



# Environmental Appeal Board

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## **DECISION NO. 2014-WIL-028(a)**

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

<b>BETWEEN:</b>	Brent D. Smith	<b>APPELLANT</b>
<b>AND:</b>	Deputy Regional Manager	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Ken Long, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on December 15, 2014	
<b>APPEARING:</b>	For the Appellant: Brent D. Smith For the Respondent: Michael Burwash	

## **APPEAL**

[1] The Appellant, Brent Smith, appeals part of the September 16, 2014, decision of Michael Burwash, Deputy Regional Manager, Recreational Fisheries and Wildlife Program, Thompson/Okanagan Region (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). Specifically, Mr. Smith appeals the Regional Manager's decision to deny him a permit for item 5 on his application, i.e., to shoot a firearm or bow during prohibited hours with the use or aid of light. "Prohibited hours" for hunting is, essentially, at night: one hour after sunset on any day until one hour before sunrise of the day following (see e.g., *Hunting Regulation*, section 14).

[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*. Section 101.1(5) of the *Wildlife 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] Mr. Smith asks the Board to reverse this part of the Regional Manager's decision to deny him a permit for item 5, and to issue him a permit allowing him to shoot a firearm or bow during prohibited hours with the use or aid of light.

[4] Mr. Smith further requests a refund of 50% of the application fee.

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

## BACKGROUND

[6] Mr. Smith provides, or wishes to provide, problem and nuisance wildlife control services to farmers, ranchers and other landowners in the Okanagan area of British Columbia. These services include shooting, trapping, snaring and other means to either capture or kill nuisance wildlife.

[7] In the summer of 2014, Mr. Smith applied to the Ministry for a permit which would allow him to carry out a number of activities related to his business. There were seven requests in his application;

1. to shoot, trap, snare, haze, hunt with dogs, live capture, or use aversive conditioning on wolf, coyote and red fox that have been verified as either killing, injuring, or harassing livestock in the Okanagan Region (cats and dogs and other pets to be included as livestock);
2. to possess, transport and release from captivity nuisance animals;
3. to traffic in starling and beaver carcasses;
4. to shoot from a motor vehicle, possess a loaded firearm in a motor vehicle as required to hunt, trap or kill nuisance wildlife species during the open or closed season;
5. to shoot a firearm or bow during prohibited hours (at night) with the use of illuminating devices;
6. to remove beaver dams; and
7. to begin commercial trapping of wolf and coyote beginning September 10 until June 30.

[Emphasis added]

[8] On September 16, 2014, the Regional Manager responded to the application by issuing a permit for items 1, 2, 3 and 6. He specifically denied items 4 and 5. Of relevance to this appeal, the Regional Manager denied a permit for item 5 for the following reasons:

Given the level of settlement in the Southern Interior and the fact that many conflicts [with nuisance wildlife] are in settled rural areas, there are significant public safety concerns, RCMP

enforcement concerns and associated ministry liability in authorizing individuals to discharge firearms during prohibited hours with the use of lights. The ministry can be held liable for the safety of applicants and their designates under WorkSafe BC regulations. Furthermore, the Conservation Officer Service is not in support of authorizing exemptions for discharging firearms or bows during prohibited hours with the use of lights. This decision is consistent with other predator control and nuisance wildlife permits authorized in the region.

[9] Item 7 involved an activity that is not covered by the legislation (*Wildlife Act, Permit Regulation* (B.C. Reg. 235/2000)) and is, therefore, not within the Regional Manager's scope of decision-making authority.

[10] On October 9, 2014, Mr. Smith appealed the Regional Manager's denial of item 5: "shoot with a firearm ... during prohibited hours with the use of illuminating devices".

[11] Mr. Smith did not appeal any of the decisions for the other items.

## ISSUES

1. Whether the Regional Manager's decision is reasonable in the circumstances.

## RELEVANT LEGISLATION

[12] The following sections of the *Wildlife Act* and the *Permit Regulation* are relevant to this appeal.

### ***Wildlife Act***

#### **Permits**

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

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

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite

anything contained in this Act or the regulations, that person has that authority during the term of the permit.

- (2) The form and conditions of the permit may be specified by the director.
- (3) If a regional manager issues a permit respecting the use of firearms, the regional manager may exempt a person from the requirements of section 9 of the Firearm Act and may specify the conveyance or type of conveyance for which the permit is limited.
- (4) The regional manager or the person authorized by the regional manager may amend the conditions of a permit as determined by him or her and issued under this section, but the amendment is not effective until the permittee has notice of it.

### **Hunting, trapping and firearm prohibitions**

**26(1)** A person commits an offence if the person hunts, takes, traps, wounds or kills wildlife

...

(d) with a firearm or a bow during the prohibited hours,

(e) by the use or with the aid of a light or illuminating device,

...

[13] According to section 1 of the *Wildlife Act*, "prohibited hours" means the hours during which the hunting of specified species of wildlife in a locality is prohibited. The *Hunting Regulation* and the *Commercial Activities Regulation*, define the prohibited hours for hunting and for trapping wildlife using a firearm are "from one hour after sunset on any day until one hour before sunrise of the day following".

### ***Permit Regulation, B.C. Reg. 253/2000***

#### **Authorization by permit**

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

...

(c) authorizing a person to hunt, trap or kill wildlife during the open or closed season for the following purposes:

...

(iii) if the regional manager considers it necessary for the proper management of the wildlife resource;

- (iv) on behalf of the government, to destroy wildlife that is dangerous to public safety;

...

## DISCUSSION AND ANALYSIS

### **Whether the Regional Manager's decision is reasonable in the circumstances.**

#### *The Appellant's position*

[14] In his appeal, Mr. Smith argues that:

1. He is highly experienced, having been a CO for approximately 20 years.
2. In his time with the Conservation Officer Service ("COS"), he killed hundreds of animals at night in both rural and urban areas, with and without the use of a light, and without safety issues arising.
3. He was also a Predator Attack Team Leader, Livestock Kill verification trainer and has extensive experience with firearms.
4. He has developed detailed procedures for night shooting that he believes will allow night shooting to be carried out safely.
5. New thermal imaging (night vision) technology allows for positive target identification and ascertaining safety issues beyond the target.
6. The use of traps/snares intended to target wild canines has a real possibility of injuring or killing non-target species, including domestic pets, and there are three known cases of people being caught in wolf traps.
7. Civil liabilities to the small business owner (the business providing the wildlife control service) increase with setting traps.
8. Budgetary constraints are why the COS does limited night shooting.
9. The denial is unreasonable as similar permits have been approved elsewhere in the province. In particular, this type of permit has been issued to a retired Conservation Officer ("CO") in the Peace River Region of the province.
10. Site, and not region, should be the determining criteria. There can be significant safety concerns in a poor site location in Dawson Creek and a perfectly safe site in Armstrong. Region has nothing to do with safety.
11. This permit is intended to give an opportunity for a small business to provide a more effective (than the COS) method of solving problems for the agriculture industry.

12. While the COS has the mandate to deal with livestock depredation, the COS prioritizes human safety concerns over livestock depredation and does not have the time to attend to all but the most serious incidents, usually involving wolves and cattle. As a result, the small livestock producer is left to deal with livestock depredation, especially with coyotes, without COS assistance.
13. Recreational night shooting for nuisance animals is allowed in 30 of the 50 US states, as well as in the United Kingdom, Australia and New Zealand.
14. The decision-maker used the level of settlement in a geographic area as a reason to deny the application. This argument is flawed because there would be more safety issues with night "foxing" in England than in the Okanagan Region of the province.
15. In personal conversation with Sgt. J. Lockwood, COS, Sgt. Lockwood stated that he would be in favour of allowing qualified persons to hunt at night with a light to alleviate the large numbers of coyote-livestock depredations in the area.

*The Respondent's position*

[15] In his submissions, the Regional Manager clarifies that, although he included in his reasons the following statement "The ministry can be held liable for the safety of applicants and their designates under WorkSafe BC regulations", this statement is not relevant to this case as Mr. Smith would not be acting as an agent of the province.

[16] In response to Mr. Smith's arguments, the Regional Manager submits that:

1. COs are not certified to discharge long gun firearms at night. The discharge of a firearm in low light, or no light, is only used by the COS for the protection of life or for humanely dispatching injured wildlife.
2. There has been no COS review of Mr. Smith's procedures and, therefore, uncertainty as to their "firearm safety equivalency".
3. There are no approved night shooting lesson plans for long guns in the COS.
4. These activities are not practiced or supported for free ranging animals at night, therefore, Mr. Smith's experience is irrelevant.
5. The permit issued in the Peace Region was specific to just wild canids (wolf, coyote and fox) specifically for the protection of livestock cattle. The permit given to Mr. Smith includes both wolf and coyote, as well as 19 other species. Mr. Smith's request would afford significantly greater night shooting opportunities.
6. The Okanagan Region presently has a minimum of six permit holders, including Mr. Smith, who are allowed to hunt, trap or kill

nuisance wildlife during open and closed hunting seasons. Not one of the other permittees has applied to use a firearm during prohibited hours or to hunt with the aid of light or an illuminating device. Furthermore, not one of the current permit holders has mentioned that this has prohibited them from effectively conducting their business.

7. The context of the conversation with Sgt. Lockwood referenced by Mr. Smith (with Sgt. Lockwood supporting hunting at night), does not reflect the circumstances Mr. Smith mentions in his appeal letter, or his procedures for night shooting.

[17] The Regional Manager placed considerable weight on evidence and documentation from the COS regarding the increased public safety risk and the lack of social acceptance associated with discharging firearms during prohibited hours. The Regional Manager states that the issue of public safety is paramount. While Mr. Smith believes the "permit is regionally discriminatory as the permit section is currently approved for use in other areas of the province", the Regional Manager notes that the Okanagan Region has a settlement area forty times greater than the Peace River. Therefore, he submits that the risk to the public and/or public property in the Okanagan Region is greater and warrants the increased restrictions around the discharge of weapons. Further, he submits that others with similar permits have been successful at removing nuisance wildlife without the need for night shooting and that various trapping methods currently provide Mr. Smith with a way to conduct his business during all times of the day.

[18] The Regional Manager states that he actively administers the *Wildlife Act* on a daily basis, making decisions on when and how firearms are to be used. In consideration of safety and social acceptability, the Regional Manager does not believe that the practice of night shooting with the use of an illuminating device is warranted in this case.

[19] In support of his case, the Regional Manager provided evidence in the form of letters from two members of the COS.

#### *The Evidence of Inspector Mark West*

[20] Mark West is a firearms instructor with the COS, and has been the COS lead instructor for the past ten years. In a letter dated November 25, 2014, Inspector West states that one of the more important safety rules is to be sure of your target, around your target, and beyond. Identifying the target and beyond in low light or no light conditions is difficult and, therefore, the discharge of firearms in these conditions can be dangerous. He states that it is not common practice for COs to use firearms at night for controlling wildlife.

#### *The Evidence of Inspector Barbara Leslie*

[21] Barbara Leslie is an Inspector with the COS in charge of the Okanagan Region. In a letter dated November 28, 2014, Inspector Leslie agrees that it

is important to recognize that Mr. Smith has experience as a CO, as COs and police officers are required to complete firearms practice at intervals throughout the year, and are formally tested once a year. She notes that officers are not only tested on their ability to safely and accurately discharge firearms, but are also tested on their judgment as to when to deploy firearms.

[22] Inspector Leslie also writes that there is a communications protocol in place for use by COs and police officers when firearms are discharged at unusual times and places. This protocol system is in place so that all appropriate public agencies are aware of the discharge. This system is not available to those outside of the agencies and, therefore, would not be available to Mr. Smith.

[23] In response to Mr. Smith's allegation that "budgetary constraints" are why the COS does not allow night shooting, Inspector Leslie states that this assertion is incorrect and inaccurate; rather, the restrictions on night shooting are due to risks to public safety.

[24] Inspector Leslie also explains that government is continually fielding requests from non-hunting groups who desire more restrictive hunting and firearms closure regulations. Many of these requests are due to public safety risks associated with the discharge of firearms.

[25] In response to Mr. Smith's application for item 5, Inspector Leslie states, generally, as follows:

1. Mr. Smith requested a blanket permit to hunt during prohibited hours and with a light for all of Region 8. This could include both private and public lands. Mr. Smith did not indicate that he had the endorsement of municipalities, regional districts or police agencies to support his request.
2. The sound of a gunshot at night can travel a great distance and a person shooting at night is likely to generate emergency calls and/or complaints. Emergency responses to calls regarding shots fired at night require additional law enforcement resources to attend.
3. Night time conditions can cause further difficulty for authorized persons to track and kill wounded wildlife.
4. Although the use of a spotlight can make an animal an easy target, the person may not be able to correctly identify what may be to the left, right, in front of, and around, the target.
5. Thermal imaging and infrared devices also have their imitations.

[26] Inspector Leslie states that the discharge of firearms or hunting at night is not socially acceptable in British Columbia. Even when law enforcement officials discharge firearms at night, it is subject to legal and public scrutiny. In her view, hunting and shooting wildlife at night should



only be considered when there is imminent danger to a human(s) from that wildlife. One must have utmost consideration for human safety.

*Appellant's Rebuttal*

[27] Although the Regional Manager states that the discharge of firearms (at night) is only used by the COS for protection of life or dispatching injured wildlife, Mr. Smith states that the "actual practice" of officers currently in service is the long range use of firearms at night on problem wildlife. He states that cougars and grizzly bears are sometimes shot at night, and that wolves and coyotes have also been killed at night. He agrees that the vast majority are not killed at night, but states that it does happen, and it happens with the knowledge of supervisors.

[28] Mr. Smith also submits that, just because COS doesn't endorse the policies from other jurisdictions, it doesn't make those policies any less valid.

[29] With regard to population densities, a 160-acre property remains a 160-acre property, regardless of its geographic area. Each property presents a unique set of circumstances that will allow, or preclude, night shooting. Should a safety issue exist, no night shooting will occur if he receives a permit.

[30] Mr. Smith notes that the Regional Manager gave the population density for the North Okanagan as 10.8 persons per square kilometer (km<sup>2</sup>). However, excluding Canada, the countries listed below allow some form of recreational and permitted night shooting, and their population densities (according to Wikipedia) are greater than Canada's:

United Kingdom	262 per km <sup>2</sup>
Ireland	65 per km <sup>2</sup>
Czech Republic	133 per km <sup>2</sup>
United States	32.5 per km <sup>2</sup>
New Zealand	42.5 per km <sup>2</sup>
Norway	15.6 per km <sup>2</sup>
Canada	9.29 per km <sup>2</sup>

[31] As for the assertion that the lack of night shooting has not impeded other permit holders businesses, Mr. Smith questions where this information comes from: have the other permittees been asked if this limitation has impeded their business? Mr. Smith states that no data was provided by the Regional Manager regarding other permit holders.

[32] Regarding the increased public safety risk, Mr. Smith states:

I am not aware of any dangerous incidents or injuries caused by night shooting, limited in scope as it is. Night shooting can be accomplished as safely as day shooting or other jurisdictions

would not allow it. If given a chance to utilize common sense procedures, it can be done as safe [sic] as day shooting.

[33] Regarding social acceptance, Mr. Smith maintains that people impacted by wild canines do not care about the method employed to deal with the animals, they only want the problem solved, and quickly. He also believes that social acceptance of night shooting is occurring. In the US, recreational night hunting is the single largest growing form of hunting.

[34] Mr. Smith also submits that:

- Shooting at night is only one tool to assist those impacted by predation and will not replace accepted practices such as snaring and trapping;
- Night shooting will augment snaring and trapping; and
- Technological advances have made night shooting a safe and effective tool in wildlife management, and the technology will only get better.

[35] Contrary to Inspector Leslie's evidence, Mr. Smith submits that his application for item 5 is not about a "blanket permit to hunt wildlife on Crown land and private property"; rather, it is about the ability to better deliver a service that is much needed in the Okanagan.

[36] Mr. Smith maintains that night shooting can safely be applied to solving problem wildlife issues, but that it is only another tool to be used. It is another tool to be used for combatting wildlife depredation issues for small ranchers/farmers. Where other methods (such as trapping) will work with no incidental catch, those methods will be used instead of night shooting. However, where the possibility exists that a person's pet or livestock will be injured or killed by traditional methods, he believes that night shooting should be allowed to deal with specific instances.

[37] For all of these reasons, Mr. Smith submits that the Board should grant him a permit for item 5. In the alternative, Mr. Smith states that he would accept limited night shooting of wild canines verified as killing/harassing livestock (including pets) and Schedule "C" wildlife (pigeons, etc.) limited to private land only.

#### *The Panel's Findings*

[38] There is no dispute that the Regional Manager correctly interpreted and applied the legislation. The only issue is whether the Regional Manager's decision is reasonable in the circumstances.

[39] The Regional Manager relied heavily on the information and recommendations of the COS, and upon a geospatial statistical analysis contrasting the population densities of the Okanagan Region and the Peace Region, where a permit similar to the one applied for by Mr. Smith is in effect. The COS's stated concerns are focused on public safety, public acceptance (or lack thereof) of night shooting, and increased workload for

law enforcement who may be called out to deal with complaints and concerns upon hearing shots being fired at night.

[40] The Panel places no weight on the geospatial analysis, which attempts to foster the notion that people are equally distributed across the region when, in fact, people are distributed in clusters within the region, some at very high densities (such as in the cities of Kelowna and Vernon), and some at very low densities, typical of the forest and rangelands outside and above the main valley areas.

[41] Under section 26(1)(d) and (e) of the *Wildlife Act*, it is an offence to hunt “with a firearm or bow during prohibited hours” and to hunt “by the use or with the aid of a light or illuminating device”. Although section 19 of the *Wildlife Act* allows the Regional Manager (and this Board on appeal) to issue a permit allowing Mr. Smith to do what is otherwise prohibited under the *Act*, this discretion must be exercised carefully – especially when the activity being allowed is otherwise an offence.

[42] While Mr. Smith provided strong arguments supporting his position, his arguments were not supported with hard data or evidence. Similarly, while the inspectors with the COS made many assertions, such as that “Thermal imaging and infrared devices also have their imitations”, they provided little by way of supporting information or data. Nevertheless, the burden of proof is on the Appellant, Mr. Smith, and the Panel finds that he has not met that burden.

[43] The Panel finds that it is both logical and reasonable for the Regional Manager to consult with the COS, the organization with the greatest expertise in the use of firearms and problem wildlife, for its views on the application. Moreover, the finding that the information provided by the COS were not supported with data does not necessarily mean that it is wrong, nor does it mean that the Regional Manager erred in relying on it.

[44] Despite the lack of strong supporting data being provided by either party, the Panel finds that the safety concern identified by the COS, and the Regional Manager, is the most compelling in the circumstances, and must be overcome in order to issue a permit in this case. Even without substantive data in support, it is reasonable to believe that hunting at night is dangerous for the very reasons identified by Inspectors West and Leslie. Darkness will impede identification and/or tracking of the target, and makes it difficult to observe the surroundings. If, as Mr. Smith suggests, the new thermal imaging (night vision) technology allows for positive target identification and the ability to ascertain safety issues beyond the target, he should have provided the supporting information and/or studies to the Regional Manager, and to this Panel. That information is required in order to overcome the obvious safety issues.

[45] Mr. Smith is free to make permit applications to the Ministry in the future. Should Mr. Smith provide an application to the Ministry that is supported by local government, livestock associations and the like, and perhaps even offer the Ministry and the COS a demonstration of the

technology and techniques that could make night shooting a viable tool for problem wildlife control, he may find it much more likely that permit approval could be obtained.

[46] Accordingly, the Panel agrees with the Regional Manager's decision in the circumstances. However, the Panel also finds that Mr. Smith's arguments in favour of night shooting may have some merit, and, had he provided evidence in support of his safety argument with respect to night vision technology, the Panel's decision may have been different.

[47] Finally, the Panel notes that Mr. Smith requested the refund of 50% of his application fee. This matter is outside of the Board's jurisdiction.

### **DECISION**

[48] 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 here.

[49] For the reasons stated above, the Panel confirms the Regional Manager's decision not to issue a permit to Mr. Smith for item 5 on his application.

[50] The appeal is dismissed.

"Ken Long"

Ken Long  
Panel Chair

August 14, 2015