



Environmental Appeal Board

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DECISION NO. 2016-WIL-003(b)

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

BETWEEN:	Darren DeLuca	APPELLANT
AND:	Deputy Regional Manager, Recreational Fisheries and Wildlife Programs	RESPONDENT
AND:	Wildlife Stewardship Council	PARTICIPANT
BEFORE:	A Panel of the Environmental Appeal Board Jeffrey Hand, Panel Chair	
DATE:	Conducted by way of written submissions concluding on August 31, 2016	
APPEARING:	For the Appellant: Jonathan Van Netten, Counsel For the Respondent: Pamela Manhas, Counsel For the Participant: John Henderson	

APPEAL

[1] On April 28, 2016, the Appellant filed a Notice of Appeal against the March 30, 2016 decision of Michael Stalberg, the Deputy Regional Manager, West Coast Region (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The decision under appeal concerns the Appellant's 2016 quota for Roosevelt elk attached to guide outfitter licence GONA16-226629 (the "Licence"). The Regional Manager attached an annual quota of two elk to the Licence which may be harvested in specified areas within his guide outfitter territory on Vancouver Island, British Columbia.

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

- a) send the matter back to the person who made the decision being appealed, 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.

[3] The Appellant asks the Board to vary the decision by increasing his 2016 quota to three Roosevelt elk, instead of two elk.

[4] The Regional Manager submits that the quota was properly determined and within the discretion granted to him. He submits that the appeal ought to be dismissed.

[5] The Wildlife Stewardship Council (the "Council") applied for Participant Status in this appeal on July 28, 2016. On August 5, 2016, after reviewing submissions from all parties, the Board concluded that the Council may participate in the appeal, but that participation should be limited to making submissions on the impact that the appeal may have on the Roosevelt elk population on Vancouver Island, and how that might affect the Council and its members. The Council supports the Regional Manager's decision.

[6] This appeal was conducted by way of written submissions.

BACKGROUND

General

[7] The Regional Manager has discretion under the *Act* to grant licences to guide outfitters, to set quotas for the harvesting of specific species, and to determine the areas within a guide outfitter's territory within which that harvesting may occur. To assist in this exercise of discretion, the Ministry has established several policies and procedures, some of which are referred to in this decision.

[8] This appeal concerns a quota for Roosevelt elk, a sub-species of elk that is indigenous to coastal British Columbia and considered to be at risk. Roosevelt elk are on the Provincial Blue List (special concern). They have characteristics that make them particularly sensitive or vulnerable to human activities and natural events. Consequently, the hunting of Roosevelt elk is closely monitored and managed with a view to ensuring conservation of the species.

[9] In 2015, the Ministry published an elk management plan, intended to guide the management of elk populations over the next decade with the goal of eventually removing these elk from the Provincial Blue List within the decade.

[10] The harvest of Roosevelt elk on Vancouver Island is managed using special management units called "elk population units". The Ministry will only allow Roosevelt elk to be hunted in areas where the elk population can sustain hunting opportunities.

Hunting opportunities for guide outfitters

[11] In order to allow guide outfitters to plan their commercial operations in advance, the Regional Manager sets tentative allocations (target harvest) for each guide outfitter in five year blocks. The allocation establishes the maximum number of animals the guide's clients may harvest over that period. However, it is the quota that legally establishes the number of animals that a guide's clients may actually harvest in a given year. Quotas are issued annually with the guide's licence.

[12] A guide's five-year allocation is determined after certain information is gathered by the Ministry, and analyses are performed. Specifically, the Ministry determines the elk population and the amount of harvest that should be permitted to allow the elk population to be replenished through natural means (the sustainable harvest). The anticipated harvest by First Nations for ceremonial and sustenance purposes is then deducted. The remaining available harvest, known as the Allowable Annual Harvest ("AAH"), is then split between resident hunters and non-resident (guided) hunters on a percentage basis.

[13] Until 2015, the percentage of the AAH split between the resident and non-resident hunter groups could be adjusted during the five-year allocation period to account for either the over- or under-harvest by the hunter groups, among other things. A number of Ministry policies and procedures described when an adjustment may be warranted. However, for Roosevelt elk, this changed on February 6, 2015, when the Minister of Forests, Lands and Natural Resource Operations released a revised decision on wildlife harvest allocations that created fixed allocation splits for elk hunts between resident and non-resident hunters on Vancouver Island. In the Appellant's region (Region 1), resident hunters were allocated 85% of the AAH for bull elk or either sex elk, and guided (non-resident) hunters were allocated the remaining 15%.

[14] Once the AAH and the split is determined, the non-resident hunters' portion of the AAH is allocated to guide outfitters based upon another set of calculations performed by regional managers, and guided by Ministry policies and procedures. Individual guide outfitters receive their tentative allocation for five years, taking into account a number of factors including movements and trends in the elk population, and whether a guide's territory is shared with First Nation hunters or another guide outfitter.

[15] The five-year allocation is considered to be tentative because it is subject to ongoing review to ensure the proper management of the elk population.

[16] After establishing the tentative five-year allocation, the Regional Manager determines an annual quota for the guide outfitter in each of the years making up the five-year allocation.

The Appellant's past allocation and quotas

[17] The Appellant is a guide outfitter who has been licensed to operate in certain areas on Vancouver Island for many years. The licences authorize him to guide hunters in the territory (areas) specified in his guide territory certificates. The Appellant's guide territory at issue in this case is shown on his guide outfitter certificate 100677, and extends from the southern part of Vancouver Island up to the Qualicum area (and includes certain Gulf Islands). This territory overlaps, at least partially, with management units 1-03 and 1-05. These management units overlap, at least partially, with several elk population units, and with limited entry hunt zones for elk ("hunt zones"). According to the Regional Manager, these hunt zones are the only areas considered by the Province to have a population of elk that can sustain hunting opportunities: hunt zones are determined, and reflect, the harvestable portion of the elk population.

[18] The Appellant's guide territory is shared with multiple First Nation hunters, resident hunters, and one other guide outfitter. Management unit 1-03 is split between two guides, and the Appellant has hunt zone 1-03A within this management unit. Management Unit 1-05 has two hunt zones (1-05A and 1-05B), both of which are in the Appellant's territory.

[19] In 2013, the Appellant was provided with his tentative allocation of Roosevelt elk to be taken during the five-year period of 2012 to 2016. This allocation was revised in 2015 as a result of the fixed allocations established by the Minister, and is the allocation at issue in this appeal. Based upon the elk populations in the three hunt zones within his territory (the "Hunt Zones"), he was given a revised tentative allocation of four elk, as follows:

Common Name/ MU Hunt Zone	Lower San Juan 1-03A	Nanaimo Lakes 1-05A	Nanaimo River Camp 1-05B
New 2012-2016 Guided Hunter Allocation – all guides POLICY 15%	1	2	1
New 5 year Guided Hunter Allocation by Guiding Territory	4		

[20] The Appellant has been issued licences with the following annual quotas during the allocation period:

2012: one elk
 2013: one elk
 2014: two elk
 2015: two elk

[21] Bearing in mind that the Appellant's tentative five-year allocation was four elk, the licences issued prior to 2016 provided the Appellant with a total of six opportunities to harvest those four elk. The Appellant states that he guided hunters in each of the years 2012-2015, but only one elk was successfully taken in 2014. That elk was taken from hunt zone 1-05A (Nanaimo Lakes).

[22] The reason why the Appellant did not achieve his annual quotas in those years is not explained in the evidence before the Panel.

[23] The Regional Manager states that the "Guide Declaration Reports" filed by the Appellant do not confirm that the Appellant had guided hunts for elk in each of those four years; however, whether the Appellant had clients or not in those years, and why those hunts were unsuccessful, is not relevant to the determination of this appeal.

The Regional Manager's decision-making process

[24] The Regional Manager explained how he arrived at the Appellant's five-year allocation, his previous quotas, and his 2016 quota, in detail, in an affidavit sworn on July 29, 2016. In it, he identified the population estimates that he used, the applicable harvest rates, the estimated First Nations harvest, the resident/non-resident shares of the harvest, and the policies and administrative guidelines that he considered.

[25] When exercising his discretion to set annual quotas, the Regional Manager considers the Ministry's policies and procedures. In particular, the Regional Manager considers the "Quota Procedure" and "Administrative Guidelines Procedure" set out in subsections 01.05.1 and 01.05.2 of the Ministry's Procedure Manual.

[26] Typically, an administrative guideline of up to 30% of the five-year allocation may be harvested in any one year. Applying the administrative guideline in this case results in 1.2 elk, being 30% of the allocated four elk. Through mathematical rounding, 1.2 becomes an annual quota of one elk.

[27] The Appellant's 2012 and 2013 annual quotas were each set at one elk using an administrative guideline. However, in 2014 the Appellant advised that an annual quota of one elk made it difficult to market guided hunts to two party groups (e.g., spouses, mother/daughter or father/son), as each hunter wanted an opportunity to harvest an animal. The Regional Manager increased the Appellant's annual quota to two elk that year as a mitigation measure. The Regional Manager recognized that administrative guidelines should not be applied too strictly to guide outfitters with small allocations of four animals or less. He was also satisfied that this increase would not be detrimental to elk population management. He issued the same quota in 2015.

[28] Accordingly, in 2014 and 2015, while the administrative guidelines would normally have allowed an annual quota of one elk in each of those years, the Regional Manager exercised his discretion to allow the Appellant to take two elk in each of those years.

[29] The Regional Manager established the Appellant's annual quota for 2016, the final year of his five-year allocated period, at two elk as well. The Regional Manager issued the Licence and attached quota on March 30, 2016. It was sent to the Appellant by email that day. The quota states:

SPECIES	QUOTA	AREA WITHIN WHICH THE HARVEST MAY OCCUR
Roosevelt elk	2 elk	<ul style="list-style-type: none">• Maximum of 1 bull elk from Hunt Zone 1-03A• Maximum of 1 bull elk from Hunt Zone 1-05A• Maximum of 1 bull elk from Hunt Zone 1-05B

[30] Thus, for the year 2016, the Regional Manager issued the Licence to the Appellant with a quota allowing a maximum of two Roosevelt elk to be harvested, with no more than one bull elk being taken from any of the three Hunt Zones covered by the Licence. No reasons for the quota were provided at the time that it was emailed to the Appellant on March 30, 2016.

[31] Upon receipt of the Licence and quota on March 30th, the Appellant emailed the Regional Manager, advising that he ought to have three elk to harvest – one in each zone. That same day, the Regional Manager provided a two-page explanation for his quota decision.

[32] The Appellant responded in a follow-up email, stating that there should be three elk available for harvest in this final year of his five-year allocation, as he had only harvested one of the four elk that he was allocated.

[33] In an email dated April 1, 2016, the Regional Manager provided another two-page email setting out a detailed response to the Appellant's email. He confirmed the quota of two elk.

The appeal and the parties' positions

[34] The Appellant appealed the quota decision on April 28, 2016. The Appellant argues that he is entitled to attempt to harvest the whole of his five-year allocation, and to take three elk in 2016. He submits that, when making his decision, the Regional Manager:

- failed to properly apply the Ministry's policies and procedures;
- failed to consider that:
 - he was issuing quota in the last year of the 2012-2016 elk allocation period,
 - as no elk were harvested by the Appellant's clients in 2012, 2013 and 2015, despite booked hunts for the available quota, three elk remain in his allocation, and
 - elk are managed in the territory on a management unit/hunt zone level and the Appellant had one elk remaining in each of the three hunt zones.

[35] The Appellant also argues that the Regional Manager failed to consider the Ministry's policies titled "Commercial Hunting Interests" (subsection 01.11 of the Ministry's Policy Manual), and "Under-Harvest of Allocated Shares" (subsection 01.13 of the Ministry's Policy Manual), as his decision does not remove unnecessary barriers and allow the Appellant to achieve his five-year allocation of four elk.

[36] The Appellant submits that, if he is issued a quota of three elk for 2016, no conservation impacts will result.

[37] In his reply submissions, the Appellant also argues that the Regional Manager failed to give reasons for his decision, contrary to section 101 of the *Act*.

[38] The Regional Manager submits that he made his decision within the bounds of his legislative discretion, as guided by policy and procedure. He submits that the Appellant is, in effect, asking to "stockpile" wildlife which is not consistent with best wildlife management practices.

[39] The Regional Manager submits that there is no compelling reason to interfere with the quota decision. He also submits that he provided reasons to the Appellant in two emails, and that the Appellant has suffered no disadvantage from the manner or timing of the reasons.

[40] The Council opposes any variation to the Appellant's quota. It submits that increasing the quota to three elk would mean that the Appellant could harvest 75% of his total allocation in one year. If such a scenario is approved, "then it is only reasonable to expect that the same opportunity would be requested by other guide outfitters, First Nations and the resident hunting community". The Council does not want to see the vulnerable Roosevelt elk populations on Vancouver Island placed at risk, and is also concerned that, if the Appellant is successful in his appeal, it may set a precedent for other populations of sensitive species, such as grizzly bear, sheep and caribou.

ISSUES

[41] The issues that arise in this appeal are the following:

1. Whether the Regional Manager failed to give reasons for his decision, contrary to section 101 of the *Act*?
2. Did the Regional Manager issue the Appellant's 2016 annual quota in accordance with the applicable legislation, policies and guidelines?
3. Does the Appellant's request for a quota of three elk in 2016 amount to "stockpiling" of unused quota from previous years?
4. Would a 2016 quota of three elk raise conservation concerns?

RELEVANT LEGISLATION

[42] According to section 2(1) of the *Act*, ownership of all wildlife in the Province is vested in the government. As the owner of wildlife, the government is responsible for the management and protection of the Province's wildlife resource (*Ministry of Environment Act*, R.S.B.C. 1996, c. 299).

[43] Under section 47 of the *Act*, it is illegal for a non-resident of British Columbia to hunt big game in the Province without a licensed guide outfitter. Section 47 states:

- 47** A person commits an offence if the person hunts big game unless he or she
- (a) is a resident, or
 - (b) is accompanied by
 - (i) a guide licensed under this Act, ...

[Emphasis added]

[44] Guide outfitter licences are issued by regional managers under section 51 of the *Act*, as follows:

51 (1) A regional manager

- (a) may issue a guide outfitter licence to a person if all of the following apply:

- (i) the person is a citizen of Canada or a permanent resident of Canada;
 - (ii) the person has public liability insurance prescribed by regulation;
 - (iii) the person has other qualifications prescribed by regulation, and
- (b) ...
- (2) A guide outfitter licence authorizes the holder to guide persons to hunt only for those species of game and in the area described in the licence.

...

[Emphasis added]

[45] According to section 60 of the *Act*, regional managers may attach a quota as a condition of the licence. Section 60 states:

Quotas

60 (1) If a regional manager issues a guide outfitter licence, the regional manager may attach a quota as a condition of the licence and may vary the quota for a subsequent licence year.

...

[46] Under section 1, "quota" is defined as:

- (a) the total number of a game species, or
 - (b) the total number of a type of game species
- specified by the regional manager that the clients or a class of client of a guide outfitter may kill in the guide outfitter's guiding area, or part of it, during a licence year, or part of it, but does not include an angler day quota.

[47] The *Commercial Activities Regulation*, B.C. Reg. 338/82, also addresses a regional manager's discretion over quota, by describing the subjects that may be covered:

Guide outfitter licence with a quota

1.04 Where a regional manager issues a guide outfitter licence which attaches a quota as a condition of the licence, he may specify

- a) species of game and their age, sex, horn or antler classification, and numbers of each class or classification of game that may be harvested,
- b) the area of areas within which the harvest may occur,
- c) the time period within which the game may be harvested, or

- d) the number of hunters or a class of hunters that may hunt a species in a defined time and area.

[Emphasis added]

[48] Finally, section 101(1) of the *Act* specifies when a regional manager is required to provide written reasons. It states as follows:

Reasons for notice of decisions

101(1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

- (a) a licence, permit ...,
- (b) an application by a person for anything referred to in paragraph (a).

ANALYSIS

1. Did the Regional Manger fail to give reasons for his decision, contrary to section 101 of the *Act*?

[49] The Appellant submits that section 101(1) of the *Act* requires the Regional Manager to provide reasons for a decision when there is an alteration in the Appellant's licence.

[50] The Regional Manager submits that his decision, "in its complete form", is the Licence, attached quota, and two emails: the first dated March 30, 2016; the second dated April 1, 2016. The Regional Manager relies on both emails as his written reasons for the Appellant's 2016 quota.

[51] The Appellant submits that these reasons were only delivered after he questioned his 2016 quota on March 30, 2016. He submits that the decision under appeal relates to the quota attached to the 2016 Licence, not the emails.

[52] The Appellant also submits that delivery of the reasons in this fashion has resulted in confusion, and that his ability to argue this appeal has been impaired. The Appellant submits that the confusion about what, exactly, were the Regional Manager's reasons for decision put him "at a significant disadvantage on this appeal because he is left to guess at what constitutes the written reasons for the Decision."

The Panel's findings

[53] The Panel finds that the March 30 and April 1, 2016 emails constitute the Regional Manager's reasons for decision. Further, the Panel finds that these emails clearly set out the Regional Manager's reasons for setting the quota at two elk. These emails constitute compliance with section 101(1) of the *Act*.

[54] Although the reasons were not provided simultaneously with his quota decision, and were provided in response to the Appellant's emails, the Panel finds there is no violation of the *Act* as a result of this short delay, or the fact that they may have been prompted by the Appellant.

[55] Further, the Panel finds that the Appellant has not established that his ability to argue this appeal was, in any way, impaired by the short delay (a few hours at best, two days at worst) in providing reasons. The Appellant's detailed submissions in support of his appeal confirm that he fully understood the basis for the Regional Manager's decision, albeit he disagreed with it. Further, the Appellant has been given a full opportunity to be heard on this appeal, and to submit why he believes his quota was improperly determined. The Panel finds that any minor defect in the timing of the reasons has been cured by the appeal process where all parties have made full written submissions, and the matter has been heard afresh.

2. Did the Regional Manager issue the Appellant's 2016 annual quota in accordance with the applicable legislation, policies and guidelines?

[56] The Appellant submits that, when making his quota decision, the Regional Manager appears to have simply given the Appellant the same quota as in previous years, and used the administrative guideline as justification for his decision.

[57] The Appellant further submits that the Regional Manager did not correctly calculate his quota according to the Ministry's Quota Procedure, in particular, sections 1(1.1) and 1(1.4), which provide as follows:

1.1 Allocations of harvest opportunities to guided hunters by means of a quota should be based on the calculation of an annual allowable harvest (AAH), and be consistent with the Ministry of Environment's policy and procedures concerning harvest allocations.

1.4 Quotas should be calculated to reflect guided hunters' share of the harvestable portion of the population within each guide outfitter's territory, if available.

[58] The Appellant clarifies that he is not challenging the calculation of the AAH or his five-year allocation of four elk. Rather, he submits that these sections direct the Regional Manager to calculate the elk quota for 2016 to reflect the Appellant's share of the harvestable portion of the remaining elk in the 2012-2016 allocation period (i.e., three elk). He submits that issuing three elk for the final year of the allocation period would not exceed the Appellant's share of the allocated harvest.

[59] In support of these arguments, the Appellant refers to the following underlined portions of the Regional Manager's January 23, 2013 letter notifying the Appellant of his tentative five-year allocation:

...

An allocation is a target total harvest of species over a period of years that normally informs annual setting of quota. Your total allocation is tentative because an allocation may change over the course of an allocation period due to such factors as changes in population estimates or changes in harvest rates.

...

My goal for you is to come as close as possible to taking your entire allocation. That goal will be achieved by the annual setting of quota annually, keeping in mind your harvest to date in the allocation period.

....

...

[60] The Appellant submits that it must necessarily follow that, if his quota is “informed by” the five-year allocation, then he must be given an opportunity to achieve his entire allocation. The Appellant argues that the Regional Manager’s main consideration ought to have been that there were three elk remaining in the final year of his allocation and that, “absent some extraordinary or compelling justification”, the Appellant’s 2016 quota should have reflected the elk remaining in this allocation. He submits that the Regional Manager has not provided any compelling justification for limiting the Appellant’s quota to two elk.

[61] The Appellant argues that his argument is further supported by the Ministry’s Commercial Hunting Interest policy, which provides that guide outfitters should receive “predictable” and “fair” allocations without “unnecessary barriers to achieving allocations”, and with the Ministry’s Under-Harvest of Allocated Shares policy, which was established to ensure that the allocation to resident and guided hunters is not altered because of under-harvest at a regional level.

[62] The Appellant also submits that the Regional Manager erred by calculating the quota at a guide territory level, whereas the management of elk takes place on a management unit/hunt zone level. If his quota had been based on a management unit/hunt zone level, his quota would have been one elk in each of his three Hunt Zones: his client’s had only killed one elk in the hunt zone with an original allocation of two elk (Nanaimo Lakes, 1-05A).

[63] In response, the Regional Manager submits that the five-year allocation is nothing more than a target. It is the annual quota that sets out the number of animals a guide is actually allowed to harvest.

[64] The Regional Manager states that the setting of annual quotas must take into account a variety of factors, including: changes in population estimates, harvest rates, the interplay between harvest allocations made to resident hunters and guide outfitters, and First Nations’ aboriginal or treaty rights to harvest wildlife.

[65] The Regional Manager states further that conservation concerns need to be reviewed on a continual basis. In this regard, he must be cautious when setting quotas because:

- despite its best efforts, the Ministry does not always have reliable and accurate information respecting population estimates, the First Nations’ harvest, or poaching;
- the Snuneymuxw First Nation’s harvest in two of the Appellant’s hunt zones is high (the Nanaimo Lakes and Nanaimo River Camp hunt zones); and
- the population estimate in the Lower San Juan hunt zone is uncertain, and there are concerns regarding a potential overharvest in that area.

[66] The Regional Manager submits that the harvest of elk by First Nations is particularly challenging because regional managers have no authority to set harvest limits for First Nations, and First Nations are not required to report the number of animals killed to the Ministry. Thus, Roosevelt elk harvesting by First Nations is dependent on First Nation hunters voluntarily adhering to conservation guidelines

and providing accurate reporting of their elk harvest. The Regional Manager submits that, given these conditions, special care must be taken to ensure that an overharvest does not occur.

[67] The Regional Manager explains that the establishment of an annual quota is a matter of wide discretion, and he utilizes the various policies and procedures established by the Ministry when setting quotas. He submits that, consistent with section 1(1.1) of the Quota Procedure, the allocations of harvest opportunities to the Appellant were based upon the calculation of the AAH, and consistent with policy and procedure concerning harvest allocations. He provided a description of how this was done.

[68] The Regional Manager further submits that quota, as provided for in section 1(1.4) of the Quota Procedure, is not intended to be calculated to reflect the sum total of the harvestable population in every management unit or hunt zone in the guide's territory. The Regional Manager submits that the Appellant has misinterpreted this section. He states in his affidavit that section 1(1.4) simply means that a quota should not exceed the guided hunters' share of the available population within his territory.

[69] Regarding the "Under-Harvest of Allocated Shares" and "Commercial Hunting Interests" policies, the Regional Manager submits that these policies no longer apply to the elk allocations on Vancouver Island. He states that the sections of those policies relied upon by the Appellant relate to the AAH split between the resident and non-resident hunter groups. As the Minister's February 6, 2015 decision created a fixed allocation (split) for resident and non-resident elk hunters on Vancouver Island, he submits that those policies do not apply to the Appellant's case.

[70] Further, the Regional Manager notes that the "Frequently Asked Questions" resulting from the Minister's 2015 decision states that "no additional mitigation measures for guides will be made available beyond the increased harvest percentages as noted."

[71] Regarding his application of administrative guidelines, the Regional Manager states that he recognizes that they are problematic for small allocations, such as the Appellant's. To mitigate the impact of the guidelines, he has exercised his discretion to increase the Appellant's annual quotas to two elk since 2014. However, in doing so, he "could foresee some challenges". For instance, this approach has the potential to increase non-First Nations' harvest within a single First Nations' territory, which, in turn, has the potential to infringe their right to harvest. In addition, the additional harvest may impact conservation. He states in his affidavit, "Considering raising the appellant's quota to two Elk already entails these risks, increasing the appellant's quota to three Elk is not a sound proposition." (p. 10)

[72] Although the Appellant places significant weight on the fact that he is in the final year of the current five-year period, with three animals remaining in his allocation, the Regional Manager states that "this allocation is not an entitlement". In this case, the Regional Manager submits that he properly established an annual quota of two elk, but provided the Appellant with the flexibility to take those two elk from any of the Hunt Zones, provided that he did not take more than one bull elk from the zone.

[73] In choosing to decline the Appellant's request to be given a quota of three elk in 2016, the Regional Manager points out that many other guide outfitters and First Nations hunters also find themselves in the position of the Appellant. That is, in some instances, many of those hunters have not taken their full share of Roosevelt elk or another animal. He submits that, to make an exception for the Appellant in this instance would likely result in other guide outfitters seeking similar concessions or, in the case of First Nations hunters who are not governed by the quotas process, simply choosing to maximize their harvest. Such an outcome would potentially result in an overharvest, which could impair the long-term stability of the elk population.

The Panel's findings

[74] The Panel finds that the wording of the *Act*, the *Commercial Activities Regulation* and the Ministry's policies and procedures support the Regional Manager's position.

[75] Section 60(1) of the *Act* provides that the Regional Manager may attach a quota as a condition of a licence.

[76] Section 1.04 of the *Commercial Activities Regulation* provides that the Regional Manager may specify the species and number of game that can be harvested by a guide outfitter.

[77] The Ministry's policies and procedures set out guidelines to assist the Regional Manager, but there is no mandatory language in these documents that, in any way, restricts the discretion to be exercised by the Regional Manager.

[78] The wide scope of discretion that the Regional Manager may exercise was recognized by the Board in its decision on the Appellant's 2013 appeal of his quotas (see: *DeLuca v. Regional Manager of Fish and Wildlife*, (Decision Nos. 2013-WIL-046(a) & 2013-WIL-047(a), October 31, 2013)). In that decision, the Board considered the role of the Ministry's policies and procedures in the context of that discretion and found at paragraph 36:

By way of conclusion to this discussion, the scheme of the *Act* grants wide discretion to officials: the procedures constitute non-binding advice/guidance for officials only, to assist them in the exercise of that discretion.

[79] In this case, one of the procedures considered was the Administrative Guidelines procedure. This establishes a procedure for regional managers to follow when determining a yearly quota by:

- a. calculating a five year allocation;
- b. multiplying the five year allocation by 30% to determine the quota to attach to the yearly licence.

[80] Utilizing this procedure, the Appellant would receive a quota of not more than one elk in 2016.

[81] However, recognizing that strict utilization of the administrative guidelines for determining small quotas for guide outfitters with five-year allocations of four animals or less might be too restrictive, the Regional Manager exercised his

discretion to increase the Appellant's annual quotas issued in both 2014 and 2015 to two elk instead of one. He exercised his discretion to do so in 2016 as well, and has outlined some of the potential consequences with this approach. The Panel finds that the Regional Manager considered the impact of his decision, and did not simply issue the same quota as in previous years and use the guidelines as justification, as alleged by the Appellant.

[82] The Appellant also submits that, in arriving at this quota, the Regional Manager failed to properly interpret and apply sections 1(1.1) and 1(1.4) of the Quota Procedure. Had the Regional Manager properly interpreted and applied these sections, the Appellant submits that the number of elk remaining to be harvested in each of the Management Unit/Hunt Zones within the territory "should have been the most significant factor" in setting the Appellant's quota.

[83] The Panel has reviewed the documents and the detailed chart attached as exhibits to the Regional Manager's affidavit. The Panel finds that, consistent with section 1(1.1) of the Quota Procedure, the Regional Manager calculated the quota on the basis of the AAH, and the percentage of the AAH for guided hunters. The Panel finds that there is no basis to conclude that the Regional Manager failed to follow section 1(1.1) of the Quota Procedure.

[84] Regarding section 1(1.4) of the Quota Procedure, the Panel notes that this section simply requires a regional manager to ensure that quotas issued to guides for their territory "reflect the guided hunters' share of the harvestable portion" of the animal population. The reference to "guided hunters' share" is not a reference to an individual guide's share of his or her five-year allocation; it is a reference to the larger non-resident hunter group, and its share of the harvest.

[85] In his affidavit, the Regional Manager states regarding section 1(1.4):

44. As per section 1(1.4) of the *Quota Procedure*, the appellant's quota was calculated to reflect the guided hunters' share of the harvestable portion of the population within his Territory. This was done by examining the elk populations within the Elk population units ("EPU") that are capable of supporting a hunt and are located within the Territory.

45. Note that s. 1(1.4) does not mean quota is or should be calculated so that it reflects the sum total of the harvestable population in every Management Unit or Hunt Zone in a guide's territory. A regional manager has the discretion to specify the number of game that can be harvested, the areas in which the harvest can occur, and the timer [sic] period in which the harvest can occur. As such, I calculated the number of Elk the appellant could harvest in total for the licence year and then specified the areas in which there are harvestable portions of the population.

[86] Having considered the Regional Manager's evidence, and the detailed chart attached as Exhibit D to his affidavit, the Panel finds that the Regional Manager correctly interpreted the Quota Procedure, and the Appellant's quota reflects the guided hunters' share of the harvestable portion of elk within the Appellant's territory.

[87] The Panel has also considered the Appellant's argument that the Regional Manager erred by calculating the quota at a guide territory level, whereas the management of elk takes place on a management unit/hunt zone level. The Appellant argues that, if his quota had been calculated at the management unit/hunt zone level, it would have been one elk in each of the Hunt Zones. The Panel rejects this argument.

[88] Under section 51(2) of the *Act*, a licence authorizes the holder of the licence to guide hunters "only for those species of game and in the area described in the licence." In this case, the Licence allows the Appellant to guide in his guide outfitter territory.

[89] Further, the definition of quota states that a quota is the total number of game species, or type of game species, specified by a regional manager that the guide's clients "may kill in the guide outfitter's guiding area, or part of it" [Emphasis added].

[90] In addition, considering the Ministry's policies and procedures, the Board has previously concluded that quotas are properly calculated at a guide territory level. This was confirmed by the Board in the Appellant's 2013 appeal, as well as in *Findlay v. Deputy Regional Manager, Recreational Fisheries and Wildlife Program (Thompson/Okanagan Region)*, (Decision No. 2013-WIL-033(a), April 24, 2014) [*Findlay*], and numerous other guide outfitter appeals decided by the Board in 2014. Although the elk populations available for harvest within the Appellant's territory are located within three hunt zones, his five-year allocation and his annual quotas are established for his territory: his allocation of four elk is for his territory, and the Regional Manager has specified the zones (areas) from which he must harvest the elk. The fact that the allocation is derived from elk populations in three different areas (zones) that are located within his territory, does not entitle him to a quota within each one. Moreover, as stated by the Regional Manager, allocations are not entitlements.

[91] The Panel finds that, in effect, the Appellant's argument turns hunt zones into separate guide outfitter territories, within which he would get separate allocations and quotas. This is not the way the legislation is structured, and such an outcome is contrary to the elk management scheme that has been developed over the years by the Ministry.

[92] The Panel finds that there is no basis to conclude that the Regional Manager failed to follow sections 1(1.1) and 1(1.4), or that he ought to have calculated the Appellant's quota on the basis of a management unit or hunt zone.

[93] Lastly, the Appellant argues that two additional Ministry policies assist his position in this appeal. The first is the Commercial Hunting Interest policy, which provides that guide outfitters should receive "predictable" and "fair" allocations without "unnecessary barriers to achieving allocations".

[94] The Panel finds that this policy does not assist the Appellant. In 2014, the Board decided numerous appeals by guide outfitters, in which the appellants relied upon this policy as support for an increase to their quotas. In *Findlay*, the Board found that this policy is not intended for this purpose. The Board found as follows at paragraph 128:

... From a review of the Commercial Hunting Interests policy, it is apparent that the government's focus is on larger concepts such as protecting the industry by requiring non-residents to hire a guide to hunt big game, as well as predictability, timeliness, maximizing hunters' success and maintaining exclusivity for guides and their achievement of allocation. The focus of the policy is not on preventing or eliminating economic impacts to an individual guide's business.
If the Commercial Hunting Interests policy was intended to be used by a Regional Manager to determine quota, the policy would have said that. Instead, the policy focuses on the larger policy goals of the Ministry; not the determination of quota by the Regional Manager.

[Emphasis added]

[95] This reasoning has been adopted in subsequent Board decisions, and is adopted in this case.

[96] However, even if the policy applied to this case, the Panel finds that the Appellant's quota was predictable and fair. In addition, the evidence does not support a finding that a quota of two elk in 2016 is an "unnecessary barrier" for the Appellant achieving his allocation. Moreover, when the past five years of quotas is considered, the Appellant has been given a total of eight opportunities to achieve his overall allocation of four elk. The Panel finds that there is no basis to find that the Regional Manager has erected any unnecessary barrier to the Appellant's achievement of his allocation.

[97] The second policy referenced is the Under-Harvest of Allocated Shares policy. The Appellant argues that this policy, likewise, requires that he be given a quota of three elk in 2016. That policy provides:

That the allocation to a hunter group is not to be altered because of under-harvest by that hunter group at the regional level if the cause of the under-harvest is redundant or unnecessarily restrictive regulations or licence conditions.

[98] The Panel agrees with the Regional Manager that this policy relates to the resident/non-resident split of the AAH, which is not applicable to this case given the Minister's 2015 decision to fix that split for Roosevelt elk.¹ In any event, the Panel fails to see how this policy assists the Appellant. There is no evidence that the Appellant's under-harvest in the years prior to 2016 was due to the regulatory scheme, as opposed to his guided hunters simply being unsuccessful in their hunts. This provision does not apply to the issues raised in this appeal.

[99] Considering the whole of the evidence, the Panel is not satisfied that the Appellant has demonstrated that his 2016 quota was improperly calculated. There is nothing in the legislation, or the Ministry's policy and procedure manuals, that supports the Appellant's claim to the whole of his five-year allocation simply because he has not achieved the annual quotas in the previous years of his allocation. There is nothing in the evidence before the Panel that indicates that the Regional Manager failed to exercise his discretion in conformance with the power

¹. See also the Board's reasoning in *Findlay*, at paragraph 132.

granted to him under the *Act* and the *Regulation*, or that he failed to properly interpret, or incorrectly applied, the Ministry's policies and procedures.

[100] To the contrary, the evidence discloses that the Regional Manager is given wide discretion to set quotas, taking guidance from the policy and procedure manuals while ensuring that conservation of the elk species is properly managed, and without undue risk of overharvest in any given year.

[101] The additional objective of achieving a fair balance of all competing interests in the circumstances is supported by the submissions made by the Council, who oppose the variation to the Appellant's licence out of concern that granting the Appellant's appeal could have adverse impacts on the elk population.

[102] The Panel finds that the Regional Manager considered the need to manage the Roosevelt elk population in the context of interests of all stakeholders and, in particular, the uncertainties surrounding the unregulated harvest undertaken by First Nations.

[103] The Panel finds that the Appellant's 2016 quota was properly determined by the Regional Manager.

3. Does the Appellant's request for a quota of three elk in 2016 amount to "stockpiling" of unused quota from previous years?

[104] While the Panel's finding on Issue #2 is sufficient to dispose of this appeal, it is appropriate in the Panel's view to deal with the issue of stockpiling.

[105] Stockpiling wildlife, also known as "banking" wildlife, is the practice of harvesting animals in excess of one's quota in the current year to make up for a lack of harvest success in past years. The Ministry's Game Harvest Management policy (subsection 01.07 of the Policy Manual) states the following on this practice:

(7) Harvest management decisions will ensure that the following principles are maintained:

(l) game populations cannot be stockpiled.

Definitions:

"stockpiling" - means when an allowable harvest is not achieved in a given period and the remainder is retained for harvesting in future years.

[106] While the Appellant submits that he is not seeking to stockpile his five-year allocation and, instead, asserts that his quota was improperly calculated, the inescapable result of his request for three elk is that the Appellant would be permitted to carry forward the annual quota that he did not previously harvest into the 2016 season. His earlier quota would, in effect, have been stockpiled. This is clearly not permitted under the Game Harvest Management policy. Although the Regional Manager states that he may diverge from this policy, there would have to be compelling circumstances to do so, and that those circumstances are not present in this case: in this case, the Appellant has simply failed to harvest in past years. The Regional Manager states as follows at paragraph 53 of his affidavit:

Stockpiling removes the purpose of the quota system which is to temper the harvest from year to year to ensure its sustainability. The appellant's Territory has multiple First Nations with aboriginal and treaty rights overlapping the area and there are three hunt zones with Limited Entry Hunts for resident hunters, along with one hunt zone that overlaps with another guide's territory. If everyone harvested additional Elk beyond what was anticipated and planned by using the practice of "stockpiling", this would likely result in an over-harvest situation to the detriment or elimination of Elk herds.

[107] The Panel agrees that the circumstances do not warrant diverging from the policy in the present case.

4. Would a 2016 quota of three elk raise conservation concerns?

[108] The Appellant submits that allowing him to take three elk in a single year does not give rise to any conservation concerns. He states that, if his allocation over five years allowed him to harvest four elk, it must necessarily follow that no conservation concerns should arise even if he were to take three elk in a single year. The Panel disagrees.

[109] Firstly, when the overall scheme of elk population management through five-year allocations and annual quotas is considered, it is apparent that annual quotas are typically set at amounts lower than the five-year allocation so that the elk harvest is managed in a measured way. The expectation is that the licence holders will, more or less, spread their allocated harvest over more than one season.

[110] If the Panel were to agree with the Appellant's position, this would represent a marked departure from the Ministry's approach to ensuring a measured harvest over time and without extreme fluctuations in harvest rates from year to year. Moreover, as the Regional Manager points out in his affidavit (quoted in the previous Issue, above), this approach risks overharvest. It should only be allowed in special circumstances, particularly with this species at risk. He submits that those circumstances are not present in this case.

[111] The Panel finds that, not only did the Regional Manager properly consider conservation, the Appellant has failed to establish that his suggested approach properly takes into consideration elk conservation.

[112] Accordingly, the Panel finds:

1. The Regional Manager did not contravene section 101 of the *Act*.
2. The Appellant's 2016 quota was calculated in accordance with the applicable legislation, policies and guidelines.
3. Allowing the Appellant to take the remaining portion of his five-year allocation in a single year would amount to stockpiling, contrary to the Ministry's policy, and without adequate justification to deviate from that policy.
4. The Appellant's 2016 quota properly takes into account the objective of conserving the Roosevelt elk population in a sustainable manner, and there are unacceptable risks to elk conservation efforts if the Appellant's remedy is granted.

DECISION

[113] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated herein.

[114] For the reasons stated above, the Regional Manager's decision is confirmed.

[115] The appeal is dismissed.

"Jeffrey Hand"

Jeffrey Hand, Panel Chair
Environmental Appeal Board

September 21, 2016