Environmental Appeal Board

2014/2015 Annual Report

APRIL 1, 2014 ~ MARCH 31, 2015

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, 2014 through March 31, 2015.

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 2014/2015 fiscal year.

The Year in Review – Appeals

During the past year, the Board experienced a decrease in the number of appeals filed compared to the previous year. Fifty-five appeals were filed during the 2014/2015 fiscal year, compared to 62 during 2013/2014. However, the Board was very busy during this report period, as many of the appeals filed during the previous reporting period were resolved in 2014/2015. Notably, in 2014/2015, the Board decided 28 appeals filed in 2013/2014 by guide outfitters under the *Wildlife Act*. These appeals involved a review of the highly contentious division of big game allocations between resident hunters and non-resident hunters. As a result of resolving many appeals that were filed in the previous reporting period, the Board closed a total of 76 appeals during 2014/2015. In addition, 43 of those appeals that were resolved did not require a hearing, as the appeals were withdrawn, rejected, or resolved by consent of the parties. The Board continues to work towards reducing the number of appeals that proceed to a hearing, and to reduce the costs associated with hearings. I am also pleased to note that most of these hearings were conducted by way of written submissions, which reduces costs for all parties and the Board.

In addition, the Board dealt with two particularly complex matters that engaged a high degree of interest from the public. One of those matters involved several appeals against a permit authorizing the operation of a contaminated soil landfill in the Shawnigan Lake area. After a lengthy oral hearing in which the parties presented voluminous expert evidence, the Board decided to confirm the landfill permit subject to several conditions. The other matter involved several appeals against a permit authorizing an increase in the amount of sulphur dioxide emitted from an aluminum smelter in Kitimat. Prior to hearing those appeals, the Board was required to address numerous preliminary applications from the parties, including a challenge to the Appellants' standing to appeal the permit, a reconsideration of some of the Appellants' standing to appeal, and multiple document disclosure applications from the Appellants. This also resulted in a judicial review of one Board decision that was upheld by the court.

Administrative Penalties

I also wish to congratulate the government in making amendments to environmental regulations that provide for increased ability for environmental regulators to assess administrative penalties. The Board and its sister tribunals, the Forest Appeals Commission and the Oil and Gas Appeal Tribunal, have years of experience in adjudicating administrative

penalty regimes. They are an effective, fair and efficient enforcement tool. Given the extreme importance that is attached to the protection of the environment in this province, it is refreshing to see the continued improvement and strengthening of environmental protection legislation.

Outside Activities

I am also pleased to report that I have continued to be active in promoting increased administrative fairness and administrative efficiencies throughout the Tribunal community in British Columbia and nationally. During this reporting period I was re-elected to Chair the Circle of Chairs of Administrative Tribunals in British Columbia. I also sit on the Executive of both the British Columbia Council of Administrative Tribunals and the Council of Canadian Administrative Tribunals. I believe that the leadership and expertise that has been developed by the Board and its sister tribunals should be shared with the administrative justice community at large.

Board Membership

The Board membership experienced only one change during the past year. I am very pleased to welcome Norman Yates as a new member of the Board. He will complement the expertise and experience of the outstanding professionals on 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, ranging from the remediation of contaminated sites, to hunting for bull moose and grizzly bear, to water licensing on sensitive streams and water bodies.

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 continued 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, 2014 to March 31, 2015.

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, Q.C.	Lawyer	Vancouver
Members		
Maureen Baird, Q.C.	Lawyer	West Vancouver
R. O'Brian Blackall	Land Surveyor	Charlie Lake
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Cindy Derkaz	Lawyer (Retired)	Salmon Arm
Brenda L. Edwards	Lawyer	Victoria
Tony Fogarassy	Geoscientist/Lawyer	Vancouver
Les Gyug	Professional Biologist	West Kelowna
James Hackett	Professional Forester	Nanaimo
Jeffrey Hand	Lawyer	Vancouver
R.G. (Bob) Holtby	Professional Agrologist	West Kelowna
Gabriella Lang	Lawyer (Retired)	Campbell River
Blair Lockhart	Lawyer/Geoscientist	Vancouver
Ken Long	Professional Agrologist	Prince George
James S. Mattison	Professional Engineer	Victoria
Linda Michaluk	Professional Biologist	North Saanich
Howard Saunders	Forestry Consultant	Vancouver
David H. Searle, CM, Q.C.	Lawyer (Retired)	North Saanich
Daphne Stancil	Lawyer/Biologist	Victoria
Gregory J. Tucker, Q.C.	Lawyer	Vancouver
Douglas VanDine	Professional Engineer	Victoria
Reid White	Professional Engineer/Professional Biologist (Retired)	Dawson Creek
Norman Yates (from December 19, 2014)	Lawyer/Professional Forester	Penticton

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.

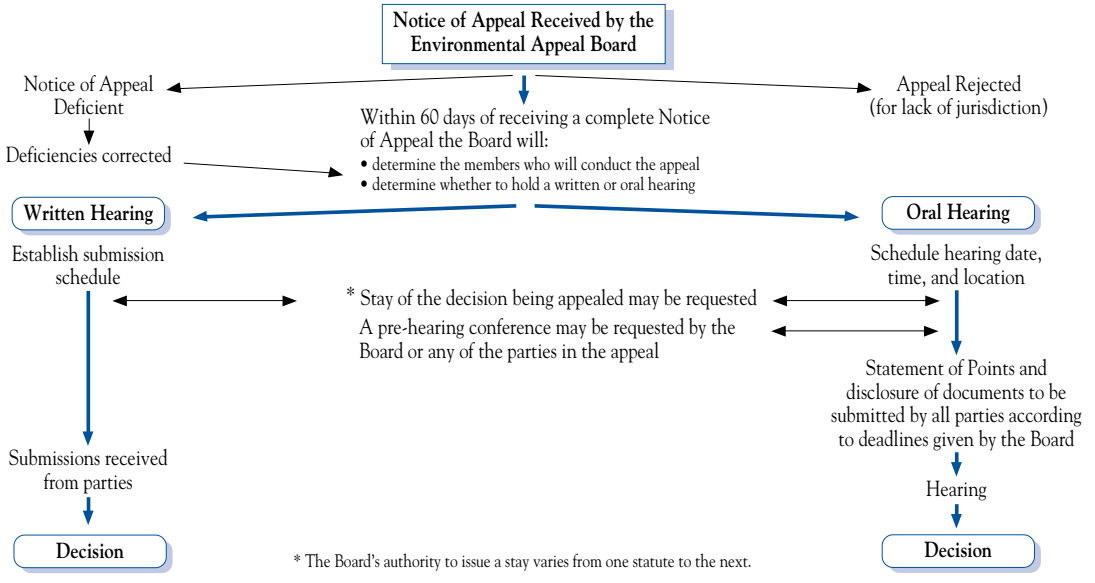
The Appeal Process

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*, B.C. Reg. 1/82. The relevant portions of the *Act* and the *Regulation* are included at the back of this report.

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



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 landfills 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 Board has interpreted the phrase "person aggrieved" to mean that an appellant must establish that he or she has a genuine grievance because a decision has been made which prejudicially effects his or her interests.

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;*
- 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*, B.C. 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.

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

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(5)(d)(ii)(B) of the *Act* [*low carbon fuel requirement*]; and
- a prescribed decision or a decision in a prescribed class.

According to the *Renewable and Low Carbon Fuel Requirements Regulation*, B.C. 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.

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 that are 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

On June 23, 2014, two new regulations came into force:

- *Administrative Penalties Regulation (Environmental Management Act)*, B.C. Reg. 133/2014; and
- *Administrative Penalties Regulation (Integrated Pest Management Act)*, B.C. Reg. 134/2014.

These regulations create new powers and procedures for officials in the Ministry of Environment and the Ministry of Forests, Lands and Natural Resource Operations to issue administrative penalties under the *Environmental Management Act* and the *Integrated Pest Management Act*.

Under section 115(1) of the *Environmental Management Act* and the *Administrative Penalties Regulation (Environmental Management Act)*, a director may issue a determination in respect of:

- a contravention of a prescribed provision of the *Environmental Management Act* or its regulations;
- a failure to comply with an order under the *Environmental Management Act*; or
- a failure to comply with a requirement of a permit or approval issued or given under the *Environmental Management Act*.

Under section 23(1) of the *Integrated Pest Management Act* and the *Administrative Penalties Regulation (Integrated Pest Management Act)*, an administrator may issue a determination in respect of:

- a contravention of a prescribed provision of the *Integrated Pest Management Act* or its regulations;
- a failure to comply with an order under the *Integrated Pest Management Act*; or
- a failure to comply with a requirement of a licence, certificate or permit issued, or a pesticide notice given, under the *Integrated Pest Management Act*.

Determinations with respect to administrative penalties issued under these Acts and their respective regulations may be appealed to the Board.

Recommendations

During this reporting period, the Board has one recommendation.

Reiteration of recommendation regarding auctions under the *Wildlife Act*

In its annual report for the previous reporting period, the Board made a recommendation based on a concern that section 6(2) of the *Permit Regulation*, B.C. Reg. 253/2000 (the "*Permit Regulation*"), may require the Regional Manager to rely on increasingly outdated auction data in making a valuation determination, given that government auctions of wildlife parts ceased in 2012. This concern arose from two separate appeals under the *Wildlife Act* that were decided by the Board in 2013/2014. Those appeals raised issues regarding how Regional Managers determine the value of dead wildlife and wildlife parts when deciding whether to issue a permit transferring the right of property in dead wildlife or wildlife parts from the government to a person.

Under the *Wildlife Act*, ownership of all wildlife in the Province is vested in the government, and a person can only acquire a right of property in wildlife through a permit or licence, or by lawfully killing the wildlife. Under section 2(p) of the *Permit Regulation*, a Regional Manager may issue a permit transferring the right of property in dead wildlife or wildlife parts to a person, subject to certain limitations. One of those limitations is set out in section 6(1)(d) of the *Permit Regulation*, which prohibits a Regional Manager from issuing a permit under section 2(p) if the value of the dead wildlife or wildlife parts is greater than $200, subject to two narrow exceptions. Section 6(2) provides that the value of wildlife or wildlife parts for the purpose of section 6(1)(d) is to be determined by the Regional Manager "based on the average price the government receives at an auction" for similar dead wildlife or wildlife parts.

In the two appeals that led to the Board's recommendation in the 2013/2014 annual report, the appellants had each applied for a permit to keep dead wildlife (a snowy owl in one case, and a wolverine in the other case) that was found on a roadside, for personal use. In separate decisions issued by different Regional Managers, the appellants' respective permit applications were denied on the basis that the value of the dead wildlife in each case exceeded $200 based on government auctions conducted several years earlier. In both appeals, the Regional Managers confirmed that the government had not held an auction of dead wildlife or wildlife parts since 2012. Based on that evidence, the Board concluded that the value of dead wildlife and wildlife parts has, in effect, become 'frozen' in time, given the requirement in section 6(2) of the *Permit Regulation*. The Board held that, as more

time passes, this creates a risk that the application of section 6(2) of the *Permit Regulation* may lead to absurd results, and/or reduce confidence in valuations to the point where the accuracy of a valuation will be unknown. The Board recommended that the government consider amending section 6(2) of the *Permit Regulation* if the government no longer intends to conduct auctions of dead wildlife and wildlife parts.

This same issue arose in another appeal under the *Wildlife Act* that was decided during the current reporting period (Frederick Vandenberghe v. Regional Manager, Decision No. 2014-WIL-001(a)) (see the summary in this annual report). To the Board's knowledge, the government has taken no steps to address this issue or the Board's previous recommendation.

Recommendation: the Board reiterates the recommendation in its previous annual report, that the government consider amending section 6(2) of the *Permit Regulation* if the government no longer intends to conduct wildlife auctions.

Statistics

The following tables provide information on the appeals filed with the Board, and decisions published by the Board, during this reporting 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, 2014 and March 31, 2015, a total of 55 appeals were filed with the Board against 50 administrative decisions, and a total of 67 decisions were published. No appeals were filed or heard under the *Greenhouse Gas Reduction (Cap and Trade) Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, or the *Integrated Pest Management Act*.

April 1, 2014 – March 31, 2015

Total appeals filed		**55**
Total appeals closed		**76**
Appeals abandoned or withdrawn		**31**
Appeals rejected, jurisdiction/standing		**7**
Hearings held on the merits of appeals:		
Oral hearings completed	3	
Written hearings completed	10	
***Total hearings held on the merits of appeals**		**13**
Total oral hearing days		**41**
Published Decisions issued:		
Final Decisions (excluding consent orders)		
Appeals allowed	0	
Appeals, allowed in part	2	
Appeals dismissed	31	
Total Final Decisions		**33**
Decisions on preliminary matters		**27**
Decisions on Costs		**2**
Consent Orders		**5**
Total published decisions		**67**

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

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

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 Act	Greenhouse Gas Reduction (Cap and Trade) Act	Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act	Integrated Pest Management Act	Water Act	Wildlife Act	Total
Appeals filed during report period	12				14	29	55
Appeals closed	13				11	52	76
Appeals abandoned or withdrawn	4				10	17	31
Appeals rejected jurisdiction/							
standing	4				1	2	7
Hearings held on the merits of appeals							
Oral hearings	1				2		3
Written hearings					1	9	10
Total hearings held on the merits of appeals	1				3	9	13
Total oral hearing days	16				25		41
Published decisions issued							
Final decisions	4					29	33
Preliminary applications	25				2		27
Costs decisions	2						2
Consent orders						5	5
Total published decisions issued							**67**

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

Summaries of Board Decisions

April 1, 2014 ~ March 31, 2015

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. In the summaries, the Board has included an example of a case that resulted in a consent order.

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. Please refer to the Board's website to view all of the Board's published decisions and their summaries.

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 who has "standing" to appeal, and the types of decisions that may be appealed to the Board.

Appeals dismissed in air emissions case because appellants were not "persons aggrieved"

2013-EMA-005(b), 2013-EMA-008(b), 2013-EMA-011(b), and 2013-EMA-012(b)
Lynda Gagne, Charles Henry Claus, Skeena Wild Conservation Trust and Lakelse Watershed Stewards Society v. Director, *Environmental Management Act* (Rio Tinto Alcan Inc., Third Party)
Decision Date: April 17, 2014
Panel: Alan Andison

In April 2013, Lynda Gagne, Charles Henry Claus, the Skeena Wild Conservation Trust (the "Trust"), and the Lakelse Watershed Stewards Society (the "Society") were among a group of eight appellants who appealed a decision issued by the Director,

Environmental Management Act (the "Director"), Ministry of Environment, to amend a permit held by Rio Tinto Alcan Inc. ("Rio Tinto"). The permit authorizes Rio Tinto to discharge effluent, emissions, and waste from an aluminum smelter located in Kitimat, BC. Among other things, the amendment allowed an increase in the smelter's maximum daily air emissions of SO2 (sulphur dioxide).

After the appeals were filed, Rio Tinto challenged the appellants' standing to appeal the permit amendment. Rio Tinto submitted that the appellants were not "persons aggrieved" by the amendment within the meaning of section 100(1) of the *Environmental Management Act* (the "*Act*"). The Board found that two of the appellants had standing to appeal as "persons aggrieved" by the amendment, but the other six appellants including Ms. Gagne, Mr. Claus, the Trust, and the Society, had not established that they were "persons aggrieved," and therefore, they had no standing to appeal (*Lynda Gagne et al v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-005(a) and 007(a) through 012(a)).

Ms. Gagne, Mr. Claus, the Trust, and the Society sought a judicial review of the Board's decision by the BC Supreme Court. In their submissions to the Court, the petitioners argued that the Board had acted in a procedurally unfair manner when staff of the Board requested that Rio Tinto provide copies of certain documents that both Rio Tinto and the appellants had cited and partially quoted in their submissions. The petitioners argued that this was unfair because the deadline for written submissions had closed, the petitioners were not copied on the Board's request to Rio Tinto, and the petitioners were not given an opportunity to make further submissions regarding the documents contrary to the Board's Procedure Manual.

The Court issued its decision in March 2014 (*Gagne v. Sharp*, 2014 BCSC 2077) [*Gagne*]. The Court found that, although there was no intentional misconduct by any party, the Board's request for documents from Rio Tinto was a breach of its Procedure Manual, and this breached the petitioners' right to procedural fairness. The Court also held that the Board had applied the "balance of probabilities" standard of proof to the question of standing, and this standard of proof was too rigorous. The Court held that appellants should only have to demonstrate on a *prima facie* basis that they are "persons aggrieved" when their standing is being decided as a preliminary matter. Accordingly, the Court directed the Board to reconsider whether the petitioners had established, on a *prima facie* basis, that they are "persons aggrieved," based on the submissions and information before the Board when the preliminary hearing on standing had concluded.

In accordance with the Court's directions, the Board reconsidered the four appellants' standing to appeal the permit amendment. The Board found that none of the four appellants had established, on a *prima facie* basis, that they are "persons aggrieved" by the amendment. The Board found that their evidence and submissions were primarily aimed at establishing that they had a "genuine interest" in the subject matter of the appeals, which is insufficient to establish standing as a "person aggrieved" under the *Act*. The Board held that general concerns about the environment or public health are insufficient to establish standing; an appellant must provide some evidence or information that demonstrates, on a *prima facie* basis, that the appellant's interests are prejudicially affected. The Board also found that the appellants' concerns about the potential effects of the sulphur dioxide emissions were too remote and speculative to establish that they are "persons aggrieved." The four appellants reside and work outside of the Kitimat area, and they did not challenge Rio Tinto's evidence that the sulphur dioxide emissions are predicted not to exceed the BC Pollution Control Objectives outside of Kitimat.

Further, the Board noted that the permit amendment allows an increase in sulphur dioxide emissions, not a new source of such emissions, and there was no evidence that the existing emissions had harmed the appellants' health or other interests.

Accordingly, the four appeals were dismissed for lack of jurisdiction.

Is an approval of a monitoring plan an appealable "decision" under the *Environmental Management Act*?

2014-EMA-003(a), 2014-EMA-004(a) and 2014-EMA-005(a) Emily Toews, Elisabeth Stannus and Unifor Local 2301 v. Director, *Environmental Management Act* (Rio Tinto Alcan Inc., Third Party)

Decision Date: December 4, 2014

Panel: Alan Andison

Elisabeth Stannus, Emily Toews, and Unifor Local 2301 ("Unifor") filed separate appeals against the approval of an environmental effects monitoring program plan (the "Plan") by the Director. The Plan applied to air emissions from Rio Tinto's smelter in Kitimat, BC. The preparation and implementation of the Plan is a requirement in a permit amendment that the Director issued to Rio Tinto in 2013. That permit amendment authorized an increase in the daily air emissions of SO2 from the smelter, and was already the subject of appeals by Ms. Stannus and Ms. Toews which had not yet been heard by the Board.

Before accepting the appeals, the Board requested submissions from the parties regarding whether the approval of the Plan was an appealable "decision" within the meaning of section 99 of the *Environmental Management Act* (the "*Act*"), and whether the Appellants were "persons aggrieved" by the Plan under section 100(1) of the *Act*.

The Board found that the Director's approval of the Plan was not an appealable "decision" as defined by section 99 of the *Act*. Applying the principles of statutory interpretation, the Board found that the approval of the Plan did not fall within the ambit of any of the appealable matters listed in section 99 of the *Act*. In addition, the Board found that concerns about the adequacy of the Plan had already been raised in the appeals against the permit amendment. The Board also noted that the Plan did not change the amount or type of waste emissions allowed under the permit amendment, and that allowing an appeal of every monitoring plan or further study required by a permit or permit amendment would allow parties to circumvent the 30-day period for appealing a permit or permit amendment.

Given the Board's finding that the approval of the Plan was not an appealable "decision" as defined by section 99 of the *Act*, it was unnecessary to decide whether the Appellants were "persons aggrieved" by the Plan.

Accordingly, the appeals were rejected for lack of jurisdiction.

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 *Water Act*, the Board found that a stay should not be granted as it was unlikely that the Appellant's aboriginal rights would be irreparably harmed.

Stay denied: unauthorized access road poses risks to the environment, infrastructure, and public safety

2014-WAT-019(a) Steven Vestergaard v. Engineer under the *Water Act*

Decision Date: October 8, 2014

Panel: Alan Andison

Steven Vestergaard applied for a stay of an order (the "Order") issued to him under section 88 of the *Water Act*. The Order was issued by a designated Engineer under the *Water Act* (the "Engineer"), with the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The Order concerned an access road and an associated road berm and culvert that were constructed by Mr. Vestergaard on Crown land. The Order required Mr. Vestergaard to remove the road berm and culvert, retain a qualified professional to prepare a road deactivation plan, and deactivate the access road in accordance with the deactivation plan.

Mr. Vestergaard held a conditional water licence (the "Licence"), which authorized him to construct a "diversion structure and pipe" on a delineated parcel of Crown land, and to divert water from that parcel of land at Battani Creek for domestic purposes. As the holder of the Licence, Mr. Vestergaard also held a permit (the "Permit"), which authorized him to "occupy Crown land by constructing, maintaining and operating thereon the works authorized under" the Licence. According to Mr. Vestergaard, he had enquired with government staff about building an access road parallel to the water pipe running from the diversion point in Battani Creek to his residence. He also applied for a timber mark, and was granted a licence in October 2011 to clear timber from the proposed access road. Mr. Vestergaard then constructed a "simple dirt trail", which was subsequently damaged by firefighting crews

in the process of fighting a forest fire. He further advised that, to repair the damage to the access road, he covered the road surface with aggregate and asphalt, and he dug a drainage ditch and installed culverts. Mr. Vestergaard acknowledged that he did not apply for an approval or amendment to the Licence prior to making those changes to the access road. Mr. Vestergaard submitted that he had pursued compensation from the Ministry for the cost of repairing the access road, and his claim for damages was successful.

In July 2014, the Engineer issued the Order on the basis that there was no legal authority under the Licence and/or Permit for the culvert, access road, or related road berm. In addition, the area around Battani Creek has a known history of natural hazards, and the Engineer was concerned that the unauthorized works could cause a slope failure if they were improperly designed.

Mr. Vestergaard appealed the Order. In his Notice of Appeal, Mr. Vestergaard stated that he had already complied with the terms of the Order requiring him to remove the road berm and culvert. Mr. Vestergaard requested that the Board set aside the terms of the Order requiring him to prepare a road deactivation plan and deactivate the road. He also sought a stay of the Order, pending a hearing on the merits of the appeal.

In determining whether the stay ought to be granted, the Board applied the three-part test set out in *RJR-McDonald Inc. v. Canada (Attorney General)*. With respect to the first part of the test, the Board found that the appeal raised serious issues which were not frivolous, vexatious, or pure questions of law. Specifically, the appeal raised the following issues: whether the access road, road berm, and related works were in accordance with the Permit, Licence, or any other legal authorization; whether the works constructed by Mr. Vestergaard were within the area covered by the Permit; and whether some or all of the works were necessitated by damage arising from the firefighting activity. The Board held that these issues were questions of mixed fact and law that would require further evidence. The Board concluded that Mr. Vestergaard met the first part of the test.

Regarding the second part of the test, the Board found that Mr. Vestergaard had not established that his interests would suffer irreparable harm if a stay was denied. Mr. Vestergaard submitted that if a stay was denied, he would be required to comply with the Order and remove the access road. He argued that this would render his appeal moot, and he would be unable to collect damages from the Ministry for the cost of replacing the access road if his appeal was to succeed. However, the Board found that denying a stay would not render the appeal moot. Although a stay would require Mr. Vestergaard to take deactivation measures, he may be able to return the road to its present condition if his appeal was ultimately successful. Also, given that Mr. Vestergaard had been successful in his previous claim for damages against the Ministry for the cost of repairing the access road, the Board was not convinced that he would be unable to collect damages from the Ministry for road deactivation costs, if his appeal was successful. In addition, the Board found that Mr. Vestergaard would still be able to access the water pipe and diversion structure by means other than a vehicle, if a stay was granted. For these reasons the Board found that Mr. Vestergaard failed to meet the second stage of the test.

Regarding the third part of the test, the Board found that the balance of convenience favoured denying a stay. The Board found that Mr. Vestergaard would suffer some harm and/or inconvenience if a stay was denied, as he would have to incur the costs of deactivating the road, and accessing the water pipe and diversion structure would be less convenient. However, the Board found that granting a stay could

result in a risk of irreparable harm to the environment, as defined in *RJR MacDonald* (i.e., "permanent loss of natural resources"). The Engineer provided evidence that the area in issue was steeply sloping and had experienced significant debris flow in the past. The Board found that permanent environmental damage could occur if a slope failure or washout occurred as a result of inadequate construction of the access road. Further, the Board found that the risk of slope failure and washout created associated risks to public safety and risks of damage to residences, roads, a railway, and the licenced works located downslope and/or downstream from the access road.

Accordingly, the application for a stay of the Order was denied.

Final Decisions

Environmental Management Act

Permit for contaminated soil landfill upheld

2013-EMA-015(c), 2013-EMA-019(d), 2013-EMA-020(b) and 2013-EMA-021(b) Shawnigan Residents Association; Cowichan Valley Regional District; John and Lois Hayes; Richard O. Sanders v. Director's Delegate, *Environmental Management Act* (Cobble Hill Holdings Ltd., Third Party)

Decision Date: March 20, 2015

Panel: Alan Andison, Brenda Edwards, Tony Fogarassy

The Shawnigan Residents Association (the "Association"), the Cowichan Valley Regional District (the "Regional District"), John and Lois Hayes, and Richard Saunders appealed a permit issued by a delegate acting on behalf of the Director, *Environmental Management Act* (the "Delegate"), Ministry of Environment (the "Ministry"). The permit was issued under section 14 of the *Environmental Management Act* (the "Act"). The permit authorizes Cobble Hill Holdings Ltd. ("Cobble Hill") to operate a soil treatment and landfill facility on Cobble Hill's property located approximately five kilometres south of, and upslope from, Shawnigan Lake. The Shawnigan Lake watershed provides drinking water to thousands of people who rely on surface water and ground water sources. The facility is adjacent to, and includes, a rock quarry operated under a *Mines Act* permit. The *Mines Act* permit requires reclamation of the quarry.

The landfill permit specifies the characteristics of the soil that may be accepted and landfilled at the facility. Among other things, the permit prohibits the disposal of hazardous waste. The facility is designed to process contaminated soil through bioremediation or landfilling. Soils that cannot be bioremediated are encapsulated in engineered cells with leachate collection and leak detection systems. The cells are placed in areas of the quarry where mining has been completed. The permit authorizes Cobble Hill to deposit and bury up to 100,000 tonnes of contaminated soil per year. The permit also regulates the characteristics of the treated effluent that may be discharged to an ephemeral stream that flows into Shawnigan Lake via Shawnigan Creek. Treated effluent must meet the provincial guidelines for aquatic life protection and drinking water use. The permit contains numerous other conditions, including monitoring and reporting on groundwater, effluent and air emissions; and, providing financial security.

The Appellants raised numerous grounds for appeal. In general, the Appellants submitted that the facility's site, design, and the permit requirements would not protect domestic water supplies, fish habitat, and human health. The Appellants submitted that there was insufficient information to determine

whether the environment and human health would be protected from risks associated with the facility. The Appellants also raised concerns about the Delegate's jurisdiction to issue the permit, and whether the Ministry will enforce the permit. The Appellants requested that the Board rescind the permit.

In deciding the appeals, the Board addressed the following issues:

- Whether the Director's letter delegating certain powers to the Delegate authorized the Delegate to consider the permit application and issue the permit.

The Board reviewed the Director's letter of delegation and the relevant provisions of the legislation, and concluded that the Delegate was acting within the scope of his authority.

- Whether there were errors in the Ministry's consultation process.

The Board found that the Ministry conducted extensive consultations about the permit application over a two-year period, involving two phases. The Board found that the Delegate went well beyond the notification and consultation requirements under the *Public Notification Regulation*, and beyond the usual consultation undertaken on permit applications. This ground for appeal was dismissed.

- Whether the Delegate properly considered the information obtained during the review process and properly exercised his discretion by making appropriate investigations, considering relevant information, and by applying relevant policies, in an unbiased manner.

The Board dismissed this ground for appeal after considering several sub-issues. The Board held that the Delegate properly considered the reports prepared by Cobble Hill's consultant for the permit application. The Board found that the Delegate was aware of the test for considering whether to issue the permit under section 14 of the *Act*. Specifically, when assessing the potential for harm to drinking water resources, the correct approach is to be "prudent and cautious," and where the permitted activity poses a threat of serious or irreversible damage to the environment, a rigorous analysis of the application is required, including a comprehensive investigation of the site. In addition, the Board found that the Delegate considered the values associated with water resources in the watershed, and the concerns raised about potential impacts of the facility on residents' wellbeing and economic livelihood.

The Board considered the applicability of the *Hazardous Waste Regulation*, and the Ministry's guidelines and protocols regarding contaminated sites and municipal landfills, and found that the Delegate considered them, to the extent that they were helpful in assessing the permit application. Additionally, the Board found that the Delegate evaluated the input that was received through the consultation process, and there was no evidence that he was either biased in favour of the permit or colluded with Cobble Hill.

- Whether the site is suitable for the facility.

Based on the evidence, the Board found that the site is suitable for the facility, provided that the facility design provides adequate primary protections, and the permit requirements provide additional "checks and balances" to protect the environment and human health.

- Whether the facility, as designed, will protect the environment and human health.

The Board found that the facility design takes a proactive approach to environmental protection through screening, management and storage of soils, the use of cell liners and barriers to prevent groundwater from contacting contaminated soils, the separation of water that has contacted contaminated soils from non-contact water, the treatment of contact

water, the inclusion of a leachate detection system, and a sophisticated drainage system. The design was modified to address the risk of flooding and to manage storm water events. The permit includes requirements for sampling and monitoring, to ensure that the facility operates as designed.

However, the Board acknowledged that there is always a risk that a design component may fail. To minimize the identified risks, the Board directed that the facility's environmental procedures manual be amended to prevent the re-use of cell liners in the event that a cell is deconstructed and moved. In addition, blasting is to be prohibited while liners are being installed. Finally, a permanent roof must be constructed over the soil management area, to reduce the amount of precipitation that contacts the contaminated soil. As there is no wheel washing facility at the site, the Board also directed the Delegate to amend the permit to require that the wheels of soil transport vehicles be rinsed before leaving the site. The Board concluded that, subject to these directions, the facility design would protect the environment and human health.

- Whether the conditions and financial requirements of the permit ensure that the facility operates in a manner that protects the environment and human health.

The Appellants submitted that the permit does not address the harm caused by increased traffic travelling to and from the facility, and the dust and noise from trucking soil to the facility. However, the Board found that there was no evidence to substantiate those concerns. The Board also found that the permit's financial security requirements are adequate to address the present and future risks associated with the facility.

- Whether Cobble Hill is a suitable entity to be named to the permit.

The Appellants submitted that Cobble Hill is an unreliable operator, based on events that occurred before and after the permit was issued, and it should not be trusted to operate the facility in compliance with the permit. The Board found that there was no basis to conclude that Cobble Hill is unreliable or should not be trusted to comply with the permit.

- Whether the Ministry lacks the resources and/or intent to enforce the permit?

The Board found that, to date, the Ministry had been actively ensuring compliance with the permit. The Board also found that the Delegate has demonstrated that he has the ability to enforce the terms of the permit, and is actively doing so.

In conclusion, the Board confirmed the permit, subject to the Board's directions to the Delegate to amend or add requirements to the permit. The appeals were 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

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

Wildlife Act

Parties negotiate a consent order to resolve an appeal over a fishing licence suspension

2014-WIL-029(a) David Ward v. Deputy Director, Fish, Wildlife and Habitat Management

Decision Date: January 22, 2015

Panel: Alan Andison

David Ward appealed the decision of the Deputy Director (the "Deputy Director"), Fish, Wildlife and Habitat Management, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), to suspend Mr. Ward's angling licence privileges for two years.

From 2006 to 2012, Mr. Ward received five violation tickets and one warning for angling in contravention of regulations under the *Wildlife Act*. Two of the tickets and the warning were issued in 2012, after he had served a one-year suspension of his angling privileges in 2010. The two tickets issued in 2012 were for using prohibited fishing gear, and failing to record a Chinook salmon caught in non-tidal waters. The warning was also for using prohibited fishing gear.

The Deputy Director concluded that Mr. Ward had been given sufficient penalties for the offences which occurred before 2010, but the tickets and previous suspension were insufficient to deter Mr. Ward from re-offending, and therefore, a further suspension should be imposed. Based on the circumstances, the Deputy Director decided that the offences which occurred after 2010 warranted a further two-year suspension under section 24 of the *Wildlife Act*.

Mr. Ward appealed the Deputy Director's decision to the Board, on the basis that the penalty was too harsh in the circumstances. He submitted that the offences since 2010 did not warrant a suspension. He also submitted that he had promptly paid the fines associated with the tickets, he took responsibility for his actions, and that fishing is very important to him.

Before the appeal was heard by the Board, the parties negotiated an agreement to settle the appeal. With the parties consent, the Board ordered that the two-year suspension of Mr. Ward's angling privileges be reduced to a 17-month suspension.

Accordingly, the appeal was allowed, in part.

Guide outfitter's quota for bull moose confirmed on appeal

2013-WIL-033(a) Neil T. Findlay v. Deputy Regional Manager (British Columbia Wildlife Federation, Participant)

Decision Date: April 24, 2014

Panel: Alan Andison

Neil T. Findlay appealed a decision of the Deputy Regional Manager (the "Regional Manager"), Recreational, Fisheries and Wildlife Program, with respect to the quota and allocation of bull moose issued with his 2013/2014 guiding licence. Mr. Findlay is a guide outfitter in the Thompson/Okanagan Region of BC. He guides non-resident hunters who pay to take part in a hunt for a particular species of wildlife. Mr. Findlay's annual guide outfitter licence is issued

with one-year quotas and five-year allocations, which specify the maximum number of animals of a specific wildlife species that Mr. Findlay's clients may kill within his guiding territory during the specified time period. The Regional Manager issued Mr. Findlay's guide outfitter licence for the 2013/2014 season with a total quota of eight bull moose, and a total five-year allocation for 2012 to 2016 of 16 bull moose.

Mr. Findlay appealed the decision on the grounds that the Regional Manager failed to follow and apply the Ministry's harvest allocation policies and procedures to correctly determine his quotas and allocations. In particular, Mr. Findlay submitted that the Regional Manager erred by calculating the quota and allocation on a guide territory level, rather than on a regional level. Further, Mr. Findlay submitted that the Regional Manager's decision would cause significant financial and economic hardship to his guide outfitting business, contrary to the Ministry's Commercial Hunting Interests policy. Mr. Findlay requested that the Board increase his quota and allocation of bull moose. Alternatively, he requested that the matter be sent back to the Regional Manager with directions to properly apply the Ministry's policies and procedures, and to increase his quotas and allocations accordingly.

The Board found that the appeal gave rise to two primary issues. The first issue was whether the Mr. Findlay's annual quota and five-year allocation should be determined on a "guide territory level" or a "regional level". The second issue was whether the Regional Manager calculated Mr. Findlay's five-year allocation and quota in accordance with the Ministry's policies and procedures.

In respect of the first issue, the Board found that the Ministry's policies and procedures indicate that quotas and five-year allocations should be determined on a guide territory level. In respect of the second issue, the Board found that the Regional Manager calculated Mr. Findlay's quota and five-year allocation in accordance with Ministry policies and procedures, and that the quota and five-year allocation should not be changed. Concerning the economic impact of the Regional Manager's decision, the Board found that recent changes in Ministry hunting policies and procedures did affect the guide outfitting industry, but such policy decisions are not made by the Regional Manager nor can they be "fixed" or "corrected" by the Regional Manager. The Board found that the Commercial Hunting Interests policy focuses on the larger policy goals of the Ministry. The Board noted that the Regional Manager considered certain measures that are available to mitigate economic hardship, and he provided reasons why these measures did not apply in Mr. Findlay's case. The Board could find no clear error in the Regional Manager's calculations, or any improper consideration by the Regional Manager, that would warrant changing Mr. Findlay's quotas or five-year allocations. The Board noted that its role in not to change Ministry policies and procedures, upon which the Regional Manager's decision was based.

Accordingly, the appeal was dismissed.

Permit for Bighorn Sheep horns denied due to price at auction

2014-WIL-001(a) Frederick Vandenberghe v. Regional Manager

Decision Date: September 22, 2014

Panel: Ken Long

Frederick Vandenberghe appealed a decision of the Regional Manager denying Mr. Vandenberghe a permit to acquire ownership of the horns of a dead Rocky Mountain Bighorn Sheep for personal use. Mr. Vandenberghe found the horns on private land, and was advised by the landowner that he could keep them. Mr. Vandenberghe then submitted a request to the Regional Manager for a permit to possess the horns.

The Regional Manager denied Mr. Vandenberghe's request on the basis that the value of the horns was approximately $664.50, and section 6(1)(d) of the *Permit Regulation* forbids the Regional Manager from issuing a possession permit for an item with a value greater than $200 when the item is to be used for personal purposes. The Regional Manager based his value determination on the average price received for Bighorn Sheep horns in government auctions from 2007 to 2010, and his finding that the horns were in "good condition".

Mr. Vandenberghe appealed on the grounds that the Regional Manager's value determination was too high. Mr. Vandenberghe submitted that the horns were in "very rough condition", and he questioned how the Regional Manager could obtain an "average value" of the horns from auction data when there had not been a wildlife auction in over three years. Mr. Vandenberghe asked the Board to reverse the Regional Manager's decision.

The Regional Manager opposed the appeal, and maintained that the value of the horns was "significantly higher" than the $200 threshold in the *Permit Regulation*. The Regional Manager submitted that, despite some damage and imperfections, the horns were in "average or above-average condition". Further, the Regional Manager submitted that the auction values from 2007 to 2010 were still relevant and likely conservative. In support of this proposition, the Regional Manager provided evidence that there is a continued high interest and demand for Bighorn Sheep hunts, as indicated by the continued high numbers of resident hunter days associated with Bighorn Sheep hunting in the region.

The Board expressed concern that section 6(2) of the *Permit Regulation* may require the Regional Manager to rely on increasingly outdated auction data in making a valuation determination, given that government auctions of wildlife parts ceased in 2012. Accordingly, the Board reiterated the recommendation it made in two previous decisions, which called for the government to consider amending section 6(2) of the *Permit Regulation* if the government no longer intends to conduct wildlife auctions. However, the Board found that the Regional Manager's value determination was reasonable in the circumstances. The Board found that the Regional Manager would be aware of hunter demand in the Kootenay region, and thus accepted the Regional Manager's evidence that Bighorn Sheep are still popular in the Kootenay region. The Board also found that, based on photographs, the horns were in average or above average condition. The Board found that it would be reasonable to conclude that Bighorn Sheep horns have held their auction value in the region, and that it is more probable than not that their value would exceed $200. The Board confirmed the Regional Manager's decision, and dismissed the appeal.

Disabled hunter seeks to expand his motor vehicle exemption permit

2014-WIL-025(a) Robert P. Thompson v. Regional Manager (British Columbia Wildlife Federation, Participant)

Decision Date: October 31, 2014

Panel: Alan Andison

This appeal was filed by Robert P. Thompson, a disabled hunter, who had applied for an exemption permit so that he could use a motor vehicle to access certain areas for hunting that were otherwise closed to motorized vehicles under the *Motor Vehicle Prohibition Regulation* (the "*Regulation*"). Specifically, Mr. Thompson applied to access seven hunting areas which were closed to motor vehicles, including an area referred to as Warspite Creek drainage.

In August 2014, the Regional Manager issued a permit (the "Permit") that exempted Mr. Thompson from the *Regulation* for all of the

requested areas (meaning that he could hunt with the use of a motor vehicle in those areas) except for the Warspite Creek drainage. The Regional Manager advised that he did not grant the request in regard to Warspite Creek because the area is managed in a manner that limits motorized activity to reduce the risk of displacement and disturbances of wildlife, and reduce adverse impacts to habitat quality and effectiveness.

Mr. Thompson appealed the Regional Manager's decision, and asked the Board to order that Warspite Creek drainage be added to his list of exempted (i.e., permitted) roads. In his Notice of Appeal, Mr. Thompson asserted that the Warpite Creek area is not a delicate wildlife habitat, and that access to the area would improve his hunting opportunities because, as a disabled hunter, he can only hunt in limited areas. However, Mr. Thompson filed no submissions in support of his appeal.

The Regional Manager opposed the appeal, and provided full submissions on how Ministry policies and procedures were applied, and his approach to considering Mr. Thompson's application. Elements of this approach included his consideration that Warspite Creek is within a protected Access Management Area, recognition that the Ministry's efforts to control the spread of invasive plants could be compromised by vehicle traffic, and determination that Mr. Thompson had been reasonably accommodated because the Permit granted him access to six of the seven requested areas.

The Board noted that, in an appeal, the appellant has the ultimate burden of proving his or her case on a balance of probabilities. Mr. Thompson did not meet the burden of proof. While Mr. Thompson opined that the Warspite Creek area was not "a delicate habitat for wildlife", the Board noted that the area is a designated Access Management Area, and is designated under the *Regulation* as closed to motor vehicles year round, except for certain roads. Further, the Board found that there was no evidence that the Regional Manager's concern about the potential spread of invasive species seeds from vehicles travelling in this area was unfounded.

In summary, the Board found that the Regional Manager exercised his discretion in a manner that accommodated Mr. Thompson, while not creating the potential for environmental damage. The Board found that the Regional Manager considered the appropriate factors, and his decision should be confirmed. Accordingly, the appeal was dismissed.

Permit to shoot problem geese near helipad denied

2014-WIL-024(a) Dr. Ian Mackenzie v. Regional Manager

Decision Date: January 12, 2015

Panel: Linda Michaluk

Dr. Ian Mackenzie appealed a decision issued by the Regional Manager denying his application to renew a permit to discharge a firearm or bow in a no shooting zone. Previously, Dr. Mackenzie held a permit to shoot Canada geese in the vicinity of the helipad at the Port Alice Health Centre. The geese, which are attracted to the grass surrounding the helipad, can be a safety hazard for helicopters. To control the geese, a wildlife management plan was created which includes habitat modification as well as chasing, scaring, and selectively killing the geese. The helipad is within 30 metres of residences, and therefore, is in a no shooting area under section 4 and schedule 3 of the *Closed Areas Regulation*. In denying the permit, the Regional Manager cited safety concerns due to the helipad's proximity to homes.

Dr. Mackenzie appealed the Regional Managers' decision to the Board. In his appeal, he proposed that the permit exclude the use of a shotgun, and be limited to the use of a bow. He submitted that limiting the permit to bow hunting would address the

safety concerns of Port Alice residents, while allowing shooting under the wildlife management plan to proceed.

The Board found that public safety was a legitimate concern given the helipad's proximity to homes, and that shooting the geese, either by shotgun or bow, is not required to maximize safety for helicopters. Information provided by Transport Canada and helicopter pilots indicated that geese will clear the helipad if helicopters approach slowly and hover over the helipad until the geese move. In addition, there was evidence that habitat modification may provide a long-term solution by making the area less attractive to geese, and that the Village of Port Alice was willing to provide gravel for the area free of charge. Further, the evidence was that Dr. Mackenzie did not possess, and was unlikely to be able to obtain, a municipal permit to discharge a firearm or bow in the vicinity of the helipad. In these circumstances, the Board concluded that issuing a permit would be contrary to the proper management of wildlife resources, and therefore, inconsistent with section 5(1)(b) of the *Permit Regulation*.

Accordingly, the appeal was dismissed.

Board issues directions on the process for allocating angling quotas

2014-WIL-021(a) Dustin Kovacvich v. Regional Manager (Keith Douglas, Third Party)

Decision Date: January 26, 2015

Panel: Greg Tucker

Dustin Kovacvich appealed a decision of the Regional Manager to cancel a process where three angling guides submitted bids on a quota of 42 guided angler days on the Zymoetz River upstream of Limonite Creek ("Zymoetz I") for the 2014/2015 season. Mr. Kovacvich, Keith Douglas, and Stan Doll each submitted bids for the 42 guided angler days. This bidding process arose from an earlier decision from the Board, in which the Board directed the Regional Manager to 're-do' the previous bidding process.

The Zymoetz I is a classified water under the *Angling and Scientific Collection Regulation*, B.C. Reg. 125/90 (the "*Regulation*"). Schedule A of the *Regulation* limits the number of guides permitted, and the number of guided angler days available, on classified waters during a specified period. Historically, Mr. Kovacvich, Mr. Douglas, and Mr. Doll operated on the Zymoetz I.

The previous appeals arose from the following events. In 2012, Schedule A of the *Regulation* was amended, resulting in 42 additional guided angler days being available on the Zymoetz I. To allocate the 42 additional days, the Regional Manager requested that existing guides on the Zymoetz I submit bids in the form of sealed tenders and written proposals pursuant to section 11(1.2)(c) of the *Regulation*. After reviewing the bids, the Regional Manager awarded the entire 42 days to Mr. Douglas for a 20-year period. Mr. Kovacvich and Mr. Doll appealed the Regional Manager's decision to award each of them zero guided angler days.

On April 17, 2013, the Board issued a decision directing the Regional Manager to 're-do' the allocation process for the 42 additional days, and request new sealed tenders and written proposals from the three guides (Decision Nos. 2012-WIL-021(b) and 2012-WIL-022(b)). In December 2013, pursuant to the Board's directions, the Regional Manager sent application packages to the guides, and requested that they submit sealed tenders and written proposals for the 42 days. The terms of the application package included requirements to either confirm that they had prepared their respective bids independently, or had entered into communications or arrangements with another bidder regarding the call for bids.

In January 2014, the guides submitted tenders and proposals, and each guide indicated that they had prepared their bids independently. However, Mr. Douglas expressed concern about the fairness of the process, given that his 2012 winning bid had been inadvertently disclosed during the previous appeal hearing. He also advised the Regional Manager that, before the tenders and proposals were submitted, Mr. Doll had contacted him with a proposal that the guides cooperate by bidding on an equal share of the 42 days (i.e., 14 days per guide). Mr. Douglas considered the proposal to be inappropriate communication that may be contrary to the independent bid requirement in the application package.

In May 2014, the Regional Manager advised the guides that he had decided to cancel the allocation process, based on his concerns that the process had been unfair and there were issues related to inappropriate contact among the guides during the process.

Mr. Kovacvich appealed the Regional Manager's decision. He argued that there was no inappropriate contact among the guides during the process, and that the Regional Manager should have dealt with concerns about the disclosure of Mr. Douglas' 2012 pricing information before initiating the process. He requested that the Board allocate the 42 days based on the tenders and proposals provided in January 2014, or divide the 42 days equally among the three guides and require the guides to pay the maximum pricing set out in an independent appraisal.

Mr. Douglas argued that the process was unfair for the reasons given by the Regional Manager, and because he had less time than the other guides to prepare his tender and proposal due to the Ministry sending his application package to the wrong address. He submitted that the Regional Manager's decision to cancel the process complied with the Board's previous direction to implement a fair allocation process. He also submitted that there was no mechanism to 'take away' the 42 days allocated to him in 2012, and he requested that his allocation of 42 days remain in force until a fair process is completed.

The Board found that, although there was no evidence of intentional misconduct, Mr. Doll's communication with Mr. Douglas, suggesting that the guides cooperate in preparing their tenders and proposals, was contrary to the independent bid determination provisions in the application package, and that Mr. Doll's tender and proposal was materially incorrect insofar as it stated that he had prepared his bid independently. For those reasons, the Board found that the Regional Manager would have been justified in rejecting Mr. Doll's tender and proposal. In addition, the Board found that the Regional Manager was justified in cancelling the allocation process altogether, given that the allocation process was only open to three bidders, and the allocation would last for 20 years. As a result, another allocation process would have to be initiated. Although those findings concluded the appeal, the Board provided guidance for a future allocation process.

For those reasons, the Board confirmed the Regional Manager's decision to cancel the allocation process. The Board noted that a new allocation process would be necessary and must comply with the directions issued in the Board's 2013 decision on the previous appeals. Accordingly, the appeal was dismissed.

Costs Decisions

Environmental Management Act

The Board has the power to 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.

Costs awarded due to unreasonable and abusive conduct during an appeal of a contaminated site remediation order

2010-EMA-005(c) and 2010-EMA-006(c) Seaspan ULC (formerly Seaspan International Ltd.) v. Director, *Environmental Management Act* (Attorney General of British Columbia, Participant; Vancouver Fraser Port Authority, Fibreco Export Inc. and 602534 BC Ltd., Domtar Inc., Third Parties)

Decision Date: September 15, 2014

Panel: Robert Wickett, Cindy Derkaz, Blair Lockhart

The Vancouver Fraser Port Authority (the "Port"), Fibreco Export Inc. and 602534 BC Ltd. (collectively "Fibreco"), and the Director, *Environmental Management Act* (the "Director"), each applied to the Board for an order for costs against the Appellant, Seaspan ULC ("Seaspan"). The costs applications relate to Seaspan's appeals of two decisions issued by the Director in relation to a contaminated site.

One of Seaspan's appeals concerned a remediation order (the "Order") that identified Seaspan and Domtar Inc. as "responsible persons" under the *Act*, with respect to five contaminated parcels of land (the "Site"). The parcels of land are located on or near the Burrard Inlet. Seaspan appealed the Order on multiple grounds, which Seaspna changed and modified over the course of the appeal process. One of those grounds alleged that Seaspan was not a "responsible person" with respect to some or all of the parcels. In support of this position, Seaspan relied on an expert report at the hearing on the merits of the appeals. When Seaspan's expert was cross-examined, the expert made concessions, admitted errors, and changed his evidence, such that his report was shown to be fatally flawed. After the second day of the appeal hearing, Seaspan elected not to re-examine its expert, and largely abandoned its appeals.

Following the abandonment of the appeals, the Port, Fibreco, and the Director (collectively, the "Applicants") applied to the Board for an order of costs against Seaspan. The Applicants sought costs on the grounds that the Seaspan's appeals were manifestly deficient and without merit. They asserted that the meritless appeals, combined with the issues arising from the evidence of Seaspan's expert, warranted an order of costs under section 95(2)(a) of the *Environmental Management Act*.

The Board first considered the applicable principles for an award of costs under section 95(2)(a) of the *Environmental Management Act*. The Board found that its power to award costs is discretionary, and depends on the particular facts of the case. The Board also reviewed its policy on costs, and concluded that an order for costs in Board proceedings is punitive in nature, not compensatory. The objectives of the Board's policy are to "encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct". Costs act as a disincentive to those who may bring meritless appeals or recklessly pursue appeals which turn out to have little prospect of success. When assessing whether or not to award costs, the Board will weigh the importance of ordering costs in the circumstances against the likelihood that such an award will have the unwanted "chilling effect" of deterring individuals with legitimate concerns from using the Board's process. The Board also considered the applicability of the law on special costs. Although the Board found that it does not have the jurisdiction to award special costs, it concluded that special costs principles may be relevant.

The Board then considered whether the facts in this case warranted an order of costs against Seaspan. It concluded that a costs order was justified in the circumstances. The Board found that, during the appeal process, Seaspan had either advanced a theory that it knew lacked merit or, at least, had not undertaken a careful assessment of the strength of its case. The Board based this finding on Seaspan's reluctance to clearly identify its position from the outset of the appeal process, its change of position over the years, and the flaws in its expert's report. The Board also found that the flaws in Seaspan's expert evidence reflected more than a mere error or "a bad day" on the witness stand. The expert report was found to be deceptive and fundamentally and irredeemably flawed such that the theory put forth by Seaspan crumbled almost immediately under cross-examination. The Board concluded that Seaspan's case was more than doubtful – it was hopeless, and the theory advanced by Seaspan at the hearing should never have been pursued. In addition, the Board found that concerns of the costs order giving rise to an unwanted "chilling effect" were not engaged because the parties to the appeal were sophisticated, and were represented by experienced and knowledgeable counsel.

Concerning the quantum of costs awarded to the Applicants, the Board applied the costs scale set out in the BC Supreme Court Civil Rules. The Board found that the matters involved in Seaspan's appeals were of more than ordinary difficulty, and therefore, costs were awarded at Scale C. Accordingly, the applications for costs were granted.

Summaries of Court Decisions Related to the Board

During this reporting period, the BC Supreme Court issued two decisions on judicial reviews of Board decisions.

Court dismisses Petitioners' application for costs in judicial review of Board decision

Lynda Gagne, Charles Claus, Skeena Wild Conservation Trust and Lakelse Watershed Stewards Society v. Ian Sharpe in his capacity as Delegate of the Director, *Environmental Management Act*, Environmental Appeal Board, and Rio Tinto Alcan Inc.

Decision Date: February 5, 2015

Court: B.C.S.C., MacKenzie J.

Citation: 2015 BCSC 154

Lynda Gagne, Charles Claus, Skeena Wild Conservation Trust, and Lakelse Watershed Stewards Society (collectively, the "Petitioners") applied to the BC Supreme Court for an order awarding them costs in a judicial review of a decision of the Board. They sought an order requiring Rio Tinto Alcan Inc. ("Rio Tinto") to pay their costs associated with the judicial review.

In April 2013, the Petitioners were among a group of eight appellants who filed appeals with the Board against a decision issued by the Director, *Environmental Management Act* (the "Director". The Director's decision amended a permit held by Rio Tinto. The permit authorizes Rio Tinto to discharge effluent, emissions, and waste from a smelter located in Kitimat, BC. Among other things, the amendment allowed an increase in the smelter's maximum daily emissions of SO2 (sulphur dioxide). After the appeals were filed, Rio Tinto challenged the appellants' standing to appeal the permit amendment. Rio Tinto submitted that the appellants were not "persons aggrieved" by the amendment within the meaning of section 100(1) of the *Environmental Management Act* (the "*Act*"). The Board requested written submissions from all parties on the preliminary issue of standing.

In a decision issued in October 2013 (*Lynda Gagne et al v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-005(a) and 007(a) through 012(a)), the Board found that two of the eight appellants had standing to appeal as "persons aggrieved" by the permit amendment. The Board held that the other six appellants, including the Petitioners, had not established that they were "persons aggrieved" by the amendment, and therefore, they had no standing to appeal.

The Petitioners sought a judicial review of the Board's decision by the BC Supreme Court. The Petitioners argued that the Board had acted in a procedurally unfair manner when it requested that Rio Tinto provide copies of certain documents that both Rio Tinto and the appellants had cited and partially quoted in their submissions. The Petitioners argued

that this was unfair because the deadline for written submissions had closed, and the Petitioners were not given an opportunity to make further submissions regarding the documents, contrary to the Board's Procedure Manual.

In March 2014, the Court issued its decision in *Gagne v. Sharp*, 2014 BCSC 2077 [*Gagne #1*]. The Court first considered the degree of procedural fairness owed by the Board under the rules of natural justice. The Court concluded that the key question was whether the Board complied with its own Procedure Manual, and not whether the petitioners had suffered any prejudice. The Court held that the Board was required to rigorously comply with its Procedure Manual. The Procedure Manual provided that, in deciding appeals, the Board would not request further information from a party without providing the other parties with notice and an opportunity to make submissions regarding that information. The Court found that, although there was no intentional misconduct by any party, the Board's request for documents from Rio Tinto was a breach of its Procedure Manual, and this breached the Petitioners' right to procedural fairness. The Court also held that the Board had applied the "balance of probabilities" standard of proof to the question of standing, and this standard was too rigorous. The Court held that appellants should only have to demonstrate on a *prima facie* basis that they are "persons aggrieved" when their standing is being decided as a preliminary matter. Finally, the Court concluded that any determination the Board makes regarding standing is entitled to deference from the courts, and a standard of "reasonableness" should be applied by the courts. Accordingly, the Court directed the Board to reconsider whether the petitioners had established, on a *prima facie* basis, that they are "persons aggrieved," based on the submissions and information before the Board when the preliminary hearing on standing had concluded.

In late 2014, the Court received written submissions from the Petitioners and Rio Tinto on the issue of awarding costs associated with the court proceedings. The Petitioners sought special costs against Rio Tinto on the basis that *Gagne* #1 was an exceptional public interest case. Alternatively, they sought ordinary costs against Rio Tinto on that basis that they were the successful party in *Gagne #1*.

In February 2015, the Court dismissed the Petitioners' application for costs. First, the Court considered whether the Petitioners were entitled to ordinary costs. The Court noted that the BC Supreme Court Rules provide that costs must be awarded to the successful party unless the Court orders otherwise, and "success" in this context has been defined as substantial success. The Court found that the notion of substantial success is useful in cases where a party raises multiple issues and seeks multiple remedies, but is only partially successful. Turning to the circumstances in *Gagne #1*, the Court noted that the Petitioners had asked the Court to apply a different test for standing than the Board had applied, and they had requested an order directing the Board to grant them standing. The Petitioners had also argued that the Board's decisions with respect to standing are not entitled to deference from the courts. However, the Court had rejected those submissions, and the Petitioners were only successful on relatively straightforward issues which led to the Court granting the alternate remedy they sought. Overall, the Petitioners were unsuccessful on a number of significant issues, and they did not get the primary remedy they sought. Consequently, the Court held that the Petitioners were not substantially successful, as at best, they had mixed success. As such, they were not entitled to ordinary costs.

In addition, the Court found that even if it had concluded that the Petitioners were successful, the circumstances in *Gagne #1* did not warrant an

exceptional order of special costs. In particular, the Court held that, although the Petitioners could be described as public interest litigants, the emission of sulphur dioxide is a concern for all members of the public, two appellants had standing to appeal the permit amendment regardless of the outcome of the judicial review, and the issues on which the Petitioners were successful were not sufficiently novel or of broad importance that an order for special costs would be appropriate.

In conclusion, the Court ordered that the parties should bear their own costs.

Court dismisses Petitioners' judicial review of Board's second decision denying their standing to appeal

Lynda Gagne and Charles Claus v. Environmental Appeal Board, Attorney General of British Columbia, and Rio Tinto Alcan Inc.

Decision Date: October 31, 2014

Court: B.C.S.C., MacKenzie J.

Citation: Victoria Registry No. 14-3037

Lynda Gagne and Charles Claus applied to the BC Supreme Court for a judicial review of the Board's reconsideration of their standing to appeal a permit amendment issued under the *Environmental Management Act* (the "*Act*").

In April 2013, Ms. Gagne and Mr. Claus were among a group of eight appellants who appealed to the Board against a decision issued by the Director, *Environmental Management Act* (the "Director"). The Director's decision amended a permit held by Rio Tinto Alcan Inc. ("Rio Tinto"). The permit authorizes Rio Tinto to discharge effluent, emissions, and waste from a smelter located in Kitimat, BC. Among other things, the amendment allowed an increase in the smelter's maximum daily emissions of SO_2 (sulphur dioxide). After the appeals were filed, Rio Tinto challenged the appellants' standing to appeal the permit amendment. Rio Tinto submitted that the appellants were not "persons aggrieved" by the permit amendment within the meaning of section 100(1) of the *Act*. The Board considered the issue as a preliminary matter conducted by way of written submissions.

In a decision issued in October 2013 (*Lynda Gagne et al v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-005(a) and 007(a) through 012(a)), the Board found that two of the eight appellants had standing to appeal as "persons aggrieved" by the permit amendment. The Board held that the other six appellants, including Ms. Gagne and Mr. Claus, had not established that they were "persons aggrieved" by the permit amendment, and therefore, they had no standing to appeal.

Four of the unsuccessful appellants, including Ms. Gagne and Mr. Claus, sought a judicial review of the Board's decision by the BC Supreme Court. The Court directed the Board to reconsider whether the petitioners had established, on a *prima facie* basis, that they are "persons aggrieved," based on the submissions and information before the Board when the preliminary hearing on standing had concluded.

In a decision issued in April 2014 (*Lynda Gagne et al. v. Director of the Environmental Management Act*, Decision No. 2013-EMA-005(b), 008(b), 011(b), and 012(b)), the Board reconsidered the four petitioners' standing to appeal the permit amendment, in accordance with the Court's directions in *Gagne #1*. Based on the evidence, the Board found that they had failed to establish, on a *prima facie* basis, that they were "persons aggrieved" by the permit amendment, within the meaning of section 100(1) of the *Act*.

Ms. Gagne and Mr. Claus filed a petition with the BC Supreme Court for a judicial review of the Board's reconsideration decision.

On October 31, 2014, the Court issued oral reasons for judgment. The Court held that the Board had properly considered and implemented the reasons and directions of the Court in *Gagne #1*. In addition, the Court confirmed that the Board's interpretation and application of section 100(1) of the *Act* falls within the Board's particular expertise, and is entitled to deference from the courts. The Court found that the Board had clearly considered all of the submissions and evidence before it, and had provided detailed reasons as to why, on reconsideration, the petitioners failed to establish on a *prima facie* basis that they are "persons aggrieved." The Court concluded that the Board's reconsideration decision was reasonable. The Court dismissed the petition, and ordered that each party would bear their own costs.

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

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

Quorum

5 (1) Where the members of the board sit as a board, 3 members, one of whom must be the chairman or vice chairman, constitute a quorum.

(2) Where members of the board sit as a panel of one, 3 or 5 members, then the panel chairman constitutes a quorum for the panel of one, the panel chairman plus one other member constitutes the quorum for a panel of 3 and the panel chairman plus 2 other members constitutes the quorum for a panel of 5.

Order or decision of the board or a panel

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

Written briefs

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

Public hearings

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

Recording the proceedings

9 (1) Where a full hearing is held, the proceedings before the board or a panel of the board shall be taken using shorthand or a recorder, by a stenographer appointed by the chairman, for a hearing before the board, or by the panel chairman, for a hearing before the panel.

(2) Before acting, a stenographer who takes the proceedings before the board or a panel shall make oath that he shall truly and faithfully report the evidence.

(3) Where proceedings are taken as provided in this section by a stenographer so sworn, then it is not necessary that the evidence be read over to, or be signed by, the witness, but it is sufficient that the transcript of the proceedings be

(a) signed by the chairman or a member of the board, in the case of a hearing before the board, or by the panel chairman or a member of the panel, in the case of a hearing before the panel, and

(b) be accompanied by an affidavit of the stenographer that the transcript is a true report of the evidence.

Transcripts

10 On application to the chairman or panel chairman, as the case may be, a transcript of the proceedings, if any, before the board or the panel of the board shall be prepared at the cost of the person requesting it or, where there is more than one applicant for the transcript, by all of the applicants on a pro rata basis.

Representation before the board

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

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

Part 7 – Appeals to Environmental Appeal Board

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

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

(a) the determination of non-compliance under section 18 [*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*, B.C. Reg. 1/82, is adopted in relation to appeals under the Act.

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

Part 5 – Appeals to Environmental Appeal Board

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

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

(a) the determination of non-compliance under section 11 [*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(5) (d) (ii) (B) [*low carbon fuel requirement*];

(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,
(B.C. 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,

which ever 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.

BRITISH COLUMBIA