Environmental Appeal Board
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DECISION NO. EAB-EMA-21-A003(b)

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53

BETWEEN:	Norman Tapp	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board James Carwana, Panel Chair	
DATE:	Conducted by way of written submissions closing on December 15, 2021	
APPEARING:	For the Appellant: Self-represented	
	For the Respondent: Chris Rolfe, Counsel	

FINAL DECISION

APPEAL

[1] This is an appeal by Norman Tapp from a decision made by a Director (the "Director") under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"). The Director works in the Ministry of Environment and Climate Change Strategy (the "Ministry"), and his decision (the "Decision") was rendered on January 18, 2021.

[2] In the Decision, the Director determined that the Appellant had contravened several subsections within section 13 of the *Open Burning Smoke Control Regulation*, B.C. Reg. 152/2019 (the "*Regulation*") on eight different days from December 30, 2019 to January 17, 2020. The Director imposed an administrative penalty of $10,000 on the Appellant for the contraventions.

[3] The Environmental Appeal Board (the "Board") has the authority under section 103 of the *EMA* to:

(a) send the matter back to the Director, with directions,

(b) confirm, reverse, or vary the Decision, or

(c) make any decision that the Director could have made, and that the Board considers appropriate in the circumstances.

[4] The Appellant requests that the Board reduce the administrative penalty to $5,000.

BACKGROUND

Procedural Background of the Appeal

[5] On February 5, 2021, the Appellant filed a Notice of Appeal against the Decision. Following the filing of the Notice of Appeal, a conference call was held with the parties where the issues under appeal were identified as:

i) the Appellant's challenge to evidence obtained by the conservation officer which was considered by the Director; and

ii) the Appellant's challenge to the monetary amount of the Director's Decision.

[6] Regarding the evidentiary issue, the Appellant alleged that the Director had considered evidence that was obtained by a conservation officer entering a reserve of the Cowichan Tribes First Nation (the "Cowichan First Nation") without permission or notice. The Board decided to hear that ground of appeal as a preliminary issue before addressing the Appellant's request that the penalty be reduced. The Board offered the parties an opportunity to make written submissions on that preliminary issue.

[7] On August 13, 2021, the Board issued a decision on the preliminary issue (Decision No. EAB-EMA-21-A003(a)) (the "*First Decision*"). In the *First Decision*, the Board set out the test for summary dismissal of an appeal or part of an appeal under section 31(1)(f) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), which provides that the Board may dismiss an appeal, or part of an appeal, if there is no reasonable prospect the appeal, or the part of the appeal, will succeed. The Board found that the Appellant's first ground of appeal ought to be summarily dismissed because the Appellant provided "insufficient evidence and no legal argument to support his allegation that the Conservation Officer entered the Cowichan First Nation's reserve land without permission when investigating him" (*First Decision*, at para. 48). Consequently, this ground of appeal had no reasonable prospect of success. In addition, based on the evidence and submissions provided by the Director, the Board found that the conservation officer "did not trespass or otherwise unlawfully enter on First Nation's land in gathering evidence which was relied upon in determining that the Appellant contravened section 13 of the *Regulation*" (*First Decision*, at para. 51).

[8] Following the *First Decision*, a pre-hearing conference was held on September 14, 2021 between the Vice Chair and the parties. The pre-hearing conference dealt with a number of matters including the method of hearing for the remaining issue in the appeal. The Appellant preferred an oral hearing because of his belief that being able to present his views and arguments in person was more persuasive, and the Director preferred the appeal to be heard "by written submissions, as it is the most appropriate method given the nature and complexity of the appeal".

[9] On October 1, 2021, the Vice Chair wrote to the parties regarding the matters dealt with at the pre-hearing conference. The Vice Chair confirmed that the amount of the penalty in the Director's Decision remained at issue. On the method of hearing, the Vice Chair weighed various factors from the Board's Practice and Procedure Manual to determine the matter. These factors included the nature and

complexity of the appeal, whether there were any issues of credibility, and whether there were any language or literacy barriers. The Vice Chair found that the appeal was not complex, there were no issues of credibility, and no language barriers. The Vice Chair held that the appeal could "be fairly heard and decided by written submissions and that "the factors supporting a decision to hold the hearing in writing outweigh the preference sought by Mr. Tapp." The Vice Chair further noted that this was consistent with "the Board's mandate to hear appeals in the most timely and cost-effective way for the parties and the Board when appropriate and fair." In the letter regarding the pre-hearing conference, the Board also set out a schedule for the parties to provide their written submissions.

[10] On October 1, 2021, the Appellant sent an email to the Board indicating that he would like to appeal the Vice Chair's decision to hold the hearing in writing.

[11] On October 6, 2021, the Chair of the Board wrote to the Appellant regarding the Appellant's request to appeal the decision to hold the hearing in writing. The Chair indicated that there was no internal review process or right to appeal the Vice Chair's decision to the Chair, but the Appellant could renew his objection to having the matter heard by way of written submissions to the panel member assigned to decide the appeal. The Chair further encouraged the Appellant to include his objections in his written submissions if he did not think he had a reasonable chance to argue his case and present evidence in writing.

[12] The Appellant's written submission was due on November 1, 2021. The Board did not receive a submission from the Appellant.

[13] On November 2, 2021, the Board sent an email to the Appellant, asking if he intended to provide a written submission and whether he required more time.

[14] The Appellant responded to the Board by email on November 10, 2021, and stated: "There is no new information to add".

[15] The Director filed his written submission and supporting material on December 1, 2021.

[16] The Appellant had until December 15, 2021, to file his reply submission; however, the Appellant did not file a reply submission.

Overview of the Statutory Scheme

[17] Under section 115(1)(a) of the *EMA*, a director may issue an administrative penalty to a person who fails to comply with a prescribed provision of the *Act* or its regulations.

[18] The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Penalties Regulation*") governs the determination of administrative penalties under section 115(1) of the *EMA*. Section 7(1) of the *Penalties Regulation* lists the following factors that a director must consider, if applicable, in establishing the amount of an administrative penalty:

(a) the nature of the contravention;
(b) the real or potential adverse effect of the contravention;
(c) any previous contraventions, administrative penalties imposed on, or orders issued to the person who is the subject of the determination;

(d) whether the contravention was repeated or continuous;
(e) whether the contravention was deliberate;
(f) any economic benefit derived by the person from the contravention;
(g) whether the person exercised due diligence to prevent the contravention;
(h) the person's efforts to correct the contravention;
(i) the person's efforts to prevent recurrence of the contravention; and,
(j) any other factors that, in the opinion of the director, are relevant.

[19] Under section 7(2) of the *Penalties Regulation*, if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues.

[20] Under section 31.1(2) of the *Penalties Regulation*, a person who fails to comply with section 13 of the *Regulation* is liable for an administrative penalty not exceeding $40,000.

[21] The Ministry uses the "Administrative Penalties Handbook – Environmental Management *Act* and Integrated Pest Management *Act*" (the "Handbook") as guidance for the issuance of administrative penalties. The Handbook recommends determining a "base penalty" that reflects the seriousness of the contravention considering the nature of the contravention and any real or potential adverse effects (factors 7(1)(a) and (b) of the *Penalties Regulation*). The base penalty is added to, or deducted from, by considering each of the factors (c) through (j).

The Decision

[22] Various elements of the background relating to the Director's Decision were set out in the *First Decision*. For ease of reference, I set some of them out here:

> [4] On September 15, 2019, a new version of the *Regulation* came into effect. Under section 13(1) of the *Regulation*, open burning must be carried out at least 500 metres from neighbouring residences unless the requirements in section 13(2) are met.
>
> [5] On several days in December 2019 and January 2020, the Appellant was burning vegetation debris after clearing two parcels of land (the "Property") that he owns. The Property is located immediately south of Theik Indian Reserve #2 ("Theik Reserve #2"), a reserve of the Cowichan First Nation. Jack Road is located on the southern perimeter of Theik Reserve #2. Parts of Cowichan Bay Road cross Theik Reserve #2. The parties agree the Appellant's open burning on the Property occurred within 500 metres of neighbouring residences.
>
> [6] During the course of their duties, Conservation Officer Sergeant Scott Norris and another Conservation Officer observed, from various locations, evidence of the open burning on the Property. According to an affidavit sworn by Sgt. Norris on May 6, 2020, on several days, he and his colleague made those observations from portions of Jack Road or Cowichan Bay Road on Theik Reserve #2. On some other days, they made their observations from locations that were not on Theik Reserve #2, such as on Highway 1 or on the Property.

> [7] On December 19, 2019, the Ministry had issued a warning notice to the Appellant for non-compliance with the *Regulation*.

[23] In addition to the Appellant being given a written warning, the Conservation Officer had discussions with the Appellant about the need to comply with the requirements of the *Regulation* and gave verbal warnings to the Appellant. Such discussions occurred on October 1, 2019, November 27, 2019, December 19, 2019, and December 20, 2019.

[24] However, as noted in the above quote from the *First Decision*, the Conservation Officers subsequently observed further violations of the *Regulation*.

[25] On January 30, 2020, the Director issued a Notice Prior to Determination of Administrative Penalty (the "Notice") to the Appellant. Attached to the Notice was an Administrative Penalty Assessment Form showing how the Director calculated the proposed penalties for each of the contraventions in relation to the factors set out in section 7(1) of the *Penalties Regulation*. It stated that the Director had calculated preliminary penalties totaling $104,000 based on the evidence before him and the factors in the *Penalties Regulation*. This preliminary penalty included an initial penalty of $13,000, based on the factors in section 7(1) of the *Penalties Regulation*, and then a "daily multiplier" of eight was applied under section 7(2) of the *Penalties Regulation* to account for eight separate days when contraventions occurred. The Notice offered the Appellant an opportunity to be heard and make submissions before the Director made a final decision.

[26] On February 3, 2020, the Appellant provided comments to the Director.

[27] On September 23, 2020, the Director issued a revised Administrative Penalty Assessment Form to the Appellant, in which the Director set out reasons for proposing a revised total penalty of $12,000 for the contraventions. The most significant change was that the revised proposed penalty no longer included a "daily multiplier" of eight. The Director again offered the Appellant an opportunity to make submissions before the Director made a final decision.

[28] On January 11, 2021, the Appellant provided a written submission to the Director. Those submissions were directed towards two factors set out in the revised Administrative Penalty Assessment Form: i) the "Actual or Potential for Adverse Effect" of the contraventions portion of the Base Penalty assessment; and ii) the Economic Benefit derived by the Appellant from the contraventions, being factor (f) in the potential penalty adjustment factors. The Appellant argued that the actual or potential effect of the contraventions was "Low to None", rather than "medium". The Appellant submitted that the "potential to result in an adverse effect was low" because the burning was not conducted recklessly and the burning was not done on days where the venting was listed as "poor". Regarding the economic benefit derived from the contraventions, the Appellant argued that the "intention with the land was not to log and clear as fast and cheap as possible and then sell the properties off to the highest bidder", but "to create sustainable farmland". The Appellant further stated that he did "not enjoy burning" and he would have not done so "if there was another way to deal with the vegetative debris that made sense economically". Ultimately, the Appellant did cease burning by loading and hauling all remaining material to a pile at the back of the property "at the expense of $60,000", with the pile taking up otherwise usable farmland.

[29] On January 18, 2021, the Director issued the Decision. Under the heading "Reasons for Decision" in the Decision, the Director addressed the Appellant's written submissions to the Director.

[30] Regarding the actual or potential for adverse effect of the contraventions, the Director stated in the Decision that there is an "abundance of publicly available epidemiological information respecting the impact" on human health of the very small particulate matter in wood smoke, there is a greater impact on the elderly and those with respiratory conditions, and there were many neighbours within the 100 and 500 meter setback requirements who were elderly as well as one complainant with "COPD" (chronic obstructive pulmonary disease). The Director stated that he could not accept the Appellant's argument that there was little or no impact as a result of this extended period of non-compliant burning under these specific circumstances. The Director concluded that the actual or potential adverse effect of the contraventions was medium.

[31] Attached to the Decision was a final Administrative Penalty Assessment Form in which the Director set out a further revised penalty amount, compared to the September 23, 2020 Administrative Penalty Assessment Form, based on the factors in section 7(1) of the *Penalties Regulation*. On the final Administrative Penalty Assessment Form, the Director further elaborated on the "Actual or Potential for Adverse Effect" factor, indicating that it could arguably be characterized as high rather than medium "since the burning was within the minimum setback distances established for human health protection, it occurred during prohibited hours when smoke is trapped near the surface, and based upon witness impact statements, the impact was real and the contraventions resulted in material discomfort to a number of elderly neighbouring residents who filed multiple complaints with the Ministry". However, the Director found that this factor was medium because the Appellant "is a private individual and higher classifications could result in a base penalty which may appear punitive in nature." The Director levied a base penalty of $10,000.

[32] In his reasons regarding the economic benefit derived from the contraventions, the Director noted that the Appellant's information on the cost to avoid burning "could be used to assign a quantified cost to this factor numbering in the tens of thousands of dollars". However, the Director instead elected "to drop the aggravating factor for this consideration" as he did "not have a quantified cost" relating to this factor. The Director noted the leniency shown to the Appellant in this respect, and indicated that in a similar situation in the future his "inclination would be to assign a large aggravating factor for costs avoided equivalent to what the cost of full compliance would have been". In any event, because this was the Director's "first encounter using this administrative penalty tool" with the Appellant, and because the Appellant "is an individual as opposed to a corporation", the Director decided to remove the additional $1,000 that he had originally proposed levying for this factor in this specific instance. In the final Administrative Penalty Assessment Form, the Director stated that "the cost of legally disposing of the subject wood waste would be significant but since this cost has not been quantified, no aggravating factor is proposed".

[33] The Director also dealt with the factor involved with the Appellant's "Efforts to prevent reoccurrence of the contravention or failure" on the final Administrative Penalty Assessment Form. The Director had previously reduced the Base Penalty by

ten percent based on this factor. After receiving the Appellant's response to the Notice, the Director increased the reduction to twenty percent.

[34] In the result, after considering the Appellant's submissions, the Director reduced the proposed administrative penalty from $12,000 to a final administrative penalty of $10,000 in the Decision.

ISSUES

[35] As previously noted, the *First Decision* addressed the Appellant's allegation about the evidence that was considered by the Director, and that ground of appeal was dismissed.

[36] The remaining issue in the Notice of Appeal relates to the amount of the penalty. On that issue, the Appellant objected to the matter being heard in writing, and the Director submitted that the appeal should be summarily dismissed on the basis that the Appellant had not met the burden of proof in showing the Decision was wrong, as well as under section 18 of the *ATA,* given the Appellant's failure to make any submissions following the filing of the Notice of Appeal.

[37] I will consider the questions raised as follows:

1. Should the issue regarding the penalty amount be heard by written submissions?
2. Should the appeal be summarily dismissed?
3. If not, should the amount of the penalty be reduced?

RELEVANT LEGISLATION

[38] Relevant sections of the *EMA* and its regulations are provided where they are discussed in this decision.

[39] Sections 18 of the *ATA* is also relevant to this appeal. That section of the *ATA* applies to the Board under section 93.1 of the *EMA*, and it provides as follows:

> **18** If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal, after giving notice to that party, may do one or more the following:
>
> …
>
> (b) continue with the application and make a decision based on the information before it, with or without providing an opportunity for submissions;
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> (c) dismiss the application.

[40] Section 1 of the *ATA* defines "application" as including an appeal.

DISCUSSION AND ANALYSIS

1. Should the issue regarding the penalty amount be heard by written submissions?

[41] As previously noted, the Vice Chair weighed various factors and concluded that the method of hearing should be by written submissions. The Appellant wrote to the Board indicating that he wished to appeal the Vice Chair's decision regarding the method of hearing, and the Chair responded by indicating the Appellant could renew his objection with the panel member assigned to decide the appeal. The Chair further encouraged the Appellant to include his objections in his written submissions if he did not think he had a reasonable chance to argue his case and present evidence in writing.

[42] The Appellant did not renew his objection to having the matter heard by way of written submissions. Before this panel, the Appellant did not raise the matter of an oral hearing, nor did he explain why he believed the decision about the method of hearing was wrong, nor did he assert any prejudice through a written hearing. Indeed, when the Board wrote to the Appellant to indicate that it had received no submission from him, and to inquire whether he intended to provide a written submission, the Appellant responded by saying: "There is no new information to add".

[43] In stating there was no new information to add, I infer that the Appellant was indicating he did not require an oral hearing to present evidence or argument in support of his case. Given the Appellant's failure to renew his objection regarding the method of hearing, his failure to indicate to the panel that he would suffer any prejudice through this method of hearing, and his statement indicating he had nothing to add, I find that the remaining issue of whether the penalty should be reduced ought to be decided based on written submissions. As a result, the Vice Chair's decision to have this matter heard by written submissions stands.

[44] In making this finding, I agree with the Vice Chair's approach in weighing the factors set out in the Board's Practice and Procedure Manual in determining the method of hearing. These factors include the complexity of the matter, whether there were any issues of credibility, and whether there were any language or literacy barriers. In the present case, the issue of whether the amount of the penalty should be reduced is not a complex one, and there are no issues of credibility or barriers relating to language or literacy. I find that the weight of such factors here favours a hearing by written submissions. Further, in making this determination, I agree with the Vice Chair that it is appropriate to consider "the Board's mandate to hear appeals in the most timely and cost-effective way for the parties and the Board when appropriate and fair", and that such a consideration favours a hearing by written submissions in the present case.

2. Should the appeal be summarily dismissed?

Summary of the Appellant's position

[45] This issue was raised by the Director. Although the Appellant had an opportunity to provide submissions in response to the Director's submissions, he provided none. His Notice of Appeal and previous submissions did not address this issue.

Summary of the Director's position

[46] The Director says the appeal should be dismissed on a summary basis either because the Appellant failed to provide submissions by the deadline set by the Board, or because the Appellant has failed to discharge the onus on him to show that the Decision was inappropriate.

[47] The Director refers to section 18 of the *ATA* and notes that the Appellant did not provide his written submissions by the November 1, 2021 deadline set by the Board. Also, after being contacted by the Board about the matter, the Appellant indicated that he had "no new information to add". The Director notes that the Board relied on section 18 of the *ATA* in dismissing the appeal in similar circumstances in *Telegraph Cove Resorts Ltd. v. British Columbia (Ministry of Environment)*, [2019] B.C.E.A. No. 15 (QL) [*Telegraph Cove*].

[48] The Director also submits that the Board has previously held that an appellant bears the burden of proving its case and "must provide some evidence to support its claims"; it is not enough to simply file a notice of appeal against a decision because the appellant does not like it (see: *Telegraph Cove*, at para. 35).

[49] The Director says the Appellant has failed to file any submissions to show why his Decision is wrong and should be changed. The Director argues that in these circumstances, there is no need to consider the merits of his Decision, and "it is not in the interest of judicial economy to hear a matter where the Appellant cannot be bothered to make submissions".

[50] The Director argues that the appeal ought to be dismissed on a summary basis "with no consideration of substantive issues" based on the failure of the Appellant to file submissions or "because the Appellant has failed to discharge the onus on him to show that the Decision was inappropriate".

Panel's Findings

[51] I find that I can decide this matter on the basis of the Appellant's failure to meet the burden of proof.

[52] The Board has stated on many occasions that the burden of proving the appellant's case lies with the appellant. In paragraphs 35 and 36 of *Telegraph Cove*, the Board held that an appellant must provide some evidence to meet this requirement:

> Further, in an appeal before this Board, the Appellant bears the burden of proving its case. It is not enough for the Appellant to simply file notices of appeal against decisions it did not like. It must provide some evidence to support its claims. The Board has explained this requirement in several previous decisions such *as Wilfred Boardman v. Regional Manager* (Decision No. 2013-WIL-021(a), September 9, 2014) [*Boardman*], *and City of Cranbrook v. Assistant Regional Waste Manager* (Decision No. 1999-WAS-023(c), April 9, 2009).
>
> I find that the Appellant also failed to meet this burden of proof, because it provided no evidence to prove its case even after its request for an extension of time…

[53] An appellant, in filing an appeal, is responsible for being aware of this obligation. Further, in the present case, I find the Appellant knew or ought to have known, in three ways, that the burden was on him to provide some evidence supporting his case. First, in the *First Decision*, the Board noted "that the Appellant has the burden of proof" (at para. 39). Second, the Board's information sheet titled "Preparing for a Written Hearing and Preparation Checklist" was provided to the Appellant with the Vice Chair's letter of October 1, 2021, and the information sheet indicates that it is up to an appellant "to prove, on a balance of probabilities, that the decision under appeal should be changed". Third, the Director's submission made it clear that the onus was on the Appellant to show the Decision was inappropriate, and it included reference to *Telegraph Cove*. Nevertheless, the Appellant did not lead any evidence or make any submissions or seek more time to put forward material in support of his appeal and to meet the onus.

[54] In his Notice of Appeal, the Appellant mentioned that he wished to have the penalty reduced because Covid has affected his income; however, he led no evidence to substantiate that allegation about his income, nor has he raised any arguments as to why any effect on his income should lead to a reduction in the penalty assessed by the Director. With respect to the Appellant's reference to the "government changing regulations without consideration of projects in progress and committed to under contract price", the Appellant did not provide evidence of any such contracts he may have entered into, nor did he explain how any such contracts should have prevented the government from passing the regulations that it passed. Similarly, the Appellant has not explained whether he checked any regulations before entering into any contracts he may have made for the work that led to the contraventions, nor has he argued that it was on the basis of checking such regulations that he entered into any such contracts. In fact, as previously noted, the Appellant did not file a written submission with any evidence or argument to support the request in his Notice of Appeal that the administrative penalty be reduced.

[55] As a result of the foregoing, I find the Appellant did not put forward sufficient evidence or arguments in support of the allegations in his Notice of Appeal relating to this ground of appeal and has not met the burden of proof. As set out in *Telegraph Cove* and in *Boardman*, the Board may dismiss an appeal where an appellant has failed to put forward evidence or arguments to prove his case. In the circumstances, I summarily dismiss the remaining issue in the Appellant's appeal on the basis that the Appellant has not met the burden of proof. As such, there is no need to consider the additional ground for dismissing the appeal put forward by the Director based on section 18 of the *ATA*.

3. Should the amount of the penalty be reduced?

[56] As a result of my findings above, there is no need to address the remaining issue. Before concluding this matter, I will simply make the following comments about the two items set out in the Notice of Appeal.

[57] First, regarding the allegation that the government changed the regulation without considering projects in progress, a review of the material filed on this appeal indicates that the Conservation Officers gave the Appellant a number of

warnings before instituting a penalty. These warnings were given over a number of months including on October 1, November 27, and December 19, 2019. This indicates that consideration was given to the work underway, and the Appellant was given time to adjust the work on his projects to meet the new requirements of the *Regulation* which came into force on September 15, 2019.

[58] Second, regarding the Appellant's reference in his Notice of Appeal to Covid affecting his income, a review of the material indicates that the Director has already made allowances for the Appellant's circumstances. For example, in his Reasons, the Director explained that he had taken into account that the Appellant "is an individual as opposed to a corporation" in showing leniency towards the Appellant and reducing the final penalty amount.

DECISION

[59] In reaching my decision, I considered all of the submissions and relevant evidence provided by the parties, whether specifically referenced in my reasons or not.

[60] For the reasons set out, I summarily dismiss the remaining issue on this appeal.

[61] In the result, the Appellant's appeal is dismissed.

"James Carwana"

James Carwana, Panel Chair
Environmental Appeal Board

June 16, 2022