



Environmental Appeal Board

Fourth Floor, 747 Fort Street, Victoria BC V8W 3E9

Tel: (250) 387-3464

www.bceab.ca

Fax: (250) 356-9923

Email: info@bceab.ca

DECISION NO. EAB-EMA-21-A008(a)

In the matter of an appeal under the *Environmental Management Act*, SBC 2003, c. 53

BETWEEN:	Peace River Coal Inc.	APPELLANT
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on March 29, 2022	
APPEARING:	For the Appellant:	Robin Junger, Counsel Komal Jatoi, Counsel
	For the Respondent:	Andrew Grant, Counsel

PRELIMINARY DECISION ON METHOD OF HEARING

[1] This preliminary decision is to determine whether this appeal will be considered through written submissions, an oral hearing (whether in-person or via videoconference), or a hybrid of the two.

BACKGROUND

[2] Peace River Coal Inc. ("Peace River") owns a metallurgical coal mine near Tumbler Ridge, British Columbia. Although the mine has not been operational since 2015, runoff from the mine site discharges regulated substances into surface water in the area. When operational, the mine generated additional waste discharges into nearby surface water. All of these discharges are authorized under Permit 17762 (the "Permit"), issued by a Director (the "Director") designated under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act").

[3] The Permit was initially issued on October 31, 2015. It recognizes that effluent from the mine site is directed to a set of sedimentation ponds.¹ One pond has an associated water treatment facility that reduces the concentration of

¹ A sedimentation pond is a body of water that is sufficiently calm that solids settle out of solution.

selenium in the water before discharging the treated water back into the sedimentation pond system. The water in the sedimentation ponds is ultimately discharged to surface water in the area. The surface water bodies are, or include, Gordon Creek and Babcock Creek.

[4] The Permit required that Peace River construct and start operating a second water treatment facility on Gordon Creek, downstream of the sedimentation ponds, by March 31, 2017. This was to reduce selenium levels in Gordon Creek. In May 2016, Peace River applied for an amendment to the Permit, to delay the construction of the Second Facility.

[5] On November 15, 2016, the Director granted Peace River's request and amended the Permit. According to Peace River, the Ministry has acknowledged that any elevated selenium levels at one selenium monitoring site, numbered G2, downstream of the planned location for the Second Facility, should not give rise to administrative penalties. This is not documented in the amended Permit.

[6] The Permit imposes other requirements on Peace River. Those include that Peace River:

- supply quarterly and annual reports, and
- maintain selenium concentrations at various locations, relative to the Interim Site Performance Objective (the "Objective"), which is defined in the Permit.

[7] On September 9, 2021, a Delegate of the Director (the "Director") issued an administrative penalty (the "Decision") based on two types of Permit violations.

[8] Firstly, the Director concluded that Peace River had violated the Permit by not submitting quarterly reports (six times) and one annual report as required. She imposed a \$4,200 penalty in respect of those violations. Her reasons do not appear in the Decision, which refers to those contained in an earlier "Notice and penalty assessment form." Peace River has not appealed this aspect of the Decision.

[9] Secondly, the Director determined that selenium concentrations exceeded the Objective at two monitoring stations. The first monitoring station, numbered B-5, had one exceedance. The Delegate considered this to be a "moderate" contravention, so imposed a \$5,000 penalty, plus 10% to reflect the economic benefit that the Director says Peace River experienced as a result of its noncompliance with the Permit.

[10] The Director also determined that there were 40 exceedances at a second monitoring station, numbered Gu/sGT33. Site Gu/sGT33 is downstream of the planned location of the Second Facility. The Director considered this to be a "major" contravention, with an associated base amount of \$20,000 per day. The Director stated that, while Peace River obtained economic benefit as a result of its noncompliance, the increased penalty amount was offset by the efforts Peace River made to prevent reoccurrence of the contravention. The Director applied the penalty 40 times to reflect the repeated or continuous nature of the noncompliance, for a total penalty of \$800,000, in respect of the exceedances at Site Gu/sGT33.

[11] In total, the Director imposed an administrative penalty of \$809,200.

[12] Peace River appealed the Decision. In its initial Notice of Appeal and a more recent amended Notice of Appeal, Peace River raised the following issues (as I have characterized them, more generally than Peace River did):

- that the Director:
 - improperly sub-delegated decision-making functions to other Ministry staff;
 - destroyed, permitted the destruction of, or failed to take reasonable steps to prevent the destruction of decision drafts that show the input of other Ministry staff into the Delegate's decision-making;
 - failed to prepare or retain records of how she assessed or came to conclusions about both Peace River's response to the Notice of Determination and input from other Ministry staff; and
 - sought and entertained comments from Ministry staff that showed bias against, or hostility toward, Peace River, without advising Peace River about those comments and giving it the chance to respond;
- that the penalty for Site B-5 should be reversed because:
 - the Director did not identify what steps Peace River could and should have taken, beyond what it had done, in the circumstances;
 - the Director did not establish actual or likely harm to animal health; and
 - it was not relevant whether selenium levels exceeded water quality guidelines, given that the levels authorized under the Permit do as well;
- that the penalty for Site Gu/sGT33 should be reversed because:
 - that site is downstream of the planned site for the second water treatment facility, and (like Site G2), should not be subject to any penalty;
 - the Director unreasonably relied on analyses provided by a sub-delegate because it failed to consider the question of what (if any) penalty was appropriate separate from the question of whether the authorized discharges exceeded levels authorized in the Permit; and
 - the Director misunderstood Peace River's submissions insofar as the locations of various sampling sites were concerned; and
- that the penalty imposed for Site Gu/sGT33 should be reduced because:
 - the daily multiplier was not warranted,
 - the contravention should not be considered "major",
 - the Director failed to identify any economic benefits Peace River received from the alleged noncompliance, and
 - the Director failed to give sufficient weight to the efforts Peace River had taken to prevent any recurrence.

[13] The Board has continued to work with the parties to advance the appeal. There is now a dispute between the parties as to whether the appeal should be considered by way of written submissions, an oral hearing, or a hybrid of the two. This preliminary decision addresses that procedural question.

ISSUES

[14] The issue in this preliminary decision is whether the appeal will be considered by way of written submissions, an oral hearing (whether in-person or held via videoconference), or a hybrid of the two.

POSITIONS OF THE PARTIES*The Director's position*

[15] The Director requests that the appeal proceed by way of written submissions. The Director says that this is not a novel or complex matter, whether Peace River failed to comply with the Permit. There appears to be a low risk of conflicting evidence or issues of credibility.

[16] Rather, the Director says that Peace River seems to focus on "procedural matters including ... record keeping, sub-delegation, the consideration of irrelevant factors, and failing to provide the appellant an opportunity to respond to records." The Director says that the process leading up to the Decision was procedurally fair but, even if it was not, the Board can remedy that through the appeal process.

Peace River's position

[17] Peace River asks that the appeal proceed by way of an oral hearing. Peace River references an earlier decision of the Board, *Donald Pharland v. Director, Environmental Management Act* (2007-EMA-014(a), December 4, 2007) [*Pharland*], saying the Board will consider two factors predominantly in deciding whether to grant an oral hearing:

- whether an oral hearing is required so the parties can present their cases in a full and fair manner, and so that the Board can make an informed and fair decision, given the issues raised in the appeal; and
- whether the public is able to view proceedings that impact it, in a fair and accessible manner.

[18] Peace River also references the Board's *Practice and Procedure Manual* (the "*Manual*"), which says that a hearing will be conducted in writing where: credibility is not a significant factor; the material facts are not in dispute; the issues to be decided have been dealt with in previous appeals or are not complex; and the questions to be decided are purely legal.

[19] Peace River says that the appeal raises complex factual, technical issues related to the potential environmental effect of selenium. Peace River notes that the actual or potential adverse effect of selenium discharges in excess of what is authorized under the Permit informs the amount of the administrative penalty. Peace River says the question of actual or potential adverse effect is likely to require expert evidence, and the Board would benefit from hearing testimony and asking questions of such experts, and from observing cross-examination of the witnesses.

[20] Peace River also argues that it should not be penalized for elevated selenium concentrations at Site Gu/sGT33 for the same reasons that the Ministry has stated

that elevated selenium concentrations at Site G2 would not give rise to administrative penalties. Peace River says that the Director had previously agreed to amend the Permit, to delay a requirement that Peace River build a secondary selenium treatment plant.

[21] Peace River says the Board may need to consider "... the nature of the discussions and understanding preceding the amendment ... in terms of determining what (if any) is a fair and appropriate penalty for exceedances that occurred downstream of the location where the Ministry agreed to defer the second selenium treatment plant." Peace River says issues of credibility and testing recollections may be important on this issue.

[22] Peace River also argues that two more questions at issue in the appeal cannot be properly addressed in writing. The first is whether the sub-delegation by the Director was appropriate. The second is whether there were flaws in the sub-delegate's analysis that were inappropriately adopted by the Director, in making the Decision. Peace River says this issue will involve asking questions of the Director, as to "... why she sought input from other parties, what (if any) instructions she gave them and how and why she decided to include such input into her final decision." Peace River says that the issue will also "... require questioning as to the amount of time and depth of analysis undertaken by staff that provided that input."

[23] Peace River adds that, in particular, one email from a Ministry staff member, Mr. Bings, to the Director, will require testimony and cross examination. Peace River says that an email written by Mr. Bings demonstrates that he was hostile to Peace River. Peace River intends to question whether it is typical for the Director to seek and/or receive such comments during the course of an administrative penalty determination.

[24] Peace River says that there are not purely legal issues at play, but rather factual concerns and weighing of factors, including whether:

- there was any actual or likely harm to animal health resulting from Peace River's noncompliance,
- selenium concentration in excess of water quality guidelines is a relevant factor in the analysis,
- the application of the daily multiplier was warranted; and
- whether the contravention should be considered "major".

[25] Peace River argues that none of the parties would be prejudiced by any delay associated with convening an oral hearing. Peace River says this is "... one of the least time sensitive matters that could arise before the Board."

[26] Peace River has no concerns about proceeding via videoconference, but says there is no demonstrated need or ability to engage in a hybrid hearing in this case.

The Director's reply

[27] The Director notes that, if Peace River wishes to present expert evidence, it cannot attack the terms of the Permit, as it is not under appeal. The Director also notes that the amendment to the Permit, which delayed the timeframe for the construction of the Second Facility, did not alter the Objectives for selenium

concentration or the requirement that Peace River comply with those objectives. The Director views these as independent issues.

[28] The Director also advises that she anticipates presenting procedural evidence, including some that Peace River wants to solicit via questions in an oral hearing, via affidavit. The Director takes the position that only her evidence is relevant in this matter, and not the evidence of her staff.

[29] The Director concludes by saying the issues in the appeal are neither novel nor complex, and that an oral hearing is not necessary to fairly decide the appeal. The Director argues that written submissions are appropriate.

Peace River's reply

[30] Peace River says that the question of selenium impacts in a particular body of water, a relevant factor in assessing the appropriate quantum of the administrative penalty, is highly contextual and requires expert evidence to decide. Peace River reiterated that this is not a purely legal issue, and requires the Board to make factual findings and weigh several factors. Peace River says the Board will benefit from hearing the expert evidence live and being able to ask questions directly to the expert(s), with respect to selenium impacts.

[31] Furthermore, Peace River says that the environmental impacts of selenium have not been addressed in any previous decision of the Board, although some decisions have mentioned selenium.

[32] Peace River adds that there are credibility concerns that require an oral hearing to fairly address, including whether the Director relied on Mr. Bings' information, despite him being biased against Peace River, and relied to an inappropriate extent on the analysis of another sub-delegate. Peace River adds that the Board will also need to hear live evidence from the Director, on the change in her opinion, with respect to the "fairness implications" of her agreement to allow the construction of the Second Facility.

[33] Similarly, Peace River argues that the Board will need to hear live evidence, including cross-examination of the Director, on the reasons she used her discretion to apply a daily multiplier of a base penalty amount, in calculating the total penalty to be paid. According to Peace River, this gave rise to the largest administrative penalty ever imposed under the *Act*. That the Director has further evidence, as yet unrepresented and to be submitted via affidavit, further supports the need for an oral hearing.

[34] Peace River also says that the Director did not provide any authorities to support her argument that subject matter concerning violations of procedural fairness militate in favour of a hearing by way of written submissions. The Board's *Manual* does not support the Director's argument on this point either.

[35] Peace River argues that the appeal extends beyond procedural fairness issues in any event, and the three *Pharland* criteria used to determine whether an oral hearing is appropriate all militate in favour of such a hearing. The criteria are: whether the parties will be able to fully and fairly present their cases, whether the Board is able to make a fair and informed decision, and whether the public has the opportunity to view the proceedings.

[36] Peace River concludes by agreeing that an oral hearing held by videoconference would be reasonable; however, argues that the number of issues and their complexity mean that a hybrid hearing would be less fair, practical, efficient, and cost effective for all concerned.

The panel's findings

[37] At the outset, I note that the Board has the jurisdiction to hold a hearing in writing, virtually or in person, or any combination of those formats.² The question is whether, in the circumstances of this particular case, the Board ought to require an oral hearing (either in person or virtually).

[38] As Peace River noted, *Pharland* identifies three predominant factors the Board will consider in deciding whether to convene an oral hearing in any particular appeal. They are whether:

- the parties require an oral hearing to fully and fairly present their cases,
- the Board requires an oral hearing to make a fair and informed decision on the appeal, and
- the public can view proceedings that impact it, in a fair and accessible manner.

[39] The *Manual* provides further guidance, listing circumstances that would not generally suggest the need for an oral hearing, based on those criteria: where credibility is not a significant factor, where the material facts are undisputed (including where the questions to be resolved are purely legal), and where the appeal is neither novel nor complex. This is not a closed list; there will be other circumstances where an oral hearing is not required. Additionally, the list does not imply that an oral hearing will be indicated where those criteria not met. For example, although a case that is neither novel nor complex may be appropriately decided through written submissions, this does not mean that an oral hearing is necessary in any case that is novel, complex, or both.

[40] While addressing the circumstances outlined in the *Manual* may not be determinative of the issue I must decide, because the parties did so I will address their arguments.

[41] I agree with Peace River that the appeal raises complex issues. While the Director is correct that the question of whether or not Peace River complied with the terms of its Permit is straightforward, the factors considered by the Director were not. For example, in determining the base penalty amount, the Director considered the potential the selenium exceedance(s) had to threaten animal health.

[42] The question of the environmental fate of selenium in the particular waterway(s) at issue is a complicated question. It can depend on the particular qualities of the waterway(s) in question and the biology present. It draws upon the studies of aqueous chemistry and biology, at a minimum. These are complex issues. This does not mean, however, that an oral hearing is indicated.

² See sections 11(1) and 36 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, made applicable to the Board by section 93.1(1)(d) of the *Act*.

[43] This is because I do not consider the subject matter to be novel. While the Board may not have issued any decisions making findings on the environmental fate of selenium, it has issued many decisions on administrative penalties, and the appropriate classification of base penalty amounts. It has issued numerous decisions addressing the environmental fate and biological impacts associated with many different contaminants in a range of aqueous settings. These cases provide insight into how the Board is likely to consider the matter, and offer references that the parties can use in making their arguments to the Board on this appeal. These prior cases will also allow the parties to help expert witnesses structure their reports, to ensure that they explain important details to the Board.

[44] While I recognize that the exact circumstances of this case have not been dealt with previously, the general issues have been, and the case cannot be said to be "novel". Indeed, if each appeal that had not considered a particular contaminant in a particular context were considered novel, the Board would virtually never hear an appeal that was not "novel". Rather, existing cases on similar issues allow a predictable blueprint for how arguments can be made and what questions are likely to be significant for the Board.

[45] Peace River asserts that the Board would benefit from hearing evidence on the complex questions raised in this appeal via an oral hearing, but does not explain why. The Board's rules contemplate that expert evidence can be provided by way of written reports and Peace River has not established why this process would be unsuitable for the purposes of this appeal. Expert reports on complex issues are often tendered and the Board can often make fair and informed factual findings based on those reports. For all the reasons described above, I conclude that written arguments and evidence are appropriate in this case, even though some of the information at issue is complex.

[46] Second, I do not consider whether the process leading to the Penalty was procedurally fair to be, by itself, indicative of whether the Board should convene an oral hearing. The Director is correct that the appeal process can cure any procedural unfairness that existed leading up to a decision under appeal. If a decision in first instance were unfair because a party was denied a hearing they should have gotten, that may indicate that an oral hearing would be necessary. Here, however, Peace River does not suggest that the process was unfair because it was denied an oral hearing that it should have had.

[47] Peace River's procedural fairness concerns in this case hinge predominantly on whether the Director inappropriately delegated certain elements of her decision-making, and relied to an inappropriate degree on the analyses and opinions of her subdelegates. This includes whether the Director relied on erroneous information or (in the case of Mr. Bings) conclusions from subdelegates that were biased against Peace River. Peace River also raises the question of whether the Director relied on irrelevant information, such as the selenium concentration listed in the applicable water quality guidelines, when determining the appropriate penalty to impose in this case.

[48] In the particular circumstances of this case, these procedural defects can all be cured with an appeal and do not, on their own, indicate that the appeal should proceed by way of an oral hearing. A hearing may be indicated because of the nature of the evidence to be presented—a point to be considered below—but the

fact that Peace River says that the Director delegated decision-making inappropriately, inappropriately relied on analyses presented to her, and considered irrelevant factors in her decision making does not mean that the Board should necessarily convene an oral hearing.

[49] Third, I consider the question about whether the Director should have imposed a penalty, given her prior agreement to a delay in the construction of the Second Facility, to be a matter of argument that can be resolved fairly and thoroughly through written submissions. Both parties will have the opportunity to explain the nature of the communications that took place, and whether the Director should have imposed an administrative penalty, given that historical context and plan of action with respect to selenium discharges from the Peace River mine. It is not clear that there will necessarily be credibility or reliability concerns that require an oral hearing to resolve.

[50] The same analysis applies to the question of whether the Director appropriately used the daily multiplier in setting the amount of the administrative penalty. The Director can explain her rationale and Peace River can present evidence as to why the Director inappropriately applied the daily multiplier. Both parties will have a reasonable opportunity to present evidence on whether the use of the daily multiplier was appropriate. The Board does not owe the Director any deference, and any concern over this use of the daily multiplier can be fully addressed with the Board through written submissions.

[51] Having addressed the issues Peace River intends to cover in the appeal, I turn to the nature of the evidence. Peace River argues that concerns may arise regarding the credibility and reliability of evidence provided by the Director or those working in her staff. Peace River says these concerns include whether the Director inappropriately delegated matters to subordinates, inappropriately relied on the opinions of her delegate(s), and shifting opinion with respect to the "fairness implications" flowing from her agreement to allow to delay construction of the Second Facility. These concerns about credibility, reliability, or both, are currently speculative. The Director intends to explain these issues to some degree at a minimum and, until those explanations are offered, neither Peace River nor the Board can reasonably conclude that there are related credibility or reliability concerns. The fact that evidence has yet to be fully produced reflects only the stage at which the appeal finds itself presently, and this does not militate in favour of an oral hearing.

[52] The Director is content to submit evidence in writing and I consider it reasonable to do so in the circumstances of this case. While the questions involved may be complex, they are not novel. The procedural fairness concerns raised by Peace River can be fairly and fully canvassed through written evidence and submissions. Peace River's concerns about the Director's rationale for imposing a penalty at all in respect of selenium exceedances downstream of the planned location for the Second Facility, and about the Director's use of the daily multiplier, can be fully and fairly explored through the same process.

[53] There is insufficient reason to suspect that the parties cannot present their evidence and make their arguments, fully and fairly, in writing. Furthermore, there is insufficient reason to conclude that the Board requires an oral hearing to make a fair and informed decision on the subject matter involved in this appeal. Lastly,

while an oral hearing may offer greater accessibility to members of the public, there are ways in which written hearings can provide the required level of public transparency. In any event, neither party has identified any members of the public that have any particular interest in the outcome of this case. This appeal does not involve permit terms or other prospective environmental effects, but rather whether, and to what extent, Peace River ought to pay an administrative penalty for its alleged failures to comply with the Permit. The public interest is accordingly less than in other types of appeals. Given these circumstances, I do not consider the public to be sufficiently impacted by the proceedings to convene an oral hearing. The desire of any prospective, undefined members of the public to fairly and accessibly view the appeal can be met by members of the public reviewing the decision when it is released and, if they so choose, request appeal records, including by submitting requests for records through the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. I have considered these factors independently and in sum in reaching this conclusion.

[54] In reaching this conclusion, I note that this matter remains at a preliminary stage. Notwithstanding this preliminary decision, at a later stage in the proceeding the Panel assigned to hear this appeal on the merits may consider whether fairness requires all or part of the proceedings to be conducted orally. In that respect, Peace River remains free to raise any specific concerns about the sufficiency or quality of the evidence presented by the Director. The Director is on notice that Peace River wishes to pose questions of the Director and various staff members subordinate to the Director. Peace River may apply to the Board for an order compelling the Director or her staff to provide evidence, should the Director's evidence not sufficiently address any relevant points Peace River wishes to address.

[55] Peace River may also apply to the Board for cross-examination on the contents of any affidavits, after reviewing them, in the normal course of this appeal. Such a request will need to describe the subject matters to be addressed in the cross-examination and establish why cross-examination would be required or of assistance to the Board in deciding the appeal.

CONCLUSION

[56] For the reasons provided above, I conclude that the appeal will proceed by way of written submissions, subject to later applications for individual oral testimony or cross-examination.

[57] In reaching this conclusion, I considered all information and arguments provided by both parties, whether or not specifically referenced in this decision.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

June 10, 2022