BRITISH COLUMBIA

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DECISION NO. 2015-WIL-006(a)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	British Columbia Society for the Prevention of Cruelty to Animals, Wild Animal Rehabilitation Centre	**APPELLANT**
AND:	Deputy Regional Manager Recreational Fisheries and Wildlife Programs	**RESPONDENT**
AND:	Wildlife Rehabilitators' Network of British Columbia	**PARTICIPANT**
BEFORE:	A Panel of the Environmental Appeal Board: Linda Michaluk, Panel Chair	
DATE:	Conducted by way of written submissions concluding on May 27, 2016	
APPEARING:	For the Appellant:	Christopher Rhone, Counsel Andrea Greenwood, Counsel
	For the Respondent:	Stephen E. King, Counsel Johnny Van Camp, Counsel
	For the Participant:	Angelika Langen Kimberly Reid

APPEAL

[1] This is an appeal by the British Columbia Society for the Prevention of Cruelty to Animals, Wild Animal Rehabilitation Centre ("Wild ARC"), against the July 31, 2015 decision issued by Michael Stalberg, acting in his capacity as the designated Deputy Regional Manager, Recreational Fisheries and Wildlife Programs (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry").

[2] The Regional Manager issued permit NA15-166466 (the "Permit") allowing the Appellant to operate a designated rehabilitation facility, but refused to include a clause allowing the Appellant to release the non-native wildlife species identified in Schedule C of the *Designation and Exemption Regulation*, B.C. Reg. 168/90, a clause which had been included in previous permits. The non-native species identified in Schedule C include all species of the genus *Sciurus* (grey and fox

squirrels), the European starling, house sparrow, North American opossum, eastern cottontail, among others (see Appendix "A").[1] These are sometimes referred to in the submissions as "invasive species".

[3] The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*. Section 101.1(5) of the *Wildlife Act* provides that the Board may:

> (a) send the matter back to the regional manager or director, with directions,
>
> (b) confirm, reverse or vary the decision being appealed, or
>
> (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[4] The Appellant asks the Board to vary the Permit by including a clause allowing the release of rehabilitated non-native Schedule C wildlife.

[5] The Regional Manager asks the Board to uphold the Permit, as issued.

[6] In a letter dated September 8, 2015, the Wildlife Rehabilitators' Network of British Columbia ("WRNBC") applied to participate in the appeal. This request was granted by the Board on September 28, 2015. WRNBC supports the Appellant's continued operation as a rehabilitation and release program.

[7] This appeal was conducted by way of written submission, at the request of the Appellant.

BACKGROUND

Legislative Context

[8] According to section 2(1) of the *Wildlife Act*, "Ownership in all wildlife in British Columbia is vested in the government." There is no right of property in any wildlife except in accordance with a permit issued under the *Act*, or other specified ways set out in section 2.

[9] "Wildlife" is defined in section 1 of the *Act* as:

> (a) means raptors, threatened species, endangered species, game or other species of vertebrates prescribed by regulation, and …
>
> but does not include controlled alien species.

[10] "Species" is defined as "a species, sub-species, variety or genetically or geographically distinct population of (a) animals …."

[11] A regional manager's authority for issuing a permit is found in section 19(1) of the *Wildlife Act*, which states:

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[1] Certain species identified in Schedule C are native, such as the common crow, black-billed magpie and brown-headed cowbird and, therefore, may be rehabilitated and released. They are not subject to the prohibition against release.

19(1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, or

(b) to omit to do anything that the person is required to do by this Act or the regulations,

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

[Emphasis added]

[12] The permit applied for in this case is to operate a wildlife rehabilitation facility. This subject is covered by section 2(t) of the *Permit Regulation*, B.C. Reg. 253/2000, which states:

2 A regional manager may issue a permit in accordance with this regulation on the terms and for the period he or she specifies

(t) authorizing a person, for the purpose of rehabilitating wildlife, to do any or all of the following:

(i) keep wildlife in captivity;

(ii) capture wildlife;

(iii) transport wildlife

(A) to a rehabilitation facility, or

(B) for the purpose of releasing the wildlife;

(iv) release wildlife;

(v) perform euthanasia on wildlife;

(vi) possess dead wildlife for the purpose of disposal.

[13] Section 5 of the *Permit Regulation* establishes the applicable test for issuing a permit under the above-noted section. It states:

5 (1) Before issuing a permit under section 2, 3 or 4 the regional manager or the director, as applicable, must be satisfied

(a) that the applicant meets the specific requirements, if any, for the permit as set out in this regulation, and

(b) that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia.

[Emphasis added]

[14] When making a decision on a permit application, section 101(1) of the *Wildlife Act* requires a regional manager to give written reasons for the decision.

History of the Appellant's rehabilitation permits

[15] There are currently 20 wildlife rehabilitation facilities operating in various regions within British Columbia. The Appellant is a charitable-funded wildlife rehabilitation center operating on Vancouver Island (Region 1), and has received annual permits authorizing the rehabilitation and release of wildlife since 1997.

[16] In 2005, the Ministry changed the Appellant's permit, prohibiting it from releasing non-native Schedule C wildlife.

[17] On March 31, 2006, the Appellant was issued a permit allowing the release of non-native Schedule C species for the permit year. However, specific requirements were added for eastern grey squirrel: the squirrel had to be sterilized and ear tagged prior to release, and released in designated areas under the direction of Ministry staff. The permit also stated that non-native species that "cannot be rehabilitated/won't survive will be humanely euthanized". These provisions were also included in the 2007 permit (nutria, eastern fox squirrel, North American opossum and yellow-bellied marmot excepted).

[18] In 2008, the Appellant's permit allowed the rehabilitation and release of non-native Schedule C wildlife, but contained an additional clause requiring non-native wildlife to be released within one kilometer of their capture site unless otherwise authorized by Ministry staff. Further, the Appellant was not allowed to accept non-native wildlife from outside of Region 1.

[19] No permit was issued in 2009.

[20] In 2010, the Appellant's permit contained basically the same permissions and restrictions as the 2008 permit, with the additional requirement that the non-native wildlife be released back into a suitable habitat in the region of origin no further than one kilometer from the capture site, and must not be released outside of the Capital Regional District ("CRD"). It also included a prohibition against accepting non-native wildlife species from outside of the CRD. One further difference was that the release of eastern grey squirrels was addressed in a separate section of the permit.

[21] The next four permits (2011 – 2014) were, for all intents and purposes, the same as the 2010 permit.

[22] All permits since 2010 have also contained the following statement regarding the Schedule C wildlife: "These measures may be subject to change during the permit year". No changes occurred.

The 2015 permit application and the Regional Manager's decision

[23] On February 5, 2015, the Appellant submitted an application to renew its permit for the Wild ARC facility for the period April 1, 2015 to March 31, 2016.

[24] The application was reviewed by the Sean Pendergast, RPBio., Senior Wildlife Biologist with the Ministry. After considering the application, Ministry policy, the legislation and other wildlife rehabilitation permits in the region, he recommended that the Permit be issued without the ability to release non-native Schedule C wildlife.

[25] On May 27, 2015, the Regional Manager wrote to the Appellant advising that he was not inclined to grant the application to release non-native Schedule C wildlife. The Regional Manager set out the legislative authority and policy framework for his consideration of the application, stating as follows:

> Next, I have considered the standard practices of the ministry (without being fettered by them). It is the ministry's policy direction to not support the release, from rehabilitation facilities, of invasive species listed on Schedule C. ….

[26] He then considered the Appellant's previous permits. He states:

> … I have examined permits previously issued to the SPCA Wild Arc facility. These permits contained interim permit conditions regarding measures for treatment of Schedule C animals, including eastern grey squirrels; however, it was indicated that these measures may be subject to change.
>
> 11. The permit holder must follow these interim permit conditions regarding measures for treatment of Schedule C non-native wildlife received by the permit holder. These measures may be subject to change during the permit year.

[27] The antepenultimate and penultimate paragraphs of his letter state:

> After careful consideration of your application and the forgoing information, I am not convinced at this time that we can issue a rehabilitation permit that contain provisions for the release of non-native Schedule C animals. In keeping with the duty of fairness, I would like to delay making a decision until 30 days from the date of this letter, so that you have an opportunity to respond in writing or in person. Any additional information would be considered prior to making a decision.
>
> I am prepared to issue a permit provided that it does not contain provisions for the release of non-native Schedule C animals. If this is acceptable to you, please let me know and we can proceed with issuing a permit.

[28] In order to prepare a response, on June 4th, the Appellant asked the Regional Manager for the specific Ministry policy referenced in his letter, or new research that informed his conclusion. Neither were provided to the Appellant.

[29] On June 22, 2015, the Appellant's Chief Executive Officer, Craig Daniell, provided a written submission to the Regional Manager, noting that the submission was made without the benefit of the policy or the basis for the Ministry's apparent new position. He attached a briefing note outlining "the evidence-based rationale for the policy model we and other wildlife rehabilitation professionals and scientists recommend: a biologically responsible approach of judicious rehabilitation of established non-native species." In his view, this model provided an evidence-

based reason to issue a permit to the Appellant that would allow the release of rehabilitated non-native Schedule C wildlife.

[30] On June 24, 2015, the Appellant met with the Regional Manager, WRNBC, and others from the Ministry, to discuss the Regional Manager's May 27, 2015 letter and the issues regarding the release of non-native Schedule C wildlife.

[31] On July 31, 2015, the Regional Manager issued the Permit for the period July 31, 2015 to March 31, 2016. The Permit authorizes the Appellant to keep provincially mandated wildlife in captivity for the purposes of operating a designated rehabilitation facility, to capture wildlife, to transport wildlife, to release wildlife from captivity, and/or to perform euthanasia "as might be required to prevent undue suffering of an animal in care, and to possess dead wildlife for the purpose of immediate disposal". However, clause 11 of the Permit states in bold type: "**Non-native wildlife under Schedule C of the Wildlife Act are not to be released back into the wild**".

[32] The Regional Manager's cover letter to the Permit states in full:

> This is to acknowledge and respond to your request for a permit to operate a designated rehabilitation facility and to rehabilitate invasive, non-native species such as the eastern grey squirrel.
>
> Within my letter of May 27, 2015, I set out the process I use to consider this request.
>
> Subsequently, I received an email with three attachments on June 22, 2015, from Mr. Craig Daniell which further stated the SPCA's [the Appellant's] position. Furthermore, we also had a face-to-face meeting on June 24, 2015, which allowed you to voice your thoughts on the requested permit conditions, as well as other topics relating to captive wildlife.
>
> As a result of this additional input, I have spent time contemplating your request once again.
>
> After careful consideration of the input you have provided I have decided to issue a permit which does not include all the conditions that you have requested.
>
> You have the right to appeal ….

The appeal and the parties' positions

The Appellant

[33] The Appellant filed an appeal of the Regional Manager's decision on August 31, 2015, on the following grounds:

1. *The decision is inconsistent*

[34] The Appellant submits that the Ministry has allowed rehabilitation facilities in some regions to rehabilitate and release non-native species, and prohibited it in

others. It has also issued permits within the regions containing varying restrictions regarding the release of this wildlife.

[35] The Appellant has been issued permits allowing the release of sterilized and tagged eastern grey squirrels since 2006. This is the first time since then that such permission has been denied, and no reasons were provided to justify or explain the change.

2. The decision is arbitrary and takes into account irrelevant considerations

[36] The Appellant submits that the Regional Manager's May 27, 2015 letter refers to a Ministry policy direction which "does not support the release of Schedule C animals". The Appellant submits that this policy direction is not part of the legislation, and appears to be a verbal policy since it does not appear in writing. Details of the policy are unknown to the Appellant and its potential impacts uncertain as it has not been reduced to writing. As a result, the Appellant submits that the decision appears arbitrary.

3. The decision is unreasonable

[37] The Appellant submits that the Regional Manager failed to provide reasons for his decision to change the permit conditions. He also fettered his discretion by considering the unwritten policy direction and failed to consider the particulars of "the matter at hand". The Appellant submits that the decision is not based on evidence or appropriate rationale; rather, it is controlled by an unwritten policy.

4. The decision is unfair

[38] The Appellant submits that the decision was made in the middle of the Appellant's active rehabilitation season, which runs from April to October, and it was issued without reasonable notice or consultation regarding the changes to Ministry policy.

[39] In later submissions, the Appellant asserts that the Permit was only issued after the Appellant demanded a meeting with the Ministry after the Ministry failed, for the first time in seven years, to sign importation paperwork for squirrel sterilization implants. The Regional Manager's May 27, 2015 letter to the Appellant constitutes the only notice respecting the important policy changes, but without any details regarding that policy.

5. The decision is unsupported by science

[40] The Appellant submits that scientific data demonstrates a negligible impact on local ecology, based upon the relatively small number of Schedule C animals released by rehabilitation facilities, including by the Appellant, relative to their respective animal populations. In fact, the Appellant submits that "scientific evidence supports a conclusion that releasing sterilized animals assists population control, as the sterilized animals compete with unsterilized animals for scarce resources."

6. The decision failed to fully consider important factors

[41] If the Appellant cannot release injured or orphaned non-native Schedule C wildlife brought to its rehabilitation facility, the only realistic option will be to euthanize those animals. The Appellant submits that this conflicts with the Appellant's mandate to its members and to the public, and that it is contrary to the Appellant's policy not to euthanize healthy or orphaned wild animals that they establish to be non-invasive.

[42] Moreover, the Appellant submits that the unwritten Ministry policy directive, and the Regional Manager's decision, increase the risk to public health and safety and increase the risk of animal cruelty. The Appellant submits that, "given fears over euthanasia, members of the public will be inclined to attempt to treat animals on their own rather than seeking appropriate assistance. In so doing, they face risk of personal injury and harm, and contrary to their best intentions, they may cause animals to needlessly suffer."

[43] The Appellant submits that the release of rehabilitated non-native Schedule C wildlife from its facility into the CRD, in accordance with its professional assessment criteria, is not contrary to the proper management of wildlife in British Columbia.

[44] The Appellant asks the Board to vary the Permit to allow it to rehabilitate and release non-native Schedule C wildlife in the CRD.

The Regional Manager

[45] The Regional Manager submits that he gave the Appellant an opportunity to be heard before making his decision, and listened to the Appellant's concerns. In making his decision, the Regional Manager submits that he relied upon his own experience and research about the harms associated with Schedule C wildlife, as well as the information and expertise of Ministry colleagues.

[46] Further, the Regional Manager advises that, although he was somewhat reliant on Ministry policies, he did not fetter his discretion: he was simply not convinced by the Appellant that he should issue a permit on terms that are contrary to Ministry policy. The Regional Manager submits that refusing to allow the release of non-native Schedule C wildlife in the Permit is consistent with Ministry policy concerning Schedule C wildlife, and with the proper management of wildlife resources in British Columbia. He asks the Board to uphold the Permit, as issued.

The Participant

[47] As noted above, the WRNBC was granted Participant status on September 28, 2015. The WRNBC is a non-profit, volunteer-run organization whose membership includes licensed rehabilitation facilities and individual rehabilitators, rehabilitation volunteers, wildlife researchers, government and humane association representatives, veterinarians and other animal care personnel, and interested members of the public. Sixteen of its 69 members are permitted rehabilitation facilities.

[48] The purpose of the WRNBC's organization includes: public education; program and guide development promoting the protection and preservation of wildlife and enhancing standards of care for injured wildlife; and, among other

things, providing a venue for members to communicate with government and other organizations.

[49] The WRNBC submits that, in the absence of a comprehensive plan to deal with invasive wildlife species, it is unreasonable to enforce non-rehabilitation of invasive wildlife species. It submits that the relatively small number of invasive species released will have no substantial impact on species management.

[50] Further, because the public is not aware of issues surrounding invasive wildlife species, enforcing the Ministry's policy puts the burden of public education on small non-profit organizations, and risks animal health if these species are handled by those not trained in proper handling/care techniques.

The written hearing process and applications made to the Board

[51] Following the addition of the WRNBC as a Participant, the parties agreed to a written submission schedule that was later revised at the request of both the Appellant and Regional Manager. At this time, the Regional Manager was representing himself in the appeal; he was not represented by legal counsel.

[52] On October 19, 2015, the accepted schedule required the Appellant to submit its written submissions on or before November 20, 2015; the Participant to submit written submissions on or before December 11, 2015; the Regional Manager to submit written submissions on or before January 29, 2016; and the Appellant to submit any rebuttal comments on or before February 26, 2016. All parties agreed to the timeline. Provision was also made for the Appellant to request, if necessary, additional time to retain and instruct an expert to provide a rebuttal opinion to appropriately respond to the submissions and evidence presented by the Regional Manager and/or Participant.

[53] The Appellant provided its submissions by the November 20th deadline, along with supporting affidavits sworn by Dr. Sara Dubois (November 18, 2015), Christine Tait (November 12, 2015), and Birthe Levie (November 13, 2015). The Appellant also provided an expert report dated November 10, 2015, by wildlife biologist Mark Fraker.

[54] On December 9, 2015, the Participant sought and received a one-week extension to December 18, 2015, with the consent of the parties. That deadline was met. The Board similarly extended the other parties' deadlines by one week, i.e., the Regional Manager's submissions were due on February 5, 2016, and the Appellant's rebuttal was due on March 4, 2016.

[55] On February 4, 2016, the day before his submissions were due, the Regional Manager requested a 28-day extension due to workload issues. The Board granted this request, and the following schedule was set: the Regional Manager's written submissions were due on February 26, 2016; and the Appellant's rebuttal was due on March 24, 2016.

[56] On February 25, 2016, again, only one day before his submissions were due, the Regional Manager requested a 90-day extension. He explained that this extension was required in order to consult with legal counsel due to the complexity of the Appellant's submission. The Appellant objected to the request, noting that

the Regional Manager had been in receipt of the Appellant's submission for over three months, which should have been ample time to consult with legal counsel and prepare a response. In addition, the Appellant asked for the appeal to be heard on a timely basis because the Permit expired on March 31st, permits had to be renewed on an annual basis, and because the fate of the Schedule C wildlife would be impacted by the appeal.

[57] The Board agreed that the Regional Manager had been in receipt of the Appellant's submissions for three months, which should have been sufficient time for him to consult with legal counsel, if necessary, and prepare his response. Accordingly, the Board was not prepared to grant a 90-day extension. However, not wanting to adjudicate the appeal without the benefit receiving full argument and submissions from all parties, the Board granted the Regional Manager a 32-day extension, bringing the submission date to March 29, 2016. The Appellant's rebuttal was due on April 26, 2016. The Board advised that no further extensions would be granted.

[58] Legal counsel was appointed to represent the Regional Manager on or about March 3, 2016.

[59] In a letter dated March 15, 2016, counsel for the Regional Manager noted the new submission schedule and the fact that the Permit was set to expire on March 31st. He therefore proposed that the Board consider holding the appeal in abeyance until such time as a new permit is issued. The Board sought comments from the Appellant and Participant on this proposal, and allowed a reply by the Regional Manager.

[60] The Appellant objected to the proposal. It argued that the current appeal would not be moot even if a new permit was issued. The Appellant argued that the Board's findings in the current appeal could affect the Ministry's future processes and decisions to deny such permits. Further, the Appellant submitted that the Regional Manager had been served with the Appellant's written submissions in November, and that the Board had already granted two requests by the Regional Manager for extensions of time to provide his appeal submissions. The Appellant asked the Board to continue with the current appeal according to the existing schedule, despite the fact that the Board's decision would not be rendered until after the Permit expired.

[61] On March 21, 2016, counsel for the Regional Manager filed his reply. He provided a copy of the policy direction that was relied upon by the Regional Manager in his May 27th letter, and suggested that this addressed a "main concern" of the Appellant. That policy is set out in a Ministry "Decision Note" signed by the Assistant Deputy Minister, Tom Ethier, on October 5, 2013. Counsel states, "You will see that the Ministry's policy direction respecting not releasing invasive Schedule C wildlife does exist. Further, it is the product of considerable thought by Ministry employees and executives, well-reasoned, and fair."

[62] In light of his production of a written policy, counsel argued that the appeal would be moot on expiry of the Permit. Further, counsel advised that, as the Board has discretion to postpone hearings, it was justified in doing so in the circumstances.

[63] On March 22, 2016, the Board refused to hold the appeal in abeyance as suggested by the Regional Manager. The Board reviewed the history of the appeal file, and found that the March 29, 2016 deadline for the Regional Manager's submissions provided the Regional Manager, and his counsel, with adequate time to review the Appellant's submissions and prepare a response. The Board also concluded that, although the Permit expired on March 31st, the issues were not moot, and that it would be unfair and prejudicial to the Appellant to wait for some future appeal to address the issues before the Board on the present appeal.

[64] The Regional Manager's submissions were provided according to the submission schedule, and attached three affidavits: an affidavit sworn by Mr. Pendergast, the Senior Wildlife Biologist; an affidavit sworn by Dr. Helen Schwantje, Provincial Wildlife Veterinarian with the Ministry, and an affidavit sworn by Mike Stalberg, the decision-maker and Regional Manager in this case. All of the affidavits were sworn on March 24, 2016.

[65] On April 26, 2016, the Appellant provided its written rebuttal submissions, which included an additional affidavit from Dr. Dubois, and a rebuttal expert report from Mr. Fraker.

[66] On April 27, 2016, counsel for the Regional Manager objected to portions of the Appellant's rebuttal submissions on the grounds that they contained new evidence, and asked the Board to excise those portions from the Appellant's rebuttal. In response, the Appellant drew attention to the Board's earlier letter, which allowed the Appellant to submit an expert rebuttal report. It submitted that the additional evidence was directly related to the Regional Manager's submissions containing his reasons for decision, reasons which should have been provided to the Appellant either before, or when, his decision was made.

[67] On April 28, 2016, the Board advised the parties that it was satisfied that the new evidence and submissions filed by the Appellant were not improper. Rather, the evidence and submissions were provided at the first opportunity after the Appellant became aware of the complete rationale for the Regional Manager's decision. The Board also considered it fair for the Regional Manager to have a further opportunity to respond to the new evidence and submissions. As a result, the Regional Manager was given an opportunity to submit a written response to the new evidence by May 19, 2016, and the Appellant was given an opportunity to provide any rebuttal comments by May 27, 2016. The schedule was met.

ISSUES

[68] The issues to be determined in this case are:

1. Whether the Regional Manager failed to provide adequate reasons for his decision, contrary to section 101(1) of the *Wildlife Act*.
2. Whether the Regional Manager fettered his discretion when applying the Ministry's policies.
3. Whether the Regional Manager's decision-making process violated the principles of fairness and whether the decision was based upon erroneous evidence.

4. Whether the Permit should be varied to include the requested clause allowing the release of non-native Schedule C wildlife in the CRD.
5. Whether the Regional Manager's conduct during the appeal hearing process warrants an order for costs.

DISCUSSION AND ANALYSIS

1. Whether the Regional Manager failed to provide adequate reasons for his decision, contrary to section 101(1) of the *Wildlife Act*.

[69] Section 101(1) of the *Wildlife Act* requires a regional manager to give written reasons for a decision that affects:

> (a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or
>
> (b) an application by a person for anything referred to in paragraph (a).
>
> [Emphasis added]

The Appellant's submissions

[70] The Appellant submits that the Permit marks the first time since 2005 that the Ministry has refused to allow the Appellant to release sterilized and tagged eastern grey squirrels, and other unaltered non-native Schedule C wildlife. Rather than provide a substantive explanation for the sudden change, the Regional Manager simply drew attention to the 2014 permit provision stating that the 2014 permit was "subject to change". The Regional Manager did not provide any substantive reasons to justify the sudden change in position, did not provide or describe the policy he was relying on, and failed to address the additional information provided by the Appellant.

The Regional Manager's submissions

[71] The Regional Manager submits that his decision is set out in the Permit and the cover letter. However, if there are deficiencies in his decision-making process, the Regional Manager submits that they are cured by the *de novo* hearing, in which the parties have provided affidavit evidence, including an affidavit from the Regional Manager, and full argument on the issues. The Regional Manager relies upon the Board's previous decision in *Jozef and Bibiana Demcak v. Director of Wildlife* (Decision No. 2012-Wil-012(a), June 14, 2013); [2013] B.C.E.A. No. 10 (Q.L.) [*Demcak*].

[72] In *Demcak*, the Board found that the decision-maker failed to provide adequate reasons for denying the appellants' permit amendment request. The Board noted that the decision-maker had referred to Ministry policy but did not explain how he applied it to the appellants' circumstances, and he did not explain what aspects of the appellants' proposal raised concerns in relation to safety or human health. The Board also found that neither the permit issued in that case,

nor the cover letter, explained what was meant by some of the permit terms. It was not until the appeal hearing that the decision-maker explained what some of the terms meant, and explained, in detail, his reasons for not denying the permit amendment. In that case, the Board found as follows:

> 95. The Panel also finds that any errors in the Director's decision-making process have been remedied by the appeal hearing before the Board, which was conducted as a new hearing of the matter. During the appeal hearing, all parties had the opportunity to make oral submissions with respect to issues of law, fact and jurisdiction. Also, all parties had a full opportunity to call witnesses and present evidence, including new evidence that was not before the Director, and to cross-examine the other party's witnesses. The Panel has considered all of the relevant evidence and submissions in reaching its decision.

The Panel's findings

[73] Under section 101(1) of the *Wildlife Act*, a regional manager must provide written reasons for a decision that affects a permit application. In addition, decision-makers are required, at common law, to provide reasons that are adequate.

[74] The importance of reasons was described by the Board in *Lynne Luker v. Regional Wildlife Section Head*, (Decision No. 2000-WIL-013, September 27, 2000); [2000] B.C.E.A. No. 49 (Q.L.) [*Luker*]:

> The duty to provide reasons for refusing to issue a permit is outlined in section 101 of the *Act*. As such, the failure to provide reasons constitutes a breach of a statutory requirement. The underlying rationale for requiring reasons to be supplied is to improve administrative accountability, and to enable a person affected by a decision to assess whether he or she has any grounds of appeal. Of course, there is an implied requirement that the reasons supplied must be adequate. "Adequate" reasons does not mean that every piece of evidence or finding of fact must be set out, but the reasons must reveal what matters have been taken into account when making the decision. …. (pages 4-5)

[75] The Panel notes that Regional Manager's letter dated May 27, 2015, set out the legislative authority and policy framework for the rehabilitation permits, and included the following statements:

> Next, I have considered the standard practices of the ministry (without being fettered by them). <u>It is the ministry's policy direction to not support the release, from rehabilitation facilities, of invasive species listed on Schedule C.</u> [Emphasis added]

[76] While this letter set out the applicable legislation, the only information provided on the "policy direction" was the single statement set out above. The Regional Manager also referenced earlier permits held by the Appellant, and drew attention to the following provision:

> 11. The permit holder must follow these interim permit conditions regarding measures for treatment of Schedule C non-native wildlife received by the permit holder. These measures may be subject to change during the permit year.

[77] In the Regional Manager's decision cover letter of July 31, 2015, the only "reasons" given to the Appellant for refusing to include the requested provisions regarding the release of Schedule C wildlife are as follows:

> As a result of this additional input, I have spent time contemplating your request once again.
>
> After careful consideration of the input you have provided I have decided to issue a permit which does not include all the conditions that you have requested.

[78] Even if his "decision" consists of both the May 27 and the July 31 letters, there is little, if anything, to explain why the Regional Manager decided as he did. There was no analysis or discussion of the information presented by the Appellant. The only specific reference to his considerations was in regard to the Ministry policy direction.

[79] In this regard, this case is similar to another wildlife case recently heard by the Board, in which the Board found that the decision-maker failed to provide sufficient reasons for his decision in violation of section 101 of the *Act*, and the common law duty to provide reasons.: *Martin Scholz v. Regional Manager* (Decision No. 2015-WIL-008(a), April 12, 2016); [2016] B.C.E.A. No. 3 (Q.L.) [*Scholz*].

[80] However, as noted by the Regional Manager, a full hearing before the Board may "cure" the lack of reasons provided with the original decision. In *Luker*, the Board states at page 5:

> Although the Board recognizes that there has been a defect in failing to provide reasons, the Board finds that the Respondent has subsequently cured this defect in later correspondence. In letters dated July 5, 2000 and September 11, 2000, the Respondent provides reasons for refusal of the permit, the content of which will be discussed in greater detail in the following section. These reasons have been provided to the Appellant, and the Appellant has been given the opportunity to make submissions on these reasons before the Board. Given that the Environmental Appeal Board is a *de novo* tribunal, the Board finds that the original failure to provide reasons has subsequently been cured. Accordingly, this ground of appeal fails.

[81] In the case at hand, the Panel finds that the Regional Manager did not provide sufficient reasons for the July 31, 2015 decision. This finding does not change even if the May 27, 2015 letter is used to supplement the later decision letter. It was not until many months after the appeal was filed, and just before the Permit expired, that the Regional Manager provided his reasons for his decision, other than his reliance on Ministry policy. However, like the situation in *Luker* and in *Demcak*, the Regional Manager has provided a detailed explanation of his decision-making process in an affidavit produced during the appeal hearing. The

Regional Manager has also provided the Appellant with the relevant polices, and the Appellant has had an opportunity to submit evidence, and make full submissions in response to the Regional Manager's case. Thus, the Panel finds that the defects in his decision have been cured. Whether his rationale justifies a prohibition on releasing non-native Schedule C wildlife in the subject Permit will be considered later in this decision.

[82] As a final point under this issue, the Panel is alarmed by the number of cases that have come before the Board where there are insufficient, or a complete absence of, adequate reasons for decision. The cases referenced above represent a fraction of the cases where the lack of reasons for decision is raised as an issue. This is a matter that ought to be addressed by the Ministry as providing adequate reasons for decision may well lead to fewer appeals or, at least, result in one less issue to be argued in an appeal.

2. Whether the Regional Manager fettered his discretion when applying the Ministry's policies.

The Appellant's submissions

[83] The Appellant submits that the Regional Manager's blanket refusal to allow the release of non-native Schedule C wildlife from rehabilitation facilities, with no further detail or direction, is arbitrary and irrational. By failing to consider the particulars of the matter at hand, and appearing to base his decision on policy direction, the Regional Manager fettered his discretion. Specifically, the Appellant submits that the Regional Manager failed to consider the scientific data and information specific to the release of non-native Schedule C wildlife from the Wild ARC facility. Instead, he relied upon government policy and irrelevant scientific publications regarding non-native wildlife to make his decision.

The Regional Manager's submissions

[84] In his affidavit, the Regional Manager explained his decision-making process, including the policies that he considered.

[85] The Regional Manager states that he considered Ministry Policy 4-7-04.01.3 titled "Control of Species". According to that policy, lethal techniques targeting populations as opposed to individuals (where practical) are the Ministry's preferred methods for controlling non-native species. Its strategy is to prevent the range of non-native species from expanding and not to aid, or enable, non-native species.

[86] The Regional Manager states that he also considered the Decision Note issued by the Assistant Deputy Minister on October 5, 2013. The Decision Note established a new policy direction in furtherance of the Ministry's "Invasive Species Strategy", endorsed by the Ministry in 2012. The new policy direction was to "not support the release of invasive species on Schedule C from rehabilitation facilities". The Decision Note is described in detail at pages 20-21 of this decision.

[87] In addition, the Regional Manager states that he considered:

a. information regarding non-native Schedule C wildlife and other non-native species generally, including the "Invasive Species Strategy for British Columbia";

b. information received from his communications with Ministry biologists;

c. information that he had previously reviewed when responding to issues about eastern grey squirrels, European rabbit, eastern cottontail, North American opossum, rock doves, American bullfrogs and snapping turtles;

d. information from the Invasive Species Council of British Columbia, indicating that eastern grey squirrels are not native to the Province, and were introduced to Vancouver Island in 1966;

e. information that eastern grey squirrels can harm native flora and fauna, including sensitive Garry Oak ecosystems, given that the squirrels can strip bark and eat acorns of Garry Oak trees, and can eat the bulbs of camas flowers;

f. information that eastern grey squirrels compete with, and displace, native red squirrels, transfer diseases to red squirrels, compete with native birds for tree cavities, and eat bird eggs and nestlings, as well as information claiming that the impact of eastern grey squirrels on red squirrels is overstated;

g. information indicating that red squirrels have historically been able to persist in urban areas where eastern grey squirrels are not present;

h. information from the Invasive Species Specialist Group, a global network of scientific and policy experts on invasive species, who identify eastern grey squirrels as #85 on its list of top 100 invasive species of concern; and

i. information from Mr. Pendergast, an expert in wildlife management, who did not support issuing the Permit without restricting rehabilitation and relocation of non-native Schedule C wildlife in accordance with the Decision Note.

[88] The Regional Manager attached the scientific papers and printouts to his affidavit that are referred to in the list above.

[89] In addition, the Regional Manager states that he received the June 22nd materials provided by Mr. Daniell and he listened to the Appellant's presentation on June 24th. However, he remained unconvinced that the release of non-native Schedule C wildlife, including the eastern grey squirrels, should be permitted contrary to the legislation, the policy, restrictive permits given to other rehabilitation facilities in British Columbia, and the Decision Note. Specifically, he was not convinced that the release of non-native Schedule C wildlife was consistent with the proper management of wildlife resources in British Columbia.

[90] The Regional Manager submits that, although not binding on statutory decision-makers, the policy and Decision Note are compelling, and would have required significant justification and reasons not to be followed when issuing

subsequent permits for relocating invasive Schedule C wildlife. That justification was not present in the Appellant's case.

The Panel's findings

[91] The Panel accepts, and the Board has previously found, that policies are an important means of guiding decision making. However, policies are not law and cannot "bind" a decision-maker: the policies cannot "fetter" a decision-maker's exercise of discretion.

[92] The rule against fettering was described by the Board in *Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, (Decision Nos. 2013-EMA-007(g) and 2013-EMA-010(g), December 23, 2015); [2015] B.C.E.A. No. 25 (Q.L.):

> 133. The BC Supreme Court has held that an administrative decision-maker who blindly follows a policy, or closes his or her mind to the evidence, will have fettered their discretion. … the BC Court of Appeal discussed the concept of fettering in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), at para. 62:
>
> > The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant …. Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy….
> >
> > [Emphasis in *Toews and Stannus*]

[93] In *Demcak*, the Board considered how a decision-maker should apply the Ministry's policy regarding controlled alien species ("CAS") when exercising the discretion to issue a permit under section 19 of the *Wildlife Act*, as follows:

> [91] The CAS Policy and Procedure provide guidance to the Director and are not legally binding. Although the CAS Policy and the CAS Procedure provide guidance that permits to publicly display CAS should be limited to circumstances where a number of considerations are met, the Panel finds that the Director must evaluate each permit application on its own merits, and must exercise his discretion in a manner that is consistent with the objectives and purposes of the *Act* and the regulations, including protecting human health and safety from the risks posed by CAS.

[94] In *Scholz*, the Board confirmed that, where discretion is exercised in making decisions for the proper management of wildlife in British Columbia, it must be exercised in accordance with legislated requirements, within the bounds of the

Wildlife Act and regulations, and in accordance with the rules of natural justice. In *Scholz,* the Board considered whether the decision-maker in that case provided adequate reasons and/or fettered his discretion. The Board found as follows:

> [50] Although the Regional Manager states in his letter that he 'reviewed and considered all of the information provided in' the application, on its face, his 'reason' for denying the application suggests otherwise. His statement that 'the province does not recognize that trapping may take place on vacant traplines' suggests that he fettered his discretion by strictly applying a government policy against trapping on vacant traplines. …. In the present case, there is simply no indication from his decision that the Regional Manager considered the merits of the Appellant's application in terms of whether the application was 'necessary for the proper management of the wildlife resource' under section 2(c)(iii) of the *Permit Regulation*.

[95] The Regional Manager argues that *Scholz* is not applicable in the present situation; i.e., in this case there was consultation and there is written policy direction, whereas in *Scholz* the decision-maker simply said that "the province does not recognize" the requested activity.

[96] The Panel finds that while there are differences between *Scholz* and the present case, there are also similarities. As noted earlier in this decision, the Panel found that the Regional Manager's decision did not provide adequate "reasons" – it did not assist the Appellant to understand his decision to prohibit the release of rehabilitated non-native Schedule C wildlife - and appeared to rely heavily on the undisclosed Ministry policy direction. Apparently aware of the fettering issue, the Regional Manager expressly states in his May 27th letter that he "considered the standard practices of the ministry (without being fettered by them)". Such a statement, alone, is not sufficient to conclude that fettering has not occurred.

[97] To show that the Regional Manager had, in fact, considered the Appellant's specific circumstances, one would expect him to address some of the information provided by the Appellant prior to, and during, the June 2015 meeting, and explain, even in brief terms, why the circumstances did not justify deviating from the policy. One would expect him to explain why the circumstances do not justify the inclusion of a clause that had been included in previous years, even in the years after the Invasive Species Strategy was adopted (2012) and policy direction in the Decision Note was issued (2013).

[98] Even considering the May 27 and July 31 letters together, the Panel can find no basis for concluding that the Regional Manager considered whether to deviate from the policy direction. It appears that he simply applied the government policy against releasing Schedule C wildlife.

[99] However, as stated in the preceding issue, such defects may be cured by a full appeal hearing (see, for example, paragraph 51 of *Scholz*, citing *Wiens v. Regional Manager, Fish and Wildlife*, Decision Nos. 2005-WIL-020(b) and 2005-WIL-026(b), March 9, 2006). In the present case, the policies relied upon by the Regional Manager were finally disclosed to the Appellant in March 2016 and, during the hearing process, his reasons and rationale for making the decision were finally provided. Based upon this new evidence, the Panel finds that the Regional Manager

did not fetter his discretion when he made his decision. While he clearly considered and applied the Ministry policies, the Panel accepts his evidence that he also considered the information provided by the Appellant but, ultimately, he did not believe this situation justified a deviation from the policy direction.

3. Whether the Regional Manager's decision-making process violated the principles of fairness and whether the decision was based upon erroneous evidence.

The Appellant's submissions

[100] The Appellant submits that the Regional Manager did not provide the Appellant with the Decision Note that he relied upon to make his decision, or any other policies, "despite multiple requests for same". Moreover, the Appellant was not advised of any of the information that the Regional Manager apparently relied on when making his decision. It submits that, had this information been provided, the Appellant could have clarified misinformation relied upon by the Regional Manager. For example, in an email sent by Mr. Pendergast to the Regional Manager, and attached to the Regional Manager's affidavit as exhibit "M", Mr. Pendergast provides incorrect information regarding the Appellant's 2014 release of non-native wildlife. The Appellant submits that it provided the correct information to the Panel in an affidavit sworn by Dr. Dubois.

[101] In addition, if the information relied upon by the Regional Manager had been disclosed, the Appellant would have pointed out that none of the eight scientific articles on eastern grey squirrels provided evidence to support his decision. Further, those articles only relate to eastern grey squirrels, which is just one of the non-native Schedule C species at issue in this case.

[102] While the Appellant was provided with an opportunity to meet with and make submissions to the Regional Manager in June of 2015, the Appellant submits that this opportunity "was meaningless": the Appellant was not informed of the information being considered by the Regional Manager so it could not assess that information prior to making its submissions. In particular, it was not provided the relevant policies or research, even after it requested them.

The Regional Manager's submissions

[103] The Regional Manager submits that his May 27, 2015 letter gave the Appellant notice of his intended decision and offered an opportunity to be heard. In response, he received a letter from the Appellant on June 22, enclosing attachments from experts advocating for the rehabilitation and release of Schedule C wildlife, and he held a face-to-face meeting with the Appellant. During that meeting, he listened to the Appellant's presentation. The Appellant discussed its non-euthanasia policy and how donors would be offended if eastern grey squirrels were not accepted and treated, among other things.

[104] The Regional Manager submits that he relied upon the opinions of Dr. Schwantje and Mr. Pendergast, and other information when he made his decision.

The Regional Manager submits that, based on his research and the input that he received from other Ministry professionals, his decision was that rehabilitating and relocating non-native Schedule C wildlife does not accord with the Invasive Species Strategy, because it would contribute to the spread of invasive wildlife and provide aid to invasive wildlife that the Ministry would like to see eliminated from British Columbia. Therefore, a permit allowing the release of such animals would be contrary to the proper management of wildlife resources in the Province.

[105] Ultimately, the Regional Manager submits that most of the Appellant's grounds for appeal and arguments were brought to his attention prior to issuing the Permit. The Appellant had the opportunity to convince him that issuing a permit without the release restriction would benefit wildlife management in the Province, but did not do so.

[106] In the alternative, in the event that there are deficiencies in the decision-making process, he submits that they are cured by the *de novo* hearing before the Board.

The Panel's findings

[107] The Panel is extremely concerned with the Regional Manager's process in this case. Given that the main policy at issue was not disclosed to the Appellant until nine months after the opportunity to be heard, the Panel agrees with the Appellant that the opportunity to be heard was, essentially, meaningless.

[108] The Decision Note is an 11 page document. The Decision Note explains that it was prepared at the request of Ministry staff who were seeking a province-wide policy direction on the rehabilitation and release of invasive species listed on Schedule C. Concerns had been identified with rehabilitation facilities knowingly or inadvertently violating "do not release" conditions in their permits. Concerns were also identified in relation to inconsistent messaging and decision-making from the Ministry regarding the release of invasive species. The Decision Note states that, while the numbers of animals being released from rehabilitation facilities are small enough that the impacts are localized, releasing these animals is not consistent with the Province's mandate to control invasive species. The Decision Note also explains that Ministry staff are concerned about the ecological consequences of expanding populations of invasive species in the Province, and the role that rehabilitating these species may be playing in this trend.

[109] At page 3, the Decision Note explains as follows:

> Inconsistencies have been occurring with rehabilitation permits partly due to permits and permit conditions being approved by Regional Managers. This has led to inconsistent wording of conditions and species specific restrictions in some regions. The best option for creating consistency with the release of invasive species is to create a regulation that would affect all persons, not just rehabilitation facilities and would provide clear direction on what species are and are not approved for release.

[110] The Decision Note then sets out three options for resolving the issues and uncertainties identified, and outlines the implications (pros and cons) of each

option. Option 1 was, "Confirm Ministry policy direction to not support the release of invasive species on Schedule C from rehabilitation facilities". Option 2 was, "Confirm Ministry policy direction to not support the release of invasive species on Schedule C from rehabilitation facilities, with the new exception of those individuals [animals] that have been surgically sterilized." Option 3 was, "Confirm new Ministry policy direction to support the release of all Schedule C wildlife from rehabilitation facilities, and recommend the removal of current permit conditions that restrict this activity".

[111] Option 1 was recommended and approved by the Assistant Deputy Minister; i.e., the policy of not permitting the release of invasive species listed on Schedule C from rehabilitation facilities.

[112] Some of the potential implications of Option 1 are interesting as they come into play in this appeal. A potential benefit was identified as "Would allow for the development of a regulation change that would provide the most consistency to not only rehabilitation facilities but to all persons within the Province of B.C.". One of the negative implications identified was that it may create "discontent among some members of the public and the rehabilitation community, particularly Wild ARC …". It also noted that certain rehabilitation facilities would be "highly impacted" by this policy option, and that it may result in the public trying to rehabilitate invasive species themselves and release them illegally in inappropriate places.

[113] In his March 24, 2015 affidavit, the Regional Manager described his decision-making process. In terms of his rationale, the Panel notes that, in several instances, the Regional Manager advises that he was unable to issue a permit authorizing the rehabilitation and release of non-native Schedule C wildlife, and still meet the requirements of the legislative and policy regime for the Province. For example, in this affidavit, the Regional Manager states:

> [35] Rehabilitating and relocating non-native Schedule C wildlife does not, in my view, accord with the Invasive Species Strategy, because this would contribute to the spread of invasive wildlife and provide aid to invasive wildlife that FLNRO [the Ministry] would like to see eliminated from British Columbia.
>
> …
>
> [57] Given the above information, combined with my interpretation of the applicable legislation, I was satisfied that the policy and policy direction from the Decision Note was applicable to the permit application. In other words, the permit could be issued, but needed to prohibit rehabilitation and release of non-native Schedule C wildlife in accordance with the policy direction provided by the Decision Note.
>
> …
>
> [72] After considering the information presented by the applicant, I remained respectful of their views, but unconvinced that the release of non-native schedule C wildlife should be permitted contrary to policy and the policy direction provided in the Decision Note. I was also unconvinced the

> release of non-native Schedule C wildlife was consistent with the proper management of wildlife resources in British Columbia.

[114] In the Regional Manager's written submissions, he also states:

> [31] Although not binding on statutory decision-makers, FLRNO's [sic] policy and the Decision Note are, on their face, compelling and would have required significant justification and reasons not to be followed in issuing subsequent permits for relocating invasive Schedule C Wildlife, such as the one under appeal.

[115] Had the Appellant been provided with the Decision Note and the other relevant Ministry policy prior to the opportunity to be heard, the Panel is of the view that it would have been in a position to provide specific information relevant to policy direction set out in the Decision Note. The Regional Manager's conclusion that he was "unconvinced" by the Appellant's information is not surprising since the Appellant was in the dark as to the reasons for the Ministry's abrupt change in policy. The Appellant was, in effect, placed in a position where it was "battling a ghost".

[116] In addition, the Panel is troubled by some of the information before the Regional Manager when he made his decision, particularly, some of the information provided by Ministry employees. For instance, the Appellant referred to exhibit "M" of the Regional Manager's affidavit. It is a July 29, 2015 email from Mr. Pendergast, which includes the following statements:

> I have reviewed the attached permit application and draft permit for the rehabilitation of injured wildlife. I recommend approval of the attached draft permit.
>
> NOTE: The applicant has indicated that they have rehabilitated and released 308 eastern cottontails, 145 Grey squirrels and 54 Rock Doves. All are schedule C wildlife and should not be released back into the wild. The applicant has been advised in writing that this is not authorized. The attached draft permit reflects this.

[117] Appended to this email is an earlier, February 18, 2015 email from a Ministry employee, which contains a copy of the application and draft permit NA15-166466, for the period April 1, 2015 to March 31, 2016. This draft permit was later issued by the Regional Manager as the Permit, with no changes from the draft.

[118] The Panel agrees with the Appellant that the numbers of animals that Mr. Pendergast says were "rehabilitated and released" by the Appellant are incorrect. A comparison of Mr. Pendergast's numbers with the unchallenged evidence provided by the Appellant, shows that the Pendergast numbers are not the number of animals "*released*" by Wild ARC; rather, they are the number of animals "*admitted*" into the facility. Based upon the unchallenged evidence before the Panel, the numbers of animals released from Wild ARC is significantly lower. It is not known whether this error influenced the Regional Manager in his assessment of the permit application.

[119] In addition, Mr. Pendergast fails to note that any eastern grey squirrels released from the facility were sterilized prior to their release, as required by the

previous permit. It is not known whether the omission of this detail influenced the Regional Manager's assessment of the permit application.

[120] Finally, Mr. Pendergast states that "the applicant has been advised in writing that this [rehabilitation and release] is not authorized". This language suggests that the referenced Schedule C wildlife were released without authority when, in fact, the previous permits expressly authorized these actions. Again, it is not known whether this language influenced the Regional Manager's assessment of the permit application. Further to this point, the Appellant states that Wild ARC did not receive any written communication on this point. No evidence was before the Panel to show that the communication was indeed sent.

[121] As a final point on exhibit "M", paragraph 57 of the Regional Manager's affidavit seems to suggest that he considered the Pendergast email and attachments and then sent the May 27, 2015 letter to the Appellant, explaining that he could not issue the permit as applied for. The Panel notes that the above referenced email is dated July 29, 2015, which is some time after the May 27th letter. The Panel accepts that, perhaps, an incorrect email string was attached to the affidavit.

[122] Despite the Panel's findings on this issue, as with the previous issues, a full hearing before the Board may cure the defects. Both parties have had an opportunity to present evidence and argument afresh, and the Panel may make a new decision on the matter. The Panel's main reason for addressing this issue in the decision, has been to highlight its concerns with the decision-making process in the hope that the Regional Manager will correct such problems in the future.

4. Whether the Permit should be varied to include the requested clause allowing the release of non-native Schedule C wildlife in the CRD.

[123] The Appellant asks the Board to consider the scientific data presented, the expert report of Mr. Fraker, and the average annual release statistics from the Wild ARC facility, and find that the release of non-native Schedule C wildlife from that facility is not contrary to the proper management of wildlife in British Columbia. It asks the Board to issue a permit without restrictions on the release of non-native Schedule C wildlife within the CRD.

[124] The Appellant submits that a scientific and evidence based assessment fails to support a blanket ban on the release of non-native Schedule C animals and, in particular, fails to support the Regional Manager's decision in this case. The Appellant submits that its release of such animals results in no adverse environmental impacts.

[125] Although the Appellant agrees that certain non-native species can potentially impact the native environment, the Appellant maintains that an evidence-based approach ought to be used to address these animals, not a total ban on permits for the release of all Schedule C non-native species. It states that, although its permits have allowed for the rehabilitation and release of all Schedule C wildlife, consideration of the species' specific and regional-based environmental impact has meant that the Appellant has chosen to release only certain Schedule C wildlife, i.e., eastern grey squirrels (sterilized in accordance with permit conditions), eastern

cottontails, house sparrows, rock doves, and European starlings. Animals were released into established urban habitats within one kilometer of their capture site; eastern grey squirrels were released after discussion with Ministry staff so as to ensure appropriate release sites.

[126] The Appellant submits that the species, released by the Appellant into the CRD, are not harmful to the environment (including native flora and fauna), do not increase population sizes, do not contribute to the spread of species (and actually reduces potential spread by the public), and returns a negligible fraction of animals back into the environment. The Appellant submits that wildlife rehabilitation has no measureable effect on the populations of wildlife in British Columbia. In support, the Appellant relies on the evidence of Dr. Dubois, RPBio, Chief Science Officer of the BCSPCA, and its expert, Mr. Fraker, RPBio..

[127] In Mr. Fraker's expert reports he addresses questions regarding whether release of non-native Schedule C wildlife by rehabilitation centres in general, and the Wild ARC in particular, would adversely impact the environment, and the extent, if any, sterilization of the animals would affect his opinion. His evidence is that the number of rehabilitated animals released back into habitats from which they were captured is undoubtedly small compared to the total population of animals in the area. It is, therefore, improbable that these individuals, even if all survived, could have any impact on the established populations.

[128] In her November 18, 2015 affidavit, Dr. Dubois presented an assessment of 63 scientific and peer reviewed articles to support the Appellant's position to rehabilitate and release Schedule C wildlife. Information such as this has, in Dr. Dubois' opinion, assisted the Appellant in establishing a biologically-responsible rehabilitation policy based on an assessment of establishment, abundance, distribution, disease risks, animal welfare, environmental impacts, feasibility of management actions, mitigation opportunities and relative effect of release numbers.

[129] The Appellant further argues that there are many good policy and practical reasons for the release clause to be added to its Permit. The number of animals that are actually released under this clause is small. For instance, in 2014, the Appellant accepted 2,508 animals in total, and released the following Schedule C wildlife: 72 sterilized eastern grey squirrels; 98 eastern cottontail rabbits; 23 rock doves; 42 house sparrows; and 22 European starlings. These animals were released into established urban habitats within one kilometer of their capture site.

[130] The loss of the ability to release these species means that the Appellant will either not be able to accept the animals into the facility, or will have to euthanize them upon receipt, contrary to the Appellant's mandate. Another possible consequence is that members of the public will decide to treat these animals on their own, rather than seeking appropriate assistance, which may result in personal injury and harm, the spread of disease to other animals and household pets, and/or prolonged suffering of the subject animals. It could also lead to many animals simply being left in situations of distress.

[131] As a practical consideration, the Appellant points out that the public and, indeed, facility staff, cannot always make the distinction between native and non-

native species. As a result, animals may be accepted and rehabilitated only to find that the facility cannot, under the terms of the Permit, be released. The only available option under the Permit will be to euthanize the animal.

[132] The Appellant also points out that the Regional Manager's decision may result in a decline in donations, volunteers and staff, putting the privately funded facilities' ability to rehabilitate all wild animals at risk.

[133] Finally, the Appellant submits that, despite the fact that the Ministry's policy is to prevent experienced rehabilitation facilities from releasing non-native Schedule C wildlife, the legislation does not prevent other people from doing so. Section 3(1) of the *Designation and Exemption Regulation* currently allows anyone, without a permit, to capture and, within 24 hours, release Schedule C wildlife within one kilometer from its capture site. The Appellant submits that Wild ARC seeks to do, under permit, what others are permitted to do without a permit, with the only difference being the length of time the animals would be held prior to release (i.e., more than 24 hours). The release provisions in the Regulation are more generous than the protocol followed by the Appellant, which re-releases captured wildlife at the site they were found unless it is unsafe to do so. In the latter case, they are released within their existing home range. Section 3(1) states as follows:

3 (1) Subject to subsections (2) and (3), a person is exempted from sections 11(8), 33, 37, 44 and 77(2) and (3) of the *Wildlife Act* in respect of wildlife listed in Schedule B or C if all of the following conditions are met:

(a) the person traps the wildlife on land that

(i) is owned or occupied by the person, or

(ii) is private land, and the person has the permission of the owner or occupier to be on the land for the purpose of trapping wildlife;

(b) the person possesses the trapped wildlife for not more than 24 hours;

(c) the person transports the trapped wildlife a distance no greater than 10 km from where the wildlife was trapped, unless a further distance is specified by an officer;

(d) the person releases the trapped wildlife on Crown land or on the person's private land.

(2) Subjection (1) does not apply where the person releases the wildlife

(a) at a distance greater than one km from the site of its capture in M.Us 1-1 to 1-13 on Vancouver Island, or

(b) on an island in any body of water in the province, other than the island on which the wildlife was captured

unless the person has prior approval of an officer.

(3) Subsection (1) does not apply with respect to

(a) *Lepus americanus* – snowshoe hare in Region 2, as that region is described in section 3 of the *Hunting Regulation*, British Columbia Reg. 190/84,

(b) the wildlife listed in section 3.1(2), or

(c) feral pigs within the meaning of section 3.2.

...

[134] The Appellant contends that, if the Ministry based its decisions on valid scientific evidence, it would develop a consistent policy to control Schedule C invasive wildlife. The piecemeal solution of banning rehabilitation organizations from releasing Schedule C animals does not address this complex issue, and does nothing to protect the environment.

[135] Further, it submits that the Ministry:

- is taking an inconsistent approach to the control of non-native species in that the Ministry regularly stocks lakes with non-native fish deemed to be invasive, and has not included red-eared slider turtles in the *Controlled Alien Species Regulation* amendments, a highly invasive species purchased from the pet industry and dumped into local waterways by the public;
- knows that other rehabilitation facilities in British Columbia have continued to release non-native Schedule C wildlife contrary to their permit restrictions, yet has not taken enforcement action since 2005; and
- operates a toll-free "Report All Poachers and Polluters" line that advises members of the public to take animals to rehabilitation facilities. The Appellant submits that, if the Ministry refers the public to rehabilitation facilities, it should work with facilities to develop an acceptable approach to the management of non-native Schedule C wildlife.

[136] The Appellant contends that these actions, or lack of action, suggest that the release of non-native Schedule C wildlife from rehabilitation facilities is not a top priority – does not have the dire consequences as suggested by the Regional Manager - and will not result in any real impact on native populations. It submits that the permitting decisions regarding non-native wildlife ought to be guided by science-based evidence, and that the evidence presented in this case supports the conclusion that the release of non-native Schedule C wildlife from its facility is not contrary to the proper management of wildlife in British Columbia.

The Participant's Submissions

[137] The WRNBC met with the Ministry on issues surrounding Schedule C animals in 2006, following the 2005 change to several rehabilitation permits to prohibit the release of non-native Schedule C wildlife. Although several rehabilitation facilities continued to rehabilitate and release Schedule C wildlife while under the prohibition, and the numbers were reported to the Ministry, the Ministry took no enforcement action.

[138] The WRNBC submits that the 2012 "Invasive Species Strategy for British Columbia" identified the public's lack of awareness about invasive species and their impacts to valued resources. Yet, to date, the Ministry has no comprehensive plan to deal with invasive wildlife species or public education. The WRNBC submits that it is unreasonable to enforce the non-rehabilitation of invasive wildlife species at

this point, given the lack of public awareness and given that, in its view, the relatively small number of invasive species that will be released will have no substantial impact on species management.

[139] The WRNBC also raises concerns with the impact of the Ministry's blanket ban on public health and safety, and animal welfare, many of which were set out in the Appellant's submissions above.

[140] In addition, when ill or under stress, animals can be unpredictable. Without proper equipment, husbandry skills and natural history knowledge, there is risk of injury to untrained persons through bites and scratches.

[141] The WRNBC also submits that, having to kill animals that could be rehabilitated and lead full and productive lives, is in direct contradiction with internationally recognized standards of animal welfare that wildlife rehabilitators uphold. The WRNBC submits that, despite numerous discussions with the Ministry, no alternatives for such situations have been provided by the Ministry.

The Regional Manager's Submissions

[142] The Regional Manager submits that, under the *Wildlife Act*, a permit to possess live wildlife is a privilege bestowed at the discretion of a regional manager. Further, before issuing a permit under the *Permit Regulation*, a regional manager must be satisfied that issuing a permit is not contrary to the proper management of wildlife resources in British Columbia. The Regional Manager submits that the words "must be satisfied" mean that, if the decision-maker has an absence of knowledge, or is unsure of the effect of issuing a permit, the answer to the request for the permit must be "no". The Regional Manager submits that the Appellant has not met the onus of establishing, on a balance of probabilities, that the release of non-native Schedule C wildlife is consistent with the proper management of wildlife resources in British Columbia.

[143] The Regional Manager submits that certain non-native wildlife species are known to destroy property and/or are detrimental to native wildlife. These have been categorized in Schedule C of the *Designation and Exemption Regulation*. Schedule C wildlife are generally harmful to native flora and fauna because they compete with native wildlife for food, water and habitat, and may carry new diseases and parasites, damage ecosystems, and prey on native wildlife. Schedule C wildlife have fewer restrictions regulating their hunting, killing or capture, and do not enjoy the same protection as other wildlife under the *Wildlife Act*, although any capture or killing of these wildlife must be done in accordance with the *Act* to ensure humane treatment.

[144] In her affidavit, Dr. Schwantje, the Provincial Wildlife Veterinarian, states that eastern grey squirrels are a known carrier of squirrelpox virus which, in the United Kingdom, has proven deadly to native red squirrels. In her opinion, a study conducted on Vancouver Island indicating there was no pox virus in resident eastern grey squirrels was too limited in scope to exclude the pathogen as a threat to local populations. In terms of the use of the implanted contraceptive agent used in the past by the Appellant to sterilize the eastern grey squirrels, Dr. Schwantje is not aware of a full trial to gauge effectiveness of the method on squirrels. She

notes that the histological examination she carried out on one treated female grey squirrel carcass showed it to be contracepted, but this is the only evidence she has to indicate the contraceptive was effective. Dr. Schwantje submits that in terms of grey/red squirrel competition, she has heard of many incidents where, on arrival of eastern grey squirrels to rural and semi-rural properties, the native red squirrels disappear. Indeed, when eastern grey squirrels were trapped and removed from her property, the red squirrels returned; with the reinvasion of the grey squirrels, however, the red squirrels have not returned.

[145] In his affidavit, Mr. Pendergast states that non-native species of any plant or animal should not be encouraged to become established, and all efforts should be made to remove them regardless of now they arrived or how long they have been present. He has seen, firsthand, the reduction in the numbers of red squirrels in neighbourhoods after grey squirrels became established. In his role as Senior Wildlife Biologist for the Ministry, Mr. Pendergast has received many calls from individuals who are upset that grey squirrels have become established in their communities, and who have spent thousands of dollars trying to prevent them from causing damage to homes and gardens. Mr. Pendergast states that he has been involved with the eradication of invasive species, such as (but not limited to) rabbits at the University of Victoria, eastern grey squirrels in Victoria, and bullfrogs across Vancouver Island.

[146] Mr. Pendergast states that the Appellant is the only facility on Vancouver Island that continues to release non-native Schedule C wildlife. While one permit was issued to another agency that did not include a restriction for eastern cottontails, this was oversight that was corrected in 2016 (no cottontails were released under the permit).

[147] Mr. Pendergast's professional opinion is that the rehabilitation and release of Schedule C wildlife is not in the best interest of the native species and ecosystems of Region 1. He believes that allowing this activity is confusing to the public, and to other rehabilitation centres that abide by the current policy direction with respect to the non-release of Schedule C wildlife. In Mr. Pendergast's view, the release of any additional invasive species into the environment, which include Schedule C wildlife, puts unneeded stress on already at risk native species and ecosystems. In his opinion, a permit allowing the release of Schedule C wildlife is contrary to the proper management of wildlife resources of British Columbia.

[148] In terms of the Appellant's expert opinion evidence, the Regional Manager submits that the evidence only establishes that the number of animals released will likely represent a proportion of the population that is too small to influence population growth of the species. It does not address the surrounding habitat or nuisance considerations. Further, the Appellant's evidence is not based on accurate estimates of population size, as those figures are not available. The Regional Manager submits that Mr. Fraker's expert evidence regarding the potential impact of rehabilitated wildlife on the dynamic of those populations in the wild should be given no weight.

[149] Regarding the Appellant's claim that releasing rehabilitated non-native Schedule C wildlife into regions where those species have existed for decades will have minimal detrimental impact, the Regional Manager submits that, even if this is

true, it fails to take into account the travel distances of those species and the potential impact they may have on less established surrounding environments. Further, when considering whether a permit is "contrary to the proper management of wildlife", the legislation does not limit that assessment to the impact the permit will have on management within the specific region.

[150] In this regard, the Regional Manager submits that the Appellant's focus on the potential micro impact of the non-native species' release within a specific region is of limited assistance. The Regional Manager submits that a correct interpretation of the legislative requirement to consider the "proper management of wildlife in British Columbia" requires a macro, as opposed to micro, analysis.

[151] In response to concerns that unqualified individuals may capture, rehabilitate and release non-native wildlife in a way that increases danger to themselves and the wildlife, the Regional Manager submits that such concerns are speculative, and assumes that people are willing to break the law. The Regional Manager submits that the Ministry cannot be responsible for illegal actions undertaken by others and, therefore, these arguments and concerns are without merit.

[152] The Regional Manager submits that the Permit, and its restrictions on the release of non-native Schedule C wildlife, is consistent with the permit conditions included within every other rehabilitation permit issued in the Province. The Regional Manager submits that the restrictions are reasonable, and uphold the proper management of wildlife resources in British Columbia.

The Appellant's reply

[153] In her April 26, 2016 reply affidavit, Dr. Dubois provides a critique of the eight scientific articles submitted by the Regional Manager, noting (amongst other things) that two articles support the Appellant's position on eastern grey squirrels, while another stated that caution should be used when comparing squirrel introductions in Europe and Vancouver Island due to differences in habitat and climate. In terms of Dr. Schwantje's concern regarding squirrel pox, Dr. Dubois notes that the pox virus has never been found in Canada, including in Ontario where the eastern grey squirrel is native. This finding is echoed in one of the articles submitted by the Regional Manager, which found that tests for the pox virus in 100 grey squirrels in British Columbia were negative.

[154] In his rebuttal report, Mr. Fraker states that, while he agrees with the general assertions made by the Regional Manager regarding the potential adverse effects of Schedule C species, he notes that the species under consideration here have been well-established in British Columbia for many decades. As a result, he concludes that any effects these species may have had on the environments in which they now reside have already occurred. He is not aware of any plans to eradicate these species. In his review of the Regional Manager's submissions and affidavits, he did not find any scientific data or information to support the conclusion that the release of rehabilitated Schedule C wildlife back into the environments that they came from could contribute to possible adverse effects.

[155] Mr. Fraker calculates that, in the absence of any accurate estimates of population sizes of Schedule C wildlife anywhere in the Province, and by relying on

species' abundance information from across their ranges, the rehabilitated eastern grey squirrels and eastern cottontails released by Wild ARC from 1997 – 2004 probably amounted to less than 0.1% of the total population. Releases of starlings, house sparrows and rock doves were, in his opinion, too small to be consequential. Further, rehabilitated individuals do not add to the population, as they were removed temporarily for rehabilitation and, therefore, do not constitute new introductions.

[156] The Appellant submits that the Regional Manager's evidence shows that, although Dr. Schwantje and Mr. Pendergast have concluded that the release of non-native Schedule C wildlife into the environment is "not beneficial", they did not conclude that the release of Schedule C wildlife is harmful. The Appellant submits that there is no legal requirement for the release of wildlife to be beneficial in any way. The only requirement in the legislation is that "issuing the permit is not contrary to the proper management of wildlife resources in British Columbia" [Emphasis added]

[157] The Appellant also submits that the Regional Manager has created an arbitrary distinction between macro and micro analysis when assessing potential impacts of the release of non-native Schedule C wildlife in the CRD. The Appellant submits that, while the Regional Manager states that the proper management of wildlife requires a macro analysis, in practice, the Ministry acts at the micro level for both habitat and wildlife management, establishing, for example, 28 wildlife management areas. Further, within its nine regions, the Ministry has established 225 management units, within which annual determinations of all hunting and trapping allocations are made by micro analysis of sustainable harvest.

[158] In summary, the Appellant submits that the release of rehabilitated, non-native Schedule C wildlife from Wild ARC into the CRD is not contrary to the proper management of wildlife in British Columbia.

The Panel's findings

[159] Wildlife management in British Columbia is provided for under the *Wildlife Act*. The *Wildlife Act* and the *Permit Regulation* use permissive language with respect to a regional manager's authority to issue permits: i.e., a regional manager "may", not "must", issue a permit even when an applicant meets all the requirements. Of particular relevance to this case, section 2(t) of the *Permit Regulation* provides that a Regional Manager may issue a permit to keep, capture, transport, release and euthanize wildlife for the purpose of rehabilitating wildlife.

[160] The one mandatory requirement relevant to this appeal is found in section 5(1)(b) of the *Permit Regulation*, which states that, before issuing a permit under section 2, a regional manager "must be satisfied" that "issuing the permit is not contrary to the proper management of wildlife resources in British Columbia."

[161] The Appellant has held permits to rehabilitate and release wildlife since 1997. Permits issued since 2006 have included provisions for the rehabilitation and release of non-native Schedule C wildlife. Although the provisions respecting the release of Schedule C wildlife have changed over the years, permits issued since

2010 have contained, essentially, the same clauses addressing the release of non-native Schedule C wildlife.

[162] In May of 2012, the "Invasive Species Strategy for British Columbia" was released by the Ministry. In October 2013, the often referenced Decision Note, setting the policy prohibiting release of non-native Schedule C species, was released. Yet, despite the release of these Ministry documents, the Regional Manager issued a permit in 2014 to the Appellant that authorized the release of rehabilitated non-native Schedule C wildlife.

[163] Permits since 2010 have also contained a provision advising that Schedule C wildlife measures could be subject to change during the permit year. There were no changes to the permits during that time, and there was no evidence presented to show that the Appellant, in any way, violated permit terms during that time.

[164] There is no dispute that a person cannot expect a permit bearing the same provisions to be issued just because one was issued in the past. This was confirmed by the Board in *Pacific Northwest Raptors, Ltd. v. Regional Manager*, (Decision No. 2010-Wil-021(a), February 25, 2011):

> [69] In summary, the authority to issue permits is a discretionary one and an applicant is not entitled to a permit simply because it had one before, because it has good intentions, or because it is carrying on operations that should be authorized by a permit. …. It is, however, reasonable for the Appellant to expect, in fact, the law requires, that the application be given fair consideration, and that it be decided in accordance with the law.

[165] There is also no dispute that the wildlife listed in Schedule C have the potential to be invasive and may, in some cases: displace native species, cause direct harm to native species and/or humans, and may cause damage to vegetation. What is in question, however, is whether releasing the numbers and species of rehabilitated animals covered by, and in the manner defined by the Permit is, or is not, contrary to the proper management of wildlife resources in British Columbia.

[166] As is apparent from the submissions above, the Appellant and Regional Manager disagree on the geographical limits of the wildlife resources being assessed for the purposes of section 5(1)(b) of the *Permit Regulation*. The Regional Manager submits that a proper interpretation of the legislation leads to the conclusion that management of the wildlife resource takes place on a macro scale – larger geographical areas. The Appellant submits that, in this case, it is appropriate to consider management of the wildlife resource on more of a micro scale – within the smaller, localized, region

[167] The Panel agrees with the Appellant that the Ministry does, at times, employ a micro, as opposed to a macro, assessment of impacts as part of its mandate to manage wildlife within British Columbia. Hunting licences, for example, are issued at a regional level.

[168] Further, this appeal is based on the discretionary authority of a "regional" manager to issue a permit which implies, at least, that regional considerations are

to be applied. If decisions are made on a regional basis, it stands to reason that localized concerns, as opposed to provincial impacts, are to be considered.

[169] For these reasons, the Panel finds that, for the purposes of evaluating whether the requested permit condition is, or is not, contrary to the proper management of wildlife in British Columbia", it is appropriate to consider the wildlife populations and impacts from, to use the terminology advanced by the Regional Manager, a micro perspective.

[170] The Panel has also considered the evidence presented in relation to non-native species and the potential impact of their release on native species, as well as on humans and the environment.

[171] The Appellant produced expert opinion evidence stating that it was unclear how the release of small numbers of non-native Schedule C wildlife from its facility, into the same areas from which they came, could contribute to the spread of invasive species. This evidence was supported by numerous scientific papers concerning invasive species generally and, in particular, in British Columbia.

[172] Most of the scientific evidence provided to the Panel relates to eastern grey squirrels. These squirrels were introduced to Southern Vancouver Island some 50 years ago. The last several permits held by the Appellant have allowed the release of eastern grey squirrels within one kilometer of capture, within appropriate areas of the CRD after discussion with Ministry staff, provided that the animals are sterilized. In 2014, 72 altered eastern grey squirrels were released by the Appellant under the authority of its permit. Sterilization has been achieved by means of hormone-based contraceptive implants, which were ordered with provincial assistance from Australia. No evidence was presented to show whether the sterilization program is effective, although an examination of the carcass of one of the treated squirrels showed she was contracepted.

[173] One issue that drives many of the concerns regarding non-native species is their potential impact on native species. Much of the evidence presented concerning competition and impacts of eastern grey squirrels on red squirrels is from Europe; red squirrels in Europe are a different species from that of the British Columbia native red squirrels. Further, the evidence on the eastern grey squirrel's impact on the native red squirrel was somewhat contradictory. There was some evidence that eastern grey squirrels out-compete red squirrels for food and nest sites, leading to red squirrel displacement and declining red squirrel numbers. However, there was also evidence that red squirrels prefer rural, coniferous areas, and are more impacted by changes in habitat than by the presence of the eastern grey squirrels, which prefer a mixed wood urbanized setting.

[174] There was also evidence to suggest that perception of the respective squirrel populations, rather than the actual population numbers, could be driving some of the concerns about eastern grey squirrels: red squirrels tend to be shyer than the more gregarious eastern grey squirrels, so their populations are not as visible. This would imply that the impact of grey squirrels on red squirrels is more of perception than reality.

[175] An additional concern with eastern grey squirrels concerns a pox virus known to be carried by these squirrels in Europe. However, there was no evidence to

show that the pox virus has been found in populations on Vancouver Island. Moreover, while there was evidence that the pox virus has never been found in Canada, including in Ontario where eastern grey squirrels are native.

[176] Evidence was produced to show that squirrels, in general, can damage and kill young trees by stripping bark, and that eastern grey squirrels, in particular, can impact Garry Oak and associated ecosystems, by biting out the tips of acorns, thus affecting oak regeneration. There was also evidence, however, that eastern grey squirrels are beneficial to hardwood tree regeneration in areas where they are native through acorn caching.

[177] Evidence indicated that other Schedule C wildlife, such as house sparrows, starlings and eastern cottontails, can impact the Garry Oak ecosystems through damage to vegetation, nest site competition, and disease transmission.

[178] What is absent from the evidence, is any definitive determination of the population sizes of the Schedule C wildlife at issue in this matter. It was suggested, and appears to have been accepted by the parties, that such information simply does not exist. The Appellant produced affidavit evidence regarding the relative size of the populations, compared to the numbers of individual animals rehabilitated and released by the Appellant over the past several years. According to the evidence of Mr. Fraker, over the period from 1997 to 2014, the number of eastern grey squirrels and cottontails rehabilitated and released by the Appellant "probably amounted to <1% of the population". Over that same period of time, 21 European starlings were released, 37 house sparrows, and 37 rock doves. According to Mr. Fraker, even a casual observer would conclude that the numbers were too small to be consequential.

[179] Further, Mr. Fraker's evidence is that the non-native Schedule C species at issue have been well-established in British Columbia for many decades, and the government has no existing plan to eradicate these populations. The evidence, in the opinion of Mr. Fraker, shows that the return of these small numbers of animals to the area from which they were taken will have a negligible impact on the areas. The Appellant contends that this practice, therefore, is not contrary to the proper management of wildlife resources. The Panel agrees.

[180] The Panel also finds the Ministry's new policy direction, while created for legitimate reasons, is clearly intended to operate as a "blanket ban" on the release of non-native Schedule C wildlife. The Decision Note makes that intent clear.

[181] The Appellant and the WRNBC submit that this attempt to ban the release of non-native Schedule C wildlife, without proper notification, consultation, public education and planning, is likely to have many unintended consequences. Some of the negative consequences of the policy change are recognized in the Decision Note. Interestingly, the note itself explains how this will be mitigated. It states at page 3:

> Regardless of the option chosen, staff will work to develop alternatives on how the policy direction should be enforced (e.g. through policy advice only to statutory decision makers, through the development of regulations, etc.). Significant changes to current practices may also require the development of a transitional implementation plan, with

> input from the WRNBC, to take place over a 1-2 year period. This plan will provide time for rehabilitation facilities to become compliant [with] any new policy direction or enforcement mechanism, and for the Ministry to develop educational material. [Emphasis added]

[182] This direction has not been applied to the Appellant but, in the Panel's view, should have been.

[183] Further, the Ministry's position on this issue is inconsistent, given the presence of section 3(1) of the *Designation and Exemption Regulation*, which allows individuals to trap (on private land) and possess Schedule C wildlife for up to 24 hours before releasing the animal within one kilometer of its capture site on Vancouver Island. This is, in fact, very close to what the Appellant has requested permission under permit to do; the exceptions being the length of time the animal is held (i.e., rehabilitation would likely take longer than 24 hours) and by whom (i.e., the Appellant as opposed to the individual finding the animal).

[184] For some unknown reason, the Regional Manager applied a new policy to the Appellant's facility without advance notice, without a transitional plan for the animals currently in the facility, and without any plan for public education. The manner in which this was implemented, and the way that the Appellant has been treated throughout this process, has been inconsiderate, procedurally unfair - even harsh. The Appellant has been rehabilitating the Province's wildlife through funding obtained by donors, not the Province. If the Ministry wishes to ban the rehabilitation and release of non-native Schedule C species, it ought to do so by regulation, rather than by policy. This appears to have been the plan contemplated in the Decision Note, as the Decision Note states at page 3: "The best option for creating consistency with the release of invasive species is to create a regulation that would affect all persons, not just rehabilitation facilities and would provide clear direction on what species are and are not approved for release." The Panel agrees that this would be the best option for consistent application of the Ministry's policy.

[185] However, there is no regulation at this time. Therefore, in this case, the Panel must consider the current legislative scheme, the Ministry policy and the evidence before it. Having done so, the Panel is convinced that the rehabilitation and release of the small numbers of non-native species from the Wild ARC facility, provided that the conditions in the 2014 permit (Permit NA14-93249) are applied, will not be contrary to the proper management of the wildlife resource in British Columbia. The Panel finds that the Appellant has addressed the issues underlying the Ministry's policies.

[186] The Panel understands that the Appellant is seeking a permit that does not contain any restrictions regarding the release and rehabilitation of Schedule C wildlife. The Panel is of the view that, although the impact of sterilizing eastern grey squirrels may be minimal overall, if grey squirrels are to be released, it is best to ensure they will not be in a position to contribute to an increase in the squirrel population. Therefore, the sterilization and stringent re-release provisions should remain in effect.

[187] Based upon all of the evidence, some of which was not before the Regional Manager at the time the decision under appeal was made, the Panel finds that it is reasonable and appropriate to vary the Permit to add the requested clause allowing the release of Schedule C wildlife with the same conditions as in the previous permit, i.e. Permit NA 14-93249**.**

[188] However, as the Permit has expired and a new permit is being sought by the Appellant, the Panel directs that these reasons for decision be considered by the Ministry. Unless the circumstances have changed, in fairness to the Appellant, and given the length of time that the Regional Manager delayed the appeal process, it should apply these new clauses to any new permit issued to the Appellant while it implements a transitional policy as stated in the Decision Note.

[189] Finally, the Panel notes that this outcome is also consistent with the March 11, 2014 Hansard extract provided as exhibit "BB" in the first affidavit of Dr. Dubois. In that extract, the Minister of Forests, Lands and Natural Resource Operations responded to a question regarding the new policy direction regarding non-native Schedule C wildlife, as follows:

> What I'm advised is that nothing is final. Discussions are continuing. The branch and the staff are working with the rehabilitators to try to find that sweet spot in the policy area with respect to this.
>
> I think it's a good question, and hopefully I can provide the comfort that nothing is final on this.

5. Whether the Regional Manager's conduct during the appeal hearing process warrants an order for costs.

[190] Pursuant to section 47(1)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, the Board may make an order for costs. Section 47(1)(a) gives the Board the authority to make an order "(a) requiring a party to pay all or part of the costs of another party or an intervener in connection with the application."

[191] The Appellant did not request an order for costs in the appeal, and the Board's policy is that it will not make an order for costs unless it is requested by a party or participant (see section 13.0 of the Board's Practice and Procedure Manual). However, the panel may, on its own initiative, ask a party/participant whether it seeks costs.

[192] In light of the conduct of the Regional Manager following the appeal (as described in the Background to this decision), the Panel asks the Appellant to advise whether it will be seeking any or all of its costs from the Regional Manager within 30 days of the release of this decision. For convenience, the Panel has set out the board's policy on awarding costs as described in its Practice and Procedure Manual, at pages 53-54:

> The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs." The objectives of the Board's costs policy are to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct.

Thus, the Board's policy is to award costs in special circumstances. Those circumstances include:

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

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

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

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

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

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

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

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

DECISION

[193] In making this decision, the panel has carefully reviewed and considered all evidence and submissions before it, whether or not specifically reiterated here.

[194] For the reasons provided above, the Panel varies the Permit NA15-166466 to allow the rehabilitation and release of Schedule C wildlife as allowed in Permit NA14-93249.

[195] The appeal is allowed.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

July 27, 2016

"APPENDIX "A"

Schedule C

[en. B.C. Reg. 253/2000, App. 2, s. 9; am. B.C. Reg. 32/2014, ss. 9 and 10.]
(sections 10 (1) (a), 11 (1), 4, 2 (1), 6 (1))

1 Mammals of the following species:

(a) all species of the genus *Sciurus* — gray and fox squirrels;

(b) *Didelphis virginiana* — North American opossum;

(c) *Sylvilagus floridanus* — eastern cottontail;

(d) *Oryctolagus cuniculus* — European rabbit;

(e) *Myocastor coypus* — nutria;

(f) feral pigs, being pigs of the genus *Sus* that are not in captivity or are not otherwise under a person's control.

2 Birds of the following species or their nests or eggs:

(a) all species of the genus *Corvus* — crows, except *Corvus corax* — common raven;

(b) *Pica pica* — black-billed magpie;

(c) *Sturnus vulgaris* — European starling;

(d) *Passer domesticus* — house sparrow;

(e) *Columbia livia* — rock dove;

(f) *Molothrus ater* — brown-headed cowbird.

3 Amphibians of the following species:

(a) *Rana catesbeiana* — bullfrog;

(b) *Rana clamitans* — green frog.

4 Reptiles of the following species:

(a) all species of the family *Chelydridae* — snapping turtles;

(b) all species of the family *Emydidae* — pond and river turtles, except Painted Turtles (Chrysemis picta) and Western Pond Turtles (Actinemys marmorata);

(c) all species of the family *Trionychidae* — soft-shelled turtles;

(d) all species of the genus *Podarcis* — wall lizards.