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**DECISION NOS. 2018-EMA-003(a), 004(a), and 012(a) to 016(a)**

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

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| **BETWEEN:** | Patricia Rush, Norman W. Rush, Brookswood Fernridge Community Association, Frank P. Mueggenburg, IronGait Ventures Inc., Randy Ryzak, and Catholic Independent Schools Vancouver Archdiocese | **APPELLANTS** |
| **AND:** | District Director, *Environmental Management Act* | **RESPONDENT** |
| **AND:** | Ebco Metal Finishing L.P. | **APPLICANT / THIRD PARTY** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **DATE:** | Conducted by way of written submissions concluding on August 1, 2018 | |
| **APPEARING:** | For the Appellants:<br>Patricia Rush: Terry McNeice<br>Norman W. Rush: Terry McNeice<br>Brookswood Fernridge Community Association: Murray McFadden<br>Frank P. Mueggenburg: Frank Mueggenburg<br>IronGait Ventures Inc.: Dianne Orringe<br>Randy Ryzak: Frank Mueggenburg<br>Catholic Independent Schools Vancouver Diocese: Julia Lauwers, Counsel<br>For the Respondent: Susan Rutherford, Counsel<br>For the Third Party: Nicholas Hughes, Counsel | |

## PRELIMINARY ISSUES OF JURISDICTION

[1] On March 28, 2018, Ray Robb, District Director (the "District Director") for the Greater Vancouver Regional District ("Metro Vancouver"), issued permit GVA1093 (the "Permit") to Ebco Metal Finishing L.P. ("Ebco"). The Permit, which was issued under both section 14 of the *Environmental Management Act*, S.B.C.

2003, c. 53 (the "*Act*") and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008 (the "Bylaw"), authorizes Ebco to discharge contaminants to the air from a hot dip zinc galvanizing facility located at 18699 25 Avenue, Surrey, BC.

[2] The Board received thirteen appeals against the Permit.

[3] Ebco applies to the Board for dismissal of seven of those appeals; specifically, the appeals filed by Patricia Rush (2018-EMA-003), Norman W. Rush (2018-EMA-004), Brookswood Fernridge Community Association (2018-EMA-012), Frank P. Mueggenburg (2018-EMA-013), Irongait Ventures Inc. (2018-EMA-014), Randy Ryzak (2018-EMA-015), and Catholic Independent Schools Vancouver Diocese (2018-EMA-016).

[4] Ebco submits that each of those appeals is outside of the Board's jurisdiction, because the particular appeal was filed after the expiry of the 30-day time limit specified in section 101 of the *Act* for commencing an appeal, and/or was not filed by a "person aggrieved" by the Permit within the meaning of section 100(1) of the *Act*.

[5] This decision addresses the preliminary issues of jurisdiction raised by Ebco's application. The application was heard by way of written submissions.

## BACKGROUND

[6] Ebco operated a galvanizing plant in Richmond for about 30 years. In April of 2016, Ebco began the process of transferring its galvanizing operations to a new facility in Surrey.

[7] On March 1, 2016, the District Director issued a short-term approval, valid until November 30, 2016, authorizing Ebco to discharge contaminants to the air from the Surrey facility. The approval required Ebco to submit several plans and reports to the District Director by specific dates, including: a report on the methodologies used to estimate emissions and conduct dispersion modelling for emissions from the facility, and discussing the impacts of the model results on human health and the environment (the "Dispersion Model"); a modelling plan (the "Modelling Plan"); and a report assessing the potential for the maximum predicted air contaminant concentrations and wet and dry deposition levels to adversely affect human health, aquifers and groundwater, soil quality and agricultural productivity, plants, food crops, "organic" status, farm animal health, and fish habitat and health (the "Impact Assessment").

[8] The Board received 14 appeals against the approval.

[9] On May 26, 2016, the Board granted a stay of the approval pending Ebco's completion, to the District Director's satisfaction, of the Modelling Plan, the Dispersion Model, and the Impact Assessment (Decision Nos. 2016-EMA-107(a) to 119(a)). The stay was subject to the Board's direction that Ebco could discharge air contaminants to the air in accordance with the approval for the purposes of completing those reports.

[10] On August 31, 2016, the District Director issued an amendment to the approval, which extended the deadline for Ebco to submit the Dispersion Model and the Impact Assessment. The Board received nine appeals against the amendment.

[11] On January 9, 2017, Ebco advised that it had abandoned an application for an extension of the approval, and applied for a permit to discharge air emissions from its Surrey facility.

[12] On January 12, 2017, the Board dismissed the appeals against the approval and the amendment of the approval, as moot.

[13] Ebco retained Hemmera Envirochem Inc. ("Hemmera") to complete an air quality assessment of the potential effects of emissions from the Surrey facility on ambient air quality, human health risk, vegetation, soil, surface water and ground water. The assessment relied on an emission dispersion model called "CALPUFF" which used predicted air emissions from the facility and meteorological data from a model called "CALMET", and considered the results over a 20 km by 20 km study area. A meteorological domain of 21 km by 21 km was used. Both areas were centered on the Surrey facility.

[14] On September 22, 2017, Hemmera provided Ebco with a report titled "Air Quality, Health and Environmental Assessment – Ebco Metal Finishing L.P. surrey Hot-Dip Galvanizing Facility" (the Hemerra Report").

[15] Ebco provided a copy of the Hemmera Report to the Board, in support of its application to dismiss the seven appeals.

*The Permit*

[16] On March 28, 2018, the District Director issued the Permit. The Permit is valid until February 28, 2033, almost 15 years, and applies to "the existing or planned works" at Ebco's facility. The Permit authorizes the discharge of air contaminants from specific emission sources at the facility, which are identified as emission sources 01a, 01b, and 02.

[17] The Permit describes both emission sources 01a and 01b as "Galvanizing dip pan enclosure discharging through Baghouse Exhaust(s)". The Permit states that those emission sources have a stack height of 21.9 metres above ground level. For emission sources 1a and 1b, the Permit sets the following limits:

- maximum emission flow rate: 142 $m^3$/min
- maximum annual operating hours: 8760 h/yr
- maximum emission quality:
    1. 6.5 mg/$m^3$ Ammonia
    2. 2 mg/$m^3$ Ammonium Chloride
    3. 1 mg/$m^3$ Chlorine
    4. 0.01 mg/$m^3$ Nickel
    5. 5 mg/$m^3$ Zinc
    6. 10 mg/$m^3$ Particulate Matter
    7. 5% Opacity

[18] Regarding emission sources 01a and 01b, the Permit states that "Upgraded works to achieve the restrictions specific above are to be completed by not [sic] later than" July 27, 2018, and December 31, 2018, respectively.

[19] The Permit describes emission source 02 as "Degrease tank, pickling tanks, flux tank, and general room air discharging through a Vent(s)". The Permit states that this emission source consists of eight vents, of which a maximum of six are authorized to be operating at any time, with a stack height of 12.4 metres above ground level. For emission source 02, the Permit sets the following limits:

- maximum emission flow rate: 1825 $m^3$/min
- maximum annual operating hours: 8760 h/yr
- maximum emission quality:
    1. 0.055 mg/$m^3$ Sulphuric Acid

[20] The Permit also contains numerous monitoring and reporting requirements. For example, Ebco is required to have a qualified person prepare stack testing reports that include sampling results for certain substances from emission sources 01a and 01b, commencing on October 31, 2018, and October 31, 2019, respectively, and every two years thereafter. Related to that requirement, Ebco is required to have a qualified person prepare, for the Director's review and approval, a stack test plan for emission sources 01a and 01b by August 31, 2018. In addition, Ebco is required to have a qualified person prepare, for the District Director's review and approval, a plan for sampling soil, plant tissues, and water to assess the impacts of the emissions from sources 01a and 01b, by July 20, 2018. Ebco must report the findings of the sampling program by April 30, 2021, and every two years thereafter. The Permit also requires Ebco to prepare several other types of reports.

*Appeals of the Permit*

[21] The Board received 13 appeals against the Permit. Appeals were filed by Patricia Rush, Norman W. Rush, Nickomekl Enhancement Society ("NES"), Little Campbell Watershed Society ("LCWS"), Semiahmoo Fish and Game Club ("SFGC"), Gabriel Farms Ltd. ("GF"), Carl and Inga Thielemann, Sonja Kroecher, Brookswood Fernridge Community Association ("BFCA"), Frank P. Mueggenburg, Irongait Ventures Inc. ("Irongait"), Randy Ryzak, and Catholic Independent Schools Vancouver Archdiocese ("CISVA").

[22] In general, the Appellants raise concerns about the potential adverse impact of the facility's air emissions on human health, animals, fish, plants, agricultural operations, and businesses surrounding the facility. Some of the Appellants also raise concerns about the emissions due to the facility's proximity to an aquifer that supplies drinking water, a salmon-bearing creek, homes, a school, and land where a new school and housing is planned to be built. Further, Mr. Mueggenburg and Irongait submit that the District Director was biased in favour of Ebco and/or "big business" in issuing the Permit.

*Ebco's application for summary dismissal of seven appeals*

[23] On June 21, 2018, Ebco applied to the Board for dismissal of seven appeals; specifically, the appeals filed by Patricia Rush (2018-EMA-003), Norman W. Rush (2018-EMA-004), Brookswood Fernridge Community Association (2018-EMA-012), Frank P. Mueggenburg (2018-EMA-013), Irongait Ventures Inc. (2018-EMA-014), Randy Ryzak (2018-EMA-015), and Catholic Independent Schools Vancouver Diocese (2018-EMA-016) (collectively, the "Affected Appellants").

[24] Ebco submits that the seven appeals are outside of the Board's jurisdiction.

[25] Specifically, Ebco submits that the appeals filed by the BFCA, Mr. Mueggenburg, Irongait, Mr. Ryzak, and the CISVA were filed after the expiry of the 30-day time limit specified in section 101 of the *Act* for commencing an appeal.

[26] In addition, Ebco submits that Mrs. Rush, Mr. Rush, and the BFCA have no standing to file appeals against the Permit, because they are not "persons aggrieved" by the Permit within the meaning of section 100(1) of the *Act*.

[27] The Board invited the Affected Appellants, the District Director, and Ebco to provide written submissions on the application.

[28] In general, the Affected Appellants submit that the appeals are within the Board's jurisdiction, were filed in time, and each Affected Appellant is a "person aggrieved" by the Permit.

[29] The District Director takes no position on Ebco's application, but provided some information regarding Metro Vancouver's records of notices of the Permit that were given in relation to the BFCA, Mr. Mueggenburg, Irongait, Mr. Ryzak, and the CISVA.

## ISSUES

[30] The following issues arise from this application:

1. Whether the BFCA, Mr. Mueggenburg, Irongait, Mr. Ryzak, and the CISVA filed their appeals within the 30-day time limit specified in section 101 of the *Act*.
2. Whether Mrs. Rush, Mr. Rush, and the BFCA have standing to appeal as "persons aggrieved" by the Permit within the meaning of section 100(1) of the *Act*.

## RELEVANT LEGISLATION

[31] The following sections of the *Act* are relevant to this decision:

**Appeals to Environmental Appeal Board**

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

...

**Time limit for commencing appeal**

**101** The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

...

**Service of notice**

**133** (1) Anything that under this Act must be served on a person, may be served by registered mail sent to the last known address of the person.

(2) Any notice under this Act may be given by registered mail sent to the last known address of the person.

(3) If a notice under this Act is sent by registered mail to the last known address of the person, the notice is deemed to be served on the person to whom it is addressed on the 14th day after deposit with Canada Post unless the person received actual service before that day.

(4) This section does not apply to notices or documents of the appeal board.

[32] Other relevant legislation is set out in the text of this decision, where it is referred to.

## DISCUSSION AND ANALYSIS

### 1. Whether the BFCA, Mr. Mueggenburg, Irongait, Mr. Ryzak, and the CISVA filed their appeals within the 30-day time limit specified in section 101 of the *Act*.

*The Parties' submissions*

[33] Ebco submits that the BFCA, Mr. Mueggenburg, Irongait, Mr. Ryzak, and the CISVA filed their appeals outside of the 30-day time limit specified in section 101 of the *Act*. Ebco maintains that Metro Vancouver gave notice of the decision to issue the Permit on March 28, 2018, and therefore, the deadline for filing any appeals of the Permit was April 27, 2018.

[34] In that regard, Ebco submits that section 25(2) of the *Interpretation Act* applies to the calculation of the 30-day appeal period. Section 25 of that Act states:

**25** (1) This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.

...

(3) If the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.

(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

[35] Ebco submits that the Board received the appeals of the BFCA, Mr. Mueggenburg, Irongait, and Mr. Ryzak on April 30, 2018, and received the appeal of the CISVA on May 15, 2018, all of which are after the April 27, 2018 deadline. Ebco submits that Board has no authority to extend the 30-day appeal period.

[36] As stated above, the District Director takes no position on Ebco's application, but he provided some information regarding Metro Vancouver's records of notices of the Permit that were given in relation to the BFCA, Mr. Mueggenburg, Irongait, Mr. Ryzak, and the CISVA.

[37] Specifically, the District Director submits that according to Metro Vancouver's records, there is no record of notice of the Permit being provided to the President of the BFCA, although the BFCA's President sent an email to Metro Vancouver expressing concerns about the proposed Permit during the review of Ebco's permit application. However, the District Director submits that notice of the Permit was sent to Mr. McFadden, the BFCA's spokesperson in the appeal process, on March 28, 2018, and the email was first opened at 17:29 (5:29 pm) on that day.

[38] Regarding Mr. Mueggenburg, the District Director submits that he was notified of the Permit on March 28, 2018, via the email address he had used to provide comments during the permit application review process. The email was first opened at 17:37 (5:37 pm) on March 28, 2018.

[39] Similarly, the District Director submits that Irongait was notified of the Permit on March 28, 2018, via the email address that Ms. Orringe had used to provide comments on behalf of Irongait during the permit application review process. The email was first opened at 17:37 (5:37 pm) on March 28, 2018. An email notice was also sent to Ms. Orringe's email address, but that email was not opened.

[40] In addition, the District Director submits that Mr. Ryzak was notified of the Permit on March 28, 2018, via the email address he had used to provide comments during the permit application review process. The email was first opened at 18:13 (6:13 pm) on March 28, 2018.

[41] The District Director submits that Metro Vancouver has no record of receiving any comments from the CISVA during the permit application review process, and the CISVA was not notified of the Permit via email. However, the decision to issue the Permit was posted on Metro Vancouver's website on March 28, 2018.

[42] The BFCA's Notice of Appeal states that the BFCA received notice of the Permit on April 3, 2018. The BFCA submits that the email that Mr. McFadden opened at 17:29 on March 28, 2018 was unrelated to the BFCA's appeal, and Mr. McFadden was not involved in communicating information to the BFCA about Ebco's permit application. The BFCA maintains that Metro Vancouver's evidence confirms that it did not send notice of the Permit to Mr. Crossen (the BFCA's president) or to the email address that he used to send concerns to Metro Vancouver during the permit application process. The BFCA notes that Ebco appears to be aware that Mr. McFadden was the BFCA's spokesperson on a similar but unrelated appeal, No.

2017-EMA-G06 (involving an air emissions permit issued to Weir Canada Inc.). The BFCA provided a copy of an email that Mr. Crossen received from Terry McNeice, which was sent on April 24, 2018, stating that he could send a Notice of Appeal "by e mail by Friday April 27th…".

[43] Mr. Mueggenburg acknowledges that, on the evening of March 28, 2018, he read the email notifying him of the Permit. However, he submits that the 30-day appeal period consists of 30 calendar days, each containing 24 hours, with each day ending at midnight. He submits, therefore, that the first day of the 30-day appeal period was March 29, 2018, and the last full and included day was Friday April 27, 2018. Consequently, he submits that his Notice of Appeal, which was sent to the Board by email at 4:59 pm on April 27, 2018, was filed within the 30-day appeal period. He submits that the Board's date of receipt on April 30, 2018, reflects the Board's office hours of 8:30 am to 4:30 pm, Monday to Friday, but it is the filing date, and not the date of receipt by the Board, that is important.

[44] Irongait submits that it has no record of receiving notice of the Permit from Metro Vancouver, but it learned about the Permit from other Appellants. Irongait also submits that the Board has not specified a precise time for filing Notices of Appeal, and a reasonable interpretation of section 101 of the *Act* would be the close of business hours on the 30th day of the appeal period. Irongait's Notice of Appeal was sent to the Board by email at 4:59 pm on April 27, 2018, and Irongait maintains that this was within business hours on the 30th day of the appeal period.

[45] Mr. Ryzak submits that he never received notice of the Permit from Metro Vancouver, but he heard about the issuance of the Permit via a voicemail message left on his cellphone on March 29, 2018, while he was out of the country. He submits that he sent his Notice of Appeal to the Board on April 28, 2018, and his representative confirmed with the Board office on April 30, 2018 that the Notice of Appeal had been received.

[46] The CISVA submits that its Director of Finance and Administration was verbally notified about the Permit during the week of April 18, 2018, but he did not receive a copy of the Permit until April 26, 2018. The CISVA submits that its counsel contacted the Board office on April 27, 2018, and was advised that the appeal deadline was 30 days from the date that the appealing party first became aware of the Permit. The CISVA submits that this information is consistent with the Board's form for filing appeals, which asks the appellant to provide the date that the appellant received the decision. The CISVA's appeal was filed on May 15, 2018, which it submits is well within 30 days of when it received notice of the Permit.

[47] Regarding the language in section 101 of the *Act*, the CSVA argues that "notice" is not defined in the *Act*, and should be interpreted based on its ordinary meaning; i.e., "notice" occurs when the party is made aware of the decision. It submits that "notice of the decision" should not be read as meaning the date on which the decision was "issued", as this would render the word "notice" superfluous or redundant.

[48] In reply, Ebco submits that section 133 of the *Act* provides that any notice required under the *Act* "may be" sent by registered mail, which indicates that registered mail is not the only permissible means for service. Ebco submits that the

District Director can rely on methods, such as electronic transmission, for providing notice, as long as those methods abide by the principles of procedural fairness, and the manner of giving notice is reasonable to inform those concerned: *Donald Steven (Steve) Graham v. Director of Waste Management* (2005-EMA-010(a), January 24, 2006) [*Graham*], at p. 10.

[49] Ebco submits that Metro Vancouver has provided evidence that Mr. Ryzak, Mr. Mueggenburg, and Irongait received notice of the Permit via email on March 28, 2018. This is consistent with the Notices of Appeal filed by Mr. Mueggenburg and Irongait, which state that they received the decision on March 28, 2018. Ebco submits that the email notice sent to those parties was reasonable and sufficient, and took effect on March 28, 2018.

[50] In addition, Ebco submits that the Board's Rule 10(10) provides that a document sent by email "is not deemed to be delivered to the Board until the transmission is received by the Board, regardless of the date or time that it is shown to have been sent", and Rule 10(9) provides that a document that is received by the Board after the business day is deemed to be delivered on the next business day.

[51] Regarding the CISVA, Ebco submits that the March 28, 2018 notice that Metro Vancouver posted on its website regarding issuance of the Permit was fair and reasonable in the circumstances, and the CISVA should be considered to have received actual or constructive notice of the Permit on that date. In particular, Ebco submits that CISVA provided no comments and registered no contact information with Metro Vancouver regarding Ebco's permit application, despite Metro Vancouver creating a webpage that notified persons of Ebco's application and provided interested persons with an opportunity to provide comments and their contact information to Metro Vancouver. Ebco maintains that, having declined to provide comments or contact information to Metro Vancouver, it was fair and reasonable that notice of the Permit would be given to the CISVA via posting on Metro Vancouver's website. If website notice in such circumstances is not held to be sufficient, the appeal period could continue indefinitely. Furthermore, Ebco submits that such notice is consistent with section 4(4) and Schedule A, column 5, of the *Public Notification Regulation*, B.C. Reg. 202/94.

[52] Regarding the BFCA, Ebco submits that Metro Vancouver provided evidence that it sent notice of the Permit to the email address that Mr. McFadden used to provide comments regarding Ebco's permit application, and the email was first opened on March 28, 2018 at 5:29 pm. Although the BFCA maintains that Mr. McFadden was not involved in communicating the Permit decision to the BFCA, Ebco submits that Mr. McFadden is the BFCA's agent in these appeal proceedings, and notice to him should be considered actual or constructive notice to the BFCA. In addition, Ebco submits that direct notice to the BCFA's president, Mr. Crossen, was not required given that notice of the Permit was given to Mr. McFadden and posted on Metro Vancouver's website on March 28, 2018.

[53] Although the BFCA's Notice of Appeal states that it received notice of the Permit on April 3, 2018, Ebco submits that the BFCA has provided no information about how it received notice on that date, or from whom. In addition, Ebco argues

that the email between Mr. Crossen and Mr. McNeice confirms that, on April 24, 2018, Mr. McNeice told Mr. Crossen that an appeal of the Permit should be sent "by e mail on Friday April 27th", which would be consistent with the BFCA having received notice of the Permit on March 28, 2018. In the circumstances, Ebco submits that the notice provided to BFCA via its agent, with whom the BFCA was in communication, and posting on Metro Vancouver's website support a finding that the BFCA received actual or constructive notice of the Permit on March 28, 2018, and that such notice was fair and reasonable in the circumstances.

*The Panel's findings*

[54] The time limit for filing an appeal under section 101 of the *Act* is "30 days after notice of the decision is given" [underlining added]. This language is different than the language used in some other legislation, such as section 24(1) of the *Administrative Tribunals Act*, which provides that notice of an appeal "must be filed within 30 days of the decision" [underlining added]. It also contrasts with section 72(7) of the *Oil and Gas Activities* Act, which provides that a land owner must file a notice of appeal "within 15 days of the day the determination being appealed was made" [underlining added]. Section 101 does not say that an appeal must be filed within 30 days of "the decision", or within 30 days of the day the decision "was made". The legislature could have used such language in section 101 of the *Act*, but chose not to. Consequently, in the context of appeals under the *Act*, the Panel finds that the words "after notice of the decision is given" in section 101 of the *Act* should not be interpreted as meaning the date of the decision, or the date on which the decision was made. Rather, they should be interpreted as meaning the date on which the decision was first "given" to the person filing the appeal.

[55] The Panel finds that section 133(2) of the *Act* provides direction regarding the methods for giving notices under the *Act*. Section 133(2) states:

> **133** (2) Any notice under this Act may be given by registered mail sent to the last known address of the person.

[56] In *Graham*, the Board considered section 133(2) of the *Act*, and found as follows at page 10:

> This Panel accepts that the *Act* in this case sets out a permissive, non-exhaustive method of service. This means that the Director can rely on other methods, provided those methods abide by the principles of procedural fairness, which dictate that notice must be given in a manner that is reasonable to inform those concerned. It can be inferred from the wording of the *Act* that the statutory limitation period for appealing a decision begins to run when notice of the decision is first given to the appellant, whether the mode of delivery is by mail, personal delivery or facsimile transmission.
>
> [underlining added]

[57] The Panel agrees with those findings in *Graham*. In the present case, the Panel finds that the District Director could rely on methods other than registered mail to "give" notice of the Permit to the Appellants, as long as the method

complies with the principles of procedural fairness, and is reasonable to inform the persons concerned.

[58] Section 25 of the *Interpretation Act* addresses that calculation of time. The relevant portions of section 25 of that Act states as follows:

**25** (1) This section applies to an enactment ….

…

(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

…

[59] When calculating the 30-day appeal period in section 101 of the *Act*, the number of days is counted based on section 25(5) of the *Interpretation Act*; i.e., the first day must be excluded and the last day included. Section 101 of the *Act* does not specify a time of day at which the appeal period ends: it simply states 30 "days". Thus, the question becomes whether the appeal period expires at the end of the 24-hour period that constitutes the 30th "day", or at the close of the Board's business hours on that day. As discussed below, the Board's business hours are 8:30 am to 4:30 pm, Monday through Friday, excluding public holidays.

[60] The Board has created Rules pursuant to section 11 of the *Administrative Tribunals Act*. Those Rules provide guidance regarding the calculation of time and the delivery of documents to the Board. Ebco refers to the Board's Rules 10(9) and (10), which state as follows regarding the deemed delivery of documents to the Board:

**Rule 10 – Filing documents with the Board**

…

***When documents are deemed to be delivered to the Board***

9. A document that is received by the Board after the business day is deemed to be delivered on the next day business day.

10. If a document is sent to the Board by fax or email, the document is not deemed to be delivered to the Board until the transmission is received by the Board, regardless of the date or time that it is shown to have been sent.

[61] The Board's Rule 1 provides definitions of "day", "calendar day", and "business day". Rule 1 defines "business day" to mean "8:30 am to 4:30 pm, Monday through Friday, excluding public holidays", which are the times and days when the Board's office is open for business. However, Rule 1 also defines "document" as follows:

> "**document**" includes a letter, email, application, submission, reply, notice, photograph, chart, report, plan, sound recording, videotape, or other thing upon which information is communicated or recorded, but does not include a notice of appeal;
>
> [underlining added]

[62] Consequently, the provisions addressing the deemed delivery of "documents" in Rules 10(9) and (10) do not apply to Notices of Appeal.

[63] The Board's Rule 5(3) states as follows regarding the filing of a Notice of Appeal:

> 3. A notice of appeal must be filed within the appeal period specified in the particular statute. The Board has no power to extend the statutory time period to appeal.

[64] Thus, for the purposes of resolving this question regarding the time at which the appeal period ends, the key consideration is the meaning of the word "day" in section 101 of the *Act*. The word "day" is not defined in the *Act* or the *Interpretation Act*. Therefore, the Panel has considered the common meaning of "day" based on dictionary definitions. The English Oxford Dictionary defines "day" as:

> Each of the twenty-four-hour periods, reckoned from one midnight to the next, into which a week, month, or year is divided, and corresponding to a rotation of the earth on its axis.

[65] Based on the common definition of "day", the Panel finds that the final "day" in the 30-day appeal period does not end at 4:30 pm, when the Board's business hours end, on the 30th day after the person filing the appeal received notice of the decision; rather, it ends at 11:59 pm on the 30th day.

[66] The BFCA's Notice of Appeal states that it received notice of the Permit on April 3, 2018. If that date is correct, the 30-day period for the BFCA to file an appeal expired on May 3, 2018. Metro Vancouver's evidence is that it never sent notice of the Permit to the BFCA or Mr. Crossen, the BFCA's president, despite the fact that Mr. Crossen sent concerns on behalf of the BFCA to Metro Vancouver via email during its review of Ebco's permit application. Metro Vancouver's evidence indicates that it had a record of the email address that Mr. Crossen used for that purpose, but Metro Vancouver has provided no explanation as to why it did not send notice of the Permit to the BFCA using that email address. There is no evidence that Mr. McFadden was acting on behalf of the BFCA before the Permit was issued, or at the time when it was issued. The fact that Mr. McFadden is acting as the BFCA's agent in the appeal process is irrelevant, given that there is no evidence that he was acting as the BFCA's agent prior to the filing of its Notice of Appeal in late April 2018. In these circumstances, the Panel finds that it is neither fair nor reasonable to conclude that the notice sent to Mr. McFadden, who had only provided comments to Metro Vancouver on his own behalf, should be deemed to constitute notice to the BFCA.

[67] Furthermore, the Panel finds that the public notice of the Permit that was posted on Metro Vancouver's website on March 28, 2018, does not constitute reasonable or fair notice to an organization, such as the BFCA, that had sent comments to Metro Vancouver about the proposed permit, and which had provided Metro Vancouver with an email address for contacting the BFCA. Moreover, column 5 in Schedule A of the *Public Notification Regulation* states that notice of a decision to issue a permit must be given "to all persons who submitted written notification of concerns", which includes Mr. Crossen on behalf of the BFCA.

[68] In light of that, the Panel finds that the April 24, 2018 email that Mr. Crossen received from Terry McNeice, stating that he could send a Notice of Appeal "by e mail by Friday April 27th…", is irrelevant. What is relevant is the fact that Metro Vancouver acknowledges that it never sent notice of the Permit to the email address that it had on record for Mr. Crossen on behalf of the BFCA, but the BFCA acknowledges that it received notice of the Permit (through means that are unknown to the Panel) on April 3, 2018. The Panel finds that the evidence, on its face, supports a finding that the BFCA received notice of the Permit on April 3, 2018. As such, the 30-day period for it to file an appeal expired on May 3, 2018. The Board's office received the Notice of Appeal well before that date, and therefore, the Panel finds that the BFCA's appeal was filed in time.

[69] Metro Vancouver provided evidence that it sent notice of the Permit to Mr. Mueggenburg and Irongait via email on March 28, 2018, and those emails were first opened on that same day. In those cases, the notice was sent to the email address that each of those Appellants had used to provide comments to Metro Vancouver during its review of Ebco's permit application. The submissions and Notices of Appeal of Mr. Mueggenburg and Irongait state that they first received notice of the Permit on March 28, 2018, which is consistent with Metro Vancouver's evidence. In these circumstances, the Panel finds that sending notice of the Permit to those email addresses was consistent with the principles of procedural fairness, and was a reasonable method for informing those persons. Consequently, with regard to Mr. Mueggenburg and Irongait, the Panel finds that April 27, 2018, was the 30th day after notice of the Permit was given to them, and the appeal period ended at 11:59 pm on that day.

[70] Mr. Mueggenburg and Irongait provided evidence that they sent their Notice of Appeal to the Board by email at 4:59 pm on April 27, 2018. The Board's records confirm this. Ebco's submission that Mr. Mueggenburg and Irongait did not file their appeals until April 30, 2018, relies on Rules 10(9) and (10), and the fact that the Notices of Appeal were sent after the close of the Board's business hours on Friday, April 27, 2018. However, the Panel has found that Rules 10(9) and (10) do not apply to Notices of Appeal. Therefore, the 30-day period for Mr. Mueggenburg and Irongait to file their appeals ended at 11:59 pm on on April 27, 2018, and not at the close of the Board's business hours. Consequently, the Board finds that their appeals were filed in time.

[71] Mr. Ryzak sent his Notice of Appeal to the Board via email on Saturday, April 28, 2018. He claims that this was in time, because he received notice of the Permit on March 29, 2018, when a neighbour left him a voicemail message about the Permit. He claims that he never received notice of the Permit from Metro

Vancouver. This contradicts Metro Vancouver's evidence that it sent notice of the Permit to Mr. Ryzak on March 28, 2018, via the email address that he had used to provide comments to Metro Vancouver during its review of Ebco's permit application, and the email notice was first opened on the evening of March 28, 2018.

[72] The Panel finds that sending notice of the Permit to the email address that Mr. Ryzak had used to send comments to Metro Vancouver about the proposed Permit is consistent with the principles of procedural fairness, and was a reasonable method for informing him. There is no evidence that Mr. Ryzak had informed Metro Vancouver that he was no longer using that email address. He submits that he was out of the country at that time, but a person need not be in Canada to access their email. Given that he received a voicemail message on his phone while he was outside of Canada, it is reasonable to presume that he could also receive email messages on his phone while he was outside of Canada. He has provided no information that would explain why or how he could have been unaware of the email from Metro Vancouver that was opened on March 28, 2018. Consequently, the Panel finds that the evidence, on its face, indicates that Mr. Ryzak either received, or should be deemed to have received, notice of the Permit via the email that Metro Vancouver sent to his email address, which was first opened on March 28, 2018. Consequently, the 30-day period for him to file an appeal ended at 11:59 pm on Friday, April 27, 2018. Given that his Notice of Appeal was sent to the Board on Saturday, April 28, 2018, the Panel finds that his appeal was filed out of time, and the Board has no jurisdiction over the appeal.

[73] Given that the CISVA did not participate in Metro Vancouver's review of Ebco's permit application, and Metro Vancouver had no contact information for the CISVA, public notification via Metro Vancouver's website may be a reasonable method of providing notice to the CISVA. However, the Panel finds that the date of posting on Metro Vancouver's website does not necessarily correspond to the date when the CISVA actually became aware, or should reasonably have been aware, of the Permit. It is not reasonable to expect that all potential "persons aggrieved" would become aware of the Permit on the same day it was posted on Metro Vancouver's website. If this method of notification is used, it may reasonably take some time before potential appellants learn about the decision. Similar to section 133(3) of the *Act*, which provides that a notice sent by registered mail is deemed to be served on the 14th day after the notice was deposited with Canada Post unless the person received actual service before that date, potential appellants should be allowed a reasonable period of time, after posting on the website, before it can be presumed that they either knew or should have known about the decision.

[74] The CISVA advises that its Director of Finance and Administration was verbally notified about the Permit during the week of April 18, 2018, and he received a copy of the Permit on April 26, 2018. This was within three to four weeks of when the Permit was posted on Metro Vancouver's website. The Panel finds that this was a reasonable amount of time for the CISVA to have become aware of the Permit via posting on the website. The CISVA's Notice of Appeal was filed on May 15, 2018, which is within 30 days of when it received both verbal

notice of the Permit (i.e., the week of April 16-22, 2018) and a copy of the Permit (i.e., April 26, 2018).

[75] In summary, the Panel finds that the appeals of the BFCA, Mr. Mueggenburg, Irongait, and the CISVA were filed within the 30-day appeal period specified in section 101 of the *Act*. The appeal filed by Mr. Ryzak was filed outside of that time period, and therefore, the Board has no jurisdiction over his appeal.

## 2. Whether Mrs. Rush, Mr. Rush, and the BFCA have standing to appeal as "persons aggrieved" by the Permit within the meaning of section 100(1) of the *Act*.

*The test for standing as a "person aggrieved"*

[76] In *Ellis O'Toole et al v. Director, Environmental Management Act* (Decision Nos. 2016-EMA-150(a) to 153(a), March 29, 2017)[*O'Toole*], the Board summarized the case law regarding the test for standing as a "person aggrieved" under section 100(1) of the *Act*. At paras. 70 – 75 of *O'Toole*, the Board stated as follows:

> Over the years, the Board has interpreted the words "a person aggrieved" in section 100(1) of the *Act* 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." …
>
> In *Gagne v. Sharpe*, 2014 BCSC 2077 [*Gagne #1*], the BC Supreme Court confirmed the Board's interpretation of "a person aggrieved". The Court also clarified that a person seeking to appeal a decision under the *Act* must show how his or her specific interests are prejudiced – prejudiced in a way that is particular to the individual - and that the prejudice be established on a *prima facie* evidentiary standard.
>
> …
>
> In a subsequent oral judgment delivered by the BC Supreme Court on a judicial review from the Board's reconsideration of its standing decision (*Gagne v. Environmental Appeal Board*, Victoria 14-3037, October 31, 2014) [*Gagne #2*], the Court addressed the meaning of a *prima facie* evidentiary standard. The Court applied the following general principles from *In the Matter of a Production Orde*r, (6 July 2006), Vancouver BL0455 (B.C.S.C.):
>
> > [26] Justice Hollinrake in the oral ruling cited earlier provided the additional clarification that what must be shown is more than a mere allegation of fact, but less than proof on a balance of probabilities. The "*prima facie*" evidentiary standard means that the petitioners must present some evidence beyond [m]ere assertions, but short of proof on a balance of probabilities.
> >
> > [Emphasis added]
>
> Applying that standard, the Court in *Gagne* #2 then found as follows at paragraph 24:

> It is not inconsistent with the *prima facie* standard to require at least some objective evidence of how the amendment prejudicially affects a person's interests. In my view, it was not unreasonable for the Board to conclude that the evidence of the petitioners was insufficient in these particular circumstances. Even on a *prima facie* standard, the burden is on a person seeking standing to disclose enough information or evidence to allow the Board to reasonably conclude that the person's interests are, or may be, prejudicially affected. It was the Board's view of the totality of the evidence that the claim of the petitioners failed to meet this burden, even on a *prima facie* basis.
>
> [Emphasis added]

The Court's reference to objective evidence and a reasonableness standard in *Gagne #2*, builds upon the Court's previous comment in *Gagne #1* when it stated that "the Board may require a challenger [an appellant] to establish, on a *prima facie* basis, something more than a subjective genuine interest." (paragraph 74).

[77] This Panel adopts those findings in *O'Toole*, and the judicial decisions that are discussed therein, for the purposes of determining whether Mrs. Rush, Mr. Rush, and the BFCA have standing to appeal the Permit.

*The Parties' submissions*

[78] Ebco submits that Mr. and Mrs. Rush are not "persons aggrieved" by the Permit, because they have provided no information as to how they, as individuals, are aggrieved by the Permit. Ebco argues that their Notices of Appeal express general concerns about the alleged potential health and environmental effects of the facility's emissions, but identify no basis on which the Rushes purport to be individually prejudiced or affected by the emissions.

[79] In addition, Ebco submits that the Rushes live well outside of the area affected by emissions from the facility. According to the address provided in their Notices of Appeal, they reside approximately eight km north of the facility. Ebco maintains that the Hemmera Report confirms that there are negligible or no emissions or depositions of any potentially material concentrations of contaminants beyond a five km by five km square perimeter around the facility, and the dispersion areas for potentially material concentrations of emissions are less than the five $km^2$ area around the facility. Moreover, Ebco submits that the Hemmera Report confirms that, within the five $km^2$ area, the maximum predicted ambient air conditions and deposition rates are below the reference guidelines, and the potential adverse effects on vegetation, soil, surface water and groundwater due to deposition of zinc and nickel are negligible.

[80] Similarly, Ebco submits that the BFCA is located well outside of the dispersion area for emissions from the facility, and its address is approximately six km away from the facility, which is outside of the dispersion area for any potentially material concentration of emissions. Moreover, Ebco submits that the entire BFCA, and the addresses of its directors, are many km away from the facility, and outside of the dispersion area for any potentially material concentration of emissions. Ebco

submits that the BCFA has provided no basis on which it, or any of its members, is prejudiced by the Permit.

[81] Mrs. Rush submits that although she and Mr. Rush live seven km away from the facility, they may be affected by toxic emissions when there are strong southerly winds. She also submits that they frequently walk their dogs along 28th Avenue towards Keery Park (located near the corner of 28th Avenue and 188 Street, approximately one km away from Ebco's facility). In addition, she and Mr. Rush moved from an area near pulp and paper mills, to their current home, after receiving advice from their doctor to live in a place with cleaner air. Mrs. Rush also expresses concerns about the impact of the emissions on other users of Keery Park, and children attending East Kensington School. Finally, she hopes that her great-grandchildren will enroll in St. John Paul II Catholic high school, which is located within one km of the Ebco facility.

[82] Mr. Rush expresses concern that he and Mrs. Rush will lose the use of Keery Park and Latimer Lake Park, where they walk their dogs, due to the toxic environment. Mr. Rush states that Mrs. Rush has sensitive respiratory health, and the discharge of harmful emissions will aggravate her condition. He also advises that he intends to volunteer at St. John Paul II Catholic high school (within one km of the Ebco facility) in the future.

[83] The BFCA submits that its boundary is located just over one km away from Ebco's facility, and the BFCA represents potentially aggrieved residents within its boundaries. BFCA also submits that Ebco's facility is located directly above the Brookswood Aquifer, which supplies drinking water to thousands of people, including many within the BFCA catchment area. In support of those submissions, the BFCA provided a map from the Township of Langley, titled "Vulnerable Aquifer Map", which indicates the location of Ebco's facility, areas of the aquifer that have an "extremely high" degree of vulnerability, and Brookswood Aquifer well #10 located approximately 2.5 km away from Ebco's facility. The BFCA also provided a map from the Township of Langley showing properties located approximately one to five km east of the facility that rely on wells which draw potable water from the Brookswood Aquifer.

[84] In reply to the BFCA's submissions, Ebco submits that the BFCA, which is a registered society under the *Societies Act*, must establish that it is a "person aggrieved" by the Permit by demonstrating "some form of prejudice to [its] individual interest" in a way that "separates the [appellant] from the general public", such as having "a specific property or economic interest" (*Gagne #1*, at paras. 74 and 78). Ebco maintains that the BFCA provided no such evidence; rather, the BFCA asserts general concerns about the alleged effects of the emissions, which are insufficient to establish standing.

[85] In reply to Mr. and Mrs. Rush's submissions, Ebco submits that their assertion that emissions from the facility may be transported to their residence by wind is unsupported by evidence or specific information. Moreover, Ebco submits that the emission dispersion and deposition model discussed in the Hemmera Report took into account wind data, and the model results show that the Rushes reside well outside of the area affected by emissions from the facility.

*Panel's findings*

[86] The onus is on an appellant, in this case the BFCA, Mr. Rush, and Mrs. Rush, to establish on a *prima facie* basis that they are a "persons aggrieved" by the Permit. However, before turning to the information and evidence provided by these Appellants, the Panel has considered Ebco's submission that the emissions will have no impact on Mr. and Mrs. Rush, or the BFCA and its members, because they are located outside of the area that is predicted to be impacted by emissions from the facility.

[87] Ebco's argument relies on the predictions and results generated by the modelling assessment in the Hemmera Report. The Panel finds that those results and predictions are likely to be the subject of arguments at any future hearing on the merits of the appeals, and it would be inappropriate to make conclusive findings about whether these Appellants will, or will not, be impacted based on modelling predictions and results that have not been fully assessed by the Board. To further illustrate why it would be inappropriate to find that an Appellant lacks standing based on modelling results and predictions that have not yet been fully assessed by the Board, it is noted that the Hemmera Report states at page 15 that the model results are based on one year (2012) of meteorological data. However, the BC Ministry of Environment's "British Columbia Air Quality Dispersion Modelling Guideline" (2015), cited as a reference in the Hemmera Report, states at page 41 regarding meteorological data that "At least three years of data should be used for the applications where there are significant public concerns about impacts of air quality". However, the Panel emphasizes that it is drawing no conclusions at this stage about the merits of the Hemmera Report or the appeals.

[88] Turning to the evidence and information provided by the three Appellants, the Panel finds that although Mr. Rush and Mrs. Rush reside approximately eight km north of Ebco's facility, they have indicated that they frequently walk their dogs along 28$^{th}$ Avenue towards Keery Park, which is located approximately one km from Ebco's facility and is within the area that the Hemmera Report predicts will be affected by emissions from the facility. In addition, there is information that Mrs. Rush has sensitive respiratory health, which may make her more susceptible than the average person to any adverse health effects from the emissions. The Panel finds that Mr. and Mrs. Rush have provided sufficient information and evidence for the Panel to conclude, on a *prima facie* basis, that their recreational activities and/or health may be prejudicially affected by the emissions authorized under the Permit.

[89] Regarding the BFCA, the Panel finds that the maps provided by the parties show the boundary of the BFCA to be approximately 2 km east of Ebco's facility. According to the Hemmera Report, some of the facility's emissions are predicted to travel within 500 m of that boundary. The Panel finds that the 500 m distance is reasonably close to residents within the BFCA's boundaries, given the Panel's findings that the predictions in the Hemmera Report are not conclusive for the purposes of deciding the issue of standing. The maps also show that Ebco's facility is located directly above the Brookswood Aquifer, and the facility is surrounded by portions of the aquifer with an extremely high degree of vulnerability. Some of the vulnerable portions of the aquifer are within the area where, according to the

Hemmera Report, the facility's emissions will cause zinc deposition in the environment. The Hemmera Report states at p. 27 that "measurable increases in zinc concentrations above existing background levels are possible" under permitted conditions. Although the Hemmera Report estimates that it would take over 200 years for zinc concentrations in soil to exceed the standards for agriculture, and over 12,000 years for groundwater used for drinking water to be adversely affected, it is apparent that at least some level of impact and risk to the environment is present under permitted levels of emissions. According to the BFCA, the Brookswood Aquifer supplies drinking water to residences within the BFCA's boundaries that draw water from wells that are connected to the Brookswood Aquifer. Based on all of the evidence and information, the Panel finds, on a *prima facie* basis, that the BFCA's interests, and/or the interests of at least some of its members, in drinking water and human health may be prejudicially affected by the emissions authorized under the Permit.

## DECISION

[90] The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

[91] For the reasons stated above, the Panel finds that the appeals filed by the BFCA, Mr. Mueggenburg, Irongait, the CISVA, Mr. Rush, and Mrs. Rush are within the Board's jurisdiction. Mr. Ryzak's appeal was filed outside of the 30-day appeal period provided in section 101 of the *Act*, and therefore, the Board has no jurisdiction over his appeal.

[92] Accordingly, Mr. Ryzak's appeal (2018-EMA-015) is hereby dismissed and the application for dismissal is granted. All of the other applications for dismissal are denied, and those appeals will proceed to a hearing.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

August 20, 2018