examine witnesses.

The application for participant status was granted, on a limited basis.

An Extraordinary Remedy – the Power to Order a Stay

An appeal to the Board does not automatically prevent the decision under appeal from taking effect. The decision under appeal remains valid and enforceable unless the Board makes an order to temporarily "stay" the decision. A temporary stay prevents the decision from taking effect until the appeal is decided.

If a party wants to postpone the decision from taking effect until after the appeal is decided, the party must apply to the Board for a stay and address the following issues:

- whether the appeal raises a serious issue to be decided by the Board;
- whether the applicant for the stay will suffer irreparable harm if a stay is not granted; and
- whether there will be any negative consequences to property (real or economic), the environment or to public health or safety if the decision is stayed until the appeal is concluded (the balance of convenience test).

When addressing the issue of irreparable harm, the party seeking the stay must explain what harm it would suffer if the stay was refused and why this harm is "irreparable" (i.e., it could not be remedied if the party ultimately wins the appeal). "Irreparable" has been defined by the Supreme Court of Canada as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision …, where one party will suffer permanent market loss or irrevocable damage to its business reputation …, or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

In addressing the issue of "balance of convenience", the party seeking the stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties or the environment if the stay is granted. In the following appeal under the *Water Act*, the Board found that a stay should be granted due to irreparable financial harm.

Dispute over a Ditch results in a Stay

2011-WAT-009(a) & 010(a) Comet Investments Ltd., Inc. No. 69349 and P.G. Realty & Insurance Agency Ltd., Inc. No. 63919 v. Assistant Regional Water Manager and Regional Water Manager

Decision Date: September 29, 2011

Panel: Robert Wickett

Comet Investments Ltd., Inc. No. 69349 and P.G. Realty and Insurance Agency Ltd., Inc. No. 63919 own a property referred to in this case as Lot A, located in Prince George, BC. The property is zoned

for light industrial use. Many years ago, the president of both companies dug an overflow ditch on the property. He dug the ditch to address flooding on the property allegedly caused by storm water runoff being diverted from a development north of Lot A, into a head pond which lies, in part, on Lot A.

At some point prior to June of 2011, the companies decided to dig a new overflow ditch and to fill in the old ditch so that the property could be used for its light industrial zoned uses. The new ditch was constructed in July and August of 2011, and connected with the City of Prince George's storm water system. The old ditch was filled in. No prior *Water Act* approvals or authorizations were sought or obtained for these activities.

In 2011, two orders were issued to the companies: one order was issued in August, the other in September. The first order required the companies to cease any further works on Lot A that may cause or allow erosion, to retain a qualified professional, and to prepare a plan for remediating the alleged unauthorized works. The second order extended the dates for compliance with the first order. The orders related to alleged unauthorized works in and about a creek, pond, and ditch on Lot A.

The companies appealed and asked the Board to grant a stay of the orders pending a final decision by the Board on the merits of the appeals. The companies argued that the orders were made without jurisdiction because they do not pertain to a "stream", and that the decision-making process was unfair. They maintain that the "creek" referred to in the orders is the man-made ditch constructed on Lot A many years earlier. All parties provided substantial evidence and arguments in relation to the three-part test for a stay.

The Board found that the companies would suffer financial harm if they had to comply with the orders. The Board also found that this harm would be irreparable in nature: if they were successful in their appeals, there was no clear mechanism by which the companies could recover the money spent in order to comply with the orders.

In contrast, the Board found that there was no evidence that granting a stay, and delaying the operation of the orders, would cause any material, irreparable harm to the environment, including fisheries values. Weighing the potential harm to the Applicants' interests if a stay was denied, against the potential harm to the environment if a stay was granted, the Board concluded that the balance of convenience favoured granting a stay of the orders.

The applications for a stay were granted.

Final Decisions

Environmental Management Act

Director Erred in Withholding Certificate of Compliance for Remediated Contaminated Site

2010-EMA-007(b) 455161 BC Ltd. v. Director, *Environmental Management Act*

Decision Date: September 15, 2011

Panel: Alan Andison

The Appellant, 455161 BC Ltd., owns property in Westbank, BC, that had been the site of a gas station until approximately 1994. Before the gas station closed, it was determined that gasoline had leaked into the soil and that there was hydrocarbon contamination in the property's soil and groundwater.

Remediation efforts took place in 2002, and again in 2006. In May 2007, the Appellant applied to the Director, *Environmental Management Act*, for a Certificate of Compliance (a "Certificate") in relation to remediation conducted on the property. The application included a letter and report prepared by an approved professional under the Act. He advised

that the Appellant's property had been remediated to appropriate standards, and he recommended that a Certificate be issued for the property. The approved professional acknowledged that there was evidence of contaminant migration to adjacent land, but he concluded that mitigation measures on the Appellant's property, consisting of a plastic curtain wall, had been implemented to protect against recontamination of the Appellant's property.

Years of discussions between the Appellant and Ministry representatives ensued, however, no Certificate was issued.

In April 2010, the Director wrote to the Appellant stating that he would not reject or approve the application until further information was provided about the extent of the contamination that may exist on lands adjacent to the Appellant's property. The Appellant appealed.

The Board considered the Director's powers and discretion in relation to applications for Certificates, as set out in the applicable provisions of the *Act*, the *Contaminated Sites Regulation*, and a July 28, 2004 version of the Director's Protocol 6, which was in effect when the Appellant submitted its application. The Board found that Protocol 6 is not a regulation but the Director has the discretion to require compliance with Protocol 6, in terms of the information to be submitted with applications for Certificates. The version of Protocol 6 in effect at the relevant time did not require that applications for Certificates address all lands affected by the contamination. It also stated that applications for a Certificate for part of a contaminated site were eligible, if the application includes an approved professional's statement of assurance confirming that measures necessary to prevent recontamination of the property have been put in place. The Board found that those aspects of Protocol 6 were consistent with the provisions authorizing the Director to issue a Certificate for part of a contaminated site, and requiring the Director to consider whether permanent solutions have been given preference to the maximum extent possible when issuing a Certificate.

The Board considered the approved professional's recommendation and assurance statements that were submitted with the Appellant's application, and found that the statements met the requirements of Protocol 6 and the *Act* in relation to Certificate applications for part of a contaminated site. The Board held that the existing information about the adjacent lands was inconclusive as to the levels of any contaminants or whether the Appellant's property was the source of any contaminants on those lands. However, the Board found that the lack of information about the adjacent lands was not a proper basis for not considering the application in respect of the Appellant's property, as part of a site, given the recommendations and assurances that were provided by the approved professional. The Board also found that it was unreasonable for the Director to refuse to consider the application based on a lack of information about compliance with remediation standards that did not exist when the application was filed, or based on speculation that contaminants may have migrated to the Appellant's property, after the application was filed, from a different potential source of contamination on another property.

The Board also noted that the Director had a broad range of statutory powers to address the need to investigate and possibly remediate the adjacent lands, and he retained the right to exercise his statutory powers in relation to the adjacent site, even if a Certificate was issued.

The Board therefore referred the matter back to the Director with directions to issue a Certificate for the property as part of a contaminated site, subject to the Appellant providing notice to the adjacent property owners regarding the potential migration of contamination from the Appellant's property to those properties.

The appeal was allowed.

Cache Creek Landfill Annex will Harm the Environment Say Concerned Residents

2009-EMA-004(a); 005(b); 006(a) Marcus Lowe; Ermes Culos et al; Cornwall Watershed Coalition Society v. Director, *Environmental Management Act* (Wastech Services Ltd.; Village of Cache Creek, Third Parties) (Metro Vancouver, Observer)

Decision Date: August 24, 2011

Panel: Alan Andison, Dr. Robert Cameron, Ken Long

The Village of Cache Creek and Wastech Services Ltd. ("Wastech") hold an Operational Certificate that allows them to manage municipal solid waste at a sanitary landfill located in Cache Creek, BC. The landfill is located on Crown land near Cache Creek, and has operated since 1987 under a permit, and later an Operational Certificate, both issued by the Ministry. The landfill receives waste from the Greater Vancouver Regional District, Powell River, the Cowichan Valley Regional District, Cache Creek, and parts of the Thompson-Nicola Regional District. It also receives fly ash from a solid waste incinerator in Burnaby.

In 2007, Wastech applied for amendments authorizing an "Annex" that would increase the annual disposal capacity of the landfill. However, Wastech did not proceed with that proposal because Metro Vancouver's waste disposal needs did not increase as forecast. In January 2009, Wastech advised the Ministry that it wanted to revive the Annex proposal, but with no increase to the annual rate of discharge to the landfill. Wastech published public notices and conducted public consultations regarding both the 2007 and 2009 applications.

In response to public concern, the Ministry commissioned an independent team of consultants to review several previous technical reports that had considered the environmental impacts of the landfill. The independent consultants' report was completed in June 2009, and presented at public community meetings. Wastech agreed to all of the recommendations in that report, some of which related to the proposed Annex. In August 2009, the Director approved an expansion of the landfill's footprint to include an additional 6.7 hectare area (the Annex) located adjacent to the existing landfill, subject to conditions, and issued an amended Certificate. Marcus Lowe, Ermes Culos and four other persons, and the Cornwall Watershed Coalition Society appealed the amendments.

The Appellants raised several issues related to the process that led up to approving the amendments and the potential environmental effects of the Annex. The Appellants asked the Board to reverse the decision approving the amendments that authorize the Annex.

The Board first considered the Appellants' argument that the Annex constitutes a "new landfill" that should have undergone different procedures, including the amount and type of pubic consultation. The Board found that the Annex is not a new landfill: it is a part of the existing landfill and is not a reviewable project under the *Environmental Assessment Act*. It also concluded that the amendments were consistent with the approved solid waste management plan for the landfill. The Board found that the public consultation process that took place in this case complied with the *Act*, the *Public Notification Regulation*, and that no additional public consultation was required.

The Appellants also argued that a vote by Metro Vancouver Sewage and Drainage District Board to abandon all Interior BC landfills, and Metro Vancouver's use of various waste reduction strategies, should have been considered by the Director before he issued the amended Certificate. The Board rejected this argument. The Board found that those were not relevant considerations in relation to the application for the amendments, because the Director is not bound by the Metro Vancouver Sewage and Drainage District Board's decision, and there was evidence of the need for the amendments, mainly to accommodate solid waste generated by the Metro Vancouver area.

Regarding the potential environmental effects of the Annex, the Board found that the manner of handling and disposing of fly ash in the Annex will protect the environment. The Board found that concerns about the way fly ash was handled in other areas of the landfill were beyond the scope of the appeal. Regarding impact to air quality, the Board found that there would be no new impacts from trucking waste to the Annex, and there was insufficient evidence to establish that flaring methane gas from wells at the landfill would harm human health. However, the Board encouraged Wastech and Cache Creek to continue to pursue advanced gas recovery and utilization techniques. Regarding leachate, the Board held that the system for collecting and managing leachate from the Annex would protect the environment. Finally, the Board found that the vertical expansion of the landfill from the deposit of waste in the Annex would not cause problems with the existing landfill and would not result in environmental concerns.

The appeals were dismissed.

Greenhouse Gas Reduction (Cap and Trade) Act

There were no decisions by the Board during this reporting period.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

There were no decisions by the Board during this reporting period.

Integrated Pest Management Act

There were no decisions by the Board during this reporting period.

Water Act

Neighbours Required to Work Together to Obtain Licences on a Spring

2009-WAT-017(a) Wilhelm Helmer v. Assistant Regional Water Manager (Andre Weilenmann and Barbara Friedli; Jaroslav J. Nydr; Trent Rivet, Third Parties)

Decision Date: February 7, 2012

Panel: Blair Lockhart

Water Act appeals can be extremely contentious, emotionally charged and difficult to resolve. This is one of those types of cases.

Roy Seward Spring is located on property outside of Golden, BC. The Spring consists of a number of surface seeps that, together, provide a source of water. There were two licences on this Spring, including one belonging to the Appellant, Mr. Helmer.

Mr. Helmer purchased part of Roy Seward's ranch in the 1970s and operates a guest ranch on the property. He sought an additional licence on the Spring to ensure sufficient water in his trout pond, which he states is both beneficial to wildlife and is enjoyed by his guests.

The other licensee on the Spring is a neighbour who also operates a guest lodge. This neighbour also applied for an additional licence on the Spring to ensure sufficient flow to their pond.

In addition to the two existing licences and these two applications, two other neighbours applied for licences on the Spring.

The Water Manager refused to issue the additional licence to Mr. Helmer, and subsequently refused all other applications for licences on Roy Seward Spring. Only Mr. Helmer's application is the subject of the decision under appeal. The Water Manager noted that there had been a history of disagreements between Mr. Helmer and the other licensee over water consumption and diversion from Roy Seward Spring, with each blaming the other for water shortages, and accusing the other of interfering with their water works. The Water Manager concluded that no further licences would be issued on the Spring until there was: an assessment by an independent hydrologist, a design for joint works, and a joint works agreement.

The Board agreed that there was unrecorded water available for licensing at Roy Seward Spring, but there was not enough information to allow further licensing. In particular, further information was needed regarding the sustainability of the surface seeps, the interconnectedness of the various surface seeps at the Spring, and the surface and subsurface sources that may be recharging the Spring. The Board also found that there was insufficient water available from the Spring to satisfy the two existing licences and all of the applications. The Board agreed with the Water Manager that an independent hydrological assessment should be done before any further licences are issued on the Spring and offered recommendations to assist the parties in obtaining the assessment.

The appeal was dismissed.

Dispute Arises Over Two Walls and a Willow Tree

2009-WAT-003(a) Daniel Sapergia and Vyvian Burton v. Assistant Regional Water Manager (GDW Property Development Corporation; City of Vernon, Third Parties)

Decision Date: April 28, 2011

Panel: David Searle, CM, QC

Daniel Sapergia and Vyvian Burton own a piece of property along the shore of Okanagan Lake which they wanted to redevelop. There are three features along the shore that are at issue in this appeal: an old retaining wall in front of the Sapergia/Burton property, an old breakwater built into the foreshore of the neighbour's property, and a willow tree growing on the breakwater. The neighbouring property is owned by GDW Property Development Corporation ("GDW").

Both the retaining wall and the breakwater had been built on the Crown-owned foreshore by previous owners of the respective properties, without prior authorization.

In 2008, Mr. Sapergia was granted an approval by the Water Manager to remove the retaining wall, the breakwater and the willow tree. GDW was not notified of the approval, and became aware of it only after GDW's tenant observed Mr. Sapergia attempting to kill the willow tree with a chainsaw. Following a complaint by GDW that it was not notified of the approval, the Water Manager amended the approval by ordering that all work, except for the willow tree's removal by a certified arborist, stop until further notice. After hearing from the two property owners, the Water Manager issued a second amendment that deleted the permission to remove the breakwater unless support was obtained from GDW.

Mr. Sapergia and Ms. Burton applied for a further amendment to the approval that would allow them to remove the breakwater in front of GDW's

property and infill the foreshore in front of their own property. The Water Manager refused that application on the basis that the proposal would likely cause erosion of the foreshore in front of GDW's property, and the infilling would likely be contrary to the *Fisheries Act*.

Mr. Sapergia and Ms. Burton appealed this refusal to amend their approval. They argued that the breakwater was an environmental and aesthetic eyesore, was dangerous, and was falling down. They also argued that the breakwater was partially located on their property and, as such, it infringed their riparian right of full access to their property.

The Board found that the breakwater did not infringe the Appellants' riparian right of full access to their property. The Board held that the Appellants' property line should be determined by drawing a line perpendicular to the general trend of the shoreline and, on that basis, no part of the breakwater was in front of the Appellants' property. Rather, the entire breakwater fronts GDW's property.

The Board also found that the Appellants' plans to redevelop their property, in accordance with the City of Vernon's development requirements for shoreline areas, required removal of the retaining wall in front of their property only if it was geotechnically feasible, and that removing the retaining wall did not depend on removal of the breakwater. Further, based on the evidence, the Board concluded that the breakwater was not dangerous or falling down, and that removing the breakwater would cause erosion of GDW's property and the Appellants' property.

Finally, the Board concluded that, although naturalization of the shoreline is in the best interests of the environment, the riparian rights and interests of GDW must be taken into account when issuing an approval in this case, and GDW's rights would be threatened by removal of the breakwater and willow tree. Regarding the tree, the Board accepted the evidence of GDW's expert that it would be best to wait until the end of summer 2011 to assess whether the tree would survive. On that basis, the Board ordered that the tree remain in place until an expert in plant health advised the Water Manager, by the end of summer 2011, whether it would recover.

The appeal was dismissed.

Applications for Costs

Two applications for costs were made in this proceeding. The Appellants asked the Board to order the City of Vernon to pay the Appellants' appeal costs and GDW asked the Board to order the Appellants to pay GDW's costs associated with the appeal. The Board concluded that there were no special circumstances to warrant either award of costs.

The applications for costs were denied.

Whether a New Licence can be Issued on a "Fully Recorded" Stream

2009-WAT-002(a) Peter and Joan Sanders v. Assistant Regional Water Manager (Pincott Ranches Ltd., Participant)

Decision Date: April 5, 2011

Panel: Alan Andison, Reid White, Loreen Williams

Peter and Joan Sanders live on a farm called Houseman Acres near 100 Mile House, BC. They wanted to irrigate a hay field on their farm so they could support a larger flock of sheep. To do so, they needed to apply for a water licence, which they did. The Sanders applied to divert 12 acre feet of water per year from Bridge Creek for irrigation purposes. The application was considered by the Water Manager who refused to issue them a licence. The Water Manager refused their application on the basis that the Creek was fully recorded. He found that there was insufficient flow in the Creek to supply the 12 acre feet of water they sought, and still meet the demands of existing water licenses and provide the minimum flow needed for fisheries. The Sanders appealed this decision.

During the appeal hearing, the Sanders indicated that their intention in applying for the licence was to withdraw water from the Creek during the freshet in May and June, and in most years they would need only 50 to 60 percent of the 12 acre feet of water sought. They acknowledged that their licence application did not specify those limitations, and it was understandable that the Water Manager assessed their application on the basis that they sought to use the water year-round. However, they submitted that the Water Manager relied on flawed information when he determined that the Creek had insufficient flows to support the requested licence.

When making his decision, the Water Manager had relied upon a Ministry policy that new licences should not be issued on fully recorded streams. The Board found that the Water Manager relied on a flawed report regarding the minimum flow needed to support fisheries in the Creek, and that neither the Board nor the Water Manager were bound by a Ministry policy that new licences can only be issued on fully recorded streams if the water use is supported by storage during freshet. Based on the evidence presented at the hearing, the Board concluded that there were sufficient flow in the Creek to support a licence for the diversion of 6 acre feet of water from the Creek between May 1 and June 30 annually. The Board determined that withdrawing 6 acre feet of water at that time would have no negative impacts on fisheries or existing downstream licensees. However, the Board ordered that, as a condition of the licence, the Sanders must install and maintain a stream gauge and record the volume of water they used. The Board also ordered that the Water Manager should establish a reasonable and defensible low-flow level for the Creek, and that water withdrawal would not be permitted below that level.

The appeal was allowed.

Wildlife Act

Board Renews Permit for Predator Control

2011-WIL-005(a) Kyle Lay v. Regional Wildlife Manager

Decision Date: January 6, 2012

Panel: David H. Searle, CM, QC

Kyle Lay operates a company that specializes in the control and capture of large predators that are harassing or killing livestock. His clientele includes livestock producers and members of the general public that keep livestock.

In 2010, Mr. Lay obtained a permit under the *Wildlife Act* that allowed him to "shoot, trap, snare, hunt with dogs, haze, live capture, or use aversive conditioning on grizzly bears, black bears, wolves, cougars, and coyotes, that have been verified as either killing or harassing livestock" in a specified portion of the Cariboo Region. The permit contained conditions regarding the investigation and confirmation of alleged livestock predation, including a requirement to contact local Conservation Officers and notify the Regional Wildlife Manager if he intended to respond. The permit also set out reporting requirements and limitations on the methods of predator control.

When the permit was issued, and for some time before that, the policy of the Conservation Officer Service was not to respond to complaints involving losses of livestock unless there was also a possibility of personal injury, which was unlikely in cases of wolf or coyote predation. Mr. Lay's expertise in the control of wolf predation was recognized, and there was no dispute regarding the need for the permit when it was originally issued in 2010. The permit was for a one-year period.

Mr. Lay applied to renew the permit in 2011. The Regional Wildlife Manager refused his application. In his view, the permit was no longer needed because the Ministry had relaxed previous restrictions on hunting and trapping wolves and coyotes and that, with Mr. Lay's regular hunting and trapping licences, he could do everything that the permit had previously allowed him to do. In addition, the Conservation Officer Service had a new policy of responding to all wildlife predation of livestock.

Mr. Lay appealed this decision and asked the Board to order the Regional Wildlife Manager to issue him a 3-year permit. He also asked for the definition of "livestock" in the permit to be expanded to include llamas and alpacas.

At the hearing, the Board heard from several witnesses who explained why they needed Mr. Lay's services, how effective he has been in dealing with predation issues, and their concerns with the way the Conservation Officer Service has handled their calls, and predation situations, in the past. Their testimony regarding the Conservation Officer Service's past actions was unchallenged in cross-examination or through rebuttal evidence.

The Board found that there were still legal limitations on the regular hunting and trapping of wolves, coyotes, bears and cougars and, therefore, Mr. Lay's ability to address livestock predation problems would be limited if he had to rely on his regular hunting and trapping licences in the absence of the permit. In addition, based on the evidence, the Board found that there was a clear need for Mr. Lay's services; he provided a safe, effective and professional method of dealing with problem predators. In addition, he provided an alternative to the Conservation Officer Service while it developed expertise in predator control. Also, there was no evidence that the permit was contrary to the proper management of wildlife resources. Consequently, the Board sent the matter back to the Regional Wildlife Manager with directions to issue a new permit for a 3-year term, with certain conditions.

The Board allowed the appeal.

Size Matters when Counting Tines on Moose Antlers

2011-WIL-003(a) Chad Hayward vs. Regional Manager

Decision Date: November 29, 2011

Panel: Carol Brown

Chad Hayward was hunting in Lone Prairie, BC. It was there that he shot and killed his first bull moose. Before shooting the moose, Mr. Hayward looked at the antlers through his telescope to determine whether they met the standards under the applicable regulations: to ensure the legality of harvesting the moose. He believed that the left antler did not have ten tines but that the right antler did have ten tines, which would make the moose legal to harvest.

After shooting the moose he took the cape and antlers to a taxidermist, who advised him that some of the tines may not meet the legal definition of "tine". Mr. Hayward took the cape and antlers to the local Conservation Service office for inspection. A Ministry Wildlife Biologist determined that neither of the antlers had ten tines and, therefore, the moose was harvested contrary to the *Hunting Regulation*. Mr. Hayward then applied to the Regional Manager for a permit to possess the cape and set of antlers, but the Regional Manager denied his application. The Regional Manager concluded that he had no authority to issue a permit because Mr. Hayward had harvested the moose contrary to the *Hunting Regulation*. Specifically, the moose did not have at least ten tines or points on at least one of its antlers.

On appeal, Mr. Haywood submitted that the Regional Manager had the discretion to issue a permit, because there was a small deviation in the size of the tines on the right antler from the definition of "tine"

in the *Hunting Regulation*. He also submitted that a different method of measuring the tines ought to be adopted, which would allow him to obtain a permit. Mr. Haywood asked the Board to order the Regional Manager to issue him a permit to possess the cape and antlers.

The Board found that the measurement method proposed by Mr. Haywood was inconsistent with the definition of "tine" in the *Hunting Regulation* and the diagrams in the Ministry's 2010/2012 Hunting & Trapping Regulations Synopsis, which provides guidance on how to measure a tine. The Board found that, although there may be limited opportunity for a hunter to count the tines before deciding whether to shoot, the evidence of two Ministry Wildlife Biologists, and the photographs of the antlers, clearly established that neither of the antlers had ten tines.

Next, the Board considered whether there was any discretion under the *Permit Regulation* to issue Mr. Hayward a permit to possess the antlers. The Board found that, although Mr. Hayward had no intention to harvest the moose contrary to the *Hunting Regulation*, there was no legal authority under the regulations to issue a possession permit to Mr. Hayward under these circumstances.

Accordingly, the appeal was dismissed.

Appeal Resolved Without the Need for a Hearing

2011-WIL-007(a) Robert Lynton Steele v. Deputy Director of Wildlife

Decision Date: August 26, 2011

Panel: Alan Andison

Robert L. Steele appealed the Deputy Director's decision to suspend Mr. Steele's hunting licensing privileges for one year, from July 1, 2011 to July 1, 2012. The Deputy Director also required Mr. Steele to repeat the Conservation and Outdoor Recreation Education program before again obtaining a hunting licence. The Deputy Director's decision arose out of a 2003 contravention of the *Firearms Act* and a 2001 and 2004 contravention of the *Wildlife Act*.

Mr. Steele argued that the penalty was too harsh in the circumstances. He also pointed out that the contraventions had resulted in a previous one-year suspension of his hunting licensing, from December 2004 to December 2005. He also argued that a further penalty was unfair given that the Deputy Director's decision was issued over 6 years after the most recent contravention.

Before the Board heard the appeal, the parties reached an agreement to settle the appeal. The terms of the settlement were set out in a consent order that was approved by the Board. With the consent of the parties, the Board ordered that the Deputy Director's decision was varied by reducing the original penalty of a one-year suspension with a suspension of Mr. Steele's hunting licensing privileges for 2 months until August 31, 2011.

The appeal was allowed, by consent.

Increase to Moose Quota and Allocation Sought by Guide Outfitter

2011-WIL-004(a) Gary Blackwell v. Regional Manager (BC Wildlife Federation, Third Party)

Decision Date: July 28, 2011

Panel: Gabriella Lang

Under the *Wildlife Act*, non-resident hunters may hunt for big game only if guided by a licensed guide outfitter, and only within the territory in which the guide is permitted to operate. Section 60 of the *Wildlife Act* authorizes managers to issue annual species quotas to guide outfitters as a condition of their annual guide outfitter licence. In addition, managers issue species allocations that cover multi-year periods. The quotas and allocations limit the number of each species that may be harvested by the guides' clients over the period specified. The multi-year allocations

allow a guide to exceed the annual quota by a set number, but that number then counts against the multi-year allocation. The multi-year allocations give guide outfitters flexibility in their annual harvests, and are used for harvest planning purposes.

Gary Blackwell is a guide outfitter operating in a territory within the Skeena Region. For the 2011/12 season, the Regional Manager issued Mr. Blackwell an annual quota of 30 moose and a two-year (2011 to 2013) allocation of 43 moose. Mr. Blackwell appealed this decision and asked the Board to return his moose quota and allocation to higher numbers based on his 2005 to 2009 allocation of 135 moose. He also asked the Board to delay the implementation of the Ministry's Allocation Policy, which is set by the Director of Fish and Wildlife, and has reduced the share of moose allocated to non-resident hunters and increased the share allocated to resident hunters. Finally, Mr. Blackwell argued that the Regional Manager had failed to abide by the Board's direction in a previous appeal decision: *Blackwell v. Acting Regional Manager* (2010-WIL-0012(a), issued February 16, 2011) (*"Blackwell I"*). In that decision, the Board allowed Mr. Blackwell's appeal of a moose quota and allocation, and sent the matter back to the Regional Manager with directions to "consider various ways and means to address this Appellant's concerns, one of which might be the re-allocation of moose" that had been granted to another guide outfitter who does not hunt for moose.

The Board found that the Regional Manager had responded to the Board's direction in Blackwell I, by proposing a reasonable option to Mr. Blackwell that could increase his moose quota and lessen the impact of the Allocation Policy on his business, at least temporarily, if Mr. Blackwell negotiated a transfer of quota from the other guide outfitter. The Board found that any value attached to the transfer of quota from one guide to another is a business matter to be negotiated between the guides. The Regional Manager was willing to facilitate the administrative aspects of a quota transfer between Mr. Blackwell and the other guide outfitter, but Mr. Blackwell had declined to negotiate with him.

In addition, the Board found that the Regional Manager had reviewed the way that he had determined Mr. Blackwell's share of the moose quota for non-resident hunters in the region. The Regional Manager had also applied measures to ease the impact of the Allocation Policy on Mr. Blackwell. The Board concluded that, within the constraints of provincial legislation and the Allocation Policy, the Regional Manager had exercised his discretion in a reasonable manner when he determined Mr. Blackwell's moose quota and allocation.

Finally, the Board considered whether there were other remedies available to address Mr. Blackwell's concerns. The Board held that there was no basis to deviate from the current Allocation Policy or to apply historic policies that are no longer used by the Ministry. In addition, the Board found Mr. Blackwell's proposal for distributing the non-resident hunter moose allocation among guides would be inequitable to other guides in the region.

The Board dismissed the appeal.

Summaries of Court Decisions Related to the Board

There were no court decisions issued on judicial reviews or appeals of Board decisions during this reporting period.

Summaries of Cabinet Decisions Related to the Board

There were no orders by Cabinet during this reporting period concerning decisions by the Board.

APPENDIX I

Legislation and Regulations

Reproduced below are the sections of the *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation* which establish the Board and set out its general powers and procedures.

Also included are the appeal provisions contained in each of the statutes which provide for an appeal to the Board from certain decisions of government officials: the *Environmental Management Act*, the *Greenhouse Gas Reduction (Cap and Trade) Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Water Act* and the *Wildlife Act*. Some appeal provisions are also found in the regulations made under the *Greenhouse Gas Reduction (Cap and Trade) Act* and the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (March 31, 2012). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications.

Although not provided below, it should be noted that, in addition to decisions of government officials, Part 3 of the *Environmental Management Act* gives district directors and officers appointed by the Greater Vancouver Regional District certain decision-making powers that can then be appealed to the Board under the appeal provisions in the *Environmental Management Act* referenced below. In addition, the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 (not reproduced) allows the Oil and Gas Commission to make certain decisions under the *Water Act* and the *Environmental Management Act*, and those decisions may be appealed in the usual way under the appeal provisions of the *Water Act* and *Environmental Management Act*, as set out below.

Environmental Management Act, SBC 2003, c. 53

Part 8 – Appeals

Division 1 – Environmental Appeal Board

Environmental Appeal Board

93 (1) The Environmental Appeal Board is continued to hear appeals that under the provisions of any enactment are to be heard by the appeal board.

(2) In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

(3) The appeal board consists of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

(4) The *Administrative Tribunals Appointment and Administration Act* applies to the appeal board.

(5 and 6) Repealed 2003-47-24.]

(7) The chair may organize the appeal board into panels, each comprised of one or more members.

(8) The members of the appeal board may sit

(a) as the appeal board, or

(b) as a panel of the appeal board.

(9) If members sit as a panel of the appeal board,

(a) 2 or more panels may sit at the same time,

(b) the panel has all the jurisdiction of and may exercise and perform the powers and duties of the appeal board, and

(c) an order, decision or action of the panel is an order, decision or action of the appeal board.

(10) The Lieutenant Governor in Council, by regulation, may establish the quorum of the appeal board or a panel.

(11) For the purposes of an appeal, sections 34 (3) and (4), 48, 49 and 56 of the *Administrative Tribunals Act* apply to the appeal board.

Parties and witnesses

94 (1) In an appeal, the appeal board or panel

(a) may hear the evidence of any person, including a person the appeal board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body, whose decision is the subject of the appeal or review, must give that person or body full party status.

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

(a) be represented by counsel,

(b) present evidence,

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

(d) make submissions as to facts, law and jurisdiction.

(3) A person who gives oral evidence may be questioned by the appeal board, a panel or the parties to the appeal.

Costs and security for costs

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

(2) In addition to the powers referred to in section 93(2) *[environmental appeal board]* but subject to the regulations, the appeal board may make orders as follows:

(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

(b) if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal.

(3) An order under subsection (2) may include directions respecting the disposition of money deposited under subsection (1).

(4) If a person or body given full party status under subsection 94(2) *[parties and witnesses]* is an agent or representative of the government,

(a) an order under subsection (2) may not be made for or against the person or body, and

(b) an order under subsection (2)(a) may be made for or against the government.

(5) The costs payable by the government under an order under subsection (4) (b) must be paid out of the consolidated revenue fund.

Decision of appeal board

96 If the appeal board or a panel makes an order or decision with respect to an appeal the chair must send a copy of the order or decision to the minister and to the parties.

Varying and rescinding orders of appeal board

97 The Lieutenant Governor in Council may, in the public interest, vary or rescind an order or decision of the appeal board.

Appeal board power to enter property

98 The members of the appeal board have, for the purposes of an appeal, the right to enter any property except a private residence.

Division 2 – Appeals from Decisions under this Act

Definition of "decision"

99 For the purpose of this Division, **"decision"** means

making an order,

imposing a requirement,

exercising a power except a power of delegation,

issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

including a requirement or a condition in an order, permit, approval or operational certificate,

determining to impose an administrative penalty, and

determining that the terms and conditions of an agreement under section 115 (4) *[administrative penalties]* have not been performed.

Appeals to Environmental Appeal Board

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

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

Time limit for commencing appeal

101 The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

Procedure on appeals

102 (1) An appeal under this Division

(a) must be commenced by notice of appeal in accordance with the prescribed practice, procedure and forms, and

(b) must be conducted in accordance with Division 1 of this Part and the regulations.

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

Powers of appeal board in deciding appeal

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

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

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

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

Appeal does not operate as stay

104 The commencement of an appeal under this Division does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

Division 3 – Regulations in Relation to Appeal Board

Regulations in relation to the appeal board

105 (1) Without limiting section 138 (1) *[general authority to make regulations]*, the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing a tariff of fees to be paid with respect to a matter within the jurisdiction of the appeal board;

(b) prescribing practices, procedures and forms to be followed and used by the appeal board;

(c) establishing restrictions on the authority of the board under section 95 (1) to (4) *[costs and security for costs]* including, without limiting this,

(i) prescribing limits, rates and tariffs relating to amounts that may be required to be paid or deposited, and

(ii) prescribing what are to be considered costs to the government in relation to an appeal and how those are to be determined;

(d) respecting how notice of a decision under section 96 *[decision of appeal board]* may be given.

Environmental Management Act Procedure Regulation, BC Reg. 1/82

Interpretation

1 In this regulation:

"Act" means the *Environmental Management Act*;

"board" means the Environmental Appeal Board established under the Act;

"chairman" means the chairman of the board;

"minister" means the minister responsible for administering the Act under which the appeal arises;

"objector" in relation to an appeal to the board means a person who, under an express provision in another enactment, had the status of an objector in the matter from which the appeal is taken.

Application

2 This regulation applies to all appeals to the board.

Appeal practice and procedure

3 (1) Every appeal to the board shall be taken within the time allowed by the enactment that authorizes the appeal.

(2) Unless otherwise directed under the enactment that authorizes the appeal, an appellant shall give notice of the appeal by mailing a notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.

(3) A notice of appeal shall contain the name and address of the appellant, the name of counsel or agent, if any, for the appellant, the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested.

(4) The notice of appeal shall be signed by the appellant, or on his behalf by his counsel or agent, for each action, decision or order appealed against and the notice shall be accompanied by a fee of $25, payable to the minister charged with the administration of the *Financial Administration Act*.

(5) Where a notice of appeal does not conform to subsections (3) and (4), the chairman may by mail or another method of delivery return the notice of appeal to the appellant together with written notice

(a) stating the deficiencies and requiring them to be corrected, and

(b) informing the appellant that under this section the board shall not be obliged to proceed with the appeal until a notice or amended notice of appeal, with the deficiencies corrected, is submitted to the chairman.

(6) Where a notice of appeal is returned under subsection (5) the board shall not be obliged to proceed with the appeal until the chairman receives an amended notice of appeal with the deficiencies corrected.

Procedure following receipt of notice of appeal

4 (1) On receipt of a notice of appeal, or, in a case where a notice of appeal is returned under section 3(5), on receipt of an amended notice of appeal with the deficiencies corrected, the chairman shall immediately acknowledge receipt by mailing or otherwise delivering an acknowledgement of receipt together with a copy of the notice of appeal or of the amended notice of appeal, as the case may be, to the appellant, the minister's office, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(2) The chairman shall within 60 days of receipt of the notice of appeal or of the amended notice of appeal, as the case may be, determine whether the appeal is to be decided by members of the board sitting as a board or by members of the board sitting as a panel of the board and the chairman shall determine whether the board or the panel, as the case may be, will decide the appeal on the basis of a full hearing or from written submissions.

(3) Where the chairman determines that the appeal is to be decided by a panel of the board, he shall, within the time limited in subsection (2), designate the panel members and,

(a) if he is on the panel, he shall be its chairman,

(b) if he is not on the panel but a vice chairman of the board is, the vice chairman shall be its chairman, or

(c) if neither the chairman nor a vice chairman of the board is on the panel, the chairman shall designate one of the panel members to be the panel chairman.

(4) Within the time limited in subsection (2) the chairman shall, where he has

determined that a full hearing shall be held, set the date, time and location of the hearing of the appeal and he shall notify the appellant, the minister's office, the Minister of Health if the appeal relates to a matter under the *Health Act*, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(5) Repealed. [B.C. Reg. 118/87, s. 2.]

Quorum

5 (1) Where the members of the board sit as a board, 3 members, one of whom must be the chairman or vice chairman, constitute a quorum.

(2) Where members of the board sit as a panel of one, 3 or 5 members, then the panel chairman constitutes a quorum for the panel of one, the panel chairman plus one other member constitutes the quorum for a panel of 3 and the panel chairman plus 2 other members constitutes the quorum for a panel of 5.

Order or decision of the board or a panel

6 Where the board or a panel makes an order or decision with respect to an appeal, written reasons shall be given for the order or decision and the chairman shall, as soon as practical, send a copy of the order or decision accompanied by the written reasons to the minister and the parties.

Written briefs

7 Where the chairman has decided that a full hearing shall be held, the chairman in an appeal before the board, or the panel chairman in an appeal before a panel, may require the parties to submit written briefs in addition to giving oral evidence.

Public hearings

8 Hearings before the board or a panel of the board shall be open to the public.

Recording the proceedings

9 (1) Where a full hearing is held, the proceedings before the board or a panel of the board shall be taken using shorthand or a recorder, by a stenographer appointed by the chairman, for a hearing before the board, or by the panel chairman, for a hearing before the panel.

(2) Before acting, a stenographer who takes the proceedings before the board or a panel shall make oath that he shall truly and faithfully report the evidence.

(3) Where proceedings are taken as provided in this section by a stenographer so sworn, then it is not necessary that the evidence be read over to, or be signed by, the witness, but it is sufficient that the transcript of the proceedings be

(a) signed by the chairman or a member of the board, in the case of a hearing before the board, or by the panel chairman or a member of the panel, in the case of a hearing before the panel, and

(b) be accompanied by an affidavit of the stenographer that the transcript is a true report of the evidence.

Transcripts

10 On application to the chairman or panel chairman, as the case may be, a transcript of the proceedings, if any, before the board or the panel of the board shall be prepared at the cost of the person requesting it or, where there is more than one applicant for the transcript, by all of the applicants on a pro rata basis.

Representation before the board

11 Parties appearing before the board or a panel of the board may represent themselves personally or be represented by counsel or agent.

Greenhouse Gas Reduction (Cap and Trade) Act,
SBC 2008, c. 32

Part 7 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal, the process of appeal

22 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 18 *[imposed administrative penalties: failure to retire compliance units]* or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 19 *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b), or

(b) a document evidencing a decision referred to in subsection (1) (c).

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 *[Appeals]* of the *Environmental Management Act* applies in relation to appeals under this Act.

Reporting Regulation,
BC Reg. 272/2009

Part 5 – General

Appeals to Environmental Appeal Board

32 (1) The following provisions are prescribed for the purpose of section 22 (1) (c) of the Act:

(a) section 13 (7) [approval of alternative methodology for 2010];

(b) section 14 (2) [approval of change of methodology].

(2) The following provisions of the *Environmental Management Act* apply in relation to appeals under the Act:

(a) section 101 *[time limit for commencing appeal]*;

(b) section 102 *[procedure on appeals]*;

(c) section 103 *[powers of appeal board in deciding appeal]*;

(d) section 104 *[appeal does not operate as stay]*.

(3) The *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82, is adopted in relation to appeals under the Act.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act, SBC 2008, c. 16

Part 5 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal, the process of appeal

14 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 11 *[imposed administrative penalties: fuel requirements]* or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 12 *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a refusal to accept an alternative calculation of carbon intensity under section 6 (3) (b) (iii) *[requirements for reduced carbon intensity]*;

(d) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b),

(b) a refusal referred to in subsection (1) (c), or

(c) a document evidencing a decision referred to in subsection (1) (d)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 *[Appeals]* of the *Environmental Management Act* applies in relation to appeals under this Act.

Renewable and Low Carbon Fuel Requirements Regulation, BC Reg. 394/2008

Part 4 – Appeals

Time limit for commencing appeal

21 The time limit for commencing an appeal is 30 days after the notice of administrative penalty to which it relates is served.

Procedures on appeal

22 An appeal must be

(a) commenced by notice of appeal in accordance with the *Environmental Appeal Board Procedure Regulation*, and

(b) conducted in accordance with Part 5 *[Appeals to Environmental Appeal Board]* of the Act and the *Environmental Appeal Board Procedure Regulation*.

Powers of appeal board on appeal

23 (1) On an appeal, the appeal board may

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

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

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

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

Integrated Pest Management Act,
SBC 2003, c. 58

Part 4 – Appeals to the Environmental Appeal Board

14 (1) For the purposes of this section, "decision" means any of the following:

(a) making an order, other than an order under section 8 *[minister's orders]*;

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) *[administrative penalties]* have not been performed.

(2) A declaration, suspension or restriction under section 2 *[Act may be limited in emergency]* is not subject to appeal under this section.

(3) A person may appeal a decision under this Act to the appeal board.

(4) The time limit for commencing an appeal of a decision is 30 days after the date the decision being appealed is made.

(5) An appeal must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*.

(6) Subject to this Act, an appeal must be conducted in accordance with Division 1 *[Environmental Appeal Board]* of Part 8 of the *Environmental Management Act* and the regulations under that Part.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

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

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

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

(9) An appeal does not act as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

Water Act,
RSBC 1996, c. 483

Part 6 – General

Appeals to Environmental Appeal Board

92 (1) Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) an owner whose land is or is likely to be physically affected by the order, or

(c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

(1.1) Despite subsection (1), a licensee may not appeal an order of the comptroller or a regional water manager to cancel in whole or in part a licence and all rights under it under section 23(2) (c) or (d).

(2) An order of the comptroller, the regional water manager or an engineer under Part 5 or 6 in relation to a well, works related to a well, ground water or an aquifer may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) the well owner, or

(c) the owner of the land on which the well is located.

(3) An order of the comptroller, the regional water manager or an engineer under section 81 *[drilling authorizations]* may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) the well owner,

(c) the owner of the land on which the well is located, or

(d) a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

(4) The time limit for commencing an appeal is 30 days after notice of the order being appealed is given

(a) to the person subject to the order, or

(b) in accordance with the regulations.

(5) For the purposes of an appeal, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise,

whichever is earlier.

(6) An appeal under this section

(a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*, and

(b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

(a) send the matter back to the comptroller, regional water manager or engineer, with directions,

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

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

(9) An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.

Wildlife Act, *RSBC 1996, c. 488*

Reasons for and notice of decisions

101 (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

(a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or

(b) an application by a person for anything referred to in paragraph (a).

(2) Notice of a decision referred to in subsection (1) must be given to the affected person.

(3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise, whichever is earlier.

(4) For the purposes of applying this section to a decision that affects a guiding territory certificate, if notice of a decision referred to in subsection (1) is given in accordance with this section to the agent identified in the guiding territory certificate, the notice is deemed to have been given to the holders of the guiding territory certificate as if the agent were an affected person.

Appeals to Environmental Appeal Board

101.1 (1) The affected person referred to in section 101(2) may appeal the decision to the Environmental Appeal Board continued under the *Environmental Management Act*.

(2) The time limit for commencing an appeal is 30 days after notice is given

(a) to the affected person under section 101 (2), or

(b) in accordance with the regulations.

(3) An appeal under this section

(a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*, and

(b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director, with directions,

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

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

(6) An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

BRITISH COLUMBIA