



ENVIRONMENTAL  
APPEAL BOARD

2003/2004

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Annual Report

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APRIL 1, 2003 - MARCH 31, 2004



## Environmental Appeal Board

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Honourable George Abbott  
Minister of Sustainable Resource Management  
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Honourable Shirley Bond  
Minister of Health Services  
Parliament Buildings  
Victoria, British Columbia  
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Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2003 through March 31, 2004.

Yours truly,

A handwritten signature in blue ink, appearing to read "C. G. Andison".

Alan Andison  
Chair  
Environmental Appeal Board





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## Message from the Chair

I am pleased to submit the thirteenth Annual Report of the Environmental Appeal Board.

The number of appeals filed with the Board decreased slightly over this report period from 133 in 2002/2003, to 109 in this report period. The number of appeals filed under the *Health Act*, *Water Act* and *Waste Management Act* decreased marginally, while the number of appeals filed under the *Pesticide Control Act* and *Wildlife Act* increased marginally.

Four Board members have departed during this reporting period. On behalf of the entire Board, I wish to thank Tracey Cook, Joanne Dunaway, Fred Henton and Barbara Thomson for their hard

work and contributions to the Board. Eleven new members were appointed to the Board and I would like to welcome Sean Brophy, Bruce Devitt, Bob Gerath, R.A. (Al) Gorley, Lynne Huestis, Paul Love, Gary Robinson, David J. Thomas, Robert Wickett, Stephen V.H. Willett and J.A. (Alex) Wood. These new members are also members of the Forest Appeals Commission.

Alan Andison



## Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period of time between April 1, 2003 and March 31, 2004.

The report provides an overview of the structure and function of the Board and how the appeal process operates. It contains statistics on appeals filed, hearings held and decisions issued by the Board within the report period. It also contains the Board's recommendations for legislative changes to the statutes and regulations under which the Board has jurisdiction to hear appeals. Finally, summaries of the decisions issued by the Board during the report period are provided and sections of the relevant statutes and regulations are reproduced.

Decisions of the Environmental Appeal Board are available for viewing at the Board office, on the Internet, and at the following libraries:

- Legislative Library
- University of British Columbia Law Library
- University of Victoria Law Library
- British Columbia Court House Library Society
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Data Base.

Information about the Environmental Appeal Board is available from the Board office and on the Board's website. Detailed information on the Board's policies and procedures can be found in the Environmental Appeal Board Procedure Manual. Pamphlets explaining the appeal procedure under each of the relevant statutes are also available. Please feel free to contact the office if you have any questions, or would like additional copies of this report. The Board can be reached at:

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# The Board

The Environmental Appeal Board is an independent agency established under the Environment Management Act. It hears appeals from administrative decisions made under five statutes. Three of the statutes are administered by the Ministry of Water, Land and Air Protection. They are the *Pesticide Control Act*, the *Waste Management Act* and the *Wildlife Act*. The *Water Act* is administered by the Ministry of Sustainable Resource Management. The fifth statute, the *Health Act*, is administered by the Ministry of Health Services.

## Board Membership

The Board members are appointed by the Lieutenant Governor in Council (Cabinet) under section 11(3) of the Environment Management Act. The members are drawn from across the Province, representing diverse business and technical experience. Board membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members.

The Board	From
<b>Chair</b>	
Alan Andison	Victoria
<b>Vice-chair</b>	
Cindy Derkaz	Tappen
<b>Members</b>	
Sean Brophy (from November 27, 2003)	North Vancouver
Robert Cameron	North Vancouver
Richard Cannings	Naramata
Tracy Cook (to October 26, 2003)	Victoria
Don Cummings	Penticton
Bruce Devitt (from September 18, 2003)	Victoria
Joanne Dunaway (to April 26, 2003)	Vancouver
Margaret Eriksson	New Westminster
Bob Gerath (from November 27, 2003)	North Vancouver
R.A. (Al) Gorley (from November 27, 2003)	Victoria
James Hackett	Nanaimo
Fred Henton (to October 26, 2003)	Nanose Bay
Lynne Huestis (from November 27, 2003)	North Vancouver
Katherine Lewis	Prince George
Paul Love (from November 27, 2003)	Campbell River
David Ormerod	Victoria
Gary Robinson (from November 27, 2003)	Victoria
Lorraine Shore	Vancouver
David J. Thomas (from November 27, 2003)	Victoria
Barbara Thomson (to October 26, 2003)	Victoria
Robert Wickett (from November 27, 2003)	Vancouver
Stephen V.H. Willett (from November 27, 2003)	Kamloops
Phillip Wong	Vancouver
J.A. (Alex Wood) (from November 27, 2003)	North Vancouver



## The Board Office

The Board office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board.

The Environmental Appeal Board shares its staff and its office space with the Forest Appeals Commission. The Forest Appeals Commission, set up under the *Forest Practices Code of British Columbia Act*, hears appeals from forestry-related administrative decisions made under that Act, the *Forest and Range Practices Act*, the *Forest Act* and the *Range Act*, in much the same way that the Board hears environmental appeals.

Each of the tribunals operates completely independently of one another. Supporting two tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, cutting down on administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

## Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. If a member of the public requests information regarding an appeal, that information may be disclosed, unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*.

Parties to appeals should be aware that information supplied to the Board is subject to public scrutiny and review.



# Legislative Amendments Affecting the Board

In this report period, several provisions of the *Commercial River Rafting Safety Act* were repealed. In particular, section 6 of that Act was repealed effective April 1, 2003, retroactive from May 14, 2004. Therefore, the Board no longer hears appeals under that Act.

In addition, the *Environmental Management Act*, S.B.C. 2003, c. 53, received royal assent on October 23, 2003. It will replace the *Environment Management Act* and the *Waste Management Act*, and will be brought into force by regulation.

The *Integrated Pest Management Act*, S.B.C. 2003, c. 58, also received royal assent on October 23, 2003. It will replace the *Pesticide Control Act*, and will be brought into force by regulation.

Finally, on February 13, 2004, the *Administrative Tribunals Appointment and Administration Act* came into force. This Act made changes to the appointment process, clarifying the role of the chair in the appointment process, and clarifying the general role and responsibilities of the chair of the Board. It will apply to the Board with the next year's reporting period.



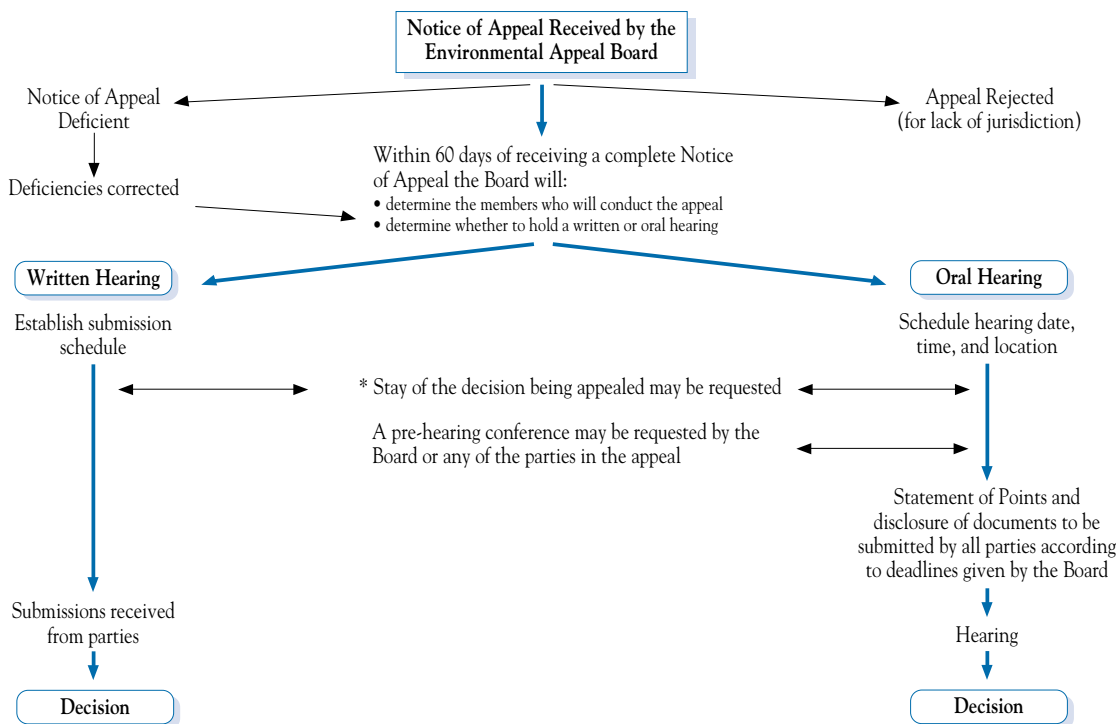
# The Appeal Process

The *Environment Management Act* and the *Environmental Appeal Board Procedure Regulation* set out the general powers and procedures of the Board. The Board's authority is further defined in the statutes and regulations under which the Board has jurisdiction to hear appeals.

In order to ensure that the appeal process is open and understandable to the public, the Board has developed the Environmental Appeal Board Procedure Manual. The manual contains information

about the Board itself, the legislated procedures that the Board is required to follow and the policies the Board has adopted to fill in the procedural gaps left by the legislation.

The following is a brief summary of the appeal process. For more detailed information, a copy of the Board's Procedure Manual can be obtained from the Environmental Appeal Board office, or from the Board's website.



\* The Board's authority to issue a stay varies from one statute to the next.



# Recommendations

## Operation of the Board

In the Board's 2002-2003 Annual Report, the Board provided an update on its involvement in the Administrative Justice Project.

Between April 1, 2003 and March 31, 2004, the Board has been working towards the consolidation of the Board with the Forest Appeals Commission as directed by the government.

The Board has no further recommendations to make with respect to the operation of the Board at this time.

## Health Act

The Board has previously made recommendations in the annual reports for 1998/1999, 2000/2001 and 2002/2003 relating to the posting and notice requirements under the *Sewage Disposal Regulation* and regarding the wording of the 30-day appeal period specified under the *Health Act*. The recommendations were based upon concerns that the legislation created confusion as to when the appeal period begins and ends and that this may result in unfairness and uncertainty to appellants, property owners and others affected by the appeal process.

The Board continues to recommend that changes be made to the *Act* and/or the *Regulation* to ensure that the public has a fair opportunity to obtain information about permits being issued that may affect them, and to appeal those permits within the specified appeal period.

In addition, it has become apparent over the years that the *Regulation* as a whole is outdated; it has not kept up with advances in the knowledge and technology related to sewage disposal. The Board recommends that the *Regulation* be amended to reflect current technology and knowledge.

## Environment Management Act, Waste Management Act and Pesticide Control Act

As noted earlier in this report, the legislative assembly has enacted new statutes to replace all three of these statutes. Specifically, the *Environmental Management Act* will replace the *Environment Management Act* and the *Waste Management Act*. The *Integrated Pest Management Act* will replace the *Pesticide Control Act*. The Board is waiting for the new statutes to come into force.

## *Water Act and Wildlife Act*

The Board has no recommendations in relation to appeals under these statutes.



# Statistics

The following tables provide information on the appeals filed with the Board, and decisions published by the Board, during the report period. The Board publishes all of its decisions on the merits of an appeal, and most important preliminary and post-hearing decisions. The Board also issues numerous unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

Between April 1, 2003 and March 31, 2004, a total of 109 appeals were filed with the Board against 93 administrative decisions, and a total of 54 decisions were published.

## April 1, 2003 - March 31, 2004

Total appeals filed	109
Number of administrative decisions appealed	93
Appeals abandoned, withdrawn, or rejected	65
<b>Hearings held on the merits of appeals</b>	
Oral hearings completed	26
Written hearings completed	5
<b>*Total hearings held on the merits of appeals</b>	<b>31</b>
<b>Total oral hearing days</b>	<b>50</b>
<b>Published Decisions issued</b>	
<b>Final Decisions</b>	
Appeals allowed, allowed in part	9
Appeals dismissed	22
<b>Total Final Decisions</b>	<b>31</b>
<b>Decisions on preliminary matters</b>	<b>16</b>
<b>Decisions on Costs</b>	
Costs awarded, in part	0
Costs denied	7
<b>Total Costs Decisions</b>	<b>7</b>
<b>Total published decisions issued</b>	<b>54</b>

\*Note: Most preliminary applications and post-hearing applications are conducted in writing. However, only the final hearings on the merits of the appeal have been included in this statistic.

## Appeal Statistics by Act

	Health Act	Pesticide Control Act	Waste Management Act	Water Act	Wildlife Act
Appeals filed during report period	21	20	19	16	33
Number of administrative decisions appealed	18	13	13	16	33
Appeals abandoned, withdrawn or rejected	17	5	17	13	13
<b>Hearings held on the merits of appeals</b>					
Oral hearings	2	1	2	5	16
Written hearings	0	2	0	1	2
<b>Total hearings held on the merits of appeals</b>	<b>2</b>	<b>3</b>	<b>2</b>	<b>6</b>	<b>18</b>
<b>Total oral hearing days</b>	<b>2</b>	<b>2</b>	<b>20</b>	<b>9</b>	<b>17</b>
<b>Published decisions issued</b>					
Final decisions	4	3	2	17	5
Preliminary applications	3	4	12	1	3
<b>Total published decisions issued</b>	<b>7</b>	<b>7</b>	<b>14</b>	<b>18</b>	<b>8</b>

▲ This table provides a summary of the appeals filed, hearings held and published decisions issued by the Board during the report period, categorised according to the statute under which the appeal was brought.

◀ This table provides an overview of the total appeals filed, hearings held, and published decisions issued by the Board during the report period. It should be noted that the number of decisions issued and hearings held during the report period does not necessarily reflect the number of appeals filed for the same period, because the appeals filed in previous years may have been heard or decided during the report period.

It should also be noted that two or more appeals may be heard together.

## Decisions issued by the Board under each Statute

In an appeal, the Board will decide whether to allow the appeal, dismiss the appeal or return the matter back to the original decision-maker with directions. The Board may also be required to deal with a number of preliminary matters such as requests for stays, applications regarding standing and questions regarding the Board's jurisdiction.

The following tables provide a summary of the published decisions issued by the Board, including any decisions regarding preliminary matters dealt with by the Board.



### Health Act

#### Administrative Decision Appealed

	Preliminary Matter	Appeal Allowed	Appeal Allowed in Part	Appeal Dismissed	Appeal Dismissed with Recommendations	Application for Costs	Jurisdiction/Standing Dismissed
Issuance of a permit				4		3	



### Pesticide Control Act

#### Administrative Decision Appealed

	Preliminary Matter	Appeal Allowed	Appeal Allowed in Part	Appeal Dismissed	Appeal Dismissed Subject to Amendments	Referred back to Original Decision-maker	Application for Costs
Issuance of a permit				1			
Pest Management Plan	3		1	1			1



### Waste Management Act

#### Administrative Decision Appealed

	Preliminary Matter	Appeal Dismissed	Appeal Allowed in Part	Appeal Allowed	Application for Costs	Jurisdiction/Standing Granted
Remediation order	9		1			1
Issuance of approval		1				
Site investigation order					2	



### Water Act

#### Administrative Decision Appealed

	Preliminary Matter	Appeal Allowed in Part	Appeal Allowed	Appeal Dismissed	Jurisdiction/Standing Granted	Application for Costs
Refusal to issue a licence		1		1		
Cancellation or suspension of a licence				2		
Issuance of conditional licence				7		1
Order of Comptroller				4		
Order of Engineer				1		
Order of Water Manager		1				



### Wildlife Act

#### Administrative Decision Appealed

	Preliminary Matter	Appeal Allowed	Appeal Allowed in Part	Appeal Dismissed
Refusal to issue a licence or permit	2	1		
Change to quota under a licence				1
Suspension or cancellation of a licence or permit	1		1	
Registration of trapline		1		
Amendment of plan		1		



# Summaries of Environmental Appeal Board Decisions

April 1, 2003 ~ March 31, 2004

The Board issues hundreds of decisions each year, some that are published and others that are not published. A selection of published decisions have been summarized below. These decisions were issued by the Board between April 1, 2003 and March 31, 2004. They are organized according to the statute under which the appeal was filed.



## Health Act

2002-HEA-024(a), 025(b), 027(b), 028(b)

Robert Hill dba Breakwater Enterprises, Arrowsmith Watersheds Coalition Society, French Creek Residents Association, and Regional District of Nanaimo v. Environmental Health Officer (Combined Forest Holdings Ltd., Third Party)

**Decision Date:** June 17, 2003

**Panel:** Alan Andison

Robert Hill (doing business as Breakwater Enterprises), Arrowsmith Watersheds Coalition Society, French Creek Residents Association, and the Regional District of Nanaimo filed separate appeals against the decision of the Environmental Health Officer (“EHO”) to issue a permit to Combined Forest Holdings Ltd. to construct a sewage disposal system. The Appellants asked the Board to rescind the permit. In the alternative, the

Arrowsmith Watersheds Coalition Society asked the Board to amend the permit. All of the Appellants were concerned about potential contamination of the aquifer located under the system.

Overall, the Board found that the proposed system would protect the aquifer and the public health. It noted that the soil beneath the proposed system had an adequate confining layer and surpassed the regulatory requirement of four feet of natural permeable soil. The Board also found as follows: the trenches in the disposal field met all statutory requirements and posed no risk to health because of the impenetrable soil beneath the trenches; the setbacks met regulatory requirements with respect to distance to domestic water; and land use zoning was not relevant to a determination of whether the proposed system would affect the aquifer or public health.

Finally, the Board found that further investigations, at the expense of the permit holder, were unnecessary as the Appellants had failed to prove that the system posed a threat to public health.

The Board confirmed the issuance of the permit, and dismissed the appeals. The Board also ordered that the permit be amended to be effective for one year from the date of the appeal decision.



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2002-HEA-030(a), 031(a), 032(a) **Christine and Dan Webb, Waco and Kim Wallace, Alex and Clover Quesnel, Gordon and Carol Webb, and Kevin King v. Environmental Health Officer (No. 3 V.C. Ventures Ltd., Third Party)**

**Decision Date:** July 31, 2003

**Panel:** Alan Andison, Fred Henton, David Ormerod

This is a decision on three applications for costs against the Third Party, No. 3 V.C. Ventures Ltd. Christine and Dan Webb also applied for “damages” against the Vancouver Island Health Authority.

The Board found that costs were not warranted in this case, and that the Board did not have jurisdiction to award “damages” as requested by the Webbs.

Accordingly, the Board denied the applications for costs.



## **Pesticide Control Act**

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2002-PES-006(a) **Society Promoting Environmental Conservation v. Deputy Administrator, Pesticide Control Act (Canadian National Railway, Third Party)**

**Decision Date:** June 12, 2003

**Panel:** Lorraine Shore, Dr. Robert Cameron, Fred Henton

The Society Promoting Environmental Conservation (“SPEC”) appealed the decision of the Deputy Administrator to issue a pesticide use permit to the Canadian National Railway (“CNR”). The permit authorized CNR to use multiple types of herbicides for total vegetation control on the railway ballast, within two metres of signal facilities and within rail yards. SPEC wanted an amendment so that further rules and restrictions would be added to the permit.

The Board found that SPEC failed to demonstrate that the use of herbicides authorized by the permit would create an adverse effect on humans or the environment. SPEC provided only general evidence of the potential risk of the herbicides to the environment and wildlife, and did not provide evidence that addressed the specific permit or the specific areas where pesticides may be used. Consequently, the Board did not undertake a risk-benefit analysis to ascertain the unreasonableness of any adverse effect.

The appeal was dismissed.

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2002-PES-008(a) **TimberWest Forest Corporation v. Deputy Administrator, Pesticide Control Act (Cowichan Tribes, Participant)**

**Decision Date:** September 4, 2003

**Panel:** Alan Andison, David Ormerod, Lorraine Shore

TimberWest Forest Corporation appealed certain conditions in the Deputy Administrator’s authorization of a pest management plan. The pest management plan authorized the use of certain pesticides to manage vegetation competing with crop trees on TimberWest’s private lands. The appealed conditions required separate approval for treatment of areas of cultural significance to the Cowichan Tribes, and prohibited treatment of red alder and bigleaf maple within a certain distance of fish habitat without the approval of an environmental specialist. Cowichan Tribes asked the Board to confirm the conditions at issue and dismiss the appeal. They also asked the Board to order TimberWest to pay their costs in relation to the appeal.

The Board held that the evidence did not support a finding that the Deputy Administrator erred by considering irrelevant factors concerning timber harvesting; and that the Deputy Administrator did not impose the appealed conditions in order to

restrict logging activity. The Board also found that the Deputy Administrator did not impose the appealed conditions in order to avoid an appeal by the Cowichan Tribes.

In determining whether the use of pesticides in the absence of the appealed conditions would cause an unreasonable adverse effect on humans or the environment, the Board considered whether an infringement of a constitutionally protected aboriginal right constitutes an adverse effect under the *Pesticide Control Act*. The Board found that the word “damage” in the definition of “adverse effect” in the Act was broad enough to include the infringement of such rights. The Board found that there would be no adverse effect if the condition restricting treatment of red alder and bigleaf maple was removed from the pest management plan authorization. The Board further held that there was insufficient evidence to determine whether there would be an adverse effect on constitutionally protected aboriginal rights if the condition requiring separate approval before treating areas of cultural significance to the Cowichan Tribes was removed from the pest management plan authorization.

The Board found that the Deputy Administrator had a duty to consult with the Cowichan Tribes before authorizing pesticide use on TimberWest’s private lands, and has a wide discretion to impose conditions that require further consultation. Specifically, the Board held that the conditions requiring separate approval for areas of cultural significance were a reasonable exercise of discretion, but that the condition prohibiting treatment of red alder and bigleaf maple within a certain distance of fish habitat without the approval of an environmental specialist was unreasonable.

The Board held that it has jurisdiction to vary the authorization without being obligated to undertake further consultation with the Cowichan Tribes.

Finally, the Board found that there were no special circumstances that warranted an order of costs against TimberWest in this case.

The Board ordered that the authorization be varied by deleting the condition prohibiting treatment of red alder and bigleaf maple within a certain distance of fish habitat without the approval of an environmental specialist. The Board upheld the other conditions of the Deputy Administrator’s authorization of the pest management plan.

The appeal was allowed, in part.

The Cowichan Tribes’ application for costs against TimberWest was denied.

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**2003-PES-001(a) Fort Nelson First Nation v. Deputy Administrator, Pesticide Control Act (Slocan Forest Products Ltd., Third Party)**

**Decision Date:** July 22, 2003

**Panel:** Alan Andison

The Fort Nelson First Nation (“FNFN”) applied for a stay of the Deputy Administrator’s decision to issue Slocan Forest Products Ltd. a pest management plan approval. The approval was in relation to the use of herbicides for forestry purposes.

The Board concluded that the FNFN failed to present sufficient evidence to establish that there would be irreparable harm to their financial interests, their constitutional rights, and their interests in the environment, if a stay was denied.

Further, the Board found that the balance of convenience favoured denying the stay. Due to the small window of time in which to apply herbicides, the Board found that Slocan might suffer harm to its interests in reforestation if a stay was granted, and this harm outweighed any potential harm to the FNFN.

The Board denied the application for a stay.

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**2003-PES-008(a) Nak'azdli Band Council v. Deputy Administrator, Pesticide Control Act (Canadian Forest Products Ltd., Third Party)**

**Decision Date:** August 21, 2003

**Panel:** Alan Andison

The Nak'azdli Band Council requested a stay of an approval issued in relation to a pest management plan. The Approval permitted Canadian Forest Products Ltd. to apply pesticides using aerial spray methods to eight cutblocks within the traditional territory claimed by the Nak'azdli First Nation.

The Board held that the Nak'azdli Band Council provided sufficient site-specific evidence to show that irreparable harm may arise from the use of pesticides on four of the eight cutblocks. The Board further concluded that, on these four cutblocks, the possibility of irreparable harm to members of the Nak'azdli Band outweighed the possible financial harm to Canadian Forest Products Ltd. in the event of a stay being granted.

However, in relation to the other four cutblocks, the Board found that the Nak'azdli Band failed to establish that it would suffer irreparable harm if a stay was denied. The Board also found that the balance of convenience favoured denying a stay with regard to those cutblocks.

The Board granted the application for a stay, in part (stay granted for four cutblocks).

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**2003-PES-011(a) Nak'azdli Band Council v. Deputy Administrator, Pesticide Control Act (Canadian Forest Products Ltd., Third Party)**

**Decision Date:** September 26, 2003

**Panel:** Alan Andison

The Nak'azdli Band Council requested a stay of an approval issued in relation to a pest management plan. The approval permitted Canadian Forest Products Ltd. to apply pesticides to

seven cutblocks within the traditional territory claimed by the Nak'azdli First Nation.

The Board held that the Nak'azdli Band Council failed to establish that it would suffer irreparable harm if a stay was not granted.

The Board denied the application for a stay.

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**2003-PES-014(a) Tom Eberhardt v. Deputy Administrator, Pesticide Control Act (Merrill & Ring Forestry, Inc., Third Party)**

**Decision Date:** January 12, 2004

**Panel:** Alan Andison

Tom Eberhardt appealed the Deputy Administrator's decision to approve a pest management plan held by Merrill & Ring Forestry Inc. The approved plan authorized use of the herbicides Vision and Release to manage vegetation competing with crop trees. Mr. Eberhardt sought an order rescinding the pest management plan.

The Board concluded that there was no evidence that the use of herbicides in accordance with the terms and conditions of the pest management plan would create an adverse effect on human health or the environment. In addition, the Board held that there was no evidence submitted to demonstrate that the pest management plan approval was issued contrary to the requirements of the *Pesticide Control Act*.

The appeal was dismissed.



## Waste Management Act

2000-WAS-018(b) British Columbia Railway Company, BC Rail Ltd., BCR Properties Ltd., and BC Rail Partnership v. Director of Waste Management (Nexen Inc., International Forest Products Ltd., District of Squamish, FMC Chemicals Ltd., FMC Corporation, FMC of Canada Ltd. - FMC Canada Limitee, Mid-Atlantic Investments Ltd. and Squamish Nation, Third Parties)

**Decision Date:** March 3, 2004

**Panel:** Alan Andison, Dr. Robert Cameron, and Margaret Eriksson

British Columbia Railway Company (“BCRC”), BC Rail Ltd. (“BC Rail”), BCR Properties Ltd. (“BCR Properties”), and the BC Rail Partnership (“BCR Partnership”) (collectively referred to as the “BCR Group”), appealed the decision of the Director of Waste Management, to add BCR Group as a person responsible for remediation. In the appeal, BCR Group sought an order that BCRC, BC Rail and BCR Properties be removed from the remediation order.

The issues in this appeal were: whether an appeal under the *Waste Management Act* is a trial *de novo* or an appeal on the record of the administrative decision maker below; whether all members of the BCR Group are “responsible persons” under section 26.5(1) of the *Act*; whether those members of the BCR Group that are responsible persons are entitled to the exemption from liability under section 26.6(1)(e) of the *Act*; whether section 29 of the *Contaminated Sites Regulation* should be “read down” so as to be inapplicable in this case; whether section 29 of the *Regulation* nullifies an exemption that the BCR Group, or any of its member companies, could assert under section 26.6(1)(e) of the *Act*; whether

there was a private agreement respecting liability for remediation that should have been taken into account under section 27.1(4)(a) of the *Act*; and, whether the Board should remove the BCR Group or any of its member companies from the remediation order, and to refuse to name BCR Partnership in the remediation order as a responsible person.

The Board held that the relevant provisions of the *Act* clearly demonstrated the Legislature’s intention to give the Board “hybrid powers” to handle appeals in a flexible manner. Through the use of these “hybrid powers,” the Board may choose to conduct a narrower review of the decision below, or it may opt to conduct a hearing *de novo* and take a fresh look at the relevant issues or evidence.

The Board held that all members of the BCR Group were *prima facie* “responsible persons” with regard to remediation of the site, by virtue of their status as current or previous owners of the plant site, as specified in section 26.5(1) of the *Act*. In addition, the Board found that BC Rail, BCR Properties and BCR Partnership were not exempt from liability for remediation under section 26.6(1)(e) of the *Act*, because each were separate corporate entities that were owners of the plant site after it had become contaminated. The Board found that BCRC was entitled to the exemption from liability because it was not listed as an owner of a contaminated site within the meaning of the *Act*, even though it owned land adjacent to the contaminated site, which contained some contamination.

The Board found that section 29 of the *Regulation* was inconsistent with section 26.6(1)(e) of the *Act* and was an invalid attempt to dispense with the exemption from liability in section 26.6(1)(e) for an entire class of persons. Accordingly, the Board concluded that section 29 of the *Regulation* would not be considered for the purposes of this appeal. Given this finding, it was unnecessary for the Board to address the fifth issue.

The Board found that there was not an applicable private agreement respecting liability for remediation.

Finally, the majority of the Board held that BC Rail, BCR Properties, and BCR Partnership should remain on the remediation order. The Board concluded that it was the clear intent of the Legislature to find landowner's responsible for the contamination of their land, even if some other person may have caused the contamination. The Board noted this to be expressly relevant when the landowner receives financial benefit from their property.

A minority of the Board held that BC Rail and BCR Properties should be removed from the remediation order, and that BCR Partnership should not have been named in the order.

The appeal was allowed, in part.

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**2002-WAS-007(a) Westcliff Management Ltd. and Morris Kowall v. Assistant Regional Waste Manager**

**Decision Date:** October 16, 2003

**Panel:** Alan Andison, Fred Henton, Phillip Wong  
Westcliff Management Ltd. and Morris Kowall appealed the decision of the Assistant Manager to issue a final determination stating that a property located at 1150 Lakeside Drive, Nelson is a contaminated site. The property had, under a permit, been used as a landfill.

The issues in this appeal were: whether the landfill constitutes “works” under the *Waste Management Act*; whether a landfill permitted under the *Act* can also be the subject of contaminated sites provisions; whether the terms of the waste permit become the “prescribed” standards for the purpose of assessing whether the property is a contaminated site; and whether the chemical contamination exceeds the “background concentration” in the *Contaminated Sites Regulation*.

The Board found that the property is “land”, and that it therefore falls under the definition of “contaminated site.” The Board also found that the permit authorizing the “works” in question was cancelled, which would preclude this property from being characterized as “works.” The Board noted that even if the property could also be characterized as “works,” it would not be exempt from categorization as a contaminated site. The Board held that activities arising from permits are not immune from categorization as contaminated sites.

The Board further held that the conditions of the permit were not “prescribed,” and, therefore, that the standards contained in the permit did not function similarly to a regulation. The Board found that, for the purposes of the *Act*, “prescribed” standards are those found in the *Contaminated Sites Regulation*, not those authorized by a permit.

Finally, the Board held that the definition of “background concentration” of a substance is limited to substances occurring naturally at the site. There was no evidence before the Board to show that the contaminants at the property occurred naturally. The Board rejected the Appellants’ argument that the property is not a contaminated site.

The appeal was dismissed.

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**2003-WAS-002(a) Beazer East, Inc. v. Assistant Regional Waste Manager (Atlantic Industries Limited and Michael Wilson, Canadian National Railway Company, North Fraser Port Authority and Province of British Columbia, Third Parties)**

**Decision Date:** February 5, 2004

**Panel:** Alan Andison

This is a decision on a preliminary issue relating to the Board’s jurisdiction over certain grounds of appeal.

Beazer East Inc. appealed an amended remediation order issued by the Assistant Manager that changed the identification of responsible

persons in the original order. The amended order used the word “persons” in place of the word “companies,” and required all responsible persons (Beazer, Michael Wilson, Atlantic Industries Ltd. and Canadian National Railway), to prepare a performance-monitoring program and post financial security for the replacement costs and operating and maintenance costs of the remediation work. Beazer appealed on a number of grounds, including whether the Assistant Manager erred in failing to name the Provincial Crown (the “Province”) and the North Fraser Port Authority (“NFPA”) as responsible persons.

The issues in this preliminary decision were: whether the Assistant Manager’s failure to name the Province and NFPA in the amended order was an appealable “decision” within the meaning of section 43 of the *Waste Management Act*; and, if so, whether the Board had the jurisdiction to add the Province and NFPA to the order.

The Board found that the failure to name, and the failure to consider naming, additional parties in the amended order was not an appealable “decision” within the meaning of section 43 of the Act. The Board held that the failure or refusal to amend an order to include new previously unnamed parties was not the “imposition of a requirement,” an “exercise of a power” or the “inclusion of a requirement or condition,” and was, therefore, not an appealable decision.

The Board noted that the issues of whether to name the Province or NFPA in the amended order were not before the Assistant Manager and were not addressed in the amended order. The Board found, therefore, that those issues cannot form the basis of an appeal of the amended order. The Board also noted that the issue of whether to include additional parties had already been addressed by the Director of Waste

Management, who had refused to add the parties on the basis that he was not convinced that it was necessary to ensure that the remediation objectives were achieved. Furthermore, the Director’s decision had been appealed and the Board dismissed that appeal on the basis that there was no appealable decision.

The Board found that it had no jurisdiction over these grounds of appeal or the remedy requested. Therefore, these grounds for appeal were dismissed. However, the Board found that appeal could proceed on the remaining grounds for appeal.

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**2003-WAS-003(b) Spike Investments Ltd. v. Assistant Regional Waste Manager (City of Burnaby and Telus Corporation, Third Parties)**

**Decision Date:** November 21, 2003

**Panel:** Alan Andison

The City of Burnaby, Telus Corporation, and the Assistant Regional Waste Manager applied for costs against Spike Investments Ltd. Spike had filed an appeal of a site investigation order, but withdrew its appeal the day before the appeal hearing was scheduled to begin. Spike decided to withdraw the appeal after receiving an expert opinion on a report that was prepared by one of the other parties’ experts.

The issue in these applications was whether the Board should order Spike to pay all or part of the other parties’ costs in connection with the appeal.

The Board found that Spike pursued the appeal in good faith, caused no unreasonable delays in the appeal process, and that the appeal was not frivolous and vexatious.

The applications were dismissed.



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2003-WAS-007(b) & 2003-WAS-016(a)

Imperial Oil Limited v. Regional Waste Manager (British Columbia Power and Hydro Authority, BC Rail Ltd., City of Quesnel and Shell Canada Products Limited, Third Parties)

**Decision Date:** February 6, 2004

**Panel:** Alan Andison

Imperial Oil Limited applied for an order to have its appeals conducted as appeals for reversible error on the record (“true appeals”), rather than a hearing *de novo*. It had filed separate appeals of a final determination of a contaminated site and a remediation order, both of which were issued by the Regional Manager. The Third Parties also filed appeals of the remediation order. The Board decided that it would hear all of the appeals together.

The issues in these applications were: whether the Board had the discretion to hear an appeal as a true appeal as opposed to a hearing *de novo*; if so, what were the relevant factors to be considered in the exercise of this discretion.

The Board held that the *Environment Management Act* and the *Waste Management Act* provide the Board with the discretion to hear an appeal as a true appeal, an appeal *de novo*, or a hybrid of the two. The Board found that the hybrid process was generally the most effective method for hearing the majority of appeals, but noted that it was not confined to one specific process.

The Board set out the factors to be considered in the exercise of this discretion and held that Imperial’s appeals should be heard as a new hearing using the hybrid process and that they should be joined with the other appeals.

The applications were denied.



## Water Act

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1991-WAT-028(a), 029(a), 030(a) & 1993-WAT-025(a) Tim and Galena Hadikin, Philip and May Kanigan and Marie Hadikin v. Deputy Comptroller of Water Rights (Charles L. and Bonnie L. Olsen, Don L. and Fernande M. Wilson, James E. Sutherland and Elsie Lazareff, Arthur S. Coburn and Bob and Bonnie Essuance, Third Parties)

**Decision Date:** May 30, 2003

**Panel:** Margaret Eriksson

Three 1991 water licencing decisions of the Deputy Comptroller were appealed to the Board.

At the appeal hearing, the Deputy Comptroller argued that the appeals were moot because the decisions under appeal had been revoked in 1993. The Board ruled that the 1991 appeals were moot.

The Board was then advised that the appeal of the 1993 decision was being abandoned as the parties had resolved any outstanding differences.

The Board dismissed all of the appeals.

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2002-WAT-011, 012, 013, 014 Willowbrook Community Society, Administrators for the Estate of Rudi Hochkirch, Bryan Boughton and Bonnie Hendra and Elroy and Nancy Pankratz v. Assistant Regional Water Manager (The Owners of Strata K-180, Third Party) (Willowbrook Utilities Ltd. and Geoffrey and Janet Neily, Participants)

**Decision Date:** April 9, 2003

**Panel:** Alan Andison

Four appeals were filed against the decision of the Assistant Manager to issue a conditional water licence to the owners of Strata K-180, allowing for

the diversion of 15 acre feet of water from Kitley Creek for storage and irrigation (golf course watering) near Oliver, BC. The Appellants claim that Kitley Creek contributes to Kearns Creek and argued that there is insufficient water available in Kearns Creek to meet the demands of licensees, wildlife and the community.

The Board found that Kitley Creek and Kearns Creek are separate and distinct water bodies for the purposes of the *Water Act*. The Board noted that the only connection between the two creeks is a man made ditch, which is properly characterized as “works” under the *Water Act*. Furthermore, the Board found that the licensees on Kearns Creek cannot have priority rights over those on Kitley Creek because the creeks are separate streams for the purposes of the *Water Act*.

In addition, the Board found that a water shortage in Kearns Creek in the summer of 2002 was the result of extremely dry conditions, and not from the licence holder’s use of water. Therefore, the licence was upheld.

The appeals were dismissed.

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[2002-WAT-016\(b\), 017\(b\), 018\(b\) and 2002-WAT-033\(b\) Thomas and Carolyn Baird v. Comptroller of Water Rights and Engineer under the Water Act \(David and Karen Peterson, Edward and Donna Salle, Winbury Mortgage Corp. and Upton Capital Corp., Third Parties\)](#)

**Decision Date:** November 10, 2003

**Panel:** Alan Andison

Thomas and Carolyn Baird appealed three orders issued by the Comptroller of Water Rights; two of the orders were for joint use of a dam and a reservoir on each of two lakes near Barriere, BC, and the other was for the appointment of Edward Salle as the water bailiff for the purpose of regulating the storage and use of water from the reservoirs of those

lakes. The Bairds also appealed an order of the Engineer issuing directions to Edward Salle in his capacity as water bailiff.

The issues in this case were: whether the Comptroller’s order for joint use allows the unlawful use by other licensees of the Bairds’ property; whether the other licensees have failed to diligently prosecute expropriation proceedings under the *Water Act*; whether the Comptroller’s orders for joint use of the dams and reservoirs should be reversed because they allow the works to be operated in a manner which damages the Bairds’ property; whether the order appointing Edward Salle as water bailiff was reasonable in the circumstances; and, whether the Engineer’s directions to the water bailiff are reasonable in the circumstances.

The Board found that the Comptroller’s orders do not permit the unlawful use of the Bairds’ property by other licensees and that there are Crown grants for the property that preserve the rights of licensees to access and use the land for purposes contemplated by their licences. The Board also found that the Third Parties have diligently prosecuted the expropriation proceedings as required under the *Water Act*. With regard to the water bailiff, the Board held that the Engineer is unable to regulate the diversion and use of water in person in this case, and that the order appointing Edward Salle as the water bailiff is reasonable in the circumstances. Furthermore, the Board held that the Engineer’s directions to Edward Salle were reasonable in the circumstances.

Accordingly, the orders and directions were upheld.

The appeals were dismissed.



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**2002-WAT-034(b) Wohlleben v. Assistant Regional Water Manager (Dan Lenko, Third Party)**

**Decision Date:** May 15, 2003

**Panel:** Cindy Derkaz

Bernard Wohlleben appealed an order issued by the Assistant Manager that cancelled a conditional water licence for the diversion, storage and use of water from Martin Brook, which flows into Degnen Bay on Gabriola Island, BC. This Licence was appurtenant to property owned by Mr. Wohlleben. The order also required Mr. Wohlleben to remove a dam constructed on the foreshore at the mouth of Martin Brook. Mr. Wohlleben requested that the Board reverse the order and reinstate the licence.

The Board found that the Assistant Manager had made an error of law in determining the “natural boundary,” and had failed to address whether the permit that authorized flooding should have been extended to cover the entire flooded foreshore. Taking into account the dam’s function in supplying fresh water to Mr. Wohlleben, as well as the Assistant Manager’s error of law, the Board reversed the order.

The appeal was allowed.

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**2002-WAT-038(a) Tom Redl v. Assistant Regional Water Manager (Merv and Shirley Furlong, Third Party)**

**Decision Date:** September 5, 2003

**Panel:** Cindy Derkaz

Tom Redl appealed the decision of the Assistant Manager refusing to issue him a water licence for irrigation purposes near 150 Mile House, BC.

The issues in this case were: whether the provincial government had entered into an agreement to provide Mr. Redl with the irrigation licence; whether the Assistant Manager erred in considering the minimum flow required for fish in the creek; whether there is sufficient flow from

April to June to support the licence in question; and whether the licence should be issued.

The Board concluded that there was no agreement to provide Mr. Redl with a water licence. The Board also held that it was appropriate for the Assistant Manager to consider regional policy regarding minimum fish flows when he evaluated Mr. Redl’s water licence application. The Board found that there would be, in most years, sufficient flow to support a water licence without adversely affecting prior rights or minimum fish flows. However, the Board found that there was no aboriginal interest assessment report completed for this licence application and it would be necessary to consider the impact of the licence on traditional aboriginal activities in the area. The Board referred the matter back to the Regional Manager, with directions to issue a licence to Mr. Redl provided that it would not unreasonably infringe on aboriginal interests.

The appeal was allowed, in part.

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**2002-WAT-039(a) Tom Redl v. Assistant Regional Water Manager (Merv and Shirley Furlong, Third Party)**

**Decision Date:** September 15, 2003

**Panel:** Cindy Derkaz

Tom Redl appealed various conditions of a water licence issued by the Assistant Manager authorizing diversion and storage of water for irrigation purposes.

The Board found that the Assistant Manager had the discretion to consider the impact of the water licence on fish habitat, and that he properly considered practices and procedures regarding minimum fish flows that came into effect after the licence application was submitted. The Board found, however, that some of the conditions of the licence were unreasonable: there was no need for conditions requiring the redesigning of a dam, the installation of

monitoring devices, and restricting water diversion based on flow minimums. The matter was referred back to the Regional Manager with directions to remove the provisions relating to flow minimums for fish and to redraw the plan attached to the licence to show District Lot lines.

The appeal was allowed, in part.

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**2003-WAT-006(a) David de Montreuil v. Assistant Regional Water Manager**

**Decision Date:** August 29, 2003

**Panel:** Alan Andison

David de Montreuil appealed an order issued by the Assistant Manager to cancel a licence for the diversion, storage, and use of water from a creek near Port Alberni, BC.

The Board determined that Mr. de Montreuil was making beneficial use of the water for a domestic purpose, as permitted by the licence, and, therefore, that the licence should not be cancelled due to lack of beneficial use. The Board also found that section 748 of the *Local Government Act* did not provide a basis for cancelling the licence. The Board found that Mr. de Montreuil should have been given notice of the cancellation before the order was issued, but held that the proceedings before the Board corrected any irregularities in notification. Finally, the Board found that, although there was evidence to show that Mr. de Montreuil was using the creek for fish conservation purposes not authorized by his licence, this did not negate Mr. de Montreuil's beneficial use of the water for domestic purposes, and therefore was not sufficient grounds to cancel a licence.

The order was reversed, and the licence was reinstated.

The appeal was allowed.

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**2003-WAT-009(a) John W. Zahradnik v. Assistant Regional Water Manager (Cook's Ferry Indian Band and Michael John Rice, Third Parties)(Markku and Julie Toijanen, Participants)**

**Decision Date:** February 27, 2004

**Panel:** Cindy Derkaz

John W. Zahradnik appealed the Assistant Manager's decision to refuse his application for a water licence authorizing the use of 21 acre feet of water for irrigation purposes on Twaal Creek near Spences Bridge, BC. Mr. Zahradnik sought an order to reverse the decision and another order to have a water bailiff appointed to manage Twaal Creek.

The Board found that Mr. Zahradnik failed to establish that the Assistant Manager had acted unfairly in reaching the decision to refuse the application.

The Board held that Mr. Zahradnik failed to prove, on a balance of probabilities, that there was a sufficient flow of water in Twaal Creek to support the issuance of a licence. Furthermore, the Board held that the engineer's report relied on by the Assistant Manager, and the visual estimates of water flow made by an experienced technician were compelling evidence that there was insufficient water flow in Twaal Creek to support the issuance of a licence.

The Board held that it did not have the jurisdiction in this appeal to appoint a water bailiff for Twaal Creek, because this was an appeal of a refusal of a licence under section 12 of the *Water Act*.

The appeal was dismissed.

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**2003-WAT-014 Urs Studer v. Engineer under the Water Act (Claude Sankey, Third Party)**

**Decision Date:** December 16, 2003

**Panel:** Cindy Derkaz

Urs Studer appealed an order by an Engineer under the *Water Act* that required him to remove a dam located on Honeyburn Creek near

Quesnel, BC. Mr. Studer requested that the Engineer's order be reversed.

The Board found that the dam on Honeyburn Creek was authorized by a conditional water licence, but found that, even if it was an authorized structure, an engineer has the power under section 39(1)(d) of the Act to order it removed.

On the facts of this case, the Board upheld the order and found that the dam should be removed.

The appeal was dismissed.



## Wildlife Act

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### 2001-WIL-016(e) Ignace Burke, Julie Michel, Lynn Michel v. Regional Wildlife Manager (Larry Burke, George Patrick Michel, Eddy Thomas and George Whitehead, Third Parties)

**Decision Date:** August 21, 2003

**Panel:** Cindy Derkaz

Ignace Burke, Julie Michel, and Lynn Michel appealed a decision of the Regional Manager to re-register a trapline near Fort Nelson, BC. The re-registration listed a number of people not included on the previous registration, listed 4 "Family Groups" and their "Head Persons," and included a map which indicated sub-boundaries of the trapline, by Family Group. The Appellants sought an order reversing the re-registration and restoring the original registration, and a direction from the Board to the Oil and Gas Commission identifying Ignace Burke as a primary contact person for the trapline.

The Board found that the Regional Manager had the statutory authority to add individuals to the trapline and re-register it, but did not have the authority to divide the trapline into

sub-boundaries and allocate those sub-boundaries amongst the Family Groups. Therefore, the Board found that the map attached to the registration had no legal effect. The Board also determined that the Regional Manager failed to provide the Appellants with sufficient notice of the hearing he conducted prior to making his decision, and failed to give the Appellants a proper opportunity to be heard.

Therefore, the Regional Manager breached some of the principles of procedural fairness. Furthermore, the Board found that the changes made to the list of registered holders were based on erroneous information, and could not be upheld. With regard to the naming of "Head Persons" as contact persons for the trapline, the Board found that the Regional Manager erroneously concluded that the families had reached an agreement to identify the Head Persons as contact persons. The Board concluded that each person registered on the trapline is entitled to notice of any resource developments that may affect the trapline. However, the Board noted that the registered trapline holders may agree amongst themselves to designate a few persons as contacts.

The Board reversed the decision of the Regional Manager, and restored the previous registration of the trapline.

The appeal was allowed.

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### 2002-WIL-011(a), 011(b), 011(c), 011(d) Carmen Nyuli v. Regional Manager (Thomas Fox and Fox Lake Outfitters Ltd., Third Parties)

**Decision Date:** June 6, 2003

**Panel:** Lorraine Shore

Carmen Nyuli appealed the decision of the Regional Manager that made him ineligible to obtain or hold a guide outfitter licence or assistant guide licence for a specified period of time, as well as suspended his guide outfitter certificate for a specified time, and placed restrictions on the

transferring of that certificate. He also argued that the Regional Manager did not possess the jurisdiction under section 61 of the *Wildlife Act* to order periods of ineligibility for guide outfitter licences and assistant guide outfitter licences. He wanted the parts of the decision dealing with ineligibility to be rescinded, and stated that if they were, he would withdraw his appeal.

After hearing this preliminary issue of jurisdiction the Board concluded that the Regional Manager had jurisdiction to impose the periods of ineligibility.

Mr. Nyuli's application was denied.

In a subsequent application, the Third Parties asked the Panel whether they could take the place of Mr. Nyuli in Mr. Nyuli's appeal should Mr. Nyuli withdraw the appeal. Mr. Nyuli did withdraw his appeal. The Board found that it did not have the jurisdiction to substitute the Third Parties as appellants.

The Board denied the Third Parties' application to become the appellant.

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### 2003-WIL-005(a) *Kim Robinson v. Deputy Director of Wildlife*

**Decision Date:** April 11, 2003

**Panel:** Alan Andison

Kim Robinson requested a stay of the decision of the Deputy Director to cancel his hunting licensing privileges for seven years for being in possession of bear gall bladders. Mr. Robinson's sole purpose for applying for the stay was to pursue live wildlife as a means of training his hunting dogs, which would be sold in order to generate family income.

The Board concluded that the balance of convenience favoured granting a stay for the sole purpose of allowing Mr. Robinson to train his dogs during the current bear-hunting season.

The application for a stay was granted, in part.

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### 2003-WIL-005(b) *Kim Robinson v. Deputy Director of Wildlife*

**Decision Date:** October 6, 2003

**Panel:** Don Cummings

Kim Robinson appealed the decision of the Deputy Director to cancel his hunting licence for a period of seven years for being in possession of bear gall bladders. Mr. Robinson appealed on the basis that the length of the cancellation was excessive.

The Board found that a seven-year penalty was excessive in comparison with similar decisions previously issued by the Deputy Director. Accordingly, the Board reduced the cancellation period to four and one-half years.

The appeal was allowed.

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### 2003-WIL-024(a) *Robert Milligan v. Regional Manager*

**Decision Date:** August 21, 2003

**Panel:** Lorraine Shore

Robert Milligan appealed the decision of the Regional Manager to allocate to him a quota of four grizzly bears for his 2003 guide outfitter licence. He sought an increase in his quota of one additional grizzly bear. In the alternative, he asked that the two grizzly bears available annually in the area be shared equally between himself and the other two guides whose territories cover one management unit, over a three-year period.

The Board found that the evidence did not support granting an increase in Mr. Milligan's grizzly bear quota. The Board rejected Mr. Milligan's allegations of bias on the part of the Ministry of Water, Land, and Air Protection. The Board also concluded that the Ministry had correctly followed the standard method of estimating the grizzly bear population and determining the quota, and that it should not be increased.

The Board further concluded that the grizzly bear quota should continue to be set annually

and should be based on the size of a guide's territory. The Board held that to divide the grizzly bear quota between the guides in the area over a three-year period would be contrary to the Ministry's decision to allocate quotas on a one-year basis, pending the results of a scientific study on grizzly bear populations. The Board also rejected Mr. Milligan's claim that, because Mr. Milligan did not guide for a number of years, the other two guides in the management unit received a benefit.

The appeal was dismissed.

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### 2003-WIL-031 *Larry Hall v. Regional Manager*

**Decision Date:** December 9, 2003

**Panel:** Alan Andison

Larry Hall appealed the decision of the Regional Manager to refuse to issue a disabled hunter special access permit to him. Mr. Hall sought the permit so that he could use a motor vehicle to hunt on roads that are closed to vehicles or are closed to vehicles for the purpose of hunting. The application for the permit was denied on the grounds that Mr. Hall's disability did not meet the level of disability required in the Ministry's Procedure Manual.

The Board found that the Regional Manager erred in applying a policy that neither takes into account the type of hunting Mr. Hall wished to participate in, nor considered the type of disability that he experiences. The Board also found that the Regional Manager has the authority to issue the type of permit that Mr. Hall sought, but failed to consider whether the Ministry could provide reasonable accommodation for his particular disability, without unduly sacrificing the Ministry's objectives in establishing road closures. With regard to a remedy, the Board was unable to properly determine whether issuing a permit to Mr. Hall would adversely affect the Ministry's valid objectives in establishing road closures. The Board referred the

matter back to the Regional Manager with directions to reconsider Mr. Hall's application based on all of the relevant considerations.

The appeal was allowed.

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### 2003-WIL-032(a) *Robert Gordon v. Regional Manager*

**Decision Date:** January 7, 2004

**Panel:** Alan Andison

Robert Gordon appealed the decision of the Regional Manager to amend his approved angling guide operating plan. The amendment was in response to a provincially declared moratorium on fishing in certain rivers, three of which were listed in Mr. Gordon's operating plan.

The Board found that the Regional Manager had no authority to amend the approved plan. The plan itself does not allow the use of provincial waters named in the plan, and is simply a precondition to obtaining a licence. To achieve the goal of prohibiting the use of certain rivers, the Regional Manager must amend Mr. Gordon's angling guide licence to indicate that it does not include the bodies of water mentioned in the moratorium. Accordingly, the Board found that the approved plan remained in effect and rescinded the amendment to the plan.

The appeal was allowed.



# Summaries of Court Decisions Related to the Board



## *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)*

**Decision Date:** July 29, 2003

**Court:** B.C.C.A., Madam Justice Rowles,  
Madam Justice Prowse, Madam Justice  
Newbury

**Cite:** 2003 BCCA 436

In an appeal of a decision by a manager under the *Waste Management Act* (the “Act”), the Board found that British Columbia Hydro and Power Authority (“BC Hydro”) could, due to the conduct of one of its predecessor companies, be named in a remediation order under the Act. The Board’s decision was upheld by the British Columbia Supreme Court. BC Hydro appealed to the British Columbia Court of Appeal.

The central issue in the appeal was whether BC Hydro could be made subject to a remediation order under the Act by reason of the conduct of B.C. Electric from 1920–1957, which resulted in a contaminated site. BC Hydro was created out of the amalgamation of B.C. Electric and two other companies under a special Act that permitted them to amalgamate “in any manner.” Under the Amalgamation Agreement, which was appended to the *Power Measures Act, 1966*, BC Hydro was to be liable for the obligations and liability of predecessor corporations “immediately

before amalgamation.” Following the amalgamation, an Order in Council “recommended” that B.C. Electric “be declared to be dissolved.” The question in the appeal was whether BC Hydro inherited the responsibility under the Act for B.C. Electric’s actions.

The majority of the Court (Newbury and Prowse JJ.A.) held that under the unusual terms of the amalgamation, and following the plain and ordinary meaning of the Amalgamation Agreement, BC Hydro had assumed only those liabilities of B.C. Electric that were liabilities immediately before the amalgamation. The majority also held that the Act operates retrospectively, not retroactively. Therefore, B.C. Electric had not been liable “immediately before the amalgamation” and BC Hydro could not be said to be a “responsible person” for purposes of the Act by virtue of B.C. Electric’s activities between 1920 and 1957.

The dissenting judge (Rowles J.A.) found that, by virtue of the amalgamation, and on an application of *R. v. Black and Decker Manufacturing Co.*, [1975] 1 S.C.R. 411, B.C. Electric’s liabilities “flowed through” to BC Hydro, and that the words “immediately before the amalgamation” were not “words of limitation.” Rowles J.A. did not address the question of retroactive versus retrospective operation of the Act.

Leave to appeal to the Supreme Court of Canada granted on March 26, 2004.



*Wier v. Environmental Appeal Board  
and Minister of Forests of the Province  
of British Columbia*

**Decision Date:** September 24, 2003

**Court:** B.C.S.C., Madam Justice Ross

**Cite:** 2003 BCSC 1441

Josette Wier applied for a judicial review of a decision by the Board upholding a decision by the Deputy Administrator to issue a permit for the use of the pesticide monosodium methane arsenate (“MSMA”) to control beetle infestations in trees.

At the judicial review, the B.C. Supreme Court considered whether the Board erred in its application of the two-step test set out in *Canadian Earthcare Society v. British Columbia (Environmental Appeal Board)* (1987), 2 C.E.L.R. (NS) 254, [1987] B.C.J. No. 1747, (“*Earthcare*”), by improperly limiting its considerations to only that evidence related to site-specific concerns, and by failing to undertake the appropriate analysis before concluding that the permitted pesticide use would cause no unreasonable adverse effects.

Before addressing those issues, the Court determined that the applicable standard of review was “correctness,” because the questions concerned the Board’s interpretation of the law.

The Court determined that the Board had found that the permitted use of MSMA posed “some risk” of adverse effects. However, the Board failed to then consider the evidence of two of the Appellant’s witnesses concerning alternative, non-pesticide methods of beetle control. In failing to consider the evidence of alternative beetle control methods, the Board failed to apply the second step of the *Earthcare* test.

Accordingly, the Court remitted the matter back to the Board to reconsider the question of unreasonable adverse effects, taking into consideration the evidence of viable alternatives disclosed by the evidence.



# Summaries of Cabinet Decisions Related to the Board

There were no orders by Cabinet during this report period concerning decisions by the Board.



APPENDIX I  
**Legislation and Regulations**

Reproduced below are relevant provisions from the *Environment Management Act*, the *Environmental Appeal Board Procedure Regulation*, and each of the statutes from which the Board hears appeals, which were in force on March 31, 2003.



## **Environment Management Act**

### **Environmental Appeal Board**

- 11 (1) The Lieutenant Governor in Council must establish an Environmental Appeal Board to hear appeals that under the provisions of any other enactment are to be heard by the board.
- (2) In relation to an appeal under another enactment the board has the powers given to it by that other enactment.
- (3) The board consists of a chair, one or more vice chairs and other members the Lieutenant Governor in Council appoints.
- (4) The Lieutenant Governor in Council may
  - (a) appoint persons as temporary members to deal with a matter before the board, or for a period or during circumstances the Lieutenant Governor in Council specifies, and
  - (b) designate a temporary member to act as chair or as a vice chair.
- (5) A temporary member has, during the period or under the circumstances or for the purpose for which the person is appointed as a temporary member, all the powers of and may perform all the duties of a member of the board.
- (6) The Lieutenant Governor in Council may determine the remuneration and expenses payable to the members of the board.
- (7) The chair may organize the board into panels, each comprised of one or more members.
- (8) The members of the board are to sit
  - (a) as a board, or
  - (b) as a panel of the board.
- (9) If members sit as a panel,
  - (a) 2 or more panels may sit at the same time,
  - (b) the panel has all the jurisdiction of and may exercise and perform the powers and duties of the board, and
  - (c) an order, decision or action of the panel is an order, decision or action of the board.
- (10) The number of members that constitute a quorum of the board or a panel may be set by regulation of the Lieutenant Governor in Council.

- (11) The board, a panel and each member have all the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.
- (12) In an appeal, the board or a panel
- (a) may hear any person, including a person the board or a panel invites to appear before it, and
  - (b) on request of
    - (i) the person,
    - (ii) a member of the body, or
    - (iii) a representative of the person or body,
 whose decision is the subject of the appeal or review, must give that person or body full party status.
- (13) A person or body that is given full party status under subsection (12) may
- (a) be represented by counsel,
  - (b) present evidence,
  - (c) where there is an oral hearing, ask questions, and
  - (d) make submissions as to facts, law and jurisdiction.
- (14) A person who gives oral evidence may be questioned by the board, a panel or the parties to the appeal.
- (14.1) The appeal board may require the appellant to deposit with it an amount of money it considers sufficient to cover all or part of the anticipated costs of the respondent and the anticipated expenses of the appeal board in connection with the appeal.
- (14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:
- (a) requiring a party to pay all or part of the costs of another party in

- connection with the appeal, as determined by the appeal board;
  - (b) if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal.
- (14.3) An order under subsection (14.2) may include directions respecting the disposition of money deposited under subsection (14.1).
- (14.4) If a person or body given full party status under subsection (12) is an agent or representative of the government,
- (a) an order under subsection (14.2) must not be made for or against the person or body, and
  - (b) an order under subsection (14.2)(a) may instead be made for or against the government.
- (14.5) The costs required to be paid by the government under an order under subsection (14.4)(b) must be paid out of the consolidated revenue fund.
- (15) If the board or a panel makes an order or decision with respect to an appeal the chair must send a copy of the order or decision to the minister and to the parties.

## Varying and rescinding orders of board

- 12 The Lieutenant Governor in Council may, in the public interest, vary or rescind an order or decision of the board.



# Environmental Appeal Board Procedure Regulation

## Interpretation

- 1 In this regulation  
“**Act**” means the *Environment Management Act*;  
“**board**” means the Environmental Appeal Board established under the Act;  
“**chairman**” means the chairman of the board;  
“**minister**” means the minister responsible for administering the Act under which the appeal arises;  
“**objector**” in relation to an appeal to the board means a person who, under an express provision in another enactment, had the status of an objector in the matter from which the appeal is taken.

## Application

- 2 This regulation applies to all appeals to the board.

## Appeal practice and procedure

- 3 (1) Every appeal to the board shall be taken within the time allowed by the enactment that authorizes the appeal.  
(2) Unless otherwise directed under the enactment that authorizes the appeal, an appellant shall give notice of the appeal by mailing a notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.  
(3) A notice of appeal shall contain the name and address of the appellant, the name of counsel or agent, if any, for the appellant, the address for service upon the appellant,

grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested.

- (4) The notice of appeal shall be signed by the appellant, or on his behalf by his counsel or agent, for each action, decision or order appealed against and the notice shall be accompanied by a fee of \$25, payable to the Minister of Finance and Corporate Relations.
- (5) Where a notice of appeal does not conform to subsections (3) and (4), the chairman may by mail or another method of delivery return the notice of appeal to the appellant together with written notice
  - (a) stating the deficiencies and requiring them to be corrected, and
  - (b) informing the appellant that under this section the board shall not be obliged to proceed with the appeal until a notice or amended notice of appeal, with the deficiencies corrected, is submitted to the chairman.
- (6) Where a notice of appeal is returned under subsection (5) the board shall not be obliged to proceed with the appeal until the chairman receives an amended notice of appeal with the deficiencies corrected.

## Procedure following receipt of notice of appeal

- 4 (1) On receipt of a notice of appeal, or, in a case where a notice of appeal is returned under section 3(5), on receipt of an amended notice of appeal with the deficiencies corrected, the chairman shall immediately acknowledge receipt by mailing or otherwise delivering an

acknowledgement of receipt together with a copy of the notice of appeal or of the amended notice of appeal, as the case may be, to the appellant, the minister's office, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

- (2) The chairman shall within 60 days of receipt of the notice of appeal or of the amended notice of appeal, as the case may be, determine whether the appeal is to be decided by members of the board sitting as a board or by members of the board sitting as a panel of the board and the chairman shall determine whether the board or the panel, as the case may be, will decide the appeal on the basis of a full hearing or from written submissions.
- (3) Where the chairman determines that the appeal is to be decided by a panel of the board, he shall, within the time limited in subsection (2), designate the panel members and,
  - (a) if he is on the panel, he shall be its chairman,
  - (b) if he is not on the panel but a vice chairman of the board is, the vice chairman shall be its chairman, or
  - (c) if neither the chairman nor a vice chairman of the board is on the panel, the chairman shall designate one of the panel members to be the panel chairman.
- (4) Within the time limited in subsection (2) the chairman shall, where he has determined that a full hearing shall be held, set the date, time and location of the hearing of the appeal and he shall notify the appellant, the minister's office,

the Minister of Health if the appeal relates to a matter under the Health Act, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(5) Repealed. [B.C. Reg. 118/87, s.2.]

## Quorum

- 5 (1) Where the members of the board sit as a board, 3 members, one of whom must be the chairman or vice chairman, constitute a quorum.
- (2) Where members of the board sit as a panel of one, 3 or 5 members, then the panel chairman constitutes a quorum for the panel of one, the panel chairman plus one other member constitutes the quorum for a panel of 3 and the panel chairman plus 2 other members constitutes the quorum for a panel of 5.

## Order or decision of the board or a panel

- 6 Where the board or a panel makes an order or decision with respect to an appeal, written reasons shall be given for the order or decision and the chairman shall, as soon as practical, send a copy of the order or decision accompanied by the written reasons to the minister and the parties.

## Written briefs

- 7 Where the chairman has decided that a full hearing shall be held, the chairman in an appeal before the board, or the panel chairman in an appeal before a panel, may require the parties to submit written briefs in addition to giving oral evidence.

## Public hearings

- 8 Hearings before the board or a panel of the board shall be open to the public.

## Recording the proceedings

- 9 (1) Where a full hearing is held, the proceedings before the board or a panel of the board shall be taken using shorthand or a recorder, by a stenographer appointed by the chairman, for a hearing before the board, or by the panel chairman, for a hearing before the panel.
- (2) Before acting, a stenographer who takes the proceedings before the board or a panel shall make oath that he shall truly and faithfully report the evidence.
- (3) Where proceedings are taken as provided in this section by a stenographer so sworn, then it is not necessary that the evidence be read over to, or be signed by, the witness, but it is sufficient that the transcript of the proceedings be
- (a) signed by the chairman or a member of the board, in the case of a hearing before the board, or by the panel chairman or a member of the panel, in the case of a hearing before the panel, and
- (b) be accompanied by an affidavit of the stenographer that the transcript is a true report of the evidence.

## Transcripts

- 10 On application to the chairman or panel chairman, as the case may be, a transcript of the proceedings, if any, before the board or the panel of the board shall be prepared at the cost of the person requesting it or, where there is

more than one applicant for the transcript, by all of the applicants on a pro rata basis.

## Representation before the board

- 11 Parties appearing before the board or a panel of the board may represent themselves personally or be represented by counsel or agent.



## Health Act

### Power to make regulations

- 8 (2) In addition to the matters set out in subsection (1), the Lieutenant Governor in Council may make regulations with respect to the following matters:

...

- (m) the inspection, regulation and control, for the purposes of health protection provided in this Act, of

...

- (ii) the location, design, installation, construction, operation and maintenance of

...

- (C) sewage disposal systems,

...

and requiring a permit for them and requiring compliance with the conditions of the permit and authorizing inspections for that purpose;

...

- (4) If a person is aggrieved by the issue or the refusal of a permit for a sewage disposal system under a regulation made under subsection (2)(m), the person may appeal that ruling to the Environmental Appeal Board established under section 11 of the

*Environment Management Act* within 30 days of the ruling.

- (5) On hearing an appeal under subsection (4), the Environmental Appeal Board may confirm, vary or rescind the ruling under appeal.



## Pesticide Control Act

### Appeals to Environmental Appeal Board

- 15 (1) For the purpose of this section, “**decision**” means an action, decision or order.
- (2) Any person may appeal a decision of the administrator under this Act, or of any other person under this Act, to the appeal board.
- (3) The time limit for commencing an appeal is the time limit prescribed by regulation.
- (4) An appeal under this section
  - (a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environment Management Act*, and
  - (b) subject to this Act, must be conducted in accordance with the *Environment Management Act* and the regulations under that Act.
- (5) For the purposes of an appeal under this section, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on
  - (a) the 14th day after the notice was deposited with Canada Post, or

- (b) the date on which the notice was actually received by the person, whether by mail or otherwise, whichever is earlier.

- (6) The appeal board may conduct an appeal by way of a new hearing.
- (7) On an appeal, the appeal 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.
- (8) An appeal does not act as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.



## Pesticide Control Act Regulation

### Appeals

- 45 (1) A person who intends to appeal to the board against the action, decision or order of the administrator or of any other person under the Act shall file the appeal in the manner required by subsection (2) within 30 days from the date of the action, decision or order against which the appeal is taken.
- (2) The appellant shall file the appeal by mailing notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.

- (3) A notice of appeal shall contain the name and address of the appellant, the name of counsel or agent, if any, for the appellant, the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested, and shall be signed by the appellant or on his behalf by his counsel or agent.
- (4) Where a notice of appeal does not conform to subsection (3), the chairman may by mail or another method of delivery return the notice of appeal to the appellant together with written notice
  - (a) stating the deficiencies and requiring them to be corrected, and
  - (b) informing the appellant that under this section the board shall not be obliged to proceed with the appeal until a notice or amended notice of appeal, with the deficiencies corrected, is submitted to the chairman.
- (5) Where a notice of appeal is returned under subsection (4) the board shall not be obliged to proceed with the appeal until the chairman receives an amended notice of appeal with the deficiencies corrected.
- (6) **Repealed.** [B.C. Reg. 132/82.]
- (7) The procedures on the appeal shall be those set out in the Environmental Appeal Board Procedure Regulation.



## Waste Management Act

### Definition of “decision”

- 43 For the purpose of this Part, “decision” means
- (a) the making of an order,
  - (b) the imposition of a requirement,
  - (c) an exercise of a power,
  - (d) the issue, amendment, renewal, suspension, refusal or cancellation of a permit, approval or operational certificate, and
  - (e) the inclusion in any order, permit, approval or operational certificate of any requirement or condition.

### Appeals to Environmental Appeal Board

- 44 (1) Subject to this Part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.
- (2) Nothing in this section is to be construed as applying in respect of a decision made by the minister under this Act or by the Lieutenant Governor in Council.

### Time limit for commencing appeal

- 45 The time limit for commencing an appeal is 30 days after notice of the decision being appealed is given
- (a) to the person subject to the decision, or
  - (b) in accordance with the regulations.

### Procedure on appeals

- 46 (1) An appeal under this Part
- (a) must be commenced by notice of appeal in accordance with the

- practice, procedure and forms prescribed by regulation under the *Environment Management Act*, and
- (b) subject to this Act, must be conducted in accordance with the *Environment Management Act* and the regulations under that Act.
- (2) The appeal board may conduct an appeal by way of a new hearing.

### Powers of appeal board in deciding appeal

- 47 On an appeal, the appeal board may
- (a) send the matter back to the person who made the decision, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

### Appeal does not operate as stay

- 48 An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.



## Water Act

### Appeals to Environmental Appeal Board

- 40 (1) An order of the comptroller, the regional water manager or an engineer may be appealed to the Environmental Appeal

Board established under the *Environment Management Act* by

- (a) the person who is subject to the order,
- (b) an owner whose land is or is likely to be physically affected by the order, or
- (c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.
- (2) The time limit for commencing an appeal is 30 days after notice of the order being appealed is given
- (a) to the person subject to the order, or
- (b) in accordance with the regulations.
- (3) For the purposes of an appeal, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on
- (a) the 14th day after the notice was deposited with Canada Post, or
- (b) the date on which the notice was actually received by the person, whether by mail or otherwise, whichever is earlier.
- (4) An appeal under this section
- (a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environment Management Act*, and
- (b) subject to this Act, must be conducted in accordance with the *Environment Management Act* and the regulations under that Act.
- (5) The appeal board may conduct an appeal by way of a new hearing.



- (6) On an appeal, the appeal board may
  - (a) send the matter back to the comptroller, regional water manager or engineer, with directions,
  - (b) confirm, reverse or vary the order being appealed, or
  - (c) make any order that the person whose order is appealed could have made, and that the board considers appropriate in the circumstances.
- (7) An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.



## Wildlife Act

### Appeals to Environmental Appeal Board

- 101.1** (1) The affected person referred to in section 101(2) may appeal the decision to the Environmental Appeal Board established under the *Environment Management Act*.
- (2) The time limit for commencing an appeal is 30 days after notice is given
- (a) to the affected person under section 101(2), or
  - (b) in accordance with the regulations.
- (3) An appeal under this section
- (a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environment Management Act*, and

- (b) subject to this Act, must be conducted in accordance with the *Environment Management Act* and the regulations under that Act.
- (4) The appeal board may conduct an appeal by way of a new hearing.
- (5) On an appeal, the appeal board may
  - (a) send the matter back to the regional manager or director, 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.
- (6) An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

