Environmental Appeal Board

2012/2013

Annual Report

APRIL 1, 2012 ~ MARCH 31, 2013

BRITISH COLUMBIA

Environmental Appeal Board

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Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2012 through March 31, 2013.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

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Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2012/2013 fiscal year.

The Year in Review – Appeals

During the past year, the Board experienced a significant increase in the number of appeals filed. Almost three times more appeals were filed during the 2012/2013 fiscal year compared to 2011/2012. Despite the increase in appeals filed, the Board continues to work towards reducing the number of appeals that proceed to a hearing. During this reporting period, I am pleased to note that while 109 new appeals were filed, 45 appeals were withdrawn, rejected or resolved, which meant that they did not require a hearing. Of the 51 appeals that were closed during the reporting period, only ten proceeded to a hearing on their merits and, of those, only seven were the subject of an oral hearing.

Efficiencies and Cost Reduction

As the Chair of three tribunals, the Environmental Appeal Board, the Forest Appeals Commission and the Oil and Gas Appeal Tribunal, I have encouraged the "clustering" of tribunals with similar processes and/or mandates. As a result, the Board office supports a total of eight administrative tribunals.This model has numerous benefits, not only in terms of cost savings, but also in terms of shared knowledge and information. Having one office provide administrative support for several tribunals gives each tribunal greater access to resources while, at the same time, reducing costs and allowing each tribunal to operate independently of one another.

Adding to these efficiencies, the Board has developed a number of Information Sheets to make the appeal process more accessible and understandable to the public, and has created a Notice of Appeal form that can be filled in on-line. This has reduced the number of "deficient" notices of appeal, thereby reducing cost and delay. In addition, the Board is improving its joint information systems to facilitate further access and information sharing. The Board is also considering new appeal procedures that may further facilitate the early resolution of appeals. Should an appeal proceed to a hearing, the new procedures will ensure that the hearing proceeds as quickly and efficiently as possible.

Board Membership

The Board membership experienced some changes during the past year. I am very pleased to welcome one new member to the Board who will complement the expertise and experience of the outstanding professionals on the Board. That new member is James Mattison. Also, the appointment of Carol Brown ended during 2012, and I thank her for her service as a member of the Board.

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 members bring with them the necessary expertise to hear appeals on a wide range of subject matters, from air emission to hunting permits and water licensing for purposes that range from domestic use to industrial fracking.

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

Alan Andison
Chair

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, 2012 to March 31, 2013.

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
- 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:

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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 the following six statutes, the relevant provisions of which are administered by the Minister identified: the *Environmental Management Act*, the *Integrated Pest Management Act*, and the *Greenhouse Gas Reduction (Cap and Trade) Act*, administered by the Minister of Environment; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* administered by the Minister of Energy and Mines; and the *Wildlife Act* and the *Water Act*, administered by the Minister of Forests, Lands and Natural Resource Operations. The legislation establishing the Board is administered by the Minister of Justice and Attorney General of BC.

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 report period were as follows:

The Board	Profession	From
Chair		
Alan Andison	Lawyer	Victoria
Vice-chair		
Robert Wickett	Lawyer	Vancouver
Members		
R. O'Brian Blackall	Land Surveyor	Charlie Lake
Carol Brown (to June 20, 2012)	Lawyer/CGA/Mediator	Sooke
Robert Cameron	Professional Engineer	North Vancouver
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Cindy Derkaz	Lawyer (retired)	Salmon Arm
W.J. Bruce Devitt	Professional Forester (retired)	Esquimalt
Tony Fogarassy	Geoscientist/Lawyer	Vancouver
Les Gyug	Professional Biologist	Westbank
James Hackett	Professional Forester	Nanaimo
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Jagdeep Khun-Khun	Lawyer	Vancouver
Gabriella Lang	Lawyer (retired)	Campbell River
Blair Lockhart	Lawyer/Geoscientist	Vancouver
Ken Long	Professional Agrologist	Prince George
James S. Mattison (from May 3, 2012)	Professional Engineer	Victoria
Gary Robinson (to September 17, 2012)	Resource Economist	Victoria
David H. Searle, CM, QC	Lawyer (retired)	North Saanich
Douglas VanDine	Professional Engineer	Victoria
Reid White	Professional Engineer/Professional Biologist (ret.)	Telkwa
Loreen Williams	Lawyer/Mediator (retired)	West 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 Oil and Gas Appeal Tribunal, the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, 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 eight 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.

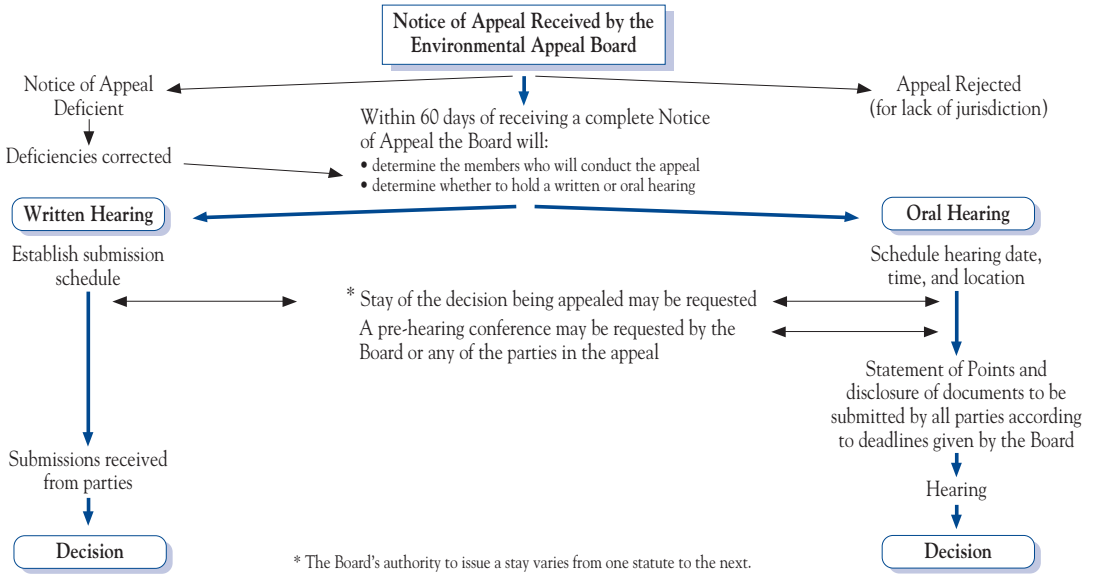
The Appeal Process

General Powers and Procedures of the Board

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*, BC 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. Also on the Board's website are a number of "Information Sheets" on specific topics and specific stages of the appeal process. The Board has also created a new Notice of Appeal form that can be filled out on line.

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 in the chart on the next page.



The Basics: who can appeal, what can be appealed and when to appeal

As stated above, to determine what decisions are appealable to the Board, who can appeal the decisions and the time for filing an appeal, as well as the Board's power to issue a stay, the individual statutes and regulations which provide the right of appeal to the Board must be consulted. The following is a summary of the individual statutes and the provisions that answer these questions.

Environmental Management Act

The *Environmental Management Act* regulates the discharge of waste into the environment, including the regulation of land fills and the clean-up of contaminated sites in BC, by setting standards and requirements, and empowering government officials to issue permits, approvals, operational certificates, and orders, and to impose administrative penalties for non-compliance. Waste regulated by this *Act* includes air contaminants, litter, effluent, refuse, biomedical waste, and special wastes.

The decisions that may be appealed under the *Environmental Management Act* are set out in Part 8, 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(5), 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.

Greenhouse Gas Reduction (Cap and Trade) Act

The Greenhouse Gas Reduction (Cap and Trade) Act requires operators of BC facilities emitting 10,000 tonnes or more of carbon dioxide equivalent emissions per year to report their greenhouse gas emissions to the government, and empowers government officials to impose administrative penalties for non-compliance.

Under this *Act*, certain decisions of a director, as designated by the responsible minister, 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;*

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

- 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]*.

According to the *Reporting Regulation*, BC Reg. 272/2009, the time limit for filing an appeal of a decision is 30 days after notice of the decision is given, and the Board may order a stay of the decision under appeal.

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

The Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels and to submit annual compliance reports to the government, and empowers government officials to impose administrative penalties for non-compliance.

Certain decisions of a director, as designated by the responsible minister, 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]*; and
- a prescribed decision or a decision in a prescribed class.

According to the Renewable and Low *Carbon Fuel Requirements Regulation*, BC Reg. 394/2008, 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.

Integrated Pest Management Act

The *Integrated Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application and disposal of pesticides in BC. This *Act* requires permits to be obtained for certain pesticide uses, and requires certain pesticide applicators to be certified. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect, and it empowers government officials to impose administrative penalties for non-compliance.

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 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; and
(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.

Water Act

The *Water Act* regulates the diversion, use and allocation of surface water, regulates work in and about streams, regulates the construction and operation of ground water wells, and empowers government officials to issue licences, approvals, and orders.

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 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 Part 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 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.

Wildlife Act

The *Wildlife Act* regulates the use, allocation, ownership, import and export of fish and wildlife in BC, and empowers government officials to issue licences, permits, certificates, and orders, and to impose administrative penalties for non-compliance. Activities regulated by this *Act* include hunting, angling in non-tidal waters, guide outfitting, and trapping.

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.

Starting an 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. The Board has created a Notice of Appeal form that may be filled out on-line.

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.

Parties and Participants to an Appeal

A party to an appeal has a variety of important rights: the right to present evidence, cross-examine the witnesses of the other parties, and make opening and closing arguments. The person who filed the appeal (the appellant) and the decision-maker (the respondent) are parties to the appeal.

In addition to the appellant and respondent, the Board may add other 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. These additional parties are referred to as "third parties" to the appeal.

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 a person applies to participate in an appeal, the Board will 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

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.

The Board has the power to stay all decisions under appeal, except for decisions appealed under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*. However, a stay is not granted in every case: it is an extraordinary remedy that a person must specifically apply for. For the Board to grant a stay, the applicant must satisfy a particular test. That test is described later in this report under the heading "Summaries of Decisions: Preliminary Applications".

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 Conferences

The Board, or any of the parties to any appeal, 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.

Scheduling a Hearing

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. A hearing may be conducted by way of written submissions, an oral (in person) hearing, or a combination of both.

If the chair decides that the issues in the appeal can be fairly decided on the basis of written submissions, the chair will schedule a written hearing. Prior to ordering a written hearing, the Board may request the parties' input.

If the chair decides that an oral (in person) hearing is required in the circumstances, the chair must 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*). It may be held in the locale closest to the affected parties, at the Board office in Victoria or anywhere in the province.

Regardless of the type of hearing scheduled, the Board has the authority to conduct a "new hearing" on the 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.

Written Hearings

If it is determined that a hearing will be by way of written submissions, the chair will invite all parties to provide submissions and will establish the due dates for the submissions. The general order of submissions is as follows. 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 Hearings

Oral (in person) hearings are normally scheduled in cases where there is some disagreement on the facts underlying the dispute; where there is a need to hear the parties' evidence and assess the credibility of witnesses.

To ensure the hearing proceeds in an expeditious and efficient manner, in advance of the hearing, the chair asks the parties to provide the Board, and each of the parties to the appeal, with a written Statement of Points (a summary of the main issues, evidence, witnesses, and arguments to be presented at the hearing) and all relevant documents.

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

Evidence

The Board has full discretion to receive any information that it considers relevant and will then determine what weight to give the evidence when making its decision.

Experts

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge".

The Board is not bound by the provisions relating to expert evidence in the BC *Evidence Act*. However, the Board does require 60 days advance notice that expert evidence will be given at a hearing. The notice must 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 the 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.

The Decision

To make 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 BC 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. In particular, it may order a party to pay all or part of the costs of another party in connection with the appeal. The Board's policy is to only award costs in special circumstances.

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

During this report period, there were no legislative changes that affected the types of appeals the Board hears, or that affected the Board's powers or procedures.

Recommendations

There were no issues that arose in 2012/2013 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 hundreds of unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

Between April 1, 2012 and March 31, 2013, a total of 109 appeals were filed with the Board against 91 administrative decisions, and a total of 29 decisions were published. No appeals were filed or heard under the *Integrated Pest Management Act*, the *Greenhouse Gas Reduction (Cap and Trade) Act* or the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

April 1, 2012 – March 31, 2013

Total appeals filed		**109**
Total appeals closed		**52**
Appeals abandoned or withdrawn		**29**
Appeals rejected, jurisdiction/standing		**13**
Hearings held on the merits of appeals:		
Oral hearings completed	7	
Written hearings completed	3	
***Total hearings held on the merits of appeals**		**10**
Total oral hearing days		**17**
Published Decisions issued:		
Final Decisions (excluding consent orders)		
Appeals allowed	1	
Appeals, allowed in part	1	
Appeals dismissed	5	
Appeals withdrawn	1	
Total Final Decisions		**8**
Decisions on preliminary matters		**24**
Decisions on Costs		**0**
Consent Orders		**2**
Total published decisions		**34**

▲

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.

Note:

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

Appeal Statistics by Act

	Environmental Management	Greenhouse Gas Reduction (Cap and Trade Act)	Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements Act)	Integrated Pest Management	Waste Management	Water	Wildlife	Total
Appeals filed during report period	6	0	0	0		44	59	109
Appeals closed during report period	9	0	0	0	1	21	21	52
Appeals abandoned or withdrawn	6				1	14	8	29
Appeals rejected jurisdiction/standing	1					2	10	13
Hearings held on the merits of appeals								
Oral hearings						3	4	7
Written hearings	1						2	3
Total hearings held on the merits of appeals								10
Total oral hearing days						5	12	17
Published decisions issued								
Final decisions						4	3	8
Costs decision								0
Preliminary applications	4					4	16	24
Consent Orders	1					1		2
Total published decisions issued								**34**

▲

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

Summaries of Board Decisions

April 1, 2012 ~ March 31, 2013

Appeal cases are not heard by the entire Board, they are heard by a "panel" of the Board. As noted earlier in this report, once 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 authority, 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. In addition, the Board is called upon to make a variety of other preliminary decisions, some which are reported and others that are not. Examples of some of the preliminary decisions made by the Board have been 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 a description of a 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 into preliminary applications decided by the Board, and decisions on the merits of the appeal. The summaries of final decisions are further organized by 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 website.

Preliminary Applications and Decisions

Jurisdictional Issues

For the Board to have jurisdiction over an appeal, certain requirements in the Board's enabling legislation must be met. Generally, the legislation sets out requirements such as the categories of decisions that may be appealed, the categories of persons who may file appeals, and the time limits for filing an appeal. All of the applicable legislative requirements must be met before the Board has jurisdiction to hear an appeal.

Over the years, there have been many cases in which the Board has been asked to determine, as a preliminary matter, whether the person filing an appeal has "standing" to appeal, i.e., whether the person falls within a category of persons who may file an appeal under a specific Act. The requirements for "standing" vary from one Act to another. For example, under section 101(1) of the *Environmental Management Act*, an appeal may be initiated by a "person aggrieved by a decision". However, under section 92(1) of the *Water Act*, an appeal may be initiated 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."

Similarly, the Board must sometimes make a preliminary determination about whether the decision or order being appealed is appealable under the applicable legislation, as the types of decisions or orders that may be appealed vary from one Act to another. For example, specific types of decisions may be appealed under the *Wildlife Act*. Section 101(1) of that *Act* requires a director or regional manager to give written reasons for "a decision that affect… a licence, permit, registration of a trapline or guiding territory certificate held by a person, or an application by a person for *[any of those things]*". Section 101(2) states that notice of a decision referred to in subsection (1) must be given to the affected person. Section 101.1 of the *Act* states that "The affected person referred to in section 101(2) may appeal the decision" to the Board. Thus, the decisions that are referred to in section 101(1) may be appealed to the Board.

The following summaries include examples of preliminary decisions regarding a person's "standing" to appeal, and the types of decisions that may be appealed to the Board.

Absentee Property Owner Lacks Standing to Appeal a Permit Authorizing Emissions from a Green Energy Facility

2012-EMA-001(a) Evelyn Armstrong v. Director, Environmental Management Act (Merritt Green Energy Limited Partnership, Third Party/Permit Holder)

Decision Date: April 2, 2012

Panel: Alan Andison

Evelyn Armstrong appealed the Director's decision to issue a permit to Merritt Green Energy Limited Partnership ("MGE"). The permit authorized MGE to discharge emissions to the air from a "biomass to energy" facility that MGE planned to build in Merritt, BC. The proposed facility included a boiler, certain emission control equipment, and a pneumatic

system for collecting flyash and conveying it to a storage silo. The boiler and the flyash collection system were the two authorized sources of air emissions under the permit. The boiler was authorized by the permit to burn untreated wood waste only. Emissions from the boiler would pass through emission control equipment before being discharged through a tall stack. Emissions from the flyash collection system would pass through a filter and then be discharged from an outlet at the top of the storage silo. The permit contained conditions limiting the maximum rate of discharge and maximum concentration of particulate matter in relation to emissions from the boiler and the flyash collection system. Ms. Armstrong's notice of appeal only referred to the emissions from the latter.

MGE filed an application requesting that the Board dismiss the appeal on the basis that Ms. Armstrong was not a "person aggrieved" by the permit within the meaning of the *Environmental Management Act*. Section 100(1) of that *Act* states that a "person aggrieved by a decision" of the Director may appeal that decision to the Board.

In determining whether Ms. Armstrong was a "person aggrieved" by the permit, the Board applied the test set out in *Attorney General of the Gambia v. N'Jie*, [1961] 2 ALL E.R. 504 (P.C.). That test, which has been applied by the Board in numerous cases, required Ms. Armstrong to disclose sufficient information to allow the Board to reasonably conclude that the permit will or may prejudicially affect her interests.

Ms. Armstrong submitted that she is a person aggrieved by the permit. She advised that she owns a home in Merritt that she intends to live in when she retires. She submitted that the permitted emissions would harm the environment and human health in Merritt, her use and enjoyment of her retirement property, and may adversely affect property values in Merritt.

MGE provided evidence that Ms. Armstrong lives 22 km away from the proposed facility, and tenants occupy her property in Merritt. MGE also provided evidence that her Merritt property is located 1.65 km north of the proposed facility, and the wind blows in that direction 10 percent of the time. MGE submitted that the rate of emissions from the flyash system would be equivalent to that of a standard ventilation hood over a home kitchen stove, and that the facility may provide a net improvement in ambient air quality in Merritt because it would burn logging debris that would otherwise be incinerated by open burning. MGE also submitted that the facility may have a positive effect on property values in Merritt, because it would create new jobs, purchase local goods and services, and pay local property taxes.

The Board found that there was uncontested evidence that Ms. Armstrong lives 22 km away from the proposed facility, and there was no evidence that she travels to Merritt on a regular basis for work or any other purpose. The Board also found that Ms. Armstrong provided no information about the potential effects of the permitted emissions on air quality at her home, her health, or her use and enjoyment of her home.

Regarding Ms. Armstrong's Merritt property, the Board found that even if it were to accept that her intention to live there at an unspecified future date constitutes a personal interest that is relevant to the current issue of standing, evidence of proximity alone does not necessarily lead to the conclusion that a person's interests may be prejudicially affected. The Board held that Ms. Armstrong's general concerns about the potential effects of the emissions on the environment and human health in Merritt were insufficient alone to establish that she is a person aggrieved. Although she also expressed more specific concerns about potential harm to water, salmon, and people with lung disorders, the Board found that those concerns were not in relation to her personal interests. She disclosed no information that she has any health concerns that may be affected by the emissions in the future, when she retires to her Merritt property.

She also expressed concern that "chemicals" on airborne particulates may make locally grown food unfit for consumption and her yard unfit for her enjoyment, but the Board found that she did not specify what those chemicals may be or how they may cause the alleged harm. Without more information, and given that the boiler is restricted to burning untreated wood residue, the Board concluded that those concerns were speculative. Finally, the Board found that her assertion that the emissions may adversely affect property values was unsupported by any evidence and was also speculative.

Based on all of the evidence and information, the Board concluded that Ms. Armstrong did not provide sufficient information to establish that her interests would or may be prejudicially affected by the permitted emissions. Consequently, the Board found that the appeal was not within its jurisdiction.

Accordingly, the appeal was dismissed for lack of standing to appeal.

First Nation has Standing to Appeal Water Licence Issued to Oil and Gas Company for Fracking

2012-WAT-013(a) Chief Kathi Dickie in her own right and on behalf of the members of the Fort Nelson First Nation v. Assistant Regional Water Manager (Nexen Inc., Third Party; EOG Resources Canada Inc. and Devon Energy Canada Corporation, Participants)

Decision Date: November 6, 2012

Panel: Alan Andison

Chief Kathi Dickie, in her own right and on behalf of the members of the Fort Nelson First Nation (the "First Nation"), appealed the Water Manager's decision to issue a water licence to Nexen Inc. ("Nexen"). The Licence authorized Nexen to divert water from North Tsea Lake from April 1 to October 31 for five years, pipe it to storage dugouts, and use it throughout the year in the hydraulic fracturing or "fracking" process to obtain natural gas from underground.

North Tsea Lake is located northeast of Fort Nelson, within the First Nation's traditional territory. The First Nation is an adherent to Treaty 8, and its members have treaty rights to hunt, fish and trap within their traditional territory. The First Nation asserted that its members conduct traditional activities including hunting, fishing, and trapping in the vicinity of North Tsea Lake.

Since 2007, Nexen has been diverting water from North Tsea Lake and piping it to storage dugouts for use in the fracking process. Before the Licence was issued, Nexen was diverting and using water under short-term (one-year) water use approvals issued under the *Water Act*.

In April 2009, Nexen applied for the Licence. Over the next three years, various telephone conversations, exchanges of correspondence, and meetings occurred between representatives of the Ministry, the First Nation, and Nexen. Also, the Ministry referred Nexen's proposed water management plan to an independent expert for review. By May 2012, the First Nation was still expressing concern about the proposed Licence and sought further consultation with the Ministry. However, the Water Manager decided that the First Nation had been given sufficient opportunity for consultation, and had failed to provide information about how its treaty rights may be affected by the Licence. The Water Manager decided that the Licence would have no impact on the First Nation's treaty rights, and issued the Licence.

Under the Licence, Nexen may divert up to 60,000 cubic metres of water per day, to a maximum of 2,500,000 cubic metres per year, from North Tsea Lake, subject to certain conditions including a requirement that withdrawals cease when the flow of water from North Tsea Lake to the Tsea River falls below 0.351 cubic metres per second. The works

authorized under the Licence were in use under the previous short-term approvals. However, the maximum amount of water that may be diverted under the Licence is greater than under the short-term approvals.

The First Nation appealed the Licence on the grounds that the Ministry failed to uphold the Crown's duty to consult with the First Nation before the Licence was issued, and that the Water Manager failed to adequately consider and assess the impacts that the Licence would have on the environment and the First Nation's treaty rights.

After the appeal was filed, the Water Manager requested that the appeal be dismissed on the basis that the First Nation did not have standing under section 92(1) of the *Water Act* to appeal the Licence. Section 92(1) specifies the categories of persons who may appeal a decision to the Board. The First Nation argued that it fit within the categories listed in sections 92(1)(b) and (c) of the *Water Act*; namely, that it is an "owner whose land is or is likely to be physically affected" by the Licence within the meaning of section 92(1)(b), and it is a "riparian owner" within the meaning of section 92(1)(c). The Water Manager submitted that the First Nation did not fall within these, or any other category under section 92(1). Nexen and the Participants took no position on the issue.

First, the Board considered whether the First Nation was an "owner whose land is or is likely to be physically affected" by the Licence within the meaning of section 92(1)(b). In deciding that issue, the Board considered the meaning of "owner", which is defined in the *Water Act* as "a person entitled to possession of any land … and includes a person who has a substantial interest in the land …." The Board found that "possession", as used in the *Water Act*'s definition of "owner", has a broad meaning. Possession can be synonymous with the physical occupation of land in a manner that has continuity. The Board also found that "owner", as defined in the *Water Act*, is not limited to a person who is registered under the land title system as an owner of land or of a charge on land. The Board noted that, although the First Nation's treaty rights are not registered under the land title system, they are legally recognized and constitutionally protected, and their rights involve physically occupying the land. The Board also noted that, in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, the Supreme Court of Canada held that Treaty 8 assures the aboriginal signatories "continuity in traditional patterns of economic activity", and that "Continuity respects traditional patterns of activity and occupation." The Board found that the First Nation's occupation of its traditional hunting, fishing and trapping grounds is characterized by continuity over many generations. Consequently, the Board held that the First Nation is entitled to possession" of the lands where it exercises its treaty rights, and found that there is evidence that the First Nation exercises it treaty rights in and around North Tsea Lake.

Additionally, the Board found that the First Nation has"a substantial interest in the land", in that its treaty rights in relation to the Crown land in question are legally recognized, are of significant importance to the First Nation's way of life, and there was no evidence that the Licence amounted to a "taking up" of the land by the Crown that would extinguish the treaty rights.

For all of those reasons, the Board concluded that the First Nation is an "owner" within the meaning of section 92(1)(b) of the land where it exercises its treaty rights, including the land in the vicinity if North Tsea Lake.

Next, the Board considered whether the land in the vicinity if North Tsea Lake "is or is likely to be physically affected by" the Licence, within the meaning of section 92(1)(b). The Board found that there were reasonable grounds to conclude, on a balance of probabilities, that the land is likely to be physically affected by the Licence. Specifically, although Nexen was previously withdrawing water

under short-term approvals, the Board found that the Licence authorizes the withdrawal of significantly more water than was allowed under the short-term approvals, and that this could have a physical effect on the water level in North Tsea Lake, which could affect the land around the Lake.

Finally, the Board considered whether the First Nation was a "riparian owner" within the meaning of section 92(1)(c) of the *Water Act*. The Board held that the phrase "riparian owner" is not defined in the *Water Act*, and therefore, the common law meaning applies. At common law, "riparian owner" means a person who owns land through or past which a stream runs. The Board found that the First Nation is not a "riparian owner" because its reserve lands are not lands through or past which the Tsea River runs, and North Tsea Lake is not adjacent to, or within the boundaries of, the First Nation's reserve lands. There was also no evidence that the First Nation holds aboriginal title to any of the lands adjacent to the Tsea River or North Tsea Lake. Consequently, the Board found that First Nation is not a "riparian owner" within the meaning of section 92(1)(c) of the *Water Act*.

In summary, the Board found that the First Nation had standing to appeal as an "owner whose land is or is likely to be physically affected" by the Licence within the meaning of section 92(1)(b) of the *Water Act*, and therefore, the Water Manager's application to dismiss the appeal was denied.

Policy Decisions made by Ministry Officials Cannot be Appealed to the Board

2012-WIL-004(a), 005(a), 007(a) Michael Langegger et al v. Deputy Regional Manager et al

Decision Date: August 3, 2012

Panel: Alan Andison

Michael Langegger and two other persons (the "Appellants") who hold resident hunter licences appealed three separate decisions of three Regional Managers. The Appellants argued that Stone's Sheep (a sub-category of Thinhorn Sheep) should have been designated as a "category A species" by the Regional Managers in their regions.

According to the Ministry's Harvest Allocation Policy, a category A species is a big game species for which the harvest by guided hunters is limited by quota in a region. Also, according to the Ministry's Resident Hunter Priority Policy, when category A species are allocated in a region, resident hunters are given higher priority for harvesting than guided hunters. In addition, Ministry policies set out that the minimum resident hunter share of the harvest is 60 percent for category A species, and 51 percent for non-category A species. The Regional Managers did not designate Stone's Sheep as a category A species in their respective regions. Previously, Stone's Sheep were designated as a category A species in those regions.

The Appellants appealed on the basis that the failure to designate Stone's Sheep as a category A species affected their opportunities, as resident hunters, to harvest Stone's Sheep, and that the Regional Managers ignored Ministry policies and conservation concerns. However, the Appellants' Notices of Appeal did not indicate when the appealed decisions were made, and they did not include a copy of a written decision of any of the Regional Managers.

Consequently, the Board requested submissions from the parties on whether appealable decisions had been made in accordance with sections 101 and 101.1 of the *Wildlife Act* (the "*Act*"). Section 101(1) of the *Act* requires a regional manager to give written reasons for "a decision that affect… a licence, permit, registration of a trapline or guiding territory certificate held by a person, or an application by a person for *[any of those things]*". Section 101(2) states that notice of a decision referred to in subsection (1) must be given "to the affected person." Section 101.1 of the *Act* states that "The affected person referred to in

section 101(2) may appeal the decision" to the Board.

The Regional Managers submitted that no appealable decisions had been made, because no statutory decisions had been made under the *Act* or its regulations; rather, they made policy decisions that are not appealable "decisions" within the meaning of sections 101 and 101.1 of the *Act*. The Regional Managers also submitted that there was no decision that affected the Appellants' resident hunter licences.

The Board reviewed the *Act* as a whole, and found that the *Act* sets out a number of specific decisions that clearly affect a licence, permit, registration of a trapline or guiding territory certificate, or an application for one of those things, and notice of those decisions is required to be given. Also, those decisions are clearly referred to in the *Act*'s appeal provisions. However, nothing in the *Act* or its regulations define or refer to "category A" or a "category A species". There is no statutory authority for making decisions in relation to whether a species is a category A species. Rather, such determinations are a construct of, and in furtherance of, policy objectives. The Board held, therefore, that the Legislature did not intend the appeal provisions to include category A species designations.

In addition, the Board found that determinations regarding category A species do not affect a specific resident hunter's licence, and no notice of such determinations is required to be given.

Finally, the Board noted that the remedies sought by the Appellants were likely to be beyond the Board's jurisdiction. The Appellants asked the Board to change the Regional Managers' decisions in relation to the share of the Stone's Sheep harvest allocated to resident hunters. In that regard, the Board cited the reasoning in *Olson v. British Columbia (Ministry of Environment Wildlife Branch, Director)*, [1989] B.C.J. No. 1579, which provides that the Board has no jurisdiction to alter general policy decisions of the Ministry.

Accordingly, the appeals were dismissed.

Requests for Participant Status

Under section 94(1)(a) of the *Environmental Management Act*, the Board has the discretion to invite (add) any person to be heard in an appeal. This may be done on the Board's initiative or as a result of a request. Under this section, the Board may add a person as a "party" to the appeal, or as a "participant". Parties generally have more rights to call evidence and make submissions than a participant.

When deciding whether to add a person as a party or as a participant in an appeal, the Board will consider the timeliness of the application, the prejudice, if any, to the existing parties to the appeal, whether the applicant has sufficient interest in the proceeding, whether the interest of the applicant can be adequately represented by another party, the applicant's desired level of participation, whether allowing the application will delay or unduly lengthen the proceedings, and any other factors that are relevant in the circumstances.

Guide Outfitters Association of BC Granted Limited Participant Status in Angling Guides' Appeals

2012-WIL-016(b), 017(b), 018(b), 019(b), 020(b) Walter Faetz et al v. Regional Manager (Guide Outfitters Association of British Columbia, Applicant)

Decision Date: July 31, 2012

Panel: Alan Andison

Walter Faetz and four other angling guides (the "Guides") appealed five separate decisions issued by the Regional Manager which denied the Guides' respective bids for angler day quotas to fish for Steelhead Trout on the Zymoetz River downstream of Limonite Creek ("Zymoetz II") for the 2012/13 season. The Zymoetz II is a classified water under the *Angling and Scientific Collection Regulation*, BC Reg. 125/90 (the "*Regulation*"). Classified waters are designated in

Schedule A of the *Regulation*. Schedule A also limits the number of guides on the particular water and the number of guided angler days available on that water during the specified – or "classified" – period. All of the Guides have taken clients to fish on the Zymoetz II in past years.

On April 1, 2012, amendments were made to Schedule A of the *Regulation* in relation to the classified period and the number of angling days available on the Zymoetz II. Previously, Schedule A only regulated the period from September 1 to October 31. Under the amendments, Schedule A was changed to regulate the "shoulder periods" (July–August and November–May), and reduce the previous guided angler days during the September to October period. Following those changes, the Regional Manager required the Guides to submit bids for the guided angler days available on the Zymoetz II during the new classified period. The Regional Manager rejected all of the bids, and the Guides appealed to the Board on a number of grounds.

Before the appeals were heard by the Board, the Guide Outfitters Association of British Columbia (the "GOABC") applied for participant status in the appeals.

Four of the Guides supported the application for participant status. The remaining Guide provided no comments on the application.

The Regional Manager opposed the application.

In determining whether to grant the application for participant status, the Board applied a two-part test that the Board has previously applied:

- whether the applicant has a valid interest in participating in the appeals; and
- whether the applicant can be of assistance in the proceedings.

The Board found that the GOABC had a valid interest in participating in the appeals. In particular, the Board found that the GOABC has a record of advocacy on matters such as wildlife management that affect the interests of guide outfitters in BC, and in the present appeals, the GOABC intended to address issues of stakeholder consultation and consistency in resource management that would affect the angling guide industry. The Board also noted that the GOABC has participated in many previous appeals before the Board involving issues that affect guide outfitters.

In addition, the Board found that, although the GOABC's interests were aligned with those of the Guides, the GOABC would bring a different perspective from the Guides or the Regional Manager. However, the Board held that adding the GOABC as a participant may add complexity to the proceedings, and would add to the cost and length of the appeal hearing. Further, the Board noted that the Guides supported the GOABC's involvement in the process primarily so that the GOABC could provide "representation" to the Guides and assist them with the legal aspects of their appeals. The Board held that the GOABC did not require participant status to act as the Guides' representative in the appeal process, or to have its staff testify in support of the Guides' appeals.

Given the potential for duplication and delay, the GOABC's intention to address broad issues of importance to angling guides in general, and the Guides' desire to have the GOABC assist them as a representative, the Board concluded that the GOABC should be permitted to participate, but should not be permitted to present or cross-examine witnesses. The Board decided to limit the GOABC's participation to making a brief opening statement and closing submission.

Accordingly, the application for participant status was granted, with limitations.

An Extraordinary Remedy – the Power to Order a Stay

An appeal to the Board does not automatically prevent the decision under appeal from taking effect. The decision under appeal remains valid and enforceable unless the Board makes an order to temporarily "stay" the decision. A temporary stay prevents the decision from taking effect until the appeal is decided.

If a party wants to postpone the decision from taking effect until after the appeal is decided, the party must apply to the Board for a stay and address the following issues:

- whether the appeal raises a serious issue to be decided by the Board;
- whether the applicant for the stay will suffer irreparable harm if a stay is not granted; and
- whether there will be any negative consequences to property (real or economic), the environment or to public health or safety if the decision is stayed until the appeal is concluded (the balance of convenience test).

When addressing the issue of irreparable harm, the party seeking the stay must explain what harm it would suffer if the stay was refused and why this harm is "irreparable" (i.e., it could not be remedied if the party ultimately wins the appeal). "Irreparable" has been defined by the Supreme Court of Canada as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision …, where one party will suffer permanent market loss or irrevocable damage to its business reputation …, or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

In addressing the issue of "balance of convenience", the party seeking the stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties or the environment if the stay is granted. In the following appeal under the *Environmental Management Act*, the Board found that a stay should be granted due to irreparable financial harm.

Stay Granted in Dispute over Air Emissions Monitoring Requirements

2013-EMA-001(a) Pinnacle Renewable Energy Inc. v. Director, *Environmental Management Act*

Decision Date: March 19, 2013

Panel: Alan Andison

Pinnacle Renewable Energy Inc. ("Pinnacle") appealed a decision of the Director to amend Pinnacle's air emissions permit. Pinnacle owns and operates a mill (the "Meadowbank facility") that produces wood pellets, located near Strathnaver, BC. Although the Meadowbank facility is not located in a highly populated area, the facility does have immediate neighbours.

In 2008, a permit was issued to authorize air emissions from the Meadowbank facility. Among other things, the permit required Pinnacle to conduct ambient air quality monitoring. Pinnacle installed a monitoring station on the Meadowbank facility, and a second monitoring station on private land owned by a third party (the "Mead Property") approximately 1.25 kilometres west-northwest of the Meadowbank facility. The monitoring stations sampled the particulate levels in the air, as well as the meteorological conditions of wind speed, wind direction, barometric pressure, and temperature. An

annual report summarizing the monitoring data, and any recommendations and conclusions, had to be submitted to the Ministry of Environment.

Sometime after the monitors were installed, Pinnacle installed a wet electrostatic precipitator ("WESP") at the Meadowbank facility to reduce particulate emissions.

On April 1, 2012, the monitoring station at the Meadowbank facility was taken out of service with Ministry approval.

On June 1, 2012, Pinnacle applied to the Director for an amendment to the permit, to remove the monitoring station from the Mead Property. Pinnacle believed the WESP had reduced particulate emissions to the provincial standard, and therefore, the monitoring station on the Mead Property could be removed. However, the Director never responded to Pinnacle's June 1, 2012 application, and the monitoring system at the Mead Property remained intact.

In November 2012, the owner of the Mead Property requested that Pinnacle remove the monitoring station. The land owners believed the monitoring station was negatively affecting their ability to sell the Mead Property.

In early January 2013, Pinnacle applied for a permit amendment, to remove the monitoring station from the Mead Property and relocate the equipment.

The Director issued a decision authorizing a permit amendment to allow the temporary removal, and permanent relocation, of the monitoring station. The amendment was subject to conditions that the Director must be notified of the new location by February 28, 2013, and the monitoring station would be operational at the new Director-approved location by April 30, 2013. On January 11, 2013, Pinnacle removed the station from the Mead Property.

Pinnacle appealed the Director's decision, on the grounds that it was unnecessary to relocate the monitoring station, as it was ineffective. As a preliminary matter, Pinnacle requested a stay of the Director's decision, pending the Board's decision on the merits of the appeal.

The Director opposed the stay application.

In determining whether the stay application 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 appeal raised serious issues regarding the basis for the Director's decision, including questions of fact. Therefore, the Board proceeded to consider the second part of the test.

Regarding the second part of the test, the Board held that Pinnacle's interests would suffer irreparable harm if a stay was denied. The Board found that Pinnacle would incur significant costs in connection with relocating the monitoring station, and Pinnacle would be unable to recover those costs even if it were successful in the appeal.

Turning to the third part of the test, the Board weighed the potential harm to Pinnacle's interests if a stay was denied, against any potential harm to the Director's interests if a stay was granted. The Board found that the balance of convenience favoured granting a stay. In particular, the Board found that Pinnacle would suffer irreparable harm to its financial and commercial interests if a stay was denied. Conversely, a brief period of lost monitoring data would not result in irreparable harm to the Ministry or the environment. The Ministry was in possession of Pinnacle's 2012 data, which could be relied upon should the Meadowbank facility require any modification in the interim. Monitoring would also recommence if the Board first found that it was necessary. Accordingly, the stay application was granted.

Final Decisions

Environmental Management Act

First Nation's Appeal of a Waste Permit Resolved Without the Need for a Hearing

2010-EMA-009 Fred Sam on his own behalf and on behalf of the Nak'azdli First Nation v. Director, *Environmental Management Act* (Terrane Metals Corporation, Third Party)

Decision Date: July 6, 2012

Panel: Alan Andison

Fred Sam, on his own behalf and on behalf of the Nak'azdli First Nation (the "Nak'azdli"), appealed a decision of the Director to issue a permit to Terrane Metals Corporation ("Terrane"). The permit authorized Terrane to discharge effluent to the ground from the Mount Milligan gold-copper mine and mill located northwest of Prince George, and from a concentrate loading facility located north of Fort St. James. The permit was issued following an environmental assessment process that approved the project. The proposed mine is located within the Nak'azdli's asserted traditional territory.

The Nak'azdli appealed the permit on several grounds, including that the Director failed to fulfill the Crown's duty to consult with the Nak'azdli before making the decision to issue the permit, and that the Director made his decision based on inadequate technical information.

After the appeal was filed, the Nak'azdli requested that the Board hold the appeal in abeyance to allow time for the parties to attempt to resolve the appeal.

Before the appeal was heard, the parties reached a negotiated resolution to the appeal.

Accordingly, by consent of the parties, the appeal was dismissed.

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

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

Water Act

Board Corrects Error in Water Licence and Reverses Water Manager's Order

2011-WAT-008(b) Dr. Julia Low Ah Kee Inc. v. Assistant Regional Water Manager (Doug E. Schuk, Jackson Sandford Hart, and Mike Ramsey in his capacity as Section Head of Fish and Wildlife, Participants)

Decision Date: April 25, 2012

Panel: Cindy Derkaz, Les Gyug, Reid White

On June 27, 2011, the Water Manager issued an order to Dr. Julia Low Ah Kee Inc. (the "Appellant"). The order required the Appellant to restore the flow of Chavez Creek by removing a "blockage" or berm that was diverting all of the surface water in Chavez Creek to a ditch that connected to Cedar Creek. The diverted water eventually flowed to Lot 167, which the Appellant purchased in 2010.

The Appellant holds a conditional water licence (the "Licence") that is appurtenant to Lot 167. The Licence allows a maximum of 18,502.35 cubic metres (15 acre feet) of water per year to be diverted for irrigation purposes, from April 1 to September 30. Paragraph (a) of the Licence states that the water rights are granted on "Cedar Creek." Paragraph (b) of the Licence refers to a point of diversion located on a map attached to the Licence. Paragraph (h) of the Licence describes the authorized works as "diversion structure, ditch, pipe, pump and sprinkler system, which shall be located approximately as shown" on the map attached to the Licence.

In May 2011, the Applicant's contractor cleared some vegetation from Cedar Creek. In June 2011, staff from the Ministry of Forests, Lands and Natural Resource Operations investigated the site in response to a public inquiry. Ministry staff found an alleged illegal diversion that was directing water from Chavez Creek into a ditch connected to Cedar Creek. The Water Manager issued the order after determining that the Appellant's Licence authorizes water diversion out of Cedar Creek, but not out of Chavez Creek.

The Appellant appealed the order, and requested a stay of the order pending a decision from the Board on the merits of the appeal. After considering written submissions, the Board granted the stay application (Decision No. 2011-WAT-008(a), issued August 10, 2011).

The Water Manager and the Participants opposed the appeal, and requested that the order be confirmed. The Participants, Doug E. Schuk and Jackson Sandford Hart, hold water licences on Chavez Creek downstream of the blockage.

The Appellant submitted that the "blockage" and ditch were built decades ago by a previous owner of Lot 167, and were unauthorized works when they were built but are authorized under the Licence, which was issued in 2009. The Appellant also submitted that removing the berm would result in no water being available for irrigation on Lot 167. The Appellant requested that the Board rescind the order, and rename the creek above the berm as Cedar Creek. Alternatively, the Appellant requested that the Board amend the Licence to state that the water source is Chavez Creek. The Appellant also requested that the Board provide directions with respect to monitoring water use on Chavez Creek.

Based on the evidence presented at the hearing, the Board found that the work done on the Appellant's behalf in May 2011 did not cause the blockage on Chavez Creek, or the diversion of water into the ditch leading to Cedar Creek. Rather, the blockage was constructed as early as 1961, when a berm was built to divert the entire normal flow of water from Chavez Creek into the ditch that flows into Cedar Creek. The Board found that the maintenance work done in May 2011 did not change the effect of the berm during normal surface water flows in Chavez Creek.

In addition, the Board found that although paragraph (a) of the Licence states that it grants rights on Cedar Creek, paragraph (b) of the Licence refers to a diversion point on a map attached to the Licence, and the map shows a diversion point on Chavez Creek. Also, a map from the Ministry's water rights database shows the diversion point as being on Chavez Creek. Further, the "diversion structure and ditch" authorized in paragraph (h) of the Licence is the berm and ditch located at the diversion point indicated on those maps. Based on the evidence, the Board concluded that the Licence authorizes the diversion of water from Chavez Creek.

Next, the Board considered whether the order should be reversed, taking into account the water rights of all persons who may be affected, and the objectives and purposes of the *Water Act* including the impacts on fish and fish habitat. The Board noted that the parties' evidence regarding the geology of the area and historical water flows indicated that most of the surface flow that is diverted from Chavez Creek seeps back into Chavez Creek within a short distance of the diversion. There was no evidence that the work done in May 2011 altered the seepage back into Chavez Creek, or that reduced water flows experienced in recent summers by downstream licensees on Chavez Creek were caused by the diversion, which has been in place for many decades. Further, there was no evidence that the diversion had any impact on fish or fish habitat, or that the flows in Chavez Creek do not meet the minimum necessary to support fish and fish habitat. Additionally, there was no evidence as to what would happen to the water regime and the environment if the berm was removed, given that it had been in place for decades. Based on all of the evidence, the Board held that the order should be reversed.

Regarding the remedies sought by the Appellant, the Board found that paragraph (a) of the Licence should be amended to state that the water rights are granted on Chavez Creek and Cedar Creek. The Board declined to require monitoring of water use on Chavez Creek or Cedar Creek, but noted that the Water Manager may require monitoring in the future. The Board referred the matter back to the Water Manager with directions to amend the Licence.

Accordingly, the appeal was allowed.

A Fence Intended to Keep Neighbouring Cattle Off of Private Land is not "Works" under a Water Licence

2009-WAT-008(a) David Clarke v. Assistant Regional Water Manager (Ministry of Forests and Range, Third Party)

Decision Date: September 17, 2012

Panel: Gary Robinson

David Clarke appealed a decision of the Water Manager (then within the Ministry of Environment), denying an application to amend Mr. Clarke's water licence. Mr. Clarke sought an amendment to authorize the construction of additional "works"; namely, a fence. He wanted to build a fence on Crown range land, adjacent to his land, to keep neighbouring cattle off of his land.

Mr. Clarke's licence authorizes the diversion of water from a creek for irrigation purposes. A ditch was built approximately 40 years ago on Crown range land, adjacent to Mr. Clarke's property line, to deliver water to Mr. Clarke's land, as part of the "works" authorized under the water licence. However, the ditch had not been used to convey water for irrigation in recent years.

Mr. Clarke wanted to build the fence on the Crown range land adjacent to his land, because the Crown land was easier to build on. He initially sought approval to either purchase or gain tenure over the Crown land where he wanted to build the fence, but government staff suggested that he submit an application for a "change in works" under the *Water Act*, which he did. The area of Crown range land that he proposed to enclose, between the fence and his own property, was approximately 19 hectares.

The amendment application was referred to potentially affected stakeholders, including the existing Crown range tenure holders. One of the tenure holders objected, as did the Ministry of Forests and Range (now the Ministry of Forests, Lands and Natural Resource Operations), which was responsible

for managing Crown range land. Subsequently, the Water Manager refused the application, partly due to the objections.

Mr. Clarke appealed to the Board on several grounds.

The Board considered the definition of "works" in the *Water Act*, and noted that works may be capable of, or used for, "conserving" water, among other things. Thus, the question was whether the proposed fence was capable of, or would be used for, conserving water. The Board found that the ditch had not been used in recent years to convey water for irrigation, and there was no evidence that the ditch had been damaged by grazing cattle, so there was no evidence that the fence was needed to prevent water loss. The Board also found that the fence would result in the existing range tenure holder losing the use of some Crown range land, although there was no information as to what impact, if any, that would have on the tenure holder.

There was evidence that a fence could be safely built along Mr. Clarke's properly line, with a couple of exceptions. However, based on all of the evidence, the Board found that a fence along his property line was not needed to protect the ditch from damage by cattle, and in any case, the ditch was no longer being used for irrigation. The Board held that the real motivation for wanting the fence was to keep neighbouring cattle out of Mr. Clarke's property, and not to "conserve" water. The Board concluded, therefore, that the fence could not be considered "other works" under section 18(1)(d) of the *Water Act*, and that a water licence amendment was not an appropriate vehicle for obtaining approval for the fence.

Accordingly, the appeal was dismissed.

Water Licence was Correctly Issued to all Co-owners of a Parcel of Land

2012-WAT-004(a) Daniel Boyd Fretts v. Regional Water Manager (Wenawae Kristin Gislason, Third Party)

Decision Date: December 27, 2012

Panel: Cindy Derkaz

Daniel Boyd Fretts appealed the Water Manager's decision to issue a water licence to Mr. Fretts and four other co-owners of land on Cortez Island. The co-owners hold the land as tenants in common, which means that they each own an undivided interest of the entire parcel of land. Mr. Fretts owns an undivided 28/122 interest in the land.

Since 1977, Zephyr Creek has been used as an unlicensed water source by the co-owners. In 2011, Mr. Fretts applied for a licence to supply water to his cabin. After applying for the licence, he installed a pump, pipes, and valves to divert water from the existing shallow well on Zephyr Creek to his cabin.

The Ministry notified the other co-owners of Mr. Fretts' application. Two of the co-owners objected to the application.

In March 2012, the Water Manager and other Ministry staff conducted a site visit, and estimated the flow of water in Zephyr Creek. Subsequently, the licence was issued.

The licence states that it is appurtenant to the co-owners' land, and all co-owners are licensees. The licence authorizes the co-owners to divert and use 500 gallons per day of water from Zephyr Creek for domestic purposes.

Mr. Fretts appealed to the Board on the basis that he should be the sole licensee, because he applied for the licence in his name only, and the licensed volume of 500 gallons per day is sufficient for his domestic use only. He submitted that it is absurd for people who have separate dwellings, served by separate water works, to share water rights that

were intended for use at only one dwelling. Mr. Fretts requested that the Board amend the licence, either by making it appurtenant only to his interest in the land, or by naming him as the sole licensee.

The Board found that the crux of the appeal is the co-ownership of the land as a tenancy in common, and the nature of that form of land ownership. The Board noted that section 13(c) of the *Water Act* provides that every water licence must be appurtenant to "land, a mine or undertaking" that is located in British Columbia. Also, under section 16 of the *Water Act*, a water licence, and any rights and obligations granted and imposed under the licence, pass with a conveyance or disposition of the land. As such, a licensee holds rights under a water licence in his or her capacity as an owner of the land to which the licence is appurtenant. The rights under a water licence pass with the land, and are not the licensee's personal property.

The Board held that, as tenants in common, Mr. Fretts and the other co-owners are entitled to possess the whole parcel of land, including all buildings. Mr. Fretts has a distinct, but not separate, interest in the land, and no co-owner owns any particular part of the land. Mr. Fretts cannot hold exclusive rights under the licence, because all of the co-owners have equal rights to possess the entire parcel of land to which the licence is appurtenant. Consequently, the Board found that the Water Manager correctly issued the licence to the co-owners of the land.

Accordingly, the appeal was dismissed.

Water Licence Suspended to Ensure that the Crown Conducts Adequate Consultation with First Nation

2011-WAT-005(c) & 2011-WAT-006(c) Chief Richard Harry in his own right and on behalf of the Xwémalhkwu First Nation v. Assistant Regional Water Manager (Bear River Contracting Ltd., Third Party; Environmental Law Centre, Participant)

Decision Date: February 7, 2013
Panel: Robert Wickett

Chief Richard Harry, in his own right and on behalf of the Xwémalhkwu First Nation (the "First Nation"), appealed two decisions of the Water Manager (then within the Ministry of Environment). The Water Manager issued two conditional water licences to Bear River Contracting Ltd. ("BRC"), authorizing BRC to construct certain water works, and to divert and use water from the Bear River. The Bear River flows into Bear Bay, within Bute Inlet on the mainland coast of British Columbia. Before discharging into Bear Bay, the Bear River traverses land that BRC owns, and crosses a portion of the First Nation's Indian Reservation No. 8. Indian Reservation No. 8 borders Bear Bay to the south, and is surrounded by BRC's land on its other three sides. The only deep water access to Indian Reservation No. 8 is on the shore of Bear Bay adjacent to BRC's land. Indian Reservation No. 8 has not been inhabited in recent years, but is used by the First Nation when harvesting fish in the area. The First Nation is involved in 4th stage treaty negotiations, and Bear Bay is within the First Nation's claimed traditional territory. The First Nation asserts ownership of the Bear River's water resources.

In February 2009, BRC applied for the water licences as part of a plan to build cabins on its land, and to withdraw water from the Bear River for use in bottling, and ultimately, use in a microbrewery. As part of the water bottling proposal, BRC sought to build a dock facility on the foreshore of Bear Bay adjacent to BRC's land. Consequently, in addition to applying for the water licences under the *Water Act*, BRC applied for tenure over the Crown foreshore pursuant to the *Land Act*.

The water licence applications were referred to various stakeholders for comment, including the First Nation and the Ministry's Environmental Stewardship Division. The Crown has a legal duty to consult with, and if necessary accommodate, the

First Nation if its Aboriginal rights and/or title may be adversely affected by the water licences. The First Nation advised the Ministry that it objected to the commercialization of fresh water in the area, as it could impact the First Nation's Aboriginal rights and have long-term environmental consequences.

In August 2010, after various communications and meetings between the Ministry, BRC, and the First Nation, the Ministry completed a preliminary assessment which concluded that the water licences had minimal potential environmental impacts, but the affected site could be of considerable interest to the First Nation. The Ministry sent a copy of its preliminary assessment to the First Nation, and offered the First Nation an opportunity to respond, but it did not respond.

In February 2011, the Ministry completed a technical report that included a summary of the potential environmental impacts of the water licences, and the concerns expressed by stakeholders, including the First Nation. The technical report also included a summary of the Ministry's research into the First Nation's asserted Aboriginal rights and title in the area. The technical report concluded that the First Nation's strength of claim in the affected area was strong in terms of rights, and significant in terms of title, but the water licences had a low potential to infringe the First Nation's Aboriginal rights and title.

Subsequently, the Water Manager accepted the recommendations in the technical report, and issued the water licences to BRC.

One of BRC's water licences is for the purposes of fire protection and residential lawn watering. During the appeal hearing before the Board, the First Nation abandoned its appeal of that licence.

BRC's other water licence is for industrial purposes, particularly bottling sales (the "Commercial Water Licence"). That licence was the focus of the appeal hearing.

Under the Commercial Water Licence, BRC may withdraw up to 0.15 cubic metres of water per second, or 1 percent of the instantaneous pre-diversion stream flow at the point of diversion, whichever quantity is less. The licenced works consist of a screened intake, pump, pipe and tanks, and the works must be constructed, and the water beneficially used, before December 31, 2014. In addition, within six months of completion, the works must be inspected by an independent qualified environmental professional ("QEP"), who must report whether there are any environmental concerns.

The main issue in the appeal was whether the Water Manager, on behalf of the Crown, conducted adequate consultation with the First Nation in relation to the potential impacts of the water licence on the First Nation's asserted Aboriginal rights and title in the Bear Bay area. In particular, the First Nation argued that the Water Manager had failed to adequately consult with the First Nation in relation to not only the withdrawal of water under the water licence, but also the water bottling project as a whole, and particularly regarding the effects on the First Nation's rights and title in relation to Indian Reservation No. 8. In addition, the First Nation submitted that the Water Manager breached section 11 of the *Water Act* by failing to hold a hearing with the First Nation before issuing the Commercial Water Licence.

The Environmental Law Centre ("ELC"), a public interest environmental law clinic associated with the University of Victoria's Faculty of Law, was granted limited participant status in the appeal. The ELC provided submissions on two issues: whether the Water Manager had the legal authority to issue the Commercial Water Licence without re-referring the licence application to the Ministry of Environment after a ministerial reorganization in October 2010 resulted in the Water Manager's position being transferred to the then Ministry of Natural Resource Operations (now the Ministry of Forests, Land and Natural Resource Operations); and, whether the Water Manager unlawfully relied on future reporting from a QEP as a condition of the Commercial Water Licence.

The Water Manager submitted that he, on behalf of the Crown, met the duty to consult the First Nation regarding the potential impact of the Commercial Water Licence on the First Nation's Aboriginal rights and title.

BRC submitted that it met its obligations in the application process, and it made its best efforts to inform the First Nation of its plans with respect to the water bottling proposal. BRC also submitted that the Commercial Water Licence will have minimal impact on the First Nation's rights and title.

In assessing the nature of the Crown's duty to consult in this case, the Board first considered the strength of the First Nation's claims to Aboriginal rights and title in the area affected by BRC's water bottling proposal. The Board then considered the potential impacts of the Commercial Water Licence on the First Nation's asserted rights and title. The Board found that the First Nation's asserted right of ownership of the Bear River's water resources was weak based on the lack of evidence before the Board to support such a claim. The Board also found that there was no evidence that the withdrawal of water in accordance with the Commercial Water Licence would cause any harm to the First Nation's asserted right of water ownership. Accordingly, the Board found that the Crown's duty to consult the First Nation with respect to the potential impacts of the Conditional Water Licence on the asserted water ownership right was at the low end of the spectrum. In that regard, the Board found that the Water Manager had fulfilled the Crown's duty to consult.

However, the Board found that the First Nation's asserted rights of ownership, occupation, use and access in relation to Indian Reservation No. 8 are strong. In addition, the Board found that the Crown was obliged to consider the Commercial Water Licence application in the context of the entire water bottling proposal, including the potential impacts of the dock facility on the marine environment and the First Nation's ability to access Indian Reservation No. 8. In that regard, the Board noted that the Water Manager's powers under section 12 of the *Water Act* include the ability to require "additional information" relevant to water licence applications. Consequently, the Board found that there was no statutory restriction on the Water Manager's ability to engage in consultation with respect to the impacts of the water bottling proposal as a whole.

The Board held that the evidence clearly established that the Water Manager, and his staff, made no effort to consult with the First Nation on the overall impacts of the water bottling proposal, as the Water Manager viewed those matters as being outside of his jurisdiction. Further, there was limited evidence before the Board regarding the Crown's consultations with the First Nation regarding the proposed dock and the application for foreshore tenure under the *Land Act*. The branch of the Crown responsible for approving the *Land Act* application did not share consultation information with the Water Manager, and vice versa. The Board found that, at a minimum, the Water Manager was obliged to seek relevant information from that branch to ensure the disclosure of that information to the First Nation, and to seek information about the First Nation's position with respect to the water bottling proposal as a whole. The Water Manager, on behalf of the Crown, failed to fulfill his duty to consult in this regard, in part, because the policy at the time was that information should not be shared between various branches of the Crown. Had the Water Manager met this duty, it may have changed his assessment of certain aspects of the Commercial Water Licence, such as the quantity of water authorized.

Next, the Board considered whether the Water Manager breached section 11(2) of the *Water Act* by not holding a hearing with the First Nation before issuing the Commercial Water Licence. The Board held that section 11(2) did not require the Water Manager to hold a hearing; rather, it

required the Water Manager to consider whether the First Nation's objection to the licence application warranted holding a hearing. The Water Manager testified that he did not consider whether to hold a hearing. Consequently, the Board found that the Water Manager did not comply with section 11(2). However, the Board held that the First Nation had little basis to expect a hearing, given the generalized nature of its objection, and its failure to respond to the Ministry's requests for further information about the nature of its concerns. Moreover, the Board held that the appeal process provided the First Nation with a full opportunity to express its concerns, and the Water Manager's failure to comply with section 11(2) caused no prejudice to the First Nation. Consequently, the Board rejected this ground for appeal.

Regarding the ELC's submissions, the Board held that the ministerial reorganization had no effect on the Water Manager's legal authority under the *Water Act* to consider the application for the Commercial Water Licence. Moreover, before the reorganization occurred, the licence application was referred to the Ministry of Environment's Environmental Stewardship Division, and it provided comments that formed the basis of several conditions in the Commercial Water Licence.

The Board concluded that the *Water Act* does not require the Water Manager to consider cumulative environmental impacts when deciding whether to issue a water licence. The Board also found that the Water Manager did not unlawfully delegate his authority by putting a condition in the Commercial Water Licence that requires BRC to have the constructed water works inspected by a QEP, who must report any environmental concerns to the Water Manager.

Regarding the remedy for the Crown's failure to adequately consult with the First Nation about the potential impacts of the water bottling proposal on the First Nation's Aboriginal rights and title in relation to Indian Reservation No. 8, the Board suspended the Commercial Water Licence pursuant to sections 92(8)(c) and 23(2) of the *Water Act*, and the matter was returned to the Water Manager with directions. The Board directed the Water Manager to ascertain whether any agency of the Crown had adequately consulted with the First Nation regarding the impact of the water bottling project on the First Nation's rights in relation Indian Reservation No. 8, and if the Water Manager is not satisfied that adequate consultation was completed, then the Commercial Water Licence will remain suspended until the Crown conducts adequate consultation with the First Nation. Upon completion of that process, the Water Manager may reinstate, amend or cancel the Commercial Water Licence. If the Commercial Water Licence is reinstated, the Board directed the Water Manager to extend its termination date to December 31, 2016, to account for the length of the appeal process, and the Water Manager may further extend the termination date to account for the period of consultation.

The appeal of the Commercial Water Licence was allowed, in part.

Wildlife Act

Disabled Hunter Disgruntled Over Being Granted a Permit to Hunt with a Motor Vehicle in a Different Area than he had Requested

2011-WIL-008(a) Larry Hall v. Regional Manager
Decision Date: July 12, 2012
Panel: Gabriella Lang

Larry Hall appealed a decision issued by the Regional Manager denying Mr. Hall's application for a disabled hunting permit. Mr. Hall sought a permit for the 2011/12 hunting season that would allow him to use a motor vehicle to hunt in an access management area that is otherwise closed to motor vehicles. The

Regional Manager denied Mr. Hall's application on the basis that the area is important wildlife habitat, and allowing vehicle access could cause noxious weeds to spread in the area. Instead, the Regional Manager issued Mr. Hall a permit for a different area.

In the appeal, Mr. Hall submitted that the alternate area was unsuitable for him as a disabled hunter and offered poorer hunting opportunities than the area he had requested. He also submitted that the Regional Manager's concerns about noxious weeds were unjustified, and the Regional Manager had failed to accommodate him in violation of the BC *Human Rights Code*. Mr. Hall requested that the Board issue him a permit for the requested area for the 2012/13 hunting season. The appeal hearing concluded after the 2011/12 hunting season has expired.

The Board found that the appealed decision was with regard to Mr. Hall's application for the 2011/12 hunting season. The Board found that such permits are applied for on an annual basis, and the Board's powers on appeal do not include making decisions about future matters that are not part of the decision under appeal. The Board held, therefore, that it had no jurisdiction to issue Mr. Hall a permit for the 2012/13 hunting season, and in any case, it did not have the relevant information to make a decision about the 2012/13 hunting season.

Next, the Board considered whether the Regional Manager failed to accommodate Mr. Hall as a disabled hunter contrary to the *Human Rights Code*. Although the Board's conclusion on the first issue made it unnecessary to decide this issue, the Board provided guidance to the parties for future permit applications. The Board found that the Regional Manager was aware of his duty to accommodate disabled hunters, he made his decision based on site-specific information and conservation concerns, and he approved an alternate area for Mr. Hall.

Accordingly, the Board dismissed the appeal.

Hunting Licence Cancellation and Three-Year Suspension Confirmed due to Hunting Contraventions

2011-WIL-011(a) Allan R. Steele v. Deputy Director, Fish, Wildlife and Habitat Management

Decision Date: October 26, 2012

Panel: Tony Fogarassy

Allan R. Steele appealed the Deputy Director's decision that Mr. Steele had committed eight contraventions of the *Wildlife Act* as a result of activities that occurred during a hunting trip in August 2005. The contraventions related to the killing of a moose and a bear, and statements that were made to conservation officers. Specifically, the Deputy Director found that Mr. Steele: shot a moose but did not cancel his species licence for the moose; illegally possessed the moose because he had not cancelled his species licence; shot a black bear but did not cancel his species licence for it and failed to retrieve the bear; knowingly made false statements to a conservation officer at a roadside check about a moose that was shot by someone else; knowingly cancelled his species licence for a moose that someone else had shot; allowed his moose species licence to be used by another person; and was in unlawful possession of a moose shot by someone else for which Mr. Steele had no transfer documents. Some of the Deputy Director's findings were based on statements made by Mr. Steele and other hunters to undercover conservation officers during the hunting trip. The other evidence against Mr. Steele included statements made to conservation officers at a roadside check at the end of the hunting trip. As a result, the Deputy Director cancelled Mr. Steele's hunting licence effective December 1, 2011, and suspended his hunting privileges for three years until November 30, 2014.

Mr. Steele appealed to the Board on the grounds that he did not make the alleged incriminating statements, or if he did, the statements were stories that he had embellished after consuming alcohol. He

also submitted that he was tricked by the undercover officers into saying things that were untrue, and that the officers encouraged the hunters to contravene the law. In addition, he submitted that he was prejudiced by the delay between the occurrence of the alleged contraventions in August 2005 and the issuance of the Deputy Director's decision in October 2011.

The Deputy Director submitted that there was sufficient cause to warrant the penalties, and that the three-year suspension was lenient. The Deputy Director also submitted that the Board should defer to his decision.

First, the Board considered whether it should defer to the Deputy Director's decision. The Board found that sections 101.1(4) and (5) of the *Wildlife Act* empower the Board to conduct appeals by way of a new hearing, and to make any decision that the Deputy Director could have made and that the Board considers appropriate in the circumstances. The Board is also empowered to hear new evidence, and is not limited to reviewing the evidence that was before the Deputy Director. As a result, the Board concluded that it owes no deference to the Deputy Director.

Next, the Board considered whether Mr. Steele was prejudiced by the passage of time between the date of the contraventions and the issuance of the Deputy Director's decision. The Board found that the majority of the delay was due to the Deputy Director waiting for criminal proceedings against Mr. Steele to conclude. Thereafter, 18 months transpired between the issuance of the Deputy Director's decision and the date when Mr. Steele was notified that the Deputy Director was considering levying administrative penalties. The Board found that there was no evidence that Mr. Steele had been prejudiced by the delay.

The Board then considered whether Mr. Steele had committed the eight contraventions, and whether the penalty was appropriate in the circumstances. Based on the evidence, the Board concluded that Mr. Steele committed the contraventions, and there was no evidence that the undercover officers used trickery, duress or intimidation to cause Mr. Steele to break the law or make incriminating statements. The Board found that Mr. Steele was an experienced hunter, who had exhibited disrespect for wildlife resources and showed no willingness to take responsibility for his actions. The Board noted that the Deputy Director had taken those factors into account, along with the delay in issuing the penalties, and the fact that Mr. Steele had paid a fine for some of the contraventions. In all of the circumstances, the Board concluded that the cancellation of Mr. Steele's hunting licence, and three-year suspension of his hunting privileges, was appropriate.

Accordingly, the appeal was dismissed.

Guide Outfitter Denied a Grizzly Bear Quota Due to Low Grizzly Population in his Guide Territory

2012-WIL-013(a) Harold Koenig v. Regional Manager (British Columbia Wildlife Federation, Participant)

Decision Date: November 27, 2012

Panel: Loreen Williams

Harold Koenig appealed a decision of the Regional Manager with respect to his quota of grizzly bear for the 2012/13 guiding season. Mr. Koenig is a guide outfitter operating in a guide territory located in the Skeena region of BC. He guides hunters who pay to take part in a hunt for specific species of wildlife. Mr. Koenig's annual guide outfitter licence is issued with species quotas, which are the number of individuals of specific wildlife species that his clients may kill. Mr. Koenig's guide outfitter licence for the 2012/13 season was issued with a quota of ten moose and zero grizzly bear. In the past, Mr. Koenig was granted a quota of one grizzly bear per five-year period. The Regional Manager issued a quota of zero on the

basis that the estimated grizzly bear population of 58 bears in Mr. Koenig's territory was too low to support any hunting.

Mr. Koenig appealed to the Board, and requested that the Board grant him a quota to hunt grizzly bears in his guide territory. He submitted that the Ministry's grizzly bear population estimate for his territory is too low, and that the population can support a quota of one bear every five years.

The Board found that, in 2012, the Ministry re-evaluated its previous grizzly bear population estimates, using data from recent inventories and more sophisticated statistical analysis. As a result, the estimated population of grizzly bears in Mr. Koenig's territory fell from 140 bears in 2008 to 58 bears in 2012. The Ministry's policy with respect to grizzly bears is that, for conservation reasons, no hunting is permitted in population units with less than 100 bears. Although Mr. Koenig expressed concerns about the accuracy of the Ministry's population estimate, the Board found that the Ministry provided the best evidence with respect to the bear population in the territory. The Board also found that, even if the estimate of 58 bears is conservative, it is still well below the Ministry's 100-bear threshold for allowing hunting. The Board found that this was compelling evidence of a conservation concern, and that it was appropriate to reduce Mr. Koenig's grizzly bear quota to zero for the 2012/13 season.

Accordingly, the appeal was dismissed.

Summaries of Court Decisions Related to the Board

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

Summaries of Cabinet Decisions Related to the Board

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

APPENDIX I

Legislation and Regulations

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

Also included are the appeal provisions contained in each of the 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, 2013). 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 Activities Act*, S.B.C. 2008, c. 36 (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) *[environmental appeal board]* 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) *[parties and witnesses]* 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

making an order,

imposing a requirement,

exercising a power except a power of delegation,

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

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

determining to impose an administrative penalty, and

determining that the terms and conditions of an agreement under section 115 (4) *[administrative penalties]* 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) *[general authority to make regulations]*, 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) *[costs and security for costs]* 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 *[decision of appeal board]* 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 Health if the appeal relates to a matter under the *Health Act*, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(5) Repealed. [BC 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 *[imposed administrative penalties: failure to retire compliance units]* 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 *[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;

(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 *[Appeals]* of the *Environmental Management Act* applies in relation to appeals under this Act.

Reporting Regulation,
BC Reg. 272/2009

Part 5 – **General**

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*, BC 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 *[imposed administrative penalties: fuel requirements]* 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 *[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;

(c) a refusal to accept an alternative calculation of carbon intensity under section 6 (3) (b) (iii) *[requirements for reduced carbon intensity]*;

(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 *[Appeals]* 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 the 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 *[minister's orders]*;

(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) *[administrative penalties]* have not been performed.

(2) A declaration, suspension or restriction under section 2 *[Act may be limited in emergency]* 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 *[Environmental Appeal Board]* 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

Part 6 – General

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 *[drilling authorizations]* 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.

(4) For the purposes of applying this section to a decision that affects a guiding territory certificate, if notice of a decision referred to in subsection (1) is given in accordance with this section to the agent identified in the guiding territory certificate, the notice is deemed to have been given to the holders of the guiding territory certificate as if the agent were an affected person.

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 continued 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.

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