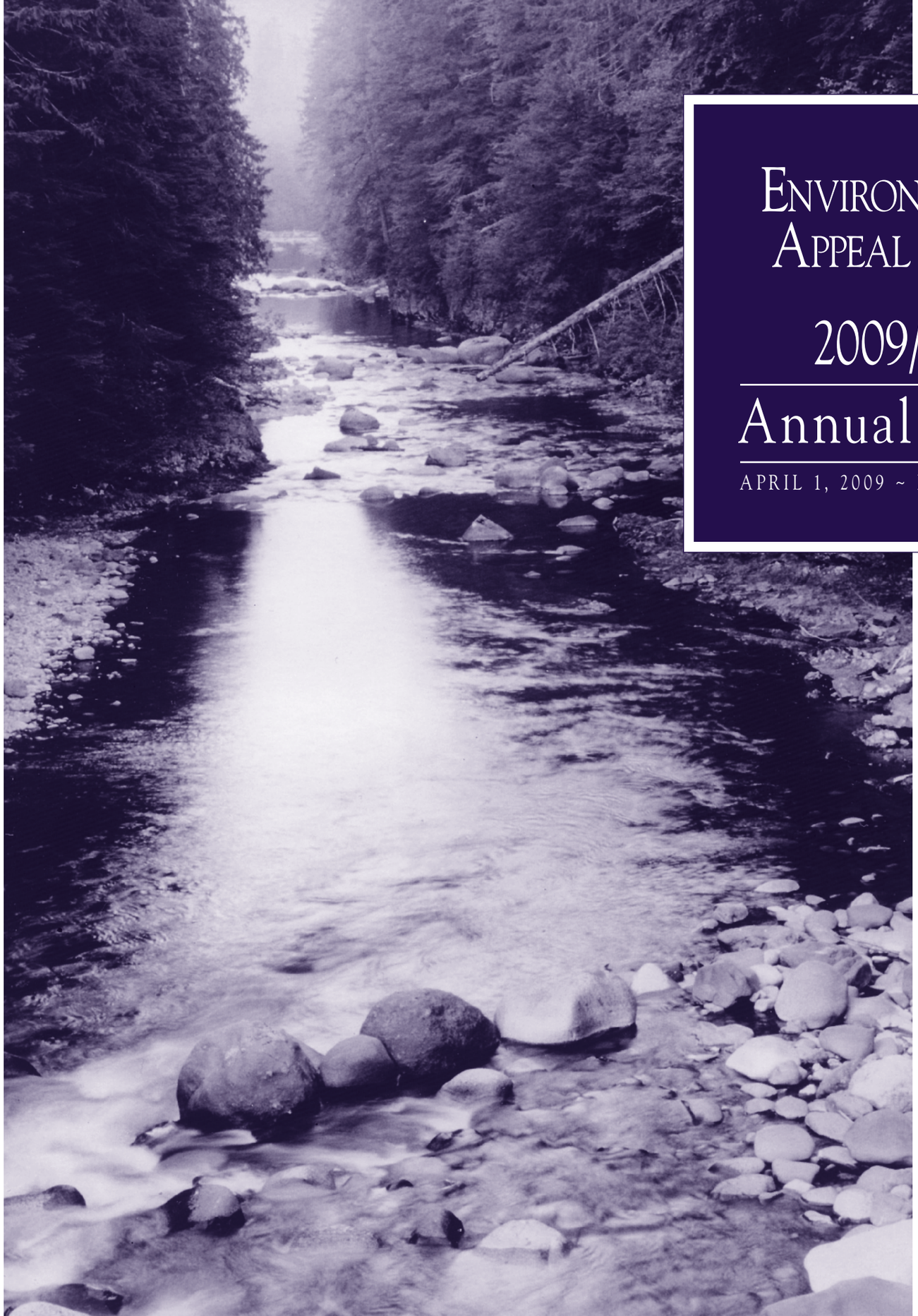

Environmental Appeal Board

2009/2010

Annual Report

APRIL 1, 2009 ~ MARCH 31, 2010

BRITISH COLUMBIA
The Best Place on Earth

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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
Attorney General
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Minister:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2009 through March 31, 2010.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

AR 09/10

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Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2009/2010 fiscal year.

The year in review

During the past year the Board has received, heard and decided a wide variety of appeals that have a significant impact on human health, the environment and the economy of British Columbia.

Included in these appeals are issues involving air quality on the Lower Mainland, municipal sewage in the East Kootenays, a contaminated site in the Cariboo, a toxic chemical spill in Mackenzie, pesticide use on Vancouver Island, a 'run' of the river project near Stewart, cougar poaching and firearms violations near Kamloops, and the stewardship of a trapline near Fort Nelson. A selection of these and other Board decisions have been summarized in this report.

Improving the Board's Website

The Board has made some changes to its website this year in an effort to include more useful information. 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 older decisions was not available electronically until recently. To improve the public's access to older decisions made by the Board, the archived decisions have been scanned and the full text of those decisions is now accessible on the Board's website.

One of our continuing projects is to improve the search mechanism for the Board's decisions to facilitate more precise searches.

Legislative Changes

The Government of British Columbia has enacted several pieces of climate-action legislation that frame B.C.'s approach to reducing greenhouse gas emissions. The Board is empowered to hear appeals under some of that legislation, and two of those Acts were brought into force during this report period: the *Greenhouse Gas Reduction (Cap and Trade) Act*, S.B.C. 2008, c. 32, and the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel) Act*, S.B.C. 2008, c. 32. The Board's powers and procedures under those Acts are discussed later in this report.

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 Board's office also provides support to the Health Professions Review Board. The Review Board is located in the same building as the Board and shares some administrative resources with the Board.

Changes to the Composition of the Board

The Board's membership experienced several significant changes to its roster of qualified professionals during the past year. A number of valued members left the Board during this reporting period. I wish to thank those departing members for their exceptional contribution to the activities of the Board over the past number of years. Those members are Sean Brophy, Bruce Devitt, Bob Gerath, Al Gorley, Lynne Huestis, Paul Love, Gary Robinson, David Thomas, Steve Willett and Alex Wood. I wish each of these individuals well in their future endeavours.

I am also very pleased to welcome four new members to the Board who will complement the expertise and experience of the outstanding professionals on the Board. These new members are Carol Brown, Blair Lockhart, Reid White and Lori Williams.

I am very fortunate to have a Board that is comprised of highly qualified individuals who can 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. These people bring with them the necessary expertise to hear cases involving issues ranging from contaminated sites to hunter licensing.

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, 2009 to March 31, 2010.

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*. As an adjudicative body, the Board operates at arms-length from 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, decisions that can be appealed to the Board are made by provincial and municipal government officials under four statutes that are administered by the Ministry of Environment: the *Environmental Management Act*, the *Integrated Pest Management Act*, the *Wildlife Act* and the *Water Act*. During the report period, the Board also gained the jurisdiction to hear appeals from certain decisions made by Ministry of Environment officials under the *Greenhouse Gas Reduction (Cap and Trade) Act* and the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

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 the 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 appointments. 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 (to November 28, 2009)	Professional Engineer	North Vancouver
Carol Brown (from October 28, 2009)	Lawyer/CGA	Prince George
Robert Cameron	Professional Engineer	North Vancouver
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Bruce Devitt (to September 13, 2009)	Professional Forester (Retired)	Esquimalt
Margaret Eriksson	Lawyer	New Westminster
Bob Gerath (to November 28, 2009)	Engineering Geologist	North Vancouver
R.A. (Al) Gorley (to November 28, 2009)	Professional Forester	Victoria
Les Gyug	Professional Biologist	Westbank
James Hackett (from October 28, 2009)	Professional Forester	Nanaimo
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Lynne Huestis (to November 28, 2009)	Lawyer	North Vancouver
Gabriella Lang	Lawyer	Campbell River
Blair Lockhart (from October 28, 2009)	Lawyer	Vancouver
Ken Long	Professional Agrologist	Prince George
Paul Love (to November 28, 2009)	Lawyer	Campbell River
David Ormerod	Professional Forester	Victoria
Gary Robinson (to November 28, 2009)	Resource Economist	Victoria
David H. Searle, CM, QC	Lawyer (Retired)	North Saanich
David Thomas (to November 28, 2009)	Oceanographer	Victoria
Reid White (from October 28, 2009)	Professional Biologist/Civil Engineer	Telkwa
Stephen V.H. Willett (to November 28, 2009)	Professional Forester (Retired)	Victoria
Loreen Williams (from October 28, 2009)	Lawyer/Mediator	West Vancouver
Phillip Wong	Professional Engineer	Vancouver
J.A. (Alex) Wood (to November 28, 2009)	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.

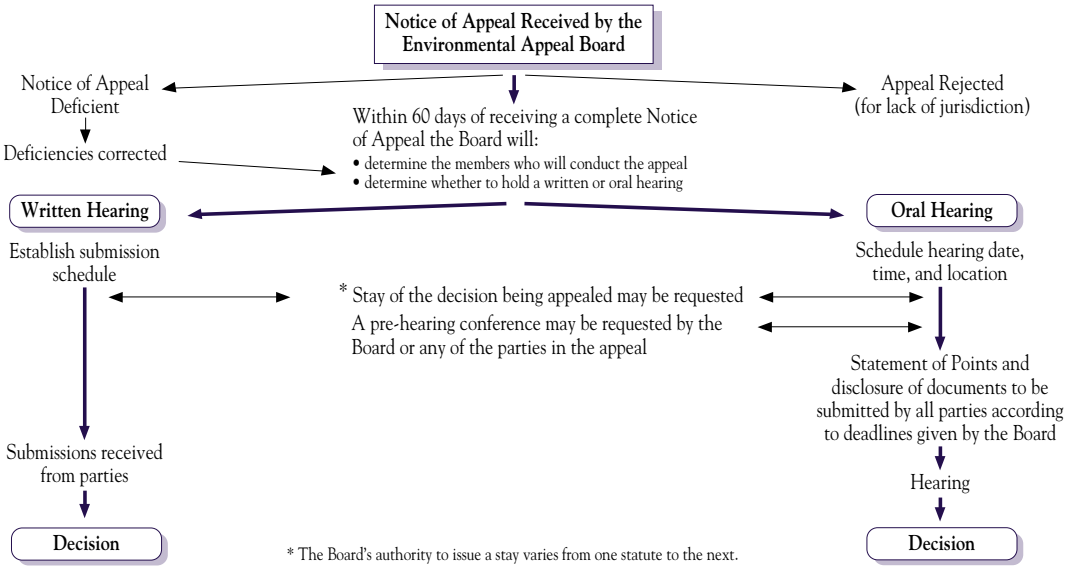
In addition, the names of the parties in an appeal appear in the Board's published decisions which are posted on the Board's website, and may appear in this Annual Report.

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 authority 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 *Greenhouse Gas Reduction (Cap and Trade) Act*

Under the *Greenhouse Gas Reduction (Cap and Trade) Act*, certain decisions of a director as designated by the Minister of Environment may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 18 of the *Act [imposed administrative penalties: failure to retire compliance units]* or of the extent of that non-compliance, as set out in an administrative penalty notice;*
- the determination of non-compliance under section 19 of the *Act [administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;*
- a decision under section 13(7) of the *Reporting Regulation [approval of alternative methodology for 2010]*; and
- a decision under section 14(2) of the *Reporting Regulation [approval of change of methodology]*.

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

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

*Sections 18 and 19 of the *Act* are not yet in force.

Appeals under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*

Under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, certain decisions of a director as designated by the Minister of Environment may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 11 of the *Act [imposed administrative penalties: fuel requirements]* or of the extent of that non-compliance, as set out in an administrative penalty notice;
- the determination of non-compliance under section 12 of the *Act [administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;
- a refusal to accept an alternative calculation of carbon intensity under section 6 (3)(b)(iii) of the *Act [requirements for reduced carbon intensity]*;
- a prescribed decision or a decision in a prescribed class.

The time limit for commencing an appeal is 30 days after the decision is served.

The Board is not empowered to order a stay of the decision under appeal.

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*. The *Act* 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 guiding territory 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 *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) 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.

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

On November 25, 2009, certain sections of the *Greenhouse Gas Reduction (Cap and Trade) Act*, S.B.C. 2008, c. 32 (the "*GHG Reduction (Cap and Trade) Act*"), were brought into force, including section 22 which provides for appeals to the Board. At the same time, the *Reporting Regulation*, B.C. Regulation 272/2009, was also brought into force. This legislation requires operators of certain facilities in British Columbia that emit over 10,000 tonnes of greenhouse gases annually to report their greenhouse gas emissions to the Ministry of Environment. The first requirements for reporting operations started on January 1, 2010.

Under section 22(1) of the *GHG Reduction (Cap and Trade) Act*, certain decisions of a director as designated by the Minister of Environment may be appealed to the Board:

- the determination of non-compliance under section 18 *[imposed administrative penalties: failure to retire compliance units]* or of the extent of that non-compliance, as set out in an administrative penalty notice; and
- the determination of non-compliance under section 19 *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice.

It is noted that sections 18 and 19 of the *Act* have not yet been brought into force.

Also, under section 32 of the *Reporting Regulation*, other decisions of a director in the Ministry of Environment may be appealed to the Board:

- a decision under section 13(7) *[approval of alternative methodology for 2010]*; and
- a decision under section 14(2) *[approval of change of methodology]*.

Section 22(3) of the *GHG Reduction (Cap and Trade) Act* and section 32(2) of the *Reporting Regulation* together provide that the Board's powers and procedures in sections 93 to 98 and 101 to 104 of the *Environmental Management Act*, S.B.C. 2003, c. 53, and in the *Environmental Appeal Board Procedure Regulation*, B.C. Regulation 1/82, apply to appeals under this Act.

In addition, on January 1, 2010, most sections of the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, S.B.C. 2008, c. 16 (the "*GHG Reduction (Renewable and Low Carbon Fuel Requirements) Act*"), were brought into force, including section 14 which provides for appeals to the Board. At the same time, the *Renewable and Low Carbon Fuel Requirements Regulation*, B.C. Regulation 394/2008, was also brought into force. This legislation requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels, such as ethanol and biodiesel, and to

submit annual compliance reports to the Ministry of Environment.

Under section 14(1) of the *GHG Reduction (Renewable and Low Carbon Fuel Requirements) Act* certain decisions of a director as designated by the Minister of Environment may be appealed to the Board:

- the determination of non-compliance under section 11 *[imposed administrative penalties: fuel requirements]* or of the extent of that non-compliance, as set out in an administrative penalty notice;
- the determination of non-compliance under section 12 *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice; and
- a refusal to accept an alternative calculation of carbon intensity under section 6 (3)(b)(iii) *[requirements for reduced carbon intensity]*.

Section 14(3) of the *GHG Reduction (Renewable and Low Carbon Fuel Requirements) Act* and Part 4 of the *Renewable and Low Carbon Fuel Requirements Regulation* together provide that the Board's powers and procedures under sections 93 to 98 of the *Environmental Management Act*, S.B.C. 2003, c. 53, and in the *Environmental Appeal Board Procedure Regulation*, B.C. Regulation 1/82, apply to appeals under this *Act*. Also, sections 21 and 23 of the *Renewable and Low Carbon Fuel Requirements Regulation* specify some of the Board's powers and procedures in an appeal.

Recommendations

There were no issues that arose in 2009/2010 that 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.

Between April 1, 2009 and March 31, 2010, a total of 45 appeals were filed with the Board against 39 administrative decisions, and a total of 26 decisions were published. No appeals were filed or heard under the *GHG Cap and Trade Act* or the *GHG Renewable and Low Carbon Fuel Requirements Act*.

April 1, 2009 – March 31, 2010

Total appeals filed		**45**
Total appeals closed		**46**
Appeals abandoned or withdrawn		**19**
Appeals rejected, jurisdiction/standing		**8**
Hearings held on the merits of appeals		
Oral hearings completed	11	
Written hearings completed	16	
***Total hearings held on the merits of appeals**		**15**
Total oral hearing days		**29**
Published Decisions issued		
Final Decisions		
Appeals allowed	1	
Appeals allowed, allowed in part	3	
Appeals dismissed	11	
Total Final Decisions		**15**
Decisions on preliminary matters		**10**
Decisions of Costs		**0**
Consent Orders		**1**
Total published decisions issued		**26**
Total unpublished decisions issued		**35**
Total decisions issued		**61**
****** **Average days until a decision is issued**		**32**

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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	Integrated Pest Management	Waste Management	Water	Wildlife	Total
Appeals filed during report period	17	2		16	10	45
Appeals closed during report period	16	1	2	11	16	46
Appeals abandoned or withdrawn	7	1		8	3	19
Appeals rejected jurisdiction/standing	2		1		5	8
Hearings held on the merits of appeals						
Oral hearings	5			2	4	11
Written hearings	6	1		3	7	17
Total hearings held on the merits of appeals	11	1		5	11	28
Total oral hearing days	13			4	12	29
Published decisions issued						
Final decisions	6		1	1	7	15
Costs decision						0
Preliminary applications	6	1		0	3	10
Consent Orders	1					1
Total published decisions issued	13	1	1	1	10	26
Unpublished decisions issued						
Interim Stay	1				1	2
Jurisdiction		1		1	1	3
Participant/Intervnor					17	17
Preliminary Miscellaneous	5			2		7
Standing	2				1	3
Stay	2				1	3
Total unpublished decisions issued	**10**	**1**		**3**	**21**	**35**

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This table provides a summary of the appeals filed, hearings held and both published and unpublished 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, 2009 ~ March 31, 2010

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 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, a panel may also send the matter back to the original decision-maker with or without directions, or 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/ Waste Management Act

Municipal sewage system appeal resolved after years of negotiation and mediation

1999-WAS-023(c) City of Cranbrook v. Assistant Regional Waste Manager (Canadian Pacific Railway, Third Party; Arlene Ridge of behalf of the Fort Steele Residents, Participant)

Decision Date: April 9, 2009

Panel: David H. Searle, CM, QC, Robert Gerath, R. G. Holtby

The City of Cranbrook ("Cranbrook") has a sewage treatment system that includes two storage lagoons. Treated effluent is pumped to the lagoons for storage, and the effluent is disposed of via spray irrigation on agricultural fields located primarily southeast of the lagoons. This operation is authorized by a waste permit that was issued to Cranbrook in 1975.

In 1997, Canadian Pacific Railway ("CPR") experienced some instability at its tracks approximately three miles north of Cranbrook's sewage lagoons. CPR retained an engineering firm to review the track instability and prepare a geotechnical report. That report concluded that effluent seepage from Cranbrook's lagoon #2 poses a risk to the stability of the tracks when the elevation of the effluent in the lagoon reaches 824 metres above sea level ("ASL") and higher because it causes the natural groundwater flow to reverse and flow towards the tracks.

In April 1999, the Assistant Regional Waste Manager (the "Assistant Manager"), Ministry of Environment, Lands and Parks (now the Ministry of Environment), amended Cranbrook's waste permit. The amendments include a requirement that Cranbrook manage lagoon #2 so that the effluent level does not exceed 824 metres ASL.

Cranbrook appealed the amendments and requested that the Board set aside the condition that sets the maximum elevation of lagoon #2 at 824 metres ASL, or alternatively, vary the amendments by increasing the maximum elevation for lagoon #2 to 827.5 metres ASL. In the further alternative, Cranbrook requested that it be permitted to construct an outfall from the lagoons to a nearby river. Cranbrook also requested a stay of the amendments, which the Board denied (*City of Cranbrook v. Assistant Regional Waste Manager*, Appeal No. 99-WAS-23(a), May 10, 1999).

Ms. Ridge applied to the Board on behalf of the Fort Steele Residents (the "Residents") for participant status in the appeal, based on their concerns that Cranbrook's spray irrigation operation is contaminating groundwater. The Board granted the Residents limited participant status (*City of Cranbrook v. Assistant Regional Waste Manager*, Appeal No. 99-WAS-23(b), August 20, 2002).

At the parties' request, the hearing of the appeal was adjourned several times to allow the parties time to attempt to negotiate a solution. At the parties' request, the Board also attempted to mediate a resolution to the appeal. Ultimately, the parties were unable to reach an agreement, and they requested that the Board adjudicate the appeal.

In addition to the issue of the appropriate maximum elevation for the effluent in lagoon #2, the parties raised legal issues regarding: the Board's jurisdiction to make findings regarding the Residents' evidence about Cranbrook's spray irrigation system; the legal test for deciding the appropriate maximum

elevation of lagoon #2; the burden of proof; and, the legislation that applies to the appeal.

The Board found that it is not bound by strict rules of evidence, and it has jurisdiction to consider new evidence presented by the Residents that was not before the Assistant Manager, to the extent that the evidence is relevant to the permit amendments. It is not unfair for the Board to consider the relevant portions of that evidence, because the parties were given an opportunity to respond to the evidence, although they declined to do so.

Additionally, the Board found that, contrary to Cranbrook's submissions, the legal threshold for the Assistant Manager to exercise his discretion to amend the permit is not "reasonable certainty" that exceeding 824 metres ASL causes an adverse effect on the environment. Rather, it is consistent with the relevant statutory provisions, and previous Board decisions, to take a cautious approach in assessing the potential risks associated with the elevation of lagoon #2, aimed at proactively preventing harm to the environment.

Similarly, the Board held that the evidentiary threshold for the Assistant Manager to exercise his amending powers is not "reasonable certainty", but rather a "balance of probabilities". Moreover, the Board found that Cranbrook is responsible for leading sufficient evidence for the Board to conclude, on a balance of probabilities, that allowing the elevation of lagoon #2 to exceed 824 metres ASL will not create an unreasonable risk of harm to the environment. It is insufficient for Cranbrook to simply seek to discredit the Assistant Manager's evidence, or argue that CPR has not proved its case.

Regarding the applicable legislation, the Board noted that when the Assistant Manager issued his decision, the *Waste Management Act* empowered him to amend the permit, and it also provided Cranbrook with a right of appeal. At that time, the *Environment Management Act* established the Board's powers and procedures. In 2004, those Acts were repealed and the *Environmental Management Act*, which regulates waste discharge and contains the appeal provisions, came into force. Based on the relevant transitional provisions and the *Interpretation Act*, the Board found that the appeal was continued under the *Environmental Management Act*, but the *Waste Management Act* applied for the purposes of considering the merits of the amendments. The Board also found that it was beyond its jurisdiction in this case to amend the permit to provide for an outfall as requested by Cranbrook, and in any case, there was insufficient information before the Board to justify authorizing an outfall. The Board held that Cranbrook should apply under the current legislation if it wishes to install an outfall.

Finally, regarding the appropriate maximum elevation for lagoon #2, the Board found that the evidence clearly established, on a balance of probabilities, that the limit of 824 metres ASL is justified. The Board concluded that there was overwhelming evidence that approximately 330,000 m^3 of effluent escapes from lagoon #2 to the groundwater annually. The Board also found that there was sufficient evidence to establish, on a balance of probabilities, that at elevations exceeding 824 metres ASL, effluent migrates underground to the CPR right of way. The evidence indicated that some of the slope failures along CPR's tracks were caused by a combination of unusual events of high precipitation and high ground water. The Board held that the consequences of such failures are severe, and the risk of failure should be reduced by limiting the elevation of lagoon #2 so that seepage to the right of way is eliminated. Consequently, the Board confirmed the requirement in the amendments that the elevation of lagoon #2 not exceed 824 metres ASL.

Regarding other aspects of the amended permit, the Board remitted the matter back to the Assistant Manager (now the Director) with a number of directions aimed at finding ways to minimize

effluent leakage to the groundwater. The Board also recommended that the Ministry attach appropriate conditions to Cranbrook's spray irrigation system.

Accordingly, the Board dismissed the appeal, subject to certain directions.

Longstanding dispute over odour emissions in Vancouver addressed

2007-EMA-007(a) & 2008-EMA-005(a) West Coast Reduction Ltd. v. District Director of the Greater Vancouver Regional District (Don Dickson, Brenda Belak, Sheila Craigie, and Blair Redlin, Third Parties)

Decision Date: March 8, 2010

Panel: Alan Andison, Monica Danon-Schaffer, Robert Wickett

West Coast Reduction Ltd. ("West Coast") appealed two separate amendments of an air emission permit pertaining to a rendering plant it operates in Vancouver, BC. The amendments were issued by the District Director, Greater Vancouver Regional District (the "District Director"). In both decisions, the District Director imposed requirements, conditions, criteria, standards, guidelines and objectives in relation to odour emissions from the plant. The objective was to reduce the amount of odour emitted from the plant. The 2008 amendments fully replaced, and were more stringent than, the 2007 amendments.

The plant began operations in 1964, and has operated under an air emission permit since 1992. The plant collects and processes approximately 1.6 million pounds of animal by-products per day, and produces products such as refined animal fats and protein meals that are used in pet food and animal feed. The plant also collects and refines used cooking oil and grease from restaurants. Depending on the wind direction and weather conditions, odours from the plant may travel to nearby residential areas. Although West Coast made efforts over the years to reduce odour emissions from the plant, West Coast and the Greater Vancouver Regional District received many complaints about the odours. Beginning in 2004, there was a significant increase in complaints from the public. The District Director acknowledged that he made the amendments in response to increasing public complaints about the odour from the plant.

West Coast appealed the amendments on the basis that they were made without legal authority, and were unreasonable.

Four people who live near the plant (the "Residents") also appealed (Appeal Nos. 2007-EMA-008 & 2008-EMA-004), arguing that the amendments did not do enough to reduce the odours emitted by the plant.

The Board heard the appeals together in a hearing that took approximately three weeks, spread out over several months.

The Board found that the District Director exceeded his jurisdiction when he issued the amendments. Specifically, the Board found that he had no jurisdiction under section 4.4 of the *Air Quality Management Bylaw No. 937* (the "*Bylaw*") to amend the permit in the manner that he did. Section 4.4 of the *Bylaw* authorizes unilateral permit amendments that are "necessary for the protection of the environment." The evidence showed that the District Director could not have properly determined, based on the information available to him, whether the amendments would protect the environment by producing acceptable air quality in the community. The Board found that the amendments were more likely an attempt to appease a relatively small number of individuals who frequently complained about the odour. The Board also found that there was insufficient evidence to establish that West Coast was responsible for all of the odours that were the subject of the complaints.

In addition, the Board found that an odour is not a "substance", and therefore an odour does not fall within the definition of "air contaminant" in the *Bylaw*

and the *Environmental Management Act*. The Board also noted that no BC legislation has placed specific numerical limits on odours. However, the Board found that odour is capable of causing air pollution, and may be subject to monitoring requirements.

Further, the Board found that the District Director's imposition of odour limits, as measured in "odour units", as an enforcement tool was unreasonable and inappropriate. In particular, the Board found that "odour units" are a subjective and imprecise measurement tool, and have been developed based on data and assumptions that are not readily applicable to environmental odours, especially for the purposes of enforcement.

For all of these reasons, the Board rescinded the 2007 and 2008 amendments. The Board also made several recommendations aimed at assisting the parties to find a mutually agreeable resolution to this longstanding conflict.

Given the Board's findings, it concluded that it could not grant the remedies sought by the Residents, and their appeals were dismissed. The Board issued its decision on the Residents' appeals in a separate companion decision (see *Don Dickson, et al v. District Director of the Greater Vancouver Regional District* (Decision Nos. 2007-EMA-008(b) and 2008-EMA-004(b), issued March 8, 2010)).

Accordingly, West Coast's appeals were allowed.

Parties negotiate an agreement to resolve appeal over air emissions

2008-EMA-007(a) Delta Cedar Products Ltd. v. District Director of the Greater Vancouver Regional District

Decision Date: May 7, 2009

Panel: Alan Andison

Delta Cedar Products Ltd. ("Delta") appealed a decision by the District Director of the Greater Vancouver Regional District (the "District Director") to amend Delta's permit that authorizes the discharge of particulate emissions from a wood-fired boiler at Delta's sawmill located in Delta, BC. In the amendment, the District Director required Delta to reduce emission levels, undertake certain works, and submit reports, all by specific dates. Delta appealed on the grounds that the amendments were unreasonable, that the District Director failed to consider the financial impacts of the amendments on Delta, and that the District Director failed to give reasons for the amendments.

Before the appeal was heard by the Board, Delta and the District Director reached an agreement to settle the appeal.

By consent of the parties, the Board ordered that the amendments were confirmed with certain exceptions. Most of the exceptions pertained to the dates for compliance with the amendments, such that Delta was given additional time before it was required to comply with the amendments.

Accordingly, the appeal was allowed, in part.

Purchaser of contaminated land partially successful in appeal to develop the lands

2008-EMA-006(a) CNT Holdings Inc. v. Director, *Environmental Management Act*

Decision Date: July 14, 2009

Panel: David H. Searle, CM, QC

CNT Holdings Inc. (the "Appellant") appealed a decision of the Director, *Environmental Management Act*, Ministry of Environment (the "Ministry"), directing the Appellant to conduct a detailed site investigation of two lots it owns near Williams Lake, BC.

The lots consisted mainly of undeveloped land which was zoned for rural use. A small portion of one lot was occupied by a market and was zoned for rural and commercial use. Neither was zoned for

residential use. For many years, starting in the mid-1950s, the market had been operated as a convenience store and gas bar. In 1989, the Ministry issued a pollution abatement order to a previous owner of the gas bar, to address groundwater contamination originating from the gas bar. In 1990, the gas bar was decommissioned and two underground storage tanks were removed. Contaminated soil under the gas pumps was removed to a depth of seven metres, but removal beyond that was considered impractical. Groundwater remediation was also considered impractical. New groundwater wells were constructed on adjacent properties that had been contaminated by pollutants which migrated from the gas bar.

In 2004, the Appellant purchased the lots. The Appellant was aware of the previous environmental concerns. In 2007, the Appellant applied for rezoning and subdivision of the lots. The Appellant sought to subdivide the two lots into six lots, five of which would be developed for residential use and would, therefore, require rezoning. The market would remain on the sixth lot. The Appellant's rezoning application was referred to the Ministry in October 2007, and the Ministry provided no comments. As part of the subdivision and re-zoning application process, the Appellant prepared a site profile which was forwarded to the Ministry, as required by the *Environmental Management Act* and the *Contaminated Sites Regulation*. In March 2008, the Director issued his decision requiring a detailed site profile for both lots. This requirement suspended any approval of the Appellant's subdivision application.

The Appellant appealed the Director's decision on the basis that requiring a detailed site profile was unfair and unreasonable. The Appellant argued that the Ministry should have advised it early in the rezoning process if the Ministry had concerns about the property. The Appellant submitted that it would not have proceeded with the rezoning and subdivision, and incurred further costs, if it had known that a detailed site investigation would be required, because the cost of preparing a detailed site investigation will make the subdivision un-economical. The Appellant also submitted that, as part of the rezoning application, it completed a geotechnical investigation on all six of the proposed lots to determine their suitability for sewage disposal systems, and no indication of contamination was found.

The Board found that the Director has authority under the *Environmental Management Act* and the *Contaminated Sites Regulation* to require a detailed site investigation, and that he properly exercised his discretion by requiring a detailed site profile in this case. Specifically, the Board held that the evidence showed that the contamination caused by the former gas bar was not fully remediated by the previous owner. Although the Ministry's Contaminated Site Registry listed the site's status as "inactive – no further action", the Registry also indicated that the site had not gone through the entire remediation process and the Ministry could require further assessment or remediation in the future, despite the fact that it required no further action in 2000 when the notation was made. The Board also found that the geotechnical investigation of the lots' suitability for sewage disposal systems was not deep enough to be conclusive regarding the historic contamination. Further, the Board found that it was reasonable for the Ministry not to comment on the rezoning application, because there is no legal requirement for the Ministry to do so. The statutory requirement to submit a site profile to the Director, and for the Director to decide whether further information is needed, applies to subdivision applications. Furthermore, the Board noted that the legislation makes the Appellant, as the owner of the site, responsible for conducting the detailed site investigation, regardless of the fact that the contamination was originally caused by someone else.

In these circumstances, the Board agreed with the Director that a detailed site investigation

is warranted. However, the Board found that the Director's decision was too broad, because the evidence of groundwater flows indicates that the area of concern is limited to the former gas bar site, which is proposed for lot 1, and does not include lots 2 to 6.

In conclusion, the Board found that the matter should be remitted back to the Director with directions to limit the detailed site investigation to lot 1 of the proposed subdivision, and that he consider whether an investigation of adjacent lands should be conducted.

Accordingly, the appeal was allowed, in part.

Dispute over electronics recycling

2009-EMA-003(a) Western Canada Computer Industry Association v. Director, *Environmental Management Act*

Decision Date: March 18, 2010

Panel: Robert Wickett

The Western Canada Computer Industry Association (the "Association") appealed a decision issued by the Director, *Environmental Management Act*, Ministry of Environment, to rescind the Association's stewardship plan approval. The approval was granted on October 10, 2007, and authorized the Association to undertake electronics product recycling on behalf of the Association's members, which include computer wholesalers and retailers.

When the approval was issued, the Association intended to undertake recycling in competition with the Electronics Stewardship Association of BC (the "ESABC"), which had received a stewardship plan approval from the Director in 2006. However, the Association faced an immediate obstacle to soliciting members to use its services. As the ESABC had received its approval many months before the Association, and as the ESABC was the only electronics recycler at that time, it has signed up virtually all of the electronics manufacturers who sell or distribute their product in BC under the manufacturer's own brand. Under the *Recycling Regulation* (the "*Regulation*"), all "producers" are required to have recycling plans in place, and the definition of "producers" included manufacturers, wholesalers and retailers. Manufacturers who became members of the ESABC signed an agreement with ESABC which required them to pay a recycling fee, which they would charge to non-members upon the purchase of an electronic product from them, and then they would remit the fee to the ESABC. The object was to ensure that retail purchasers only paid one recycling fee. However, non-members of the ESABC who were "producers", which included electronics wholesalers and retailers, remained liable under the *Regulation* to perform their own recycling duties, and this was at the heart of the appeal.

The Director recognized the obstacle faced by the Association, and initiated a series of discussions and negotiations with the Association and the ESABC, but nothing was resolved. In March 2009, the Director sent an advisory notice to the Association alleging various issues of non-compliance with the Association's stewardship plan. In June 2009, the Director issued a warning notice to the Association, indicating that the Association's stewardship plan may be rescinded.

On July 31, 2009, the Director rescinded the Association's approval on the basis that audits of the Association's recycling facilities showed a failure to comply with the approval's conditions, and a substantial failure to ensure a functional return-collection system for electronics products.

The Association appealed the Director's decision on numerous grounds, including that the Director's findings of non-compliance were incorrect, and that the Ministry of Environment had not provided a "level playing field" and had not acted impartially. The Association requested that the Board reverse the Director's decision and make certain orders

to "level the playing field" with the ESABC.

The Board found that the Association admitted that it had not complied with several conditions of its approval, and the evidence clearly established that the Association was unable and unwilling to comply with various aspects of its stewardship plan. The Board concluded that the Association's non-compliance with its approval and the *Regulation* provided sufficient grounds to rescind the approval.

The Board next considered whether the orders requested by the Association should be granted on the basis that the Director essentially acted in bad faith by promulgating an "uneven playing field" such that it was impossible for the Association to comply with its stewardship plan. The Board considered its powers on appeal, as set out in section 103 of the *Environmental Management Act*, and found that the Board has no jurisdiction to grant the relief sought by the Association. The Board's powers would be limited to reversing the Director's decision to rescind the approval, and referring the matter back to the Director with directions to amend the conditions in the approval, but the Board found that these remedies would be of no assistance to the Association. The Board also noted that the Association's complaint goes to issues of policy and legislative intent, which are matters for the Legislature and the Director, but not the Board.

Accordingly, the appeal was dismissed.

Residents oppose landfill expansion

2009-EMA-005(a) Ermes Culos et al v. Director, *Environmental Management Act* (Wastech Services Ltd. and the Village of Cache Creek, Third Parties)
Decision Date: November 25, 2009
Panel: Alan Andison

Ermes Culos and four other persons (the "Applicants") appealed a decision of the Director, *Environmental Management Act*, Ministry of Environment, to amend an operational certificate. The amended operational certificate authorizes the Village of Cache Creek and Wastech Services Ltd. ("Wastech") to manage municipal solid waste at a sanitary landfill located in Cache Creek, BC. Among other things, the amendments authorize an expansion of the landfill's footprint to include an additional 6.7 hectare area which is referred to as "Annex A", located adjacent to the existing landfill.

The Applicants requested a stay of the Director's decision pending the Board's decision on the merits of the appeal.

In determining whether a stay ought to be granted, the Board applied the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*. With respect to the first stage of the test, the Board found that the Applicants had raised serious issues to be tried which were not frivolous, vexatious or pure questions of law.

Regarding the second part of the test, the Board found that the Applicants failed to establish that their interests in the environment and human health would suffer irreparable harm pending the outcome of the appeal unless a stay was granted. The Board found that there was no evidence that allowing the construction of Annex A would cause irreparable harm. The Board also found that allowing the operation of Annex A before it overlaps with the existing landfill would not cause irreparable harm. There was conflicting evidence on the question of whether the use of Annex A will cause environmental harm once it overlaps with the existing landfill, but the Board held that it would be inappropriate to decide that question in a preliminary application, as it would amount to deciding the merits of the appeal, and in any case the appeal would likely be decided before the overlap occurred.

Turning to the third part of the test, the Board found that the balance of convenience weighed in favour of denying a stay. The Board held that the

Applicants had not demonstrated any harm to the environment or human health if a stay was denied, whereas granting a stay could interrupt Wastech's business operations and affect its financial interests. In addition, for the limited purpose of deciding the stay application, the Board found that many of the Director's amendments appear to provide for the protection of the environment and human health, which are the very interests that the Applicants seek to protect.

Accordingly, the application for a stay was denied.

Balancing fairness, expediency and cost effectiveness in toxic spill

2009-EMA-009(a) Worthington Mackenzie Inc. and Daniel Alexander White v. Director, *Environmental Management Act* (Province of British Columbia, Third Party)

Decision Date: January 5, 2010

Panel: Alan Andison

Worthington Mackenzie Inc. ("WMI") and Daniel Alexander White appealed a decision and certificate issued by the Director, *Environmental Management Act*, Ministry of Environment. The decision and certificate address the reasonableness of, and responsibility for, costs of spill response actions incurred by the Province of British Columbia (the "Province") at the Mackenzie Pulp Mill (the "Mill"), located in Mackenzie, BC. The Director concluded that WMI and Mr. White are jointly and severally liable for the Province's costs of $4,485,505.

In or about January 2009, the Province took over management of the Mill from WMI pursuant to section 80(2) of the *Environmental Management Act* (the "*Act*"), which addresses spill response actions.

In August 2009, the Director held an oral hearing to determine liability and costs for the spill response carried out by the Province. The hearing was attended by WMI's representatives, Mr. White, and the Province's representatives. All parties were represented by legal counsel. The Director was also represented by legal counsel, who also represented the contractor in the spill response actions carried out by the government. The contractor was not a party to the proceedings before the Director. However, during the hearing before the Director, the contractor gave evidence regarding the costs of the spill response actions.

During the Director's hearing, WMI and Mr. White alleged that the Director's involvement with the spill response actions and his representation by the same lawyer as the contractor created a reasonable apprehension of bias, for which he should have recused himself. The Director decided during the hearing that there was not a reasonable apprehension of bias. The Director then issued the decision and certificate in September 2009.

In October 2009, WMI and Mr. White filed an appeal with the Board against the Director's decision and certificate, on the basis that: the Director made errors in determining the reasonable costs of the spill response actions; the Director erred in concluding that Mr. White should be jointly liable for the Province's costs; and, the Director's appointment as the decision-maker for this matter and his representation by the same lawyer as the contractor created a reasonable apprehension of bias.

After the appeal was filed, the Province applied to the Board for an order that the appeal be conducted as an appeal on the record (i.e. a 'true appeal') conducted by exchange of written submissions. The Board offered all parties an opportunity to comment on whether the appeal should be conducted as requested by the Province.

After considering the parties' submissions, the Board found that the principles of fairness and judicial economy did not support the Province's application. The Board held that the matter should be conducted as a hybrid of a true appeal and a new hearing, where new evidence may be presented

along with any relevant evidence from the record. In addition, the Board found that the parties should be allowed to cross-examine witnesses and make submissions as to facts, law and jurisdiction, in the context of a full oral hearing.

Specifically, the Board held that the oral hearing before the Director cannot be considered a proxy or substitute for a full and fair oral hearing before the Board. The Director is the decision-maker of first instance, and he is an administrative decision-maker within the Ministry. He does not, nor is he intended to, perform the role of an independent tribunal. The *Act* creates a legislative scheme for administrative appeals of decisions such as the Director's. Part 8 of the *Act* provides persons such as the Appellants with a right of appeal to an independent appeal board. The *Act* empowers the Board to conduct appeals as a new hearing whereby the parties may participate fully in an oral hearing, including presenting evidence that was not before the Director, cross-examining witnesses, and making submissions as to facts, law and jurisdiction.

In addition, the Board found that the appeal is not restricted to purely legal questions. The parties intend to introduce conflicting expert evidence on the issue of the Province's reasonable costs of the spill response actions. That evidence will go to the heart of the merits of the Director's decision, and is likely to be complex. There are likely to be questions of credibility regarding Mr. White's personal liability. The Board's findings could have a substantial financial impact on one or both of the Appellants. Much is at stake for the Appellants, and a full oral hearing before the Board is necessary for the Board to fully and fairly decide the issues. In addition, the Board noted that there is likely to be a high degree of public interest in the appeal, and this supports holding an oral hearing.

Further, the Board held that it would be neither expeditious nor cost effective to hear the appeal based only on the record of the proceedings before the Director. If the Board found that the Director made any errors, the likely remedy would be to refer the matter back to the Director or another person acting as a director, who would then make a new decision which could lead to a further appeal to the Board. If the Appellants succeeded in their claim that there was a reasonable apprehension of bias in the Director's proceedings, the matter would be referred back to a different director, who would have to hear the matter afresh, and their decision could be appealed to the Board. In contrast, if the Board conducts the appeal as a new hearing, any errors in the proceedings before the Director will be cured by the new hearing before the Board. Consequently, a new hearing before the Board is more expeditious and less costly overall for all of the parties.

Accordingly, the applications for a hearing on the record, and for proceeding based on written submissions, were denied.

When is a person "aggrieved" by emissions from a pulp and paper mill?

2009-EMA-012(a) Shuswap-Thompson Organic Producers Association v. Director, *Environmental Management Act* (Domtar Pulp and Paper Inc., Third Party)

Decision Date: March 10, 2010

Panel: Alan Andison

The Shuswap-Thompson Organic Producers Association ("STOPA") appealed a decision issued by the Director, *Environmental Management Act*, Ministry of Environment, amending a permit held by Domtar Pulp and Paper Inc. The permit authorizes Domtar to discharge emissions to the air from its pulp and paper mill located in Kamloops, BC. The amendments mainly pertained to emissions from the mill's high elevation main stack and two new stacks that would discharge emissions at a lower elevation from two power boilers. The amendments required a series of improvements that would reduce particulate emissions

from the high elevation main stack. The amendments also authorized relatively low levels of particulate emissions from the two new lower elevation stacks. Overall, particulate emissions from the mill would be reduced from approximately 8000 kg/day to 1500 kg/day by January 2016, and 70% of those emissions would continue to be discharged from the high elevation main stack.

STOPA appealed the amendments on numerous grounds, which mainly focused on the potential effects of emissions from the two new lower elevation stacks.

Domtar challenged STOPA's standing to bring the appeal. Domtar argued that STOPA was not a "person aggrieved" by the amendments, as required under section 100(1) of the *Environmental Management Act* (the "*Act*"). There was no dispute that STOPA is a legal "person" because it is a society under the *Society Act*, but Domtar argued that STOPA was not "aggrieved" because none of the concerns STOPA had raised were directly related to the interests of STOPA or its members; rather, they were concerns of a theoretical or general nature.

The Board requested submissions from the parties regarding whether STOPA had standing to appeal as a "person aggrieved" by the amendments.

The Board found that STOPA was not a "person aggrieved" within the meaning of section 100(1) of the *Act*. Specifically, the Board found that STOPA had provided insufficient information to allow the Board to reasonably conclude that the interests of STOPA or its members would likely be prejudiced by the amendments. Although STOPA raised several issues of general concern about the potential effects of the emissions, it failed to identify any specific concerns relating to potential effects on its interests or its members interests. Also, the concerns raised by STOPA were too remote or too speculative to support a finding that the interests of STOPA or its members would likely be prejudicially affected by the amendments.

STOPA requested that the Board allow STOPA to substitute an individual to act as the appellant, if the Board found that STOPA lacked standing to appeal. However, the Board found that the individual in question was not a member of STOPA, and she could have filed an appeal in her own capacity but she had not done so before the time limit for appealing had expired. In addition, given that STOPA had failed to establish that its members' interests would likely be prejudiced by the amendments, the Board found that there was no basis to conclude that an individual member of STOPA should be substituted as the appellant. Consequently, the Board denied STOPA's request to substitute another person as the appellant.

Accordingly, the appeal was rejected for lack of jurisdiction.

Greenhouse Gas Reduction (Cap and Trade) Act

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

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

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

Integrated Pest Management Act

What is an appealable "decision" under the *Integrated Pest Management Act*?

2009-IPM-001(a) Margaret Hurst v. Administrator, Integrated Pest Management Act

Decision Date: December 3, 2009

Panel: Alan Andison

Margaret Hurst filed an appeal of a letter issued by the Administrator, *Integrated Pest Management Act* (the "Administrator"), Ministry of Environment. She sought to appeal the Administrator's refusal to amend a pesticide user non-service licence held by Island Timberlands Limited Partnership ("Island Timberlands"). The licence authorizes Island Timberlands to apply pesticides on its private managed forest lands located near Duncan, BC. Ms. Hurst had requested that the Administrator amend the licence to exclude certain areas located near her property. Ms. Hurst requested the amendment on the basis that the proposed use of pesticides to control the growth of Big Leaf Maple in commercial forest crops would cause unreasonable adverse effects including harm to the environment and human health.

After reviewing Ms. Hurst's notice of appeal, the Board requested submissions from the parties on the question of whether the Board had jurisdiction to accept her appeal.

The Board reviewed the relevant provisions of the *Integrated Pest Management Act* (the "*Act*"), in accordance with the principles of statutory interpretation. The Board found that, although section 14(3) of the *Act* states that "A person may appeal a decision under this *Act* to the appeal board", and Ms. Hurst is a person, there must be an appealable "decision" as defined in the *Act* in order for the Board to have jurisdiction over the matter.

The word "decision" is defined in a very specific manner in section 14(1) of the *Act*. Section 14(1)(c) lists "refusing to amend a licence" as an appealable decision. However, as a statutory decision-maker, the Administrator only has the powers granted to her under the *Act*, and section 9(3) of the *Act* expressly limits the Administrator's discretion to amend or refuse to amend a licence. Specifically, it states that she may amend a licence on her own initiative or in response to an application of the licence holder, and she may refuse to amend a licence in response to an application by the licence holder. The Administrator does not have the authority to amend a licence in response to a request by a third party, such as Ms. Hurst. Consequently, the Board held that the Administrator's refusal to amend the licence in response to Ms. Hurst's request is not an appealable "decision" under section 14 of the *Act*.

The Board also noted that there are various other provisions in the *Act* which authorize the Administrator to take action against unreasonable adverse effects, such as through the issuance of licences with term and conditions regulating the use of pesticides, and through various powers to ensure compliance with the *Act*, regulations, orders, and the terms and conditions of licences.

Accordingly, the appeal was dismissed for lack of jurisdiction.

Water Act

Failure to use licenced water not the licensee's fault

2009-WAT-009(a) Earl Tourangeau v. Assistant Regional Water Manager (Dan Moorhead, Third Party)

Decision Date: August 19, 2009

Panel: Alan Andison

Earl Tourangeau appealed a decision issued on March 26, 2009, by the Assistant Regional Water Manager (the "Assistant Manager"), Cariboo Region, Ministry of Environment (the "Ministry"), denying Mr. Tourangeau's request to cancel a water licence held by Dan Moorhead on Otto's Spring, which is located on Mr. Tourangeau's property near Quesnel.

Mr. Tourangeau and Mr. Moorhead both hold water licences on Otto's Spring which allow each of them to use 500 gallons of water per day for domestic purposes. Mr. Moorhead's licence was issued before Mr. Tourangeau's, and therefore Mr. Moorhead's water rights have precedence over Mr. Tourangeau's water rights. When Mr. Tourangeau purchased his property in 2002, he was unaware of Mr. Moorhead's water licence on Otto's Spring, and Mr. Moorhead had not used water from Otto's Spring since at least 2001. Shortly after Mr. Tourangeau moved onto the property, Mr. Moorhead advised him that his water rights on Otto's Spring had precedence over Mr. Tourangeau's, but he hadn't used the water for some time due to a problem with his water line near where it crosses some oil and gas pipelines. Both parties have other sources of water.

In 2008, Mr. Tourangeau provided a sworn declaration to the Assistant Manager stating that Mr. Moorhead had not used the water from Otto's Spring for more than five years. Mr. Tourangeau requested that the Assistant Manager cancel Mr. Moorhead's water licence on Otto's Spring for failure to make beneficial use of the water for three successive years, pursuant to section 23(2) of the *Water Act*. In or about the same time, Mr. Moorhead's water line from Otto's Spring was being excavated and reconnected.

In his appeal to the Board, Mr. Tourangeau submitted that, other than testing the new water line, Mr. Moorhead has not used the water from Otto's Spring, and Mr. Moorhead does not have an easement or right-of-way for his water line over Mr. Tourangeau's property. Mr. Tourangeau argued that he has greater need for the water than Mr. Moorhead, and he requested that the Board cancel Mr. Moorhead's licence so that Mr. Tourangeau would have "first right" to the water in Otto's Spring.

The Board held that there is no authority under the *Water Act* to change the precedence date of a licence in order to give another licensee "first rights" to the water. Section 23(2) of the *Water Act* provides authority to cancel a licence for failure to make beneficial use for three successive years, but section 18(1)(c) of that *Act* provides authority to extend the time set for making beneficial use of the water. The Board found that, in the circumstances, Mr. Moorhead was properly given more time to make beneficial use of the water. The Board found that Mr. Moorhead lost the use of water from Otto's Spring through no fault of his own. Rather, it was caused by the activities of oil and gas companies, who made it difficult for Mr. Moorhead to excavate his water line and make repairs. The Board further held that his non-use of the water since the water line was reconnected appears to have been due to a dispute between himself and Mr. Tourangeau regarding a right-of-way or easement over Mr. Tourangeau's property. The Board found that the absence of a right-of-way or easement is not a ground for cancelling the licence at this time. The Board concluded that the parties should be given time to negotiate access to Otto's Spring and joint

maintenance of the water works, or to proceed with expropriation and compensation under section 27 of the *Water Act*.

For those reasons, the Board confirmed the Assistant Manager's decision.

Accordingly, the appeal was dismissed.

Wildlife Act

Hunting licence cancelled as a result of unlawful hunting and guiding activities

2009-WIL-001(a) Richard F. Horning v. Deputy Director of Wildlife

Decision Date: June 11, 2009

Panel: Alan Andison

Richard F. Horning appealed a decision of the Deputy Director of Wildlife, Ministry of Environment (the "Ministry"), to cancel his hunting privileges for five years and require him to successfully complete the Conservation Outdoor Recreation Education program prior to the reinstatement of his hunting privileges.

The events that led to the licensing action against Mr. Horning occurred in December 1998. Mr. Horning took an American hunter on a guided hunt in which the American hunter killed a cougar. Mr. Horning was not a licensed guide. Mr. Horning then cancelled another person's cougar species licence and made false statements on a Ministry inspection form, to hide the illegal activities. He also made false statements on a Ministry inspection form regarding a cougar he had shot. In December 2000, following an investigation by Conservation Officers, Mr. Horning was convicted of unlawfully acting as a guide, making a false statement to a Conservation Officer, and unlawfully using another person's hunting licences.

In 2005, a former Deputy Director sent a letter to Mr. Horning notifying him that his hunting privileges may be cancelled. However, Mr. Horning did not receive that notice. In October 2007, the Deputy Director sent another notice to Mr. Horning, which he received. Mr. Horning sent a brief response to the Deputy Director, in which he expressed surprise that licensing action was still being considered. In December 2008, the Deputy Director issued his decision. He found that an eight-year period of cancellation was appropriate given Mr. Horning's actions, but the Deputy Director reduced the period by three years to account for the Ministry's delay in taking licensing action.

Mr. Horning appealed and asked the Board to eliminate the period of cancellation.

The Board found that a five-year cancellation period, rather than eight years, properly reflects the seriousness of Mr. Horning's contraventions, their effect on wildlife resources, and an appropriate level of deterrence, compared to other situations involving illegal guiding and illegal hunting. Regarding deterrence, the Board found that Mr. Horning had continued to hunt since his convictions and had not committed any further contraventions. The Board held that, given the length of time since the contraventions occurred, and Mr. Horning's clean record since then, specific deterrence was not a significant consideration.

The Board then considered mitigating factors. The Board found that Mr. Horning showed some remorse in his submissions to the Board, and this warranted a reduction of six months. The Board agreed with the Deputy Director that a three-year reduction due to the Ministry's delay was appropriate. Consequently, the Board found that Mr. Horning's hunting privileges should be cancelled for a total of 1 year and six months, after mitigating factors were considered.

Accordingly, the appeal was allowed, in part.

Application for permit to rehabilitate injured bald eagle declared moot

2009-WIL-002(b) Pacific Northwest Raptors Ltd. v. Regional Manager

Decision Date: April 3, 2009

Panel: Alan Andison

Pacific Northwest Raptors Ltd. ("PNWR") appealed a decision of the Regional Manager, Recreational Fisheries and Wildlife Program, Vancouver Island Region, Ministry of Environment (the "Ministry"), refusing PNWR's application for a special permit to rehabilitate a juvenile male bald eagle.

PNWR operates a falconry centre for commercial and educational purposes. PNWR holds permits that authorize its commercial and educational activities. One of those permits also allows PNWR to temporarily hold or care for injured raptors for a maximum of two weeks. PNWR applied for the special permit so that PNWR could hold the eagle for a longer period of time while rehabilitating it using "free flying" falconry techniques.

In February 5, 2009, the Regional Manager denied the permit application on the basis that Ministry policy is to issue such permits only if a designated wildlife rehabilitation centre, zoo, or permitted wildlife research project is not available to care for the animal, and in this case, a designated wildlife rehabilitation centre had space for the eagle and would provide a flight pen environment for rehabilitation.

PNWR appealed the Regional Manager's decision, and requested a stay of the decision until the Board could decide the merits of the appeal.

On February 13, 2009, the Board denied the application for a stay (Decision No. 2009-WIL-002(a)).

On February 16, 2009, PNWR advised the Board that the eagle was no longer in PNWR's possession, as it had returned to the wild. In spite of this, PNWR advised that it would like to proceed with the appeal. PNWR submitted that the appeal should proceed because the same type of situation would likely recur in the future.

The Board applied the test for mootness set out in *Borowski v. The Attorney General of Canada*, [1989] 1 S.C.R. 342. The Board found that there was no "live controversy" between the parties because the eagle was no longer in PNWR's possession. The Board also held that its authority is limited to the decision under appeal, and therefore, it has no authority to make orders affecting future decisions by the Regional Manager. Moreover, if PNWR applies for a permit in the future, and if PNWR is not satisfied with the decision on that application, PNWR may file an appeal with the Board.

In addition, the Board noted that, although there have been cases where the Board has found an appeal moot but provided some guidance to the parties for future reference, this has normally occurred when the issue of mootness was identified after the hearing had taken place, and where in the interests of judicial economy, the Board was in a position to comment. However, in the present case, no submissions on the merits of the appeal had been filed and no hearing has commenced before the appeal became moot.

Accordingly, the appeal was dismissed.

Possession of a Bighorn Sheep cape and horns

2009-WIL-018(a) Jack Martin v. Regional Manager

Decision Date: July 28, 2009

Panel: Alan Andison

Jack Martin appealed a decision of the Regional Manager, Environmental Stewardship Division, Kootenay Region, Ministry of Environment (the "Ministry"), refusing to issue Mr. Martin a permit to possess a cape and set of horns from a dead Rocky Mountain Bighorn Sheep. In April 2005, Mr. Martin found the dead ram and had the cape and horns

removed. He asked Ministry staff what he should do next, and he was advised to take the cape and horns for inspection at a Ministry office, which he did. At that time, Mr. Martin indicated that he intended to have the cape and horns mounted and then would donate them for public display. Mr. Martin had the cape and horns mounted by a taxidermist, and then displayed them in his home.

Approximately two years later, the Ministry became aware that the cape and horns were on display in Mr. Martin's home. Shortly thereafter, Conservation Officers attended at Mr. Martin's home and seized the cape and horns on the grounds that Mr. Martin did not have a permit to possess them. Ministry staff then advised Mr. Martin that a public facility was willing to display the mount, and the Ministry offered to reimburse him for his taxidermy costs. However, Mr. Martin rejected the offer and instead applied to the Ministry for a permit to possess the cape and horns. The Regional Manager refused his application on the grounds that the cape and horns are worth over $200, and the *Permit Regulation* prohibits the issuance of a permit in these circumstances.

Mr. Martin appealed to the Board. Mr. Marin submitted that the Ministry led him to believe that he could keep the mount after it was inspected. He requested that the Board issue him a permit to possess the cape and horns.

The Board found that the *Wildlife Act* clearly requires Mr. Martin to have a permit in order to lawfully possess the cape and horns. Section 2 of that *Act* states that ownership of all wildlife in the province is vested in the government and a person does not acquire a right of property in any wildlife except as provided under the *Act*. The Board found that Mr. Martin was seeking a permit under section 2(p) of the *Permit Regulation* authorizing a transfer in ownership of the cape and horns from the government to Mr. Martin. Section 6(1)(d) of the *Permit Regulation* clearly prohibits the issuance of such a permit if the value of the wildlife parts exceeds $200, subject to two exceptions that did not apply in this case. There was no dispute that the value of the cape and horns exceeds $200. Further, the Board found that there was no evidence that the Ministry misled Mr. Martin. The Board commended the Ministry for offering an alternative that it hoped would be acceptable to Mr. Martin.

Accordingly, the Board confirmed the Regional Manager's decision. The appeal was dismissed.

Stocking lake with Kokanee salmon challenged

2009-WIL-022(c) Jack Leggett v. Director Wildlife Branch (Freshwater Fisheries Society of BC and Ministry of Environment Fisheries Program, Third Parties)

Decision Date: May 22, 2009

Panel: Gabriella Lang

Jack Leggett appealed a decision of the Director of Wildlife, Ministry of Environment (the "Ministry"), to issue a permit to possess and transport live Kokanee salmon from a fish hatchery to Chimney Lake, near Williams Lake, BC. The Permit was issued to the Freshwater Fisheries Society of BC (the "Society"), which sought to stock Chimney Lake with Kokanee salmon for recreational anglers. The Permit formed part of an authorization that included permission to transfer live fish within BC pursuant to a regulation under the federal *Fisheries Act*. Mr. Leggett appealed on the basis that stocking the lake with Kokanee could result in irreparable harm to the lake's ecosystem and recreational trout fishery.

Before the appeal was heard, Mr. Leggett requested a stay of the permit pending the Board's decisions on the merits of the appeal. Also, the Director challenged Mr. Leggett's standing to appeal the permit. In a decision dated April 28, 2009, the Board found that Mr. Leggett had standing to appeal the permit, and the Board granted his stay application.

The Board also ordered that the appeal be heard on an expedited basis (*Jack Leggett v. Director, Fish and Wildlife*, Decision No. 2009-WIL-022(a) & (b)).

The day before the appeal hearing commenced, the Ministry's Fisheries Program advised Mr. Leggett that it was considering using Ministry wildlife officers to transport and release the Kokanee into Chimney Lake, regardless of the appeal process and the stay ordered by the Board. This was brought to the Board's attention at the start of the hearing, and the Board was asked to rule on whether the hearing should proceed given this position by the Fisheries Program. The Fisheries Program submitted that section 86 of the *Wildlife Act* gives wildlife officers immunity from the offence provisions in section 2 of the *Freshwater Fish Regulation*, which prohibit the possession and transport of live fish without a permit. The Board found that section 86 is inapplicable in this case, where there is a regulatory requirement to obtain a permit to possess and transport the Kokanee, and there is no need for an officer to commit an offence in the course of carrying out their duties, such as to deal with dangerous or injured wildlife. In addition, the Board found that even if the Fisheries Program stocked the lake with Kokanee regardless of the stay order, this would not end the appeal because the Board has express jurisdiction under the *Wildlife Act* to conduct an appeal as a new hearing of the matter, and to make any decision that the Director could have made.

Also at the beginning of the hearing, the Director submitted that the Board should only consider evidence regarding the permit, which was limited to authorizing the possession and transport of the fish, and not the transfer of the fish into Chimney Lake, which was covered by the federal authorization. However, the Board held that the Director issued the permit in order to get the fish to the lake as part of a Ministry's stocking plan for Chimney Lake, and the permit is a tool that enables the Ministry to carry out its stocking plan. Without the stocking plan, there would be no need for the permit. Consequently, the Board found that it had jurisdiction to consider the Ministry's stocking plan for Chimney Lake as one of the factors that the Director considered when he issued the permit.

Finally, the Board considered whether the permit should be rescinded. Based on the evidence, the Board found that Mr. Leggett had identified valid concerns about stocking Kokanee in Chimney Lake, but the Director had adequately assessed the potential environmental risks associated with the stocking when he considered whether to issue the permit. The Board held that there was some scientific uncertainty about the potential environmental effects of stocking the lake with Kokanee, and that the Ministry's mandate includes protecting and conserving environmental resources. However, the Board found that the potential risks in this case are low, and the *Wildlife Act* does not require that the precautionary principle be applied. In addition, the Board noted that the Ministry has committed to managing the risks associated with Kokanee stocking through monitoring and risk assessment. The Board also found that the Ministry's mandate includes both protecting the environment and managing environmental resources for economic and social benefit, and in this case, stocking the lake is consistent with the Ministry's goal of enhancing recreational angling opportunities. For all of these reasons, the Board confirmed the Director's decision to issue the permit.

Accordingly, the Board dismissed the appeal and rescinded its previously issued stay order.

Family disputes ownership of a trapline

2009-WIL-024(a) Virginia Capot-Blanc v. Regional Manager (Marilyn Michel, Violet Markin, Kathryn Capot-Blanc, Rose Capot-Blanc, Nora Elsie Duntra, Emma Williscroft, Georgina Ross, Robert Capot-Blanc, and Gilbert Capot-Blanc, Third Parties)

Decision Date: February 18, 2010

Panel: David Searle, CM, QC

Virginia Capot-Blanc appealed a decision of the Regional Manager, Environmental Stewardship, Peace Region, Ministry of Environment (the "Ministry"), regarding who should be registered on a family trapline located near Fort Nelson, BC. In making his decision, the Regional Manager had relied on registry information from 1961 showing "Samuel Capot-Blanc & Family" as the registered trapline owners, and his interpretation of the word "family" to include the nieces and nephews of Samuel Capot-Blanc that were alive in 1961. Samuel Capot-Blanc was the Appellant's third oldest son, and the trapline was registered in his name in 1961 after the Appellant's oldest son died. There had been a falling out between the Appellant's second oldest son and the rest of the family in the 1950's. Samuel Capot-Blanc died in 2007, raising the question of who should be named in the trapline register.

The Appellant argued that the Regional Manager's interpretation of "family" was too broad, and should be restricted to herself, her three daughters, and Robert Capot-Blanc, who is the Appellant's grandson but was raised by her. The Appellant's appeal was supported by her daughters, who were Third Parties in the appeal.

Several other Third Parties, who were the sons and daughters of the Appellant's second oldest son (the "Other Third Parties"), opposed the appeal. They are the nephews and nieces of Samuel Capot-Blanc who the Regional Manager decided were registered on the trapline. They argued that "family" should be interpreted broadly, and the Regional Manager should have included all of their siblings, and not just those born before 1961.

The Board found that the evidence indicated that no one traps on the trapline now, although various family members, including the Appellant's second oldest son and some of the Other Third Parties, had trapped on it in the past. The evidence indicated that the main benefit of being named on the trapline register is that the persons who are named receive monetary compensation from oil and gas companies that conduct activities in the area covered by the trapline.

The Board found that, under section 42 of the *Wildlife Act*, a person's interest in a trapline is a tenancy in common, and a family dispute cannot cause a person's interest in a trapline to be lost. Based on the evidence, the Board found that the trapping rights of the Appellant's second oldest son remained undiminished until his death. The Board also found that the records in the trapline register showed that family members' names were added and deleted from the register after 1961, as births and deaths became known to registry staff. Based on the evidence, the language in section 8 of the *Interpretation Act*, and the fact that Samuel Capot-Blanc died in 2007, the Board determined that the words "Samuel Capot-Blanc & Family" should be interpreted to include his nieces and nephews, and his other family members, who were alive before his death in 2007. Consequently, the Board confirmed the Regional Manager's decision, and held that additional family members who were born before Samuel Capot-Blanc's death and who believe they should be added to the register may apply to be added.

Accordingly, the appeal was dismissed.

Conservation of wildlife resources must be considered when accommodating disabled hunters

2009-WIL-026(a) Allan Pierce v. Regional Manager

Decision Date: October 6, 2009

Panel: Alan Andison

Allan Pierce appealed a decision of the Regional Manager, Environmental Stewardship Division, Skeena Region, Ministry of Environment (the "Ministry"), refusing to issue Mr. Pierce a permit authorizing him to hunt in zones within the Skeena Region that are closed to moose hunting during the peak of the bull moose rut.

Mr. Pierce initially applied for a disabled hunter permit, which would allow him to use a motor vehicle to access areas that are closed to motor vehicles for the purpose of hunting. However, before the Regional Manager issued his decision, Mr. Pierce advised the Ministry that he was actually seeking a permit authorizing him to hunt in zones within 400 metres of 21 secondary roads or trails that are closed to moose hunting for approximately 3 weeks during the peak of the moose rut. In his submissions to the Board, Mr. Pierce confirmed that he was seeking a permit to hunt in the areas closed to moose hunting during the moose rut.

The Board found that Mr. Pierce provided medical information that supported a finding that he has a disability to his right leg that affects his ability to walk, but that information also indicates that he is able to walk 100 metres while holding a firearm. The Board also found that Mr. Pierce was not seeking a permit to hunt in motor vehicle closed areas in order to accommodate his disability. Rather, he was seeking a permit that would allow him to hunt in areas that are closed to all moose hunting during the peak of the moose rut. The Board found that Mr. Pierce provided insufficient evidence to establish that being precluded from hunting in the rut closure areas affects his personal safety.

In addition, the Board considered the relevant provisions of the *Permit Regulation*, and found that permits authorizing hunting during a closed season may only be issued for the purposes specified under section 2(c) of that regulation. The Board found that Mr. Pierce was either not seeking the permit for one of the purposes listed, or it would be unreasonable to issue him a permit under the circumstances. In particular, the Board held that the rut closures are for conservation purposes and are in effect for a short portion of the 3-month open season for moose, the closures cover a very small portion of the region, and the closures do not restrict vehicle access along the roads subject to the rut closures. The Board found that the proper management of the wildlife resources must take precedence over Mr. Pierce's desire for a convenient hunting opportunity.

Accordingly, the Board confirmed the Regional Manager's decision. The appeal was dismissed.

2009-WIL-028(a) Dale F. Anderson v. Regional Manager

Decision Date: March 31, 2010

Panel: Carol Brown

Dale F. Anderson appealed a decision of the Regional Manager, Recreational Fisheries and Wildlife Programs, Kootenay Region, Ministry of Environment (the "Ministry"), denying Mr. Anderson's application for a permit exempting him from the *Motor Vehicle Prohibition Regulation* (the "*Regulation*") with respect to certain areas within Management Units ("MUs") 4-3 and 4-22. Mr. Anderson sought the permit so he could use a motor vehicle to access areas that are otherwise closed to motor vehicles for the purpose of hunting. Mr. Anderson was granted a permit for MU 4-3, but denied a permit for MU 4-22.

Mr. Anderson sought the permit on the basis of his physical disability, which was not in dispute. The Regional Manager denied Mr. Anderson's

application with regard to MU 4-22 on the basis that some of the areas in MU 4-22 (Pickering Hill and Sheep Mountain) are designated as Access Management Areas which are ecologically sensitive, some areas are in transition to that designation (Quinn Creek/Alpine Creek), and the other area (Upper Bull Main Road) is not closed to motorized access.

Mr. Anderson appealed with respect to Quinn Creek and Upper Bull Main Road on the basis that he was able to hunt for winter meat in those areas by walking into them before he became disabled. With his disability, he is no longer able to do so.

The Board considered whether the Regional Manager failed to accommodate Mr. Anderson as a disabled hunter by refusing his application with respect to Quinn Creek and Upper Bull Main Road, and/or failing to engage in discussions with Mr. Anderson regarding alternative areas. The Board noted that, in accommodating disabled hunters, the Ministry must balance the competing interests between providing hunting opportunities to hunters with physical disabilities and the conservation of the environment and the Ministry must provide reasonable accommodation unless doing so would cause the Ministry undue hardship.

The Board accepted the Regional Manager's evidence that Quinn Creek is in transition to being designated as an Access Management Area to protect sensitive ecological values. In these circumstances, the Board found that allowing Mr. Anderson to use a motor vehicle to access Quinn Creek would amount to undue hardship, and the Board confirmed the Regional Manager's decision with regard to Quinn Creek.

With regard to Upper Bull Main Road, the Board found that the Regional Manager was uncertain as to which area Mr. Anderson was referring to. The Board also found that there was no evidence that the Ministry attempted to engage in discussions with Mr. Anderson to determine whether it could provide alternative accommodation if the area he sought access to was closed to motor vehicles. Consequently, the Board referred the matter back to the Regional Manager with directions to engage with Mr. Anderson to find out what area he is referring to, and if necessary, to determine alternative accommodation.

Accordingly, the appeal was allowed, in part.

Conviction for firearm offence leads to 3-year prohibition to hold a hunting permit

2009-WIL-029(a) Michael Bjorn Sorensen v. Regional Manager

Decision Date: February 16, 2010

Panel: Loreen Williams

Michael Bjorn Sorensen appealed a decision of the Regional Manager, Environmental Stewardship Division, Skeena Region, Ministry of Environment (the "Ministry"), denying Mr. Sorensen's application for a permit authorizing him to accompany a non-resident hunter while hunting for big game. Mr. Sorensen sought the permit so that he could take his uncle, who is from Sweden, on a hunting trip in BC. The Regional Manager denied his application on the grounds that, under section 16(2)(b)(ii) of the *Permit Regulation*, Mr. Sorensen was not eligible for such a permit for three years from the date of his conviction for an offence under section 9 of the *Firearm Act*. The offence occurred in 2008, when Mr. Sorensen was issued a violation ticket for carrying a loaded firearm in the cab of a truck.

Mr. Sorensen appealed on the basis that the three-year prohibition was unduly harsh. He submitted that he had accepted responsibility for the violation by paying a fine, rather than contesting it. He requested that the Board reduce the period to two years, so that he could apply for a permit for the 2011 hunting season.

The Board considered whether it has authority to abridge the three-year period of ineligibility set out in the *Permit Regulation*. In particular, the Board

considered whether Mr. Sorensen had "been convicted of an offence" under the *Firearm Act*, given that he had paid a fine set out in a violation ticket. In that regard, the Board reviewed the language in sections 14 and 17 of the *Offence Act*. The Board concluded that, under those provisions, Mr. Sorensen's payment of the fine was deemed to constitute a guilty plea, which amounts to a conviction of the offence. The Board also held that, although Mr. Sorensen may not have realized the consequences of paying the fine, the Board has no discretion to ignore or modify the three-year period of ineligibility set out in the *Permit Regulation*, or the requirement in section 70(1)(a) of the *Wildlife Act* to meet the qualifications set out in that regulation.

Accordingly, the Board confirmed the Regional Manager's decision. The appeal was

Summaries of Court Decisions Related to the Board

dismissed.

There were no court decisions issued on judicial reviews or appeals of Board decisions during this

Summaries of Cabinet Decisions Related to the Board

report period.

APPENDIX I

Legislation and Regulations

There were no orders by Cabinet during this report period concerning decisions by the Board. 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 statutes which provide for an appeal to the Board from certain decisions of government officials: the *Environmental Management Act*, the *Greenhouse Gas Reduction (Cap and Trade) Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Water Act* and the *Wildlife Act*. Some appeal provisions are also found in the regulations made under the *Greenhouse Gas Reduction (Cap and Trade) Act* and the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (March 31, 2010). 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.

Greenhouse Gas Reduction (Cap and Trade) Act,
SBC 2008, c. 32

Part 7 – **Appeals to Environmental Appeal Board**

What decisions may be appealed, who may appeal, the process of appeal

22 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 18 or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 19, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1)(a) or (b), or

(b) a document evidencing a decision referred to in subsection (1)(c).

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies in relation to appeals under this Act.

Reporting Regulation,
BC Reg. 272/2009

Appeals to Environmental Appeal Board

32 (1) The following provisions are prescribed for the purpose of section 22 (1) (c) of the Act:

(a) section 13(7) *[approval of alternative methodology for 2010]*;

(b) section 14 2) *[approval of change of methodology]*.

(2) The following provisions of the *Environmental Management Act* apply in relation to appeals under the Act:

(a) section 101 *[time limit for commencing appeal]*;

(b) section 102 *[procedure on appeals]*;

(c) section 103 *[powers of appeal board in deciding appeal]*;

(d) section 104 *[appeal does not operate as stay]*.

(3) The Environmental Appeal Board Procedure Regulation, B.C. Reg. 1/82, is adopted in relation to appeals under the Act.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act,
SBC 2008, c. 16

Part 5 – **Appeals to Environmental Appeal Board**

What decisions may be appealed, who may appeal, the process of appeal

14 (1) For the purposes of this Part, "decision"

means any of the following:

(a) the determination of non-compliance under section 11 or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 12, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a refusal to accept an alternative calculation of carbon intensity under section 6 (3) (b) (iii);

(d) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b),

(b) a refusal referred to in subsection (1) (c), or

(c) a document evidencing a decision referred to in subsection (1) (d)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies in relation to appeals under this Act.

Renewable and Low Carbon Fuel Requirements Regulation, BC Reg. 394/2008

Part 4 – **Appeals**

Time limit for commencing appeal

21 The time limit for commencing an appeal is 30 days after the notice of administrative penalty to which it relates is served.

Procedures on appeal

22 An appeal must be

(a) commenced by notice of appeal in accordance with the Environmental Appeal Board Procedure Regulation, and

(b) conducted in accordance with Part 5 [Appeals to Environmental Appeal Board] of the Act and the Environmental Appeal Board Procedure Regulation.

Powers of appeal board on appeal

23 (1) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

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

Integrated Pest Management Act, SBC 2003, c. 58

Part 4 – **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 guiding territory 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.