



# Environmental Appeal Board

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## **DECISION NO. EAB-WCA-20-A001(a)**

In the matter of an appeal under the *Water Users' Communities Act*, RSBC 1996, c. 48.

<b>BETWEEN:</b>	The Nature Trust of British Columbia ("NTBC")	<b>APPELLANT</b>
<b>AND:</b>	Comptroller of Water Rights, Ministry of Forests, Lands, Natural Resource Operations and Rural Development	<b>RESPONDENT</b>
<b>AND:</b>	Allendale Water Users' Community	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A panel of the Environmental Appeal Board Darrell LeHouillier, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on March 8, 2021	
<b>APPEARING:</b>	For the Appellant:	Tony Crossman, Counsel
	For the Respondent:	Kaitlyn Chewka, Counsel Alandra Harlinton, Counsel

## **PRELIMINARY JURISDICTION DECISION**

### **APPEAL**

[1] This is a decision on the jurisdiction of the Environmental Appeal Board (the "Board") to hear appeals involving three "decisions" under the *Water Users' Communities Act*, R.S.B.C. 1996, c. 483 ("WUCA"), as described by the Nature Trust of British Columbia ("NTBC"). These "decisions" relate to:

- applications that NTBC submitted for the abandonment of water rights, which it says were implicitly denied or for which a decision has been refused; and
- whether NTBC remained part of, and liable to, a water users' community, for financial obligations related to its water rights, after NTBC sent a letter to that community advising that it wished to withdraw from the community.

[2] The NTBC has appealed all three "decisions". The respondent is the Comptroller of Water Rights (the "Comptroller"), of the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). The Board

identified jurisdictional concerns related to whether the three “decisions” are appealable and invited submissions from the parties on that issue. Both NTBC and the Comptroller provided submissions.

## **INTRODUCTION**

### *Legislative Overview*

[3] This decision relates to a water users’ community. Under the *WUCA*, water users’ communities are public corporate bodies incorporated by the Comptroller. By designating a group of water licences within a water users’ community, the Comptroller allows the community, as one body, to:

- acquire, hold, and control property and water licences;
- acquire, construct, hold, maintain, improve, replace, and operate works; and
- levy and enforce assessments on its members.

[4] The members of a water users’ community enjoy the right to participate in governance of the community and have the obligation to contribute financially to the community, through assessments. The assessments may be based on estimates of future financial liabilities, as is the case here.

[5] Voting rights and assessments are apportioned among members based on the proportion of their interests in the water users’ community. The *WUCA* provides that members’ interests in their water users’ community is generally based on the proportion of the maximum amount of water each member is able to divert and use under the licences incorporated into the water users’ community. The method of calculating the respective interests of members may be changed by a vote in a general meeting of the water users’ community, but in this case the default calculation applied.

[6] Managers are appointed to run the business of water users’ communities, including the levying of assessments on members through assessment rolls. Managers of water users’ communities are initially appointed by the Comptroller, but subsequently as a matter of self-governance by the water users’ community.

[7] The *WUCA* gives members of communities the right to appeal a manager’s assessment to the Comptroller. The Comptroller also has a wide range of powers and responsibilities under the *Water Sustainability Act*, S.B.C. 2014, c. 15 (“*WSA*”). One of these powers, granted under section 31, is the authority to cancel water licences, on application by the licence-holder. Both of these elements of the Comptroller’s authority are at issue in this decision.

[8] Section 100.1 of the *WUCA* states that certain sections of the *WSA* apply for the purposes of the *WUCA*, including section 105 of the *WSA*. Under section 105(1) of the *WSA*, certain orders resulting from an exercise of discretion of the Comptroller may be appealed to the appeal board.

*Factual Background*

[9] The Allendale Water Users' Community ("Allendale") was incorporated as a water users' community in 1972. It was originally incorporated with six constituent water licences, but its certificate of incorporation has been repeatedly amended or recalled and reissued by the Comptroller, to reflect changes in the makeup of the water licences that comprise Allendale.

[10] All the water licences comprising Allendale rely on a water licence authorizing the storage of water in Allendale Lake, which was created (at least in its current configuration) by one or two dams (the parties have provided differing information). The(se) structure(s) (the "Dam(s)") is/are deteriorating and in need of significant repair or decommissioning.

[11] NTBC became a member of Allendale in 1993, when it acquired one of the licences comprising Allendale. Between 1993 and 2000, NTBC acquired a total of five conditional water licences (the "Biodiversity Licences"). At some point in the same timeframe, NTBC says it acquired a sixth conditional water licence (the "Thomas Ranches Licence"), that was originally granted to Thomas Ranches Ltd. and subsequently gifted to NTBC. The Comptroller says NTBC has five water licences only (the Biodiversity Licences).

[12] Water rights granted under some of NTBC's conditional water licences were used until 2006. Before then, NTBC paid its assessments levied by Allendale. NTBC continued to do so for at least some time afterward, despite not beneficially using any of the water rights granted in its licences.

[13] On October 5, 2017, NTBC applied to the Comptroller, to abandon three of its water licences. On May 29, 2018, NTBC applied to the Comptroller, to abandon two more. On May 30, 2018, NTBC applied to the Comptroller to abandon its final licence. According to NTBC, it has not received any substantive reply from the Comptroller about these applications.

[14] During this time, on April 20, 2018, NTBC also notified Mr. Mavety, the manager of Allendale, that it was withdrawing from Allendale, effective immediately. In the same letter, NTBC asked to change the formula by which the interest of members of Allendale is calculated.

[15] While NTBC's position is that it withdrew from Allendale with this notice, the Comptroller's position is that NTBC remained liable to pay an assessment related to water rights to Allendale, for a period starting after April 20, 2018.

[16] On April 25, 2018, Allendale met to vote on NTBC's proposal to change the method by which the members' interests were calculated. The motion failed.

[17] On August 24, 2018, Allendale issued the 2018 Assessment Roll (the "2018 Assessment"). Allendale included NTBC as a water user and asserted that NTBC was liable to pay Allendale in respect of estimated future expenses, as authorized under the *WUCA*.

[18] Also on August 24, 2018, Mr. Mavety wrote an email to a senior water resource specialist with the Ministry, Ms. Chapman, to provide her with a copy of the 2018 Assessment. Mr. Mavety added that in the weeks preceding the completion of the 2018 Assessment, the members of Allendale had attempted to

negotiate funding to deal with the Allendale's "projects" in light of NTBC's abandonment applications. Those negotiations had proved unsuccessful.

[19] On September 10, 2018, counsel for NTBC appealed the 2018 Assessment to the Comptroller<sup>1</sup>, saying that NTBC was not liable to pay the amount described in the 2018 Assessment because of section 59(3) of the *WUCA*. That section provides that members of a water users' community become liable for financial obligations when they acquire an interest in land to which a water licence is appurtenant, to the same extent as an original member of the community, "... unless and until the purchaser notifies the manager [Mr. Mavety] that he or she does not wish to be a member of the water users' community."

[20] On December 20, 2018, a water manager with the Ministry, Mr. Reilly, wrote to NTBC and stated that the Thomas Ranches Licence is appurtenant to land owned by Thomas Ranches Ltd. Inc., not NTBC. Mr. Reilly stated, "Based on this information, [NTBC] would not appear to have authority to apply for abandonment of [the Thomas Ranches Licence]."

[21] Mr. Reilly added that, as NTBC's liability calculated in the 2018 Assessment was based on calculations including the Thomas Ranches Licence, NTBC's liability to Allendale should be reduced.

[22] Mr. Reilly added:

On application, in accordance with section 31 of the *Water Sustainability Act*, the Comptroller of Water Rights or Water Manager may approve the abandonment of all or part of the rights [held under water licences], subject to prescribed terms and conditions .... The statutory decision maker has the discretion to take into consideration the repair, maintenance, or removal of the works or arrangements respect responsibility for the repair, maintenance or removal of the works with other authorization holders or previous authorization holders. Furthermore, the statutory decision maker needs to take into consideration potential for harm to public safety, dam safety, land, other property and environmental considerations....

To proceed with consideration of the abandonment application, [NTBC] is hereby requested to provide a plan outlining arrangements for the decommissioning of authorized works, including the dam, or, alternatively, for the upgrading of the works to acceptable standards under the WSA, its regulations and any other applicable enactments applicable to the works, the water licences in the abandonment applications and any works for which [NTBC] may share responsibility based on membership in [Allendale]....

We would like to encourage [NTBC] to continue the work with [Allendale] to come to an arrangement in regard to the works associated with the storage licence that supports all licences incorporated in [Allendale].

[23] The Comptroller says that, to date, NTBC has not provided the requested plan.

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<sup>1</sup> Under section 57(1) of the *WUCA*, a member may appeal the assessment that the manager made against them to the Comptroller.

[24] On January 2, 2019, Mr. Mavety wrote to the Comptroller, urging him to address NTBC's abandonment applications, as his decision would influence negotiations between NTBC and Allendale as to financial liabilities. Mr. Mavety stated that this issue was "not independent" of the appeal of the 2018 Assessment. Mr. Mavety added that the delay in addressing those applications was also delaying much-needed repairs to the Dam(s).

[25] On February 15, 2019, the Comptroller wrote to Mr. Mavety, requesting documentation so that the Comptroller could complete his review of the 2018 Assessment. The Comptroller reviewed the obligations of Allendale, in terms of governance matters.

[26] The Comptroller also addressed safety issues related to the Dam(s). The Comptroller urged Allendale to work with the dam safety officer to ensure Allendale was compliant with the *WSA* and the *Dam Safety Regulation*. The Comptroller added:

In a letter dated December 19, 2018, to proceed with consideration of the abandonment the regional Statutory Decision Maker requested that [NTBC] provide a plan that outlines arrangements for the decommissioning or upgrading of any works with shared responsibility and/or listed in their licences.

As the diversion licences are incorporated into [Allendale], which holds the related storage licence on behalf of all incorporated water licences, the plan should include how any works associated with [the storage licence] would be addressed if the licences are abandoned.

...

I continue to encourage [Allendale] and [NTBC] to come to an arrangement regarding the works associated with the storage licence.

[27] On May 14, 2019, NTBC wrote to Mr. Reilly, asking for an accounting of NTBC's prior year assessments. NTBC made extensive submissions as to why the Comptroller should change the 2018 Assessment, including because NTBC had applied to abandon its licences and had given notice that it wished to withdraw from Allendale. Furthermore, NTBC noted that it had been paying more than its share, both because its water was being used without authorization by other members of Allendale and because not all of its water licences formed part of Allendale.

[28] NTBC also advised that, since it was not a member of Allendale and could not vote on Allendale's prospective options for decommissioning or rehabilitating the Dam(s), NTBC could not provide the "requested information" from the December 20, 2018.

[29] On March 12, 2020, a representative of NTBC met with the Comptroller and others, some in person and some via teleconference. At the meeting, both NTBC's abandonment applications and the question of its membership with Allendale were a topic of discussion.

[30] On December 1, 2020, the Comptroller wrote a letter to NTBC, stating he had completed an investigation of the 2018 Assessment in accordance with section 57(2) of the *WUCA*. The Comptroller concluded that NTBC was:

...liable for the assessment, as [NTBC] was a member of [Allendale] at the time the Assessment was issued. Section 59(2) and (3) do not apply to [NTBC]'s membership in [Allendale] because [NTBC] has not transferred their interest in land to which their water licences are appurtenant.

[31] On December 24, 2020, NTBC filed, through counsel, a notice of appeal with the Board. An additional copy was received, along with a filing fee of \$75 (\$25 for each of three appeals), on December 31, 2020.

### *The "Decisions" Appealed*

[32] The NTBC wishes to appeal three decisions:

1. the Comptroller's decision dated December 1, 2020, dismissing NTBC's appeal of the 2018 Assessment and confirming that Assessment pursuant to section 57(2) of the *WUCA*;
2. the Comptroller's failure to acknowledge NTBC's withdrawal from Allendale on April 20, 2018; and
3. the Comptroller's failure to exercise his discretion and make a decision on water licence abandonment applications that NTBC submitted pursuant to section 31 of the *WSA* on October 5, 2017, May 29, 2018, and May 30, 2018.

[33] The Board invited the Comptroller to participate in the appeal(s) as the Respondent, and Allendale to participate as a Third Party.

[34] On January 12, 2021, the Board sought submissions from the parties on the second and third identified appeals. Specifically, the Board asked whether those identified appeals were:

- captured by section 105 of the *WSA*, which provides the Board with the authority to consider appeals of orders from that legislation and the *WUCA*; and
- submitted within the 30-day appeal period provided in section 105(3) of the *WSA*.

[35] NTBC and the Comptroller exchanged submissions and evidence. Allendale did not respond to the request for submissions.

### **ISSUES**

[36] The issues I must decide are whether:

- the Comptroller's comment, that NTBC remained a part of Allendale when the 2018 Assessment was issued, was an appealable "order" under section 105(1) of the *WSA*;
- the Comptroller's lack of decision-making, in respect of NTBC's applications to abandon its water licences, was an appealable "order" under section 105(1) of the *WSA*; and
- the appeals were filed within the 30-day appeal period specified in section 105(3) of the *WSA*.

[37] If I find that something the NTBC is seeking to appeal is not an appealable “order” under section 105(1) of the *WSA*, or that an appeal was not filed within the timeframe provided in section 105(3) of the *WSA*, then the matter may be summarily dismissed for lack of jurisdiction under section 31(1)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

## **DISCUSSION AND ANALYSIS**

*Was the Comptroller’s comment, that NTBC remained a part of Allendale when the 2018 Assessment was issued, an appealable order under the WSA?*

### NTBC’s Submissions

[38] NTBC notes that the Board’s authority to consider appeals, both under the *WSA* and the *WUCA*, stems from section 105(1) of the *WSA*.<sup>2</sup> That section provides that, “Except where otherwise provided in this Act, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the [Board] ....”

[39] Section 1(1) of the *WSA* defines an order as including “... a decision or direction, whether or not the decision or direction is given in writing, but does not include a request”. “Decision” is not defined in the *WSA*.

[40] NTBC stated that, while the Board and the courts had not yet considered the scope of appealable decisions under section 105(1) of the *WSA*, the reasoning used by the BC Court of Appeal in assessing the types of decisions that may be appealed to the Board under the *Environmental Management Act*, S.B.C. 2003, c. 53, could be helpful. NTBC submits that in *Re Revolution Organics, Limited Partnership and British Columbia (Director, Environmental Management Act)* 2017, CarswellBC 2664, at para. 38, the Board relied on *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 300 [*Rio Tinto*], when it set out three factors to consider when determining whether a decision is appealable under the *Environmental Management Act*:

1. the decision must have been made pursuant to statutory authority, when considering the relevant statute as a remedial one, and giving it fair, large, and liberal interpretation, as required by section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238;
2. the contents of an appealed letter must be examined to determine if there are any decisions, given that a single letter may contain appealable decisions, as well as information and/or decisions that are not appealable; and
3. the Board should consider the nature of the decision and the legislation at issue, and not decline jurisdiction based on a “purely formal or technical basis.”

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<sup>2</sup> This provision of the *WSA* applies to the *WUCA*, according to section 101.1(b) of the *WUCA*.

[41] NTBC argues, however, that the *WSA* provides a broader definition of “order” than does the *Environmental Management Act’s* definition of “decision”, when deciding what decisions are appealable. It is important to distinguish analyses where the appeal rights and the definitions of appealable decisions are different under different enactments.

[42] NTBC says that, for appeals under the *WUCA*, the *WSA* is the important enactment to consider, as it contains the relevant appeal provisions. NTBC argues that the *WSA* is a statute with a variety of purposes. NTBC references my comments in paragraph 43 of *Smoluk v. British Columbia (Assistant Water Manager)*, Decision No. 2019-WSA-001(a) (May 20, 2020) [*Smoluk*], in which I describe the various purposes of the *WSA*, including the stewardship and authorization of beneficial use of water resources by members of the public, while also granting the Province the authority and means to monitor, protect, and enforce the protection of water resources, including streams and stream channels.

[43] NTBC referenced the legislative debate. During the debate, the Hon. Mary Polak (then the Minister of the Environment) was asked a question about appeal rights related to section 47 of the *WSA*. Minister Polak responded, “One doesn’t need a provision to say it’s appealable. If we don’t say it’s unappealable, then it’s appealable.”<sup>3</sup>

[44] NTBC also says that the Comptroller interpreted section 57(3) of the *WUCA* wrongly, to say that NTBC had not withdrawn from Allendale with its letter of April 20, 2018. The Comptroller’s conclusion that NTBC continued to be part of Allendale when the 2018 Assessment became effective resulted in the decision that NTBC remained liable for a portion of the 2018 Assessment. That conclusion, NTBC argues, is the order giving rise to the right of appeal.

[45] NTBC has also advanced two alternatives, one a request and one an argument, with respect to this issue:

- a request that it be allowed to amend the issues under appeal, “... along the lines that: NTBC appeals the Comptroller’s decision that NTBC was a member of [Allendale] for the 2018 [Assessment], and that NTBC did not withdraw from [Allendale] by notice of April 20, 2018”; and
- an argument that the Comptroller’s “failure to take into account NTBC’s withdrawal is part of the appealable decision in Appeal #1, and NTBC asks that the Board consider it in that context.”

### The Comptroller’s Submissions

[46] The Comptroller argues that the Board does not have the jurisdiction to consider this issue as it was not a stand-alone decision, but rather a component of the Comptroller’s decision to confirm the 2018 Assessment. The Comptroller argues that he has no authority under section 59(3) of the *WUCA* to make a decision about membership within a water users’ community.

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<sup>3</sup> British Columbia, Legislative Assembly, *Hansard*, 40<sup>th</sup> Leg, 2<sup>nd</sup> Sess, Vol. 11, No. 4 (29 2014) at 3245.



[47] Even if the Comptroller's comment that NTBC remained a part of Allendale was a separate decision, it was so integrated with the first appealed issue that there would be no purpose to considering it in isolation.

[48] The Comptroller acknowledges that the Board should only dismiss appeals for lack of jurisdiction in clear and obvious cases, after reading the impugned grounds of appeal generously. In this case, the Comptroller argues dismissal is in order.

#### NTBC's Submissions in Reply

[49] NTBC responds that the Board must not dismiss an appealed issue for want of jurisdiction unless it is "plain and obvious" that it lacks that jurisdiction. Referencing *Cobble Hill Holdings Ltd. v. British Columbia (Director, Environmental Management Act)*, 2014 CarswellBC 345 [*Cobble Hill*] and *British Columbia (Director, Environmental Management Act and Coape-Arnold, Re)*, 2017 CarswellBC 3276 [*Coape-Arnold*], NTBC argued that this ground of appeal should not be dismissed.

#### Panel's Findings

[50] Consistent with NTBC's submissions, I find that the analysis from *Rio Tinto* is helpful when assessing whether an appealable "order" has been made, although it is important to recognize the differences between the appeal rights conferred in different enactments, and the differences between definitions of "order" in the *WSA* and "decision" in the *Environmental Management Act*.

[51] The first element of the analysis from *Rio Tinto* is whether the impugned decision was made pursuant to a statutory authority. In this case, the Comptroller's conclusion that NTBC remained part of Allendale when the 2018 Assessment was issued was made within the context of a review of that assessment, which he conducted pursuant to his authority under section 57(2) of the *WUCA*. Accordingly, I am satisfied that the comment, if it is an "order", was made in the context of the Comptroller exercising his statutory authority.

[52] The second factor in the analysis from *Rio Tinto* involves consideration of whether there was an appealable decision. This is a matter of statutory interpretation.

[53] As described in *Rizzo & Rizzo Shoes Ltd. (Re)*, (1998) CanLII 837 (SCC), my role in interpreting the *WSA* is to read it in its entire context, and to consider the relevant portions in their ordinary and grammatical sense, harmoniously with the objects and schemes of the *WSA* and the intention of the Legislature in passing it. Section 8 of the *Interpretation Act* requires that I read the *WSA* in a liberal and remedial manner.

[54] NTBC summarized my comments from *Smoluk* and I agree that they summarize the complex tension of priorities that exist within that legislation. As such, it is difficult to glean a singular object of the *WSA*. A plain reading of sections 1(1) and 105(1) in conjunction, however, indicates that any order (including a decision or direction, but excluding a request) arising from an exercise of discretion is appealable, unless the *WSA* provides otherwise. This is consistent with the comments of the Hon. Mary Polak during the legislative debate before the *WSA* was enacted into law.

[55] Even bearing in mind the broad appeal rights granted under the *WSA* and the broad definition of an "order", I disagree with NTBC that the Comptroller's comment, that the NTBC remained a part of Allendale at the time the 2018 Assessment was issued, was an "order" for the purposes of section 105(1) of the *WSA*.

[56] The Comptroller's letter of December 1, 2020 clearly outlined that he was deciding NTBC's appeal of the 2018 Assessment. The Comptroller communicated that he "conducted an investigation" under section 57(2) of the *WUCA*. This followed his review of factual information, as well as sections 54, 56, and 59 of the *WUCA*. Those sections pertain to the calculation of the relative interests of members of water communities; water managers' authority to create and distribute assessment rolls and requirements imposed upon them; and the delineation of a community member's liability to the community based on their interest in the community. The Comptroller then applied his reading of the legislation to his understanding of the facts, leading to his conclusion that the 2018 Assessment should be confirmed.

[57] The Comptroller's confirmation of the 2018 Assessment under section 57(2) of the *WUCA* is a "decision or direction", and not a request. As such, it constitutes an "order" in the *WSA*. Furthermore, it resulted from "an exercise of discretion" and is not excluded from appeal to the Board. As a result, it is an appealable "order" for the purposes of section 105(1) of the *WSA*. His comment, based on his understanding of the facts and his interpretation of section 59 of the *WUCA*, that NTBC remained part of Allendale when the 2018 Assessment was issued, was only a finding in the context of his investigation under section 57(2). This finding, unto itself, was not an exercise of discretion under section 57(2) of the *WUCA* to confirm the 2018 Assessment. It is not an appealable decision as described in section 105(1) of the *WSA*.

[58] Having determined that the Comptroller's conclusion that NTBC was part of Allendale when the 2018 Assessment was issued was not an appealable decision on its own, but rather a finding of fact and law that is a component of an appealable order, I turn to the third factor from *Rio Tinto*: that the Board should consider the nature of the decision and the legislation at issue, and not decline jurisdiction based on a "purely formal or technical basis".

[59] I am mindful that the Board is not declining jurisdiction over this finding, but rather acknowledging the limits and authority of the Comptroller's decision, and ensuring that the adjudication of this finding is framed properly, within the context of the decision-making authority and appeal rights granted under the *WSA* and the *WUCA*.

[60] Based on the foregoing, I agree with the Comptroller that the appeal of the second "decision" should be dismissed for lack of jurisdiction pursuant to section 31(a) of the *Administrative Tribunals Act*.

[61] I do not consider it necessary or advisable to amend the issues under appeal, as NTBC remains able to discuss this issue during its appeal of the Comptroller's confirmation of the 2018 Assessment. This is consistent with NTBC's further alternative argument, that the Comptroller's finding is part of his appealable confirmation of the 2018 Assessment, and the Board will consider it in that context.

[62] For the reasons provided above, the Comptroller's comment, that NTBC remained a part of Allendale when the 2018 Assessment was issued, was not an appealable "order" for the purposes of section 105(1) of the *WSA*. The Board has jurisdiction to consider this comment in addressing the appeal of the Comptroller's confirmation of the 2018 Assessment.

*Was the Comptroller's lack of decision-making, in respect of NTBC's applications to abandon its water licences, an appealable order?*

#### NTBC's Submissions

[63] NTBC relies on its submissions with respect to the interpretation of the *WSA* generally. NTBC argues that any exercise of discretion under that Act is appealable. This includes that "...the Comptroller has exercised his discretion by continuing to withhold a decision on the [NTBC's applications to the Comptroller, to abandon its licences]."

[64] NTBC says the decision on this point was made in the course of the Comptroller's review of the 2018 Assessment, which all parties and the Board agree falls within the Board's jurisdiction. Even if this decision was not made in writing, however, NTBC argues that the Comptroller decided to withhold a decision on the abandonment applications, effectively and for all practical purposes.

[65] NTBC notes that section 31 of the *WSA* allows the Comptroller to cancel licences upon application by the licensee, and may impose terms and conditions on the cancellation. NTBC argues that, given how long the Comptroller took to complete his assessment of the 2018 Assessment, and the extent of his review, the Comptroller effectively refused NTBC's applications to abandon its water licences, by confirming the existence of any liability on the part of NTBC, in respect of the 2018 Assessment.

[66] NTBC also asserts that the Comptroller's office has repeatedly indicated it lacks the capacity to review NTBC's abandonment applications and, in December 2018, the Comptroller stated he would prefer that NTBC and Allendale reach an agreement on the Dam(s) before deciding the abandonment applications. NTBC asserts that Allendale is unwilling to negotiate on this point, and it is unreasonable for the Comptroller not to address the abandonment applications in this context.

[67] NTBC argues the Comptroller's refusal to decide the abandonment applications exposes NTBC to increasing liability associated with the progressive deterioration of the Dam(s), to be realized by the progressively increasing cost to repair the Dam(s) or the increasing likelihood of the catastrophic failure of the Dam(s). Furthermore, NTBC argues that the Comptroller's failure to decide the abandonment applications runs counter to the goal of water stewardship, one of the goals of the *WSA*. NTBC argues that, if the Board declines jurisdiction over the third appeal, this "... would condone the Comptroller's actions."

[68] NTBC further argues that it is being denied its appeal rights, as the Comptroller has refused to address the abandonment applications in a reasonable timeframe. NTBC argues this is procedurally unfair. Referencing *Blencoe v. British Columbia (Human Rights Commissioner)*, 2000 SCC 44, NTBC submits that a delayed administrative process can amount to an abuse of process, where there is

“clearly unacceptable” delay that would cause significant prejudice to a party and bring the administration of justice into disrepute.

[69] NTBC also notes the court’s reluctance to intervene in administrative processes before they have run their course, and NTBC argues the Comptroller’s refusal to address the abandonment applications leaves it with no recourse.

[70] Referencing *Revolution Organics, Limited Partnership v. British Columbia (Director, Environmental Management Act), Re*, 2017 CarswellBC 1041, NTBC argues that the Board should not decline jurisdiction on a “purely formal or technical basis”. NTBC asserts that the Board would be doing so if it declined jurisdiction in this case, because the Board had not considered the scope of appealable “orders” under section 105(1) of the *WSA*.

#### The Comptroller’s Submissions

[71] The Comptroller says no decision was made about the abandonment applications because NTBC had not provided the information requested by Mr. Reilly, which is a requirement that must be satisfied in order for the application to be considered.

[72] The Comptroller references section 12 of the *WSA*, which describes the procedure for making an application under that legislation. Section 12(b)(iii) states that part of that application includes “... providing in the form and manner specified by the decision maker any plans, specifications, reports of assessments and other information the decision maker requests.”

[73] The Comptroller argues that this request is also consistent with section 9(g) of the *Water Sustainability Regulation* (the “*Regulation*”). That section of the *Regulation* pertains to a licensee applying to abandon a licence which has related works. In such a case, unless the licensee transfers rights and responsibility for works in certain ways, or the Comptroller is satisfied that those works will continue to be used under certain types of orders or agreements, the licensee must provide a proposal for the removal, decommissioning, or deactivation of those works.

[74] As a result, the Comptroller says Mr. Reilly’s letter is a request for information, which is specifically excluded from the definition of an “order” under section 1(1) of the *WSA*. There was no order on the merits of that application because the requirements of submitting the application have not been met. The Comptroller argues that, accordingly, the Board has no jurisdiction to consider this issue.

[75] Furthermore, the Comptroller argues that the letter of December 1, 2020 related only to his authority under section 57 of the *WUCA*. He has no authority, under that section of that statute, to consider applications for the abandonment of water licences. There is no basis to conclude that the Comptroller has done so in the December 1, 2020 letter.

[76] The Comptroller adds that NTBC did not provide the requisite evidence in support of its application. The Comptroller argues that the Board cannot make factual findings based on unsupported allegations in the absence of evidence.

NTBC's Submissions in Reply

[77] NTBC argues that jurisdictional questions do not always yield "black and white", "yes or no" answers. Referencing *Cobble Hill*, NTBC says that sometimes a broader factual context, evidence, and additional argument are needed. This is the case here, as the limits of the Board's jurisdiction cannot be determined without evidence and argument that will be provided at the hearing of these appeals.

[78] NTBC argues that it provided a factual context in its submissions, to establish that the jurisdictional questions at issue are too complicated to determine on a preliminary basis. In the circumstances of this case, it is less than "plain and obvious" that any issues under appeal should be struck. Relying on *Coape-Arnold*, NTBC says that the Board should not decline jurisdiction over the Comptroller's failure to provide a decision in respect of the abandonment applications.

[79] At this juncture, the Board does not need to accept facts, but rather only needs to decide whether it needs to hear and consider the evidence and argument in a hearing on its merits. Accordingly, the submission of evidence is not required, beyond the factual context provided by way of submissions.

[80] Additionally, NTBC says that the summary it provided is generally consistent with the information provided by the Comptroller. NTBC notes that, generally, the Comptroller provided no inconsistent information or evidence.

[81] NTBC clarifies, however, that it responded to Mr. Reilly's request, contrary to the submissions from the Comptroller. NTBC argues that Mr. Reilly's request is reasonably read as the requirement for a "plan" and "arrangement [with Allendale]" is, in fact, a requirement for an agreement between NTBC and Allendale about what to do with the Dam(s). That the Comptroller, on February 15, 2019, continued to recommend that NTBC and Allendale make an arrangement regarding the Dam(s), in the same letter as addressing the 2018 Assessment and the abandonment applications, suggests that both issues were being considered by the Comptroller and were related.

[82] Furthermore, NTBC argues that Mr. Reilly's request was an order because it was a decision. Additionally, NTBC says that the Comptroller referenced his review of water licence files associated with Allendale in the December 1, 2020 decision, and this review would have included the abandonment applications. NTBC says that, given that the word "order" is not exhaustively defined in the *WSA*, a right of appeal exists whenever it can be demonstrated that a decision, whether to act or not, has been made.

Panel's Findings

[83] For the reasons provided above, I find the three factors described in *Rio Tinto* to be applicable in deciding this issue.

[84] Turning to the first element of the *Rio Tinto* test, I find that NTBC filed applications for the abandonment of its water licences, and that the authority to consider those applications vests with the Comptroller and/or a water manager appointed under the *WSA*, as described in section 31 of *WSA*. The first factor described in *Rio Tinto* supports a finding that the lack of decision-making about the

abandonment applications, if it qualifies as an “order” that can be appealed under the *WSA*, is appealable.

[85] For reasons that later become important, by making a request under section 31 of the *WSA*, NTBC satisfied the definition of an “applicant” under section 1 of the *WSA*. Mr. Reilly, as a water manager with the Ministry, appointed under the *WSA*, is a decision-maker empowered by section 31 of the *WSA* to decide the abandonment applications.

[86] Turning to the second element of the *Rio Tinto* test, I find that the *WSA*, while it does not have an identifiable objective that assists in deciding this issue, confers a fairly broad (but not unlimited) right of appeal from “orders”, as the Hon. Mary Polak promised during the legislative debates.

[87] Section 105 of the *WSA* imposes three requirements, in order for an “order” to be appealable. First, it must not be expressly excluded from being appealed (this is not an issue in this appeal). Second, it must result from an exercise of discretion under the *WSA* or its regulations. Third, it must have been made by one of the decision makers contemplated in section 105(1) of the *WSA* (this too is not a concern in this appeal). An “order” may be written or unwritten, but the three requirements above must be met for it to be appealable.

[88] An “order”, as defined in the *WSA*, includes a decision or a direction but excludes a request. The key element of this definition is that the words “order”, “decision”, and “direction” all contemplate an intentional conclusion. Section 105 of the *WSA* does not grant statutory appeal rights with respect to the refusal to make decisions (as do, for example, sections 83(2) and 84(2) of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69, and section 288(1) of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1, to the quasi-judicial bodies empowered respectively in those statutes).

[89] The *WSA* excludes a “request” from the definition of an “order”. Given that the *WSA* provides for contradictory conclusions respecting appeal rights for “decisions” and “directions” on one hand, and “requests” on the other, a communication of the Comptroller on a particular issue cannot be both. It must be one or the other.

[90] Section 12 allows a decision-maker (like Mr. Reilly, as described above) to request information from an applicant (like NTBC, as described above) in the context of an application. According to section 12(1)(b)(iii) of the *WSA*, this includes “... plans, specifications, reports of assessments and other information the decision maker requests...”. The submission of such information is one element of what section 12 requires for an applicant to bring an application before a decision-maker.

[91] I find that Mr. Reilly’s letter of December 20, 2018 includes a request for NTBC to provide a plan. Such a plan is explicitly included as the sort of information that must be provided in order for an application to be made to a decision-maker. The relevant portion of Mr. Reilly’s letter reads:

To proceed with consideration of the abandonment application, [NTBC] is hereby requested to provide a plan outlining arrangements for the decommissioning of authorized works, including the dam, or, alternatively, for

the upgrading of the works to acceptable standards under the WSA, its regulations and any other applicable enactments applicable to the works, the water licences in the abandonment applications and any works for which [NTBC] may share responsibility based on membership in [Allendale]...

[92] Due to the length and complexity of this sentence, I consider it helpful to break up this provision into list form. It asks NTBC to provide a plan outlining an arrangement for the:

- a) decommissioning of authorized works, including the dam, or
- b) upgrading of the works to acceptable standards under:
  - a. the WSA,
  - b. its regulations, and
  - c. any other applicable enactments applicable to:
    - i. the works,
    - ii. the water licences in the abandonment applications, and
    - iii. any other works for which NTBC may share responsibility based on membership in Allendale.

[93] Mr. Reilly framed this as a request and made clear that such a plan is needed for decisions to be made on the abandonment applications.

[94] Calling for a plan is also consistent with section 31 of the WSA and section 9(g) of the *Regulation*. Section 31 authorizes a water manager to impose terms and conditions on the approval of an abandonment application, including for the "... repair, maintenance or removal of works ..." or for the "... deactivation or decommissioning of works ...", or for arrangements respecting responsibility for either. Such arrangements may be made with other authorization holders who jointly use the works, previous authorization holders who jointly used the works, or owners of land on which the works are located.

[95] Section 9(g) of the *Regulation* requires certain information to be supplied along with an abandonment application under section 31, unless:

- rights and responsibility for works related to the rights to be abandoned are transferred through an arrangement with other authorization holders who use or used the works (and the Comptroller approves), or
- the Comptroller is satisfied that the works related to the rights to be abandoned will continue to be used under an agreement related to the joint use of works.

[96] The information to be provided is "... the details respecting the applicant's proposal to remove, decommission or deactivate those works."

[97] Based on the foregoing, Mr. Reilly was empowered to request submission of a plan for an arrangement for the rights and responsibility of works associated with the rights to be abandoned. Such a plan is relevant to the requirements imposed by section 31 of the WSA and section 9(g) of the *Regulation*. Even NTBC characterized Mr. Reilly's communication of December 20, 2018 as a request, in its letter of May

14, 2019. I agree, and conclude, for the reasons stated above, that Mr. Reilly's request for a plan, in his letter of December 20, 2018, was not an "order".

[98] I appreciate that Mr. Reilly also encouraged NTBC to continue to seek an agreement with Allendale, related to the Dam(s). This encouragement was not associated with any requirement or consequence within the December 20, 2018 letter and, as such, I conclude that it does not change the nature of the request for a plan, communicated in that letter.

[99] Mr. Reilly's encouragement, however, provides context for the "arrangement" described in his letter of December 20, 2018. In short, Mr. Reilly requested a plan which details some agreement between NTBC and Allendale, to either decommission or upgrade certain works, including the Dam(s). This is also consistent with the language in sections 31(1)(a) and (b) of the *WSA*, as well as section 9(f) of the *Regulation*. Sections 31(a) and (b) of the *WSA* refer to "arrangements" respecting responsibility for the repair, maintenance, removal, deactivation, or decommissioning of jointly used works. Section 9(f) of the *Regulation* refers to "a description and evidence of any arrangements the applicant has" in relation to the matters in section 31(1)(a) and (b) of the *WSA*. In this context, "arrangements" relates to agreements between applicants for the abandonment of water rights and other water users, historical water users, and/or land owners, for financial responsibility for works associated with the water rights being abandoned.

[100] This is further supported by the Comptroller's letter of February 15, 2019, which summarizes Mr. Reilly's request that NTBC "... provide a plan that outlines arrangements for the decommissioning or upgrading of any works with shared responsibility and/or listed in their licences", including the Dam(s). The Comptroller, as Mr. Reilly did, contextualizes this summary by encouraging Allendale and NTBC to "... come to an arrangement regarding the works associated with the storage licence [the Dam(s)]."

[101] By May 14, 2019, the circumstances surrounding this request had changed. On January 2, 2019, Mr. Mavety expressed a preference that the Comptroller decide the abandonment applications, as this would impact the negotiations between NTBC and Allendale for the resolution of financial obligations within Allendale. On May 14, 2019, NTBC advised Mr. Reilly that it was unable to provide the information he requested on December 20, 2018 because it was no longer a part of Allendale.

[102] The next answer from the Comptroller, based on the information available to me, was the decision of December 1, 2020. That letter does not contain any explicit decision on NTBC's abandonment applications.

[103] I also do not accept that the Comptroller made an implicit decision to reject NTBC's abandonment applications. Such a decision may not be inferred simply because the Comptroller was aware of the applications at the time he confirmed the 2018 Assessment, despite the fact that the 2018 Assessment is contingent upon the existence of the water licences. As noted by the Comptroller, the abandonment of water licences requires attention to associated works—in this case, the Dam(s). There is no legislated timeframe for a statutory decision-maker to decide an abandonment application. Given the complexities around the Dam(s) in this case, I



am unwilling to infer that the Comptroller implicitly or effectively rejected NTBC's abandonment applications. It may be a case of delayed decision-making, rather than denial of the applications.

[104] I am not satisfied, based on the circumstances of this case, that mere delay or a lack of decision-making, related to a lack of resources to do so (or to do so more quickly), satisfies the definition of an "order". With the same constraints, I am not satisfied that preferring to address one decision before another constitutes an "order" either. Had the legislature intended to require decisions made within a particular timeframe, it could have imposed such requirements on the decision-makers in section 31 of the *WSA*. For these reasons, to the extent that NTBC has argued that the Comptroller's office lacks resources to address the abandonment applications in a timely way, I am not satisfied that a non-decision or delayed decision related to any insufficiency of resources is appealable to the Board.

[105] These are not the reasons the Comptroller provides for why no decision was made on the abandonment applications, however. The Comptroller says he did not decide the abandonment applications because it is incomplete; NTBC did not provide the information requested by Mr. Reilly.

[106] By the time the Comptroller issued the letter of December 1, 2020, both NTBC and Allendale had responded to Mr. Reilly's request for a plan, related to an arrangement for decommissioning or upgrading the works related to the rights to be abandoned, including the Dam(s). Allendale had said it would rather not come to an agreement about the need to decommission or upgrade relevant works, including the Dam(s), without the abandonment applications having been decided. This followed correspondence from August 2018, in which Allendale advised that negotiations with NTBC about financial responsibility for the Dam(s) had proven unsuccessful. NTBC, for its part, stated that it was no longer a part of Allendale and could not provide a plan as a result. Now, on appeal to the Board, NTBC also says Allendale refuses to negotiate, although the basis for that assertion is unclear, particularly in light of the unsuccessful negotiations in August 2018.

[107] Considering the foregoing, I am left with significant questions that may require the input of further evidence. Can a decision-maker under *WSA* "request" that two parties make a contractual arrangement, and deny decision-making if they do not? If not, can such a decision-maker impose some level of required effort as a "request", and did NTBC and Allendale meet such a threshold in this case? If the relevant party(ies) indicate that they cannot supply the requested information, can the decision-maker persist in their request, and if so, does it remain a request? In this case, is the validity of Mr. Reilly's request, either initially or as circumstances changed, impacted by the fact that he requested an "arrangement", when the *WSA* and the *Regulation* both indicate that an "arrangement" is not necessary?

[108] With respect to the last question, I note that section 31(a) of the *WSA* allows the decision-maker to grant an application for the abandonment of water rights, "... subject to prescribed terms and conditions the decision maker considers advisable, which terms and conditions may include ..." arrangements for responsibility for the repair, maintenance, removal, deactivation, or decommissioning of related works. As a result, the decision-maker does not need to apply prescribed terms and conditions, unless they consider those to be advisable. The decision-maker may also impose other terms and conditions than those specified in the *Regulation*.

[109] Even if the decision-maker keeps to the requirements in the WSA and Regulation, however, section 31(a) of the WSA provides that on term or condition to be imposed may require "... the repair, maintenance or removal of works or arrangements respecting responsibility for the repair, maintenance or removal of works..." Section 31(b) allows the imposition of terms and conditions in the same circumstances, including "... requiring deactivation or decommissioning of the works or arrangements respecting responsibility for deactivation or decommissioning of the works..." [emphasis added in both cases]. I note also that section 9(g) of the *Regulation* requires, in respect of works associated with rights to be abandoned: a transfer of rights and responsibility for the works; the ongoing use of those works based on an "arrangement" or an order; or a proposal for the removal, decommissioning or deactivation of those works. These provisions allow arrangements in each case, but do not require them.

[110] I also note that, while Mr. Reilly's request may not have remained outstanding, NTBC's abandonment application still may not have been complete and, accordingly, it may not have been possible for the Comptroller to decide the abandonment applications. Section 9(g) of the *Regulation* requires that such an application be accompanied by "... details respecting the applicant's proposal to remove, decommission or deactivate ..." works related to the rights to be abandoned, unless there is an arrangement for the transfer of rights and responsibility, an "agreement" respecting the joint use of works, or an order for the joint construction or use of works under section 36 of the WSA. This was not a matter canvassed by the parties with respect to this preliminary matter, and more evidence and argument is required to consider the issue. The jurisdictional issue is not settled and will remain to be settled through the hearing on the merits of the matters that I have not ruled out as being appealable "orders".

[111] In closing, while I have concluded that NTBC's appeal of the Comptroller's lack of decision-making on the abandonment applications ought to be considered in greater detail, I wish to comment on some points made by the parties in the hopes of expediting the conduct of this appeal.

[112] First, I agree with the Comptroller that if he were to violate rules of procedural fairness, frustrate NTBC's appeal rights, or engage in an abuse of process, this would not give rise to a right of appeal beyond what is provided in section 105(1) of the WSA. This does not mean that the Board, if it were to decline jurisdiction in these circumstances, condones any actions on the part of the Comptroller. It would simply mean the Board's jurisdiction was limited by its enabling legislation. Furthermore, the courts' reluctance to intervene in administrative processes does not empower the Board to do so, to any greater degree. Again, it is a matter of the jurisdiction conferred upon the Board by the WSA.

[113] Second, there is insufficient evidence to support a conclusion that the lack of decision-making on the abandonment applications is running contrary to water stewardship. The evidence provided by NTBC supports that it is not using its diversionary rights to water, but others within Allendale are doing so. It is not clear that these circumstances would change if NTBC's abandonment applications were granted, particularly given that the diversionary rights it holds are conditional on

the reservoir created by the Dam(s), and that NTBC's evidence is that the reservoir is depleted annually for the purposes of irrigation, by the members of Allendale.

[114] Third, I am not satisfied that NTBC lacks the judicial recourse that it asserts, based on the information presented. In particular, I note that NTBC has not addressed section 2(2)(b) of the *Judicial Review Procedure Act*, R.S.B.C., c. 241, which allows applications for judicial review to be filed, with respect to, among other things, "... refusal to exercise ... a statutory power."

[115] Fourth, just because the Board may not have declined jurisdiction on an issue previously does not mean that doing so for the first time is done on a "purely formal or technical basis." If this were so, no jurisdiction would ever be declined, as each issue must be considered for the first time at one point or another. The passage of significant time between when an enactment is made and when the Board first considers its jurisdiction related to that enactment is purely a function of the time it takes for an appeal raising the issue to come before the Board.

[116] Fifth and finally, with respect to the Comptroller's submission that NTBC did not adequately support all of its contentions with evidence, I agree with NTBC that the nature of this preliminary matter necessitates a flexible approach. This was not an application brought by one party or another, but rather it began with an inquiry from the Board. Given the early stages of this appeal, it is not reasonable to expect all parties to gather all of the required evidence and present it to the Board. In this matter, the Board relies on the submissions of counsel and their correction of any errors or omissions made by the other parties.

[117] While the circumstances of any given case may give rise to varying requirements for the submission of evidence, here the factual circumstances described above do not seem to be in dispute. To decide, at a preliminary stage, that the Board has no jurisdiction over an appeal, and to deny a person's right of appeal, should only be done in clear cases. This is not one of those cases. There are lingering questions which I cannot evaluate and decide based on the information before me. I have found that more evidence and argument is required to decide whether the third "decision" is, in fact, an appealable decision under the *WSA*.

[118] For the reasons above, I conclude that the Board the Comptroller's lack of decision-making, in respect of NTBC's applications to abandon its water licences, may have been an appealable order under section 105(1) of the *WSA*, but a conclusive decision on this will depend on an analysis of the evidence and more detailed submissions to be provided by the parties at a hearing on the merits of the appeal(s).

*Were the appeals filed within the statutory timeframe?*

#### Positions of the Parties

[119] NTBC argues that it filed its appeals within the statutory timeframe of 30 days.

[120] While the Comptroller maintains that only one of the three "decisions" identified by NTBC constitutes an appealable order, the Comptroller submits that, if the Board finds there was more than one appealable order in the December 1, 2020 letter, NTBC brought its appeal within 30 days.

Panel's Findings

[121] As I have concluded that the Comptroller's comment that NTBC remained a member of Allendale at the time the 2018 Assessment was issued was not an "order" within the meaning of the *WSA*, I do not need to consider that comment in weighing this issue.

[122] Based on the evidence available to me, it seems that the Comptroller's December 1, 2020 letter confirming the 2018 Assessment was when NTBC first became aware that the Comptroller had not decided its abandonment applications in time to affect its liability under the 2018 Assessment. I am, accordingly, satisfied that NTBC filed an appeal within the applicable statutory timeframe, from that date.

[123] As the parties agree, I see no reason to discuss the matter in greater detail.

**DECISION**

[124] I have considered all evidence and submissions made in advance of this decision, whether or not it was specifically referenced in my decision.

[125] For the reasons provided above, I conclude that the second appealed "decision" of the Comptroller, his comment that NTBC remained a member of Allendale when the 2018 Assessment was issued, is not an appealable order under the *WSA*. That appeal is accordingly dismissed under section 31(a) of the *Administrative Tribunals Act*. The issue may be considered within the context of the first appealed "order" of the Comptroller, his confirmation of the 2018 Assessment.

[126] Furthermore, I conclude that the third appealed "decision" of the Comptroller, his non-decision in respect of NTBC's applications to abandon water rights granted under various licences, should not be dismissed under section 31(a) of the *Administrative Tribunals Act*. This jurisdictional question is reserved, pending additional evidence and submissions to be provided to the Board in the course of the appeal.

"Darrell LeHouillier"

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Darrell LeHouillier, Chair  
Environmental Appeal Board

April 6, 2021