

Annual Report 2020/2021



**Environmental
Appeal Board**



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Dear Ministers:

Please find enclosed the Annual Report for the Environmental appeal Board, for April 1, 2020 to March 31, 2021.

Yours Truly,

A handwritten signature in blue ink that reads "D. Le Houillier".

Darrell Le Houillier
Chair
Environmental Appeal Board

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Message from the Chair

I am pleased to present the 2020/2021 Annual Report of the Environmental Appeal Board (the “Board”).

Like everyone in British Columbia, the Board faced significant challenges as a result of the novel coronavirus (COVID-19). We had to adjust the way our office functions, including by enabling staff to work remotely and by creating and implementing exposure control plans, business continuity plans, and phased shutdown/reopening plans that were responsive to the dynamic circumstances unfolding during the public health crisis.

These plans required the office to close to the public briefly, early in the pandemic. Although the Board continued to function, I exercised my discretion enshrined in the *COVID-19 Related Measures Act*, to extend the statutory timeframe for appeals that would have been due while the office was closed. This was to avoid prejudicing anyone unable to access the Board’s office during that time. I am pleased to report that the Board’s office is open and expects to remain open with improved exposure control in place, avoiding the need for any further blanket extensions of the timeframes to file appeals.

We also developed and implemented procedures and infrastructure required to convene electronic hearings and mediations. This allowed the Board and the review and appeal bodies it supports to be the first in British Columbia’s justice sector to livestream hearings, with video and audio feeds. In this way, we maintained the “open courts” principle and our accountability, while safely managing to continue delivering services to British Columbians. The Board expects to continue to offer electronic hearings in the future, to more efficiently serve appellants in remote communities and those who prefer electronic hearings.

The Board has also worked to refine its new electronic case management system introduced in November 2019. We have developed and implemented a more secure and efficient way of communicating and sharing materials with our members, improving our data security. We continue to improve our website, and hope to have the new version complete in 2021. The Board is actively pursuing options for an electronic document management system to increase operational efficiency and streamline service to the public.

Process improvements are also being contemplated. The Board completed a survey in the previous reporting period. I have met with stakeholders, including members of the public, Indigenous communities, and various government agencies, to assist in a user-focused, cover-to-cover redesign of appeal processes. That engagement continues, with particular emphasis on fostering further dialogue with Indigenous stakeholders. The Board aims to improve the efficiency, timeliness, responsiveness, and fairness in its processes. I expect this project will complete in 2022, and will be a significant step toward fulfilling our obligations as described in the Truth and Reconciliation Commission’s 94 Calls to Action to further reconciliation with Indigenous Peoples.

The Board’s membership also changed significantly in 2020/2021. Monica Danon-Schaffer (a member since 2009), Les Gyug (a member since 2007), Gabriella Lang (a member since 2007 and a Vice Chair since 2017), Lana Lowe (a member since 2018), Douglas Van Dine (a member since 2010), and Norman E. Yates (a member since 2014) have moved on to other opportunities. The Board thanks each of those former members for their commitment to public service and their years of contributions toward the Board.

The Board also welcomed several new members in 2020. Shannon Bentley, David Bird (filling our newly created position of Vice Chair, Service Delivery), Daniela Dos Santos, Cynthia Lu, Ian Miller, and Reginald Whiten have been appointed as new members to the Board. Former member R. Michael Tourigny has returned to the Board as well. The Board has already benefited from the influx of new members. I wish to thank the Crown Agencies and Board Resourcing Office (CABRO) for their assistance with the appointment of new members.

The Board also saw significant shifts in staffing throughout the year. The Executive Director and General Counsel, Colleen Smith, retired after more than 25 years with the Board. Colleen was a stellar public servant who provided excellent management, mentorship, and guidance for the Board.

Colleen's successor is David Bird, who brings with him experience in adjudication, management, and Registry systems design. As the new Vice Chair, Service Delivery, David is working to modernize, and to create systemic improvements in, the Board's operations.

The former Registrar, Jacqueline Siegel, also retired in 2020, after more than 10 years with the Board. Jacqueline's energy, intellect, organizational skills, and interpersonal skills made her a great asset to the Board. She has been succeeded by two new Case Managers, now working to focus on early intervention in appeals and active case management, to help streamline processes and encourage settlement between the parties, where possible and appropriate.

Of course, while working to improve its operations, the Board continued to hear and consider appeals. During this reporting period, the Board's jurisdiction expanded to include appeals brought under the *Zero Emission Vehicles Act*, which was brought into force on July 30, 2020. No appeals have yet been received under that legislation.

I am pleased to report that the Board, for the second year running, reduced its appeal inventory, from 86 to 65. Most appeals that were closed were concluded with final decisions issued by the Board. A significant number of appeals were withdrawn or settled by consent, with the rest being rejected from the outset, due to a lack of jurisdiction or standing, or because of a failure to file the appeal within an applicable statutory timeframe.

The appeal process took, on average, 667 days to complete. This was longer than the average from the three preceding reporting periods, 471 days. Decisions on the merits took, on average, 651 days in 2019/2020 (up from 583 days on average in the preceding three reporting periods). Appeals completed without decisions on the merits took, on average, 689 days in 2019/2020 (up from 404 days in the preceding three reporting periods). These lengthy timeframes are the result of the Board resolving long-dormant appeals, which the parties had asked to hold in abeyance. While the Board will continue to focus on resolving these historical appeals, timeliness in ongoing decision-making will be a focus in the service delivery realignment project.

The Board's expenditures in the reporting period totalled \$1,566,140. This was approximately \$94,000 less than the average from the five preceding fiscal years. The cost savings related mostly to a reduction in appeals and delayed hearings due to the impacts associated with COVID-19.



Darrell Le Houillier
Chair

Introduction

The Board was established in 1981, when the *Environment Management Act* came into force. The Board has been established primarily to provide an independent level of appeal from some decisions made by government officials. It currently hears appeals from certain decisions made under eight statutes and their associated regulations: the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Mines Act*, the *Water Sustainability Act*, the *Water Users' Communities Act*, the *Wildlife Act*, and the *Zero Emission Vehicles Act*. The Board addresses issues related to the use and stewardship of natural resources and to the environment.

The Board, through its annual reports, also provides Cabinet, through the ministers responsible for its oversight, with information regarding appeal operations as required under the *Administrative Tribunals Act*.

In deciding appeals, the Board weighs evidence and makes findings of fact. It interprets the legislation and common law and applies those sources of law to its factual findings. The Board may compel the production of evidence and must ensure that its processes are procedurally fair to those involved in appeals.

Cabinet may, in the public interest, vary or rescind an order or decision of the Board.

Many significant decisions made by the Board, as well as its Rules, its Practice and Procedure Manual, and information to assist the public through the appeals process, can be found on its website (eab.gov.bc.ca, until replaced at a date in 2021, by bceab.ca).

Review of Board Operations

The principal work of the Board is to process appeals from certain statutorily-authorized decisions made under the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Mines Act*, the *Water Sustainability Act*, the *Water Users' Communities Act*, the *Wildlife Act*, and the *Zero Emission Vehicles Act*.

The Board, through its annual reports, also provides the ministers responsible for its oversight with information over the preceding reporting year: a review of its operations, performance indicators, its appeal inventory, the results of any surveys undertaken, a forecast of the upcoming workload for the tribunal, any foreseen trends or special problems, and plans for improving operations in the future.

Appeal Procedures

An appeal begins when a notice of appeal is filed against a particular decision made by a statutory decision-maker. The Board assesses whether the appeal seems to meet threshold requirements: that the appellant has the ability to appeal the decision, that the decision is appealable, that the appeal was filed within the statutory timeframe allowed, and whether the Board has the authority to grant the requested outcome of the appeal. Decisions that can be appealed and who can appeal those decisions depends on the statute under which the decision was made.

The Board may conduct appeals in writing or in person (an oral hearing), depending on the needs of the parties and based on principles of procedural fairness in administrative law. Written evidence and arguments are exchanged in either case. In written hearings, only written material is exchanged; in oral hearings, written summaries of the arguments to be presented precede the oral hearing itself. The Board is finalizing rules and procedures to standardize processes for electronic hearings and hybrid written-electronic hearings, which first became available in the 2020-2021 reporting period.

A summary follows, outlining the nine statutes allowing for appeals to the Board.

Environmental Management Act

The *Environmental Management Act* governs the disposal and dispersion of solid, gaseous, and liquid waste into the environment of British Columbia, including through regulation of landfills and contaminated sites. Governmental decision-makers may issue permits, approvals, operational certificates, orders, and administrative penalties to accomplish the aims of the Act.

The *Environmental Management Act* is broad legislation divided into 13 parts:

- Introductory Provisions;
- Prohibitions and Authorizations, which contains general provisions for the protection of the environment and governmental authority to allow the release of contaminants into the environment;
- Municipal Waste Management;
- Contaminated Site Remediation;
- Remediation of Mineral Exploration Sites and Mines;
- Clean Air Provisions;
- Greenhouse Gas Reduction, which applies to waste management facilities;
- Powers in Relation to Managing the Environment, including provisions dealing with pollution assessment, prevention, and abatement, as well as spill preparedness, response, and recovery;
- Appeals;
- Conservation Officer Service;
- Compliance, including authorization of government decision-makers to carry out inspections and seizures, make inquiries, and issue administrative penalties;

- General, which relates to offences, penalties, immunity of conservation officers from provincial offences, miscellaneous administrative provisions, provisions related to the ownership of waste, and powers to make regulations; and
- Transitional Provisions and Consequential Amendments.

Any person “aggrieved by a decision” of a director or district director named under the *Environmental Management Act* can appeal that decision to the Board. The definition of “decision” under the Act is broad, and includes:

- making orders;
- imposing requirements;
- exercising any power other than delegation;
- issuing, amending, renewing, suspending, refusing, cancelling, or refusing to amend a permit, approval, or certificate;
- including requirements or conditions in orders, permits, approvals, or operational certificates;
- imposing an administrative penalty; and
- determining that the terms and conditions of an agreement for the reduction or cancellation of an administrative penalty have not been met.

There is generally a 30-day time limit for the filing of appeals; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Greenhouse Gas Industrial Reporting and Control Act

The *Greenhouse Gas Industrial Reporting and Control Act* enables the government to set performance standards for industrial facilities or sectors by listing them within a Schedule to the Act. Presently, the Schedule sets a greenhouse gas emissions benchmark for liquified natural gas facilities.

The Act is divided into seven parts:

- Interpretation, which provides definitions for the legislative scheme;
- Emission Reporting;
- Emission Control, including use of offsets and credits to be applied to emissions;
- Compliance and Enforcement;
- Appeals to the Environmental Appeal Board;
- General, which discusses procedures, responsibility for operators of facilities or sectors regulated by the Act, and regulatory powers; and
- Transitional Provision, Repeal and Consequential Amendments.

A person who is served with a determination to impose an administrative penalty for non-compliance with requirements to accurately report emissions may appeal the determination or extent of non-compliance to the Board. A person who is served with a determination to impose an administrative penalty for non-compliance with other requirements of the Act or regulations

may appeal the determination or extent of non-compliance, and/or the amount of the penalty, to the Board. The Act also allows other decisions to be designated as appealable, by regulation.

The *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation* provides that certain decisions a director makes under the *Greenhouse Gas Emission Reporting Regulation* are appealable:

- approvals of changes in emissions measurement methodology, and
- decisions refusing to accept a verification statement of an emissions report.

The *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation* also allows for appeals of certain decisions by a director, under the *Greenhouse Gas Emission Control Regulation* and the *Greenhouse Gas Emission and Reporting Regulation*:

- suspension or cancellation of an account in the emissions cap-and-trade registry;
- refusal of a validation or verification statement;
- refusal of an emissions offset project;
- refusal to credit offset units based on an offset project report;
- approval of a change in the methodology used to quantify emissions; and
- refusal of a verification statement relating to an emissions report on the grounds that verifications performed by the verification body do not comply with the regulation or certain standards.

There is generally a 30-day time limit for the filing of appeals; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

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

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

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* allows appeals to the Board of certain decisions by a director, under the Act:

- where an administrative penalty has been imposed for failure to meet fuel requirements, the underlying determination of non-compliance or the extent of non-compliance;
- where an administrative penalty has been imposed for non-compliance with other requirements, the underlying determination of non-compliance, the extent of non-compliance, or the amount of the penalty;
- refusal to accept a proposed, alternative calculation of the carbon intensity of certain fuels; and
- other decisions prescribed by regulation.

There is generally a 30-day time limit for the filing of appeals; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board does not have the discretion to stay any other decisions under appeal from the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

Integrated Pest Management Act

The *Integrated Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application, and disposal of pesticides in British Columbia. It requires permits for certain pesticide uses and certification for individuals seeking to apply pesticides in certain circumstances. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect and empowers government decision-makers to impose administrative penalties for non-compliance.

The *Integrated Pest Management Act* is divided into seven parts:

- Introduction, including definitions and emergency provisions;
- Prohibitions and Authorizations of Pesticide Use and Sale;
- Administration, including provisions relating to inspection and monitoring;
- Appeals to the Environmental Appeal Board;
- Compliance;
- General, including provisions relating to offences, sentencing orders, notice provisions, and authorizations to make regulations; and
- Transitional and Consequential Provisions.

The *Integrated Pesticide Management Act* allows a “person” to appeal a decision to the Board. Decisions, for the purposes of that Act, include:

- orders, other than those made by the Minister;
- specification of terms and conditions in a licence, certificate, or permit, other than those prescribed by the administrator appointed under that Act;
- amendments or refusals to issue, amend, or renew a licence, certificate, or permit;
- revocations or suspension of a licence, certificate, permit, or confirmation;
- restrictions on the ability of a holder of a licence, certificate, permit, or pest management plan to apply for another licence, certificate or permit, or to receive confirmation of receipt, by the administrator, of a pesticide use notice or amended pesticide use notice;
- determinations to impose an administrative penalty; and
- determinations that the terms and conditions of agreements between the administrator and a person subject to an administrative penalty have not been performed.

Certain decisions made in emergency situations cannot be appealed to the Board.

There is generally a 30-day time limit for the filing of appeals; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Mines Act

The *Mines Act* regulates mining in British Columbia through a system of permits, regulations, and the Health, Safety and Reclamation Code. The *Mines Act* and associated Code applies to mining operations through exploration, development, construction, production, closure, reclamation, and abandonment. The *Mines Act* allows for inspections, investigations, orders, and enforcement by the Chief Inspector of Mines and inspectors appointed by him or her.

The *Mines Act* allows appeals to an “appeal tribunal” of decisions, by the Chief Inspector of Mines, for which notice must be given under section 36.3. That section applies to the imposition of an administrative penalty by the Chief Inspector of Mines and the Chief Inspector’s finding that someone has contravened or failed to comply with provisions related to:

- orders made under the *Mines Act*;
- terms or conditions imposed in permits, permit exemptions, cancellations of notices of government debt applied to abandoned mines, and orders for the recommencement or reopening of certain mining operations following closures as a result of regulatory actions;
- prescribed provisions of the Act, regulations, or Health, Safety and Reclamation Code.

The *Administrative Penalties (Mines) Regulation* provides that administrative penalties can be imposed for a wide variety of contraventions or non-compliances under the legislation, regulations, *Workplace Hazardous Materials Information System Regulation (Mines)*, and the Health, Safety and Reclamation Code. The *Administrative Penalties (Mines) Regulation* also defined the Board as the “appeal tribunal” referred to under the *Mines Act*.

There is generally a 30-day time limit for the filing of appeals; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Deadlines for payment of administrative penalties are automatically postponed upon appeal to the Board, although the Board cannot stay decisions under the *Mines Act*. The administrative penalty must be paid within 40 days after the date that the Board’s decision is given to the parties unless the Board overturns the penalty.

Water Sustainability Act

The *Water Sustainability Act* regulates the use and allocation of groundwater and surface water, works in and about streams, and the construction and operation of groundwater wells. It includes provisions for the protection of fish and aquatic ecosystems, dam safety, and enforcement and compliance. It empowers government officials to issue licences, permits, approvals, orders, and administrative penalties.

The *Water Sustainability Act* is divided into eight parts:

- Interpretation and Application;
- Licensing, Diversion and Use of Water;
- Protecting Water Resources;
- Enforcement;

- General;
- Regulations;
- Transitional Provisions; and
- Consequential and Related Amendments.

The *Water Sustainability Act* allows, subject to some exceptions created in that Act, any order (defined to include a decision or direction, whether or not it is in writing, but not a request) resulting from an exercise of discretion by the comptroller, water managers, or engineers designated under the Act to be appealed by:

- the person who is the subject of the order;
- an owner whose land is likely to be physically affected by the order;
- the owner of works that are subject to an order; and
- the holder of an authorization, riparian owner, or an applicant for an authorization who considers that his or her rights are or will be prejudiced by the order.

The exceptions created by the *Water Sustainability Act* that do not allow for appeals to the Board relate to certain:

- certain decisions affecting power operators;
- directions that licences that have lasted 30 years or more must be reviewed;
- directions related to information or declarations of beneficial use of water;
- certain orders related the creation of water sustainability plans;
- orders for determining critical environmental flow thresholds for streams in certain circumstances;
- cancellation of authorizations, in whole or part, due to non-payment of fees;
- decisions as to whether to enter into, and on what terms to enter into, compliance agreements made in relation to administrative penalties;
- certain orders made consistent with consents given for drilling authorizations; and
- certain decisions related to compensation to be paid by the government, if defined by regulation.

The time limit to appeal is 30 days; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Water Users' Communities Act

The *Water Users' Communities Act* allows for the creation of water users' communities, which are groups of six or more licensees under the *Water Sustainability Act*, who create and maintain a system to store and deliver water. The *Water Users' Communities Act* defines rights of and obligations on water users' communities, and empowers the comptroller to make certain decisions affecting water users' communities.

The *Water Users' Communities Act* uses the general appeal provisions from the *Water Sustainability Act*, which includes appeals of decisions by the comptroller to cancel a water users' community and dispose of its assets.

As with the *Water Sustainability Act*, the time limit to appeal is 30 days; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Wildlife Act

The *Wildlife Act* regulates the use, allocation, import and export of fish and wildlife in British Columbia, including activities such as hunting, angling in non-tidal waters, guide outfitting, and trapping. The Act empowers government officials to issue licences, permits, certificates, and orders, and to impose administrative penalties for non-compliance.

The *Wildlife Act* grants rights of appeal to applicants for and holders of licences, permits, registrations for traplines, and certificates for guiding territories. Those individuals may appeal to the Board any decision by a regional manager or director that affects their licence, permit, registration for a trapline or certificate for guiding territory certificate.

The time limit to appeal is 30 days; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

The Board has the discretion to stay decisions under appeal.

Zero Emission Vehicles Act

The *Zero Emission Vehicles Act* requires vehicle suppliers to meet an increasing annual percentage of new light-duty zero emission vehicle sales and leases, starting with 10% in 2025 and reaching 100% by 2040. Compliance with these directives is monitored by requiring vehicle suppliers to submit annual, auditable reports to the director appointed under the Act, who then issues assessments and possible reassessments in reply. The Act empowers government officials to impose administrative penalties for non-compliance.

The Act allows appeals to the Board of certain decisions made by a director under the Act:

- an assessment or reassessment of a report from a vehicle supplier;
- a determination of non-compliance, the extent of that non-compliance, or of the amount of an administrative penalty; and
- other decisions prescribed by regulation.

So far, no other appealable decisions have been prescribed by regulation.

There is generally a 30-day time limit for the filing of appeals; however, the Chair of the Board was granted the authority to waive, suspend, or cancel that time limit during the public health crisis related to COVID-19.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions that may be appealed under the *Zero Emission Vehicles Act*.

Statutory Framework

The statutory framework governing the operation of the Board is generally found in Part 8 of the *Environmental Management Act*, sections 93 to 98. The following sections of the *Administrative Tribunals Act* apply to the Board:

- Parts 1, 2, 3, 4 (except sections 23, 24, 33, 34(1), and 34(2)), 6, 7, and 8; as well as
- Sections 57, 59.1, 59.2, and 60.

For appeals filed under the *Mines Act*, the applicable sections of the *Administrative Tribunals Act* are slightly different. The sections that apply to appeals filed under the *Mines Act* are:

- Parts 1, 2, 3, 4 (except sections 23, 24, 25, 34(1), and 34(2)), 6, 7, 8, and 9 (except section 58).

Performance Indicators

Board Processes

In the 2020/2021 reporting period, the appeal process took, on average, 667 days to complete. Where decisions were issued on the merits of an appeal, the average was 651 days. Where decisions were resolved without a decision on the merits (by rejection, abandonment, withdraw, consent order, or dismissal), the average was 689 days.

Over the three previous reporting periods, appeals were resolved, on average, in 404 days without a decision on the merits, in 583 days with a decision on the merits, and 471 days overall. The longer timeframes in 2020/2021 are the result of an effort to resolve the oldest appeals in the Board's inventory, including one dating back to 2006, long held in abeyance.

While the time taken to resolve appeals is concerning and a focus of the service delivery realignment project, the age of the Board's appeal inventory has been reduced by roughly 29% over the reporting period (from 52,546 days to 37,180 days).

Judicial Reviews

There were four judicial reviews of Board decisions active in the 2020/2021 reporting period.

British Columbia (Assistant Water Manager) v. Chisholm

In the 2018/2019 reporting period, an Assistant Water Manager filed a petition for a judicial review of the Board's decision 2016-WAT-010(a), *Jack and Linda Chisholm v. Assistant Water Manager*. In that decision, the Board determined

that the Assistant Water Manager incorrectly declined to amend the Chisholms' water licence. The Board ordered him to issue a new licence in substitution for the Chisholms' licence in order to fix alleged errors introduced in previous amendments to water licences, including redefining a point of diversion for a water licence.

The Assistant Water Manager asked the Court to overturn the Board's decision because it erred in its assessment of the evidence and it failed to consider environmental flow needs. On April 7, 2020, the Court dismissed the Assistant Water Manager's application, confirming the Board's decision.

Comptroller of Water Rights v. Harrison Hydro Project Inc et al

On January 20, 2020, the Comptroller of Water Rights filed a petition for a judicial review of the Board's decisions: 2017-WAT-003(b) & 004(b), and 2017-WAT-003(c) & 004(c), *Harrison Hydro Project Inc., Fire Creek Project Limited Partnership, Lamont Creek Project Limited Partnership, Stokke Creek Project Limited Partnership, Tipella Creek Project Limited Partnership, and Upper Stave Project Limited Partnership v. Comptroller of Water Rights*. In these decisions, the Board varied a decision made by the Comptroller of Water Rights in 2017, to retroactively increase the water rental fees for the years 2011 and 2012 paid under several water licences by billing them as a single project, instead of billing them as separate projects, as was done at the time. The Board concluded that the Comptroller of Water Rights had no authority to retroactively adjust fees for water use, and it ordered a sum of money returned to the appellants. In supplemental reasons, the Board found that interest was payable on the amount to be returned by the Comptroller to the appellants. The Comptroller does not seek judicial review of the Board's order concerning interest.

The Court released its decision on February 9, 2021. The Court dismissed the Comptroller of Water Rights' application for judicial review and confirmed the Board's decision. The Comptroller of Water Rights has appealed to the Court of Appeal. That appeal remains in its preliminary phases.

Director, Environmental Management Act et al v. Canadian National Railway Company et al

Three appellant railways appealed orders from the Director of the Environmental Emergency Program, requiring them to report shipping information about crude oil through the province, from 2018 to 2020. The orders added that the information would be published unless it could not be disclosed under the *Freedom of Information and Protection of Privacy Act*.

The Orders were issued under Division 2.1 of the *Environmental Management Act*, which authorizes the Director of the Environmental Emergency Program to request information about certain substances transported by a "regulated person". The *Spill Response, Preparedness and Recovery Regulation* includes those shipping a certain volume of crude oil by railway. All the railways in this appeal met that threshold.

The railways argued that the legislation used to issue the orders in this case were unconstitutional or inapplicable to the railways as federal undertakings. The railways also argued that the orders were unnecessary and unreasonable.

The Board concluded that the *Environmental Management Act*, coupled with the *Spill Response, Preparedness and Recovery Regulation*, was predominantly intended to allow the Director of the Environmental Emergency Program to assess the railways' spill preparedness resources and plans, and dictate that spill preparedness resources be deployed in a manner acceptable to him. This could significantly affect the railways' operations. As a result, the Board concluded that

the Director of the Environmental Emergency Program lacked the constitutional authority to make the orders that the railways had appealed.

The Board went on to address whether the *Environmental Management Act*, coupled with the *Spill Response, Preparedness and Recovery Regulation*, were applicable to the railways. The Board concluded that the railways' safety and related operational management was a core federal power, and for provincial officials to be able to assess and request changes to spill response planning would have a serious effect on that operational management. Accordingly, the railways must be allowed to manage their security and safety without provincial interference, under the principle of interjurisdictional immunity.

The Board added that another constitutional doctrine, paramountcy, was not applicable in this case; however, given the Board's findings that the orders were made without constitutional authority and were inapplicable to the railways, the Board allowed the railways' appeals and rescinded the orders.

The Director of the *Environmental Management Act* and the Attorney General of British Columbia have applied for judicial review of the Board's decision in this case. The parties are exchanging arguments and the Court is scheduled to hear the case later in 2021.

Dougan v. Deputy Director, Wildlife and Habitat Branch

In 2016, Mr. Dougan was found guilty of hunting-related offenses that occurred in 1999, but the Court did not impose a sentence because too much time had passed since the offences took place. Additionally, Mr. Dougan had committed hunting-related offenses in the Yukon in 2011, and pled guilty in 2014.

Based on his history of non-compliance with hunting regulations, including those offenses, the Deputy Director of Wildlife and Habitat cancelled Mr. Dougan's hunting licences and prohibited him from applying for hunting licences for two years. These were related to personal hunting privileges, not Mr. Dougan's work as a guide outfitter.

Mr. Dougan appealed the Deputy Director's decision. He argued that no punishment could be based on the offenses because of an 18-month limitation period for prosecuting offenses under the *Wildlife Act*. Mr. Dougan also argued that the decision should be reversed because it violated his rights under sections 7 and 11 of *The Canadian Charter of Rights and Freedoms*, and because of unreasonable delay in the process, duplication in court proceedings and the decision, misconduct by various officials, and a lack of evidence on other compliance issues. Mr. Dougan also argued that the penalty in his case was inappropriately harsh.

The Board rejected all of Mr. Dougan's arguments. The Deputy Director was entitled to rely on the findings of guilt in court, and Mr. Dougan was not entitled to reargue the issue after having been found guilty of those offenses. The Board confirmed the penalties imposed in the circumstances.

Mr. Dougan has filed an application for a judicial review of the Board's decision. Arguments have not yet been exchanged.

Cabinet Reviews

Cabinet did not vary or rescind any decisions of the Board in 2020/2021.

Applications and Appeals in the 2020/2021 Reporting period

The Board is responsible for considering appeals on a broad range of subjects, as indicated by its appeal inventory. Fifty-five percent of the appeal inventory filed under the *Environmental Management Act* over the reporting period relate to Part 2 of that Act (Prohibitions and Authorizations), while 30% relate to Part 9.1 (Compliance), 10% relate to Part 4 (Contaminated Site Remediation), and 5% relate to Part 7 (Powers in Relation to Managing the Environment – decisions related to a potentially high risk contaminated site).

There was less variability in the appeal inventory brought under the *Water Sustainability Act*. Half the appeals filed over the reporting period related to Part 4 (Enforcement), while roughly 29% related to Part 2 (Licensing, Diversion and Use of Water) and roughly 14% related to Part 3 (Protecting Water Resources). One appeal involved decisions under both Part 2 and Part 3.

One new appeal was filed under the *Mines Act* (relating to the imposition of an administrative penalty). There were also two appeals filed under Part 2 of the *Integrated Pest Management Act* (Prohibitions and Authorizations of Pesticide Use and Sale) and one appeal under Part 3 of the *Water Users' Communities Act* (Water Users' Communities). All three appeals under the *Wildlife Act* related to Part 1 (General), which covers nearly the whole of that statute.

The diversity of appeals is typical of the year-to-year variability encountered by the Board.

The table below summarizes the number of appeals in the Board's inventory at the start of the 2020/2021 reporting period, as well as those filed in and completed in the reporting period. These figures are broken down by the legislation under which each appeal was filed. The number of appeals appears as the first number in each field, while the second number (in parentheses) provides the number of government decision letters that were the subject of appeals (as one decision letter may generate one or more appeals).



	Inventory (Start of Period)	New Appeals in Period	Matters Resolved via...				Inventory (End of Period)
			Rejection or Dismissal	Abandonment or Withdraw	Consent Orders	Final Decisions	
<i>Environmental Management Act</i>	50 (23)	20 (13)	0	4 (4)	1 (1)	25 (7)	40 (24)
<i>Greenhouse Gas Industrial Reporting and Control Act</i>	0	0	0	0	0	0	0
<i>Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act</i>	0	0	0	0	0	0	0
<i>Integrated Pest Management Act</i>	0	2 (2)	0	0	0	0	2 (2)
<i>Mines Act</i>	1 (1)	1 (1)	0	1 (1)	0	0	1 (1)
<i>Water Act</i>	5 (5)	0	0	4 (4)	0	0	1 (1)
<i>Water Sustainability Act</i>	18 (18)	14 (14)	3 (3)	7 (7)	1 (1)	4 (4)	17 (17)
<i>Water Users' Communities Act</i>	0	1 (1)	0	0	0	0	1 (1)
<i>Wildlife Act</i>	12 (12)	10 (10)	4 (4)	3 (3)	0	12 (12)	3 (3)
<i>Zero Emission Vehicles Act</i>	0	0	0	0	0	0	0
TOTAL	86 (59)	48 (40)	7 (7)	19 (19)	2 (2)	41 (23)	65 (48)

The Board convened oral hearings with respect to five appeals in 2020/2021 and took 32 workdays to do so. The Board also conducted mediations with respect to 24 appeals on six different matters, with 19 of those appeals all considered in one grouped appeal. The mediations took a total of 12.5 workdays and resulted in two of the appeals being settled or withdrawn, and the parties to two more still considering the possibility of settlement.

Forecast of Workload

Since 2016/2017, the Board has received between 42 and 92 appeals each year, for an average of 66 per year. In 2020/2021, the Board received 48. This represents a low number within recent historical ranges. Given the slowdown in the economy due to the impacts of COVID-19, the Board expects another relatively slow period in 2021/2022, and projects 45 to 55 appeals to be filed during that period.

Forecast of Trends and Special Problems

The Board has not observed any trends of note. The Board is unaware of any systemic problems related to its areas of authority.

Surveys

There were no surveys undertaken in the reporting period.





Plans for Improving Board Operations

The Board's operations will improve with ongoing adjustments to the new case management system implemented in the fourth quarter of 2019. The Board will seek to further modernize, and improve efficiency and accessibility, by investigating the suitability of various electronic document management systems. Lastly, we will continue to refine our electronic hearing processes, and codify the best practices we have developed into new rules and procedures.

The Board will also finish updating its website in 2021. This will improve communication and transparency with the public. In 2020 and beyond, the Board will work to make its processes more accessible by taking advantage of more electronic and web-based solutions for appeal processes, while ensuring that parties to appeals do not feel unduly forced to use electronic solutions or that the system is made inaccessible for those who do not have sufficient access to computers, to participate in electronic hearing processes.

The Board is engaged in a comprehensive service delivery realignment project. The Board is actively working to improve its accessibility, efficiency, efficacy, responsiveness, and timeliness. The Board is modifying its operational philosophy towards a user-focused approach. We will continue to consult with stakeholders, including frequent system users and Indigenous Peoples, to ensure our processes and procedures allow for the quicker and more efficient adjudication of appeals. We look forward to implementing significant process refinements in 2022.

Board Membership

Members of the Board are appointed by the Lieutenant Governor in Council under Part 2 of the *Administrative Tribunals Act*. The Board has diverse, highly qualified members, including biologists, engineers, and agrologists. The Board also has lawyers with expertise in natural resource and administrative law. Members are appointed from across British Columbia and the Board is committed to soliciting applications to ensure its membership reflects the diversity of British Columbians, while ensuring members have the requisite expertise and experience to carry out their responsibilities to the highest standards.

The following tables summarize the membership of the Board as of March 31, 2021, as well as changes in membership during the 2020/2021 reporting period.

Members of the Environmental Appeal Board with Special Duties as of March 31, 2021

Name	End of Term
Darrell Le Houillier (Chair)	July 29, 2022
David Bird (Vice Chair, Service Delivery)	December 31, 2023
Robert Wickett, Q.C. (Vice Chair)	December 31, 2021

Members of the Environmental Appeal Board as of March 31, 2021

Name	End of Term	Name	End of Term
Maureen Baird, Q.C.	December 31, 2023	Ian Miller	December 31, 2022
Shannon Bentley	December 31, 2022	Teresa Salamone	December 31, 2022
Dr. Daniela dos Santos	December 31, 2022	Howard M. Saunders	December 31, 2022
Brenda L. Edwards	December 31, 2022	Daphne Stancil	December 31, 2021
Jeffrey Hand	December 31, 2022	R. Michael Tourigny	December 31, 2023
Cynthia Lu	December 31, 2022	Reid White	December 31, 2022
James Mattison	December 31, 2022	Reginald Whiten	December 31, 2022
Linda Michaluk	December 31, 2023		

New and Former Members of the Environmental Appeal Board

New Members	Start of Term	Former Members	End of Term
David Bird	June 22, 2020	Gabriela Lang	September 11, 2020
Shannon Bentley	June 29, 2020	Monica Danon-Schaffer	December 31, 2020
Dr. Daniela dos Santos	June 29, 2020	Les Gyug	December 31, 2020
Cynthia Lu	June 29, 2020	Lana Lowe	December 31, 2020
Ian Miller	June 29, 2020	Douglas Van Dine	December 31, 2020
R. Michael Tourigny	June 29, 2020	Norman Yates	December 31, 2020
Reginald Whiten	June 29, 2020	Susan Ross	February 17, 2021

The Board Office and Use of Resources

The Board provides administrative support for seven other appeal bodies: the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Forest Appeals Commission, the Health Professions Review Board, the Hospital Appeal Board, the Industry Training Appeal Board, and the Oil and Gas Appeal Tribunal. Administrative support includes registry services, legal advice, research support, systems support, financial and administrative services, professional development, and communications support.

Some expenses associated with the Board's operations are shared with the other appeal bodies. Such shared expenses include professional services for information technology, information systems, office expenses, and small-scale miscellaneous expenses.

With that limitation in mind, I have provided a summary of the Board's direct expenses in 2020/2021 and historically. The figures below account for administrative support offered to the other appeal bodies, but do not account for shared expenses proportionately distributed among those appeal bodies.

The following table summarizes the Board's expenditures, rounded to the nearest dollar, for 2020/2021, and averaged over the six preceding reporting periods (2014/2015 to 2019/2020, inclusive).

Area of Expenditure	Fiscal Years 2014-2020, Averaged	2020/2021 Fiscal Year
Staff Salary and Benefits	\$1,109,091	\$1,064,360
Member Fees and Expenses	\$168,682	\$241,906
Staff Travel	\$15,279	\$9,384
Professional Services	\$63,481	\$51,137
Office Expenses	\$224,425	\$200,628
Other Expenses	\$1,227	\$0
TOTAL	\$1,661,869	\$1,567,415



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