Annual Report 1996/97

The Honourable Cathy McGregor
Minister of Environment, Lands and Parks
Parliament Buildings Victoria, British Columbia
V8V 1X4

The Honourable Joy K. MacPhail
Minister of Health and Minster Responsible for Seniors
Parliament Buildings Victoria, British Columbia
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Dear Ministers:

I respectfully submit herewith the annual report of the Environmental Appeal Board for the period April 1, 1996 through March 31, 1997.

Yours truly,

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Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. This is the sixth Annual Report of the Environmental Appeal Board. The information contained in this report covers the period of time between April 1, 1996 and March 31, 1997.

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. It also contains recommendations, made by the Board, for legislative changes to the Acts and regulations which govern the administrative decisions that the Board hears appeals from. Finally, summaries of the decisions issued by the Board during the report period are provided and sections of the relevant Acts and regulations are reproduced.

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

- Legislative Library
- Ministry of Environment, Lands and Parks Library
- University of British Columbia Law Library
- University of Victoria Law Library
- British Columbia Court House Library Society
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Data Base and some decisions are reported in the Environmental Law Digest.

Information about the Environmental Appeal Board is available from the Environmental Appeal Board office and on the Board's home page on the internet. Detailed information on the Board's policies and procedures can be found in the Environmental Appeal Board Procedure Manual. Pamphlets explaining the appeal procedure under each of the relevant Acts are also available. Please feel free to contact the office if you have any questions, or would like additional copies of this report. The Board can be reached at:

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The Board

The Environmental Appeal Board was created when the Environment Management Act was passed in 1981. It is an independent agency which hears appeals from administrative decisions made under six statutes (the "Statutes"). Five of the Statutes are administered by the Ministry of Environment, Lands and Parks. They are the *Pesticide Control Act*, the *Waste Management Act*, the *Water Act*, the *Wildlife Act* and the *Commercial River Rafting Safety Act* . The sixth statute, the *Health Act*, is administered by the Ministry of Health.

Board Membership

The Board members are appointed by the Lieutenant Governor in Council (Cabinet). The members are drawn from across the Province, representing diverse business and technical experience, and have a wide variety of perspectives. Board membership consists of a full-time chair, a part-time vice-chair and 17 part-time members.

Member	From
Chair	
Toby Vigod	Victoria
(*as of February 1, 1997*)	
David Perry	Victoria
(*April 1, 1995 - January 31, 1997*)	
Vice-Chair	
Judith Lee	Vancouver
Current Members	
Johnder Basran	Lillooet
David Brown	Gabriola
Shiela Bull	Abbotsford
Harry Higgins	Salmon Arm
Katherine Hough	Nelson
Elizabeth Keay	Saturna Island
Helmut Klughammer	Nakusp
Jack Lapin	Barriere
Bill MacFarlane	Revelstoke
Carol Martin	Hornby Island
Christie Mayall	Williams Lake
Laurie Nowakowski	Nelson
David Perry	Victoria
Bob Radloff	Prince George
Gary Robinson	Surrey
Joan Rysavy	Smithers
Elinor Turrill	Lumby

The Board Office

The Environmental Appeal Board office staffs nine full time employees reporting to an Executive Director. The office provides registry services, legal advice, research support, systems support, financial and administrative services, training, and communications strategies for the Board.

The Environmental Appeal Board shares its staff and its office space with the Forest Appeals Commission, Forest Appeal Board, and the Environmental Assessment Board.

The Forest Appeals Commission, set up under the *Forest Practices Code of British Columbia Act*, hears appeals from forestry-related administrative decisions made under that *Act*, in much the same way that the Board hears environmental appeals.

The Forest Appeal Board hears appeals from administrative decisions made under the *Forest Act* and the *Range Act*.

The Environmental Assessment Board is established under the Environmental Assessment Act. This Act establishes a formal method for the review and assessment of environmental, economic, social, cultural, heritage, and health effects of major projects. The Environmental Assessment Board may be required to conduct a public hearing as part of this process.

Supporting four tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, cutting down on the bureaucracy and cost of operation. In this way, expertise can be shared and work can be done more efficiently.

Policy on Freedom of Information

The appeal process is public in nature. Information provided by one party must also be provided to all other parties to the appeal. Further, the hearings are open to the public.

If information is requested by a member of the public regarding an appeal, that information may be disclosed. The Board is subject to the Freedom of Information and Protection of Privacy Act and the regulations under that Act.

Unless the information falls under one of the exceptions in the Freedom of Information and Protection of Privacy Act, it will be disclosed.

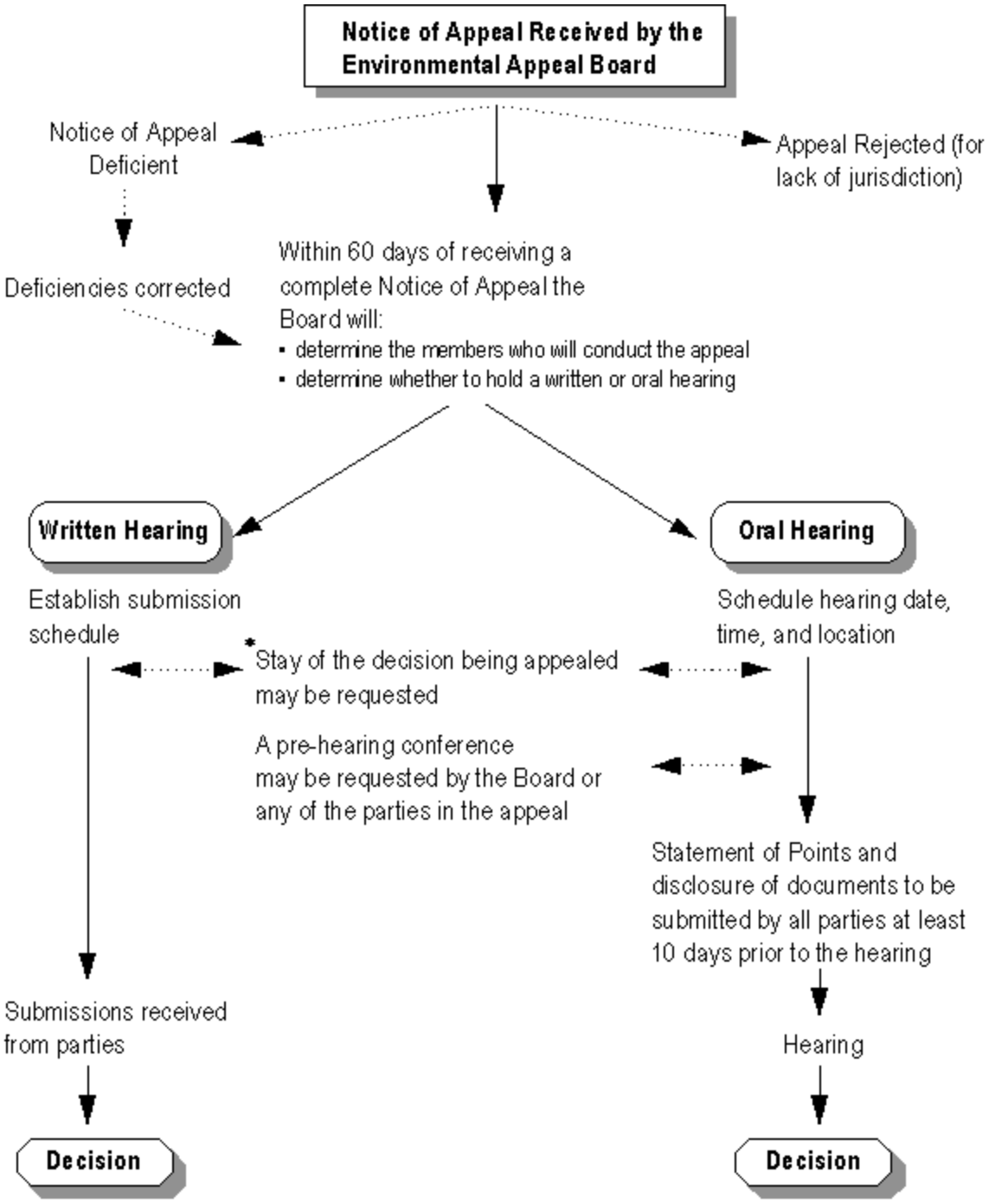
Parties to appeals should be aware that information supplied to the Board will be subject to public scrutiny and review.

The Appeal Process

The *Environment Management Act* and the Environmental Appeal Board Procedure Regulation (the "Regulation") set out the general powers and procedures of the Board. The Board's powers and procedures are further defined in each of the Statutes.

In order to ensure that the appeal process is open and understandable to the public, the Board has developed the Environmental Appeal Board Procedure Manual. The manual contains information about the Board itself, the legislated procedures the Board is required to follow, and the policies the Board has adopted to fill in the procedural gaps left by the legislation.

The following is a brief summary of the appeal process. For more detailed information, a copy of the Board's Procedure Manual may be obtained from the Environmental Appeal Board office.



* The Board's authority to issue a stay varies from one Statute to the next.

Commencing an Appeal

Notice of Appeal

To commence an appeal, a person must deliver a Notice of Appeal to the Environmental Appeal Board office along with a cheque for $25 for each decision/order being appealed. The Notice of Appeal must contain:

i. the reasons the appellant believes that the decision being appealed is incorrect (the grounds for appeal);
ii. what she or he wants the Board to order; and
iii. the name and mailing address of the government official responsible for the decision/order.

If the Board does not receive the Notice of Appeal within a specified time period (defined in each of the Statutes) it will be unable to consider it. The exception is the *Waste Management Act* which gives the Board the power to extend the time period for filing an appeal in appropriate circumstances.

If the Notice of Appeal is missing any of the required information, the Board will notify the appellant of the deficiencies. The Board will not take any action on an appeal until the Notice of Appeal is complete and any deficiencies are corrected.

Once a completed Notice of Appeal is accepted by the Board, the Chair will:

i. decide whether the appeal will be decided by the Board as a whole or by a panel of its members;
ii. decide whether the appeal will be conducted by way of written submissions or an oral hearing; and
iii. establish a submission schedule for a written hearing, or set the time, date and location for an oral hearing.

Once the date for a hearing or a submission schedule is set, the parties involved are notified.

Written Hearing Procedure

If it is determined that the hearing will be by written submissions, the submissions will be made by all parties. The appellant will be given the opportunity to provide its submissions first. The other parties will have an opportunity to receive and comment on the appellant's submissions before submitting their own.

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

Finally, all parties will be given the opportunity to provide closing submissions.

Oral Hearing Procedure

If it is determined that the appeal will be conducted by oral hearing, the parties involved will be notified of the date, time and location of the hearing. If any of the parties to the appeal cannot attend the hearing on the date scheduled, a request may be made to the Board to change the date.

An oral hearing may be held in the locale closest to the affected parties, at the Board office in Victoria, a combination of both, or anywhere in the province. The Board will decide where the hearing will take place on a case by case basis.

Statement of Points and Disclosure of Documents

If an oral hearing is scheduled, the parties will be asked to provide certain materials to the Board.

To help identify the main issues to be addressed in an oral hearing, and the arguments that will be presented in support of those issues, all parties to the appeal are requested to provide the Board, and each of the parties to the appeal, with a written Statement of Points. The Statement of Points is essentially an outline or summary of each party's case. The appellant must submit their Statement of Points at least 20 days prior to the commencement of the hearing and all other parties at least 10 days.

Disclosure of all relevant documentation in advance of the hearing is also requested so that all parties will be prepared for the hearing. The Board encourages parties to cooperate with each other in this regard.

Pre-hearing Conferences

Either before or after the documentation and Statements of Points have been exchanged, the Board, or any of the parties, may request a pre-hearing conference.

Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, the potential for resolution of the issues between the parties, and to deal with any preliminary concerns.

The Hearing

A hearing is more formal than a pre-hearing conference but less formal than proceedings before a court. It allows the Board to receive the evidence it uses in making a decision.

In an oral hearing, each party will have a chance to present evidence. They will have the opportunity to call witnesses and explain their case to the Board.

Although hearings before the Board are less formal than those before a court, some of the hearing procedures are similar to those of a court: parties are sworn or affirmed, evidence is presented, and witnesses may be cross-examined.

Parties to the appeal may have lawyers represent 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 of the Board are open to the public.

The Decision

In making its decisions the Board is required to determine, on a balance of probabilities, what occurred and to decide the rights of the parties.

The Board will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and written hearing, the final decision will be given in writing, within a reasonable time following the hearing. Copies of the decision are mailed to the parties involved and to the Minister of Environment, Lands and Parks and, in appeals under the Health Act, the Minister of Health.

If a party disagrees with the decision of the Board, that party may wish to appeal the decision. Decisions of the Board are final and the Board may not reconsider or comment on a decision once it is issued.

There are two avenues of appeal open to a person subject to a decision of the Board. They are:

1. The Lieutenant Governor in Council (Cabinet) may, if it believes it to be in the public interest, change or overturn an order of the Board. This type of review is not automatic. Cabinet may choose whether or not to review a decision.
2. Someone who is dissatisfied with a Board decision may apply to the B.C. Supreme Court for Judicial Review.

Recommendations

The Board is not required by legislation to make recommendations for amendments to the Statutes in its annual report. However, it is hoped that making recommendations will lead to changes in the appeal process that promote fairness, accessibility and efficiency.

The following are recommendations from the Board:

1. **Amend the *Health Act***

   The Board recommends that the *Health Act* be amended by adding a section which provides the Board with the power to grant an extension of time for filing an appeal.

   The Board has noted that situations exist where a permittee has not complied with the public notice requirements and, therefore, a person affected by the issuance of a permit is unable to appeal within the time frame for filing an appeal. Providing the Board with the authority to grant extensions will ensure that in these situations, a person will be able to exercise their right of appeal.

2. **Amend the Sewage Disposal Regulation**

   The Board recommends amending the Sewage Disposal Regulation, B.C. Reg. 411/85, enacted pursuant to the Health Act, to better reflect advancements in sewage disposal system technology.

   Although knowledge and technology in the area of sewage disposal have advanced significantly in recent years, the Regulation has not kept up. The standards for the construction and installation of sewage disposal systems found in the current Regulation are extremely outdated, and in some cases, are contrary to presently accepted public health practices. This is creating serious problems for all involved in the sewage disposal permit process and in public health protection.

   The current Regulation, last revised in 1985, is geared towards "conventional" systems which use septic tanks and package treatment plants in combination with trench-based absorption fields. Schedules 2 and 3 of the Regulation set out very specific standards for these systems.

   Many of these standards date back to the 1967 regulation governing sewage disposal and are sometimes ignored by field officials as the standards are no longer practical.

   Further, many recently developed systems do not use conventional trench-based absorption fields, and therefore cannot comply with the Regulation. Section 7 of the Regulation, which allows some "alternate systems" to receive permits, allows only a small number of the provisions in the schedules to be waived and thus cannot be used to issue permits for many new systems.

Chapter 6 of the Ministry of Health's On-Site Sewage Disposal Policy sets out specific guidelines for the different types of systems that may be approved under section 7 as an "alternate method". However, many of these systems, such as holding tanks and lagoons, cannot meet a number of sections under schedules 2 and 3 and the Board has found they cannot be legally permitted under section 7. Therefore, the Ministry policy is at odds with the Regulation and in need of revision.

The applications for alternate systems and new technologies are becoming more frequent and appeals to this Board are similarly increasing. This situation is resulting in a high level of confusion and frustration for the field officials, the public and the Board. It is also resulting in inconsistent approaches to these systems by health units across the Province. The outdated provisions in the Regulation are quickly reaching the point of becoming an impediment to health protection in the Province and are urgently in need of revision.

The Board therefore recommends that the Regulation be amended to update the standards set out in schedules 2 and 3 and to include additional schedules for new technologies and "alternate systems".

Statistics

The following tables provide information on the appeals filed with the Board during the report period.

Between April 1, 1996 and March 31, 1997 a total of 120 appeals were filed with the Board against 97 administrative decisions.

April 1, 1996 ~ March 31, 1997

Total appeals filed	**120**
Number of administrtive decisions appealed	**97**
Appeals abandoned, withdrawn, or rejected	**47**
Total hearings held	**53**
Oral hearings held	42
Written hearings held	11
Decisions issued	**15**
Total appeals allowed	15
Total appeals dismissed	47
Total stays granted	4
Total stays refused	2

This table provides an overview of the appeals filed, hearings held and 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 during the report period, as they may not occur in the same year as the appeals were filed.

Appeal Statistics by Act

	Health Act	Pesticide Control Act	Waste Management Act	Water Act	Wildlife Act
Appeals filed	82	7	15	6	10
Number of administrative decisions appealed	63	7	11	6	10
Appeals abandoned, withdrawn or rejected	37	2	2	3	3
Hearing held	25	4	11	7	6
Decisions issued	25	6	22	4	12

This table provides a summary of the appeals filed, hearings held and decisions issued by the Board during the report period broken down by Act. There were no appeals filed, heard or decisions issued under the Commercial River Rafting Safety Act during the report period.

Decisions under the Health Act

Administrative Decisions Appealed	Interim Orders	Appeal Allowed	Appeals Dismissed
Refusal to issue a permit		4	8
Issuance of a permit		2	9
Cancellation of a permit		1	
Amendments to a permit			1

Decisions under the Pesticide Control Act

Administrative Decisions Appealed	Interim Orders	Appeal Allowed	Appeal Dismissed
Issuance of a permit*	1 stay refused	2	3
Refusal to issue a permit			

* For one of these decisions the Board issued an interim decision which allowed the appeal; the reasons for the decision followed in a final decision. For statistical purposes, these decisions are counted as one decision.

Decisions under the Waste Management Act

Administrative Decisions Appealed	Interim Orders	Appeal Allowed	Appeal Dismissed
Issuance of a permit	1stay refused		2
Refusal to issue a permit		1	2
Amendment of a permit*	2 stays granted	1	4
Extension of permit	1 stay granted		
Issuance of a pollution abatement and/or pollution prevention order	1 stay granted		3
Conditions of a permit			1
Issuance of an order		1	1
Refusal to extend time to file an appeal			1

*Two appellants filed an appeal against one administrative decision seeking different remedies. The appeals were consolidated into one hearing. The Board upheld one appeal and dismissed the other.

Decisions under the Water Act

Administrative Decisions Appealed	Interim Orders	Appeal Allowed	Appeals Dismissed
Issuance of a permit			1
Refusal to issue a permit			
Issuance of an order			1
Issuance of an approval			1
Cancellation of licence			1

Decisions under the Wildlife Act

Administrative Decisions Appealed	Interim Orders	Appeal Allowed	Appeals Dismissed
Refusal to issue a permit		2	2
Refusal to issue angler guide days*		1	1

Cancellation and/or suspension of guide outfitter licence and/or certificate	1	1
Conditions on guide outfitter licence		1
Cancellation of hunting licence	1	2
Suspension of hunting licence	1	

*An appellant filed two notices of appeal against two related administrative decisions. The appeals were consolidated into one hearing. One appeal was allowed and one was dismissed.

New Contaminated Sites Legislation

On April 1, 1997, new contaminated sites legislation, the Waste Management Amendment Act and its supporting Contaminated Sites Regulation, came into force. This new legislation amends the contaminated sites provisions of the *Waste Management Act* by creating a more comprehensive regime for the assessment and remediation of historic contaminated sites. It provides for responsible persons to be found absolutely, retroactively, and, jointly and severally liable for the remediation of a contaminated site.

Contaminated sites are identified through the submission of a "site profile" prepared under circumstances specified in the new contaminated sites provisions. Once a site profile has been reviewed and a site investigation conducted by a regional waste manager, the manager will determine if the site is contaminated. If the site is deemed contaminated, the manager will issue a remediation order to the responsible persons, specifying how the site is to be cleaned up. The manager may determine that a responsible person is a minor contributor if the person's contribution to the contamination was so small as to make it unfair to find the person jointly and severally liable for the total cost of the remediation. Responsible persons have the option of negotiating a voluntary remediation order with the manager, or independently remediating a site. If the government is unable to identify the persons responsible for a contaminated site, the site will be remediated by the government. The government will seek to recover its costs, if the persons responsible are identified at a later date. Once a site is remediated, the manager will issue a certificate of compliance for the site.

The new contaminated sites provisions fit into the appeals and review system already in place under the W*aste Management Act*. Under section 44 of the Act, "a person who considers himself or herself aggrieved by a decision of a manager, may appeal to the director". Section 44 further provides that a director's decision can be appealed to the Environmental Appeal Board. Thus, if a person is aggrieved by a decision of a manager under the contaminated sites provisions, the decision can be appealed up to the Board. Many sections of the new contaminated sites provisions confer decision-making powers on managers, creating a number of avenues for appeal to the Board. There are approximately 30 appealable decisions under the new provisions.

Decisions under the new contaminated sites provisions which may be appealed include:

- a finding that a site is contaminated
- a finding that a party is a "responsible person"
- a finding that a party is a minor contributor

- the issuance of a remediation order
- the issuance of a voluntary remediation order
- interference with an independent remediation
- the issuance of a certificate of compliance

Summaries of Environmental Appeal Board Decisions

April 1, 1996 ~ March 31, 1997

The following are summaries of decisions reached by the Environmental Appeal Board between April 1, 1996 and March 31, 1997. They are organized by the Act which the appeal was brought under. There are preliminary matters reported, for which the final decisions are pending.

Commercial River Rafting Safety Act

No appeals were heard under the *Commercial River Rafting Safety Ac*t during the report period.

Health Act

94/27 John and Mavis Fast and Environmental Health Officer

Decision date: April 15, 1996

Panel: David Perry, Sheila Bull, Joan Rysavy

Mr. and Mrs. Fast bought property and removed an old house and an existing septic field. Some years later they applied to put in a new septic tank, but permission was refused as the water table at certain times reached the surface. The Fasts appealed.

The Board concluded that no one had explained to the Fasts that there must at all times be 4 feet of dry soil between ground level and the water level in order for approval for a septic tank to be given. Although this requirement can be waived, it would not be suitable to do so in this case where a septic tank would almost certainly be subject to periodic flooding, leakage and failure to operate. The appeal was dismissed.

95/05(b) Brian Hunter, et al. and Environmental Health Officer (South Surrey Independent School Society, Permit Holder)

Decision date: December 17, 1996

Panel: David Perry, Johnder Basran, Harry Higgins

This was an appeal by a group of citizens against a sewage disposal permit issued by the Environmental Health Officer (the "EHO") to South Surrey Independent School Society. The Appellants appealed on a

number of grounds, including that the permit did not comply with the *Health Act*, Sewage Disposal Regulation and policies of the Ministry of Health; the EHO did not obtain sufficient data with regard to environmental protection and health hazards before issuing the permit; the conditions imposed by the EHO did not offer reasonable protection to public health and the environment; and the issuance of a permit for a holding tank set a dangerous precedent.

The Board concluded that the professionally designed system was appropriate as the site was unsuitable for an in-ground sewage disposal system and the City of Surrey guaranteed to ensure the control, access, maintenance, servicing and ultimate disposal of waste material as required by Ministry policy. The Board held that the use of a holding tank was permitted under the Sewage Disposal Regulation in view of its finding that there was not a public sewer within a reasonable distance from the lot boundary. On the evidence presented, the Board found that the tank, as constructed, would not leak, affect the surrounding water table, be affected by waterflows within the ground or be at risk from earthquake damage. The Board further found that restrictions governing the installation, operation, maintenance and repair of the holding tank were sufficient to ensure that the system would not pose a threat to the environment or public health. The Board held that the issuance of this permit for a holding tank would not lead to its widespread use as the very high costs associated with a holding tank and the requirement that a local government authority must assume responsibility for its operation make it an unattractive option for sewage disposal. The appeal was dismissed.

95/22 Peter E. Harris and Environmental Health Officer

Decision date: June 12, 1996

Panel: Judith Lee

Mr. Harris appealed a decision of the Manager of the Environmental Health Program (the "Manager") for the Capital Regional District (the "CRD") denying a permit to install a holding tank sewage disposal system on a lot essentially undeveloped except for a structure containing a toilet seat and a bucket. The Manager denied the permit as there was no evidence that the holding tank would be a temporary solution, the municipality had not enacted a maintenance by-law for holding tanks, and there were public health concerns relating to holding tanks. Mr. Harris appealed on the grounds that he was discriminated against; the holding tank constitutes a repair or alteration of the existing toilet facility; the CRD improperly delegated its discretion to the municipality; and refusing the permit was an improper exercise of discretion.

The Board dismissed the allegations of discrimination and improper delegation. It also found that the holding tank does not constitute a repair or alteration, nor did the health officer improperly exercise his discretion under the *Health Act* and its Regulation. Although the policy requiring a by-law, on its face, fetters the Manager's discretion, he properly considered the application and, on the facts, the Board agreed that the system should not be permitted for the property. The appeal was dismissed.

95/29 Jacinthe B. Eastick and Stan and Maxine McRae and Environmental Health Officer (Galewind Holdings Ltd., Permit Holder)

Decision date: July 5, 1996

Panel: Bob Radloff

The Appellants appealed a decision of the Environmental Health Officer (the "EHO") to issue a permit for a sewage treatment and disposal system on a lot adjacent to their property. The Appellants maintained

that the permit was issued in violation of the notice requirements for the granting of a permit and that the Permit Holder had failed to disclose to the EHO that the permitted system was to support a strata subdivision on the subject property. They argued that the disposal system could potentially pollute wells on properties adjacent to the permitted property, including those of the Appellants. The Appellants also challenged the permit on the grounds that the treatment system proposed was not proven in British Columbia and that the engineer charged with designing the system was also the sales agent for the treatment system and therefore could not be relied on to be objective.

The Board held that the Appellants had not been prejudiced by the Permit Holder's failure to meet the notice requirements of the Sewage Disposal Regulation. The Board found that the permitted system did not support a strata subdivision and that, if a strata subdivision is sought, a new application for a permit to construct will be required. On the facts, the Board found that the proposed disposal system met the design requirements of the Regulation and did not present a threat to the general health of the community or to the adjacent wells on the Appellant's property. Any lack of objectivity on the part of the engineer was remedied by the review of the system by the EHO and the Board. The Board therefore found that a permit should be issued. The appeal was dismissed.

95/30 Edward Jonkman and Environmental Health Officer

Decision date: May 13, 1996

Panel: David Brown

Edward Jonkman appealed a decision of the Environmental Health Officer (the "EHO") refusing to issue a permit to construct a sewage disposal system consisting of a treatment plant, ozonation unit and disposal field on Mr. Jonkman's 4.65-acre single-family-dwelling lot in Surrey, B.C. The lot did not meet the legislative requirement of four feet of natural soil from the ground water table. Mr. Jonkman provided an engineer's plan, with supporting data, that compensated for the lack of soil. The EHO refused the permit on the basis that the site did not meet statutory requirements and related ministry policy. Mr. Jonkman appealed on the grounds that the EHO's rigid application of ministry policy was an improper exercise of his discretion.

The Board accepted the engineer's evidence that the custom-designed system would provide effective treatment and would not harm public health. The EHO did not present evidence of a public health hazard. The Board held that the system would not endanger public health and that the EHO cannot bind himself by department policy. The Board ordered the issuance of a permit with conditions. The appealwas allowed.

95/34 Chris Buchan and Environmental Health Officer (Chislett, Manson and Company, Permit Holder)

Decision date: July 3, 1996

Panel: Carol Martin

Chris Buchan appealed a decision of the Environmental Health Officer (the "EHO") granting a permit to Chislett Manson and Company to continue using an on-site sewage disposal system for a house that was to be converted into an office for a proposed sawmill with 30 employees. The original sewage disposal system was not required to be altered and the maximum amount of permitted discharge was unchanged. The house is near residences that draw drinking water from on-site wells and abuts Burns Marsh, a designated sensitive wetland. Mr. Buchan appealed on the grounds that the site has high groundwater

levels; the residential permit and the current application contain factual and procedural inconsistencies; the residential system criteria are unsuitable for commercial systems; the local wells could be contaminated; the EHO knew about possible current sewage break out; and experts recommended changes to the current system.

The Board was not convinced that an adequate site investigation had been conducted by the EHO. The EHO lacked sufficient information about the nature of the disposal field area and the state of the system to be satisfied that there would be no public health or environmental risk. The board cancelled the permit but noted that the Permit Holder was free to undertake the usual testing and reapply. The appeal was allowed.

95/35 Donald King (James Bastion, Second Appellant) and Environmental Health Officer (Chandler Ridge Properties Ltd., Permit Holder)

Decision date: July 3, 1996

Panel: Carol Martin

This is an appeal from a decision of the Environmental Health Officer (the "EHO") issuing a permit for an on-site sewage disposal system to Chandler Ridge Properties' proposed 18-lot strata mobile home park near Ladysmith, B.C. The Appellants, who live in mobile homes on the property, argued that the system setbacks are insufficient; the area has a high seasonal water table; the sewage would have an unknown impact on the property's ground water; percolation tests were improperly conducted; and the proposed disposal field was built on clay, was not constructed according to regulations, and was not inspected.

The Board found that there was no evidence of improper inspections or that the proposed disposal field was in a high water table area. The Board found the soil type acceptable and held that the system exceeded the ministry's requirements. The appeal was dismissed.

95/37 Dr. Alfred Johnson and Environmental Health Officer

Decision date: August 22, 1996

Panel: Sheila Bull

Dr. Johnson was issued a sewage disposal permit for his undeveloped property in 1979. In 1993, he sought a renewal of the permit. Dr. Johnson was advised to apply for a new permit as his had expired and there had been changes in public health policy since the original permit was issued. A new permit application was made in 1995, but was denied on the grounds that it did not meet the criteria required for approval. The Environmental Health Officer (the "EHO") found that there was insufficient soil, a steep slope and potential effluent breakout points. Dr. Johnson appealed the decision on the grounds that other lots in the same subdivision have functioning sewage systems; it is unrealistic to expect a municipal sewage system to be installed in the foreseeable future; and problems associated with "innovative technology" appear to be almost insurmountable.

The Board held that once a permit expires, the original permit will be subject to the standards in place when the new application is made. The Board found that it is only obliged to determine whether the EHO properly considered and applied the legislation in force at the time the application was made in 1995. The Board also found that, under the current legislation and policies, the proposed sewage disposal system did not meet the standards required to protect the public health. The appeal was dismissed.

95/38 Harry Harris and Environmental Health Officer

Decision date: August 6, 1996

Panel: Carol Martin

Harry Harris appealed a decision of the Environmental Health Officer (the "EHO") refusing to issue a permit for an on-site sewage disposal system on a quarter-acre lot. The proposed disposal field was on a 38 to 40 degree slope. The application was refused because of the excessive slope, lack of an alternative field, downslope breakout potential, limited receiving area and lot size. Mr. Harris appealed on the grounds that the EHO had discretion to approve the permit and to consider an alternative system for an existing lot.

The Board held that the EHO's discretion is subject to the EHO being satisfied that there is no risk to public health. The Board found that the EHO could not have been satisfied of this on the facts of the case, especially regarding long-term concerns for public health. The Board also held that there is no requirement to approve an alternative system or to approve a system for an existing lot. The Board noted that Mr. Harris can reapply with a proposal that addresses EHO's concerns. The appeal was dismissed.

95/43 Donald Gehring and Environmental Health Officer

Decision date: August 22, 1996

Panel: Carol Martin

Mr. Gehring had previously been turned down for a sewage disposal permit due to the high groundwater table on his lot. He dug drainage ditches on a new site and applied for a system with a raised mound disposal field. After monitoring the site, the Environmental Health Officer (the "EHO") refused to issue a permit due to the fluctuating high groundwater table, poor soils and proximity to break out points (the drainage ditches). Mr. Gehring appealed this decision maintaining that, with the new ditches to reduce the high water table and the addition of soil to elevate part of the field, the public's health should be safeguarded.

The Board found that the drainage ditches developed by Mr. Gehring to lower the water table created potential breakout points where sewage could escape. This problem, in combination with the other problems identified by the EHO, justified a refusal of the permit. Neither the EHO, nor the Board could be satisfied that the proposed system would safeguard public health as untreated effluent would likely reach the surface of the land or body of water. The appeal was dismissed.

95/48 George Briggs and Environmental Health Officer (Josef Fischer, Permit Holder)

Decision date: September 5, 1996

Panel: David Perry

Mr. Briggs appealed a decision of the Environmental Health Officer (the "EHO") amending a waste disposal permit to allow changes to the Permit Holder's sewage disposal system. Mr. Briggs maintained that the amendments could not be made because the permit itself was invalid as the original permit had since expired and its subsequent renewal by the Ministry of Health was not authorized under the Health

Act. Mr. Briggs also contended that the sewage disposal system authorized under the permit and the changes thereto under the amendment constituted a health hazard.

The Board did not assume jurisdiction for hearing appeals of sewage disposal permits issued under the *Health Act* until August 26, 1994. Accordingly the original permit of the Permit Holder issued in September 1991, is outside the jurisdiction of the Board. The Board also concluded that any legal or administrative decisions made before August 26, 1994 renewing the 1991 Permit are also outside the jurisdiction of the Board. The Board found that the alterations to the Permit Holder's sewage disposal system did not pose a threat to public health. Rather, the amendment reduced the flow of effluent and thereby reduced any threat to public health. The appeal was dismissed.

95/49 Ross and Laurel Hutton and Environmental Health Officer

Decision date: September 9, 1996

Panel: Judith Lee

Ross and Laurel Hutton appealed a decision of the Environmental Health Officer ("EHO") refusing to issue a sewage disposal permit for a combined package treatment plant, ozonation system and raised mound. The Appellants' property did not meet the standards for a conventional package treatment plant system. As a result, the Appellants proposed an alternate system, designed by an engineer, as allowed under the Sewage Disposal Regulation. The EHO rejected their proposal as not being appropriate to meet the omitted standards having regard to safeguarding public health. The sole issue before the Board was whether the EHO properly exercised his discretion in refusing to issue the permit.

The Board held that the EHO did not properly exercise his discretion under the *Health Act* and the Regulation. It found that the system proposed by the Appellants would overcome the omitted standards and that it was sufficient to safeguard public health. The Board therefore found that a permit should have been issued but ordered conditions to ensure that the system is properly monitored and maintained. The Board also recommended that the EHO require the Appellants to register a covenant under the Land Title Act in favour of the Ministry of Health confirming their agreement to monitor and maintain the system. The appeal was allowed.

95/56 Michael O'Leary and Environmental Health Officer

Decision date: February 12, 1997

Panel: David Perry

Mr. O'Leary appealed a decision of the Environmental Health Officer (the "EHO") refusing to issue a permit for a sewage disposal system on Mr. O'Leary's property on Indian Arm. The proposed system consists of a septic tank, dosing pump station, intermittent sand filter and a marine outfall pipe. The EHO considered the permit under section 7 of the Sewage Disposal Regulation governing alternate methods of sewage disposal, but refused the permit on the grounds that it does not satisfy ministry policy regarding innovative technologies. Also, the Ministry of Health adopted an embargo on applications for marine outfalls along Indian Arm because of the danger of a future cumulative impact if there is a proliferation of similar discharges.

The Board found that the application for an innovative technology does not fall under section 7 of the Regulation, but section 3. Thus, the test in this case is whether the ultimate use of the proposed system will contravene the *Health Act* or the Regulation; i.e. is a hazard to the public health. On the evidence

presented, the Board held that the proposed system will not contravene the Act or be a risk to public health and so additional requirements under the innovation policy are not applicable. The Board also found that the policy of not allowing marine outfalls in Indian Arm is beyond the Ministry of Health's statutory authority because the legislation requires each sewage disposal system to be considered on its merits, and not on whether the system may aggravate any possible future cumulative effects. The EHO did not freely exercise his discretion but bound himself by this policy. The appeal was allowed.

96/03 Alfred Fritzel and Environmental Health Officer (Mike McBride, Permit Holder)

Decision Date: August 22, 1996

Panel: Bob Radloff

Mr. Fritzel appealed a decision of the Environmental Health Officer (the "EHO") issuing a sewage disposal permit to Mr. McBride. Mr. Fritzel maintained that the effluent discharged by the proposed sewage disposal system would contaminate a water supply he uses for domestic and agricultural purposes. He also contended that covenants exist on the property which preclude the construction of a disposal field and prohibit the discharge of effluent to the water source. Further, Mr. Fritzel claimed that the permit application contained errors and omissions which prevented it from being properly assessed.

The Board held that while the effluent flow from the sewage disposal system would be towards the water course, the setback was further away from the water course than was required by the Sewage Disposal Regulation. Moreover, the effluent from the system would be properly remediated before reaching the water. The Board reviewed the covenants referred to it and found that they did not apply to the disposal field. Both convenants were in favour of the District of Salmon Arm and therefore only the District of Salmon Arm and not the Board had the authority to enforce any conditions under the covenants. The Board accepted Mr. Fritzel's submission that some errors and omissions had occurred in the original permit application, but any deficiencies were brought to the attention of the Board during the hearing thereby allowing it to make a fully-informed decision. The appeal was dismissed.

96/05 Ken and Rose Smith and Environmental Health Officer (Len Cornies, Permit Holder)

Decision date: September 24, 1996

Panel: Bob Radloff

Ken and Rose Smith appealed a decision of the Environmental Health Officer ("EHO") issuing a sewage disposal permit to Len Cornies. Mr. Cornies' property abuts Canim Lake. The Smiths maintained that Mr. Cornies' lot is subject to flooding during high water periods at Canim Lake. At those times, the disposal field will not meet the 30 metre set back from the high water mark as required under the Sewage Disposal Regulation. Therefore, the water quality of Canim Lake would be adversely affected. They also alleged that the disposal field would not have the required four feet of soil during periods of flooding.

According to the Regulation, the 30 metre set back requirement is to be measured from the average high water mark, not the highest water marks recorded. The Board held that the distance between the disposal field and the average high water mark was consistent with the Regulation. The Board also found that the EHO was authorized to reduce the depth of soil to the water table under the Regulation and did so in light of the favourable soil conditions at the site. The appeal was dismissed.

96/06 Citizens for Myrtle Rocks Park and Martin Rossander and Environmental Health Officer (Marie Rumley, Permit Holder)

Decision date: September 16, 1996

Panel: David Brown

The Citizens for Myrtle Park and Martin Rossander appealed a decision of the Environmental Health Officer ("EHO") issuing a sewage disposal permit to Marie Rumley. The Appellants challenged the permit on a number of grounds, including that the system authorized by the permit would adversely affect the environment; there was lack of outside consultation before issuing the permit; and the permit did not comply with the Sewage Disposal Regulation.

The Board found no evidence that the permit did not comply with the Regulation. The Board found that the EHO properly exercised his discretion under the Regulation in issuing the permit. In exercising this discretion, the EHO need only be satisfied that the proposed sewage disposal system adequately protects public health. The EHO is not required to make political decisions based on public consultation. The Board found that the proposed system did not constitute a risk to public health. However, the Board varied the permit to include a restrictive statutory convenant in favour of the Ministry of Health requiring the Permit Holder to observe installation and maintenance conditions to ensure the safe operation of the system. The appeal was dismissed.

96/08 Dr. Margaret Bilan and Environmental Health Officer (John Isbister, Permit Holder)

Decision date: November 15, 1996

Panel: Carol Martin

Dr. Margaret Bilan appealed a decision of the Environmental Health Officer (the "EHO") issuing a permit to Mr. Isbister for an alternate on-site sewage disposal system using fill. Dr. Bilan owns a lot adjacent to that of the Permit Holder. She appealed the issuance of the permit on the grounds that the permit notice was posted incorrectly in so far as the writing was illegible and the sketch of the system was too rough to be useful. Dr. Bilan also maintained that the soil depth to the water table did not meet the four foot requirement and that the possibility of a power failure and resultant pump failure could endanger the public health.

The Board held that section 7 of the Sewage Disposal Regulation allows for the relaxation of the four foot rule if public health can be safeguarded. The Board was satisfied that the alternate system, with the conditions set out by the EHO, would pose no risk to public health. The Board found that the notice was hard to read, but was posted in accordance with the *Health Act* and the Regulation and Dr. Bilan had not been prejudiced by any irregularity or inaccuracy in the posted notice. The Board further found that any lack of clarification in the posting had been corrected by the appeal. The Board held that maximum safeguards should be installed on the system to prevent any disruptions in the event of a power failure and amended the permit to require a high level alarm for this purpose. The appeal was dismissed.

96/09 Betty Gibbens and Environmental Health Officer (Ron King, Permit Holder)

Decision date: November 25, 1996

Panel: Carol Martin

Ms. Gibbens appealed a decision of the Environmental Health Officer ("EHO") issuing a permit for an alternate on-site sewage disposal system to Mr. King. Ms. Gibbens owns a lot adjacent to that of the Permit Holder. She appealed the issuance of the permit on the grounds that the system did not meet the requirements of the legislation; drainage conditions on the permit holder's property could cause contaminated water to run onto her property; the permit application process was flawed; and the public information process concerning the permit was also flawed. Ms. Gibbens also asked the Board to consider a number of other issues relating to fish habitat, violations of municipal bylaws and the general environmental conditions of the Permit Holder's property.

The Board held that the proposed alternate system met all required setbacks and had adequate safeguards to protect the public health. The Board found that there was insufficient evidence to support Ms. Gibbens' claim that the installation of the septic tank would affect the flow of water onto her property. It further found that the processing of the application for the permit was not flawed and any technical defects in this regard were corrected on the appeal. The Board was provided with no evidence that the public notice requirements had not been met. The Board declined to address the remaining grounds of appeal raised by Ms. Gibbens as they were outside its jurisdiction which was limited to considering whether the subject property could safely sustain an on-site sewage disposal system in accordance with the *Health Act* and the Sewage Disposal Regulation. On the evidence presented, the Board concluded that the sewage disposal system complied with the requirements of the Act and the Regulation and the EHO did not err in granting the permit. The appeal was dismissed.

96/11 James Cain and Environmental Health Officer

Decision date: December 17, 1996

Panel: Carol Martin

Mr. Cain appealed a decision of the Environmental Health Officer (the "EHO") refusing to issue a permit for an on-site sewage disposal system due to the high water table on the lot. Mr. Cain appealed on the grounds that the current Sewage Disposal Regulation and Ministry policies should not apply to him because they did not exist when his lot was created. He further maintained that the EHO was biased when he considered the permit application. Finally, he submitted that even if the current Regulation and Ministry policies were applicable to his property, the EHO failed to properly assess the property. At the hearing, Mr. Cain also argued he had not been given an opportunity to respond to the EHO's Statement of Points prior to the hearing and he objected to the late submission of documents to which he had not had an opportunity to prepare a response.

The Board found that, as Mr. Cain had an opportunity to respond to the Statement of Points at the hearing, no unfairness resulted. On the matter of the late documents, the Board noted that Mr. Cain had not requested an adjournment and decided to address the issue of lateness when weighing the evidence. The Board held that the legislation and Ministry policy in effect at the time Mr. Cain made his application was that which applied to the application. The Board found that the EHO was not biased in his decision simply because he had rejected a previous application for the same property and, on the evidence presented, the Board was satisfied that the EHO's mind was not Ôclosed' when he considered the second application. The Board was satisfied that the procedures employed by the EHO were consistent with the

legislation and with the objects and purposes of the Act. On the evidence the Board concluded that, due to the high water table, the proposed system could not be installed in a manner that would safeguard the public health. The appeal was dismissed.

96/12 Ben Van Druten and Environmental Health Officer

Decision date: January 14, 1997

Panel: David Perry, Elizabeth Keay, Katherine Hough

Mr. Van Druten appealed a decision of the Environmental Health Officer (the "EHO") denying him a permit to build a sewage disposal system consisting of a package treatment plant, ozonation unit and raised disposal field, on his property. The permit was refused because it did not meet certain criteria of the Sewage Disposal Regulation, in particular it had a high water table. Mr. Van Druten argued that the permit could be approved under section 7 of the Regulation which allows the EHO to relax certain requirements for a problem site if the proposed system will not pose a danger to public health.

The Board found that Mr. Van Druten's permit application could be considered under section 7 of the Regulation. On the evidence presented, the Board was satisfied that the system proposed by Mr. Van Druten would effectively treat sewage and would not pose a risk to public health. The Board directed the EHO to grant Mr. Van Druten a permit for the proposed sewage disposal system, provided a number of conditions were met. The appeal was allowed.

96/14 Maurice Hamer-Jackson and Environmental Health Officer, (Bruce Nyeste et al, Third Parties)

Decision date: January 6, 1997

Panel: Bob Radloff

Mr. Hamer-Jackson appealed a decision of the Senior Environmental Health Officer (the "SEHO") to cancel a permit for the upgrade of a pre-1985 sewage disposal system for Mr. Hamer-Jackson's property. The permit was cancelled because the proposed system violated some of the requirements of the Sewage Disposal Regulation.

Under section 7(2) of the Act, the SEHO may approve modifications to a pre 1985-system in need of repair or alteration, even if it cannot be upgraded in accordance with the Regulation, provided that the system will not constitute a health hazard. The Board found that, in the circumstances, the existing system was in need of repair and it could not be upgraded in compliance with the Regulation. The Board further found that the proposed sewage disposal system could be a health hazard because there was a good chance the effluent from the proposed seepage bed might reach the nearby Shuswap Lake too quickly, due to the slope and the presence of fractured rock.

However, the Board concluded that these problems could be overcome. Therefore, it ordered that the original permit be issued, provided that secondary treatment was added to the system and the discharge was alternated between the existing disposal field and a seepage pit. The appeal was allowed.

96/16 Larry Perkins and Environmental Health Officer

Decision date: January 14, 1997

Panel: David Perry

Mr. Perkins appealed a decision of the Environmental Health Officer (the "EHO") denying a permit for a sewage disposal system. Mr. Perkins' lot is next to Naramata Creek, and was placed in an environmental control zone after 1992. The permit was denied because the site did not meet the 30 metre setback to the creek as required by Sewage Disposal Regulation. Mr. Perkins appealed on the ground that the EHO erred in the way he measured the distance to the creek. In the alternative, he argued that an alternate method of sewage disposal should be considered for the lot or the EHO should consider the system under the specific sections relating to environmental control zones in the Regulation which, he argued, would allow a reduction of the 30 metres if a phosphorous system was used.

The Board found that the 30 metre setback is a measurement of surface distance, not a measurement of underground water flows. Mr. Perkins' lot could not meet this distance requirement. The Board also found that the sections relating to alternate methods did not apply, and could not assist him in any event. The Board further found that the specific sections of the Regulation relating to environmental control zones do not apply to his lot because the lot was created before 1992 and such lots were specifically exempted. The appeal was dismissed.

96/18 Kurt Darmohray, et al. and Environmental Health Officer (Cabins and Castles Construction Ltd., Permit Holder)

Decision date: February 10, 1997

Panel: Carol Martin

The Appellants appealed a decision of the Environmental Health Officer (the "EHO") granting a permit for an on-site sewage disposal system for a 1/2 acre lot being developed by Cabins and Castles Construction Ltd. in a 72 lot subdivision located on a hill above Shuswap Lake. Each Appellant lives in an older subdivision located below the lot in question, and they are concerned about the possibility of contamination of their properties and water supplies, caused by runoff storm water as it flows across the lot's drainage field, and down towards their properties and Shuswap Lake.

The Panel found that the EHO was unaware of the extent of the storm water runoff problems associated with the area and did not have sufficient information before him to be assured that the public's health would be safeguarded. Further, the conditions he included in the permit were not sufficiently clear. The Panel found that, with amendments, the permit could be issued and the proposed system would protect the public health. The appeal was allowed.

96/19 Fernand and Jocelyne Houle and Environmental Health Officer

Decision date: February 10, 1997

Panel: Carol Martin

Mr. and Mrs. Houle appealed a decision of the Environmental Health Officer (the "EHO") refusing to issue the Houles a permit for a sewage holding tank on their waterfront lot. The lot is less than 30 metres from the high water mark of the lake, and the soil on the lot is not adequate for a septic tank. The Houles appealed on the grounds that their property was created for residential use years ago, and if a holding tank is not permitted, the lot will be unusable as it cannot meet the requirements for a conventional or an alternate sewage disposal system. The Houles also argued that the Health Unit does allow holding tanks in certain circumstances, and there are other lots with holding tanks in the neighbourhood.

The Board found that the EHO should not have relied on section 7 of the Sewage Disposal Regulation when considering an application for a holding tank. The correct sections are section 3 of the Regulation, and section 25 of the Health Act, which specify that a sewage disposal system shall not be approved if it endangers public health. The Board found that the EHO had properly decided that a holding tank on the Houles' lot would not adequately protect the public health. The Board found that it is not relevant to consider other holding tanks the Health Unit may have approved because each sewage disposal system has to be considered individually. The appeal was dismissed.

96/21 Roy Leakey and Environmental Health Officer (King Coho Resort Ltd., Permit Holder)

Decision date: February 21, 1997

Panel: Carol Martin

Mr. Leakey appealed a decision of the Environmental Health Officer (the "EHO") issuing a permit for a Chromoglass sewage package treatment plant to King Coho Resort Ltd. (the "Resort") which is located on a strip of land between Little River and the shoreline of the Georgia Strait. The Resort is currently a 33 unit RV park, but the owner intends to replace the RVs with a 20 bedroom condominium development, which will require a new sewage disposal system. Mr. Leakey, an adjacent property owner, appealed the permit on the grounds that it will be a risk to public health and the environment because the disposal field for the new system is susceptible to flooding from the Little River.

On the evidence presented, the Board found that the proposed package treatment plant will protect the environment and the public health better than the current system in place for the RV park, and meet all mandatory set backs and soil results. The Board was concerned, however, that there was a possibility of floods by overflowing seasonal high water from the river. The Board decided to uphold the permit, but added conditions to ensure the older sewage system was removed; the treatment plant was flood proofed; and the drainage field diverted storm water. The appeal was dismissed.

Pesticide Control Act

94/37(b) Tsawataineuk First Nation and Deputy Administrator, *Pesticide Control Act* and International Forest Products Ltd.

Decision date: September 6, 1996

Panel: David Brown, Elizabeth Keay, Laurie Nowakowski

The Tsawataineuk First Nation appealed a Pesticide Use Permit (the "Permit") issued to International Forest Products Ltd. ("Interfor") on the grounds that the authorized spraying of pesticides in the Kingcome Valley under the Permit would have harmful side effects.

The Board held that its jurisdiction is limited to ensuring that pesticides are used in accordance with the provincial legislation and regulations and label restrictions governing their handling and application. The key requirement being that the pesticide application will not cause an unreasonable adverse effect. The Board found no evidence that the use of the pesticide in the manner set out it the Permit would contravene any of these requirements.However, the Board noted the possibility of incidental food gathering in the Permit Area and accordingly amended the Permit to give adequate warning to potential food or medicine plant gatherers in the Permit Area. The Board further amended the Permit to provide that the application of spray is supervised by a fully qualified person independent from Interfor or it's spraying contractor. The Board also amended the Permit to require Interfor to first complete its spraying of areas earlier identified as urgently requiring attention before treating any other areas. The appeal was dismissed.

95/03(b) Robson Alternatives to Pesticides and Deputy Administrator, *Pesticide Control Act* (British Columbia Minister of Forests, Permit Holder)

Decision date: April 17, 1996

Panel: Christine Mayall, Elizabeth Keay, Jack Lapin

Robson Alternatives to Pesticides' appealed the Deputy Administrator's decision to issue a Pesticide Use Permit to the Minister of Forests authorizing application of Tordon 22K and Roundup to noxious weeds on Crown Land. The grounds of appeal were that the permit did not protect water, agricultural land and the environment, and that there was insufficient permit information about spray sites, rates and timing, and inadequate posting of spray areas.

The Board found that there were discrepancies between the permit and the application. The Board also found that late-season spraying may have reduced spraying effectiveness, the permit format was too complicated to be useful, and the signage provided inadequate information to the public. The Board reduced the herbicide concentration in the applicator's contract to the concentration specified in the permit and ordered recording and monitoring of control sites. The Board concluded that there was insufficient evidence to prove buffer zone inadequacy or weather condition permit violations. The Board held that, in this case, Tordon 22K was the most cost-effective weed control method. The Board upheld the issuance of the permit with amendments. The appeal was dismissed.

95/04(b) John Ward (on behalf of Robson Alternatives to Pesticides) and Deputy Administrator, *Pesticide Control Act* (Slocan Forest Products Ltd., Permit Holder)

Decision date: May 24, 1996

Panel: Christine Mayall, Elizabeth Keay, Jack Lapin

John Ward appealed the Deputy Administrator's decision granting Slocan Forest Products a Pesticide Use Permit to spray the herbicide Vision on clearcuts to curtail broad-leafed plant growth and establish "free-to-grow" conditions for conifers as required by Slocan's cutting permit. The permit was appealed by Mr. Ward on the grounds that there were environmental and health risks from herbicide residue, inadequate public notification and information about the spraying, and improper evaluation of the spraying.

After hearing competing expert evidence, the Board found the herbicide posed no unreasonable adverse effect. The Board held that the buffer zones and weather monitoring were satisfactory but the permit should be amended to reflect current application practices. The Board held that Slocan gave adequate public notice of the permit application, spray rates and spray application. The Board determined that spraying-date notification can not be rigidly applied since weather conditions are crucial to spraying dates. The Board held that there was insufficient evidence to find a risk from residue. The Board also held that federal regulations approve the use of Vision for site preparation. The Board confirmed the Deputy Administrator's issuance of the permit with two amendments. The appeal was dismissed.

95/28 A. Carol Anderson et al. and Deputy Administrator, Pesticide Control Act (Minister of Agriculture and Agri-food Canada, Permit Holder)

Decision date: April 15, 1996

Panel: Judith Lee

A group of Citizens appealed the Deputy Administrator's decision to issue a pesticide use permit allowing ground application sprayings of FORAY 48K (BTK) against gypsy moths on 20 hectares of public and some private land in New Westminster. The Appellants' grounds for appealing the permit were endangered human and environmental health; spray ineffectiveness; failure to comply with spraying program criteria and the existence of alternative means of moth eradication.

The Board accepted expert evidence that spraying would have some adverse impact on the health of humans and other species. The Board also accepted evidence that limited spraying of the area would not provide the intended result of eradication. The Board held that the Administrator's failure to consider lower-risk control methods advocated in policy, his failure to assess site-specific considerations and his departure from egg-mass spraying thresholds were unreasonable in this case. The Board recommended adding health and environmental monitoring conditions to permits. The Board weighed limited spraying effectiveness against the risk of harm to the environment and health and cancelled the permit. The appeal was allowed.

95/33(a) Heiltsuk Tribal Council and Deputy Administrator, *Pesticide Control Act* (International Forest Products Ltd., Permit Holder)

Decision date: June 26, 1996

Panel: Christine Mayall, Shiela Bull, Laurie Nowakowski

This was an interim decision in an appeal against the issuance of two pesticide use permits to International Forest Products Ltd. Since the permit holder had little time to draw up work plans for the current season, the Board issued an interim decision pending its full written reasons. The Board cancelled both permits.

95/33(b) Heiltsuk Tribal Council and Deputy Administrator, *Pesticide Control Act* (International Forest Products Ltd., Permit Holder)

Decision date: February 25, 1997

Panel: Christine Mayall, Shiela Bull, Laurie Nowakowski

On June 26, 1996, the Board issued an interim decision 95/33(a) canceling PUP 215-146-95/97 (the "Permit"). The Board stated that it would provide detailed written reasons for the decision in due course. The following are the written reasons for the Panel's decision. The Heiltsuk Tribal Council appealed the issuance of the Permit which authorized Interfor to apply VISION® (active ingredient glyphosate) by backpack on selected cutblocks on King Island for the purpose of conifer release. The grounds of appeal were that the Heiltsuk have consistently asked for a restriction on pesticide use in their territory; there is a concern regarding the safety of glyphosate, and the testing it has undergone; glyphosate affects staple foods of the Heiltsuk and staple foods of the wildlife that the Heiltsuk hunt, and the long term effects on the Heiltsuk people are unknown; the Tailed Frog is an endangered species which lives in the area; the impact of pesticide use on cultural and ecological tourism is unknown; and an impact assessment should be carried out to determine the effects of pesticides on the Heiltsuk people.

On the evidence presented, the Board found that the berries and wild foods traditionally gathered by the Heiltsuk would be negatively affected in the spray areas for a period of time. The board futher found that the Heiltsuk were not appropriately consulted regarding the proposed spraying. All other grounds of appeal were rejected. After considering all the circumstances, the Board decided that it was appropriate to cancel the Permit and return the matter to the parties for further discussion. The appeal was allowed.

96/02(a) John Ward and Deputy Administrator, Pesticide Control Act (Hauer Bros. Lumber Ltd., Permit Holder)

Decision date: August 12, 1996

Panel: David Perry

Mr. Ward applied for a stay pending a decision on the appeal of a Pesticide Use Permit issued by the Deputy Administrator to Hauer Bros. authorizing herbicide spraying on two Robson Forest District sites. The Deputy Administrator did not provide any submissions on this application to the Board.

The Board applied the irreparable harm/ balance of convenience test to the application. It accepted Hauer Bros.' evidence that target vegetation would be stunted, not killed by the application of the pesticide. The Board found that a stay would prevent the company from meeting its statutory obligations under the Forest Act by allowing overshadowing to kill conifers and by causing planting delays. The Board found the irreparable harm to the company outweighed limited evidence of harm to the environment. The Board denied the application for a stay.

Waste Management Act

94/48 Alpha Manufacturing Inc. and Deputy Director of Waste Management (Corporation of Delta, Third Party)

Decision date: July 30, 1996

Panel: David Perry, Jack Lapin, Gary Robinson

Alpha Manufacturing ("Alpha") appealed a pollution abatement and pollution prevention order requiring Alpha to cease discharging waste, to propose corrective measures and to implement pollution prevention to a seven-acre parcel in Burns Bog which were alleged to be outside of Alpha's waste permit boundaries. Alpha appealed on the grounds that the seven acre portion of land was not described in the permit; the order was unreasonable and unnecessary; the Ministry used inadequate methodology; and the order was made for improper purposes.

The Board found that the contested area was outside the permit boundaries and that the placement of 55,000 m3 of material in that area was a substantial alteration of the environment as it constituted pollution. The Board rejected an argument that the definition of "pollution" requires a substance to have deleterious affect. The Board held that an environmental-assessment-type process is not required to make such orders. The orders were not unreasonable or unnecessary, the Ministry methodology was appropriate and the Board found no evidence that the orders were made for an improper purpose. The appeal was dismissed.

94/49 Katzie First Nation et al and Deputy Director of Waste Management (Swaneset Bay Resort, Permit Holder)

Decision date: July 30, 1996

Panel: David Perry, Bob Radloff, Elinor Turrill

The Katzie First Nation appealed a decision of the Deputy Director of Waste Management amending a waste discharge permit held by Swaneset Bay Resort Ltd. ("Swaneset"). The major amendment was an increase in the rate of effluent to be discharged under the permit. The Appellants appealed on the grounds that the authorized discharge raised pollution concerns; the ultraviolet treatment process of effluent was insufficient; the development was being allowed to occur before there was adequate infrastructure to support it; the sewage disposal system should not be monitored by Swaneset; and that it was preferable to have the development linked to the sewage treatment system already in place in the lower mainland.

On the evidence presented, the Board found that the stringent standards imposed by the permit together with the extensive monitoring and alarm systems ensured that the effluent would not harm the

environment. However, the Board held that the current level of ultraviolet treatment of effluent was not sufficient to cope with additional flows from increased development and amended the permit to increase the ultraviolet treatment requirements. The Board held that it had no jurisdiction to consider land and development issues regarding the Swaneset development. The Board further found the requirement that testing be done at approved facilities and the power of the regional waste manager to make random inspections were adequate measures to protect the environment. Finally, the Board held that it was not preferable to connect the development to the Greater Vancouver sewer system as the effluent discharged from that system was inferior to that proposed for the Swaneset development. The Board ordered that the permit be amended to require use of effluent for irrigation purposes on Swaneset's property. The appeal was dismissed.

95/19(b) Lee Granberg and Deputy Director of Waste Management

Decision date: January 21, 1997

Panel: David Perry, Elinor Turrill, Bob Radloff

Mr. Granberg owns a water supply and sewage disposal system for a trailer park and neighbouring subdivision of over 20 homes. The sewage system predates any applicable legislation. When the system malfunctioned, Mr. Granberg was required to obtain a waste permit and pay a fee of $150. A waste permit was issued to Mr. Granberg containing a number of conditions relating to maximum allowable flows, frequency of pumping, the implementation of water conservation measures, monitoring and data collection. He was also required to post a $50,000 security bond. Mr. Granberg appealed the fee and the permit conditions arguing that his system should be "grandfathered" (exempted); the conditions were unreasonable or excessive; and the bond was inappropriate.

The Board concluded that there are no provisions in the *Waste Management Act* nor the regulations to "grandfather" his system. As Mr. Granberg's water and sewage system provides an essential service for over 80 families and the lot was considered marginal, the Board found that it was necessary for his activities to be properly regulated by the Ministry. The Board held that the permit fee could not be waived and the conditions of the permit were entirely appropriate in the circumstances. The appeal was dismissed.

95/25(a) Louisiana-Pacific Canada Ltd.; Peace Country Environmental Association and Deputy Director of Waste Management

Decision date: May 21, 1996

Panel: David Perry

This matter invovled a stay application in an appeal by Louisiana-Pacific and by the Peace Country Environmental Protection Association of a decision of the Deputy Director of Waste Management amending Louisiana-Pacific's permit by requiring the Regional Manager to ensure heightened air emissions monitoring of Louisiana-Pacific's Dawson Creek plant. Louisiana-Pacific applied for a stay of the decision pending the appeal submitting that compliance would duplicate other studies and cost more than $500,000, and that without evidence of harm, monitoring was not urgently needed. The Association opposed the stay submitting that the decision affected the Regional Manager, not Louisiana-Pacific, and that the lack of evidence linking emissions to local health problems resulted from data insufficiencies. The Deputy Director took no position on the stay.

After considering the evidence, the Board held that Louisiana-Pacific would suffer irreparable harm if it made expenditures of over $500,000 and later won the appeal. The Board held that there was no evidence that local residents or the environment would suffer irreparable harm if the stay were granted. The Board granted a stay of the decision pending the appeal.

95/32 Peter and Nancy Van Der Wal and Deputy Director of Waste Management

Decision date: July 18, 1996

Panel: David Brown, Sheila Bull, Elinor Turrill

The Van Der Wals appealed the Deputy Director of Waste Management's 1995 order requiring their property to be used as an access route to a lot owned by the Hide-Away Motel. In 1991, the Appellants and Amstutz Contracting carried out landfill operations under a permit on the Appellant's property. A depression in the adjoining Hide-Away property was created by the landfill. In 1995, the Deputy Director issued a pollution prevention order to the Appellants and Amstutz requiring them to fill in the depression to prevent erosion, fire and settling from occurring.

The Board found no evidence of pollution and, therefore, the Deputy Director had no reasonable grounds to make the order. Further, there was no evidence that the activity performed by the Appellants was not in compliance with their permit. Accordingly, the Deputy Director had no power to make the order. The Board allowed the appeal and reversed all the provisions in the order as they applied to the Appellants.

95/39 Surrey Langley Environmental Protection Society and Assistant Air Quality Director (Money's Mushrooms Ltd., Third Party)

Decision date: August 12, 1996

Panel: David Brown, Elizabeth Keay, Joan Rysavy

The Surrey Langley Environmental Protection Society appealed a June 1995 order issued by the Assistant Air Quality Director of the Greater Vancouver Regional District ("GVRD") requiring Money's Mushrooms to reduce odour emissions by upgrading its manure composting facility and to submit a business plan and progress reports. The Surrey Langley Environmental Protection Society appealed the order on the grounds that it permitted pollution and odours, that the deadlines were lenient and that odour and pollution control methods were unspecified.

The Board held that the composting facility is an agricultural operation and, if it does not pollute, it is exempted from certain *Waste Management Act* provisions. On the facts, the Board found that the "odours" from Money's constitute pollution and are therefore not exempt. However, the Board held that the June order was invalid since its requirements were too vague and the order exceeds GVRD jurisdiction by regulating odours that are not severe enough to be pollution. The Board found that generally Money's uses the best proven technology but recommended implementing certain procedures. The appeal was dismissed.

95/41 Friends of South Cowichan and Deputy Director of Waste Management (Alpex Development Corporation Ltd., Third Party)

Decision date: August 15, 1996

Panel: David Perry, Harry Higgins, Johnder Basran

The Friends of South Cowichan appealed a decision of the Deputy Director of Waste Management upholding amendments to a permit issued by the Assistant Regional Waste Manager which authorized the discharge of effluent by Alpex Developments. The Appellants claimed that the effluent discharged by the waste disposal system on the Alpex Development stands to have an adverse effect on the Wheelbarrow Springs Water supply which is a source of drinking water for Mill Bay. The Appellants further maintained that the entire Alpex Development itself poses a threat to the environment and therefore the rezoning decision allowing for the development should be overturned.

The Board found that the high quality of effluent and the ground disposal system regulating its discharge was sufficient to ensure that any effect on the groundwater would be negligible. Moreover, any affected groundwater will be diverted away from the Wheelbarrow Springs water supply and accordingly there is no threat to the health and welfare of persons using that water supply. The stringent requirements of the permit will protect the environment. The Board also found that it had no jurisdiction to deal with the indirect effects of the development itself as the Waste Management Act does not confer the power to consider the environmental effects of activities which do not deal with the permit in question. The appeal was dismissed.

95/44 7437 Holdings Ltd. and Deputy Director of Waste Management

Decision date: August 28, 1996

Panel: Judith Lee

7437 Holdings Ltd. ("7437 Holdings") appealed a pollution abatement order to the Deputy Director of Waste Management. The Deputy Director made a finding on the scope of the order. However, the Deputy Director then sent the matter directly to the Board on the basis that his hearing of the appeal raised a reasonable apprehension of bias due to his prior involvement in negotiations relating to the 7437 Holdings' lands. 7437 Holdings appealed to the Board on the grounds that the Deputy Director erred in finding that the order applied to future pollution and erred in referring the matter directly to the Board instead of referring it to a different Deputy Director of Waste Management.

The Board held that it did not have jurisdiction to hear the appeal because the finding regarding the scope of the order and the Deputy Director's refusal to continue to hear the appeal did not constitute a "decision" as defined by the Waste Management Act. It found that the Deputy Director had no jurisdiction to refer the matter to the Board. By refusing to decide the appeal, the Deputy Director effectively eliminated 7437 Holdings' statutory right of appeal. The Board recommended that the matter be referred to a different Deputy Director to avoid any perception of a conflict of interest. The appeal was dismissed.

95/46 Nechako Environmental Coalition and Deputy Director of Waste Management (Canadian Forest Products Ltd., Permit Holder)

Decision was reviewed by Cabinet in OIC #1304

Decision date: September 4, 1996

Panel: Judith Lee, Carol Martin, Johnder Basran

The Nechako Environmental Coalition appealed a decision of the Deputy Director of Waste Management upholding the issuance of a waste management permit to Canadian Forest Products Ltd. The permit authorized air emission discharges from two production lines, phases 1 and 2, of a proposed Medium Density Fibre Board ("MDFB") plant in Prince George. The Appellant maintained that the permit failed to adequately protect human health and the environment. The Appellant sought to have the permit for both phase 1 and phase 2 of the plant quashed. In the alternative, the Appellant asked that the permit authorizing phase 2 of the plant be quashed.

Based on the evidence presented, the Board accepted the Appellant's submission that the air quality in Prince George was already severely compromised by pollution. However, it found that contaminants emitted into the air as a result of the operation of the MDFB plant would provide an improvement in air quality as compared with the level of air pollution caused by beehive burners. The Board, therefore, upheld the Deputy Director's decision but found that the monitoring and assessment measures taken and/or proposed in support of the permit were inadequate to protect human health and the environment. Accordingly, the Board ordered that the permit be amended to require that additional environmental assessment and monitoring conditions be met and added conditions requiring computer modelling, sampling, review and study. In particular, the Board ordered that further conditions be implemented before those sections of the permit authorizing phase 2 of the MDFB plant would come into effect. The appeal was dismissed.

Cabinet subsequently amended the Board's decision. .

95/47 Steve Turner and Deputy Director of Waste Management

Decision date: September 5, 1996

Panel: Christie Mayall, Elizabeth Keay, Gary Robinson

Mr. Turner appealed a decision amending a Waste Permit requiring him to have the wastewater treatment facility at Bamfield Inn classified and the facility operator certified. He argued that there should have been no amendment to the permit because there had been no change in ownership warranting such an amendment. He maintained that the requirement for certification of the sewage treatment facility operator imposed an undue and arbitrary hardship on Bamfield Inn.

The Board found that a mistake was made in issuing the permit in the name of one of the shareholders of the company and that the permit should be changed to show the correct owner of Bamfield Inn. It further found that the Ministry did not act unfairly in amending the permit but rather was following its standard procedure in reviewing the permit when an amendment was required. The Board amended the permit to uphold the facility classification requirement, which Mr. Turner had already complied with, and stayed the operator certification requirement until there is an appropriate training program in place in British Columbia. The appeal was dismissed.

95/50 Kenneth Goeres and Marlene Goeres and Deputy Director of Waste Management

Decision date: December 13, 1996

Panel: Judith Lee, Bob Radloff, Christie Mayall

Kenneth and Marlene Goeres appealed a decision of the Deputy Director of Waste Management denying them a waste management permit. The Appellants appealed on the grounds that their proposed sewage disposal system meets or could be equipped to meet the standards established in the Ministry's Policy Objectives and Guidelines. In the alternative, the Appellants submitted that, even if the system did not satisfy the requirements of the Objectives and Guidelines, there was sufficient technical data supplied to show the system would adequately protect the environment, and a permit should be issued.

The Board found that the Appellants' system did not meet the criteria set out in the Objectives and Guidelines. In particular, the Board accepted the evidence of the Deputy Director that the system could not meet the minimum vertical separation to the water table, and the minimum distance to breakout points. The Board also found that the proximity of the proposed disposal field to community water wells could result in the effluent contaminating the water supply due to an uneven till layer beneath the disposal fields. It further found that the proposed reserve disposal system was not an adequate solution if the proposed system failed.

The Board held that the Regional Waste Manager has a discretion to issue a permit when a proposed system does not meet the Objectives and Guidelines, provided that the technical data shows the system does not pose an unacceptable risk to the environment. However, due to the multitude of problems with the site, the Board was not satisfied that the Appellants' system ensured that the environment would be adequately protected. The appeal was dismissed.

95/51 Oyster Bay Resort and Deputy Director of Waste Management (Bill Bourdillon, President of Oyster Bay Park Association, Third Party, Campbell River Indian Band, Participant)

Decision date: January 6, 1997

Panel: Judith Lee

Oyster Bay Resort Ltd. (the "Resort") appealed a decision of the Deputy Director of Waste Management denying a waste discharge permit to the Resort. The Resort appealed the decision on the grounds that the Deputy Director should not have required their waste disposal system be a part of a regional liquid waste management plan (a "LWMP") being created. The Resort also claimed that the Deputy Director should not have imposed a duty to consult with the Campbell River Indian Band in regard to any aboriginal rights that might be affected by the proposed liquid waste disposal system. Finally, the Resort argued that the Deputy Director erred in failing to allow the permit as it complied with all environmental standards and legislation.

The Board found that the Deputy Director erred in requiring the Resort to develop a LWMP before a permit could be issued. The Board found that the Ministry of Environment, Lands and Parks bore the responsibility for consulting with any aboriginal groups whose rights could be affected by a waste discharge permit. Further, the Board found that the Campbell River Indian Band was not properly consulted during the original permitting and appeal processes, but that this was corrected by the efforts of the Environmental Appeal Board to involve the Band in the process. The Board held that the proposed system was technically sound and would protect the public health and the environment in accordance with the Act and no existing aboriginal rights would be infringed. The appeal was allowed.

95/54 Paul Bianco and Happy Valley Mobile Home Park and Deputy Director of Waste Management

Decision date: January 21, 1997

Panel: Bob Radloff, Joan Rysavy, Jack Lapin

Mr. Bianco, the owner of Happy Valley Mobile Home Park, appealed a decision of the Deputy Director of Waste Management upholding a pollution prevention order (the "Order") which required Mr. Bianco to cease spray irrigation, empty a new sewage lagoon and to obtain the services of a professional engineer to design, build and operate an alternate sewage disposal system. Prior to the Order, Mr. Bianco had been found in non-compliance with his sewage disposal permit and the *Waste Management Act* on a number of occasions. Mr. Bianco appealed each of the requirements of the Order.

The Board found that Mr. Bianco was operating his spray irrigation contrary to the permit and the Act and allowing untreated effluent to flow overland. The cost of meeting the spray irrigation requirements was not acceptable as a defence. The Board found, on the evidence presented, that the lagoon should be emptied because of the risk of lagoon failure due to structural integrity problems. The Board further found that Mr. Bianco had not built his sewage systems in accordance with the designs of professionals and, as a result, they did not adequately protect the environment. The Board held that the purpose of the Act is to protect the environment, and that given Mr. Bianco's history, the Order was appropriate. The appeal was dismissed.

96/01(a) City of Penticton and Deputy Director of Waste Management (Lorna and Steve Boultbee, Third Party)

Decision date: May 21, 1996

Panel: David Perry

The City of Penticton appealed a decision of the Deputy Director of Waste Management that varied the terms and added restrictive conditions to the City's permit for composting sewage and applied for a stay of the added permit conditions pending the outcome of the appeal. The conditions were designed to eradicate odours. At the time of the decision, the City had initiated a new composting method to control odours but the method still required study. There was no evidence of health risks or environmental damage. Implementing the decision would cost $500,000.

The Board determined that if a stay was not granted and the City won the appeal, then the City would suffer irreparable harm. The Board granted a stay pending the appeal.

96/01(b) City of Penticton and Deputy Director of Waste Management (Lorna and Steve Boultbee, Third Party)

Decision date: September 27, 1996

Panel: David Perry

On September 27, 1996, an ex parte application was made to the Board by the City of Penticton for an extension of Permit PE-12221 until a decision was rendered by the Board on their appeal. The Permit was set to expire on September 28, 1996.

The Board granted the application and ordered that the expiry date of the Permit be extended to October 31, 1996 in order to preserve the status quo pending a decision of the Board.

96/01(c) City of Penticton and Deputy Director of Waste Management (Lorna and Steve Boultbee, Third Party)

Decision date: October 2, 1996

Panel: David Brown, Bill MacFarlane, Harry Higgins

The City of Penticton and Steve Boultbee appealed a decision of the Deputy Director of Waste Management amending the City's waste composting permit to include a new waste management plan and new capital equipment. Mr. Boultbee maintained that the permit should never have been renewed. The permit was amended because the Deputy Director believed that the odour from the composting facility could cause material discomfort to a person. The City appealed a number of the amendments on the grounds that they were outside the Director's jurisdiction, unreasonably fettered the discretion of the Regional Waste Manager, were patently unreasonable and were not supported by the evidence.

The Board found that Mr. Boultbee failed to establish that the permit should not have been renewed and dismissed his appeal. The Board held that the Director had jurisdiction to make the amendments to the permit and that his decision did not unreasonably fetter the discretion of the Regional Waste Manager. It also held that his decision was not patently unreasonable. However, the Board found that there was insufficient evidence to support the Director's finding that the composting facility was creating odours capable of causing material discomfort to persons. The Board held that there was no evidence to suggest that the composting facility was inadequate and all that was required were technological improvements to enhance its operation. The Board made amendments to the permit, which included extending the length of the permit.

96/04(a) John Staples et al and Deputy Director of Waste Management (The Corporation of the Village of Kaslo, Third Party)

Decision date: September 9, 1996

Panel: David Perry

The Appellants applied for a stay of the decision of the Deputy Director of Waste Management, pending their appeal of his decision upholding the issuance of a waste permit to the Corporation of the Village of Kaslo. The Appellants maintained that unless a stay was granted the environment would be adversely affected by the construction of the sewage treatment plant authorized under the permit. The Appellants also argued that a stay was required to prevent the expenditure of public funds on the system and because there had not been adequate consultation with the public in the process leading up to the obtaining of the Permit. The Appellants further contended that if the stay request was refused, they would have nothing to appeal.

On the evidence presented, the Board found that no harm would be caused to the environment if construction of the treatment plant was allowed to proceed. The Board held that the subject matter of the appeal would not be defeated by refusing the stay because the permit could still be amended or cancelled on the appeal. The Board refused to grant a stay pending the hearing of the appeal.

96/04(b) John Staples et al and Deputy Director of Waste Management (The Corporation of the Village of Kaslo, Third Party)

Decision date: February 25, 1997

Panel: Katherine Hough, Helmut Klughammer, Jack Lapin

The Appellants appealed the decision of the Deputy Director of Waste Management, upholding the issuance of a permit to the Corporation of the Village of Kaslo (the "Village") for the discharge of waste from a package treatment plant into Kootenay Lake. The Appellants argued that the proposed plant would be unsightly, noisy, emit noxious odours, and would not adequately protect the environment. The Appellants were also concerned about the location of the plant because it would be built on a floodplain, and also that there was not adequate notice to the public when the Village modified the original application to change the location of the proposed plant.

The Board found that the visual impact of the plant will be minimal, that there will be adequate safeguards against odours escaping, and that the plant will operate quietly. The Board was satisfied that the plant would withstand a 1 in 200 year flood, and that the effluent released from the plant into Kootenay Lake would not harm the environment or public health because the proposed system is a state of the art system. The Board also found that the change in location was made before the permit was issued, and was not a significant amendment. If strict compliance with notification requirements was essential, then the conditions were met, but if there were defects with the notification process, then no unfairness resulted. The appeal was dismissed.

96/15 North End Lumber and Deputy Director of Waste Management

Decision date: January 9, 1997

Panel: Christie Mayall, Harry Higgins, Elizabeth Keay

North End Lumber ("NEL") appealed a decision of the Deputy Director of Waste Management denying NEL an air assisted open burning permit for the mill's waste wood. The Deputy Director indicated, however, that he would recommend issuance of a permit for a commercially available trench burner for a 5 year period. NEL appealed on the grounds that air assisted open burning would adequately protect the environment, and that the cost of setting up a trench burner would be too expensive, forcing the mill to shut down.

On the evidence presented, the Board found that a trench burner system would protect the environment better than the proposed air assisted open burning. The Board noted that, since the mill was first built adjacent to the town, society has learned more about pollution and its effects on human health. The expense of a trench burner is one of the consequences of adapting to the new reality of reducing the effects of pollution. The appeal was dismissed.

96/17(a) Metalex Products Ltd. and Deputy Director of Waste Management

Decision date: February 7, 1997

Panel: David Perry

A pollution prevention order was issued to Metalex Products Ltd. ("Metalex") ordering it to stop dumping slag at the Dankoe Mine and to remove the existing slag pile. On appeal to the Deputy Director of Waste Management, the order was amended to require a risk assessment to be completed by January 31, 1997 to determine whether the entire slag pile should be removed and, if so, when. If the assessment was not done by that date, the pile was to be removed by March 28, 1997. The order also required the terms of reference for the assessment to be approved by the Regional Manager before the assessment was started. Metalex appealed the decision to the Board. As the terms of reference were not going to be completed by the January deadline, Metalex asked the Board to extend the deadlines imposed by the Deputy Director.

The Board found that, until the Regional Manager approved the terms of reference for the risk assessment, the assessment could not be done. The Board further found that there was little evidence of irreparable harm to the Ministry or the environment if the assessment was not completed by the January deadline and the slag pile was not removed by the March deadline. Conversely, there would be significant expense and potentially irreparable harm to Metalex if an extension were not granted and it was required to remove the slag. On the balance of convenience, Metalex was granted a temporary extension of the deadlines.

97-WAS-03(a) King Coho Resort Ltd. (Permit Holder) and Deputy Director of Waste Management and Little River Environmental Protection Society (Appellant) and Little River Enhancement Society (Appellant)

Decision date: March 13, 1997

Panel: Toby Vigod

The Little River Environmental Protection Society ("LREPS") requested a stay of the decision of the Deputy Director of Waste Management, upholding the issuance of a waste disposal permit to King Coho Resort Ltd. The permit authorizes the discharge of waste from a 20 bedroom condominium complex, restaurant and lounge into Georgia Strait. LREPS argued that a stay of the permit is necessary to prevent any waste disposal into Georgia Strait which may harm non-harvested and transient species, and the stay will give the Respondent and the Permit Holder an opportunity to conduct further studies and analysis of the receiving environment.

The Board found that the balance of convenience favoured LREPS. The permit, as written, may not adequately protect the environment as the issue of safe levels of discharge is still unresolved. The environment could suffer irreparable harm if a stay is not granted and the amount of discharge is later found by the Board to be unsafe. The application was granted.

Water Act

95/13 Bill Wyett and Wendy Harbridge and Deputy Comptroller of Water Rights (Bill Rawn et al, Licensees)

Decision date: February 12, 1996

Panel: Harry Higgins, Elizabeth Keay, Jack Lapin

Bill Rawn, the agent for eleven property owners, applied for domestic water licences which would permit water to be removed from a local creek. Wendy Hardbridge and Bill Wyett, senior water licence holders downstream, objected to this application. They maintained that permitting the withdrawal of water upstream would prevent them from receiving their licensed water requirements. The Regional Water Manager refused the licence application but the Deputy Comptroller allowed an appeal of that decision, concluding there was sufficient water to grant the additional licences based on updated stream flow records and new water availability criteria for assessing water use. Before the Environmental Appeal Board, the Appellants contended that unless the new domestic water licences were cancelled they would experience increased shortages of water from the creek.

The Board was satisfied that there was sufficient water in the creek to fulfil the demands of all licensees at most times and that the Appellants, as senior licensees, would receive priority in times of shortage. The appeal was dismissed.

95/40 Walter McKersie and Deputy Comptroller of Water Rights

Decision date: August 27, 1996

Panel: Christie Mayall, Harry Higgins, Bill MacFarlane

The Appellant constructed a channel and a boat basin in a marsh on Columbia Lake without authority contrary to the Water Act. The Regional Water Manager ordered the Appellant to rehabilitate the changes made. The Appellant appealed the order to the Board on the grounds that government officials had caused him to mistakenly believe that he had the necessary authority to carry out the works on Columbia Lake. He further contended that the project created no harm, but rather improved the site. The Appellant also maintained that he had been unfairly treated by government officials.

On the evidence presented, the Board found that the Appellant was informed of the need for authorization under the Navigable Waters Protection Act, the Land Act and the *Water Act* before proceeding with construction on Columbia Lake and knowingly contravened the Land Act and the Water Act. The Board found that the construction of the channel and the boat basin adversely affected the habitat in the marsh. It also found that the immediate detrimental effect on the environment caused by rehabilitation could be minimised and that over time the marsh could be returned to its natural state. The Board upheld the order and extended the time to complete rehabilitation. The appeal was dismissed.

95/42 Columbia River & Property Protection Society, East Kootenay Environmental Society and Deputy Comptroller of Water Rights (Windermere Resorts Ltd., Third Party)

Decision date: August 15, 1996

Panel: David Perry

The Appellants appealed a decision of the Deputy Comptroller of Water Rights in relation to an approval issued to Windermere Resorts Ltd. under the Water Act. A preliminary challenge was made by the Third Party as to whether the Appellants had standing under the Act to appeal the issuance of the approval.

The Board found that the Appellants did not have standing under the *Water Act* to appeal the issuance of the approval. The Board held that although the Act is silent with respect to who has standing to appeal an approval, this question is to be interpreted in a manner consistent with the standing requirements for appealing the issuance of a water license. The only parties who can be granted standing in this regard are a licensee, a riparian owner, or an applicant for a license. The Board did not find any evidence that the Appellants qualified as one of these classes of persons. Further, the Board held that it does not have any independent jurisdiction to grant public interest standing, but even if it did, the Appellants failed to satisfy the relevant criteria. The Board also held that its discretionary power under the Environment Management Act which provides that it "may hear any person" does not create a separate avenue of appeal. The appeal was dismissed.

95/57 George Gotzen, D.J. Parshyn and J. Bruneau, and Mary-Lou Molsberry and the Deputy Comptroller of Water Rights, Frederick and Anita Slootweg et al (third parties)

Decision date: February 13, 1997

Panel: David Perry, Gary Robinson, Jack Lapin

Three different appellants appealed a decision of the Deputy Comptroller of Water Rights. The Deputy Comptroller issued a licence to Mr. Parshyn and Ms. Bruneau for 500 gallons a day from Adams Spring between December 1 and June 30 of each year. Mr. Parshyn and Ms. Bruneau appealed because they had applied for an order for joint works on the local water system, and in the alternative, they wanted year round use of Adams Spring. The other appellants appealed the Deputy Comptroller's decision because they oppose the issuance of any further licenses on Adams Spring that may affect their informal agreements. The community has a local water system that is a combination of water from two streams and a well. The Deputy Comptroller refused to order joint works because such orders require a high level of supervision and he would prefer the parties attempt to come to an agreement first.

The Board agreed with the Deputy Comptroller that joint works should not be ordered before there have been sufficient attempts by the community water users to come to an agreement. Failure to reach an agreement may result in an order for joint works. The Board found that Mr. Parshyn did not have priority over other users, therefore, he should not get more use of the flow than the other appellants. Regarding the sufficiency of the flow, water flow records from the Water Management Division show that there is a sufficient water flow to accommodate Mr. Parshyn's licence which is valid during the winter months. The Board found that the licence was properly issued and that informal agreements that may be affected by the Parshyn licence are not protected under the Water Act. The Board held that neither the Board, nor the Comptroller can direct an applicant for a water licence to search for other sources of water, regardless of whether it would be cheaper. The appeal was dismissed.

95/58 Maxine McKeown and the Deputy Comptroller of Water Rights, Ernest and Bridget Brown, and Leslie Brown, third parties

Decision date: March 19, 1997

Panel: Christie Mayall, Sheila Bull, Bill MacFarlane

This was an appeal against a decision of the Deputy Comptroller of Water to uphold the decision of the Regional Water Manager to cancel Conditional Water Licence 26928 on Waterfront Spring. The licence authorizes 1000 gallons/day for domestic use. The licence was cancelled on January 20, 1995 on the grounds that no beneficial use of the water under the licence had occurred in the previous three years. The grounds for appeal were that the water was beneficially used on the property within the three years prior to the cancellation of the licence, by a camper who stayed on the property for brief periods in the summer of 1992. The Appellant also claimed that there was misconduct on the part of the Deputy Comptroller and his staff throughout the investigation of the cancellation.

The Board found that weekend water use by a camper does not constitute beneficial domestic use in a dwelling as intended by the licence. Therefore, the Board found that no beneficial use of the water had occurred in the three years prior to the licence cancellation. The Board also reviewed the many allegations of misconduct made by the Appellant, and the evidence given to support these allegations, and found that the allegations of misconduct on the part of the Deputy Comptroller and his staff were not supported by the evidence. The appeal was dismissed.

Wildlife Act

93/25 R. Lynn Ross and Deputy Director of Wildlife

Decision date: February 14, 1997

Panel: Katherine Hough, Elizabeth Keay, Harry Higgins

In 1993, Mr. Lynn Ross applied to renew his guide outfitters licence, but was informed that a section 52 hearing would be convened to determine whether the certificate should be renewed, due to concerns about his guiding activities. The Appellant then applied to transfer his certificate to his daughter, but his application was denied pending the outcome of the hearing. The Regional Manager of Wildlife decided not to renew the Appellant's certificate as a result of the section 52 hearing, which the Appellant was not present for, on the advice of his former lawyer. The Appellant successfully appealed the decision from the section 52 hearing in the BC Supreme Court, and had his licence and certificate renewed for one year. The Regional Manager then informed the Appellant that a section 62 hearing would be held to determine whether the Appellants licence and certificate should be cancelled. The reasons for the hearing included 21 allegations of misconduct, including, hunting moose, elk and goat during closed seasons and shooting unauthorised sheep. On the advice of his former lawyer, the Appellant did not attend the section 62 hearing. The Deputy Director cancelled the Appellant's guide outfitter licence and certificate as a result of 16 findings of misconduct. The Deputy Director also commented in his written reasons that any transfer of the Appellant's certificate prior to its cancellation would not be proper. The Appellant appealed this decision to the Board on the grounds that the Regional Manager unfairly refused to allow him to transfer his certificate and licence prior to the section 62 hearing; the Deputy Director and Regional Manager were biased against him; the evidence heard at the section 62 hearing was not under oath, and was a repeat of the evidence heard at the section 52 hearing which was overturned in court; the Deputy Director unlawfully exercised his discretion in cancelling the Appellant's guide outfitter certificate and licence; and the Appellant had not had the opportunity to present his case due to the actions of his former lawyer.

At the hearing, the Appellant conceded that the Deputy Director, having made 16 findings of misconduct, properly cancelled the Appellant's certificate. On the evidence presented, the Board found that the Regional Manager and the Deputy Director were not biased , and the Deputy Director properly exercised his discretion in cancelling the Appellant's certificate and suspending his licence. The Board did agree that if the Appellant had presented his evidence to the Deputy Director, the result of the section 62 hearing might have been different. The Appellant testified before the Board that he was not aware he had the right to appeal the refusal of the Regional Manager to transfer his guide outfitter certificate, prior to the section 52 hearing. The Board found that the Deputy Director's comment that it would not be proper to transfer the Appellant's certificate prior to its cancellation was a decision on a matter that was not before him, and he erred in law by going beyond his own authority. The Board sent the matter back to the Deputy Director with instructions to renew the Appellant's guide outfitter certificate for 90 days to allow the Appellant to file an application to transfer the certificate. The appeal was allowed.

94/43 Michael Wilson and Deputy Director of Wildlife

Decision date: May 8, 1996

Panel: Christie Mayall

This was an appeal of a decision of the Deputy Director of Wildlife which held that a bighorn mountain sheep shot by Mr. Wilson was illegal: the left horn was 12 mm short of being a full sized curl. The ministry seized the sheep and issued Mr. Wilson a warning ticket. Mr. Wilson appealed to both the Regional Manager and the Deputy Director requesting the return of the sheep. He alleged that the right horn, which was broken off shortly after the kill, was at least 12 mm longer, making the sheep of legal size. The appeal was rejected at both levels. Mr. Wilson appealed to the Board. He argued that the horn growth measurements were incorrect, that the Deputy Director did not have all the evidence, that the Deputy Director did not address all the evidence that was before him and that the Deputy Director asked himself the wrong question.

The Board concluded that the Deputy Director asked and answered the correct question on appeal. However, the Board found that the Deputy Director did not hear some evidence relevant to the appeal due to a misunderstanding over the contents of Mr. Wilson's file. In relation to the evidence that was before the Deputy Director, the Board found that the Deputy Director erred in his assessment of the evidence, particularly the annual horn growth rate. The Board returned the matter to the Deputy Director with directions to reconsider the horn growth rate and to examine the previously omitted evidence.

94/45 Kevan Bracewell and Director of Wildlife

Decision date: May 8, 1996

Panel: Christie Mayall

This is an appeal of a decision of the Director of Wildlife upholding a grizzly bear quota of nil as a condition of Mr. Bracewell's guide outfitter licence. Mr. Bracewell appealed to the Board on the grounds that he did not receive a fair hearing, that the Director was biased, that the Director did not consider some evidence, and that the Director improperly exercised his discretion by not deciding the appeal on its merits. Mr. Bracewell sought a new hearing before the Assistant Deputy Minister of Fisheries, Wildlife and Habitat Protection.

The Board determined that, under the Wildlife Act, the Board had no jurisdiction to refer a matter to the Assistant Deputy Minister. On the evidence, the Board found that the Director of Wildlife breached the

rules of natural justice by interfering with the questioning of a witness. The Board also found that the Director failed to give Mr. Bracewell a written explanation of how he determined the nil quota. However, the hearing before the Board was found to correct the defects in the hearing below. The Board found that, ultimately, the nil quota was appropriate given the size of the territory. The appeal was dismissed.

95/45 Joseph D. Johnston and Deputy Director of Wildlife

Decision date: September 4, 1996

Panel: Judith Lee

Dr. Johnston had his hunting licence privileges cancelled and was prohibited from obtaining a hunting licence or hunting within British Columbia for a ten-year period by the Deputy Director of Wildlife for hunting sheep and goat without a licence, using another person's licence and exceeding the provincial bag limit. Dr. Johnston appealed the decision of the Deputy Director on the grounds that the length of the suspension was unduly harsh and excessive in the circumstances; the suspension was not consistent with other jurisdictions; the four years Dr. Johnston had voluntarily not hunted in the Province should have been deducted from the length of the suspension; and the Deputy Director was biased in his decision.

The Board found that the length of the suspension was justified in view of the unethical and deliberate conduct of Mr. Johnston. The Board rejected Mr. Johnston's submission that the years he did not hunt in the Province should have been deducted from the length of the suspension. Further, the Board found no evidence that the Deputy Director was biased towards Mr. Johnston in rendering his decision. The Board held that the Deputy Director properly exercised his discretion under section 25 of the Wildlife Act in ordering the 10 year licence cancellation and that the length of the suspension was lenient. The appeal was dismissed.

95/52 Daniel Goodvin and Deputy Director of Wildlife

Decision date: January 9, 1997

Panel: David Perry

Mr. Goodvin plead guilty in Provincial Court to 14 charges relating to two separate hunting incidents. On reviewing the file, the Deputy Director cancelled Mr. Goodvin's hunting licence for a period of 5 years, and ordered him to pay fines assessed by the Court and complete the Conservation and Outdoor Recreation Education. exams (C.O.R.E). Mr. Goodvin appealed this decision to the Board.

The Board found that Mr. Goodvin was notified of the Deputy Director's impending decision to cancel his licence but, as Mr. Goodvin does not write, his wife prepared his submission to the Deputy Director. The Board found that the Deputy Director's failure to provide Mr. Goodvin the option of an oral hearing was a denial of natural justice. The Board held that, if Mr. Goodvin had been heard by the Deputy Director, the licence suspension would not have been so long, as Mr. Goodvin's involvement in the two incidents was merely to assist his family members, and he had no prior convictions under the Wildlife Act. The Board directed the Deputy Director to reduce Mr. Goodvin's licence suspension to two years. However, the Board upheld the decision of the Deputy Director that Mr. Goodvin must pay outstanding fines and complete the C.O.R.E. examinations. The appeal was allowed.

95/53 Murray Lamotte and Deputy Director of Wildlife

Decision date: January 9, 1997

Panel: David Perry

Mr. Lamotte plead guilty in Provincial Court to illegally purchasing bear parts. On reviewing the file, the Assistant Deputy Director of Wildlife suspended Mr. Lamotte's hunting licence for 7 years and his fur purchasing licence was suspended indefinitely. Mr. Lamotte appealed the decision of the Assistant Deputy Director to the Board. Mr. Lamotte argued that he was entrapped and the license suspension was excessive.

The Board held that entrapment was not a defence to a licence suspension. However, the Board noted that section 25(2) of the *Wildlife Act* gives the Director of Wildlife discretion to suspend hunting licenses for sufficient cause. The Board found there was not sufficient cause in this case, since there was no rational connection between hunting privileges and trafficking bear parts although it was appropriate for his fur purchasing license to be suspended indefinitely. Consequently, the Board directed the Assistant Deputy Director to immediately end the suspension of Mr. Lamotte's hunting licence. The Board also recommended that the Wildlife Branch implement a system of advising people when their hunting privileges are at risk, as the Board had heard from Mr. Lamotte and other appellants that they were unaware a conviction under the *Wildlife Act* would put their hunting privileges at risk. The appeal was allowed.

95/55 Ron Thompson and Deputy Director of Wildlife

Decision date: January 27, 1997

Panel: David Perry

This was an appeal from two different decisions of the Deputy Director upholding decisions of the Regional Manager allocating Mr. Thompson 450 angler guide days on the West Road River, and denying him any angler guide days on the Horsefly River. Mr. Thompson appealed the West Road River decision on the grounds of bias and improper exercise of discretion because, in a previous decision, the Board had directed the Regional Manager to allocate him days based on his proportional historic use of the river, which would amount to more than 450 days. Mr. Thompson appealed the Horsefly River decision on the grounds that he should receive an angler's guide licence even without any historic use of that river because another angler had been granted a licence in the same situation.

On the evidence presented, the Board found that the Regional Manager did not make a biased decision about Mr. Thompson's quota. Rather, the Board found the decision was made on the basis of a memo from the Deputy Director directing the Regional Manager to minimize the impact of the Board's previous decision by considering other factors besides proportional historical use when allocating Mr. Thompson's angler days. The Board held this was made without statutory authority, and therefore was an improper exercise of the Regional Manager's discretion. However, during the hearing, the Deputy Director agreed to raise Mr. Thompson's quota to 600 angler guide days. Consequently, the Board directed that Mr. Thompson's angler days on the river be raised to 600 for present and future seasons. With regard to the Horsefly River decision, the Board held that the Deputy Director was correct in denying Mr. Thompson's request for an angling licence for that river. The Regional Manager has no authority to issue an angling guiding licence to Mr. Thompson if he had no historic use of the river. The West Road River appeal was allowed. The Horsefly appeal was dismissed.

96/07 Michele Kuberski and Deputy Director of Wildlife

Decision date: December 5, 1996

Panel: David Perry

The Deputy Director of Wildlife denied Ms. Kuberski a permit to possess a Norwegian Blue Fox (the "Fox"). Ministry policy discourages people from keeping wildlife in captivity and the Deputy Director found no special reasons to deviate from the policy in this case. Ms. Kuberski appealed on the grounds that the Fox is not "wildlife" for the purposes of the Wildlife Act and that she was informed by a biologist with the Fish and Wildlife Branch that no permit was required for the Fox.

The Board found that the Fox was "wildlife" for the purposes of the Act and therefore a permit was required. The Board accepted Ms. Kuberski's evidence that a Ministry official had informed her that a permit was not required. The Board also found that the basis for the Ministry policy against allowing wildlife in captivity either did not apply in this case or could be addressed through conditions in a permit. In light of the above, the Board concluded that there were special circumstances in this case which warranted the issuance of a permit. In failing to consider these circumstances, the Deputy Director erred. The decision was set aside and the matter was remitted back to the Deputy Director with directions. The appeal was allowed.

96/10 Michael Hopkins and Deputy Director of Wildlife

Decision date: January 6, 1997

Panel: Christie Mayall

Mr. Hopkins killed an elk in an area on Vancouver Island where his limited entry hunting permit did not apply. He tried to conceal this fact and lied to conservation officers about his actions. He was convicted in court of 3 offences and fined $2250. Upon reviewing the file, the Deputy Director of Wildlife cancelled Mr. Hopkins' hunting licence for a period of three years. Mr. Hopkins appealed, arguing that the length of licence cancellation was excessive in the circumstances.

The Board found that Mr. Hopkins had an opportunity to provide input into the decision of the Deputy Director but chose not to. The Board found also that Mr. Hopkins did not profit from his crime and that he was remorseful. The Board held that the penalties imposed by the courts and the Director of Wildlife are independent. The Deputy Director did not consider irrelevant information, and Mr. Hopkins' explanations for his actions did not lead to the conclusion that that the Deputy Director erred. The Board found that the Deputy Director's decision was fairly made. The appeal was dismissed.

96/13 Dow Dollar and Deputy Director of Wildlife

Decision date: January 6, 1997

Panel: David Perry

This was an appeal by Mr. Dollar from a decision by the Deputy Director of Wildlife denying Mr. Dollar a permit to possess the horns of a thinhorn ram mountain sheep which he had killed while hunting. Mr. Dollar had a permit to hunt thinhorn ram mountain sheep, but killed an under-age ram, which he believed

was the proper age. Mr. Dollar appealed on the grounds that the Deputy Director did not properly exercise his discretion in denying the permit because Mr. Dollar honestly believed the ram was of legal age.

The Board found that a permit to possess an illegal ram should only be granted in exceptional circumstances. In this case, no exceptional circumstances were found. The Board held that Mr. Dollar could have used the more reliable method of determining the age of a ram set out in the Regulation and in hunting literature. If he had done so, the error would not have been made. The Board held that the Deputy Director of Wildlife properly exercised his discretion when denying Mr. Dollar's request for a permit to possess the horns of the thinhorn ram. The appeal was dismissed.

96/20 Terry Shendruk and Deputy Director of Wildlife

Decision date: February 21, 1997

Panel: Toby Vigod

In September 1995, Mr. Shendruk, a guide outfitter, organized a hunt in his licence area, but it was later discovered that he had failed to complete the proper forms for the hunters, and that he had been absent during the hunt, which was managed by his assistant guides. The Deputy Director held a section 62 hearing as a result of Mr. Shendruk's licence violations, and decided to suspend Mr. Shendruk's guide outfitters licence and certificate for one year commencing November 1, 1996. Mr. Shendruk appealed this decision on the grounds that the Deputy Director did not consider the fact that Mr. Shendruk did not hunt in the Spring of 1996 and therefore, the term of the suspension was too long.

The Board found that the Deputy Director's decision was made properly; it was made in good faith, not arbitrarily or illegally, and the Deputy Director only considered relevant factors. The Board found that Mr. Shendruk did not apply for a guide outfitter's licence in the spring of 1996 because he was under the mistaken impression he would not be issued a licence. He did hunt in August 1996. The Deputy Director considered the fact that the appellant had booked hunters in the fall of 1996, and still felt the circumstances were serious enough to warrant a one year suspension. The Board found no errors in the Deputy Director's decision. The appeal was dismissed.

Summaries of Court Decisions Related to the Board

Minister of Health v. Environmental Appeal Board and Mountain Pacific Investments Ltd. [July 9, 1996] (S.C.B.C.)

Mountain Pacific Investments Ltd. applied to the Ministry of Health for a permit to install an experimental sewage disposal system under the *Health Act*. The Environmental Health Officer rejected the application. Mountain Pacific appealed to the Board. The Board reversed the Environmental Health Officer's decision and granted the permit. The Ministry of Health sought judicial review of the Board's decision on the grounds that the Board exceeded its jurisdiction by failing to address the question it was required to address under the legislation, namely, whether the proposed system contravened the Act and Regulation. Alternatively, the Ministry of Health maintained that the Board made an incorrect or patently unreasonable finding in concluding that the ultimate use of the proposed sewage disposal system would not contravene the Act and Regulation.

The Court found that the Board did not exceed its jurisdiction. The Board was specifically created to address technical environmental considerations and possessed expertise in environmental matters for this purpose. The Court held that the Board was operating squarely within its statutory jurisdiction to review the discretion of the Environmental Health Officer in rejecting a sewage disposal permit. The

Board did not ask itself the wrong question as the ultimate requirement of the legislation was to ensure that permits issued under the *Health Act* contained conditions to safeguard public health. The Court held that the Board addressed this requirement in issuing the permit. The Board was not required to be absolutely certain that the proposed sewage disposal system would function without any risk of harm before issuing a permit because this would be an impossible standard to meet. The Board only had to be satisfied that the installation and ultimate use of the system would not contravene the Act or the Regulation.

On the second ground, the Court found that the decision of the Board was clearly within its jurisdiction and therefore could only be interfered with if patently unreasonable. The Court held that this was not the case and that this ground for review by the petitioner was nothing but a disguised attempt at an appeal of the decision of the Board. Accordingly, the application was dismissed.

Summaries of Cabinet Decisions Related to the Board

Order in Council No. 1304 Varying Decision 95/46, Nechako Environmental Coalition and Deputy Director of Waste Management (Canadian Forest Products Ltd., Permit Holder)

Date: November 14, 1996

Pursuant to the authority of section 12 of the Environment Management Act, Cabinet varied the Environmental Appeal Board's decision in appeal 95/46 dated September 4, 1996.

In its review Cabinet substantively varied the Board's decision by making changes to the amendments made to the permit by the Board. Cabinet made nine changes to the Board's amendments and added two further amendments. Some of the more significant changes are listed below:

- The Board made it a condition of the Permit that the Beehive Burners in Prince George be shut off before those sections of the Permit associated with Line 2 take effect. Cabinet has varied this requirement to say that these sections will not be effective until January 1, 2001, which is after the dates specified for the shutdown of the Beehive Burners in the province.

- The Board required Canfor to bear the costs for ambient monitoring off the plant site. Cabinet has rescinded this requirement.

- The Board required that monitoring results shall be made publicly available through the Air Shed Monitoring Committee. Cabinet has rescinded this requirement but has added the requirement that Canfor shall submit all results from its Ambient Air Monitoring Plan in a form suitable for release to the public.

- The Board added to the Permit terms requiring a further review before Line 2 starts up; a short term intensive monitoring and assessment program to characterise the physical discharge characteristics and the major emissions of particulate and formaldehyde; the company to pro-actively work on developing technological improvements to reduce the loading of contaminants; and all discharge to meet the requirements of other regulatory agencies. Cabinet has rescinded these requirements.

- The Board required Canfor to do extensive monitoring if unacceptable levels of emissions or ambient air levels are measured. It also required that calm, inversions and/or stagnant air conditions be defined and that the RWM set requirements for specific action and more intensive monitoring if these conditions persist more than three days. Cabinet has rescinded these requirements.

APPENDIX I

Legislation and Regulations

The Environmental Appeal Board is established under section 11 of the Environment Management Act. The Act defines the structure of the Board and provides the Board with the statutory authority to hear appeals of administrative decisions made under six statutes; five are administered by the Ministry of Environment, Lands and Parks and the sixth is administered by the Ministry of Health.

On April 21, 1997, the Revised Statutes of British Columbia, 1996 came into force. Relevant excerpts from the Environment Management Act, the Environmental Appeal Board Procedure Regulation, and each of the Acts from which the Board entertains appeals are provided.

Environment Management Act

11.(1)The Lieutenant Governor in Council must establish an Environmental Appeal Board to hear appeals that under the provisions of any other enactment are to be heard by the board.

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

(3) The board shall consist of a chair, one or more vice chairs and other members the Lieutenant Governor in Council appoints.

(4) The Lieutenant Governor in Council may

> (a) appoint persons as temporary members to deal with a matter before the board, or for a period or during circumstances he specifies,
>
> (b) designate a temporary member to act as chairman or as a vice chairman.

(5) A temporary member has, during the period or under the circumstances or for the purpose for which he is appointed as a temporary member, all the powers of and may perform all the duties of a member of the board.

(6)The Lieutenant Governor in Council may determine the remuneration and expenses payable to the members of the board.

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

(8) The members of the board shall sit

> (a) as a board, or
>
> (b) as a panel of the board.

(9) If members sit as a panel,

> (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 board, and

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

(10) The number of members that constitute a quorum of the board or a panel shall be set by regulation of the Lieutenant Governor in Council.

(11) The board, a panel and each member have all the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

(12) In an appeal, the board or a panel

(a) may hear any person, including a person the 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, shall give that person or body full party status.

(13) A person or body that is given full party status under subsection (12) may,

(a) be represented by counsel,

(b) present evidence,

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

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

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

(15) If the 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.

1981-14-11; 1983-10-21, effective October 26, 1983 (B.C. Reg. 393/83); 1989-25-2.

Environmental Appeal Board Procedure Regulation

Interpretation

1. In this regulation

"Act" means the *Environment Management Act*;

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

"chairman" means the chairman of the board;

"minister" means Minister of Environment, Lands and Parks

"objector" in relation to an appealto 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 times 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 of Finance.

(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 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 only 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 of 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 The Minister of Health if the appeal relates to a matter under the *Health Act,* and to 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.

Commercial River Rafting Safety Act

Appeals

6. Where the registrar suspends or cancels a registration, license or permit or refuses to register or issue a license, the person may appeal to the Environmental Appeal Board established under the *Environment Management Act*, and the board may confirm the decision of the registrar or may reverse or vary it.

Health Act

Power to make regulations

8. (2) In addition to the matters set out in subsection (1), the Lieutenant Governor in Council may make regulations with respect to the following matters: ...

(m) the inspection, regulation and control, for the purposes of health protection provided in this Act, of ...

> (ii) the location, design, installation, construction, operation and maintenance of
>
> (C) sewage disposal systems,

and requiring a permit for them and requiring compliance with the conditions of the permit and authorizing inspections for that purpose...

(4) If a person is aggrieved by the issue or the refusal of a permit for a sewage disposal system under a regulation made under subsection (2) (m), the person may appeal that ruling to the Environmental Appeal Board established under section 11 of the Environment Management Act within 30 days of the ruling.

(5) On hearing an appeal under subsection (4), the Environmental Appeal Board may confirm, vary or rescind the ruling under appeal.

Pesticide Control Act

15. (1) An appeal may be filed by any person with the board against the action, decision or order of the administrator or of any other person under this Act.

(2) An appeal must be filed in the time and manner prescribed.

(3) The board may require the person appealing to deposit with it an amount of money it considers sufficient to cover the reasonable appeal expenses of the board and the other respondent.

(4) On an appeal, the board may make an order it considers appropriate, including an order for costs and disposal of money deposited under subsection (3).

(5) An appeal does not act as a stay unless the board directs otherwise.

Waste Management Act

Appeals

44. (1) … a person who considers himself aggrieved by a decision of

(b) the director or a district director may appeal to the appeal board.

Procedure on appeals to appeal board

46. (1) An appeal to the appeal board from a decision of a district director or the director under section 8 (4), 10, 11, 13, 18(5), 21, or 31, or of the director under section 45, must be commenced within 21 days after notice of the decision appealed from is given in the manner required by the regulations under this Act and in accordance with the practice, procedure and forms prescribed under the *Environment Management Act*.

(2) The chair of the appeal board may extend the time for commencing an appeal to the board either before or after the time has elapsed.

(3) On considering an appeal, the board may

(a) hold a new hearing,

(b) confirm, reverse or vary the decision appealed from, and

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

Appeal does not operate as stay

47. An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the person or board to whom the appeal is taken orders otherwise.

Under Section 30 of the *Act*:

Full party status

48. On the request of the person whose decision is being appealed, the person or appeal board considering the appeal shall permit the person who made the decision being appealed to have full party status.

Water Act

Objections to applications and hearings

9.(1) A licensee, riparian owner or applicant for a licence who considers that his rights would be prejudiced by the granting of an application for a licence may, within the time prescribed in the regulations, file an objection to the granting of the application.

Rights of appeal from comptroller and engineer

38. (1.1) An appeal lies

> (a) to the Environmental Appeal Board from every order of the comptroller ...

(2) Every appeal from an order of the comptroller ... shall be taken within 30 days from the date of the order.

(3) The person appealing from an order shall give notice of the appeal as directed by the officer from whose order the appeal is taken.

(4) Before hearing an appeal the appeal tribunal may require the appellant to deposit with the appeal tribunal a sum of money the appeal tribunal considers sufficient to cover the probable expenses of the appeal tribunal and the respondent in connection with the appeal.

(5) The appeal tribunal may, on an appeal, determine the matters involved and make any order that to the tribunal appears just, and may dispose of money deposited with it by the appellant.

(6) An appeal shall not act as a stay of execution.

Wildlife Act

Appeals

101. (1) If the regional manager makes a decision that affects

> (a) a license, permit registration of a trapline or guide outfitter’s certificate held by a person,
>
> (b) an application by a person for anything referred to in paragraph (a), the person may appeal the decision of the regional manager to the director.

(5) If the director

(a) exercises the powers of a regional manager respecting the matters referred to in subsection (1),

(b) makes a decision in an appeal from a decision of a regional manager under subsection (1), or

(c) makes another decision that affects a matter referred to in subsection (1), the person aggrieved by the decision may appeal the decision of the director to the Environmental Appeal Board.

(9) Unless the director or the Environmental Appeal Board orders otherwise, an appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed.

(10) In an appeal, the Environmental Appeal Board may

(a) dismiss the appeal,

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