Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
E-mail: eabinfo@gov.bc.ca

DECISION NO. 2013-EMA-005(b), 2013-EMA-008(b), 2013-EMA-011(b), and 2013-EMA-012(b)

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

BETWEEN:	Lynda Gagne Charles Henry Claus Skeena Wild Conservation Trust Lakelse Watershed Stewards Society	**APPELLANTS**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Rio Tinto Alcan Inc.	**THIRD PARTY PERMIT HOLDER**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted as a reconsideration of written submissions concluding on August 16, 2013	
APPEARING:	For the Appellants: Lynda Gagne Charles Henry Claus Skeena Wild Conservation Trust Lakelse Watershed Stewards Society	Chris Tollefson, Counsel Richard Overstall, Counsel
	For the Respondent:	Dennis Doyle, Counsel
	For the Permit Holder:	David Bursey, Counsel

RECONSIDERATION OF A PRELIMINARY ISSUE OF STANDING TO APPEAL

[1] On October 31, 2013, the Board issued a decision regarding the standing of Lynda Gagne, Emily Toews, Charles Henry Claus, Pamela Vollrath, Elisabeth Stannus, the Skeena Wild Conservation Trust (the "Trust"), and the Lakelse Watershed Stewards Society (the "Society") to appeal a decision to amend multimedia permit P2-00001 (the "Permit") held by Rio Tinto Alcan Inc. ("Rio Tinto"). In *Lynda Gagne et al v. Director, Environmental Management Act*, Decision No. 2013-EMA-005(a) and 2013 EMA-007(a) to 2013-EMA-012(a)(unreported), the Board concluded that Ms. Toews and Ms. Stannus were "persons aggrieved" by the Permit amendment within the meaning of section 100(1) of the *Environmental Management Act* (the "*Act*"), and as such, had standing to appeal the Permit

amendment. The Board found also that Ms. Gagne, Mr. Claus, Ms. Vollrath, the Trust, and the Society were not "persons aggrieved" within the meaning of section 100(1) of the *Act*, and therefore, their appeals were dismissed for lack of jurisdiction.

[2] Ms. Gagne, Mr. Claus, the Trust, and the Society filed a petition with the B.C. Supreme Court for a judicial review of the Board's decision. Ms. Vollrath did not challenge the Board's decision regarding her standing.

[3] The Court issued an oral decision on March 14, 2014. On April 7, 2014, the Board received a written copy of the Court's oral reasons for judgement: *Lynda Gagne et al v. Director, Environmental Management et al*, Victoria Registry No. 13-4445 ["*Gagne"*].

[4] In *Gagne*, the Court set aside the Board's decision to deny the petitioners' standing, and the Court directed the Board to:

- reconsider whether the petitioners are persons aggrieved pursuant to section 100(1) of the *Act* [at para. 52];
- make its determination based on the submissions that it had received as of August 16, 2013 [at para. 53];
- to determine whether the petitioners established, on a *prima facie* basis, that they were persons aggrieved and therefore entitled to be granted standing [at para. 65].

[5] In addition, at para. 54, the Court clarified that, in reconsidering whether the Trust and the Society are entitled to standing, there is no requirement for the Trust or the Society to demonstrate that one of their members satisfies the definition of person aggrieved.

[6] This decision is the Board's reconsideration of whether Ms. Gagne, Mr. Claus, the Trust, and the Society have standing as persons aggrieved to appeal the Permit amendment. As directed by the Court, this decision involves a reconsideration of whether these Appellants have established, on a *prima facie* basis, that they are "persons aggrieved" under section 100(1) of the *Act*, based on the written submissions that the Board had received as of August 16, 2013.

BACKGROUND

[7] Below is a brief background to this matter, focusing on the information that is relevant to the Board's reconsideration of the four Appellants' standing. A more detailed background regarding the appeals of the Permit amendment is provided in the Board's October 31, 2013 decision.

[8] The Permit amendment was issued on April 23, 2013, by Ian Sharpe on behalf of the Director, *Environmental Management Act* (the "Director"), Northern Region - Skeena, Ministry of Environment (the "Ministry"). The Permit authorizes Rio Tinto to discharge effluent, emissions, and waste from a smelter located in Kitimat, BC. The Kitimat smelter produces aluminum. Rio Tinto sought the Permit amendment in support of a project that is designed to modernize and increase the production at the Kitimat smelter.

[9] Among other things, the Permit amendment allows an increase in the smelter's total emissions of SO_2 (sulphur dioxide). The previous limit was a

maximum of 27 Mg/d (tonnes per day). The new limit is a maximum of 42 tonnes per day. The amendment also amends the authorized works that are listed in the Permit, and adds several conditions to the Permit including requirements to develop an environmental effects monitoring plan for Ministry approval, and to conduct public consultations regarding the environmental effects monitoring plan. Rio Tinto advises that the project will reduce the smelter's emissions of polycyclic aromatic hydrocarbons, fluorides, and particulate matter.

[10] On May 21 and 22, 2013, the Board received several Notices of Appeal against the Permit amendment. The Notices of Appeal contain similar, or in some cases identical, grounds for appeal. All of the Notices of Appeal request that the Board "strike" from the amendment the clause allowing the increase in sulphur dioxide emissions, and amend the Permit to require the installation of sulphur dioxide scrubbers.

[11] On June 18, 2013, the Board received an application from Rio Tinto requesting dismissal of the appeals on the basis that none of the Appellants are a "person aggrieved" by the amendment within the meaning of section 100 of the *Act*. Section 100 states that a "person aggrieved by a decision" of a director may appeal that decision.

[12] By a letter dated June 19, 2013, the Board requested written submissions from all parties regarding whether the Appellants are "persons aggrieved" by the amendment within the meaning of section 100 of the *Act*.

[13] In response, all of the Appellants provided virtually identical letters (dated July 1 and 3, 2013) to the Board, which submit, among other things, that: the individual Appellants all reside in the airshed that will be affected by the amendment; and, all of the Appellants are "aggrieved" within the meaning of section 100 of the *Act.* The Appellants also signed virtually identical letters dated July 4, 2013, which submit, among other things, that "some of the Appellants have medical conditions and economic interests that will be prejudiced by the permit amendment".

[14] Subsequently, some of the Appellants, including Ms. Gagne, Mr. Claus, the Trust, and the Society, retained legal counsel for the purpose of making further submissions on the issue of standing. They provided more expansive submissions on the issue of standing, and each of them provided a statement explaining their interest(s) in appealing the amendment, and how their interests may be affected by the amendment.

[15] Rio Tinto submits that the appeals should be dismissed on the basis that none of the Appellants are a "person aggrieved" by the amendment.

[16] The Director submits that the Trust and the Society lack standing to appeal the amendment. The Director takes no position in respect of the other Appellants' standing to appeal.

RELEVANT LEGISLATION

[17] The following section of the *Act* is relevant to the issue of standing:

Appeals to Environmental Appeal Board

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

ISSUE

[18] The Board has addressed the following issue in this reconsideration decision:

> Whether Ms. Gagne, Mr. Claus, the Trust, and the Society have established, on a *prima facie* basis, that they are a "person aggrieved" by the Permit amendment, based on the written submissions that the Board had received as of August 16, 2013.

DISCUSSION AND ANALYSIS

Whether Ms. Gagne, Mr. Claus, the Trust, and the Society have established, on a *prima facie* basis, that they are a "person aggrieved" by the Permit amendment, based on the written submissions that the Board had received as of August 16, 2013.

The test for establishing standing as a "person aggrieved" under section 100 of the Act

[19] In reconsidering whether each of these four Appellants has standing to appeal under the *Act*, it is important to note that, in *Gagne*, the Court discussed the proper interpretation of the phrase "person aggrieved" in the context of section 100 of the *Act*, and clarified the standard of proof that an appellant must meet in establishing standing to appeal under the *Act*.

[20] The Board has previously interpreted the phrase "person aggrieved" to mean that an appellant must establish that he or she "has a genuine grievance because an order has been made which prejudicially affects his interests." This interpretation is based, in part, on the decision of the House of Lords in *Attorney General of the Gambia v. N'Jie*, [1961] 2 ALL E.R. 504 (P.C.) [*Gambia v. N'Jie*], which the Board has previously referred to in its decisions, and which states as follows:

> The words "person aggrieved" are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.
>
> [underlining added]

[21] In their submissions to the Board as of August 16, 2013, the Appellants argued that the Board should revise its test for determining who is a "person aggrieved" under section 100 of the *Act*. They argued that the Board's test was too restrictive, and that the test should focus on whether an appellant has a "genuine interest" in the matter under appeal.

[22] In its October 31, 2013, decision, the Board considered the meaning of "person aggrieved" based on the principles of statutory interpretation and the relevant case law, and the Board rejected the Appellants' submission that standing should be granted based on an appellant establishing a "genuine interest" in the matter. The Board applied the legal test for a "person aggrieved" that it had applied in the past.

[23] In *Gagne*, the Court confirmed the Board's interpretation of the phrase "person aggrieved" under the *Act*. At para. 75 of *Gagne*, the Court stated:

> … I accept the respondents' submission that the Board's interpretation of "person aggrieved" in section 100 is consistent with our Court of Appeal decision in *Allen v. College of Dental Surgeons of British Columbia*, 2007 BCCA 75 [which quotes *Gambia v. N'Jie*], the legislative history of the term, and dictionary definitions of the word aggrieve.

[24] Further, at paras. 76 – 77 of *Gagne*, the Court confirmed that the Board has no jurisdiction to grant standing to persons or goups on either a public interest or "genuine interest" basis.

[25] However, the Court clarified that a person seeking standing to appeal under the *Act* need only demonstrate on a *prima facie* evidentiary standard that they are a person aggrieved. The Court found that, although the Board had set out the appropriate standard of proof at para. 21 of its October 31, 2013 decision, the Board had gone on to apply the "balance of probabilities" standard of proof in determining the Appellants' standing. In this regard, the Court stated as follows at para. 63 of *Gagne*:

> While the Board is correct in imposing an objective requirement to the test for standing, the burden of proof should not be balance of probabilities.

[26] Thus, the Court confirmed that the test for standing is an objective one, but the Court found that the Board should not have imposed a balance of probabilities evidentiary standard when deciding the Appellants' standing to appeal. Rather, the Board should apply a *prima facie* evidentiary burden of proof. In that regard, the Court stated at para. 56 that the Board's task when determining questions of standing "is to screen out the mere busybody without losing the benefit of contending points of view." The Court also stated at para. 58 that the balance of probabilities standard "is too rigorous a burden at the preliminary stage of determining standing." At para. 60, the Court noted that it is especially important to apply the appropriate burden of proof when standing is decided as a preliminary matter, where the timelines are short and expert evidence is generally not readily available. The Court's reasons indicate that, in the context of deciding standing as a preliminary matter of jurisdiction, a *prima facie* evidentiary burden of proof means that an appellant is obliged to provide some evidence going beyond a mere allegation, but short of proof on a balance of probabilities.

[27] At para. 74 of *Gagne*, the Court summarized what must be established by a person seeking to appeal as a "person aggrieved" under section 100 of the *Act*:

> … I also agree with the respondents when they say that the word "aggrieved" must have some meaning that separates a challenger from the general public and the Board may require a challenger to

> establish, on a *prima facie* basis, something more than a subjective genuine interest. Simply stated, a person aggrieved must demonstrate some form of prejudice to their individual interest, albeit only on a *prima facie* basis.
>
> [underlining added]

[28] Based on the Court's findings in *Gagne*, the Board concludes that the test to establish standing as a "person aggrieved" under section 100 of the *Act* is as follows:

> Whether the person has disclosed sufficient information to establish, objectively and on a *prima facie* basis, that the appealed decision prejudicially affects the person's interests.

[29] In deciding questions of standing, the Board is mindful that an appellant "must demonstrate some form of prejudice to their individual interest," and an appellant must be aggrieved in a way that "separates the [appellant] from the general public", as stated in para. 74 of *Gagne*. The Board has consistently held that, to establish standing, an appellant must provide evidence or information that demonstrates that the appealed decision prejudicially affects the appellant's interests, as distinct from those of the general public. General concerns about the environment or public health are insufficient to establish standing. The Board has also consistently held that the proximity between the point of discharge and a person's residence, business, or place of work does not necessarily lead to the conclusion that the person's interests will be prejudicially affected by the permitted emissions. While proximity is a consideration, an appellant must establish that the appealed decision prejudices his or her interests. The Court's decision in *Gagne* confirms this approach, but clarifies that an appellant need only meet the *prima facie* evidentiary burden of proof in establishing that they are a person aggrieved.

[30] Finally, the *Gagne* decision provides specific guidance in regard to determining the standing of the Trust and the Society. In para. 83 of its October 31, 2013 decision, the Board stated that, for organizations seeking standing, "there must be some evidence or information that members of the organization (or, in the case of a trust, a trustee or the assets of the trust), may suffer some prejudice to their interests as a result of the permitted emissions." However, at para. 54 in *Gagne*, the Court held that "there is no requirement for the Society or the Trust to demonstrate that one of their members would satisfy the definition of person aggrieved." At para. 78, the Court stated that the phrase "personal interest" is broad enough "to include organizations such as the Trust and the Society who might not have a specific property or economic interest." The Board has reconsidered the standing of the Trust and the Society in light of those findings.

The Appellants' submissions

[31] In general, the Appellants submit that Rio Tinto's Technical Report predicts that the impact of the permitted emissions on sulphur dioxide levels will be greatest in the Kitimat region, but sulphate deposition in the form of acid rain will disperse to the areas surrounding Kitimat and Terrace. In particular, the Technical Report predicts that the Terrace region and areas around Lakelse Lake will receive sulphate deposition of 10 to 19 kg per hectare per year. The Appellants submit that, according to the Technical Report, sulphate deposition in the Kitimat and Terrace

area is predicted to result in the acidification (increased pH levels) of soil and water, which may adversely impact vegetation growth, fish habitat and fish, depending on the toxicity level.

[32] In support of those submissions the Appellants referred to certain pages in a technical report titled, *Sulphur Dioxide Technical Assessment Report in Support of the 2013 Application to Amend the P2-00001 Multimedia Permit for the Kitimat Modernization Project*, dated Feb. 22, 2013, volumes 1 and 2, by ESSA Technologies Ltd. (the "Technical Report"). However, the Appellants did not provide copies of the pages they cited. They only provided the following quote from page 78 of the Technical Report, volume 2:

> [depending on toxicity level, acidification] … has been shown to increase fish mortality, decrease fish growth, decrease fish egg production and/or embryo survival, and cause other physiological effects (Baker et al. 1990). Early life stages are more sensitive to acidity than later life stages. Many of the most sensitive fish species are commercially and/or recreationally important, e.g., salmonids (Marmorek et al. 1986). In British Columbia, salmonids are not only commercially important, but also culturally and spiritually important for many First Nations communities. Laboratory and field studies rank rainbow trout (aka steelhead) (*Oncorhynchus mykiss*) as the most sensitive to increasing acidity.

[33] Each of the Appelants also provided submissions and information regarding how they may be genuinely interested in, and/or affected by, the Permit amendment.

[34] Ms. Gagne submits that her personal interests may be prejudiced by the Permit amendment. She states that she owns property in Terrace, where she lives part-time with her daughter and her daughter's family. Ms. Gagne advises that she suffers from asthma, and that she could be adversely affected by increased sulphur dioxide emissions when she visits Terrace. Ms. Gagne also advises that she lives in Victoria, BC, where she is employed full-time as an Assistant Professor at the University of Victoria.

[35] Ms. Gagne submits that increased sulphur dioxide emissions will lead to sulphur depositions that may cause the acidification of soil and water, which could adversely affect food that she and her family consumes. She states that her home in Terrace has a garden, in which she and her family grow food for personal consumption. She also obtains wild mushrooms for consumption from her sister, who harvests them from the area predicted to be impacted by sulphur deposition related to the permitted emissions. Further, she obtains wild salmon for consumption through family friends, who fish from water bodies predicted to be impacted by sulphur deposition related to the permitted emissions.

[36] Further, Ms. Gagne submits that she has demonstrated "continuing engagement" on issues related to local agriculture, food security, and Rio Tinto's application for the Permit amendment. For example, she has conducted research on food security in the Terrace area, written letters opposing the amendment, and participated in a public protest against the amendment.

[37] Based on the foregoing, Ms. Gagne submits that she has disclosed sufficient information or evidence for the Board to reasonably conclude that she has a

"genuine interest" in the Permit amendment, and is thereby a "person aggrieved" under the *Act*.

[38] Mr. Claus submits that his personal interests may be prejudiced by the Permit amendment. Mr. Claus states that he lives in the Terrace area, on an acreage on Braun's Island. Mr. Claus operates a farm that produces vegetables and fruit. As a farmer, he must work outdoors. He advises that he has asthma, which developed when he lived in Prince George, and he moved to Terrace due to his adverse reaction to the air quality in Prince George. Mr. Claus also advises that his son and his son's family visit twice per year, and one of his son's children has asthma. Mr. Claus is concerned that his asthmatic grandchild could be adversely affected by the increased sulphur emissions. He submits that an increase in sulphur dioxide emissions related to the Permit amendment may adversely affect his health and the health of his grandchild.

[39] In addition, Mr. Claus sells his vegetables at the Skeena Valley Farmer's Market. He also owns a bakery in Terrace, and uses the produce from his farm in his bakery business. Mr. Claus is concerned that the increased sulphur emissions will adversely impact soil on his property, and the production of fruit and vegetables, which are sensitive to acidic deposits on their foliage and in the soil. He also submits that his customers want to buy fruit and vegetables that are grown in a pure environment, and the increased emissions will put his farming operation at a competitive disadvantage if his customers believe that his produce has been exposed to more chemicals than produce that is grown in parts of the Skeena region that will be unaffected by the increased sulphur emissions.

[40] Mr. Claus also advises that he regularly fishes for salmon and steelhead trout in streams near Terrace, and he eats the fish that he catches. He is concerned that the increase in sulphur dioxide emissions will harm fish-bearing streams, and affect the quality of the fish he eats.

[41] Further, Mr. Claus submits that the increased emissions may affect the quality of the water in Terrace's community water system, which he uses in his home, in the bakery, and for farming.

[42] Ms. Claus submits that he has demonstrated "continuing engagement" on issues surrounding the potential impacts of Rio Tinto's application for the Permit amendment on agriculture in the Terrace area. For example, he has attended public consultation meetings, and written newpaper articles and letters opposing the amendment.

[43] Based on the foregoing, Mr. Claus submits that he has disclosed sufficient information or evidence for the Board to reasonably conclude that he has a "genuine interest" in the Permit amendment, and is thereby a "person aggrieved" under the *Act*.

[44] The Trust's submissions include information about the creation of the Trust, its purposes, its activities, and its reasons for appealing the Permit amendment.

[45] On October 1, 2007, the Trust was settled by agreement (the "Trust Agreement") as a charitable purpose trust. It is a registered charity under the federal *Income Tax Act*. The Trust advises that its purposes are set out under section 4.1 of the Trust Agreement, which states, in part, as follows:

4.1. The Trustees shall hold the Trust Property and shall manage the Trust Property for the purposes of the advancement of education and other purposes beneficial to the community to make Skeena wild salmonid management a global model of ecological and community sustainability by supporting:

4.1.1. scientific research and education initiatives that will increase awareness and support in Skeena watershed communities and in the world at large…

4.1.2. government, including aboriginal government and non-government programs that will review, monitor, and manage:

4.1.2.1. the headwaters to ocean, terrestrial and aquatic salmonid habitat through ecosystem-based plans, effectiveness monitoring and adaptive management;

4.1.2.2. fisheries management through historical and in-season stock population databases, management models, risk analysis and adaptive management;

4.1.2.3. and economic benefits and costs of various habitat conservation and fisheries management options through financial databases, economic models and analysis.

[46] The Trust is governed by five trustees. The Trust has no members. The Trust submits that, pursuant to section 8.9 of the Trust Agreement, its trustees may sue and be sued in their capacity as trustees, such that a trustee may bring an appeal on behalf of the Trust.

[47] The Trust submits that it has worked with first nations, communities, interest groups, and government agencies such as the Department of Fisheries and Oceans, to document and protect salmonid populations and their habitat. It also submits that, since 2007, government services related to salmonid habitat protection, salmonid science, and salmonid monitoring and management have decreased significantly. The Trust submits that it has been working to "fill the gap" resulting from the reduction of government services and a lack of government agency coordination in respect of salmonid habitat protection and monitoring.

[48] The Trust submits that it is appealing the Permit amendment for three reasons:

- to ensure that the effects of the increased sulphur dioxide emissions on salmonids and their habitat are thoroughly and properly considered by the Board;
- federal and provincial government agencies lack of capacity and coordination in providing baseline salmonid stock and habitat data, and to monitor the effects of the proposed emissions; and
- to suggest alternative management processes based on its experience and expertise with salmonid habitat monitoring and the incorporation of such monitoring results in the adaptive management of salmonid stressors, such as sulphur dioxide emissions.

[49] The Trust submits that it is not a "mere busybody." It submits that it has a "genuine interest" in a number of matter that are central to the appeals, and it has demonstrated "continuing engagement" on the following issues:

- acidification of water-bodies that provide habitat for salmonids;
- the effect of acidification on salmonid mortality and morbidity;
- the cumulative impact of a number of significant air contaminant sources in the Kitimat-Terrace airshed that could contribute to water-body acidification;
- the recent decrease in government agency capacity to adequately monitor and manage salmonid habitat;
- the lack of coordination among government agencies responsible for the little monitoring and management that is taking place; and
- evidence of regional cooperative efforts involving central government agencies, aboriginal governments and non-government entities to fill the monitoring and adaptive management gap.

[50] Greg Knox, Executive Director of the Trust, provided an organizational impact statement on behalf of the Trust, which reiterated many of the submissions set out above. He states that increased sulphur dioxide emissions may undermine the Trust's conservation work.

[51] In support of the Trust's submissions, Mr. Knox referred to Rio Tinto's Technical Report. Mr. Knox did not provide a copy of the relevant pages of that document, but he quoted the same portion of the Technical Report that the Appellants quoted regarding impacts on fish and fish habitat (which the Board has reproduced above).

[52] The Trust submits that, based on the foregoing, it has disclosed sufficient information or evidence for the Board to reasonably conclude that the Trust has a "genuine interest" in the Permit amendment, and is thereby a "person aggrieved" under the *Act*.

[53] In its reply submisisons, the Trust requested that the Board amend the style of proceeding in the appeal to name several individual trustees of the Trust as appellants in their capacity as trustees of the Trust.

[54] The Society's submissions include information about the Society's constitution, activities, membership, and its reasons for appealing the Permit amendment.

[55] The Society advises that it was incorporated under the B.C. *Society Act* in October 2002, and under section 4 of that Act, the Society has the powers and capacity of a natural person of full capacity as may be required to pursue its purposes.

[56] The Society also advises that the following purposes are set out in its constitution:

- to preserve and enhance the health of Lakelse Lake and its watershed;
- to promote and monitor water quality and advocate sound management of natural resources related to Lakelse Lake and its watershed;

- to research, develop and promote innovative management of Lakelse Lake and its watershed;
- to gather and make available to the public, information regarding sound environmental management of Lakelse Lake and its watershed; and,
- to liaise with government and other agencies in matters of watershed stewardship on behalf of residents and other users of Lakelse Lake and its watershed.

[57] The Society submits that, to meet the goals it has set under its constitution, it has undertaken the following activities:

- enhancement and reclamation, including in-stream salmon habitat enhancement, and salmon egg take and fry out-plant in the main tributary of Lakelse Lake;
- environmental monitoring, including sockeye salmon spawning counts, water sediment, temperature and dissolved oxygen surveys, reed bed and invasive weed surveys, and amphibian enumeration surveys; and,
- public education, including general information relating to the watershed, building trails, viewing platforms and signs for salmon spawning areas, and expressing community concerns over a proposed waste landfill proposal.

[58] The Society advises that it has 144 members, all of whom live in, or have seasonal homes in, the Kitimat, Terrace, or Lakelse Lake area. The Society submits that the permitted increase in sulphur dioxide emissions will affect its members in a number of ways. The Society submits that the Permit amendment may prejudicially affect the various health, food, recreational, and environmental interests of Society members.

[59] The Society advises that it has four main reasons for appealing the Permit amendment:

- effects on water quality, acidification and higher heavy metal levels that may affect the Lakelse Lake water used by Society members for drinking and other domestic uses;
- effects on air quality and on the health of Society members and, in particular, members who are allergic to sulphur compounds;
- effects on local garden vegetables and on wild plants used as food, including berries and mushrooms; and
- effects on success of members' sport fishing and wildlife viewing recreational activities, as well as the effect on the environment as a whole.

[60] The Society submits that it has a "genuine interest" in a number of matters that are central to the appeals, and it has demonstrated "continuing engagement" in the areas of environmental health monitoring and watershed management.

[61] Kelly Kline, a member, director and treasurer of the Society, provided an organizational impact statement on behalf of the Society. Mr. Kline submits that Kitimat, Terrace, Lakelse Lake, and Lakelse River are within the zone identified in the Technical Report as being expected to receive sulphur dioxide deposits of greater than 10 kg per hectare per year. He submits that the sulphur dioxide emissions will affect: water quality in the Lakelse Lake watershed, which Society

members use for drinking and other household uses; the quality of the air in the area, which may affect Society members' health; locally grown vegetables and wild food plants; and, the success of Society members' fishing and wildlife viewing activities.

[62] The Society submits that, based on the foregoing, it has disclosed sufficient information or evidence for the Board to reasonably conclude that the Society has a "genuine interest" in the Permit amendment, and therefore, is a "person aggrieved" under the *Act*.

Rio Tinto's submissions

[63] Rio Tinto submits that its modeling of sulphur dioxide emission dispersion was designed to be conservative, and that the dispersion modeling over-predicted sulphur dioxide concentrations by a factor of more than two (227%). In support of those submissions, Rio Tinto quoted the following from page 18 of the Technical Report:

> Dispersion models are designed to be conservative, because their most common purpose is to provide a worst case estimate of the air quality after a project. This worst case air quality estimate assumes continuous emissions during all meteorological conditions over three years, with the intent of capturing worst case meteorological conditions for comparison to standards or thresholds. This conservative comparison ensures that the actual project impacts will be overestimated, giving a conservative estimate of impacts to human health and the environment. Typical levels of conservatism range from 50 percent over-prediction, up to over-predicting by four times.

[64] In addition, Rio Tinto submits that its dispersion modeling predicts that the permitted sulphur dioxide emissions will not exceed BC Provincial Pollution Control Objectives outside of Kitimat. Within Kitimat, the model predicts that the sulphur dioxide emissions will be within those objectives 99% of the time, and the exceedances in Kitimat would total less than 100 hours annually. Rio Tinto also submits that exposure to sulphur dioxide concentrations within the range of emissions predicted after the permitted increase will not cause respiratory diseases such as asthma, and the health impact of any exceedances would be "minor or even trivial."

[65] In support of those submisions, Rio Tinto referred to certain pages of the Technical Report, as well as a public consultation report prepared in support of the application for the amendment, but Rio Tinto did not provide copies of those documents or the relevant pages within the documents.

[66] Regarding Ms. Gagne, Rio Tinto submits that her part-time residence in Terrace, and the fact that she has asthma, are insufficient to meet the standing test in this case. Rio Tinto submits that its dispersion modeling shows that the predicted sulphur dioxide emissions will not exceed BC Provincial Pollution Control Objectives outside of Kitimat, even under the conservative assumptions used in the modeling.

[67] Rio Tinto submits that Ms. Gagne has provided no information on the proximity of her Terrace residence to Kitimat, the amount of time she spends in

Terrace, how often she visits Kitimat, or how her asthma would be affected if she lives in Terrace and only part-time. In addition, Rio Tinto submits that Ms. Gagne's concerns in relation to the outdoors, agriculture, forestry, fishing and eco-tourism as it relates to her family and the residents of Kitimat are too general to meet the test for standing. Rio Tinto argues that she has provided no information on how the sulphur dioxide emissions will affect her or her family's ability to participate in these activities.

[68] In addition, Rio Tinto submits that its Technical Reports does not support Ms. Gagne's concerns that sulphur dioxide emissions may affect local agriculture, food and fish.

[69] Regarding Mr. Claus, Rio Tinto submits that he lives in Terrace, and has provided no information on the proximity of his residence or his business to Kitimat, or how often he visits Kitimat. In addition, Rio Tinto submits that Mr. Claus' concerns about the potential effects of the sulphur dioxide emissions on his farm, his livelihood, and his ability to sell his crops are speculative and are contradicted by Rio Tinto's Technical Report, which predicts that the emissions will not affect the quality or taste of crops, and will not exceed BC Provincial Pollution Control Objectives outside of Kitimat. Moreover, Rio Tinto submits that Mr. Claus cannot speak for his customers and make assumptions about their shopping preferences or their perception of his products. Rio Tinto also submits that Mr. Claus' concerns about harm to fish, water, and local salmon that he catches and eats, are merely speculative, as he has not shown a causal connection between the increased sulphur dioxide emissions and harm to water or fish. Rio Tinto also submits that its Technical Report does not support a causal link between the two.

[70] Furthermore, Rio Tinto submits that Mr. Claus' concerns about the effect of sulphur dioxide emissions on his livelihood are contradicted by the Technical Report and studies, which state that the predicted level of sulphur dioxide emissions will not affect the quality or taste of crops.

[71] Regarding the Trust, Rio Tinto submits that the Trust has provided no evidence or information that it or its members will suffer any prejudice as a result of the amendment. Rio Tinto submits that the Trust's reasons for bringing the appeal do not support it being awarded a role as a party in the appeal process, and its broad mandate suggests a lack of expertise in the issues that it asks the Board to consider.

[72] Similarly, Rio Tinto submits that the Society has failed to provide any evidence or information indicating it or its members will suffer some prejudice as a result of the amendment. Rio Tinto submits that it is unclear which, if any, of the Society's members may be prejudiced, and if so, in what manner. In addition, Rio Tinto submits that the Society's mandate covers conservation, monitoring, research, education and advocacy relating to Lakelse Lake and its watershed, and no aspect of this mandate is prejudiced by the amendment. Rio Tinto argues that the Society can continue to pursue its goals and engage in activities to further its mandate.

The Director's submissions

[73] The Director submits that both the Trust and the Society lack standing to appeal the amendment. The Director takes no position regarding the other Appellants' standing to appeal.

[74] Regarding the Trust, the Director submits that it is not a legal "person," and therefore, cannot be considered "aggrieved" or capable of sustaining a right of appeal. In addition, the Director submits that the "genuine interest" factors submitted in support of the Trust's standing, including a decrease in government agency capacity to adequately monitor and manage salmonid habitat and lack of coordination among government agencies, are merely an attempt to attract public interest standing, which the Board has no jurisdiction to confer.

[75] Regarding the Society, the Director submits that, although the Society asserts that the amendment will affect its members, no personal impact has been alleged that would attract standing on the part of Society members. In regard to the organizational impact statement submitted by Mr. Kline, the Director submits that there is no evidence that Mr. Kline or any other member of the Society will suffer individual harm.

The Board's findings

[76] At the outset, it is important to note that, in deciding this preliminary matter, the Board is required to make some findings about the potential impacts of the permitted emissions on the Appellants' individual interests, for the limited purposes of decidng whether the Appellants have established that they are "persons aggrieved" by the Permit amendment. The Board emphasizes that its findings in this regard have no bearing on the merits of the appeals. The Board's findings in this preliminary decision are solely for the purpose of deciding the Appellants' standing, and are made on a *prima facie* basis, rather than on the balance of probabilities standard that the Board applies when deciding the merits of an appeal.

Ms. Gagne

[77] Ms. Gagne's submissions indicate that she primarily resides in Victoria, BC, where she works full time. She owns property in Terrace, but she provided no information regarding the amount of time she spends in Terrace, or how her asthma may be affected by the Permit amendment given that she only lives in Terrace part-time. She also provided no information about whether, or how often, she visits Kitimat.

[78] The Board finds that Terrace is approximately 50 kilometres north of Kitimat, and Rio Tinto's dispersion modeling predicts that, under the Permit amendment, the level of sulphur dioxide emissions will not exceed BC Provincial Pollution Control Objectives outside of Kitimat. None of the four Appellants have challenged Rio Tinto's submissions in that regard. Indeed, the Appellants' submissions state that the impact of the permitted emissions "on atmospheric SO_2 levels will be greatest in the Kitimat region…." Also, none of the four Appellants have challenged Rio Tinto's submission that the dispersion modeling used a conservative approach to estimate the potential impacts of the permitted sulphur emissions.

[79] These circumstances distinguish the present appeals from those in *Houston Forest Products Co. et al v. Assistant Regional Waste Manager* (Appeal Nos. 99-WAS-06(c), 08(c) and 11(c) – 13(c), issued Feb. 3, 2000) [*Houston*]. In *Houston*, the standing of several appellants was challenged on the basis that they were not "persons aggrieved" by an amended air emissions permit. The appellants lived and/or worked in Smithers, and the source of the air emissions was a beehive burner located over 60 kilomatres away in Houston, BC. In that case, the Board found that the appellants were "persons aggrieved" based on credible evidence from the Ministry that the beehive burner in Houston produced considerable volumes of smoke containing particulates, and the smoke travelled throughout the Bulkley Valley and affected the air quality in that area, including in Smithers. There was also evidence that particulates in wood smoke, at ambient levels below those experienced at certain times of the year in the Bulkley Valley, caused an increased risk of adverse health effects including respiratory illnesses and emergencies. Further, there was evidence or information that the appellants would be personally affected by the smoke emissions. In contrast, in the present case, the Appellants have not challenged Rio Tinto's submission that the permitted emissions will not exceed Provincial Pollution Control Objectives outside of Kitimat, and the Appellants have provided no information regarding whether, or how, the permitted emissions are predicted to affect human health in the Terrace area.

[80] Given the findings above, and the fact that Ms. Gagne works and primarily resides in Victoria, the Board finds that Ms. Gagne's concerns about the potential effects of the emissions on her asthma are too remote and speculative to provide a basis for finding, on a *prima facie* basis, that she is a "person aggrieved" by the Permit amendment.

[81] In addition, the Board finds that Ms. Gagne's concerns about the potential effects of the permitted emissions on plants and salmon from the Terrace area, which she consumes, are too remote. She provided no information about how frequently she consumes plants or fish from the Terrace area. Given that she primarily lives in Victoria, the Board cannot reasonably assume that she consumes such food frequently. Moreover, for the reasons set out below in regard to Mr. Claus' standing, the Board finds that Ms. Gagne has not established, even on a *prima facie* basis, that soil and water bodies in the Terrace area are predicted to receive sufficient sulphate deposition for acidification to adversely affect plants, fish or fish habitat in the area.

[82] The Board also finds that the information regarding Ms. Gagne's "genuine interest" and "continuing engagament" in matters such as agriculture and the environment in the Terrace area, and her participation in public opposition to the application for the Permit amendment, are insufficient to meet the test for standing as a "person aggrieved." As discussed above, the Court in *Gagne* rejected the Appellants' submission that a "genuine interest" is sufficient to establish standing as a "person aggrieved."

[83] For all of these reasons, the Board finds that Ms. Gagne has failed to establish, on a *prima facie* basis, that she is a "person aggrieved" by the Permit amendment.

Mr. Claus

[84] Mr. Claus lives in the Terrace area. He operates a farm on his property, he sells his produce locally, and he uses his produce in the bakery that he owns in Terrace. Mr. Claus states that he has asthma, and he has a grandchild with asthma who visits Terrace twice per year. However, he has provided no information on how his, or his grandchild's, asthma may be affected by the Permit amendment. For example, Mr. Claus did not indicate how often he visits Kitimat. Given that Terrace is approximately 50 kilometres north of Kitimat, and that Rio Tinto has provided unchallenged information that, under the Permit amendment, the level of sulphur dioxide emissions is predicted not to exceed BC Provincial Pollution Control Objectives outside of Kitimat, the Board finds that Mr. Claus' concerns about the potential effects of the emissions on his and his grandchild's asthma are too speculative and remote to establish that he is a "person aggrieved" by the Permit amendment. The Board finds that the reasons noted above, in regard to the decision in *Houston* and Ms. Gagne's standing, apply equally to Mr. Claus' standing.

[85] In addition, the Board finds that Mr. Claus' concerns about the potential effects of the increase in sulphur dioxide emissions on his customers' decisions about purchasing his fruits and vegetables are speculative. There is no dispute that the Rio Tinto smelter already emits sulphur dioxide. The amendment authorizes an increase in sulphur dioxide emissions, and not a new source of emissions that did not exist before. Consequently, if the existing sulphur dioxide emissions already reach the areas where Mr. Claus grows fruits and vegetables, his customers may already take into consideration the presence of sulphur in the air, soil, and/or water where the crops are grown.

[86] The Board also finds that Mr. Claus' concern about the potential effect of sulphur deposition on drinking water in the Terrace area is speculative. Although Mr. Claus indicates that he uses water from the Terrace area in his home, bakery and farm, none of the information before the Board indicates that the permitted sulphur dioxide emissions are predicted to adversely affect the use of water in the Terrace area for drinking or other domestic purposes. In fact, the information and evidence before the Board does not address the predicted or potential impacts on domestic water use in the Kitimat and Terrace areas.

[87] In regard to Mr. Claus' concerns about the potential effects of the permitted emissions on the growth of his crops and on salmon that he consumes throughout the year, the Appellants submit that Rio Tinto's Technical Report predicts that the Terrace region will receive sulphate deposition of 10 to 19 kg per hectare per year, and that sulphate deposition in soil and water can cause acidification that can adversely impact vegetation growth, fish habitat and fish, depending on the level of toxicity. However, the Appellants did not identify the threshold(s) at which such adverse effects are predicted to occur. Moreover, Rio Tinto disputes the Appellants' submission that the permitted emissions will adversely affect plants, fish or fish habitat. Rio Tinto submits that its Technical Report does not support a finding that the permitted sulphur dioxide emissions will harm local agriculture, water, or fish. Consequently, the Board finds that Mr. Claus has not established, even on a *prima facie* basis, that the air, soil or water in the Terrace area is predicted to receive sufficient additional sulphur for acidification to reach the level(s) at which plants, fish or fish habitat may be adversely affected.

[88] The Board also finds that the information regarding Mr. Claus' "genuine interest" and "continuing engagament" in matters related to the appeals is insufficient to meet the test for standing as a "person aggrieved." As discussed above, the Court in *Gagne* rejected the Appellants' submission that a "genuine interest" is sufficient to establish standing as a "person aggrieved."

[89] For all of these reasons, the Board finds that Mr. Claus has failed to establish, on a *prima facie* basis, that he is a "person aggrieved" by the Permit amendment.

The Trust

[90] The Board finds that, pursuant to section 8.9 of the Trust Agreement, the Trust's trustees may sue and be sued in their capacity as trustees, and as such, a trustee may bring an appeal on behalf of the Trust.

[91] However, the Board finds that the evidence and information provided by the Trust is primarily aimed at establishing that the Trust has a "genuine interest" and "continuing engagament" in matters related to the appeals. The Board has already noted, above, that the Court in *Gagne* rejected the Appellants' submission that a "genuine interest" is sufficient to establish standing as a "person aggrieved."

[92] The Board finds that, since the Trust was created in 2007, it has engaged various stakeholders in Skeena watershed communities on issues that relate to its purposes are set out under section 4.1 of the Trust Agreement; in particular, conducting education and research on salmonid populations and their habitat in the Skeena watershed. The Trust's stated reasons for appealing the Permit amendment relate to its interests in those activities. However, the Board finds that there is no evidence that the Permit amendment will adversely affect the Trust's interests or its ability to engage in its activities related to salmonids and their habitat.

[93] Moreover, as discussed above in regard to Mr. Claus, although the Appellants submit that sulphate deposition in the Kitimat and Terrace region areas are predicted to result in acidification that could potentially harm plants, fish habitat and fish, the Appellants did not identify the threshold(s) at which such adverse impacts are predicted to occur. Further, Rio Tinto disputes the Appellants' submission that the permitted emissions will adversely affect plants, fish or fish habitat. Rio Tinto submits that its Technical Report does not support a finding that the permitted sulphur dioxide emissions may harm local agriculture, water, or fish. Consequently, the Board finds that the Trust has not established, even on a *prima facie* basis, that air, soil and water in the Skeena watershed are predicted to receive sufficient additional sulphur for acidification to reach the level(s) at which plants, fish or fish habitat may be adversely affected.

[94] For all of these reasons, the Board finds that the Trust has failed to establish, on a *prima facie* basis, that it is a "person aggrieved" by the Permit amendment.

The Society

[95] The Board finds that the Society is an incorporated society under the *Society Act*, and as such, has the powers and capacity of a natural person of full capacity, including the power to file an appeal.

[96] The Board finds that the Society goals and activities involve conservation, monitoring, research, education and advocacy relating to Lakelse Lake and its watershed. The Board finds that the Society has provided no information that

would establish, on a *prima facie* basis, that the permitted emissions will adversely affect the Society's ability to pursue its goals and engage in those activities.

[97] The Board also finds that the evidence and information provided by the Society is primarily aimed at establishing that it has a "genuine interest" and "continuing engagament" in matters related to the appeals. The Board has already noted, above, that the Court in *Gagne* rejected the Appellants' submission that a "genuine interest" is sufficient to establish standing as a "person aggrieved."

[98] The Society's stated reasons for appealing the Permit amendment relate to the effects of the permitted emissions on: the Lakelse Lake water used by Society members for drinking and other domestic uses; on air quality as it relates to the health of Society members who are allergic to sulphur compounds; on local plants that are used as food; and on Society members' sport fishing and wildlife viewing activities, as well as the effect on the environment as a whole. The Board has addressed each of those concerns, below.

[99] The Board finds that the Society's concern about the potential effects of drinking water acidification from sulphur deposition in the Terrace area is speculative. Although the Society and its members have an interest in the use of water from Lakelse Lake for domestic purposes, there is no information before the Board that the permitted sulphur dioxide emissions are predicted to adversely affect the use of water in the Lakelse Lake area for domestic purposes. The information and evidence before the Board does not address the predicted or potential impacts on domestic water use in the Kitimat or the Terrace areas.

[100] In regard to potential impacts on air quality as it relates to the health of Society members who are allergic to sulphur compounds, the Board has already found that Rio Tinto has provided unchallenged information that, under the Permit amendment, the level of sulphur dioxide emissions is predicted not to exceed BC Provincial Pollution Control Objectives outside of Kitimat. Lakelse Lake is located approximately 40 km north of Kitimat, and the Society has provided no information regarding the predicted effects of the increased sulphur dioxide emissions on the health of Society members who are allergic to sulphur compounds. The smelter already emits sulphur dioxide, but it is unclear whether any Society members currently suffer allergic reactions to those emissions, or the degree to which the increased emissions could be expected to cause increased allergic reactions. The Board finds that the Society's concern about the potential effects of the permitted emissions on members who are allergic to sulphur dioxide is too speculative and remote to establish that the Society, or any of its members, are a "person aggrieved" by the Permit amendment.

[101] Regarding the Society's concern about potential impacts on food plants and fishing in the Lakelse watershed, Rio Tinto's Technical Report predicts that the Lakelse Lake area will receive sulphate deposition of over 10 kg per hectare per year, and that sulphate deposition in soil and water can cause acidification that can adversely impact vegetation growth, fish, and fish habitat. However, the Society did not identify the threshold(s) at which adverse effects on food plants, fish, or fish habitat are predicted to occur. Moreover, Rio Tinto disputes the Appellants' submission that the permitted emissions will adversely affect plants, fish or fish habitat. Consequently, the Board finds that the Society has not established, even on a *prima facie* basis, that soil or water bodies in the Lakelse Lake area are

predicted to receive sufficient sulphate deposition for acidification to reach the level(s) at which plants, fish or fish habitat may be adversely affected.

[102] Finally, the Board finds that the Society's concerns about the effect of the permitted emissions on the environment as a whole are insufficient to establish that the Society is a "person aggrieved." As discussed above, an appellant must provide evidence or information that demonstrates that the appealed decision prejudicially affects the appellant's interests, as distinct from those of the general public. General concerns about the environment or public health are insufficient to establish standing.

[103] For all of these reasons, the Board finds that the Society has failed to establish, on a *prima facie* basis, that it is a "person aggrieved" by the Permit amendment.

DECISION

[104] In accordance with the directions of the Court in *Gagne*, the Board has reconsidered all of the evidence and submissions before it, as of August 16, 2013, whether or not specifically reiterated herein.

[105] For all of the reasons set out above, the Board finds that none of the four Appellants have established that they are a "person aggrieved" by the Permit amendment within the meaning of section 100(1) of the *Act*. Accordingly, the appeals of Ms. Gagne, Mr. Claus, the Trust, and the Society are dismissed, and Rio Tinto's application to dismiss those appeals is granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

April 17, 2014