Environmental Appeal Board

PRACTICE AND PROCEDURE MANUAL

July 1, 2016
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DISCLAIMER

The legislation referred to in this Manual is subject to amendment from time to time and to judicial interpretation. The Manual may not reflect recent amendments to the legislation and should not be relied upon as an accurate statement of the existing law. It is a guide to the Board's practices and procedures only. An official version of the legislation may be obtained from Crown Publications or online through BC Laws (http://www.bclaws.ca/).

1.0 INTRODUCTION

The Environmental Appeal Board (the "Board") was established in 1982, and is continued under section 93 of the *Environmental Management Act*, S.B.C. 2003, c. 53. It is a specialized quasi-judicial tribunal with statutory authority to hear appeals from administrative decisions made under various environmental statutes.

The appeal process is governed by the legislated requirements set out in the *Environmental Management Act*, the *Environmental Appeal Board Procedure Regulation*, the *Administrative Tribunals Act*, as well as by the common law principles of procedural fairness and natural justice. However, subjects such as the type of decisions that are appealable to the Board, who can appeal the decisions, the time for filing an appeal, whether the Board can issue a stay of the decision, and the Board's specific decision-making powers, are set out in the individual statutes that provide a right of appeal to the Board (e.g., the *Water Sustainability Act*, the *Wildlife Act*, the *Environmental Management Act*, the *Mines Act*, etc.).

In addition to hearing appeals, the Board produces an annual report which is provided to the Legislative Assembly. A copy of the annual report is posted on the Board's website (http://www.bceab.ca/), and is available upon request.

To ensure that the appeal process is open and understandable to the public, the Board has developed this Manual. It contains information about the Board itself, the legislated procedures that the Board is required to follow, the Board's Rules created pursuant to section 11 of the *Administrative Tribunals Act*, and the policies the Board has adopted to fill in the procedural gaps left by the legislation and the Rules.

Parties that are involved in the appeal process can expect the Board to follow the legislated procedures, the Rules, and the policies set out in this Manual. If a matter arises during the course of an appeal that is not addressed by the legislation, the Rules, or the policies and procedures set out in this Manual, the Board will do whatever is necessary to enable it to adjudicate fairly, effectively and completely on the appeal. Further, the Board may dispense with compliance with any or all of a Board policy or procedure when it is appropriate in the circumstances.

The Board will make every effort to process appeals in a timely fashion and issue decisions expeditiously. With the cooperation of the parties and their attention to the procedures and policies outlined in this Manual, the Board will be able to achieve this goal.

2.0 THE BOARD

The Board is independent, in that it is not part of the Ministries or other authorities (e.g., Metro Vancouver) that make the decisions that can be appealed to the Board,

and it does not have any of the information or documents considered by those original decision-makers. The Board was created as a separate entity to ensure that it could hear appeals from those original decisions in an independent and fair manner. The Board is committed to providing a fair, impartial and independent appeal process.

Members

The Board consists of a full-time chair, part-time vice-chair(s) and a number of part-time members. According to Part 2 of the *Administrative Tribunals Act*, the chair is appointed by Cabinet after a merit-based process for an initial term of 3 to 5 years. The vice-chair(s) and other part-time members are appointed by Cabinet, in consultation with the chair, after a merit-based process for an initial term of 2 to 4 years. All of the members may be reappointed for additional terms of up to 5 years.

The Board has a roster of highly qualified members including professional engineers, biologists, foresters, and lawyers with expertise in the areas of environmental and administrative law. They bring with them a wide range of backgrounds and perspectives.

All Board members are required to faithfully, honestly and impartially perform their duties (section 30 of the *Administrative Tribunals Act*).

Role of the Chair

Under section 9 of the *Administrative Tribunals Act*, the chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among the members.

Role of the Vice-Chair

The vice-chair acts as chair of the Board in the chair's absence.

Composition of panels

Section 26 of the *Administrative Tribunals Act* states that the chair may organize the Board into panels consisting of one or more members.

If members of the Board hear an appeal as a panel, the panel has all of the powers and duties given to the Board. Further, an order, determination or decision of a panel is deemed to be an order, determination or decision of the Board.

When determining who will be on a particular panel, the chair will consider the background, qualifications and availability of the members. Oral hearings will be conducted by a panel of 1 or 3 members, depending on the length and complexity of the hearing. Written appeals are normally considered by a panel of 1, often the chair of the Board.

Quorum

Section 26 of the *Administrative Tribunals Act* provides that, if one member of a three-person panel is unable to complete the member's duties, the remaining members of the panel may continue to hear and decide the matter with the consent of the Board's chair.

If the panel is comprised of one member, the hearing may continue with a new member provided that all parties consent.

Withdrawal or disqualification of a board member on the grounds of bias

If the chair or a member of a panel becomes aware of any facts that would lead an informed person, viewing the matter reasonably and practically, to conclude that a member, whether consciously or unconsciously, would not decide a matter fairly, the member will be prohibited from conducting the appeal unless consent is obtained from all parties to continue. In addition, any party to an appeal may challenge a member on the basis of a real or reasonable apprehension of bias.

To raise an allegation of bias during a hearing, the party should make a motion to the panel promptly. All parties will be given an opportunity to make submissions on the motion before a decision is rendered.

If the panel determines that the allegation has merit, the panel member will disqualify him/herself and withdraw from the panel hearing the appeal, unless consent is obtained from all parties for that member to continue. If the parties do not consent, the remaining members of the panel may continue with the hearing, provided there are enough panel members to constitute a quorum. Alternatively, the hearing will be adjourned until a new member is selected by the chair.

Communicating and filing documents with the Board

All appeal-related correspondence **must** be sent to the Board, and addressed to the Chair, the panel chair (if the hearing has commenced), the Board's Registrar, or staff in the Board office. Correspondence must **not** be sent to individual Board member's private residences, email addresses or offices. Board members will not contact a party, accept personal telephone calls from a party, or attend private meetings with a party while that party is involved in the appeal process. Nor will a member discuss his or her reasons for a decision. Once a decision is rendered in an appeal, the decision "speaks for itself".

Rule 10 [Filing documents with the Board]

To ensure that the appeal process is kept open and fair to the parties and participants, any correspondence sent to the Board in relation to an appeal must be copied to all other parties and participants to the appeal. Correspondence sent to

the Board should include the appeal file number (found in the upper right hand corner of the Board's correspondence).

Letters, submissions and all other materials (defined generally as "documents" in the Rules) may be sent to the Board by mail, courier, fax, email or may be hand delivered. However, if the total number of pages being sent by email is greater than 10, a printed copy (hard copy) must also be sent to the Board, unless the Board approves otherwise.

If the Board requires multiple copies of a document to be provided to the Board, a copy of the document may be sent to the Board by email or by fax; however, the required number of paper copies must also be provided to the Board by mail, courier or hand delivery. The Board will not make additional copies. In addition, any attachments emailed to the Board must be in a format supported by the software used by the Board (contact the Board for the formats which may be used).

Rule 10 also sets out when a document is deemed to be delivered to the Board. It states that if a document is sent to the Board by fax or email, the document is not considered delivered until the transmission is received by the Board, regardless of the date or time that it is shown to have been sent. Further, if a document is received by the Board after the business day (defined in Rule 1 [Definitions] as 8:30 am to 4:30 pm, Monday through Friday, excluding public holidays"), the document is deemed to be delivered on the next business day.

The Board's powers and order-making authority

In addition to the common law powers given to tribunals to determine their own procedures and control their own processes, the Board has been granted broad powers to make orders and decisions under a number of statutes.

Under the *Administrative Tribunals Act*, the Board has the power to make orders to "facilitate the just and timely resolution of an application". In particular, section 14 of the *Administrative Tribunals Act* states that the Board has the power to may make any order:

(a) for which a Rule is made by the Board;

(b) for which a Rule is prescribed under section 60 of the *Administrative Tribunals Act*; or

(c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.

Section 15 of the *Administrative Tribunals Act* allows the Board to make interim orders in an appeal. In addition, sections 16 and 17 of the *Administrative Tribunals Act* give the Board the power to make consent orders and orders incorporating the terms of a settlement.

Under all of the statutes except the *Mines Act*, the Board has the power to:

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

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

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

Under the *Mines Act*, the Board has the power to "confirm, vary or rescind" the decision under appeal.

Board office

The Board shares an office and staff with the Forest Appeals Commission, the Oil and Gas Appeal Tribunal and a number of other administrative tribunals. The combined office has a small full-time staff consisting of an Executive Director/General Counsel, Registrar, Office Administrator, Manager of Research and Mediation, Research Officer, and support staff. The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board and the other tribunals administered through the office.

The Board's contact information is as follows:

4th Floor, 747 Fort Street
Victoria BC
V8W 3E9
Phone: (250) 387-3464
Fax: (250) 356-9923
Website: http://www.bceab.ca
Email address: info@bceab.ca

The office's mailing address is:

PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

3.0 PUBLIC PROCEEDINGS/FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

Public Proceedings

The appeal process is public in nature. In accordance with procedural fairness and Rule 10 [Filing documents with the Board], information provided to the Board by one party or participant must also be provided to all other parties and participants to the appeal. Therefore, no party or participant should expect that any information

provided to the Board in the context of the appeal will be kept private or confidential, except in special circumstances that are described below. Further, section 41 of the *Administrative Tribunals Act* requires oral hearings to be open to the public and for the Board to make a document submitted in a hearing accessible to the public subject to certain exceptions.

Freedom of Information and Protection of Privacy

The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. Information may be requested by a member of the public from an appeal file. The "appeal file" is the record of communications maintained by the Board regarding an appeal, including all communications filed with the Board, or delivered by the Board to the parties or participants, except for information:

- received in confidence pursuant to section 42 of the *Administrative Tribunals Act*;
- received by the Board as part of a settlement (mediation) process (section 29 of the *Administrative Tribunals Act*); or
- falling under an exception in the *Freedom of Information and Protection of Privacy Act*.

The names of parties, participants, representatives and witnesses will appear in the Board's published decisions which are posted on its website, and may appear in its annual report. Some Board decisions may also be published in legal journals and on law-related websites (e.g., LexisNexis® Quicklaw®).

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

4.0 STARTING AN APPEAL

What can be appealed

Section 93(1) of the *Environmental Management Act* gives the Board the power to hear appeals from decisions made by government officials under various statutes. The Board currently has jurisdiction to hear appeals made under eight statutes:

Environmental Management Act, S.B.C. 2003, c. 53

Greenhouse Gas Industrial Reporting and Control Act, S.B.C. 2014, c. 29

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

Integrated Pest Management Act, S.B.C. 2003, c. 58

Mines Act, R.S.B.C. 1996, c. 293

Water Sustainability Act, S.B.C. 2014, c. 15

Water Users' Communities Act, R.S.B.C. 1996, c. 483

Wildlife Act, R.S.B.C. 1996, c. 488

The types of decisions that are appealable to the Board vary from statute to statute. To determine whether a particular decision may be appealed to the Board, the statute under which the decision was made must be consulted.

Who can appeal

The statute that provides for an appeal to the Board will also specify who can appeal: who has "standing" to appeal. To determine whether a particular person (including corporations and registered societies) may appeal a decision to the Board, the statute under which the decision was made must be consulted.

If a person does not fall within the group of persons granted standing to appeal under the statute, the Board cannot accept the appeal.

Time limit for filing the appeal

Every appeal to the Board must be filed within the time allowed by the statute that authorizes the appeal. Therefore, to appeal a decision, a party must file a notice of appeal with the Board within the time frame specified in the individual statute.

The Board does not have the power to extend the time limits.[1] If a notice of appeal is not received in the Board office within the time specified, the right to appeal may be lost.

Note: *If "notice" of the government official's decision under the Environmental Management Act, Water Sustainability Act, Wildlife Act, or the Greenhouse Gas legislation, is sent by registered or certified mail to the last known address of the person, the notice is deemed to be served on the person on the date it is actually received by the person or 14 calendar days after the notice was deposited with Canada Post, whichever is earlier. If the 14th calendar day falls on a weekend or public holiday, the notice is deemed to be served on the next calendar day that is not a weekend or public holiday.*

If the delay in filing an appeal is due to improper posting of a notice required by the legislation, the person who wishes to appeal should file a notice of appeal and explain why the posting was defective and when the person first became aware of the decision he or she wishes to appeal. The Board will consider the circumstances and whether the person was prejudiced before determining whether the appeal was filed within the appeal period.

[1] Section 24 of the *Administrative Tribunals Act* provides the power to extend the time to file an appeal, but this section does not apply to the Board.

How to file an appeal

In accordance with section 22 of the *Administrative Tribunals Act*, Rule 5 [Starting an appeal], and section 2(1) of the *Environmental Appeal Board Procedure Regulation*, to start an appeal, a person must file a notice of appeal with the Board. A notice of appeal has been created by the Board and titled "Form 1". If Form 1 is not used, the notice of appeal **MUST** be in writing and include:

(a) the appellant's name, address, and telephone number;

(b) if the appellant is represented by a lawyer or agent, the name and daytime/business telephone number of the representative;

(c) the address to which all official letters and documents are to be sent, which may be the person's current postal address, fax, or email;

(d) the identity of the decision that is being appealed (e.g., identify the name of the decision-maker, date of decision, what is the decision about);

(e) a description of what is wrong with the decision and why it should be changed (the grounds for appeal and particulars);

(f) a description of what the appellant wants the Board to order at the conclusion of the appeal (the remedy sought);

(g) the signature of the appellant or the appellant's representative; and

(h) a $25 filing fee for each decision being appealed (see "Appeal fees", below).

The Board also asks for the following information to be included:

- an email address (if available) for the appellant and/or the appellant's representative;
- the date that the appellant was notified of the decision; and
- a copy of each decision being appealed.

A notice of appeal may be filed by regular mail, registered or certified mail, courier, fax, hand delivery, or email.

If the appeal is not commenced in accordance with the requirements of section 22 of the *Administrative Tribunals Act*, the Rules, and the statute under which the decision was made, the Board may not have jurisdiction to hear the appeal, regardless of the merits of the appeal.

Filing fee

For a notice of appeal to be complete, it must include the filing fee of $25. This fee is required by section 2(1) of the *Environmental Appeal Board Procedure Regulation* and cannot be waived by the Board. The fee may be paid by cheque, money order or bank draft made payable to the Minister of Finance.

If the notice of appeal is delivered to the Board by fax or e-mail, the filing fee must be sent separately. Until the fee is received, the notice of appeal is deficient (see "Incomplete/deficient notice of appeal", below).

Acknowledgement/Notification of the appeal (and file number)

When the Board receives a notice of appeal, it will assign a file number to the appeal. In accordance with Rule 6 [Acknowledgement of appeal], the Board will then write to the appellant to acknowledge receipt of the appeal. The file number will appear in the upper right corner of the letter. A party must include this file number on all subsequent correspondence with the Board.

Pursuant to this Rule and section 2 of the *Environmental Appeal Board Procedure Regulation*, the Board will also send notification of the appeal to the government decision-maker whose decision is being appealed, to the person who is the subject of the decision (if that person is different from the appellant), to the relevant ministers, and to any persons identified as being potentially affected by the Board's decision on the appeal, including objectors under the *Water Sustainability Act*. To determine other parties who may be potentially affected by the appeal, the Board will ask for the decision-maker's input.

Incomplete (deficient) notice of appeal

If the notice of appeal does not contain the required information or the required fee, it is considered deficient. In accordance with section 22(4) of the *Administrative Tribunals Act*, the chair (or the chair's delegate) will write to the appellant and identify:

(a) the deficiencies; and

(b) the date within which the deficiencies must be corrected.

If the deficiencies identified by the chair are not corrected by the date specified, the appeal may be deemed to be abandoned.

Filing a notice of appeal that is deficient will result in delays as the Board will not take any action on the appeal until the deficiencies are corrected.

Rejection of a notice of appeal

In accordance with section 31 of the *Administrative Tribunals Act*, the Board will reject a notice of appeal (summarily dismiss the appeal) if it is clear that:

(a) the notice of appeal was filed after the time limit for filing an appeal has expired;

(b) the appellant does not have standing to appeal; or

(c) the Board does not have jurisdiction over the subject matter of the appeal or the remedy sought.

As required by section 31 of the *Administrative Tribunals Act*, before making a decision to summarily dismiss an appeal, the Board will give the appellant an opportunity to make submissions. The Board may provide the respondent, and any other parties, with an opportunity to respond. It may also give participants an opportunity to respond, depending on the circumstances.

When a notice of appeal is rejected, the Board will provide the appellant with written reasons for its decision.

Objection to the appeal by parties

Under section 31 of the *Administrative Tribunals Act*, the Board may dismiss all or part of an appeal on the grounds that it is not within the Board's jurisdiction any time after the appeal is filed.

If a party has information or an argument that may call into question the Board's jurisdiction over an appeal (e.g., no appealable decision was made, the appellant does not have standing, the appeal was filed out of time, etc.), that information should be provided to the Board as soon as possible in the appeal process in an "application to summarily dismiss the appeal". The application must include the information set out in Rule 16 [General application procedure]. Failure to provide this information and to challenge jurisdiction as soon as possible in the process may result in an unnecessary hearing, at significant cost to all involved.

Before making a decision on the application, the Board will give the appellant an opportunity to make submissions on the application. This is required under section 31 of the *Administrative Tribunals Act*. If the Board dismisses all or part of the appeal, it must provide written reasons for its decision.

Summary dismissal of all or part of an appeal

In addition to the power of the Board to reject/dismiss an appeal on the grounds of lack of jurisdiction (see above "Rejection of a Notice of Appeal"), section 31 of the *Administrative Tribunals Act* allows the Board to dismiss all or part of an appeal at any time after the appeal is filed if the following apply:

- the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
- the appeal was made in bad faith or filed for an improper purpose or motive;
- the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
- there is no reasonable prospect the appeal will succeed;

- the substance of the appeal has been appropriately dealt with in another proceeding.

A party or participant may apply for all or part of an appeal to be summarily dismissed in accordance with Rule 16 [General application procedure]. As required by section 31 of the *Administrative Tribunals Act*, the Board will give the appellant an opportunity to make submissions on the application before the Board makes a decision on the application. If the Board dismisses all or part of the appeal, it will provide written reasons for its decision.

Representatives/legal counsel

According to section 32 of the *Administrative Tribunals Act* and Rule 7 [Representation before the Board], a party or participant may represent him or herself (i.e., present their own case) in an appeal, or may be represented by legal counsel or an agent (spokesperson). Under Rule 7, there is certain information required from a representative. If a party or participant has a representative, all correspondence in the appeal will be provided to the representative. It will be up to the representative to provide the party or participant with the correspondence.

The Board will make every effort to keep the process open and accessible to parties that are not represented by a lawyer.

Amending the Notice of Appeal (adding grounds for appeal)

The grounds for appeal presented in the original notice of appeal should be complete. However, the Board recognizes that there may be occasions when additional grounds of appeal are identified after that time.

To ensure that the other parties have adequate notice of the new grounds for appeal and have an opportunity to prepare their respective cases, an appellant should file an amended notice of appeal with the Board as soon as possible. Delay in notifying the Board, and the other parties, of the new grounds may result in a postponement or adjournment of the hearing.

When does an appeal act as a stay?

In most cases, the government official's decision under appeal remains in effect and enforceable unless the Board orders a "stay" of that decision (section 25 of the *Administrative Tribunals Act*). The exceptions are appeals of administrative monetary penalties issued under the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Integrated Pest Management Act*, the *Mines Act* and the *Water Sustainability Act,* which are automatically stayed upon appeal, and decisions made under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, which cannot be stayed by the Board. In addition, the Board has no power to order a stay of a notice of contravention under the *Mines Act*.

For further information on how to apply for a stay, see Rule 16 [General application procedure] and the procedure described in section 7.0 of this Manual (below).

5.0 PARTIES, PARTICIPANTS AND INTERVENERS

Parties to the appeal

There are always at least two parties to an appeal: an appellant and a respondent. The "appellant" is the party that appeals the decision of the government official by filing a notice of appeal with the Board. The "respondent" is the government official who made the decision under appeal.

Other parties may be added in certain circumstances. They are referred to as "third parties".

The Board may also invite other persons to participate in an appeal if the Board is of the view that the person is not directly affected by the appeal, but is potentially affected and/or has a specific interest or involvement in the subject matter of the appeal. They are referred to as "participants".

For appeals under the *Mines Act*, the Board may also add "interveners".

Adding parties, participants and interveners to an appeal

Under section 94(1)(a) of the *Environmental Management Act*, the Board has the discretion to invite any person to be heard in the appeal. This may be done on the Board's initiative or as a result of an application.

If an appeal is not filed by the recipient of the decision under appeal, the Board will add that person as a third party. That person is normally directly affected by the Board's decision on the appeal and must be given an opportunity to be heard. The Board will also add any other person that is identified as being directly affected by the appeal as a third party.

A person that may be impacted or affected by the appeal in a relatively minor way, or that only has a particular interest or particular information relevant to an appeal, may be invited to participate, but on a limited basis.

Further, the Board may allow people to "intervene" in an appeal under the *Mines Act*. To be an intervener, the person must meet the test set out in section 33 of the *Administrative Tribunals Act*. That is:

(a) the intervener can make a valuable contribution, or bring a valuable perspective, to the appeal; and

(b) the potential benefits of the intervention outweighs any prejudice to the parties caused by the intervention.

How to apply

A person may apply to be added as a party or participant (or intervener in a *Mines Act* appeal) in accordance with Rules 16 [General application procedure] and 9(2) [Adding or removing parties or participants to an appeal].

When deciding whether to add a person as a party or participant to an appeal, the Board will consider:

- the degree to which the person may be impacted or affected by the Board's decision on the appeal;
- whether the person is likely to make a relevant contribution to the Board's understanding of the issues in the appeal;
- the timeliness of the application;
- the prejudice, if any, to the other parties;
- whether the interests of the person can be adequately represented by another party and/or will be duplicative or repetitive;
- the person's desired level of participation in the appeal;
- whether allowing the person's participation in the appeal will delay or unduly lengthen the proceedings; and
- any other factors that are relevant in the circumstances.

When deciding whether to allow a person to intervene in an appeal under the *Mines Act*, the Board will consider whether the person's intervention will assist the Board by offering evidence or argument relevant to the appeal, whether their participation will unnecessarily delay the appeal, whether their evidence or argument will repeat or duplicate evidence or argument presented by other parties or participants, whether the parties will be prejudiced by the intervention, and any other factors which are relevant in the circumstances or required by the legislation.

Prior to permitting a person to participate in an appeal as a party, participant, or intervener, the Board may provide the other parties to the appeal with an opportunity to comment on the application.

If the Board allows a person to participate in the appeal as a party, participant, or intervener, it will advise of any terms, conditions, or limitations placed on that participation, intervention or status in the appeal.

Applying to remove a party, participant or intervener

A party may apply to the Board to remove another party, participant or intervener from the appeal in accordance with Rule 9 [Adding or removing parties or participants to an appeal].

In accordance with Rule 9(5), the application must explain why the person to be removed is not, or has ceased to be, a proper or necessary party or participant to the appeal. The application should be made as soon as possible in a proceeding to avoid unnecessary expense and delay.

Change in contact information

In accordance with Rule 8 [Change in contact information], all parties, participants and interveners must immediately notify the Board of any change to their address for delivery or other contact information. This will ensure that the Board is able to effectively communicate with all parties, participants and interveners throughout the appeal process.

Delivering documents to the parties, participants and interveners

Note: for the purposes of the Rules, the definition of "participant" includes an intervener in a *Mines Act* appeal.

Delivery between parties & participants & interveners

According to Rule 11 [Delivering documents to parties and participants], anything that is to be sent/delivered to another party or participant, must be sent to their "address for delivery" unless the party or participant consents to an alternative location or the Board orders otherwise. An address for delivery may be the person's current address, fax number, or email address.

If an address for delivery has not been specifically identified by a party or participant, the definition of "address for delivery" in Rule 1 [Definitions] allows this to be "inferred from the party or participant's usual method of delivering documents to the Board and/or to the other parties and participants".

Rule 11 also allows the Board to make an order directing that documents be delivered by fax or email, subject to any terms, conditions or limitations that are appropriate in the circumstances. This will be considered by the Board if communicating with a party or participant is time sensitive and/or if there have been problems with delivery of documents through their preferred method. If the Board orders delivery by fax or email, the Board will attempt to advise the person of this decision by telephone.

Delivery by the Board to the parties & participants & interveners

If the Board is "required" to serve, deliver or otherwise provide a document to the parties or participants, sections 19 and 20 of the *Administrative Tribunals Act* explain how the Board is to effect that service, and when failure to properly serve a document may invalidate a proceeding. Under section 19(5), a person may dispute that he or she received the document from the Board within the deemed date of

delivery due to certain prescribed circumstances. Rule 11(5) requires this dispute to be provided to the Board "as soon as practicable".

If the Board is not "required" to serve a document, Rule 11 applies to the Board.

When delivery of a document to a party, participant or intervener is complete

Rule 11 also explains when a document delivered to a party or participant is deemed to be complete. If a document is not received by a person within the business day (defined in Rule 1 [Definitions] as 8:30 am to 4:30 pm, Monday through Friday, excluding public holidays), it is deemed to be delivered on the next business day.

For documents "required" to be sent by the Board, section 19(2) and (3) of the *Administrative Tribunals Act* establishes when that document is deemed to be received by the recipient, whether it is sent by electronic transmission or by regular mail. Section 20 of the *Administrative Tribunals Act* describes the situations when the Board's failure to serve the document in accordance with section 19 does not invalidate the proceeding.

If the Board is not "required" to serve a document, Rule 11 applies to the Board.

6.0 APPLICATIONS: GENERAL

There are a multitude of different orders, directions, or decisions that can be sought by the parties during the course of an appeal. Sections 14 and 15 of the *Administrative Tribunals Act* give the Board general order making powers. In addition to these general powers, there are various specific powers given to the Board in the *Administrative Tribunals Act*, other enactments, and the common law.

To ask for a particular order, decision, direction or exercise of discretion, a party, participant or intervener must make an application, in writing. Rule 16(2) sets out the basic requirements for making an application to the Board. They are:

(a) the grounds (the reasons) for the application;

(b) the relief requested (the nature of the order or direction);

(c) whether other parties and participants agree to it (if known); and

(d) any evidence to be relied upon.

When making an application, you should be aware that applications should be organized. This will not be difficult for a relatively short, simple application, such as an application to extend a deadline. However, for applications that require supporting documents, Rule 16(3) requires that the supporting documents be organized by either numbering all documents consecutively, or by dividing the documents using tabs.

If an application is contested and/or may raise issues of fairness, the Board will establish a submission schedule to allow the other parties to be heard. Participants and interveners may be offered an opportunity to be heard, depending upon the terms, conditions or limitations placed on their participation in the appeal, and whether the application may impact the participant.

Applications are normally conducted in writing and decided by the chair of the Board. If the subject matter of the application is such that oral evidence or argument would be helpful and appropriate, the parties may apply to have all or part of the application heard orally, by teleconference, or by videoconference (if available).

Note: Submissions and documents provided to the Board during preliminary applications (e.g., an application for a stay) are **not** provided to the panel that hears the merits of the appeal. Therefore, parties, participants and interveners that want to refer to previous submissions or documents must resubmit them during the written or oral hearing process.

7.0 APPLICATION FOR A STAY

Section 25 of the *Administrative Tribunals Act* states that an appeal does not operate as a "stay", or suspend the operation of the decision being appealed, unless the tribunal orders otherwise. A "stay" has the effect of postponing the legal obligation to implement all or part of the decision or order under appeal.

The Board has been given the power to stay a decision that has been appealed, except for decisions made under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, and a notice of contravention issued under the *Mines Act*. Administrative penalties imposed under certain statutes are automatically stayed, so do not require an order by the Board (see also, "When does an appeal act as a stay?" in Section 4.0 of this Manual).

A party seeking a stay must apply to the Board in accordance with Rule 16 [General application procedure].

When an application for a stay is made, the parties will be asked to address the test set out by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385. That is:

- whether the appeal raises a serious issue;
- whether the applicant for a stay will suffer irreparable harm if a stay is refused; and
- whether the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted (the "balance of convenience" test).

This test from *RJR-Macdonald Inc. v. Canada (Attorney General)* was adopted by the Board in *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management*, (Appeal No. 97-WAS-05(a), June 5, 1997) (http://www.bceab.ca/decision/97was05a/), and has been adopted by the Board in every stay decision since then.

When addressing the second issue of "irreparable harm", the party seeking the stay must explain what harm it will suffer if the stay is refused, and why this harm is "irreparable" (i.e., it could not be fixed/remedied if the party ultimately wins the appeal).

When addressing the issue of "balance of convenience", the party applying for the stay must show that they will suffer greater harm if the Board refuses to grant a stay, than the harm that would be suffered by the other parties or the environment if the Board grants the stay.

The Board will notify all parties of the application and provide them with an opportunity to respond to the application. In particular, the other parties will be asked to outline their positions on whether a stay should be granted, and they will also be asked to address the issues identified above: serious issue, irreparable harm and the balance of convenience.

Participants and interveners may be offered an opportunity to be heard, depending upon the terms, conditions or limitations placed on their participation in the appeal, and whether the application may impact the participant.

Normally an application for a stay will be conducted in writing, rather than in an oral hearing.

The Board will provide written reasons for its decision.

8.0 SCHEDULING A HEARING

Type of appeal hearing

Under section 36 of the *Administrative Tribunals Act* and Rule 17 [Scheduling a hearing], an appeal hearing may be conducted by way of an in-person (oral) hearing, written submissions (a written hearing), telephone or videoconferencing, or a combination thereof. The Board will determine the appropriate type of hearing for the appeal, and will provide a written notice to the parties, participants and interveners. Currently, the Board does not have videoconferencing available in its office or hearing room.

When considering the type of hearing to be held, the Board will give careful consideration to balancing the process to be followed with the nature and complexity of the appeal, any views expressed by the parties, the likelihood that there will be

conflicting evidence and/or credibility issues that will need to be assessed, the number of parties involved in the appeal, whether there are any language or literacy barriers to a particular type of hearing, and the potential for community interest in the appeal.

If there are issues of credibility, complex issues that require oral evidence or other circumstances that warrant having the parties, participants and the panel to be in the same room, the Board will schedule an oral hearing. If there are serious impediments to holding an in-person hearing in one location, the Board will consider an application for a hearing by videoconference (if available). Depending on the circumstances, the requesting party(s) may be required to bear all or part of the costs of videoconferencing. Alternatively, the Board may consider dividing the hearing between two different locations.

When a hearing by written submission is being considered for a particular case, the chair may request input from the other parties and participants before making a decision on whether to proceed in this manner.

If a party wants to request a particular type of hearing, the request should be forwarded to the Board within a reasonable time after receipt of the complete notice of appeal or amended notice of appeal. The request should set out the reasons in support of the type of hearing proposed. (For more information about written and oral hearings, see sections 11.0 and 12.0 of this Manual, below.)

Request for expedited hearing

The Board will, where possible, accommodate applications for an expedited hearing. An application must be made in accordance with Rule 16 [General application procedure]. To ensure that the application proceeds expeditiously, it should clearly explain why the matter must be heard quickly, and provide the following information:

(a) the likelihood that there will be issues of credibility and/or technical evidence at the hearing;

(b) the desired type of hearing (oral, written, other);

(c) available dates for an expedited hearing; and

(d) an estimate of the number of days that would be required if an oral hearing is held.

When making a decision on the application, the Board will consider the reasons given for the urgency, the other parties' right to proper notice of the appeal and of the appeal hearing, and the rights of other appellants who are awaiting hearings.

Hearing *de novo* (a new hearing)

A hearing, written or oral, is generally conducted as a "new hearing" (see individual statutes providing an appeal to the Board). This means that, in addition to reviewing the evidence and decision of the decision-maker below, the Board may hear new evidence and argument that was not before the previous decision-maker, make findings of fact on the evidence presented to it, and decide questions of law. The Board may exercise any discretion that it has without regard to the evidence presented to, or the conclusions reached by, the decision-maker below.

However, the Board also has the discretion to conduct the appeal as an "appeal on the record"; that is, an appeal based solely on the information that was before the decision-maker below. If a party wants the appeal to be conducted on the record, rather than as a new hearing, an application must be made to the Board as soon as possible in the appeal process and in accordance with Rule 16 [General application procedure].

Joining or consolidating appeals

In accordance with section 37 of the *Administrative Tribunals Act* and Rule 12 [Joining or consolidating appeals], when the Board considers that two or more appeals are related to each other, involve the same or similar questions, or involve some of the same parties, it may combine the appeals to be heard together, or the Board may direct that one appeal be heard immediately after the other. The goal of joining appeals is to make the appeal process more efficient.

The Board will notify all parties if it decides to join the appeals to be heard together. A group appeal file number will be given to the joined appeals.

Objections may be made to the Board, in writing, as soon as practicable.

If the Board joins a number of appeals against one decision or order, the appellants may appoint one spokesperson for the group and make a joint presentation of evidence and argument. The Board encourages such actions as they will lead to a more efficient and effective hearing process.

9.0 DISPUTE RESOLUTION & SETTLEMENT

The Board encourages parties to resolve the issues underlying the appeal at any time in the appeal process. If the parties advise the Board that they have reached a settlement of all or part of an appeal, the Board must order that all or part of the appeal is dismissed (section 17(1) of the *Administrative Tribunals Act*). If the parties are unable to resolve the appeal on their own, the Board may provide the parties with some assistance.

The purposes of dispute resolution, also referred to as facilitated settlement, are to resolve the issues underlying the appeal and avoid the need for a formal hearing. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing; and
- pre-hearing conferences (discussed further under "Oral Hearing Procedure").

If a more formal mediation process is desired by the parties, section 28 of the *Administrative Tribunals Act* and Rule 14 [Facilitated settlement] allows the Board to appoint Board members or staff to conduct a facilitated settlement. The Board will not convene a settlement meeting (mediation) unless all parties to the appeal agree to participate.

In advance of the meeting, the Board may require that the parties sign an agreement to ensure that:

(a) the parties are willing to participate in the facilitated settlement process;

(b) any representative of a party has authority to settle the appeal; and

(c) the information exchanged during the facilitated settlement process will be kept confidential.

If a Board member conducts the facilitated settlement process and the appeal is not resolved, that member will not sit on the panel that hears the merits of the appeal without the written consent of all parties.

If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order, which is submitted to the Board for its approval (see Rule 15 [Consent orders] and "Consent orders" in the next section, below). Alternatively, the appellant may withdraw the appeal at any time (see "Withdrawing or abandoning an appeal" under section 15.0 of this Manual. See also the Information Sheet).

Confidentiality of settlement discussions

In accordance with section 29 of the *Administrative Tribunals Act*, any information received by any person in the course of attempting to reach a settlement of an appeal is confidential and may not be disclosed or admitted in evidence, except with the consent of the parties.

Consent orders

The Board may make consent orders on any matter under section 16 of the *Administrative Tribunals Act*, provided that the order is consistent with the enactment governing the appeal.

In addition, the Board may make orders specifically related to settlements under section 17 of the *Administrative Tribunals Act*. If the parties reach an agreement that will resolve the issues in the appeal and want the Board to endorse the agreement, this may be done by way of a consent order. Section 17(2) of the *Administrative Tribunals Act* states that the Board may authorize an order that includes the terms of settlement if it is satisfied that the order is consistent with the enactments governing the appeal.

Under Rule 15 [Consent orders], consent orders must contain the information consented to by the parties, be signed by the parties and submitted to the Board for its consideration and approval. The date must be left blank and will be filled in if the Board endorses the order.

If the Board declines to make the order, both sections 16 and 17 of the *Administrative Tribunals Act* require the Board to provide the parties with reasons for doing so.

If the order is authorized by the Board, the Board requires an electronic version of the unsigned consent order to be provided to the Board in Word format, for posting on the Board's website.

When the Board approves a consent order, all or part of the appeal, as specified in the order, will be closed. The Board will provide a copy of the approved order to the parties. The consent order will also be posted on the Board's website and may be included in the Board's annual report.

10.0 OBTAINING DOCUMENTS BEFORE THE HEARING

Each party, participant and intervener is responsible for obtaining the documents needed to support their case. If they do not have certain documents, they must ask the person or persons in possession and control of the documents to voluntarily provide them. The Board encourages parties and participants to co-operate in the exchange of information as soon as possible in the appeal process to ensure that the matter proceeds in an informed and expeditious manner. The failure or refusal to produce documents prior to a hearing may result in delays.

If the request for the voluntary production of documents is refused, the requester may apply to the Board for an order.

Application for an order to produce documents or other things

Section 34(3)(b) of the *Administrative Tribunals Act* gives the Board the power to make an order, at any time before or during a hearing, requiring the production of documents or other things that are admissible and relevant to an issue in the appeal, and in a person's possession or control. As a result, if the documents sought are in

the possession and control of the decision-maker, a request under the *Freedom of Information and Protection of Privacy Act* is **not** required.

The Board considered the meaning of the words "possession or control" and "relevant to an issue in an appeal" at pages 13-16 in *Seaspan ULC and Domtar Inc. v. Director, Environmental Management Act*, (Decision Nos. 2010-EMA-004(a), 005(a), 006(a); and 2011-EMA-003(a), June 11, 2013)(http://www.bceab.ca/decision/2010ema004a_005a_006a_2011ema003a/) [*Seaspan*] and subsequent Board decisions. In *Seaspan*, the Board accepted that to have "possession" requires a proprietary interest in the document, and to have "control" is to have an enforceable right to obtain the documents from the person who has actual possession of them. Regarding relevance, the Board found that the question is whether it is "reasonable to suppose", that the document *may be relevant* to proving or responding to an issue in the appeal.

An application for the production of documents or other items must be made in accordance with Rule 16 [General application procedure]. To ensure that the application proceeds in an expeditious manner, it should include the following information:

(a) the name of the person in possession or control of the documents or things;

(b) a reasonably detailed description of the documents or things that would enable a reasonable person to know what documents, things or information is being sought;

(c) the reasons why such materials are relevant to the subject matter of the appeal; and

(d) the attempts made to have the person voluntarily provide the document or thing. An order will not be granted unless the party or participant has first asked the person to voluntarily produce the documents or things.

If sufficient detail is not provided in the application, the Board may ask for additional information.

When deciding whether to issue an order for pre-hearing disclosure of documents or other things, the Board will consider whether the documents are relevant to an issue in the appeal, whether they are subject to disclosure protection under section 29 of the *Administrative Tribunals Act*, and any other factors that the Board considers relevant.

It is important to note that failure or refusal to produce documents prior to the hearing may result in delays and, possibly, a postponement or adjournment of the hearing.

If an order for the production of documents is granted, the person that requested the order will be responsible for serving it on the person who is subject to the order (i.e., the person in possession or control of the documents).

The person who is subject to the order may apply to the Board to amend the terms of the order or to have it cancelled. The application may be made before or during the hearing. If the Board is satisfied that the documents are not in the person's possession or control, are not relevant to the appeal, or are protected by a privilege at law, the Board may cancel or vary the order.

11.0 WRITTEN HEARING PROCEDURE

For specific written hearing requirements, see Rule 20 [Written hearings].

Scheduling written submissions

In some cases, the Board will decide that an oral hearing is not required to fairly decide the issues in an appeal. Section 36 of the *Administrative Tribunals Act* allows the Board to conduct an appeal on the basis of written submissions.

Written hearings are normally scheduled in cases where there are no language or literacy barriers for a party or participant, where credibility of the parties or witnesses is not a significant factor in the appeal, there is no dispute about material facts, the issues to be decided have been dealt with in previous appeals, or there are purely legal questions to be decided.

If the Board determines that the appeal can be heard fairly by way of written submissions, it will provide the parties with a submission schedule. In making the schedule, the Board will ensure that each party to the appeal is given an opportunity to review the written submissions from the other parties, and is given an opportunity to respond to those submissions from parties adverse in interest. The submissions will normally be scheduled to proceed in the following order:

(1) appellant's submissions

(2) respondent's and third party's submissions

(3) appellant's submissions in reply (no new evidence is to be included)

In accordance with Rule 20, all submissions must be delivered to the Board office by the dates specified, unless the Board grants an extension of time (see "Extension of time to make submissions" below). Failure to provide submissions on an appeal may result in the appeal being dismissed (if it is the appellant's failure), or a decision being made on the appeal without further notice (if it is another party or participant's failure). (See Rule 18 [Failure to participate in a hearing], and the information below.)

Submissions must be copied to the other parties, participants, and interveners, as well as to the Board, in the quantities specified. Once the deadlines have expired for making submissions, the written hearing is over.

Written hearings are normally decided by one member of the Board, often the chair.

How to apply for a written hearing

A party may request a written hearing in accordance with Rule 16 [General application procedure]. The request should be made to the Board as soon as possible in the process, and state: whether there are any issues of credibility to be decided, whether the material facts are in dispute, whether the issues to be decided have been dealt with in previous appeals, and/or whether the appeal raises purely legal questions.

Content of submissions

If an appeal is conducted by written submissions, the parties are required to present their **entire** cases in writing (Rule 20). This means that all evidence (which includes all means of proof including correspondence, maps, charts, graphs, affidavits, studies, reports, etc.), legal authorities, and argument that the party wants the Board to consider must be included in the submissions (for further information, see section 12.2 [Evidence] in this Manual (below)). Submissions and documents that were provided to the Board during preliminary applications (e.g., an application for a stay) are **not** provided to the panel that hears the merits of the appeal. Therefore, parties and interveners that want to refer to previous submissions or documents must resubmit them with during the written hearing process.

It is important to note that the Board does not receive the information considered by the previous decision-maker. To ensure that the Board considers those materials, a party must submit them to the Board as part of their case or ensure that one of the other parties or participants does so.

In addition to the materials that were before the previous decision-maker, the Board may consider new evidence and argument: evidence and argument that was not before the previous decision-maker.

Although expert evidence is not normally provided in a written hearing, if an expert report is to be provided, the deadlines and requirements for notice set out in Rule 25 [Expert evidence] apply. (See also the heading "Notification of expert evidence" in section 12.1 of this Manual).

An appellant's written submission should contain all evidence and argument in support of the grounds for appeal. It should also explain why the decision that has been appealed should be different, and how it should be changed (what remedy is being sought). A respondent's submission should provide all evidence and argument in support of the decision being appealed, and explain why the appeal should be

dismissed. A third party's submissions should explain that party's position on the evidence and argument provided by the appellant. A participant and intervener may address the submissions presented by the other parties in accordance with any terms or conditions set out by the Board. Any party may suggest alternatives to the decision being appealed or recommend additional terms or conditions.

Where there is more than one evidentiary document or legal authority provided with the written submission, Rule 20 requires the documents and authorities to be numbered consecutively, or divided into tabs. This allows the party to easily reference the attached documents and authorities in their submission.

Prior to making a decision, the Board will consider all of the submissions, weigh the evidence provided, and apply the correct burden of proof (see "Burden of Proof", below).

Notification of expert evidence (Rule 25)

In some cases, a party (or participant or intervener if approved by the Board) may wish to provide an expert report as part of their case. Rule 25 sets out the requirements for providing notice of an expert report. These requirements are further described in section 12.1 of this Manual under "Notification of expert evidence").

Joint books of documents and legal authorities

Parties, participants and interveners should refrain from photocopying a legal authority or document already provided to the Board in the submissions of another party, participant or intervener. Photocopying of legislation or policies should be limited to the sections that are considered pertinent and necessary to the Board's decision on the issues raised in the appeal. To reduce the unnecessary duplication of legal authorities and other documents, the Board asks that the parties, participants and interveners consider providing a joint book of documents and legal authorities to the Board where possible.

Additional information requested by the Board

Upon receipt of the written submissions, the panel considering the appeal may find that further information is required from one or more of the parties in order to make an informed decision on the appeal.

If the panel requests additional information from one or more of the parties, participants or interveners, all parties will have an opportunity to respond to that information (and participants and interveners, if allowed).

Extension of time to make submissions

If a party, participant or intervener is not able to deliver their submissions by the date specified by the Board, they must apply for an extension of time. The application should be made prior to the specified deadline.

In accordance with Rule 16 [General application procedure], the application must be in writing and include the following information:

(a) the reasons for extension;

(b) the length of the extension;

(c) whether the other parties to the appeal consent to the extension; and

(d) any evidence to be relied upon.

If the other parties do not consent, they may be provided with an opportunity to make submissions on their position with respect to the request.

When deciding whether to grant an extension, the Board will consider the adequacy of the reasons given for the extension, any prejudice to the other parties, and any environmental or other impacts that may result from an extension.

If an extension of time is granted to one party, participant, or intervener, the submission schedule for the others will be similarly extended unless the circumstances do not warrant a similar extension. The Board will provide written notice of the revised schedule.

Failure to file submissions

In accordance with Rule 18 [Failure to participate in a hearing], if the appellant has been given timely notice of the submission schedule and fails to deliver its written submissions by the specified date, the Board may proceed with the hearing, dismiss the appeal as abandoned, or make any order appropriate in the circumstances.

If the respondent, third party, participant or intervener has been given timely notice of the submission schedule and, without advance written notice and reasonable explanation, fails to deliver written submissions by the specified date, the Board may proceed to make a decision without further notice to them.

Application to cross-examine

If it becomes apparent that credibility is a significant factor in the appeal, the panel may, on its own initiative or at the request of a party, require evidence to be presented at an oral hearing to allow cross-examination of some or all of the witnesses.

If a party seeks to cross-examine an affiant on an affidavit included in the written submissions of another party, Rule 20 requires the party to apply to the Board in accordance with Rule 16 [General application procedure].

Role of precedent (previous decisions of the Board)

Although the Board may be bound by the decisions of certain courts, it is not required to follow (i.e., is not bound by) its past decisions or the decisions of other administrative agencies. While prior decisions of the Board may indicate how Board members will view particular types of cases, as a matter of law, the Board must decide each case on its own merits.

Burden of proof

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities".

Public access

In written hearings, the evidence, written submissions and decisions arising from the appeal are available to the public as described in section 3.0 of this Manual.

12.0 ORAL HEARING PROCEDURE

For specific oral hearing requirements, see Rule 19 [Oral hearings].

12.1 Pre-hearing

Scheduling an oral hearing

If the Board decides that an appeal will be conducted by full oral hearing, it will ask the parties and participants for an estimate of the amount of time that will be required for an oral hearing and their availability. The Board will attempt to accommodate the parties' schedules unless:

- there is some other reason to schedule a hearing within a particular time-frame; or
- the parties cannot agree on a specific date.

In these circumstances, the Board may set the hearing date without further consultation with the parties.

An oral hearing may be held at the Board office in Victoria or any other location in the Province. The location of the hearing will be determined on a case-by-case basis. Requests to have a hearing conducted in a particular location will be considered by the Board. Hearings conducted outside of Victoria are often held in meeting or conference rooms in hotels.

In accordance with Rule 17, the Board will provide the parties, participants and interveners with a Notice of Hearing, confirming the date, time and venue for the hearing. If there is some impediment to providing this notice in the usual way, section 21 of the *Administrative Tribunals Act* allows notice of hearing by publication.

Scheduling a hearing by telephone conference call

If all or part of an appeal will be held by way of a telephone conference call, the Board will set the date, time and dial-in information for the conference call, and notify the parties, participants and interveners of these details. It will also advise of any special requirements or conditions (Rule 17).

Scheduling a hearing by videoconference

If all or part of an appeal will be held by way of a videoconference, the Board will set the time, date, and place(s) for the hearing, and provide written notification to the parties, participants and interveners. It will also advise of any special requirements or conditions (Rule 17). Currently, the Board does not have videoconferencing capabilities in its office or hearing room.

Statement of Points and exchange of documents

In order to facilitate identification of the main issues and arguments in an appeal and ensure the hearing proceeds in an efficient and expeditious fashion, Rule 19(1) requires each party to provide pre-hearing submissions and documents. The pre-hearing submissions are referred to as a Statement of Points. The Statement of Points is intended to be a summary of the case that the party will be presenting at the hearing. It is to include the party's positions on the main issues, the party's witness list (which should include the party if the party will be testifying on his or her own behalf), and the legal authorities that will be relied upon at the hearing.

In addition, Rule 19 requires all parties to provide a copy of the documents that they will be referring to, or relying upon, at the hearing. It should be noted that submissions and documents that were provided to the Board during preliminary applications (e.g., application for a stay) are **not** provided to the panel that hears the merits of the appeal. Therefore, parties that want to refer to previous submissions or documents must resubmit them with during the Statement of Points process.

Under Rule 19, any affidavit evidence that will be relied upon at the hearing must also be provided with the Statement of Points. If a party seeks to cross-examine on an affidavit, the party must provide written notice of this request within a reasonable time after receiving the affidavit.

Unless the Board directs otherwise, two copies of the appellant's Statement of Points and documents must be provided to the Board, and one copy to each party, participant and intervener, at least **30** calendar days prior to the commencement of the hearing. The respondent, and all other parties to the appeal, must also provide two copies of their respective Statements of Points and documents to the Board, and one copy to each party, participant and intervener, at least **15** calendar days prior to the commencement of the hearing unless the Board directs otherwise.

In addition, pursuant to Rule 19(6), all parties, participants and interveners must bring one additional copy of all documents to the hearing (excluding legal authorities and Statements of Points) if the documents will be referred to or relied upon at the hearing. This copy will be provided to the official recorder and marked as an exhibit, if and when required.

As a matter of practice, the Board will send a letter to the parties confirming the due dates for each party's Statement of Points and documents, and the quantities required. The Board may alter the schedule if the circumstances warrant doing so.

Pursuant to Rule 19(5), the Board may require participants and interveners to provide a Statement of Points and documents in advance of the hearing. If so, it will notify them in writing.

If a party fails to file a Statement of Points in accordance with the Rules, the Board may take any action set out in section 18 of the *Administrative Tribunals Act* or in Rule

3 [Effect of non-compliance]. However, if the appellant fails to comply with the pre-hearing disclosure in Rule 19, the Board may allow the appeal to proceed to a hearing if it is satisfied that the other parties, participants and interveners have sufficient information to prepare for the hearing (Rule 19(7)).

Documents

As noted above, Rule 19 requires parties to disclose all documents to be referred to, or relied upon, at the hearing with their Statement of Points. This will ensure that all parties, participants and interveners will be prepared at the hearing. The types of documents that might be provided are: letters, memos, emails, notes to file, photographs, studies, reports, charts, articles, and any other materials that will be used to prove the person's case at the hearing.

If more than one document is provided, the documents must be organized by using an index and either numbering all documents consecutively, or by dividing the documents using tabs in accordance with Rule 19.

In addition, as noted above, one extra copy of the documents that will be referred to or relied upon at the hearing (excluding legal authorities and Statements of Points) must be brought to the hearing for the official recorder (Rule 19(6)).

The schedule for submitting documents with the Statement of Points does not preclude parties from the voluntary exchange of documents either before or after the 30- and 15-day deadlines. The Board encourages all those involved in the appeal to co-operate in the exchange of information as soon as possible in the appeal process to ensure that the matter proceeds in an informed and expeditious manner. A party, participant or intervener that is not able to obtain the documents required through a voluntary exchange may apply to the Board for an order to produce documents or other things under section 34(3)(b) of the *Administrative Tribunals Act* and Rule 16. See also "Obtaining documents before the hearing", in section 10.0 of this Manual.

Joint books of documents and legal authorities

Parties, participants and interveners should refrain from photocopying a legal authority or document already provided to the Board in the submissions of another party, participant and intervener. Photocopying of legislation or policies should be limited to the sections which are considered pertinent and necessary to the Board's decision on the issues raised in the appeal. To reduce the unnecessary duplication of legal authorities and other documents, the Board asks that the parties, participants and interveners consider providing joint books of documents and legal authorities to the Board where possible.

Pre - hearing conferences

Rule 13 [Pre-hearing conferences] states that the Board may, on its own initiative, or at the request of a party or participant, schedule a pre-hearing conference.

A pre-hearing conference is usually conducted by telephone, but may also be conducted in person in unusual circumstances. Attendance will generally be limited to one member of the Board and one representative from each party, participant and intervener to the appeal. Normally, the chair of the Board oversees the pre-hearing conference. These conferences may be recorded by an official recorder.

Pre-hearing conferences provide the parties, participants and interveners with an opportunity to clarify the hearing procedures, narrow the issues to be dealt with at the hearing, and discuss any preliminary concerns. They are intended to facilitate a just, expeditious and inexpensive disposition of the matter and the Board may make any recommendation, direction or order to achieve this objective.

Some matters that may be addressed in a pre-hearing conference include:

- defining and simplifying the issues to be determined at the hearing;
- scheduling the date, time and place for the hearing of the appeal;
- identifying and scheduling witnesses;
- arranging for the exchange of documents and expert reports;
- admitting evidence relevant to the hearing and consented to by the parties;
- admitting facts relevant to the hearing and consented to by the parties;
- determining the day-to-day conduct of the hearing;
- hearing applications on preliminary or interim matters, including applications to extend a time limit, produce documents or postpone the hearing date; and
- resolving the appeal (settlement discussions).

The Board will normally schedule a pre-hearing conference in complex cases or in cases that involve numerous parties and participants.

An application for a pre-hearing conference must be made in accordance with Rule 13; specifically, it must be in writing, provide the reasons for the pre-hearing conference, include possible dates for the conference as well as a list of the items to be discussed.

Pre-hearing conferences are of limited value unless all involved are fully prepared for a useful discussion of all items scheduled to be addressed, and are authorized to negotiate and make decisions with respect to those items. To be effective, the parties and participants must be open to discussing all items on the agenda.

If a Board member conducts a pre-hearing conference and settlement matters are discussed but the appeal is not resolved, that member will not sit on the panel that hears the merits of the appeal unless all parties provide their written consent.

These provisions do not preclude voluntary meetings between the parties. The parties are always free to discuss the case among themselves, and to try to resolve the appeal without the need for a hearing or decision by the Board.

Failure to attend pre-hearing meetings or conferences

If notice of a pre-hearing conference has been properly given and a party, participant or intervener fails to attend without advance written notice, the Board may proceed in their absence (Rule 13).

Notification of expert evidence (Rule 25)

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on a particular subject. To be an "expert" the person must have knowledge that goes beyond "common knowledge". (See also section 12.2 of this Manual for more information on expert evidence.)

If a party wants to submit an expert report at the hearing, and/or have an expert testify at the hearing without a report, this must be planned well in advance of the hearing. Anyone wishing to submit expert evidence must provide "notice" of that evidence almost three months before the hearing is scheduled to start. However, Rule 25(12) also allows parties to agree to different dates provided that the new dates do not impact the scheduled commencement of the hearing.

The purpose of this notice is to give the other parties sufficient time to review and consider the opinions and facts upon which the opinion is based, to determine whether they need to retain their own expert to provide reply evidence, and to prepare questions to ask at the hearing. It may also facilitate settlement discussions.

Under Rule 25, if a party intends to produce a written statement or report by an expert at a hearing, two copies of the statement or report must be provided to the Board (unless additional copies are required by the Board) and one copy to each of the parties, participants and interveners before the statement or report is given in evidence. The expert report must be provided **84** calendar days before the commencement of the hearing (or **84** calendar days before the appellant's first written submission is due if the hearing is in writing). The expert's qualifications must be included with the report.

If a party intends to call an expert witness at a hearing without a report, the party is required to provide notice that an expert will be called to give an opinion. The party must provide two copies of the notice to the Board (unless directed otherwise), and one copy to each of the parties, participants and interveners, at least **84** calendar

days in advance of the commencement of the hearing (or the appellant's first written submission is due in a written hearing). The notice must include:

(a) the witness's qualifications and areas of expertise;

(b) a written summary of the opinion to be given at the hearing; and

(c) the facts on which the opinion is based.

If a party intends to produce evidence of an expert in reply, the notice of expert reply evidence and/or any reply report must be delivered at least **42** calendar days before the commencement of the hearing (or **42** calendar days before the appellant's first written submissions are due in a written hearing), in the same quantities identified above, unless the Board directs otherwise. Notice of an expert reply must contain the information required above for the notice of an expert report or notice of expert testimony (without report), whichever applies.

Failure to provide reasonable notice of expert evidence or expert reports may result in a postponement/adjournment of the hearing or exclusion of the intended evidence.

***Note**: One additional copy of any notices of expert evidence, expert reports and expert qualifications must be brought to the hearing for the official recorder (see Rule 25).*

Because the Board has established its own rules for the introduction of expert evidence and the testimony of experts, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Board. If there is a conflict between the Board's rules and sections 10 or 11 of the *Evidence Act*, the Board's Rules on expert evidence apply.

Arranging for witnesses to attend a hearing

Arranging for the attendance of witnesses at a hearing must be performed by the parties (and participants and interveners, if authorized to call witnesses). It is up to the parties to ask a person or persons to voluntarily attend a hearing and to give evidence.

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may apply to the Board for an order requiring the person to attend the hearing and give evidence (a summons).

Application for an order requiring the attendance of a witness (summons)

The Board's power to order the attendance of a witness is found in section 34(3) of the *Administrative Tribunals Act* which states that, at any time before or during a hearing, but before its decision, the Board may order a person to attend a hearing to give evidence.

An application for an order requiring a person to attend a hearing to give evidence (a summons) must be made to the Board in accordance with Rule 16 [General

application procedure] and Rule 24 [Application for a summons (order to attend as a witness)].

Before applying for an order, the applicant must first ask the person to voluntarily attend as a witness. The request should be made in writing so the applicant can show that this step has been done. If the person refuses, an application may be made. Rule 24 requires the application to be made in writing, at least **60** calendar days before the hearing is scheduled to begin. The application must include the following information:

(a) the name and address of the person wanted as a witness;

(b) a brief summary of the evidence to be given by the person, and an explanation of why the evidence is relevant and necessary (e.g., Mr. Smith has lived in the area for 70 years and will be able to explain how the stream channel has changed);

(c) the attempts made to have the person voluntarily attend the hearing; and

(d) if required, a list of the particular documents or other things the person must bring with them to the hearing.

It should be noted that Rule 24(7) requires the party who applied for the order to pay any witness fees and expenses in accordance with Schedule 3 of Appendix C of the BC *Supreme Court Civil Rules*, B.C. Reg. 168/2009, enacted under the *Court Rules Act* unless certain exceptions apply or the Board directs otherwise. Therefore, if the applicant wants the Board to waive the requirement for payment of witness fees and expenses if an order is granted, the applicant should also make this request, with reasons, in the application.

When deciding whether to issue an order, the Board will consider whether the party has requested voluntary attendance/compliance before making the request to the Board, whether the information sought to be obtained through this person is relevant to the appeal, whether the person is reasonably likely to be able to supply the information, and any other factors that the Board considers relevant.

If the application is not made 60 calendar days before the hearing, the person applying for an order must include reasons for the delay. The Board may waive this requirement.

If an order requiring the attendance of a witness is granted, the party who requested the order is responsible for serving it on the person (witness) by leaving it with that person, or by leaving it at the person's usual residence, within a reasonable time before the date the person is required to appear (Rule 24(6)). As proof of service may be required if the person does not appear at the hearing, the person who serves the order should make a note of:

- the place, date and time of delivery;

- how the order was served (by giving it to the person or leaving it at their residence); and
- if the server gave the order to the person, how did the server know that it was the right person (for example, did the server know the person, or ask to see a driver's licence?).

Objecting to an order requiring attendance at a hearing (summons)

The person (witness) who is served with a summons ordered by the Board may apply to the Board for an order cancelling or varying the summons under Rule 24(8). The application may be made before or during the hearing and must set out the reason(s) the order should be cancelled or its terms should be varied, and must be sent to the person that requested the order.

The Board may cancel or vary the order if it is satisfied that the evidence sought from the person is not relevant, may be obtained through some other means, is protected by privilege, the person is not able to provide the information sought, or the attendance of the person will be unduly inconvenient.

Failure to comply with an order for attendance at a hearing (summons)

According to section 34(4) of the *Administrative Tribunals Act,* the Board may apply to the Supreme Court for an order directing the person or any directors and officers of a person, to comply with the Board's order.

Contempt

If a person ordered by the Board to attend as a witness fails or refuses to attend a hearing, take an oath or affirmation, answer questions, or produce the records or things in their custody or possession, the Board may apply to the court to have that person committed for contempt, as if in breach of an order or judgment of the court (section 49(1) of the *Administrative Tribunals Act*).

Security for costs

Under section 47.1 of the *Administrative Tribunals Act* and section 1 of the *Security for Costs (Administrative Tribunals) Regulation*, the Board has the authority to order an appellant, a participant or intervener to deposit a sum of money that the Board considers sufficient to cover all or part of the anticipated costs of the other parties and the anticipated actual costs and expenses of the Board in connection with the appeal.

Section 2 of the *Security for Costs (Administrative Tribunals) Regulation* sets out the preconditions for making an order for security for costs. The Board cannot make this order against an appellant, a participant or intervener unless it concludes that:

(a) the appeal was initiated for improper purposes;

(b) the participant or intervener sought to participate in the appeal for an improper purpose;

(c) there is no reasonable prospect that the appeal will succeed;

(d) the appeal, or the person or body's participation in the appeal, is an abuse of process;

(e) the appellant, participant or intervener fails to attend or be represented at a hearing without reasonable excuse; or

(f) the appellant, participant or intervener unreasonably delays the hearing of the appeal.

The Board may make an order on its own initiative or upon the request of a party.

The Board is not bound to order a security deposit when one of the above-mentioned examples occurs.

An application for security for costs must be made in accordance with Rule 16 [General application procedure] and should include the suggested amount of the security deposit as well as identify which of the above preconditions is being relied upon for the order.

If the Board grants an order for security for costs, the Board may include directions respecting the disposal of the money deposited. Pursuant to section 3 of the *Security for Costs (Administrative Tribunals) Regulation*, the Board may order that a deposit under section 47.1 of the *Administrative Tribunals Act* be paid in instalments.

If an order for deposit is made and the appeal proceeds to an oral hearing, the panel will give directions respecting the disposition of the money deposited at the completion of the appeal, or in its decision (see section 47.1(2) of the *Administrative Tribunals Act*). Submissions on the disposition of the money will be accepted in closing arguments in addition to any submissions regarding costs in general (see "Application for Costs" in section 13.0 of this Manual, below).

Requesting a site visit

Prior to or during a hearing the Board may, on its own initiative or at the request of a party, schedule a site visit. If a party wishes to schedule a site visit, a written request should be made to the Board as early as possible in the process because additional time in the hearing schedule may be required to accommodate the visit. The request must comply with Rule 16 [General application procedure], in that it must be in writing, explain the reasons for the site visit, and advise whether the other parties/participants agree to a site visit.

If the site visit will be on private property, the party requesting the site visit must ensure that the property owner consents to the site visit.

The purpose of a site visit is to provide the panel with the opportunity to learn more about the appeal and better understand the evidence, not to gather evidence. The panel's observations during a site visit are not evidence. A site visit is not to be used as a fact-finding expedition. New evidence will normally not be accepted, unless in accordance with the rules of procedural fairness and in the presence of the official recorder. Examples of when a site visit would be appropriate include situations where the proximity of certain features on the site to each other, or to neighbouring properties, is an issue, or where an appreciation is needed of the size or scope of an undertaking or natural feature.

Prior to a site visit, the panel and parties will agree upon the date and time of the visit and how the visit will proceed. A site visit will not be conducted without all parties, participants or interveners in attendance, unless that party, participant or intervener has waived his or her right to attend.

Postponement of the hearing

All parties to an appeal are entitled to a hearing of the appeal in a timely fashion. Accordingly, the Board will only grant a postponement of a hearing when all parties to the appeal consent to the postponement, or when the party requesting a postponement can show that special circumstances exist that justify postponing the hearing to a later date.

An application for a postponement must be made in accordance with Rule 16 [General application procedure]; specifically, it must be in writing and explain the reasons for the postponement and whether the other parties and participants agree to a postponement. In addition, the application should include the length of the proposed postponement (specify the next available date for a hearing).

When deciding whether to grant this request, the Board will apply the general factors in section 39 of the *Administrative Tribunals Act* with respect to adjournments; that is, it will consider the reasons for the postponement, whether the postponement will cause unreasonable delay, the impact of both refusing and granting the postponement on the parties, and any impact on the public interest. In furtherance of, and/or in addition to, consideration of these general factors, the Board will specifically consider the following:

- the proposed or anticipated length of the postponement;
- the adequacy of the reasons provided and the adequacy of any objections to the postponement;
- the number, length and causes of any previous postponements that have been granted;
- whether the postponement will needlessly delay or impede the conduct of the hearing;

- whether the purpose for which the postponement is sought will contribute to the resolution of the matter;
- whether the postponement is required to provide a fair opportunity to be heard;
- the degree to which the need for the postponement arises out of the intentional actions or the neglect of the applicant for the postponement;
- the prejudice to the other parties if a postponement is granted, balanced against the prejudice to the applicant if the postponement is not granted;
- any environmental impacts that may result from a postponement of the hearing;
- any public interest factors, such as the public interest in the efficient and timely conduct of the appeal; and
- any other factors which may be relevant.

If a hearing is postponed, the Board will consider whether to order any terms and conditions that may assist with the fair and efficient conduct of the appeal such as conditions respecting rescheduling, attendance at a pre-hearing conference, or production of documents or reports.

Before granting a postponement of a scheduled hearing, and except in extenuating circumstances, the Board will give the other parties an opportunity to be heard. If the other parties to the appeal consent to the postponement, the request will rarely be denied.

12.2 Evidence

General

In an oral hearing, each party has the right to present evidence to support that party's case. "Evidence" is anything that has the potential of establishing or proving a fact. Evidence includes oral testimony, written records, demonstrations, physical objects, etc. It does not include argument or submissions made by a party for the purpose of persuading or convincing the Board to decide the case in a particular way.

The only evidence the Board will consider is the evidence that is provided to the Board by the parties and participants to the appeal. The Board does not have the information that was considered by the previous decision-maker when an appeal is filed: the Board is not part of the Ministry or other decision-making authority (e.g., Metro Vancouver) and does not have access to their files. Therefore, all parties, participants and interveners must ensure that they submit all information to the Board that will form part of their case, or make sure that one of the others does so.

In some circumstances, the *Evidence Act* may apply to oral and written evidence that is presented at hearings before the Board. Parties should consult that Act to determine whether it may apply. However, as noted above, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Board (see "Notification of expert evidence", above).

While most of the information under this heading relates primarily to oral hearings, the principles involved in weighing evidence and applying the correct burden of proof are common to all types of hearings.

Admissibility and exclusion of evidence

The rules of evidence that apply to a hearing before the Board are less formal than the rules applied by the courts. Section 40 of the *Administrative Tribunals Act* states that the Board "may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law." The Board may admit hearsay and circumstantial evidence if it is considered relevant.

Relevance is the primary consideration for the Board when deciding whether to admit evidence. Relevant evidence can be described as evidence (oral or written) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.

The Board may also exclude evidence. Section 40(2) of the *Administrative Tribunals Act* allows the Board to exclude anything unduly repetitious. In addition, in accordance with general legal principles, the Board may exclude evidence if it is of minimal relevance, is unreliable, may confuse the issues, or may prejudice the other parties. The Board may be obligated to exclude evidence that is privileged or is restricted by a statute such as the *Evidence Act*.

Before any evidence is excluded by the Board, parties will be offered an opportunity to explain why the evidence they are seeking to introduce is relevant and should not be excluded. If evidence is limited or excluded, the Board will advise the parties of its reasons for doing so.

All evidence admitted during the hearing will be assessed by the Board to determine what weight, if any, should be given to the evidence. Generally speaking, evidence that is not sufficiently reliable for the Board's purposes will be given less weight when the Board is making its decision on the merits of the appeal.

New evidence: evidence not before the initial decision-maker

To ensure that the Board has the best evidence before it, including the most up to date information, the Board normally holds a "new hearing". This means that the Board will allow evidence to be presented in a hearing that was not before the

previous decision-maker, subject to the considerations mentioned in the previous section ("Admissibility and exclusion of evidence").

However, new evidence is provided at a hearing that was not disclosed prior to the hearing, the evidence "surprises" a party or participant that is adverse in interest, or there is insufficient time for the other party or participant to adequately consider the evidence, the Board may grant a recess (a break) to allow time to consider the evidence. Alternatively, the Board may adjourn the hearing to another date.

Agreed statement of facts

If the parties to an appeal agree that certain facts are true, or that certain events relevant to the appeal happened in a certain way, the parties may submit an "agreed statement of facts" to the Board.

An agreed statement of facts can reduce the overall length of the hearing by avoiding the need for the parties to call witnesses or produce evidence at the hearing to prove those facts or events. If an agreed statement of facts is submitted, it will be determinative of those facts for the purposes of the appeal.

Evidence provided by affidavit, telephone or videoconferencing

If a witness is unable to attend an oral hearing in person, the Board may allow the witness to testify by telephone, videoconferencing, or provide their evidence in a sworn written statement (i.e., affidavit). However, if a party or participant seeks to have the witness give evidence by telephone or videoconferencing, they must determine whether such options are available at the hearing venue before making the application to the Board, and must specify the time and date that the witness will be available to testify by telephone or videoconference.

When considering a request to allow evidence to be given in one of these, the Board will consider any objections from the parties. If the request is for testimony by affidavit, the Board will also consider any request for cross-examination of the affiant on the contents of the affidavit under Rule 19.

If the Board allows a witness to testify by telephone or videoconferencing, it is up to the requesting party or participant to make all necessary arrangements, and any associated cost must be paid by that party or participant. Further, any documents that the witness will be referring to must be provided to the Board and the other parties, participants and interveners in advance.

In some cases, the Board may give less weight to evidence provided by telephone or affidavit, compared to evidence given in person or by videoconference, because it is more difficult to assess a witness's credibility.

Expert evidence

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

As stated previously in this section, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Board, because the Board has established its own rules for the introduction of expert evidence and the testimony of experts. In addition, if there is a conflict between the Board's rules and sections 10 or 11 of the *Evidence Act*, the Board's rules on expert evidence apply.

Experts must be "qualified" by the Board before giving their opinion. Each party will have an opportunity to cross-examine a proposed expert and make submissions on the expert's qualifications. To be "qualified" to give expert opinion evidence on a particular subject matter(s), the Board must be satisfied that the witness has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.

If a person is not qualified to give expert evidence on a particular subject matter, the Board may still receive the witness's evidence. The Board will determine what weight should be given to each witness's testimony. The qualifications and experience of the witness will be a factor in determining the weight to be given to that witness's testimony.

Witness panels

The Board may permit evidence to be given by a number of witnesses sitting as a witness panel. This will normally be allowed when the testimony of two or more witnesses is interconnected, and the evidence will be more understandable if the witnesses are able to give their evidence in a chronological fashion. Cross-examination will not take place until all of the witnesses on the panel have presented their initial evidence (i.e., evidence-in-chief/direct evidence).

The main restriction on this type of format is that the witnesses cannot discuss the answers to questions with the other witnesses on the panel. Each witness must give his or her evidence without consultation with the other panel witnesses.

12.3 The Hearing

Role of the panel chair

The member of a panel who has been designated as chair of that panel will be responsible for the general conduct of the appeal hearing.

Official hearing recorder

All Board hearings are recorded by an official verbatim recorder (section 35 of the *Administrative Tribunals Act*). The recording of Board proceedings by anyone other than the Board's official recorder is not permitted unless approved by the Board (see also Rule 19(10) and (11)).

Section 35 of the *Administrative Tribunals Act* states that the recording is presumed to be correct and constitutes part of the record. If the recording is defective, it does not affect the validity of the proceeding.

Powers of the panel at the hearing

The panel will determine how the hearing is conducted and may, among other things:

- determine the order and the hours of proceeding;
- receive and accept on oath or affirmation, by affidavit or otherwise, evidence and information that the panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law, or exclude or limit evidence and information;
- require the production of evidence;
- require the attendance of witnesses;
- allow oral evidence and/or argument by telephone or videoconference in special circumstances;
- order the exclusion of witnesses from the hearing prior to giving evidence;
- ask questions of parties, participants, interveners or witnesses;
- place time limits on the examination or cross-examination of witnesses, or on opening or closing arguments;
- adjourn a hearing; and/or
- make any other decision or order necessary for the just, timely and full resolution of the appeal.

The panel may make any orders or give directions that the panel considers necessary for the maintenance of order at the hearing, including:

- imposing restrictions on a person's continued participation in, or attendance at, a proceeding; and
- excluding a person from further participation in, or attendance at, a proceeding until the panel orders otherwise.

Additional information on some of these subjects is set out under different headings below.

Restriction of public access to oral hearings and documents

Under section 41 of the *Administrative Tribunals Act*, an oral hearing of an appeal will be open to the public unless the panel directs that all or part of the information be received to the exclusion of the public because, in the opinion of the panel:

(a) the desirability of avoiding disclosure in the interests of any person or appeal participant affected, or in the public interest, outweighs the desirability of adhering to the principle that hearings be open to the public; or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

A document submitted in the hearing of an appeal will be accessible to the public unless:

- the panel is of the opinion that (a), above, applies; or
- the panel directs that all or part of the document be received in confidence to the exclusion of an appeal participant or participants because, in the opinion of the panel, its nature requires that direction to ensure the proper administration of justice.

Exclusion of witnesses

Prior to giving his or her evidence, the panel may ask a witness (or witnesses) to wait outside of the hearing room until the witness is called upon to testify. This may be done on the panel's initiative or at the request of a party.

Swearing-in of witnesses

According to Rule 23 [Oath or affirmation], before a person testifies at an oral hearing (including a party), the person will be asked to swear an oath or make a solemn affirmation that the evidence given will be true. An oath is sworn on a bible. An affirmation is a solemn statement that may be expressed as follows: "I solemnly affirm to tell the truth, the whole truth and nothing but the truth."

When a spokesperson or representative will be giving evidence, he or she will also be asked to swear an oath or make a solemn affirmation before giving evidence. It is not necessary to be sworn in to examine or cross-examine a witness.

The official recorder normally administers the oath or affirmation. To avoid delays when the witness is on the stand, parties should ask each of their witnesses, in advance of the hearing, whether the witness wants to give their evidence under oath

or affirmation. The parties and participants should also give advance notice to the official recorder of the witness's choice (oath or affirmation).

Evidence in Confidence

Under section 42 of the *Administrative Tribunals Act*, the panel may direct that all or part of the evidence of a witness, or documentary evidence, be received in confidence, to the exclusion of a party(s), participant(s) or intervener(s), on terms that the panel considers necessary. This order will only be made if the panel is of the opinion that it is required to ensure the proper administration of justice.

Procedure at the hearing

While Board hearings are not as formal as court proceedings, they are still reasonably formal and all people attending the hearing are expected to act appropriately. The chair of the panel is addressed as "Mister Chair" or "Madam Chair". Surnames should be used when addressing or referring to the other panel members or parties. The degree of formality of a hearing may vary depending on the composition of the panel hearing the appeal, the nature of the parties, participants, and interveners, and the subject matter of the appeal. The following format will generally be followed:

1. The chair of the panel will begin the hearing by identifying the panel members conducting the appeal and the official recorder appointed to record the proceedings.
2. The chair will state the statutory authority for the Board to hear the appeal and identify the decision that is being appealed. The chair may also clarify the precise issue(s) to be decided in the appeal.
3. The chair will invite the parties, participants and interveners in attendance to introduce themselves for the record.
4. The chair will review the procedures that will apply at the hearing in connection with the presentation of evidence. Where there are multiple appellants, respondents and/or third parties, or the presence of a participant(s)/intervener(s), the order for presenting their respective cases will also be addressed. The chair may make a statement regarding the scope of evidence that will be acceptable and other limitations as may be applicable.
5. The parties, participants, and interveners will be given an opportunity to confirm or to clarify their understanding of the matter at hand and to make any preliminary objections or requests.
6. Opening Statements: The chair will then ask for opening statements, usually in the following order:

(1) appellant
(2) respondent
(3) third party (if any)
(4) participant (if any)
(5) intervener (if any)

The appellant's opening statement is to include the grounds for appeal, the remedy sought (what the appellant wants the Panel to order at the end of the appeal), the number and names of witnesses (if any) to be called, and the approximate time required to put the appellant's case before the panel. The respondent's and third party's opening statements should include the respective remedies they seek from the Board, the number and names of witnesses (if any) to be called, and the approximate time required to put their respective cases before the panel. A participant's or intervener's opening statement is to include a summary of its position on the appeal in accordance with any prior limitations or conditions set by the Board.

7. Witnesses/Evidence (see also sections 38 and 40 of the *Administrative Tribunals Act*): The chair will advise the appellant to call its first witness (this may be the appellant him or herself, or a representative of the corporation, society or other legal person who may be the appellant). The appellant will ask the witness questions first. When the appellant is finished with its questions, the witness may be cross-examined by the respondent and any third parties. Members of the panel may also ask the witness questions. New information given in response to questions asked by the other parties or the panel is subject to re-examination by the appellant. The same procedure applies for each subsequent witness.

8. When the appellant has finished calling of its witnesses, the chair will advise the respondent to proceed with the presentation of its evidence (call its witnesses to testify). The respondent will ask its witness questions first, and then the witness may be cross-examined by the appellant and any third parties. Members of the panel may also ask the witness questions. New information given in response to questions asked by other parties or the panel is subject to re-examination by the respondent. The same procedure applies for each subsequent witness.

9. When the respondent has finished calling its witnesses, the third parties (if any) will present their evidence in the order determined by the chair. Each witness will give his or her evidence, and will then be subject to cross-examination by the appellant and the respondent. Members of the panel may also ask the witness questions. New information given in response to questions asked by other parties or the panel is subject to re-examination

by the third party that called the witness. The same procedure applies for each subsequent witness.

10. Any participants or interveners will be given the opportunity to present evidence if, or to the extent, initially authorized by the Board. This evidence may be subject to cross-examination by the parties and to questions from the panel.

11. The appellant may apply to the panel for the opportunity to call "reply evidence" (e.g., a witness to respond to evidence tendered by the other parties). The application may only be granted if the appellant could not have reasonably anticipated the evidence tendered by the other parties.

12. Closing Statements: When the parties are finished calling their witnesses and providing their documents (presenting their evidence), the chair will ask for closing statements (arguments). In some circumstances the panel chair will allow, or request that, closing submissions be made in writing.

    In their closing statements, the parties, participants and interveners should focus on those facts and/or principles of law that they would like the panel to consider, and reiterate the remedy that they are seeking from the Board. They may also wish to suggest alternatives for the panel to consider when making its decision, provided that the evidence presented during the hearing supports the proposed alternatives. The order of presentation is normally as follows:

    (1) appellant
    (2) respondent
    (3) third party (if any)
    (4) participant (if any)
    (5) intervener (if any)
    (6) reply by appellant

    **No new evidence will be accepted in the closing statement.

13. The chair will advise that the hearing is concluded and the "record is closed" (see below).

Objections

If a party (or, in some cases, a participant) wishes to object to something during the hearing, that party may raise an objection. For instance, a party may object to questions or evidence on the grounds that it is not relevant to an issue in the appeal.

To object, a party should stand and state the reasons for the objection in a courteous manner. The panel will provide the other party(s) with an opportunity to respond before making a decision on the objection.

Maintenance of order at hearings

Section 48 of the *Administrative Tribunal Act* gives the panel the power to make orders or give directions that it considers necessary for the maintenance of order at the hearing. For instance, it may impose restrictions on a person's continued participation in, or attendance at, a hearing, or it may exclude a person from further participation in an appeal, or attendance at the hearing, until the panel orders otherwise.

Contempt

Under section 48 of the *Administrative Tribunals Act*, if the person who is subject to the order or direction disobeys, refuses, or fails to comply with the order or direction, the panel may ask a peace office to enforce the order or direction, or it may apply to the court to commit the person for contempt of the order or direction under section 49(2) of the *Administrative Tribunals Act*.

Documents not provided during pre-hearing disclosure

The pre-hearing disclosure rules were created to ensure that the Board, the parties and participants are able to prepare for the hearing. Avoiding "surprises" will ensure an efficient hearing process. However, there are occasions when new documents come to light that are relevant to the issues under appeal.

In accordance with Rule 19(8) and (9), if a party or participant seeks to refer to, or rely upon, a document that was not disclosed prior to the hearing, that party or participant must obtain the approval of the panel. The party or participant must bring sufficient copies of the document to the hearing for each member of the panel, each party and participant, the official recorder, and a copy for the Board's file (usually 7 – 8 copies). If the new material is legislation, case law, legal articles or excerpts from text books, the official recorder does not require a copy.

If sufficient copies are not brought to the hearing, it is the responsibility of the party submitting the documents to arrange for, and pay for, copies to be made during the hearing.

The panel may ask the other parties and participants whether they have any objections to the document. Among other things, when deciding whether to accept the new document, the panel will consider whether the document is relevant to an issue in the appeal, and whether the other parties will require additional time to review the document.

Documents entered into evidence at the hearing will be marked as an exhibit to the hearing.

Failure to identify witnesses prior to the hearing

If a party or participant wants to call a person to testify at the hearing that was not identified during the pre-hearing disclosure process, the person may not be able to give evidence without the panel's approval. The panel may ask the other parties and participants whether they have any objections to the proposed witness. Among other things, when deciding whether to allow the new witness to testify, the panel will consider whether the person's evidence is relevant to an issue in the appeal, whether the addition of the witness will delay the proceedings, and whether the other parties and participants may require an opportunity to present new witnesses in reply.

The panel may make any decision or order that it considers appropriate in the circumstances, including:

- adjourning the hearing; and
- ordering a party to pay the costs incurred by any other parties as a result of the adjournment.

Legal authorities not provided prior to the hearing

A party wanting to rely on a legal authority not previously provided during pre-hearing disclosure, must provide a copy for each panel member, all of the other parties and participants, and the Board's file.

Adjournments

An adjournment is a discontinuation of a hearing which is in progress. The panel will make every effort to complete a hearing within the time scheduled. However, the panel has the authority under section 39 of the *Administrative Tribunals Act* to adjourn a proceeding if an adjournment is required "to permit an adequate hearing to be held."

A hearing will be adjourned to a later date if: the hearing is not concluded within the allotted time, a party is "surprised" by previously undisclosed evidence, or another problem arises that is of sufficient importance to warrant the delay that will occur if the adjournment is granted.

If a party requests an adjournment, the panel is required under section 39(2) of the *Administrative Tribunals Act* to have regard to the reasons for the adjournment, whether the adjournment would cause unreasonable delay, the impact of both refusing and granting the adjournment on the parties, and any impact on the public interest. In furtherance of, and/or in addition to, consideration of the general factors, the panel will specifically consider the following:

- the views of the other parties and, in some cases, the participants and interveners;

- the proposed or anticipated length of the adjournment;
- the adequacy of the reasons provided for the adjournment and the adequacy of any objections to the adjournment;
- the number, length and cause of any previous adjournments or postponements that have been granted;
- whether the adjournment will needlessly delay or impede the conduct of the hearing;
- whether the purpose for which the adjournment is sought will contribute to the resolution of the matter;
- whether the adjournment is required to provide a fair opportunity to be heard;
- the degree to which the need for the adjournment arises out of the intentional actions or the neglect of the applicant;
- any prejudice to the other parties if an adjournment is granted, balanced against the prejudice to the applicant if the adjournment is not granted;
- any environmental impacts that may result from an adjournment of the hearing;
- any public interest factors, such as the public interest in the efficient and timely conduct of the appeal; and
- any other factors which may be relevant.

Before granting an adjournment, and except in extenuating circumstances, the panel will give the other parties and, in some cases, the participants and interveners, an opportunity to be heard. If the other parties to the appeal consent to the adjournment, the request will rarely be denied.

If a hearing is adjourned, the panel will consider whether to order any terms and conditions that may assist with the fair and efficient conduct of the appeal.

Closing of the record

Rule 22 [Closing of the record] states that, at the conclusion of the hearing, the record will be closed unless the panel directs otherwise. Once the record is closed, no additional evidence will be accepted.

Reopening a hearing on the basis of new evidence

Pursuant to Rule 22 [Closing of the record], once the record is closed, no additional evidence will be accepted unless the panel's decision has not been released, and the panel decides that: the evidence is material to the issues, there are good reasons for

the failure to produce it in a timely fashion, and acceptance of such evidence is in accordance with the principles of natural justice and procedural fairness.

Additional information requested by the Board

After the oral hearing is completed, the panel may find that further information is required from one or more of the parties in order to make a decision on the appeal. If the panel requests additional information from one or more of the parties, all parties will be given access to, or copies of, the information, and will have an opportunity to make submissions and respond to the information.

Role of precedent (previous decisions of the Board)

Although the Board may be bound by the decisions of certain courts, it is not required to follow (i.e., is not bound by) its past decisions or the decisions of other administrative agencies. While prior decisions of the Board may indicate how panel members will view particular types of cases, as a matter of law, the panel must decide each case on its own merits.

Burden of proof

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities".

Photographing and recording during a hearing **[as amended 04/19]**

According to Rule 19(10), photographing, audio recording, video recording or other electronic recording of Board proceedings is prohibited without the prior approval of the Board or the panel. If approved, the Board or the panel may impose terms and conditions on the activity.

If permission will be sought from the hearing panel, the panel should be advised of the application before the hearing opens for the day. This gives the panel time to determine the process that it will follow to decide the application.

Failure to attend an oral hearing

In accordance with Rule 18 [Failure to participate in a hearing], if the **appellant** has been given timely notice of the hearing and fails to attend, the panel may proceed with the hearing, dismiss the appeal as abandoned, or make any order appropriate in the circumstances.

If the **respondent, third party, a participant or intervener** has been given timely notice of the hearing and, without advance written notice and reasonable explanation, fails to attend, the panel may proceed with the hearing and make a decision without further notice to that party, participant, or intervener.

13.0 APPLICATION FOR COSTS

Section 47 of the *Administrative Tribunals Act* provides the Board with the power to order costs in respect of an appeal.

Party-and-Party Costs

Under sections 47(1)(a) and (b) of the *Administrative Tribunals Act,* the Board may order a party, participant or intervener to pay all or part of the costs of another party, participant or intervener in connection with the appeal. An order for costs cannot be made against an agent or representative of government (section 47.2 of the *Administrative Tribunals Act*), it may only be made against "the government".

An application for costs may be made at any time during the appeal. However, if the appeal proceeds to a hearing on the merits, the applicant for costs should reapply for an award of costs at the hearing, at which time the panel will normally take submissions on the application.

The panel will not make an order for costs unless a party/participant/intervener requests that it be awarded costs. However, the panel may, on its own initiative, ask a party/participant/intervener whether it seeks costs.

The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs." The objectives of the Board's costs policy are to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct. Thus, the Board's policy is to award costs in special circumstances. Those circumstances include:

(a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;

(b) where the action of a party/participant/intervener, or the failure of a party/participant/intervener to act in a timely manner, results in prejudice to any of the other parties/participants/interveners;

(c) where a party/participant/intervener, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing";

(d) where a party/participant/intervener unreasonably delays the proceeding;

(e) where a party's/participant's/intervener's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party/participant/intervener; and

(f) where a party/participant/intervener has continued to deal with issues which the Board has advised are irrelevant.

The panel is not bound to order costs when one of the above-mentioned examples occurs, nor does it have to find that one of the examples must have occurred to order costs.

The panel will not order a party or participant to pay costs unless it has first given that party, participant, or intervener an opportunity to make submissions on the application. If the panel orders that all or part of a party's costs be paid, it may ask for submissions with respect to the amount of costs incurred.

The costs payable under section 47(1)(a) or (b) of the *Administrative Tribunals Act* will be determined on the basis of Appendix B of the BC *Supreme Court Civil Rules*, B.C. Reg. 168/2009, enacted under the *Court Rules Act*. Appendix B lists items for which costs can be awarded, as well as the corresponding number of units for each item. The panel will decide the scale under which costs are to be assessed. The scale chosen depends on the difficulty of the matter being appealed and provides increasing dollar values for matters of greater difficulty.

If the panel orders costs, the order may be filed in a court registry at which time it will have the same effect as an order of the court for the recovery of a debt in the amount stated. All proceedings may be taken as if the order were an order of the court (section 47(2) of the *Administrative Tribunals Act*).

The Board's Costs and Expenses

If the panel considers that the conduct of a party has been improper, frivolous, vexatious or abusive, it may order that party to pay all or part of the "actual costs" and expenses of the Board in connection with the appeal (section 47(1)(c) of the *Administrative Tribunals Act*). Decisions of the courts defining conduct that is improper, frivolous, vexatious or abusive may be used to assist the panel in determining whether to apply this section.

Expenses of the Board that a party may be required to pay:

a) recorder fees;

b) per diems of panel members;

c) travel expenses;

d) hotel costs; and

e) charges for the hearing room.

These expenses will vary based on such factors as the nature and location of the appeal, the number of days of the hearing, and the number of panel members sitting on the appeal.

The panel will not order a party to pay the Board's actual costs or expenses unless it has first given that party an opportunity to make submissions on this issue.

14.0 DECISIONS

Powers of the Board when making final decisions

The decision-making powers of the Board are broad. Except for the *Mines Act*, each statute under which the Board hears appeals grants the Board the power to:

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

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

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

For appeals under the *Mines Act*, the Board has the power to "confirm, vary or rescind the decision" under appeal.

[For other powers, see also section 2.0 of this Manual under the heading "The Board's powers and order-making authority".]

How final decisions are made

Only those Board members who sat on the panel that heard the appeal will make the decision.

When making the decision, the panel members are required to determine, on a balance of probabilities, what occurred and decide the issues raised in the appeal. They will evaluate the evidence presented and apply the relevant legislation and legal authority. As a general rule, the panel is not bound by government policy.

The decision of the majority of the members of a panel is the decision of the Board. In the case of a tie, the decision of the chair of the panel governs (section 26(6) of the *Administrative Tribunals Act*).

Written reasons

The Board will give written reasons for all preliminary decisions and orders, and its final decisions (see section 3 of the *Environmental Appeal Board Procedure Regulation*, and section 51 of the *Administrative Tribunals Act* with respect to final decisions).

The Board will provide a copy of its final decision to all of the parties, participants and interveners in accordance with the usual method of delivery to that party,

participant or intervener, and a hard copy of the decision will be sent by mail. The decision will also be sent to the responsible minister's office.

Most preliminary decisions and all final decisions are posted on the Board's website, and some will be summarized and included in the Board's annual report.

Section 52 of the *Administrative Tribunals Act* provides the Board with authority to give notice of its decision to the parties by alternative methods in certain circumstances.

When will a final decision on the appeal be made?

The time required to issue a decision will vary depending on the nature of the appeal, the length of the hearing, and the complexity of the issues involved.

The panel presiding over an appeal will endeavour to provide its final decision and written reasons as soon as practicable after the completion of the hearing. Final written decisions with reasons will generally be released within the timelines set out in Practice Directive No. 1 issued by the Board.

On rare occasions, an oral decision may be rendered at the conclusion of an oral hearing. If this occurs, the panel will provide its written reasons within the timelines set out in Practice Directive No. 1.

Effective date of decisions and orders

Pursuant to section 50(3) of the *Administrative Tribunals Act*, a decision or order is effective on the date on which it is issued, unless otherwise specified by the Board.

Amendments to final decisions

Section 53 of the *Administrative Tribunals Act* provides that the panel may amend a final decision within 30 calendar days of all parties being served with the final decision. An amendment may be made on application by a party, or on the panel's own initiative, to correct:

(a) a clerical or typographical error;

(b) an accidental or inadvertent error, omission or other similar mistake; or

(c) an arithmetical error made in a computation.

A party may also apply for clarification of the final decision under section 53 within 30 days of being served with the decision.

Enforcement of final decisions

Pursuant to section 54 of the *Administrative Tribunals Act*, once a certified copy of the Board's final decision is filed with the BC Supreme Court, the decision will have the

same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

Where past Board decisions may be found

Copies of past Board decisions are available upon request from the Board office and from the following libraries:

- Legislative Library
- University of British Columbia Law Library
- University of Victoria Law Library
- West Coast Environmental Law Library

Decisions are also located on the Board's website (http://www.bceab.ca/decisions/), and are available on the LexisNexis® Quicklaw® database (http://www.lexisnexis.ca/en-ca/home.page), to subscribers of the service.

Review of Board decisions

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

Alternatively, a party dissatisfied with a decision or order of the Board may apply to the B.C. Supreme Court for a judicial review of the decision pursuant to the *Judicial Review Procedure Act*. A judicial review of a final decision of the Board must be commenced within **60** days of the date that the Board's decision was issued, unless the court extends the time (section 57 of the *Administrative Tribunals Act*).

15.0 WITHDRAWING OR ABANDONING AN APPEAL

An appellant may withdraw all or part of the appeal by informing the Board in writing, or by informing the panel in person (on the record) during the course of a hearing. According to section 17(1) of the *Administrative Tribunals Act*, once the appellant advises the Board that all or part of the appeal is withdrawn, the Board must accept it and order that all or part of the appeal is, accordingly, dismissed.

16.0 ADDITIONAL PROVISIONS

Calculating time limits and deadlines

Section 25 of the *Interpretation Act* applies to all time limits set out in statutes, such as the time limits for filing a notice of appeal.

Rule 4 [Calculating time] explains how the Board calculates time under the Rules, any order or direction of the Board, as well as any time lines set out in this Manual.

When something must be done or provided within a certain number of days, "days" are counted as calendar days, which is defined in Rule 1 [Definitions] as each day shown on a calendar and includes weekends and holidays. There are two types of calculations that may be required to determine a due date: calculating due dates going forward, and calculating due dates going backwards. For example, if a person is given 10 days to provide something to the Board (counting forward in time), the days are calendar days, and are to be counted by excluding the first day and including the last day. The last day will be the "due date". If it is the first days of the month, the item would be required on the 11th. However, if the 11th is a Saturday, Sunday or public holiday, the due date will be the next calendar day that is not a Saturday, Sunday or public holiday. Using the current example, the due date would be on the Monday or, if the Monday is a public holiday, then the Tuesday.

If the calculation requires time to be calculated backwards (e.g., 30 calendar days before the first day of hearing), the calendar days are counted by excluding the first day of the hearing and including the last day (i.e., the last day is the due date). For example, if the first day of a hearing is on July 31st, 30 calendar days before that day is July 1st. The item would be due on July 1st. However, if the due date falls on a Saturday, Sunday or public holiday, the due date will be the calendar day that falls before the Saturday, Sunday or public holiday (e.g., the Friday before the weekend). Using the current example, the due date would fall in June (June 30th or earlier).

If a party, participant or intervener is unable to meet a time limit in the Rules, or a deadline that has been set out in an order or direction of the Board, an application to change the time limit must be made. Under Rule 4, the Board may modify a time limit if the Board determines that it is fair and appropriate in the circumstances, regardless of whether the time limit has already expired.

It should also be noted that, to be on time, a document (including a submission) must be delivered or filed with the Board within the "business day", which is defined in Rule 1 [Definitions] as 8:30 am to 4:30 pm, Monday through Friday, excluding public holidays. If it is not delivered within that time frame (e.g., it is delivered at 5:30 pm), the document is deemed to be delivered on the next business day (see Rule 10).

Non-compliance with the Rules or a Board order

Pursuant to section 18 of the *Administrative Tribunals Act* and Rule 3 [Effect of non-compliance], if a party, participant or intervener fails to comply with a Rule or an order of the Board, the Board must give that person notice of the non-compliance, and then may do one or more of the following:

(a) schedule a hearing;

(b) continue with the appeal and make a decision based upon the information before it, with or without providing an opportunity to make submissions;

(c) dismiss the appeal;

(d) make an order for costs; and/or

(e) make any other decision or order that the Board considers appropriate in the circumstances.

However, Rule 3 also clarifies that technical defects and irregularities in form will not invalidate the proceedings or constitute non-compliance with the Rules.

When deciding the outcome of the non-compliance, the Board will consider the severity of the non-compliance, whether there is a history of non-compliance, and any prejudice to the others involved in the appeal as a result of the non-compliance. The Board will not dismiss an appeal unless the non-compliance is the appellant's, is highly prejudicial to the other parties, and it cannot be remedied by an order for costs or by an alternate remedy. Dismissing an appeal due to non-compliance will only occur in the rarest of cases.

If the non-compliance relates to a deadline in the Rules, or in an order or direction of the Board, the Board may modify the deadline whether or not it has already passed. Before doing so, the Board must be satisfied that it is fair and appropriate to do so in the circumstances (Rule 4).

Audio or visual requirements in the hearing room

It is up to the parties/participants/interveners to confirm the availability of, and make arrangements for, any audio or visual equipment or related services at the hearing venue (e.g., an overhead projector, flip chart, VCR, telephone conferencing, videoconferencing, etc.). The cost of such equipment or services must be paid by that party/participant/intervener.

Interpreters and other accommodations

The Board will make every effort to accommodate the parties', participants' and interveners' reasonable needs to enable their meaningful participation at a hearing. If a party, participant, or intervener requires an interpreter at the hearing, and/or any other accommodation (e.g., services to assist the visually or hearing impaired), the Board will, at their request, accommodate the person's needs as is reasonable in the circumstances.

If a party/participant/intervener requires some type of accommodation or assistance, he or she must notify the Board **at least 30 calendar days** before the hearing commences (Rule 21).

Transcripts

Under section 4 of the *Environmental Appeal Board Procedure Regulation*, a person may request a transcript of any proceedings before the Board. The cost of a transcript must be paid by the person who makes the request.

Pursuant to section 35 of the *Administrative Tribunals Act*, if a transcript is unable to be produced due to a mechanical or human failure or other accident, the validity of the proceeding is not affected.

Legal counsel to the Board

The Board may appoint and direct its legal counsel to:

(a) advise the Board on matters of law and procedure and on such other matters as the Board requests;

(b) ask questions of the witnesses retained by the Board; and

(c) question witnesses.