BRITISH COLUMBIA

Environmental Appeal Board

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**DECISION NOS. 2016-EMA-001(a)–030(a); 032(a)-056(a); 061(a); 067(a)-105(a) [Group file: 2016-EMA-G01]**

In the matter of 95 appeals under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

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|---|---|---|
| **BETWEEN:** | West Fraser Mills Ltd.<br>Catalyst Paper Corporation<br>Zellstoff Celgar Limited Partnership<br>Domtar Inc.<br>Nanaimo Forest Products Ltd. (aka Harmac)<br>Kruger Products LP.<br>Neucel Specialty Cellulose Ltd.<br>Canfor Pulp LP<br>Canadian Forest Products Ltd.<br>Mackenzie Pulp Mill Corporation | **APPELLANTS** |
| **AND:** | Regional Director, *Environmental Management Act* | **RESPONDENT** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **DATE:** | Conducted by way of written submissions concluding on April 29, 2016 | |
| **APPEARING:** | For the Appellants: Janice H. Walton, Counsel<br>For the Respondent: Stephen E. King, Counsel<br>Meghan Butler, Counsel | |

## PRELIMINARY ISSUE OF JURISDICTION AND APPLICATION TO SUMMARILY DISMISS APPEALS

[1] The Appellants operate in the pulp and paper industry, and hold permits that authorize the discharge of waste under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"). In December 2015, Robyn Roome, Director of Monitoring, Assessment and Stewardship (the "Director"), Environmental Protection Division, Regional Operations Branch, Ministry of Environment (the "Ministry"), issued one or both of the following notifications to the Appellants:

a. a notification requiring annual reports for high priority authorizations to include an annual status form (the "ASF" notifications); and

b. a notification requiring non-compliance reporting to be submitted electronically to the Ministry (the "NCR" notifications).

[2] In January 2016, each of the Appellants appealed one or both of the notifications that pertained to their permits. Most Appellants filed multiple appeals, as they were required to appeal each notification sent in relation to each permit held by that Appellant.

[3] After various clarifications and preliminary matters were addressed by the Board, which resulted in some appeals being rejected and others being added, there are a total of 95 appeals before the Board: 27 appeals are against the ASF notifications; and 68 appeals are against the NCR notifications. The Board joined the appeals under group file number 2016-EMA-G01.

[4] The Appellants' Notices of Appeal contain identical grounds for appeal and requested relief. Among other things, the Appellants allege that the Director erred in law and exceeded her jurisdiction when issuing the notifications.

[5] In a letter dated February 26, 2016, the Director questioned whether the ASF and NCR notifications are appealable "decisions" within the meaning of the *Act*. The Appellants filed their appeals under section 100(1) of the *Act*, which states:

**100** (1) A person aggrieved by a decision of a director or district director may appeal the decision to the appeal board.

[underlining added]

[6] Section 99 of the *Act* defines "decision" for the purposes of appeals under the *Act* as follows:

**99** For the purpose of this Division, "decision" means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

…

[7] If the ASF and NCR notifications are not "decisions" as defined under section 99 of the *Act*, then the Board has no jurisdiction over the appeals. The Board decided that this threshold issue of jurisdiction needed to be addressed as a preliminary matter, and the Board established a schedule for the parties to provide written submissions on the matter.

[8] During the exchange of written submissions on the preliminary issue of jurisdiction, the parties agreed that, if the Board finds that the ASF and NSR notifications are appealable decisions, 28 of the 95 appeals should not continue to a

hearing on the merits. However, the parties disagreed regarding the reasons why those appeals should not continue, and the appropriate remedy if those appeals do not continue. The Director submits that those appeals ought to be dismissed because the notifications are inapplicable to those particular permits, such that either the Board is either without jurisdiction or the appeals have no reasonable prospect of success. In contrast, the Appellants request that the Board allow those appeals and reverse the notifications that were issued regarding those permits.

[9] There is currently an interim stay of the ASF and NCR notifications pertaining to the appeals. Submissions on the application for a longer term stay have been suspended while this jurisdictional issue is being decided.

## BACKGROUND

*The Notifications*

[10] In December 2015, the Director sent emails to thousands of permit holders, including the Appellants, notifying them that the Ministry was implementing new reporting processes for permits held under the *Act*.

[11] In an affidavit sworn on April 19, 2016, the Director explained the process for issuing the ASF and NCR notifications. She states that, on December 10, 2015, the Ministry emailed approximately 3,209 permittees advising of the Ministry's plan to alter the format of non-compliance reporting (the "NCR Email"). On that same day, the Ministry also emailed 182 permittees advising of its plan to implement the ASF as part of the routine annual reporting by permittees (the "ASF Email").

[12] The Director states that the NCR Email was distributed to all permittees, and the ASF Email was distributed to all CPIX[1]-designated "high risk" permittees, irrespective of the terms of their individual permits. She explains the rationale for this distribution at paragraph 4 of her affidavit:

> Given the volume of permits, this was done to ensure that all permittees were aware that the Ministry had implemented changes to the format of reporting. Virtually all permittees have reporting obligations per the terms of their individual permits; however, the frequency, scope, substance and immediacy of their reporting requirements vary widely from permit to permit. In light of these variances, all permittees were notified of the changes implemented by the Ministry, and were expected to review the terms of their individual permits to determine whether either or both of the ASF and NCR notifications applied to them.

[13] The ASF Email that was sent to each permit holder is addressed to the specific client (permit holder) and includes the relevant authorization (permit) number. It then states in full:

> Dear Permittee:

[1] "CPIX" is an acronym for the Comparative Priority Index, an index used in Ministry databases

> The Ministry of Environment (Ministry) is working to improve communications with our authorization holders and streamline information management practices.
>
> To ensure transparent communication about compliance status, we are implementing a new routine reporting process for high priority authorizations. As of January 1, 2016, annual reports for high priority authorizations must include an Annual Status Form (ASF).
>
> Please find attached to this email the Annual Status Form Template & Instructions, Frequently Asked Questions and Examples documents for this new process.
>
> If you have any questions, please contact your regional ministry office. … [website for regional office contact].

[14] The NCR Email is also addressed to the specific client (permit holder) and includes the relevant authorization (permit) number. It then states in full:

> The Ministry of Environment (Ministry) is changing the way authorization holders submit reports of immediate non-compliance to the ministry for authorizations under the *Environmental Management Act*.
>
> On or after January 1, 2016, please submit all immediate non-compliance reports electronically to EnvironmentalNonCompliance@gov.bc.ca. This central email address is administered by the Environmental Protection Division Compliance Team. This reporting requirement applies to any non-compliance with authorization conditions including, but not limited to: unauthorized bypasses, malfunctions, emergency conditions, permit exceedances and toxicity test failures.
>
> An email template for non-compliance reporting is provided for your convenience.
>
> Any event that will result in direct impacts to human health, animal kills and/or immediate and significant impacts to the environment must also be reported to the RAPP [Report All Poachers and Polluters] line … [telephone number included], or electronically at this link: ….
>
> Any event that is a reportable spill as defined by the *Spill Reporting Regulation* must also be reported to the Provincial Emergency program … [phone number included].
>
> Authorization holders who do not have explicit requirements to submit non-compliance reports are encouraged to use this new reporting email to communicate with the ministry regarding non-compliance events as a way of fostering transparent communications.
>
> Please note that these changes will take effect January 1, 2016. If you need clarification, please read the attached Frequently Asked Questions. If you have any further questions related to this immediate

> non-compliance reporting requirement, please contact the ministry at … [website included].
>
> If you have general questions related to your authorization, please contact your regional ministry office. … [website for regional office contact].

*The parties' positions on the preliminary issue of jurisdiction and whether some of the appeals should be dismissed*

[15] The Director argues that the notifications are administrative in nature, and that the substance of the Appellants' permit conditions was not changed by the notifications. She submits that the notifications merely address the method by which any existing reporting requirement in a permit is to occur. The "requirement" is, at all times, the reporting of non-compliance found in the particular permit, the substance of which is unaltered by either the ASF or NCR notifications. Given the nature and purpose of the notifications, the Director submits that they are not appealable "decisions" under section 99 of the *Act*.

[16] In addition, despite the fact that the Ministry sent the notifications to all permit holders, the Director submits that the notifications *only* apply to a permit holder if its permit already contained the relevant reporting requirement. Based on the Director's review of the Appellants' respective permits, she submits that in a total of 28 appeals (5 appeals of NCR notifications, and 23 appeals of ASF notifications), the appealed notification does not apply to the subject permit, and therefore, those appeals ought to be struck.

[17] The Appellants submit that the notifications contain the "imposition of a requirement", and are appealable under section 99(b) of the *Act*. The Appellants argue that the notifications change the manner of reporting and, for a number of permittees, require additional information to be provided that was not otherwise required by the particular permit. The Appellants also submit that the requirements are mandatory, and therefore, failing to comply with the notifications may trigger enforcement action for non-compliance.

[18] Further, the Appellants submit that although many decisions could be categorized as "administrative" in nature, such decisions are appealable if they are made by a statutory decision-maker under the authority of the legislation, and fall within one of the categories in section 99. In this case, even if the notifications were just changing the *manner* of reporting, the Appellants submit that the notifications are still appealable decisions, because such a change is an exercise of a statutory power under section 14 of the *Act*.

[19] The Appellants note that some of the permits contain clauses which expressly contemplate future changes to the reporting requirements. However, the Appellants argue that such a change would still be a "decision", because action taken in furtherance of this clause would be part of a "staged decision-making" process, and therefore, would fall within the definition of "decision".

[20] The Appellants disagree with the Director's argument that 28 of the appeals ought to be struck on the basis that the notifications do not apply to those permits.

Alternatively, if the Director is correct, the Appellants propose options other than striking the appeals for lack of jurisdiction.

[21] The Appellants also advise that, regardless of the outcome of this preliminary decision, they will be seeking costs from the Director with respect to any appeals that were filed unnecessarily, and potentially for all of the appeals filed. The Director objects to the application for costs.

## ISSUES

[22] The Board has addressed the following issues in this preliminary decision:

1. Whether the ASF and NCR notifications contain the "imposition of a requirement" and are, therefore, appealable decisions under section 99(b) of the *Act*.
2. Whether certain appeals ought to be dismissed because the notifications do not apply to certain permits.
3. If the answer to issue 2 is "yes", then should the Appellants be awarded costs in relation to those 28 appeals?

## THE APPLICABLE TEST

[23] The usual test applied by the Board to determine whether a decision is appealable is whether:

1. the alleged decision falls within one of the enumerated categories in section 99 of the *Act*; and
2. the alleged decision is made pursuant to a statutory authority in the *Act*.

[24] In their submissions, both parties apply this test to the notifications at issue.

## DISCUSSION AND ANALYSIS

### 1. Whether the ASF and NCR notifications contain the "imposition of a requirement" and are, therefore, appealable decisions under section 99(b) of the *Act*.

*The Appellants' submissions*

[25] The Appellants submit that the notifications impose requirements on them, and the notifications were made by the Director to specify the manner and content of reporting in permits pursuant to the Director's authority under section 14 of the *Act*. On their face, the notifications change the manner of reporting. Thus, the Director made "decisions" that are appealable.

[26] In that regard, the Appellants rely on the BC Supreme Court's decision in *Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2015 BCSC 1592 [*Unifor*]. That case involved a judicial review of a Board decision regarding whether a Letter of Approval issued by a director was an appealable decision. The

Letter of Approval, issued in October 2014, set out the director's approval of an emission monitoring plan that was submitted by a permit holder. Submission of the monitoring plan for the director's approval was a condition of a permit amendment that the director had issued in April 2013. Two individuals had appealed the permit amendment to the Board, and their grounds for appeal included the monitoring plan. Unifor did not appeal the permit amendment, but sought to appeal the Letter of Approval. The Board concluded that the Letter of Approval was not an appealable decision, because it did not fall within any of the categories listed in section 99 of the *Act*. The Board also found that the approval of the monitoring plan did not change the amount or type of emissions allowed under the permit amendment, and that allowing an appeal of every monitoring plan or further study required by a permit or permit amendment would allow parties to circumvent the 30-day appeal period specified in the *Act*.

[27] In *Unifor*, the Court found that the Board erred in finding that the Letter of Approval was not an appealable decision. The Court found that the Letter of Approval ought to have been considered part of a two-stage decision-making process involving the permit amendment. The Court concluded that the Letter of Approval was part of the permit amendment decision, and therefore, the Letter of Approval was appealable as a "decision" under one of the subsections of section 99 of the *Act*. The Court did not specify which subsection of section 99 applied. Instead, the Court found as follows at paragraph 35:

> Although the words of a statute must be read in the context of the entire act and with a view to the object of the act and the intention of the Legislature, the ordinary and grammatical sense of the words cannot be ignored. On its face, and looking at the ordinary and usual meaning of the words of s. 99, the definition of "decision" is extremely broad, and it is difficult to conceive that in enacting such a broad definition, the Legislature could have intended to exclude a decision of the sort contained in the 2014 Letter of Approval. Put another way, it strains the limits of interpretation of the English language to hold that the 2014 Letter of Approval was neither the making of an order, nor the imposition of a requirement, nor the exercise of a power, nor the issuing or amending of an approval, nor the inclusion of a requirement or condition in an order, permit or approval.
>
> [underlining added in Appellants' submissions]

[28] The Court set aside the Board's decision rejecting Unifor's appeal, and remitted the matter back to the Board for reconsideration in accordance with its reasons. That judgment is presently under appeal to the BC Court of Appeal.

[29] The Appellants argue that the notifications in the present case are analogous to the circumstances in *Unifor*, in that the notifications constitute subsequent directions from the Director regarding reporting under the permits; i.e., the notifications are a form of staged decision-making. The notifications refer to permits held by the Appellants, and the Appellants submit that the notifications set out new requirements regarding how non-compliance reporting is to be carried out by the permit holders.

[30] The Appellants submit that it is clear on the face of the notifications that they are intended to impose requirements upon the permit holders. For instance, the NCR notifications state, "This reporting requirement applies to any non-compliance with authorization conditions …", and further, "…direct impacts to human health, animal kills … must also be reported to the RAPP line …" [underlining added in Appellants' submissions].

[31] The ASF notifications state that "… annual report for high priority authorizations must include an Annual status form." Further, the Frequently Asked Questions ("FAQ") sheet attached to the ASF notifications states, "…if you pay annual discharge fees …, you are required to submit an annual status form …", and later, "This requirement takes effect on January 1, 2016. … all 2015 annual reports due on or after January 1, 2016, will require an annual status form" [underlining added in Appellants' submissions]. In addition, the Appellants submit that the ASF Email refers to the ASF as a "New Requirement".

[32] For these reasons, the Appellants' submit that the notifications "impose a requirement", and therefore, meet the first part of the Board's test for jurisdiction.

[33] Regarding the second part of the test (i.e., whether the notifications were made pursuant to a statutory authority), the Appellants submit that this part of the test has also been met, because:

- the notifications were sent by a statutory decision-maker; and
- the notifications were imposed pursuant to section 14(1)(d) of the *Act* which authorizes a director to insert conditions in permits, including conditions relating to reporting.

[34] Section 14(1)(d) of the *Act* states:

> **14** (1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:
>
> …
>
> (d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;
>
> [underlining added in Appellants' submissions]

[35] The Appellants submit that the notifications were sent by a statutory decision-maker who was acting pursuant to her statutory powers under section 14(1)(d) of the *Act*, which is similar to the circumstances in *BCR Properties Ltd. v. Manager, risk Assessment and Remediation* (Decision No. 2011-EMA-004(a), November 10, 2011) [*BCR Properties*]. In that case, the Board found at paragraph 46 that a decision by a manager constituted "imposing a requirement" under section 99(b) of the *Act*, and the decision would have been appealable if the manager had been acting as a delegate of the director when the decision was made.

[36] Finally, the Appellants address the Director's argument that the notifications are administrative only and do not alter the clauses in the Appellants' permits. The Appellants submit that the clauses referenced by the Director demonstrate that the NCR and ASF notifications alter both the manner of reporting and the information to be provided to the Ministry.

[37] Turning to the ASF notification in particular, the Appellants note that the ASF Email included an ASF Template (which includes ASF Instructions and Definitions), and ASF Examples. Together, those Instructions and Examples set out how the ASF is to be completed and what information is to be included. For instance, the Instructions in the ASF Template indicate that the permit holder should "Identify each condition in your permit that has a requirement or a limit". The Appellants submit that the ASF Examples demonstrate that this includes both conditions related to emissions (as well as monitoring, sampling and testing), and those that are of an administrative nature (e.g., deadlines for submission of regular reports). The Appellants submit that the ASF must also indicate whether there was compliance during the previous year with all of the identified permit clauses, and the actions taken to mitigate any non-compliance. Further, the ASF Template indicates that a person granted authority by the permit holder should sign the ASF and attest to the correctness of the information presented in the ASF.

[38] Given the amount of information required, the Appellants disagree with the Director that the ASF is merely an executive summary of information already contained in annual reports. They submit that, considering the annual reporting of non-compliance requirements in the permits, the ASF still requires additional information. The ASF requires a listing of *all* provisions in a permit which establish any sort of requirement, and the identification of not only non-compliance, but also compliance, with those provisions. The ASF also requires an individual to attest, on behalf of the permittee, as to the accuracy of the information presented in the ASF, which is not currently a requirement in the permits. The Appellants argue, therefore, that the ASF notifications require not only a change in the manner of reporting, but also the substance of the reporting.

[39] Alternatively, even if the ASF is simply an executive summary of information already required to be provided in an annual report, the Appellants submit that it is nonetheless a change in the "manner of reporting". The Appellants submit that, on this basis alone, the Board can conclude that the Director was acting pursuant to her statutory authority to direct the manner of reporting, and therefore, the ASF notifications are appealable decisions.

[40] Regarding the NCR notifications, the Appellants argue that these notifications do not simply address the method (i.e., email) for submitting non-compliance reports to the Ministry. The Appellants submit that the NCR notifications:

- require all immediate non-compliance reports to be submitted electronically to a designated email box;
- state that the reporting applies to any non-compliance with the authorization (i.e., permit) conditions;
- include an attached template that set out the information to be included in the email-based report;

- require events that result in direct impacts to human health, animal kills and/or immediate impacts to the environment to be reported to the RAPP line; and
- require any event that is a reportable spill to be reported to PEP [Provincial Emergency Program] (which the Appellants note is a statutory requirement in any event).

[underlining added in Appellants' submissions]

[41] An NCR Template is attached to the NCR Email. The NCR Template sets out the information content for the email-based written report. The Template includes the nature of the non-compliance, the initial response/action taken, monitoring conducted, future action items, contact information and attachments (monitoring data, photos, etc.).

[42] In light of the above, the Appellants submit that the NCR notifications purport "to require reports to be sent for any non-compliance with the permit, for non-compliance reports to be in writing on a template provided by the Respondent, and to include the information set out in the template." In other words, the NCR notifications impose requirements for the form and content of the reports themselves, rather than simply directing the reports already required under the Appellants' permits be submitted to an email address. Therefore, the Appellants submit that the NCR is, at minimum, a change in the manner of reporting the information required under the permits under section 14 of the *Act*.

[43] In addition, the Appellants note that the wording of their permits varies considerably. For some of permits, the information in the NCR notifications is significantly broader than the information that the permits require to be reported in the event of non-compliance. For example, some permits require the permit holder to immediately notify the Ministry by telephone or facsimile in the event of an emergency which prevents the operation of the approved method of pollution control, whereas other permits require written reporting, usually at a later time. Nevertheless, the Appellants submit that "we have not identified any clauses which contain exactly the same manner and/or content of reporting required by the NCR Notification, or any permits which require the permit-holders to call the RAPP line under any circumstances." Consequently, for some permit holders, the NCR changes are significant, while for other they are less so. However, for the purposes of this jurisdictional question, the Appellants submit that the magnitude of the alteration is irrelevant.

[44] The Appellants also argue that, even if the Director has correctly described the notifications as administrative in nature, this does not mean that the notifications are not appealable. The Appellants submit that even if the notifications were made under the authority of the existing clauses in the permits, those notifications would have been part of the staged decision-making process described by the Court in *Unifor*.

[45] Based upon the foregoing, the Appellants submit that when the Director specified the information to be included in the reports, or the manner of reporting under the Appellants' permits, she was exercising a statutory power derived from, or incidental to, those granted under section 14 of the *Act*.

*The Director's submissions*

[46] The Director submits that the notifications simply identify the *method* of reporting: there is no additional or more frequent reporting required as a result of the notifications, and no penalties associated with them. She refers to section 115 of the *Act* which provides that, subject to the regulations, an administrative penalty may be imposed if the director is satisfied, on a balance of probabilities, that a person has (a) contravened the *Act* or its regulations, (b) failed to comply with an order made under the *Act*, or (c), failed to comply with a requirement of a permit or approval issued or given under the *Act*. The Director submits that the notifications are not "requirements" of any permit or approval and that, if they were, there would have to be express terms written into the permit or approval, which has not occurred. Moreover, none of the offence provisions in section 120 of the *Act* are applicable here.

[47] The Director maintains that the notifications are administrative in nature, akin to the type of matter that was addressed by the Board in *Splatsin First Nation v. British Columbia*, [2007] B.C.E.A. No. 13, where the Board states at paragraph 47:

> A decision regarding the proper form for an application is a matter of office administration, and can hardly be characterized as a matter that the legislature would have intended to be appealable to the Board.

[48] In this regard, the Director submits that the Appellants have misapprehended section 14(1)(d) of the *Act*. The Director submits that this section of the *Act* states that a director may issue a permit, and the director may "in the permit" require a permittee to report information in the manner specified by the director. The Director notes that the notifications under appeal are not permits.

[49] The Director submits that the facts in this case are distinguishable from those in *Unifor*. The notifications are not similar to the staged decision-making described in *Unifor*. The Court stated in *Unifor* that, "… it is difficult to conceive that in enacting such a broad definition [of "decision"], the Legislature would have intended to exclude a decision of the sort contained in the 2014 Letter of Approval" [Director's emphasis]. The Director submits that the notifications, which only addressed the *form* of reporting, did not alter the *substance* of the permits, and are not similar to the Letter of Approval at issue in *Unifor*.

[50] Rather, the Director submits that the facts in this case are more similar to those in *Fording Coal Limited v. Conservation Officer (Waste Management Act)*, (Appeal No. 2001-WAS-029, November 5, 2001) [*Fording Coal*], where the Board found that a warning letter issued by a conservation officer was in the nature of an administrative measure. Although the relevant legislation in *Fording Coal* was the *Waste Management Act*, the predecessor legislation to the *Act*, the definition of "decision" in section 43 of that enactment was similar to the definition of "decision" in section 99 of the *Act*. Section 43 of the *Waste Management Act* states:

**Definition of "decision"**

**43** For the purpose of this Part, "decision" means

(a) the making of an order,

(b) the imposition of a requirement,

(c) an exercise of a power,

(d) the issue, amendment, renewal, suspension, refusal or cancellation of a permit, approval or operational certificate, and

(e) the inclusion in any order, permit, approval or operational certificate of any requirement or condition.

[51] Notably, both definitions of "decision" include "imposition of a requirement".

[52] In *Fording Coal*, the Board found as follows at page 3:

> The Board notes that it has previously dealt with this issue in *Interior Pest Control v. Deputy Administrator, Pesticide Control Act* (Appeal No. 98-PES-04(b), November 6, 1998) (unreported). In that case, the Board considered whether the issuance of a warning letter constituted a "decision" under the *Pesticide Control Act*, R.S.B.C. 1996, c. 360. The Board found that, although the statutory definition of "decision" was broadly defined to include an action, decision or order, **this must mean an action, decision or order made under the authority of the legislation**. Since it found that the warning letter was an administrative measure, the Board concluded it had no jurisdiction with respect to the issue. The Board adopts the reasoning in the *Interior Pest Control* decision.
>
> In this case, the Board finds that the warning letter is an administrative measure that is part of the enforcement strategy of the conservation officer service. Because the warning letter was not issued in accordance with any statutory authority under the *Act*, it does not constitute a "decision" under section 43 of the *Act*.
>
> [Director's emphasis]

[53] Further, the Director relies upon the Board's usual method of interpreting the statutory definition of "decision" which is that the categories in that definition are exhaustive, and that each subsection refers to a specific exercise of statutory power that may be appealed to the Board.

[54] The Director submits that, in the present case, the notifications addressed the method for submitting monthly and/or annual reports, and the *Act* does not require a statutory decision-maker to decide the method for submitting reports. The fact that a statutory decision-maker did so in this case does not change the nature of the activity or alter the substance of the notifications. The notifications are part of an administrative step to ensure that permits are administered in a fashion that is consistent with changing modes of communication between permit holders and regulators. The notifications were not issued under the authority of the *Act*.

[55] In addition, the Director provided examples of circumstances in which a non-statutory decision maker, such as an Environmental Protection Officer, issued an

administrative notification to permit holders respecting a change to the format of reporting obligations pursuant to a statute or authorization. The Director submits that "it would defy logic to argue that an administrative notification sent by a statutory decision maker is appealable under section 99, when the same administrative notification sent by an EPO [Environmental Protection Officer] is clearly not."

[56] The Director argues that some of the permits contain pre-existing non-compliance reporting requirements. However, the Director submits that the NCR notification does not alter the substance of the existing reporting requirements in the permits. It simply informed the permit holders that they should submit their non-compliance reporting by electronic means to a designated central mailbox. The Director submits that there was no change to the *status quo* and no imposition of any additional requirement; thus, if a permit already had a non-compliance reporting requirement, the NCR did not alter that requirement.

[57] In addition, the Director notes that 22 of the permits contain express language stating that monitoring and/or reporting requirement may be modified, or that there is discretion to approve a method of reporting. This suggests these are administrative changes, as opposed to substantive alterations of permit conditions.

[58] The Director submits that the Appellants have provided no examples where the NCR notification imposed an additional requirement that is beyond the existing requirements in permits to report occurrences of non-compliance.

[59] To highlight the administrative nature of the notifications, the Director points out that in some of the existing permits, reports are to be submitted to the Ministry on a 3½ inch diskette. The Director notes that permit holders no longer submit reports on diskettes, despite the fact that those permits have not been amended. If a notification was sent advising permit holders that diskettes are no longer an acceptable mode of reporting and all future reporting is to be provided on a flash drive, the Director argues that "it would defy logic to argue that such notification would constitute an appealable decision" under the *Act*.

[60] Regarding *BCR Properties*, the Director submits that, in that case, the matter under appeal was a determination of the applicable water use standard to be applied to the appellant. The "requirement" was a specific determination as to the appropriate standard to apply to a specific site. Further, the Director submits that *BCR Properties* is distinguishable given that clear legislative language authorized the director to "specify water uses that apply to a given site."

[61] The Director notes that the Appellants assert that the NCR Email appears to be at odds with the Director's assertion that the notification only applies to permits with existing non-compliance reporting clauses. The NCR Email states, in part:

> This reporting requirement applies to any non-compliance with authorization conditions including, but not limited to: unauthorized bypasses, malfunctions, emergency conditions, permit exceedances and toxicity test failures.

[62] The Director submits that this "non-exhaustive language chosen is reflective of the inconsistency in permit terms contained in the 3,000+ permits respecting

which the notifications were sent." In other words, it is not specific to the individual permit holder due to the variation in the wording of each permit and the sheer number of permits in existence.

[63] Regarding the ASF notifications, the Director submits that these notifications "in no way altered the substance of the reporting requirement" in the permits that already had such reporting requirements. The Director argues that the ASF notifications informed the affected permit holders to include, as an appendix to their annual report, an executive summary of the information contained in the report. The Director submits that the notification did not impose any additional requirement. If a permit required annual reporting of non-compliance, that requirement is "in no way altered" by the ASF notification.

*The Panel's findings*

[64] The Board has reviewed the language in the NCR and ASF notifications and the documents that were attached to them, including the templates, examples, and FAQs. The Board has also considered the examples of clauses found in some of the Appellants' permits which the parties specifically referred to. In deciding this preliminary matter, the Board has not reviewed every clause of every permit in issue. The Board finds that the notifications, including their attachments, generally impose requirements that change the manner of reporting that is required in many of the permits. For some of the permits, the notifications including their attachments also impose requirements for the Appellants to provide the Ministry with information that their permits did not already require them to provide. Although the Director may well have intended the notifications to simply change the process by which the Appellants carry out the pre-existing reporting requirements under their permits, the Board finds that the nature of these changes is substantive, and not simply administrative.

[65] In particular, the NCR notifications state, "<u>This reporting requirement</u> applies to <u>any non-compliance</u> with authorization conditions …", and "…direct impacts to human health, animal kills … <u>must also be reported to the RAPP line</u> …" [underlining added]. The NCR notifications not only require a permittee to immediately submit a written report detailing events or incidents of non-compliance with their permit, which was not previously required in some permits, but also to report the incident by telephone on the RAPP line in certain circumstances, which is a new manner of reporting. Moreover, the NCR notifications require permittees to report "any" non-compliance with their permit, which was not previously required under some of the permits in issue. The NCR notifications also require non-compliance reports to include the information specified in the template including actions taken, monitoring conducted, future action items, and monitoring data or photos. That information was not previously required under some of the permits in issue.

[66] Consequently, assuming that non-compliance reports were previously required under a particular permit (although in some cases they were not), the Board finds that the NCR notifications do not simply direct the Appellants to submit non-compliance reports to an email address. Rather, the NCR notifications impose requirements that: change the manner in which non-compliance must be reported;

change the circumstances in which non-compliance must be reported; and, may require new types of information to be reported in the event of non-compliance.

[67] Similarly, the Board finds that the ASF notifications generally impose requirements that change the form and/or content of annual reports, although the degree of change depends on the wording of a particular permit. The ASF notifications state, "As of January 1, 2016, annual reports for high priority authorizations must include an Annual Status Form". The Instructions in the ASF Template require the permittee to identify and record each permit condition that contains a requirement or limit, and to indicate whether the permit conditions were met or not, and if not, the actions taken to mitigate any non-compliance. This requires a permittee to provide more than simply an executive summary of information that would typically already be provided in an annual report. The ASF Instructions also require an individual to attest, on behalf of the permittee, as to the accuracy of the information presented in the ASF, which is not currently a requirement in the Appellants' permits. Consequently, assuming that annual reporting was already required in the permits in issue (although it is not in some permits), the Board finds that the ASF notifications generally require not only a change in the manner of annual reporting, but also the type of information that must be provided with an annual report.

[68] The parties disagree as to whether the Director was exercising a statutory power when she issued the notifications. The Board agrees with the Director that the notifications were not issued pursuant to section 14(1)(d) of the *Act*. It would be illogical to find that the notifications were issued under section 14(1)(d) given that section 14(1) empowers a director to "issue" permits, and the Appellants already held permits when the notifications were issued. However, the Board notes that section 16(4)(j) of the *Act* states that a "director's power to amend a permit includes… changing or imposing any procedure or requirement that was imposed or could have been imposed under section 14 or 15 [underlining added]". Moreover, section 16(1)(a) provides that a director "may on the director's own initiative if he or she considers it necessary… amend the requirements in the permit" [underlining added]. Thus, the Director's powers under section 16(1) to amend the requirements in a permit include the power to change or impose, on her own initiative, a requirement under section 14(1)(d) for a permittee "to report information specified by the director in the manner specified by the director".

[69] The Board finds that in issuing the NCR and ASF notifications, the Director was generally acting under section 16(4)(j) of the *Act* by changing or imposing requirements in the Appellants' permits "to report information specified by the director in the manner specified by the director." To the extent that the notifications were issued to the holders of permits that did not already contain requirements for annual reporting and/or non-compliance reporting, the Board has addressed that under Issue 2.

[70] In addition, the Board notes that section 16(8) of the *Act* authorizes a director to notify a permittee via email of a change to the requirements in their permit. Section 16(8) states that a director may notify a permittee of a permit amendment "by electronic means to an address provided by the holder of the permit or approval".

[71] Although the parties' submissions in this matter focused on the whether the notifications constitute "imposing a requirement" (as stated in section 99(b) of the *Act*) on the Appellants as permittees, as opposed to amending the Appellants' permits (as stated in section 99(d) of the *Act*), the Board finds that the effect of the notifications is to impose requirements that, in effect, result in a permit amendment pursuant to section 16(4)(j) of the *Act*. The fact that the NCR and ASF notifications were issued via email, consistent with section 16(8) of the *Act*, supports the finding that these notifications were issued pursuant to section 16 of the *Act*.

[72] For all of these reasons, the Board finds that, on their face, both the ASF and NCR notifications "impose a requirement" within the meaning of section 99(b) of the *Act* with respect to reporting information specified by the Director in the manner specified by the Director, and were issued by the Director pursuant to section 16 of the *Act*.

## 2. Whether certain appeals ought to be dismissed because the notifications do not apply to certain permits.

*The Director's submissions*

[73] The Director submits that, even if the Board finds that the notifications are appealable decisions, some of the appeals ought to be dismissed for lack of jurisdiction because the notifications do not apply to some of the permits held by the Appellants. After reviewing the clauses of the permits in issue, the Director submits that 28 appeals ought to be dismissed on this basis. The Director emphasizes that she does <u>not</u> admit that that the notifications should not have been sent or were improperly sent. She submits that the sheer volume of permits that needed to be addressed necessitated the wide-spread distribution of the notifications. The Director "acknowledges the inherent difficulty in determining which permits the ASF and NCR Notifications apply to, arises from the language of the permits themselves…." The Director submits that there is no need to formally rescind all of the ASF and NCR notifications that were sent, irrespective of whether they were appealed.

[74] The Director submits that the Board should dismiss these 28 appeals either: for lack of jurisdiction (as there was no "decision" under section 99 of the *Act* that affects those permits); or, because there is no reasonable prospect of success.

[75] The Director further submits that she has not yet turned her mind to the "arduous task" of parsing the terms of some of the permits, to determine the applicability of 39 of the notifications. The Director submits that some of these appeals could be resolved by: striking the Notices of Appeal for lack of jurisdiction, or no reasonable prospect of success; or, the Appellants could voluntarily withdraw those appeals.

[76] The Director's specific submissions regarding the ASF and NCR notifications are set out under separate headings below.

<u>ASF notifications</u>

[77] Of the 182 ASF notifications sent out, 27 were appealed. Of those 27 appeals, the Director states that 23 relate to permits for which no annual reporting requirement is contained in the permit. She submits that the ASF notifications do not apply to "those permits for which there were no pre-existing requirement for annual reporting." Further, she submits that just because a permit includes a requirement for annual reporting, does not mean that the ASF notification applies. It depends on the context, and she gave examples of different wording in permits: one which she says triggers the ASF requirement; the other which does not.

[78] The Director submits that the Ministry clarified this situation in its FAQ sheet respecting ASFs:

> **2. Who has to submit an annual status form?**
>
> If you pay annual discharge fees exceeding $20,000 or are required to post security and/or mine reclamation bonds exceeding $100,000, and you are required to submit an annual report, you are required to submit an ASF. Some larger municipal authorizations related to liquid and solid waste management plans may also be required to submit an ASF. [Director's emphasis][2]

[79] The Director submits that, as confirmed in the FAQ sheet, the ASF notifications do not apply to permits that contained no prior requirement for annual reporting. The Director submits that the ASF notifications only apply to four permits. As such, the other 23 appeals of ASF notifications ought to be struck.

NCR notifications

[80] Of the 3,209 NCR notifications issued by the Director, 68 were appealed. Of those 68 appeals, the Director submits that five relate to permits for which no non-compliance reporting requirement was contained in the permit. The Director submits that the NCR notifications do not apply to permits for which there were no pre-existing requirements to report non-compliance or unauthorized discharges. In support, the Director refers to the FAQ sheet respecting NCRs:

> **6. My authorization does not require me to report non-compliance. Does this information apply to me?**
>
> Providing this information helps create a transparent line of communication between the authorization holder and the ministry. We are encouraging all authorization holders to self-report any non-compliance.
>
> Self-reporting of non-compliance demonstrates your willingness to comply. This may be taken into account in any compliance and enforcement follow up that may occur.
>
> [Director's emphasis]

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[2] This was the version of the FAQs in effect on December 21, 2015, before the appeals were filed. The Director states that it was revised as a result of questions from the Council of Forest Industries and the Pulp and Paper Environmental Forum regarding the applicability and implementation of the notifications.

[81] The Director submits that it is clear from the statement in the FAQ sheet regarding NCRs that, when issuing those notifications, she did not impose a new obligation on permit holders whose permit(s) did not contain pre-existing reporting requirements respecting non-compliance or unauthorized discharges. The FAQ sheet states, "Self-reporting non-compliance is, for what ought to be obvious reasons, *encouraged* of those permit-holders, but there is no risk of sanction if such reporting does not occur."

[82] The Director submits that, because the NCR notifications do not apply to the permits which contained no prior non-compliance reporting requirements, there is no basis for an appeal in relation to those permits, and the five appeals ought to be struck.

*The Appellants' submissions*

[83] The Appellants question the accuracy of some of the Director's submissions on this issue, and the Director's interpretation of the portions of the FAQ sheet.

[84] For example, the Appellants argue that the ASF notifications require annual reporting on both compliance and non-compliance, and not simply non-compliance as argued by the Director, and none of the permits in issue required reporting of compliance. Furthermore, the Appellants submit that the Director is incorrect that 23 of the 27 appeals regarding ASF notifications relate to permits for which there are no annual reporting requirements. The Appellants submit that nine of the 23 permits in question require the Appellants to submit annual reports, and another four of those permits require certain data to be submitted on an annual basis. Regarding the four permits that the Director says contain annual reporting requirements, the Appellants submit that those four permits are the only ones that require annual reporting of non-compliance.

[85] Nevertheless, the Appellants agree that the 28 appeals listed by the Director do not need to continue, because the Director has effectively admitted that the notifications should not have been sent to the Appellants because those permits do not contain requirements to submit the reports contemplated in the notifications.

[86] The Appellants propose two options for dealing with the 28 appeals:

1. the Board could allow the appeals of the 28 inapplicable notifications, and reverse the notifications or order the Director to do so; or
2. the Appellants could withdraw the appeals of the 28 inapplicable notifications.

[87] The Appellants argue that the first option ought to be chosen. The Appellants submit that the Director erred in law or exceeded her jurisdiction when she imposed additional requirements that are not requirements of a permit, are not reportable under the terms of a permit, and were imposed without amending the permits. The Appellants submit that, although the Director has the authority under section 16(4)(j) of the *Act* to amend a permit, or change or impose any requirement that was imposed or could have been imposed under section 14 of the *Act*, the Director has admitted that that the NCR notifications do not apply to permits that contained no prior non-compliance reporting requirements, and the

ASF notifications do not apply to permits that contained no prior annual reporting of non-compliance. The Appellants argue that this amounts to an admission by the Director that she cannot impose substantive new reporting requirements unless she exercises her authority to amend the permit under section 16 of the *Act*, and therefore, the Director exceeded her jurisdiction under section 14 of the *Act* in regard to those permits.

[88] In addition, the Appellants submit that, based upon the Director's submissions, there is sufficient evidence for the Board to conclude that the Director acted unreasonably in sending out notifications she ought not to have sent. The Director's decision to send the 28 notifications to the Appellants without first ascertaining whether their permits contained the relevant pre-existing non-compliance reporting was incorrect, arbitrary and unreasonable, and the Board ought to exercise its authority to allow the appeals of the 28 notifications. Pursuant to section 103 of the *Act*, the Appellants ask the Board to reverse the 28 notifications, or send them back to the Director with directions for the Director to reverse those notifications.

[89] Furthermore, the Appellants advise that they are not necessarily prepared to withdraw the 28 appeals, as the issue of the reasonableness and legality of the notifications in those instances remains a live issue.

*The Board's findings*

[90] The parties agree that 28 of the appeals need not continue. However, the parties disagree as to the appropriate way to resolve those appeals.

[91] Although the Director did not expressly refer to section 31 of the *Administrative Tribunals Act*, the Board notes that this provision authorizes the Board to summarily dismiss an appeal for a number of reasons, including if the Board finds that the appeal is not within the Board's jurisdiction or the appeal has no reasonable prospect of success. Some of the remedies that the Director urges the Board to apply to the 28 appeals align with those powers.

[92] In addition to the powers that have been granted to the Board under certain sections of the *Administrative Tribunals Act*, the Board has the power under section 103 of the *Act* to:

> (a) send the matter back to the person who made the decision, 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 appeal board considers appropriate in the circumstances.

[93] Some of the remedies that the Appellants urge the Board to apply to the 28 appeals align with those powers.

[94] The Board will first address the appeals relating to the NCR notifications. The parties agree that, of the 68 NCR notifications that were appealed, five relate to permits that contain no non-compliance reporting requirement. The Board finds that the NCR notifications do not apply to the five permits that contained no

previous requirement to report non-compliance. The NCR notifications should not have been issued in relation to those permits. Had the Director reviewed the terms of those permits before issuing the NCR notifications, those notifications would not have been issued and these appeals could have been avoided. Accordingly, the Board finds that the appropriate remedy is to reverse the decisions to issue those NCR notifications, and allow those five appeals.

[95] Regarding the 27 ASF notifications that were appealed, the parties agree that 23 of those appeals should not continue, but they disagree about the reasons for not continuing. The Director says that the 23 appeals involve permits which contained no prior "annual reporting" requirement. The Appellants disagree with that submission, but they submit that the Director has admitted that the ASF notifications do not apply to those 23 permits, and the Board should reverse those notifications.

[96] The Board finds that the Director has acknowledged that the ASF notifications do not apply to 23 of the permits. As such, the Board finds that the ASF notifications should not have been issued in relation to those permits. The appropriate remedy in these circumstances is to reverse the ASF notifications that pertain to those 23 permits, and allow those appeals.

### 3. If the answer to issue #2 is "yes", then should the Appellants be awarded costs in relation to those appeals.

[97] The Appellants have notified the Director that they intend to seek their costs, for any notices of appeal that were filed unnecessarily, and potentially with respect to the remainder of the appeals.

[98] The Director submits that no costs are warranted in the circumstances. In addition, the Director submits that the Appellants' stay application (and appeals) may proceed, subject to the present decision on the preliminary issue of jurisdiction.

[99] The Board finds that the Appellants are simply "notifying the Board and the Respondent that they will be seeking costs", and the Appellants have not yet made a proper application for costs. Accordingly, even in regard to the appeals that have been allowed, it is premature for the Board to decide whether costs should be ordered.

## DECISIONS

[100] The Board has considered all of the evidence and submissions provided by the parties, whether or not specifically reiterated herein.

[101] For all of the reasons set out above, the Board finds that the ASF and NCR notifications are appealable "decisions" as defined in section 99(b) of the *Act*.

[102] The Board also finds that the NCR notifications do not apply to five of the permits in issue, and the NCR notifications should not have been issued in relation to those permits. Accordingly, the Board reverses the decisions to issue those NCR

notifications, and those five appeals are allowed (Appeal Nos. 2016-EMA-002, 2016-EMA-021, 2016-EMA-022, 2016-EMA-047, 2016-EMA-087).

[103] Similarly, the Board finds that the ASF notifications should not have been issued in relation to 23 of the permits in issue. Accordingly, the Board reverses the decisions to issue those ASF notifications, and those 23 appeals are allowed (Appeal Nos. 2016-EMA-001, 2016-EMA-003, 2016-EMA-005, 2016-EMA-007, 2016-EMA-009, 2016-EMA-020, 2016-EMA-023, 2016-EMA-025, 2016-EMA-027, 2016-EMA-029, 2016-EMA-032, 2016-EMA-036, 2016-EMA-038, 2016-EMA-041, 2016-EMA-045, 2016-EMA-048, 2016-EMA-050, 2016-EMA-054, 2016-EMA-067, 2016-EMA-069, 2016-EMA-071, 2016-EMA-073, 2016-EMA-075.

[104] Finally, given that the Board has found that 28 of the 95 appealed notifications (i.e., approximately 30 percent) should not have been issued, and given that the Ministry issued a total of 3,209 NCR notifications and 182 ASF notifications, the Board notes that there may be many more notifications that should not have been issued because they did not apply to particular permits. Although almost 3,300 remaining notifications are not the subject of an appeal, the Board recommends that, in the interests of fairness, the Director review the applicability of those notifications to determine whether they should not have been issued.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

September 13, 2016