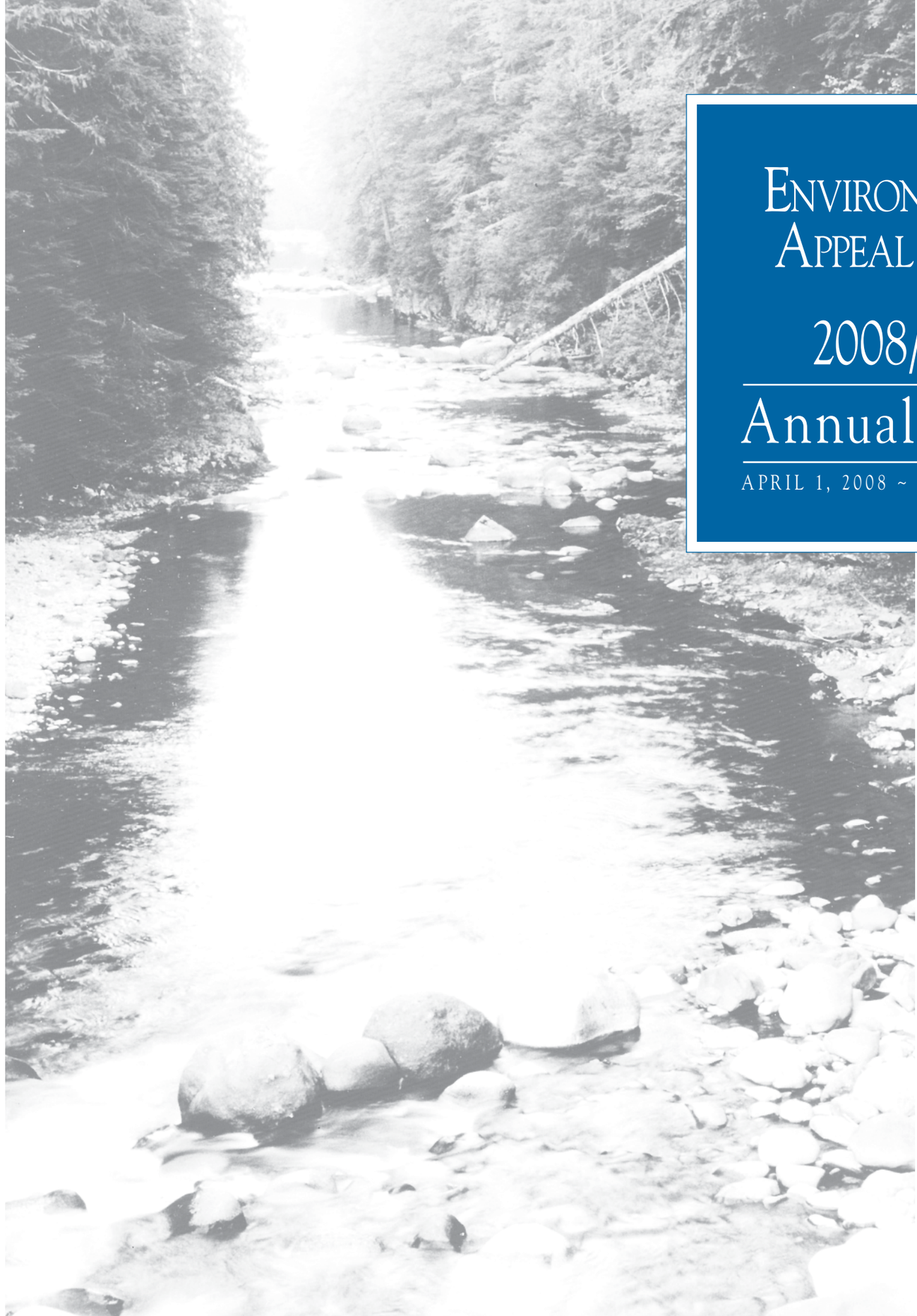

Environmental Appeal Board

2008/2009 Annual Report

APRIL 1, 2008 ~ MARCH 31, 2009

BRITISH COLUMBIA
The Best Place on Earth

QP 4500212842

BRITISH COLUMBIA
The Best Place on Earth

Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria, British Columbia
Telephone: (604) 387-3464
Facsimile: (604) 356-9923

Mailing Address:
P.O. Box 9425
Stn Prov Govt
Victoria, British Columbia
V8W 9V1

Honourable Barry Penner
Minister of Environment
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Honourable Ida Chong
Minister of Healthy Living and Sport
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2008 through March 31, 2009.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

Eco Audit

The savings below are achieved when post consumer recycled fiber is used in place of virgin fiber. The 2008/2009 Environmental Appeal Board Annual Report uses 554 lbs of paper which contains 100% post consumer recycled fiber.

- **5.32** trees preserved for the future
- **2,259** gallons wastewater flow saved
- **3,767,200** BTUs energy not consumed
- **492** lbs net greenhouse gases prevented
- **250** lbs solid waste not generated

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Message from the Chair

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

The year in review

a) Increase in Appeals Filed

This year, the Board saw a 50 percent increase in the new appeals filed over the previous reporting period. There were 60 new appeals filed this report period, compared with 40 new appeals filed in the 2007/2008 report period.

b) Improving the Board's Website

The Board has made some changes to its website this year in an effort to include more useful information, and to make the website easier to use. One of our continuing projects is to improve the search mechanism for the Board's decisions to facilitate more precise searches.

We have also been working to improve access to older decisions made by the Board. The Board's website lists its decisions from 1989 to present. A summary of the Board's decisions dating back to 1989 has been accessible on the website, but the full text of the decisions has not been available electronically.

To improve the public's access to all of the Board's decisions, we have been scanning the archived decisions and placing the full text on the Board's website. We anticipate that all of the Board's decisions since 1989 will be on the website by early 2010.

c) Legislative Changes

Effective March 31, 2009, the *Health Act* was amended to remove the right of appeal to the Board from decisions made under the *Sewerage System Regulation*. As a result of previous amendments, the public's right to appeal issues related to domestic sewage systems had almost been eliminated. The March 2009 amendment removed any remaining rights of appeal.

d) Changes in the Office

The Board's office shares its staff and its office space with the Forest Appeals Commission, the Community Care and Assisted Living Appeal Board, the Hospital Appeal Board and the Industry Training Appeal Board. This model of one office providing administrative support for a number of tribunals has been very successful. It gives each tribunal greater access to resources while, at the same time, reducing administrative and operating costs and allowing the tribunals to operate independently of one another.

The success of this model led to the government asking for the Board's assistance in setting up a new tribunal, the Health Professions Review Board. The Review Board conducts reviews from affected persons in relation to decisions made by any of the 20 Colleges in BC, established for different health related occupations that are designated under the *Health Professions Act*.

Setting up this tribunal was a significant undertaking for this office. I am pleased to advise that in March of 2009, the Review Board opened its doors and began accepting applications for review. The Review Board is located in the same building as the Board and shares some administrative resources with the Board. I would like to thank all of the Board's staff for their tireless efforts in getting this new tribunal up and running by the targeted dates.

e) Changes to the Composition of the Board

The Board's roster of members remained stable this report period with one exception. On March 26, 2009, Dr. Katherine Lewis completed her final term with the Board. Dr. Lewis was originally appointed to the Board in 2002 and has been a valuable member of the Board. Dr. Lewis will be continuing her work as the Chair of the Ecosystem Science and Management Program at the University of Northern BC. I wish her well in her future endeavours.

I am very fortunate to have on the Board a large number of highly qualified individuals to deal with the various subjects that are heard by the Board. The current membership includes professional biologists, agrologists, engineers, foresters, and lawyers with expertise in the areas of natural resources and administrative law, who are appointed as part-time members. These people bring with them the necessary expertise to hear cases involving issues ranging from contaminated sites to grizzly bear quotas.

Finally, I would like to take this opportunity to thank all of the existing Board members, as well as the Board staff, for their hard work and dedication over the past year and for their continuing commitment to the work of the Board.

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 from April 1, 2008 to March 31, 2009.

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, a selection of summaries of the decisions issued by the Board during the report period is 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 Board's website, and at the following libraries:

- Ministry of Environment Library
- University of British Columbia Law Library
- University of Victoria Law Library
- British Columbia Courthouse Library Society
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Database.

Detailed information on the Board's policies and procedures can be found in the Environmental Appeal Board Procedure Manual, which may be obtained from the Board office or viewed on the Board's website. If you have any questions or would like additional copies of this report, please contact the Board office. The Board can be reached at:

Environmental Appeal Board
Fourth Floor, 747 Fort Street
Victoria, British Columbia
V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Website Address:
www.eab.gov.bc.ca

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria, British Columbia
V8W 9V1

The Board

The Environmental Appeal Board is an independent, quasi-judicial tribunal established on January 1, 1982 under the *Environment Management Act*, and continued under section 93 of the *Environmental Management Act*. Being an adjudicative body, the Board operates at arms-length from the government to maintain the necessary degree of independence and impartiality. This is important because it hears appeals from administrative decisions made by government officials under a number of statutes.

For the most part, the decisions that can be appealed to the Board are made by Ministry of Environment officials under four statutes administered by that Ministry: the *Environmental Management Act*, the *Integrated Pest Management Act*, the *Wildlife Act* and the *Water Act*. During the report period, the Board could also hear appeals from the issuance or refusal of sewage disposal system permits. These appeals were authorized under the *Health Act*, administered by the Ministry of Healthy Living and Sport.

The Board makes decisions regarding the legal rights and responsibilities of parties that appear before it and decides whether the decision under appeal was made in accordance with the law. Like a court, the Board must decide its appeals by weighing the evidence before it, making findings of fact, interpreting the legislation and common law and applying the law and legislation to the facts.

In carrying out its functions, the Board has the powers granted to it under the above-mentioned statutes, as well as additional powers provided under the *Administrative Tribunals Act*, including the ability to compel persons or evidence to be brought before the Board. The Board also ensures that its processes comply with the common law principles of natural justice.

Appointments to the Board and the administration of the Board are governed by the *Administrative Tribunals Appointment and Administration Act*.

Board Membership

Board members are appointed by the Lieutenant Governor in Council (Cabinet) under section 93(3) of the *Environmental Management Act*. The members appointed to the Board are highly qualified individuals, including professional biologists, professional foresters, professional engineers and lawyers with expertise in the areas of natural resources and administrative law. These members apply their respective technical expertise and adjudication skills to hear and decide appeals in a fair, impartial and efficient manner.

The members are drawn from across the Province. Board membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members. The length of the initial appointments and any reappointments of Board members, including the chair, are set out in the

Administrative Tribunals Appointment and Administration Act, as are other matters relating to the appointees. This Act also sets out the responsibilities of the chair.

The Board members during this reporting period were as follows:

The Board	Profession	From
Chair		
Alan Andison	Lawyer	Victoria
Vice-chair		
Robert Wickett	Lawyer	Vancouver
Members		
Sean Brophy	Professional Engineer	North Vancouver
Robert Cameron	Professional Engineer	North Vancouver
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Bruce Devitt	Professional Forester (Retired)	Esquimalt
Margaret Eriksson	Lawyer	New Westminster
Bob Gerath	Engineering Geologist	North Vancouver
R.A. (Al) Gorley	Professional Forester	Victoria
Les Gyug	Professional Biologist	Westbank
James Hackett	Professional Forester	Nanaimo
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Lynne Huestis	Lawyer	North Vancouver
Gabriella Lang	Lawyer	Campbell River
Katherine Lewis (to March 26, 2009)	Professional Forester	Prince George
Ken Long	Professional Agrologist	Prince George
Paul Love	Lawyer	Campbell River
David Ormerod	Professional Forester	Victoria
Gary Robinson	Resource Economist	Victoria
David H. Searle, C.M., Q.C.	Lawyer (Retired)	North Saanich
David Thomas	Oceanographer	Victoria
Stephen V.H. Willett	Professional Forester (Retired)	Victoria
Phillip Wong	Professional Engineer	Vancouver
J.A. (Alex) Wood	Professional Engineer	North Vancouver

Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the rights and interests of people. It applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. This law has developed to ensure that officials make their decisions in accordance with the principles of procedural fairness/natural justice by following proper procedures and acting within their jurisdiction.

The Board is governed by the principles of administrative law and, as such, must treat all parties involved in a hearing before the Board fairly, giving each party a chance to explain its position.

Appeals to the Board are decided on a case-by-case basis. Unlike a court, the Board is not bound by its previous decisions; present cases of the Board do not necessarily have to be decided in the same way that previous ones were.

The Board Office

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

The Board shares its staff and its office space with the Forest Appeals Commission, the Community Care and Assisted Living Appeal Board, the Hospital Appeal Board, the Industry Training Appeal Board and the Health Professions Review Board.

Each of these tribunals operates completely independently of one another. Supporting six tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, reducing 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.

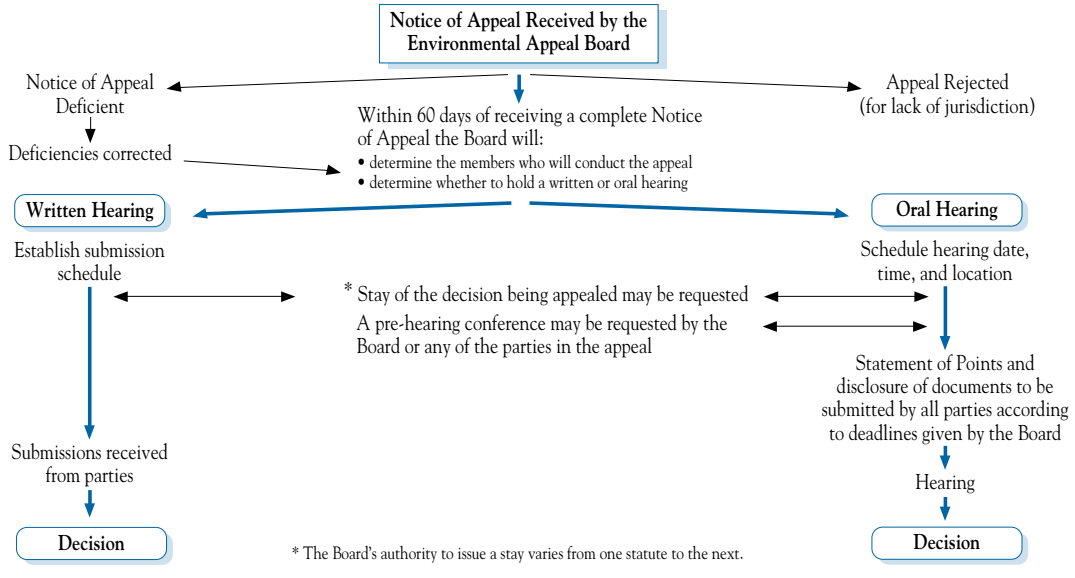
In addition, the names of the parties in an appeal appear in the Board's published decisions which are posted on the Board's website, and may appear in this Annual Report.

The Appeal Process

Part 8, Division 1 of the *Environmental Management Act* sets out the basic structure, powers and procedures of the Board. It describes the composition of the Board and how hearing panels may be organized. It also describes the power of the Board to add parties to an appeal, the rights of the parties to present evidence, and the Board's power to award costs. Additional procedural details, such as the requirements for starting an appeal, are provided in the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82. The relevant portions of the Act and the *Regulation* are included at the back of this report.

In addition to the procedures contained in the Act and the Regulation, the Board has developed its own policies and procedures. These policies and procedures have been created in response to issues that arise during the appeal process, from receipt of a notice of appeal, to the hearing, to the issuance of a final decision on the merits. To ensure that the appeal process is open and understandable to the public, these policies and procedures have been set out in the Environmental Appeal Board Procedure Manual which is posted on the Board's website.

Finally, in order to determine what decisions are appealable to the Board, who can appeal the decisions, the time for filing an appeal, whether the Board can issue a stay of the decision under appeal, and what the Board's decision-making powers are with respect to the appeal, one must consult the individual statutes and regulations which provide the right of appeal to the Board. A summary of the appeal provisions in the individual statutes is provided below.



Appeals under the *Environmental Management Act*

The decisions that may be appealed under the *Environmental Management Act* are set out in Division 2. That division states that a person "aggrieved by a decision" of a director or a district director may appeal that decision to the Board. An appealable "decision" is defined as follows:

(a) making an order,
(b) imposing a requirement,
(c) exercising a power except a power of delegation,
(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,
(e) including a requirement or a condition in an order, permit, approval or operational certificate,
(f) determining to impose an administrative penalty, and
(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed [under section 115(4), a director may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the director considers necessary or desirable].

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

The Board can order a stay of the decision under appeal.

Appeals under the *Health Act*

The only decision appealable under this enactment is the issuance or the refusal of a permit for an on site sewage disposal system. Permits are only required for the construction of holding tanks.

A person aggrieved by the issue or the refusal of a permit has 30 days to file an appeal.

The Board has no power to order a stay of the appealed decision.

Appeals under the *Integrated Pest Management Act*

Under this *Act*, the right of appeal (those with standing to appeal) is quite broad. The *Act* states that "a person" may appeal a decision under this *Act* to the appeal board. "Decision" is then defined as:

(a) making an order, other than an order under section 8 [an order issued by the Minister of Environment];
(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;
(c) amending or refusing to issue, amend or renew a licence, certificate or permit;
(d) revoking or suspending a licence, certificate, permit or confirmation;
(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;
(f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) have not been performed [under section 23(4), the administrator may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the administrator considers necessary or desirable].

The time limit for filing an appeal of a decision is 30 days after the date the decision being appealed is made.

The Board can order a stay of the decision under appeal.

Appeals under the *Water Act*

The decisions that may be appealed under the *Water Act*, and the people who may appeal them, are set out in section 92(1) of the Act. It states that an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by the person who is subject to the order, an owner whose land is or is likely to be physically affected by the order, or a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

In addition, an order of the comptroller, the regional water manager or an engineer made under Part 5 [Wells and Ground Water Protection] or 6 [General] of the Act in relation to a well, works related to a well, ground water or an aquifer may be appealed to the Board by the person who is subject to the order, the well owner, or the owner of the land on which the well is located.

Finally, an order of the comptroller, the regional water manager or an engineer made in relation to a well drilling authorization under section 81 of the Act may be appealed to the appeal board by the person who is subject to the order, the well owner, the owner of the land on which the well is located, or a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

It should be noted that a licensee cannot appeal an order of the comptroller or a regional water manager to cancel a licence if the cancellation was because the licensee failed to pay the rentals due to the government for three years, or if the licence was cancelled on the grounds of failure to pay the water bailiff's fees for six months.

The time limit for filing an appeal is 30 days after notice of the decision is given.

The Board can order a stay of the decision under appeal.

Appeals under the *Wildlife Act*

Under section 101.1 of the *Wildlife Act*, a decision of a regional manager or the director that affects a licence, permit, registration of a trapline or guide outfitter's certificate, or an application for any of those things, may be appealed by the person who is affected by the decision.

The time limit for filing an appeal under the *Wildlife Act* is 30 days after notice is given.

The Board can order a stay of the decision under appeal.

Commencing an Appeal

Notice of Appeal

For all appeals, an appellant must prepare a notice of appeal and deliver it to the Board office within the time limit specified in the relevant statute. The notice of appeal must comply with the content requirements of the *Environmental Appeal Board Procedure Regulation*. It must contain the name and address of the appellant, the name of the appellant's counsel or agent, if any, 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. Also, the notice of appeal must be signed by the appellant, or on his or her behalf by their counsel or agent, and the notice must be accompanied by a fee of $25 for each action, decision or order appealed.

In addition, the Board requires a copy of the permit, licence, order or decision being appealed.

Generally, if the Board does not receive a notice of appeal within the specified time limit, the appellant will lose the right to appeal.

If the notice of appeal is missing any of the required information, the Board will notify the appellant of the deficiencies. The Board may refrain from taking any action on an appeal until the notice is complete and any deficiencies are corrected.

Once a notice of appeal is accepted as complete, the Board will notify the office of the official who made the decision being appealed. The decision-maker will be the respondent in the appeal.

Third Party Status

The Board has the power to add parties to an appeal. As a standard practice, the Board will offer party status to a person who may be affected by the appeal such as the person holding the permit or licence which is the subject of an appeal by another person. In addition, a person may apply to the Board to become a party to the appeal if he or she may be affected by the Board's decision.

When deciding whether to add a party to the appeal, the Board will consider a variety of factors such as the timeliness of the application, the potential impact of the Board's decision on the person, whether the person can bring a new perspective to the appeal and/or make a valuable contribution, whether the potential benefits of this person's contribution outweighs any prejudice to the other parties, including any undue delay or lengthening of proceedings, and any other factors that are relevant in the circumstances.

These additional parties are referred to as "third parties" to the appeal. They have all of the same rights as the appellant and respondent to present evidence, cross examine the witnesses of the other parties, and make opening and closing arguments.

Participants

The Board also has the discretion to invite any person to be heard in the appeal, without making that person a party to the appeal. This may be done on the Board's initiative or as a result of a request. The Board refers to these people as "participants".

If the Board receives an application from a person wishing to participate in an appeal, the Board will generally consider the same factors described above in relation to adding parties. The Board will then decide whether the person should be granted participant status and, if so, the extent of that participation. In all cases, a participant may only participate in a hearing to the extent that the Board allows. It does not have the rights of a party.

Stays pending appeal

With the exception of decisions made under the *Health Act*, the Board is granted the power to stay a decision or an order pending an appeal.

A stay has the effect of postponing the legal obligation to implement all or part of the decision or order under appeal until the Board has held a hearing, and issued its decision on the appeal.

Type of Hearing

The Board has the authority to conduct a new hearing on a matter before it. This means that the Board may hear the same evidence that was before the original decision-maker, as well as receive new evidence.

An appeal may be conducted by way of written submissions, oral hearing or a combination of both. In most cases, the Board will conduct an oral hearing. However, in some instances the Board may find it appropriate to conduct a hearing by way of written submissions.

The *Environmental Appeal Board Procedure Regulation* requires the chair to determine, within 60 days of receiving a complete notice of appeal, which member(s) of the Board will hear the appeal and the type of appeal hearing.

Prior to ordering that a hearing be conducted by way of written submissions, the Board may request the parties' input.

Written Hearing Procedure

If it is determined that a hearing will be by way of written submissions, the Board will invite all parties to provide submissions. The appellant will provide its submissions, including its evidence, first. The other parties will have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

Finally, all parties will be given the opportunity to provide closing submissions. Closing submissions should not contain new evidence.

Oral Hearing Procedure

As noted above, the *Environmental Appeal Board Procedure Regulation* requires the chair to determine, within 60 days of receiving a complete notice of appeal, which member(s) of the Board will hear the appeal and the type of appeal hearing.

When the chair decides that an appeal will be conducted by full oral hearing, the chair is required to set the date, time and location of the hearing and notify the parties, the applicant (if different from the appellant) and any objectors (as defined in the *Environmental Appeal Board Procedure Regulation*). If any of the parties to the appeal cannot attend the hearing on the date scheduled, a request may be made to the Board to change the date.

An oral hearing may be held in the locale closest to the affected parties, at the Board office in Victoria or anywhere in the province. The Board will decide where the hearing will take place on a case-by-case basis.

Once a hearing is scheduled, the parties will be asked to provide a Statement of Points to the Board.

Statement of Points and Document Disclosure

To help identify the main issues to be addressed in an oral hearing, and the arguments that will be presented in support of those issues, all parties to the appeal are asked to provide the Board, and each of the parties to the appeal, with a written Statement of Points and all relevant documents.

Dispute resolution

The Board encourages parties to resolve the issues underlying the appeal at any time in the appeal process. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences; and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Board for its approval. Alternatively, the appellant may withdraw his or her appeal at any time.

Pre-hearing Conference

Either before or after the Statements of Points and relevant documents have been exchanged, the Board, or any of the parties, may request a pre-hearing conference.

Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the spokespersons for the parties, one Board member and one staff member from the Board office. It will be less formal than a hearing and will usually follow an agenda, which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

Disclosure of Expert Evidence

The Board is not bound by the provisions relating to expert evidence in the British Columbia *Evidence Act*. However, the Board does require that reasonable advance notice of expert evidence be given and that the notice include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing, and the facts on which the opinion is based.

Obtaining an Order for Attendance of a Witness or Production of Documents

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to make an order requiring a person to attend a hearing and give evidence. Also, if a person refuses to produce particular relevant documents in their possession, a party may ask the Board to order the person to produce a document or other thing prior to, or during, a hearing.

Section 93(11) of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act*, provide the Board with the power to require the attendance of a witness at a hearing, and to compel a witness to produce for the tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

If a party wants to ensure that an important witness attend the hearing, the party may ask the Board to issue an order. The request must be in writing and explain why the order is required.

The Hearing

A hearing is a more formal process than a pre-hearing conference, and allows the Board to receive the evidence it uses to make a decision.

In an oral hearing, each party will have a chance to present evidence. Each party will have an opportunity to call witnesses and explain its case to the Board.

Although hearings before the Board are less formal than those before a court, some of the hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation and witnesses are subject to cross-examination.

Parties to the appeal may have lawyers representing them at the hearing but this is not required. The Board will make every effort to keep the process open and accessible to parties not represented by a lawyer.

All hearings before the Board are open to the public.

Rules of Evidence

The rules of evidence used in a hearing are less formal than those used in a court. The Board has full discretion to receive any information it considers relevant and will then determine what weight to give the evidence.

The Decision

In making its decision, the Board is required to determine, on a balance of probabilities, what occurred, and to decide the issues raised in the appeal.

The Board will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing within a reasonable time following the hearing. Copies of the decision will be given to the parties, the participants, and the appropriate minister(s).

There is no right of appeal to the courts from a Board decision. Section 97 of the *Environmental Management Act* allows Cabinet to vary or rescind an order or decision of the Board if it is in the public interest to do so.

Alternatively, a party dissatisfied with a decision or order of the Board may apply to the British Columbia Supreme Court for judicial review of the decision pursuant to the *Judicial Review Procedure Act*.

Costs

The Board also has the power to award costs. If the Board finds it is appropriate, it may order a party to pay all or part of the costs of another party in connection with the appeal. In addition, if the Board considers that the conduct of a party has been frivolous, vexatious or abusive, it may order that party to pay all or part of the expenses of the Board in connection with the appeal.

Legislative Amendments Affecting the Board

Effective March 31, 2009, section 128(a) of the *Public Health Act*, S.B.C. 2008, c. 28, was brought into force by B.C. Regulation 49/2009. Section 128(a) of the *Public Health Act* repeals many sections of the *Health Act*, including section 8 which provided for appeals to the Environmental Appeal Board.

Previously, section 8(4) of the *Health Act* provided that a person aggrieved by the issue or refusal of a permit for a sewage disposal system under the *Sewerage System Regulation* could appeal that decision to the Board. Under the *Sewerage System Regulation*, the only type of sewage disposal system that requires a permit is a holding tank. With the repeal of section 8(4) of the *Health Act*, that right of appeal to the Board no longer exists, and the Board no longer hears any appeals under the *Health Act* or the *Sewerage System Regulation*.

Recommendations

There were no issues that arose in 2008/2009 to warrant a recommendation at this time.

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 of the 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.

Statistics Overview

Between April 1, 2008 and March 31, 2009, a total of 60 appeals were filed with the Board against 39 administrative decisions, and a total of 22 decisions were published.

The number of days to issue a final decision varies depending on the complexity of the appeal and length of the hearing. Between April 1, 2008 and March 31, 2009 the average number of days to issue a decision was 80 days from the time the submissions from the parties concluded and the final decision was issued.

April 1, 2008 – March 31, 2009

Total appeals filed	**60**
Total appeals closed	**52**
Appeals abandoned or withdrawn	**31**
Appeals rejected, jurisdiction/standing	**8**
Hearings held on the merits of appeals	
Oral hearings completed	7
Written hearings completed	10
***Total hearings held on the merits of appeals**	**17**
Total oral hearing days	**39**
Published Decisions issued	
Final Decisions	
Appeals allowed	2
Appeals allowed, allowed in part	2
Appeals dismissed	5
Total Final Decisions	**9**
Decisions on preliminary matters	**8**
Decisions of Costs	**1**
Consent Orders	**4**
Total published decisions issued	**22**
****** **Average days until a decision is issued**	**80**

▲

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.

Notes:

* 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.

** Average days are the days from close of submissions by the parties until the time that the final decision is issued.

Appeal Statistics by Act

	Environmental Management	Health	Integrated Pest Management	Pesticide Control	Waste Management	Water	Wildlife	Total
Appeals filed during report period	16					15	29	60
Appeals closed during report period	10		3	7		19	13	52
Appeals abandoned or withdrawn	5		3	7		12	4	31
Appeals rejected jurisdiction/standing	2					3	3	8
Hearings held on the merits of appeals								
Oral hearings	1				1	4	1	7
Written hearings	3					3	4	10
Total hearings held on the merits of appeals	4				1	7	5	17
Total oral hearing days	12				13	11	3	39
Published decisions issued								
Final decisions	1					4	4	9
Costs decision	1							1
Preliminary applications	3					3	2	8
Consent Orders	2						2	4
Total published decisions issued	**7**					**7**	**8**	**22**

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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.

Summaries of Environmental Appeal Board Decisions

April 1, 2008 ~ March 31, 2009

Appeal cases are not heard by the entire Board, they are heard by a "panel" of the Board. After an appeal is filed, the Chair of the Board will decide whether the appeal should be heard and decided by a panel of one or by a panel of three members of the Board. The size and the composition of the panel (the type of expertise needed on a panel) generally depends upon the subject matter of the appeal and/or its complexity. The subject matter and the issues raised in an appeal can vary significantly in both technical and legal complexity. The Chair makes every effort to ensure that the panel hearing an appeal will have the depth of expertise needed to understand the issues and the evidence, and to make the difficult decisions required.

In terms of its decision-making abilities, a panel has the power to confirm, vary or rescind the decision under appeal. In addition, under all of the statutes except the *Health Act*, a panel may also send the matter back to the original decision-maker with or without directions, and make any decision that the original decision-maker could have made and that the panel believes is appropriate in the circumstances. When an appellant is successful in convincing the panel, on a balance of probabilities, that the decision under appeal was made in error, or that there is new information that results in a change to the original decision, the appeal is said to be "allowed". If the appellant succeeds in obtaining some changes to the decision, but not all of the changes that he or she asked for, the appeal is said to be "allowed in part". When an appellant fails to establish that the decision was incorrect on the facts or in law, and the Board upholds the original decision, the appeal is said to be "dismissed".

Not all appeals proceed to a hearing and a decision by the Board. Some cases are withdrawn or abandoned by an appellant before a hearing. In other cases, an appellant's standing to appeal may be challenged, or the Board's jurisdiction over the appeal may be challenged, resulting in the Board dismissing the appeal in a preliminary decision. Some examples of these types of preliminary decisions are provided in the summaries below.

It is also important to note that many cases are also settled or resolved prior to a hearing. The Board encourages parties to resolve the matters under appeal either on their own or with the assistance of the Board. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a "Consent Order" and ask the Board to approve the order. The Consent Order then becomes an order of the Board. The Board has included an example of an appeal that was resolved by Consent Order in the summaries.

The summaries that have been selected for this Annual Report reflect the variety of subjects and the variety of issues that come before the Board in any given year. The summaries have been organized according to the statute under which the appeal was filed. For a full viewing of all of the Board's published decisions and their summaries, please refer to the Board's web page.

Environmental Management Act

First Nation challenges an amendment allowing mine tailings to be discharged into the Fraser River

2006-EMA-006(a) Xats'ull First Nation v. Director, Environmental Management Act (Gibraltar Mines Ltd., Third Party)

Decision Date: May 9, 2008

Panel: Alan Andison, Dr. Robert Cameron, Cindy Derkaz

On April 12, 2006, the Director, *Environmental Management Act*, issued a permit amendment which allowed Gibraltar Mines Ltd. to discharge certain contaminants from its tailings pond into the Fraser River. The tailings were produced as a result of Gibraltar's mining operations at the Gibraltar Mine, a copper-molybdenum ore mine located near Marguerite, BC. The tailings consist of water, chemicals and suspended solids that are a by-product of the process used to remove the copper and molybdenum from the ore.

As the tailings pond was reaching its capacity, Gibraltar applied to the Ministry of Environment for amendment to its permit that would allow the discharge of contaminants from its tailings pond, through an existing pipeline, and into the Fraser River through an outfall and diffuser that would be installed in the river. The outfall would be located approximately 0.5 kilometres from the settlement of Marguerite, which is approximately halfway between Quesnel and Williams Lake. Gibraltar's environmental consultants submitted that the discharge would dilute within a certain distance in the river, and the environment would be protected.

There is a legal duty on the Provincial Crown to consult with aboriginal people to determine whether any aboriginal interests (rights or title) may be affected by a decision of government, including a decision to issue a permit or a permit amendment. An aboriginal group has a corresponding obligation to identify their rights, participate in the consultation process, act in good faith, and try to reach a mutually satisfactory solution.

The Xats'ull First Nation ("Xats'ull") is the most northern community of the Shuswap people in British Columbia. One of the Xats'ull's reserve lands, the Soda Creek reserve, is adjacent to the Fraser River, approximately 25 kilometres downstream from the proposed point of discharge.

From February 2005 (prior to Gibraltar's formal application to the Ministry), until the issuance of the amendment in April of 2006, representatives of Gibraltar, and the Director, engaged in communications with representatives of the Xats'ull regarding the proposed discharge. They provided information regarding the proposal and sought information from the Xats'ull regarding its concerns. The Xats'ull was communicating with both Gibraltar and the Director but, at some point, it advised the Director that it only wanted to consult with Gibraltar and stopped responding to the Director's communications.

Four months before he issued the permit amendment, in December of 2005, the Director sent a draft of the amendment to the Xats'ull. He requested the Xats'ull's comments and advised of his willingness to discuss the draft. No response was provided. The

Director considered the information before him and determined that the environment, specifically the Fraser River, would not be negatively impacted by the discharge and that the Xats'ull had been adequately consulted on the proposed amendment.

The Xats'ull appealed this decision. It claimed that its aboriginal title and its aboriginal right to fish for salmon and sturgeon in the river, would be adversely affected by the discharge. Specifically, the Xats'ull argued that the authorized discharge, which contains copper and cadmium, would have a negative impact on sturgeon and salmon and, therefore, the Xats'ull's aboriginal fishing rights and title would be adversely affected by the amended permit. It also argued that the Director's consultation efforts fell short of what was required according to the legal test set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511. The Xats'ull asked the Board to rescind the Director's decision, or alternatively, rescind the decision and send the matter back to the Director with directions to consult with the Xats'ull and seek accommodations of the Xats'ull's aboriginal rights and title. It also asked the Board to award the Xats'ull its costs in connection with the appeal.

The Board heard extensive expert evidence regarding the anticipated impact of the discharge on the river, and on salmon and sturgeon. It found that the background concentrations of copper and cadmium in the Fraser River already exceeded the water quality guidelines for aquatic life, and that adding more copper and cadmium to the river would worsen water quality. The Board found that there was limited evidence that the discharge would have a negative impact on salmon, but there was evidence that it could have an adverse impact on sturgeon because sturgeon are a threatened species, are low in numbers, and are more susceptible than salmon to those contaminants. The Board found that, based on the existing state of water quality in the river and the sturgeon population, caution should be exercised before authorizing the discharge of any additional contaminants. The Board also found that the computer modelling used to predict the diffusion of the discharge may be unreliable, the configuration of the diffuser was uncertain, the permit amendments that were intended to ensure adequate dilution during periods of low water flow in the river may not be effective, and the amended monitoring requirements may not be adequate. For these reasons alone, the Board decided to send the amended permit back to the Director with a number of directions for further assessment and consideration.

These findings, however, did not answer the Xats'ull's appeal on the consultation issue. The courts have said that the amount of consultation required by the Crown (low, medium, high), depends upon the strength of the aboriginal group's claim to rights and title and the seriousness of the impacts to those rights and title by the proposed activity. In general, the stronger the claim to rights and title and the greater potential impact to them, the more the Crown will have to consult with and make efforts to accommodate the first nation. The Xats'ull argued that the strength of its claims and seriousness of the impact on its rights and title indicate that the consultation and accommodation should be at the highest level.

Based on the historical evidence, the Panel found that the only area where the Xats'ull had established a good *prima facie* case for aboriginal title was the area in or around Soda Creek Canyon where there was archaeological evidence of pit houses that were used year after year, and there was oral history and historical evidence of continuous use. The Board also noted that the Xats'ull have the right to use and occupy the Soda Creek reserve lands, located adjacent to the Fraser River approximately 25 kilometres downstream of the discharge point. However, it found that the Xats'ull's claims to title in and around the discharge area and dilution zone were weaker due to

overlapping claims with other first nations and, in particular, the fact that one of the Alexandria Band's reserves is within five kilometres of the point of discharge.

Regarding the seriousness of the potential impact of the amendment on the Xats'ull's claim of title, the Board concluded that it was low. The potential effects of the discharge in these areas where the Xats'ull's claim to title was strongest would be negligible or non-existent, due to the level of dilution and mixing that will occur by the time the river passes through Soda Creek Canyon. In the area near the point of discharge, the claim to title was weaker, and the evidence of any harmful impact to that title was weak.

The Xats'ull also claimed that there would be serious impacts to its aboriginal rights, particularly its right to fish. The oral and historic evidence indicated that fishing for salmon, and sturgeon, in the Fraser River has long been integral to the Xats'ull's distinctive culture. The Board found that the Xats'ull have relied heavily on salmon from the Fraser River as a source of food, and have also utilized sturgeon from the Fraser River as a food source. The evidence established that the Xats'ull had a particular method for catching salmon along the river (using a dip net method). Its aboriginal fishing claims were strongest in the area around Soda Creek Canyon, where fishing sites suitable for dip netting were located near the area that had been continuously occupied by the Xats'ull. Its claims of fishing rights were weaker in the areas around Marguerite and Alexandria. While there was historic and oral evidence that Northern Shuswap people fished in those locations, there was less evidence that the Xats'ull people in particular fished there.

Regarding the seriousness of the impact of the discharge on the Xats'ull's right to fish, the Board concluded that its right to fish for salmon would not be significantly affected by the discharge because, as found earlier by the Board, the discharge would have a limited impact on salmon. Regarding sturgeon, the Board found that the discharge could have an impact on the Xats'ull's right to fish for sturgeon, because sturgeon travel many kilometres, are more susceptible than salmon to the potential negative effects of copper and cadmium, and are already in limited supply. However, the Board found that there was no evidence that sturgeon was a staple in the Xats'ull's traditional diet or that sturgeon was a significant item of trade. Thus, the Board concluded that there would be a modest impact on the Xats'ull's right to fish for sturgeon.

Based on the strength of the Xats'ull's claims of rights and title, and the seriousness of the potential impact on those claims, the Panel concluded that the level of consultation was in the middle of the spectrum. On the question of whether this level of consultation was met, the Panel of the Board disagreed.

In a majority decision, the Board found that the steps taken by Director met the moderate to middle level of consultation that was required in this case. The majority held that the Director engaged in meaningful consultation with the Xats'ull, and provided reasonable accommodations in response to their concerns. While there was some incorrect information provided to the Xats'ull, this misinformation was corrected by later information provided. The majority found that the Director took the Xats'ull's claims seriously and made changes to the terms of the amendment in response.

Considering the Xats'ull's obligation to participate in the consultation in good faith, the majority observed that the Xats'ull did not always meet its responsibilities. It failed to respond to the Director, and then refused to engage with the Director. There was also evidence that the Xats'ull attempted to stall or frustrate the consultation process with the Director in other ways. For these reasons, the majority decided that it would not entertain an application for costs from the Xats'ull. The majority dismissed the Xats'ull's appeal on the issue of failure to consult and refused its application for costs. However, the majority stated

that, if the Ministry makes further changes to the amended permit arising from the Board's directions, he must continue to consult with the Xats'ull in respect of those further changes.

The minority found that the Director, on behalf of the Crown, did not meet the middle level of consultation that was required. The minority held that Gibraltar and the Director were receptive to the Xats'ull, they made themselves available to meet with the Xats'ull and to discuss the proposed discharge, and acted in good faith in their interactions with the Xats'ull. However, the minority found that the Director and Gibraltar provided the Xats'ull with erroneous information on a material issue. The minority also found that the Director failed to follow the Provincial Consultation Policy, failed to adequately inform himself of the nature of the aboriginal interests claimed, failed to make clear and reasoned assessments of the soundness of those claims and of the likelihood of an infringement of the Xats'ull's aboriginal interests, and failed to make adequate accommodation of those interests. The minority would have allowed the appeal on this issue and sent the matter back to the Ministry to carry out proper consultation.

The appeal was allowed, in part.

Parties resolve issue of costs by Consent Order

2007-EMA-008(a) & 2008-EMA-004(a) Don Dickson, Brenda Belak, Sheila Craigie, and Blair Redlin v. District Director of the Greater Vancouver Regional District (West Coast Reduction Ltd., Third Party)

Decision Date: November 5, 2008

Panel: Alan Andison

Don Dickson, Brenda Belak, Sheila Craigie and Blair Redlin appealed two separate amendments of an air emissions permit held by West Coast Reduction Ltd., which operates a rendering plant in Vancouver, BC. The amendments were issued by the District Director of the Greater Vancouver Regional District. In both amendment decisions, the District Director imposed various requirements, conditions, criteria, standards, guidelines and objectives in relation to odour emissions from the rendering plant. West Coast Reduction Ltd. also appealed the amendments (2007-EMA-007 & 2008-EMA-005), arguing that they were too restrictive.

During the appeal hearing, the Appellants applied to the Board for an order requiring the District Director to pay the Appellants' costs associated with two expert witnesses that the Appellants called at the hearing. Before the hearing concluded, the Appellants and the District Director reached an agreement regarding the Appellants' application for costs.

In a Consent Order approved by the Board, the Board ordered the District Director to pay the Appellants an amount of money agreed to by the parties, representing the disbursements of one expert witness and 40 percent of the fees and disbursements of the other expert witness.

The application for costs was granted, in part, by consent.

When is a decision, a "decision"?

2008-EMA-008(a) Darryl Secret v. Director, Environmental Management Act (New Future Building Group Inc., Kutenai Landing Inc., and Central Waterfront Enterprises Inc., Third Parties)

Decision Date: December 1, 2008

Panel: Alan Andison

This was a preliminary decision by the Board on the question of whether the Board had jurisdiction over an appeal by Darryl Secret.

Under the *Environmental Management Act* only certain kinds of government decisions are appealable to the Board. The Act specifically defines those "decisions". In this case, Mr. Secret filed an

appeal of a "notice" issued by the Director. The notice was given to the City of Nelson in relation to a mixed residential/commercial development proposed for waterfront land on Kootenay Lake. The City of Nelson had received applications for permits, zoning and subdivision approvals in relation to the proposed development but, because the site had previously been used for industrial or commercial purposes and could still be contaminated, both the *Local Government Act* and the *Land Title Act* required that the City could not approve these applications unless a notice from a director under the *Environmental Management Act* stating that the site would not present a significant threat or risk if the application were approved.

After considering the information on file, the Director provided a letter to the City of Nelson stating: "…please accept this letter as notice pursuant to section 946.2(2)(d) of the *Local Government Act* and section 85.1(2)(d) of the *Land Title Act* that that the City of Nelson may approve the development permit for Phase 1 and zoning and subdivision applications under this section because, in the opinion of the director, the site would not present a significant threat or risk if the development permit for Phase 1 and zoning and subdivision applications were approved," provided that two specified conditions were met.

Mr. Secret is a resident of Nelson opposed to the development. He filed a Notice of Appeal with the Board alleging that the land is contaminated by heavy extractable petroleum hydrocarbons and that the groundwater contains light extractable petroleum hydrocarbons above numerical and/or risk based standards. He asked for the Director's notice to be overturned on the grounds that the Director had an incomplete understanding of the nature and extent of contamination and the history of the site when he issued this notice.

Because the Director issued the notice under the authority of the *Land Title Act* and the *Local Government Act*, the Board asked the parties to make submissions on whether the notice met the definition of an appealable "decision" under the *Environmental Management Act*. The Board concluded that it did not. It found that the appeal provisions under the *Environmental Management Act* are intended to apply to decisions made under that enactment, not decisions made under other statutes. The Board concluded that there was no statutory authority for the Board to hear an appeal of the Director's notice in this case.

The appeal was dismissed for lack of jurisdiction.

Health Act

There were no decisions by the Board during this reporting period.

Integrated Pest Management Act/ Pesticide Control Act

Hearing held in abeyance to allow negotiated settlement of First Nations human health and environmental issues

2003-PES-004/005/006 Nuxalk Nation, Melvina Mack, Hereditary Chief for House of Smayusta and Wayne Padgett v. Deputy Administrator, Pesticide Control Act (International Forest Products Ltd., and Central Coast Regional District, Third Parties)

Decision Date: September 26, 2008

Panel: Alan Andison

The Nuxalk Nation, Melvina Mack, Hereditary Chief for House of Smayusta, and Wayne Padgett appealed the May 27, 2003 issuance of a Pest Management Plan (the "Plan") to International

Forest Products Ltd. ("Interfor"). The Plan was issued by the Deputy Administrator, *Pesticide Control Act*, Ministry of Water, Land and Air Protection (now the Ministry of Environment). The Deputy Administrator authorized Interfor to apply the herbicides glyphosate and triclopyr for brush control and silviculture purposes for a period of five years in the area around Bella Coola, BC. The method of application for triclopyr was to be by basal bark treatment and for glyphosate, the method of application was to be by stem injection and back-pack and foliar spray treatments.

The Appellants appealed on the grounds that there was inadequate consultation with the Nuxalk Nation before the Plan was issued, that the Plan infringes aboriginal rights and that the Plan allows the application of herbicides that will have a detrimental effect on human health and the environment.

The Board set a hearing date for October 2003 in Bella Coola to hear the appeals. Prior to the matter coming on for hearing the Appellants requested an adjournment and that the hearing be held in abeyance to allow the Nuxalk Nation and Melvina Mack the opportunity to negotiate a settlement with Interfor. The Board granted the adjournment and held the matter in abeyance in order to assist the parties in their negotiations. The Board received subsequent requests from the parties to hold the appeals in abeyance and the Board did so until the Plan expired. The Board then dismissed the appeal with the consent of the parties as the appeal had become moot.

Water Act

A few gallons are too many

2007-WAT-004(a) John and Arlene Liket v. Assistant Regional Water Manager (Joan and David Niederauer, et al, Third Parties)

Decision Date: July 22, 2008

Panel: Alan Andison

John and Arlene Liket appealed a decision of the Assistant Regional Water Manager (the "Assistant Manager"), Water Stewardship Division, Ministry of Environment (the "Ministry"), refusing to issue them a licence to divert and use 500 gallons of water per day for domestic use purposes from Peter Hope Lake, located near Kamloops. The Assistant Manager made his decision on the basis that Peter Hope Lake is fully recorded under existing licences and there is insufficient water for new licences. The Appellants requested that the Board reverse the Assistant Manager's decision.

The Appellants own lakefront property on Peter Hope Lake, which is popular for fishing, wildlife viewing, and other forms of recreation. The Appellants built a small cabin on their property in 1973, which they use periodically during the year. Since they began using the property, the Appellants have used buckets and a hand pump to draw water from the lake for domestic use. In 2007, they applied for a water licence for domestic use. The Appellants estimated that they use about 6 gallons of water per day when they are at the cabin, although their application was for more than that. The Appellants submitted that granting a licence for a small amount of water would not impact the lake.

The Board considered whether there is enough water to grant the licence. Based on the evidence, the Board found that there was

insufficient water to meet existing licensed demand in the watershed, and therefore, no new licences for consumptive use should be granted, even for small amounts of water. A detailed study of water availability in the Peter Hope Creek watershed was completed by the Ministry in 2006, and it concluded that the watershed had a deficit of 1021 acre-feet of water based on existing licensed demand, and therefore, no further licences should be granted. The Board found that evidence of water availability in the watershed since that study shows that a water deficit continues to exist.

Furthermore, there was evidence that Guichon Ranch may have to reclaim two historical water licences that would allow it to draw up to 1610 acre-feet of water from Peter Hope Lake. Guichon Ranch formerly held two water licences that together authorized the diversion and use of 1610 acre-feet of water for irrigation and stock watering purposes, but in the late 1990s it transferred those licences to the Ministry's Fish and Wildlife Section, which is holding them for conservation purposes. The Board heard evidence that Guichon Ranch may need to reclaim those water licences because the water quality in its well had become unreliable and it has had to truck in water for its cattle. This was necessary because some of the cattle had died from drinking salinated water. If Guichon Ranch reclaims its water licences and withdraws water from the lake, the lake's water level could drop by up to seven feet.

The Board was encouraged to learn that the owners of Guichon Ranch offered to assist the Appellants by trucking potable water to them during their visits to the lake.

Accordingly, the Board concluded that the Assistant Manager's decision should be confirmed.

The appeal was dismissed.

Return a stream to its natural channel – if possible

2008-WAT-001(a) Vann Chrysanthous v. Engineer under the Water Act

Decision Date: February 10, 2009

Panel: Alan Andison

Vann Chrysanthous appealed an order issued on January 31, 2008, by an Engineer under the *Water Act* (the "Engineer"), Water Stewardship Division, Ministry of Environment (the "Ministry") that required Mr. Chrysanthous to stop diverting water from an unnamed stream. Mr. Chrysanthous requested that the Board reverse the Engineer's order.

A long history of events led to this appeal. The unnamed stream flows through Mr. Chrysanthous' property to the boundary of his neighbour's property. In or about July 1997, Mr. Chrysanthous' neighbour diverted the stream without authorization under the *Water Act*. During late 1997 through 1998, Mr. Chrysanthous contacted certain government agencies, including the Ministry, regarding the unauthorized diversion, and expressed concern about damage to his fence, the potential for flooding on his property, and possible damage to an adjacent road as a result of the diversion. Those agencies, including the Ministry, requested that the neighbour return the stream and road bed to their prior state, but the neighbour did not comply, and the agencies did not follow up.

As a result, Mr. Chrysanthous carried out his own works without authorization and re-diverted the stream back onto his property.

In May 2007, acting in response to a complaint from the neighbour that Mr. Chrysanthous had unlawfully diverted the stream, Ministry staff attended at Mr. Chrysanthous' residence with law enforcement officers and verbally requested that he return the flow of the stream to its previous state. The Ministry staff were unaware of the events that

had occurred in the 1990s. Mr. Chrysanthous did not comply with the verbal request.

On July 5, 2007, the Engineer issued an order requiring Mr. Chrysanthous to cease his diversion of the unnamed stream, and return the water to where it flowed prior to his unauthorized diversion. Between July 2007 and January 2008, Mr. Chrysanthous discussed the matter numerous times with the Engineer.

On January 31, 2008, the Engineer issued his order amending the July 5, 2007 order. In or about February 2008, the Engineer became aware of Ministry photographs and documents from the 1990s which indicated that there had been an unauthorized diversion by Mr. Chrysanthous' neighbour.

The Board held that the present situation arose due to unlawful diversions undertaken by both Mr. Chrysanthous and his neighbour. In the circumstances, the Board found that the fairest solution, and the best solution for the environment, would be to restore the stream to a channel that is as close as possible to the one it had before those unauthorized diversions. However, the Board found that its powers were limited due to the nature of the order under appeal.

Under the circumstances, the Board concluded that the January 31, 2008 order should be returned to the Engineer with directions to extend the deadline to March 31, 2010, in order to allow the Engineer and Mr. Chrysanthous time to consider and comply with a number of other directions from the Board. Specifically, the Board directed the Engineer to consider granting Mr. Chrysanthous an approval under the Water Act to divert the stream along the course that has been designed by Mr. Chrysanthous, or to an alternate acceptable channel on Mr. Chrysanthous' property. The Board directed that such an approval should contain requirements to prevent future flood events and ensure that Mr. Chrysanthous' property is protected.

Accordingly, the appeal was allowed.

Neighbour appeals an Approval to make changes in and about a stream on the grounds that it may physically affect his property

Sandhill Developments Ltd. owns three parcels of bare land in Langley, BC. It intends to develop the properties for mixed commercial and residential use; specifically, a shopping center, seniors housing and residential development on the properties. In order to develop the properties as planned, it needed to "move" or realign Jeffries Brook, a salmon-bearing stream which currently runs in a north to south direction through the centre of Sandhill's property. This move required an Approval from the Ministry of Environment under section 9 of the *Water Act*. Sandhill received an Approval from an Engineer with the Ministry in March of 2008, which allowed Sandhill to divert and create a new channel for Jeffries Brook where it flows through Sandhill's property.

Murray Wood owns a neighbouring property. He appealed the issuance of the Approval on the grounds that the Approval allows Sandhill to destroy approximately 4,805 square metres of riparian habitat and divert a Class "A" Salmon Stream in order to maximize the developable area of its site, and also that the Approval was issued for an improper purpose under the *Water Act*; namely, to maximize the developable area of one property at the expense of his adjacent property.

The Board issued two decisions on this appeal. The first decision is on a preliminary matter regarding the standing of Mr. Wood to appeal. The second is the Board's decision on the merits of Mr. Wood's appeal. Following are summaries of those decisions.

2008-WAT-003(a) Murray Wood v. Engineer under the Water Act (Sandhill Developments Ltd. and the Corporation of the Township of Langley, Third Parties)

Decision Date: August 28, 2008

Panel: Alan Andison

Shortly after Mr. Wood filed his appeal, Sandhill asked the Board to dismiss Mr. Wood's appeal on the grounds that Mr. Wood did not have "standing" to appeal the approval. The only people who have standing to appeal under the *Water Act* are (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. Sandhill argued that Mr. Wood did not fit within (a), or (c), and that he did not fit within (b) because the approval would have no physical impact on Mr. Wood's property. Therefore, his appeal should be rejected. The Board requested written submissions from the parties on this issue.

Based on the extensive information provided, the Board concluded that Mr. Wood had standing to appeal as a person whose property "is or is likely to be physically affected by" the approval. The Board found that Mr. Wood's property was likely to be affected based on certain undisputed evidence. The undisputed evidence before the Board was that, in places, the new channel would be located as close as one metre from Mr. Wood's property. In addition, there were inconsistencies between the approved design and some of the actual construction that had taken place and the evidence was that minor deviations from the approved design could result in flooding or other impacts on Mr. Wood's property. Based on this evidence, there appeared to be a legitimate basis for Mr. Wood's concerns about his property. The Board concluded that Mr. Wood met the test for standing and that he should not be denied his right to appeal.

The application to dismiss the appeal was denied.

2008-WAT-003(b) Murray Wood v. Engineer under the Water Act (Sandhill Developments Ltd. and the Corporation of the Township of Langley, Third Parties)

Decision Date: March 19, 2009

Panel: Alan Andison, Dr. Robert Cameron, Gary Robinson

A full oral hearing was conducted to decide the merits of Mr. Wood's appeal. At the hearing, Mr. Wood argued that the Approval unlawfully authorized Sandhill to divert a stream, because a stream diversion can only be authorized by a water licence, not an approval. He also argued that the Approval was issued for a purpose that is prohibited under the *Water Act*, and that the Approval violated section 37(4) of the *Water Regulation* which states that changes in and about a stream must also "comply with all applicable federal, provincial or municipal enactments". Mr. Wood asked the Board to set aside the Approval or, alternatively, to send the matter back to the Engineer with directions.

The Board considered the regulatory scheme created by the *Water Act*, and the statutory provisions that relate to approvals and water licences. The Board found that approvals and licences serve different but somewhat overlapping purposes. Specifically, the Board found that section 9 approvals are limited to authorizing "changes in and about a stream" as defined in the *Water Act*. Section 9 approvals cannot authorize the beneficial use of water. Water licences may authorize changes in and about a stream, but they may also grant the right to "divert" and "use" water. One of the main functions of water licences is to control and regulate the beneficial use of water. Although the *Water Act*'s definitions of "divert" and "changes in and about a stream" overlap to some degree, "divert" involves "taking" water from a stream in order to exercise possession and control of the water, whereas "changes in and about a stream" need not involve exercising control or possession of water in a stream.

Applying those findings to the evidence in this case, the Board found that the Approval authorized the building of a new section of channel for Jeffries Brook that would be substituted for part of the pre-existing channel. The Approval did not authorize the beneficial use of water or a diversion of the stream in order to take possession and control of the water. The Board held, therefore, that the realignment of Jeffries Brook did not require a water licence, and involved changes in and about a stream that were properly authorized by an approval.

The Board also found that the Approval was granted for a purpose defined in section 1 of the *Water Act*; namely, a "land improvement purpose", and rejected Mr. Wood's argument that the approval was issued for a prohibited purpose.

Finally, the Board found that Mr. Wood failed to establish that the changes approved for Jeffries Brook did not "comply with all applicable federal, provincial or municipal enactments" as required by the *Water Regulation*. The Board noted that the federal Department of Fisheries and Oceans had issued an authorization stating that the Approval complied with federal fisheries enactments, and that the Approval appeared to comply with Langley's bylaws. The Board also found that the Approval did not authorize changes or works on Mr. Wood's property, nor any setbacks or encroachments onto his property. Therefore, Mr. Wood failed to establish a contravention of the *Water Regulation*.

The Board confirmed the Engineer's decision to grant the Approval.

The appeal was dismissed.

Can fill be placed in a wetland without government authorization?

2008-WAT-006(a) Murray Johnston v. Assistant Regional Water Manager

Decision Date: February 12, 2009

Panel: Gabriella Lang

Murray Johnston appealed a decision issued by the Assistant Regional Water Manager (the "Assistant Manager"), Cariboo Region, Ministry of Environment (the "Ministry"), denying Mr. Johnston's application for an approval to make "changes in and about a stream." Mr. Johnston sought an approval to authorize the placement of fill in a low lying area of lakefront property.

Mr. Johnston owns property on Sheridan Lake in the Cariboo Region. There was an eroded walking trail on his property that he wanted to repair but, to do so, he needed to first fill in a low lying area behind what he refers to as a natural dyke by the lakeshore. He hired a contractor to place fill on these low lying areas, and the work commenced in early February of 2008. Upon investigation by Ministry employees, it was determined that Mr. Johnston did not have any approvals or licences that authorized this infilling. Ministry officials directed Mr. Johnston to stop the work and to apply for an approval, which he did.

After circulating Mr. Johnston's application for an approval to fisheries agencies, and after considering the comments of a Senior Ecosystem Biologist with the Ministry, the Assistant Manager denied Mr. Johnston's application. He concluded that the area to be infilled was wetland, and that the fill would harm or destroy the wetland habitat.

In his appeal to the Board, Mr. Johnston's main argument was that the subject area is not "wetland", and that he needs to fill the area to provide him with lake access and to protect his land from high water levels.

For the Ministry to have authority over the infilling of the subject area, the area must fall within

the definition of "stream" in the *Water Act*. The definition of "stream" does not include wetland, but it does include a "swamp", whether or not it contains standing water year-round. The Board found that the term wetland is used synonymously with "swamp". The next question was whether the proposed infill area had the physical features characteristic of a swamp. The Board found that it did.

The Board found that the areas where Mr. Johnston wanted approval for his fill had standing water, soggy ground and was actually connected to Sheridan Lake for part of the year. This area also exhibited some biological features of a wetland/swamp such as indicator vegetation, standing water, and soggy ground. The Board found that the conditions and features of the area to be filled were consistent with the ordinary meaning of "swamp".

When considering an application to make changes in and about a stream, the Board observed that there is a balancing of interests and harms that takes place. The decision-maker must assess the purpose(s) of the requested changes, and weight the purposes or benefits of the changes against any impacts that the changes may have on the water resources and environmental values. In this case, the Board found that the potential adverse effects on the water resource and environmental values from the proposed infilling outweighed the benefits. It found that Mr. Johnston already had access to the lake and that the fill would not protect his land given that existing fill was already eroding into the lake. In addition, there was evidence that the fill would destroy valuable habitat that contributes to the lake's water quality and supports several wildlife species. The Board concluded that Mr. Johnston's application to infill was properly refused.

The appeal was dismissed.

Wildlife Act

A guide outfitter appeals his quota

Under the *Wildlife Act*, a regional manager has the authority to attach a quota to a guide outfitter's licence. A quota is defined in the Act as the total number of game species, or the total number of a type of game species, that the clients of a guide outfitter may kill within the guide outfitter's guiding area during a licence year, or part of the licence year. To arrive at the annual quota, the Ministry of Environment created an allocation policy, whereby it calculates a 3 year allocation for a guide outfitter for each animal species. The annual quota is then derived from that allocation. An increase or decrease of these allocations and quotas can have either a positive or negative impact on a guide outfitter's business. When an allocation or quota is decreased, as occurred in the case of Mr. Cary below, the decision is often appealed to the Board.

2007-WIL-002(a) Darwin Cary v. Regional Wildlife Manager (B.C. Wildlife Federation, Participant)

Decision Date: May 28, 2008

Panel: Robert Wickett

Mr. Cary is a licensed guide outfitter, which means that he has the exclusive right to guide non-resident hunters within his guide outfitter area which is located in the northeast part of BC. When he was issued his annual licence allowing him to hunt thinhorn mountain sheep, the Regional Manager attached a quota of 10 thinhorn mountain sheep for 2007, and set his allocation for 2007 to 2011 at 49 sheep. This was a reduction of 2 thinhorn sheep from his quota in 2006.

Mr. Cary appealed this decision to the Board and asked the Board to increase his quota. He argued that 13% of the *total* population of thinhorn mountain sheep live in his guide outfitter area and, therefore, he should receive 13% of the total allocation of sheep available to guide outfitters. This would increase his quota to 15 sheep.

The Regional Manager advised that this reduction was the result of a Ministry policy change. The Board was provided with a Ministry of Environment policy that was issued in 2007. This policy called for a reduction in the total sheep allocation in the province, as well as a reduction in the proportion of sheep allocated to guide outfitters in the province so that a greater proportion could be allocated to resident hunters.

The Board considered the policy and the evidence of Mr. Cary, the Regional Manager and the information provided by the BC Wildlife Federation, which represents resident hunters. It found that the Regional Manager considered the relevant policies, and applied them fairly in deciding Mr. Cary's quota. The Board noted that all guide outfitters received a 19% reduction in their quotas and, in the Board's view, it was reasonable to reduce the quotas by the same amount for all guide outfitters. The Board concluded that Mr. Cary's allocation of 10 sheep was reasonable in the circumstances.

The appeal was dismissed.

Permits to possess dead wildlife that has been found

All wildlife in the province are the property of the provincial government, whether they are alive or dead. In order to lawfully keep dead wildlife that has been found, one must obtain a permit from the Wildlife Branch of the Ministry of Environment. However, these permits are seldom granted. The *Wildlife Act* and the *Permit Regulation* describe the circumstances in which a permit to possess or own dead wildlife, or parts of wildlife, may be granted. Those circumstances are extremely limited. Of relevance to the appeals decided by the Board in this report period, section 6(1) of the *Permit Regulation* prohibits permits from being issued if the value of the wildlife is greater than $200, except in a limited number of situations.

When a permit is denied, the person has a right of appeal to the Board. In this report period, three appeals of such refusals were decided by the Board. In each case, the result of the appeal was different.

Possession of a Northern Hawk Owl

2008-WIL-003(a) A. Stanley Daykin v. Regional Manager

Decision Date: June 10, 2008

Panel: Alan Andison

In this case, the Regional Manager refused to issue Mr. Daykin a permit to possess a dead Northern Hawk Owl that he had found. Mr. Daykin wanted to display the owl in his home where it could be viewed by family, friends and business clients.

When refusing the permit, the Regional Manager relied, in part, on his conclusion that the value of the owl exceeded $200. However, he did not provide any information to support that conclusion.

Section 6(2) of the *Permit Regulation* sets out a process for determining the value of wildlife. It states that the "the value of wildlife or wildlife parts is to be determined by the regional manager based on the average price the government receives at auction for wildlife or wildlife parts of the particular species, of similar size and in similar condition." There was no indication in the Regional Manager's decision, or from his submissions to the Board, that he followed that process.

The Board found that the Regional Manager's failure to explain how he had determined the owl's value was a serious defect in the decision-making process. Further, the Board found that the defect was not cured by the appeal process because the Regional Manager provided no information or submissions to the Board. The Board concluded that the inadequacy of the reasons for the Regional Manager's decision amounted to a denial of procedural fairness.

However, the Board also found that Mr. Daykin had not provided any evidence regarding the value of the owl, the owl's size and condition, or the circumstances under which he found it. Therefore, the Board was unable to evaluate whether a permit should be granted. As a result, the Board sent the matter back to the Regional Manager for a new decision with proper reasons regarding the value of the owl.

The appeal was allowed, in part.

Possession of a cougar

2008-WIL-005(a) Ronald Janzen v. Regional Manager

Decision Date: July 4, 2008

Panel: Alan Andison

Mr. Janzen applied to the Ministry for a permit to possess a dead juvenile cougar. The Regional Manager refused to issue a permit on the grounds that the value of the juvenile cougar exceeded $200, and Mr. Janzen did not otherwise qualify for a permit. As was the case in the previous appeal, the Regional Manager did not provide supporting information for his conclusion that the cougar was worth over $200.

Mr. Janzen appealed the refusal and challenged the Regional Manager's assessment of the cougar's value. He also asked to see the proof of any auction sales that the Regional Manager relied upon to arrive at this valuation.

Similar to the Daykin case, the Board found that the Regional Manager's failure to explain how he had determined the cougar's value was a breach of procedural fairness. However, in this case, the Board found that the defect was cured by the appeal process because the Regional Manager provided the Board with an explanation and supporting information for his decision. As a result, the Board was able to evaluate the basis for the refusal.

Based on the information provided by the Regional Manager regarding the average auction values for cougars and other wild cats, the Board agreed that the value of the cougar was greater than $200. Mr. Janzen provided no evidence to contradict this finding, nor did Mr. Janzen provide any information that would allow the Board to determine whether he qualified for a permit under any other category in the *Permit Regulation*. Consequently, the Board agreed with the Regional Manager that Mr. Janzen's permit application must be denied.

The appeal was dismissed.

Possession of a wolverine

2008-WIL-004(a) Kelly Hassell v. Regional Manager

Decision Date: July 4, 2008

Panel: Alan Andison

Mr. Hassell found a dead wolverine beside a highway. He applied to the Ministry for a permit to possess the wolverine but was refused. The Regional Manager denied Mr. Hassell's application, in part, because he determined that the wolverine was worth more than $200.

Mr. Hassell advised the Board that he wanted the permit to possess the wolverine for educational purposes. Specifically, he intended to use it as a learning instrument in local schools. He provided two letters from staff at local schools in support of his request.

The Board found that the restrictions in section 6(1) of the *Permit Regulation* regarding wildlife

with a value over $200, do not apply to permits issued for scientific or educational purposes.

Based on the new information, particularly the two letters from staff at local schools, the Board determined that he qualified for a permit to possess the dead wolverine for educational purposes. The Board found that there was no indication that Mr. Hassell had any intention of disposing of the wolverine for personal financial gain, and, in any case, noted that a this permit does not transfer the "right of property" in wildlife. The government retains the right of property in the wolverine, and Mr. Hassell would have no right to sell it.

Accordingly, the Board reversed the Regional Manager's decision, and ordered that a permit be issued to Mr. Hassell allowing him to possess the wolverine for educational purposes.

The appeal was allowed.

Disability accommodated

2008-WIL-011(a) Arthur Ryckman v. Director of Wildlife

Decision Date: January 21, 2009

Panel: Alan Andison

Mr. Ryckman applied for a disabled hunting permit exempting him from the *Motor Vehicle Prohibition Regulation* (the "*Regulation*"). Sections 2 and 3 of the *Regulation* make it an offence to operate a motor vehicle in designated closed areas unless an exemption is granted under section 19 of the *Wildlife Act* and section 3(2)(a) of the *Permit Regulation*. Mr. Ryckman applied for an exemption from this *Regulation* on the basis that he has a physical disability and requires the use of a motor vehicle to access certain areas for the purposes of hunting. The Regional Manager refused to issue him an exemption and Mr. Ryckman appealed that decision to the Board.

Prior to a hearing, the parties negotiated an agreement and asked the Board to endorse a Consent Order setting out the terms of their agreement.

By consent of the parties, the Board reversed the Director's decision on the grounds that Mr. Ryckman has a physical disability for the purposes of his permit application, and directed the Director to consider issuing the requested permit to Mr. Ryckman if Mr. Ryckman still wanted a permit for the remainder of the hunting season.

By consent of the parties, the appeal was allowed, in part.

Summaries of Court Decisions Related to the Board

Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd. and the Environmental Appeal Board

Decision Date: September 22, 2008
Court: BCSC, Wedge J.
Cite: 2008 BCSC 1251

The Greater Vancouver Regional District ("GVRD") applied to the Supreme Court of British Columbia for a judicial review of the decision of the Environmental Appeal Board in *Darvonda Nurseries Ltd. v. District Director of the Greater Vancouver Regional District*, Decision No. 2006-EMA-007(a), dated July 27, 2007.

Background

Darvonda Nurseries operates a greenhouse facility in Langley, BC. The greenhouse is heated, and the burning of fuels to heat the greenhouse produces air emissions.

Darvonda's facility is located within the geographical jurisdiction of the GVRD, which has certain powers to regulate air emissions within its boundaries.

In May of 2006, the GVRD issued a permit to Darvonda that authorized air emissions from Darvonda's greenhouse facilities. Among other things, the permit established more stringent air emission discharge limits from Darvonda's wood-fired boilers than those set out in the Code of Agricultural Practice for Waste Management (the "Code of Practice"), contained within the *Agricultural Waste Control Regulation* (the "*Regulation*"). Darvonda had been complying with those less stringent standards in the *Regulation*. The permit was issued under both the *Environmental Management Act* (the "*Act*") and GVRD's Air Quality Bylaw No. 937, 1999 (the "Bylaw").

Darvonda appealed the permit to the Board arguing that the GVRD had no authority to require Darvonda to obtain a permit at all for its air emissions. The thrust of Darvonda's argument was that, since it is an "agricultural operation" as defined in the *Regulation*, it is exempt from the requirement to obtain a permit as long as it complies with the air emissions standards in the *Regulation*'s Code of Practice.

In the alternative, Darvonda argued that, even if the GVRD had the authority to require a permit, the permit cannot impose conditions that restrict the use of wood fired boilers (or other activities) if the use of such boilers is governed by a regulation and/or a code of practice. In the further alternative, it argued that heating at its facilities is "comfort heating" which does not require a permit.

The Board's decision

The Board allowed an appeal by Darvonda, finding that the permit was without effect to the extent that it imposed emissions standards that exceeded those set out in the *Regulation*; specifically, the emission standards set out in the Code of Practice.

The Board observed that the Code of Practice, which is part of the *Regulation*, sets province-

wide limits for particulate matter, opacity and odour content for emissions from wood-fired boilers used in agricultural operations. The Board found that the District Director exceeded his authority in issuing the permit because some of the emission standards in the permit were more restrictive than those in the Code of Practice. Therefore, the permit was without effect to the extent that it purported to regulate matters that are regulated by the Code. The Board rejected Darvonda's argument that the heating of its greenhouses meets the definition of comfort heating.

The District Director asked the Court to set aside the Board's decision, and restore the permit.

The Court's decision

The Court first considered the standard of review that applied to the Board's decision. The Court applied the test set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and found that the standard of correctness applied to pure questions of law, such as the Board's interpretation of the *Act* and related legislation and the effect of that legislation on the GVRD's authority. The Court concluded that the standard of reasonableness applies to questions of mixed fact and law, such as whether the greenhouses are heated solely for the purpose of comfort.

Regarding the questions of law, the Court found that the legislation empowers the GVRD to perform all regulatory aspects of air quality management within the GVRD, and that the GVRD may regulate air emissions within its boundaries differently than the Province regulates air emissions elsewhere. The Court found that the legislature contemplated overlap between GVRD bylaws and province-wide regulations, and that the GVRD is authorized to regulate air quality within its boundaries in a manner that is inconsistent with provincial regulations of general application.

Regarding the GVRD's authority to issue the permit, the Court concluded that the Bylaw requires operators to obtain a permit to discharge air contaminants in the GVRD. Accordingly, the GVRD was entitled to require, and to issue, the permit in this case. It found that neither the *Regulation*, nor the Code of Practice contained therein, operated to prohibit the GVRD from issuing the permit. While the permit imposes more restrictive emission standards than the *Regulation*, the Court found that the permit does not conflict with the *Regulation* at common law, nor under the conflict provisions provision in the *Act*. It concluded that dual compliance with the permit and the *Regulation* is possible.

Finally, the Court found that the Board's conclusions regarding comfort heating were reasonable and should be upheld.

The Court allowed the appeal and restored the permit.

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 the sections of the *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation* which establish the Board and set out its general powers and procedures.

Also included are the appeal provisions contained in each of the five statutes which provide for an appeal to the Board from certain decisions of government officials: the *Environmental Management Act*, the *Health Act*, the *Integrated Pest Management Act*, the *Water Act* and the *Wildlife Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (March 31, 2009), with the exception of section 8 of the *Health Act* which was repealed effective March 31, 2009.

Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications.

Although not provided below, it should be noted that in addition to decisions of government officials, Part 3 of the *Environmental Management Act* gives district directors and officers appointed by the Greater Vancouver Regional District certain decision-making powers that can then be appealed to the Board under the appeal provisions in the *Environmental Management Act* referenced below. In addition, the *Oil and Gas Commission Act*, S.B.C. 1998, c. 39 (not reproduced) allows the Oil and Gas Commission to make certain decisions under the *Water Act* and the *Environmental Management Act*, and those decisions may be appealed in the usual way under the appeal provisions of the *Water Act* and *Environmental Management Act*, as set out below.

Environmental Management Act, SBC 2003, c. 53

Part 8
APPEALS
Division 1 – Environmental Appeal Board

Environmental Appeal Board

93 (1) The Environmental Appeal Board is continued to hear appeals that under the provisions of any enactment are to be heard by the appeal board.

(2) In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

(3) The appeal board consists of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice

chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

(4) The *Administrative Tribunals Appointment and Administration Act* applies to the appeal board.

(5 and 6) Repealed 2003-47-24.]

(7) The chair may organize the appeal board into panels, each comprised of one or more members.

(8) The members of the appeal board may sit

(a) as the appeal board, or

(b) as a panel of the appeal board.

(9) If members sit as a panel of the appeal board,

(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 appeal board, and

(c) an order, decision or action of the panel is an order, decision or action of the appeal board.

(10) The Lieutenant Governor in Council, by regulation, may establish the quorum of the appeal board or a panel.

(11) For the purposes of an appeal, sections 34 (3) and (4), 48, 49 and 56 of the *Administrative Tribunals Act* apply to the appeal board.

Parties and witnesses

94 (1) In an appeal, the appeal board or panel

(a) may hear the evidence of any person, including a person the appeal 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.

(2) A person or body, including the appellant, that has full party status in an appeal may

(a) be represented by counsel,

(b) present evidence,

(c) if there is an oral hearing, ask questions, and

(d) make submissions as to facts, law and jurisdiction.

(3) A person who gives oral evidence may be questioned by the appeal board, a panel or the parties to the appeal.

Costs and security for costs

95 (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.

(2) In addition to the powers referred to in section 93(2) but subject to the regulations, the appeal board may make orders 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.

(3) An order under subsection (2) may include directions respecting the disposition of money deposited under subsection (1).

(4) If a person or body given full party status under subsection 94(2) is an agent or

representative of the government,

(a) an order under subsection (2) may not be made for or against the person or body, and

(b) an order under subsection (2)(a) may be made for or against the government.

(5) The costs payable by the government under an order under subsection (4)(b) must be paid out of the consolidated revenue fund.

Decision of appeal board

96 If the appeal 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 appeal board

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

Appeal board power to enter property

98 The members of the appeal board have, for the purposes of an appeal, the right to enter any property except a private residence.

Division 2 – Appeals from Decisions under this Act

Definition of "decision"

99 For the purpose of this Division, **"decision"** means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed.

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.

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

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.

Procedure on appeals

102 (1) An appeal under this Division

(a) must be commenced by notice of appeal in accordance with the prescribed practice, procedure and forms, and

(b) must be conducted in accordance with Division 1 of this Part and the regulations.

(2) The appeal board may conduct an appeal under this Division by way of a new hearing.

Powers of appeal board in deciding appeal

103 On an appeal under this Division, 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 appeal board considers appropriate in the circumstances.

Appeal does not operate as stay

104 The commencement of an appeal under this Division does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

Division 3 – Regulations in Relation to Appeal Board

Regulations in relation to the appeal board

105 (1) Without limiting section 138(1), the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing a tariff of fees to be paid with respect to a matter within the jurisdiction of the appeal board;

(b) prescribing practices, procedures and forms to be followed and used by the appeal board;

(c) establishing restrictions on the authority of the board under section 95(1) to (4) including, without limiting this,

(i) prescribing limits, rates and tariffs relating to amounts that may be required to be paid or deposited, and

(ii) prescribing what are to be considered costs to the government in relation to an appeal and how those are to be determined;

(d) respecting how notice of a decision under section 96 may be given.

Environmental Appeal Board Procedure Regulation,

BC Reg. 1/82

Interpretation

1 In this regulation:

"Act" means the Environmental 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 charged with the administration of the *Financial Administration Act*.

(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 Healthy Living and Sport 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,
RSBC 1996, c. 179

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

(A) septic tanks,

…

(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 continued under section 93 of the *Environmental 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.

Integrated Pest Management Act,
SBC 2003, c. 58

Appeals to Environmental Appeal Board

14 (1) For the purposes of this section, "decision" means any of the following:

(a) making an order, other than an order under section 8;

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) have not been performed.

(2) A declaration, suspension or restriction under section 2 is not subject to appeal under this section.

(3) A person may appeal a decision under this Act to the appeal board.

(4) The time limit for commencing an appeal of a decision is 30 days after the date the decision being appealed is made.

(5) An appeal must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*.

(6) Subject to this Act, an appeal must be conducted in accordance with Division 1 of Part 8 of the *Environmental Management Act* and the regulations under that Part.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) 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.

(9) An appeal does not act as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

Water Act,
RSBC 1996, c. 483

Appeals to Environmental Appeal Board

92 (1) Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board 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.

(1.1) Despite subsection (1), a licensee may not appeal an order of the comptroller or a regional water manager to cancel in whole or in part a licence and all rights under it under section 23(2)(c) or (d).

(2) An order of the comptroller, the regional water manager or an engineer under Part 5 or 6 in relation to a well, works related to a well, ground water or an aquifer may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) the well owner, or

(c) the owner of the land on which the well is located.

(3) An order of the comptroller, the regional water manager or an engineer under section 81 may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) the well owner,

(c) the owner of the land on which the well is located, or

(d) a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

(4) 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.

(5) 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.

(6) 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 *Environmental Management Act*, and

(b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) 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.

(9) 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,

RSBC 1996, c. 488

Reasons for and notice of decisions

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

(a) a licence, permit, registration of a trapline or guide outfitter's certificate held by a person, or

(b) an application by a person for anything referred to in paragraph (a).

(2) Notice of a decision referred to in subsection (1) must be given to the affected person.

(3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, 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.

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 *Environmental 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 *Environmental Management Act*, and

(b) subject to this Act, must be conducted in accordance with the Environmental 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.