Annual Report 1999/00

The Honourable Joan Sawicki
Minister of Environment, Lands and Parks
Parliament Buildings
Victoria, British Columbia
V8V 1X4

The Honourable Michael Farnworth
Minister of Health and Minister Responsible for Seniors
Parliament Buildings
Victoria, British Columbia
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Dear Ministers:

I respectfully submit herewith the annual report of the Environmental Appeal Board for the period April 1, 1999 through March 31, 2000.

Yours truly,

Toby Vigod

Chair

Environmental Appeal Board

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Message from the Chair

Toby Vigod

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

During the period of time that I have been Chair, the Board has been faced with many challenges. For instance, the number of appeals filed with the Board has grown significantly. In the 1996/97 reporting period, there were 120 appeals filed with the Board. This increased to a high of 200 in 1998/99, and has decreased slightly to 170 appeals this reporting year. The increase in appeals has been spread across the *Pesticide Control Act, Waste Management Act, Water Act* and *Wildlife Act*. Appeals under the *Health Act* constitute the one exception, with appeals declining from a high of 82 in the 1996/97 report period, to a low of 25 appeals filed in this report period.

In addition to the general increase in the number of appeals filed with the Board, there has also been an increase in the complexity of the issues raised in the appeals. This trend is most apparent in relation to appeals under the *Waste Management Act*, particularly those appeals involving contaminated sites. The new provisions addressing contaminated sites came into force in 1997, and the Board has been required to interpret many of the substantive provisions of the legislation for the first time during this report period. The Board has been assisted in this exercise by the continued appointment of members with specialized skills relevant to the issues before the Board.

Pesticide appeals have also presented many challenges for the Board this reporting period. There has been a challenge to the Board's jurisdiction to decide aboriginal rights and title questions in one appeal, and there have been a number of complicated stay applications to decide.

A number of Board members have departed during this reporting period, including the former Vice Chair, Judith Lee, who had been on the Board since 1992. On behalf of the entire Board, I wish to thank Judith Lee, Harry Higgins, Elizabeth Keay, William MacFarlane and Gary Robinson for their hard work and contributions to the Board. With their departure, the Board has gained a number of new members. I wish to welcome Tracey Cook, Fred Henton, Barbara Thomson and Philip Wong to the Board and look forward to working with them in the coming year.

Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period of time between April 1, 1999 and March 31, 2000.

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

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

- Legislative Library
- Ministry of Environment, Lands and Parks Library
- University of British Columbia Law Library
- University of Victoria Law Library
- British Columbia Court House Library Society
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Data Base.

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

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Telephone: (250) 387-3464
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The Board

The Environmental Appeal Board is an independent agency that hears appeals from administrative decisions made under six statutes (the "Statutes"). Five of the Statutes are administered by the Ministry of Environment, Lands and Parks. They are the *Pesticide Control Act*, the *Waste Management Act*, the *Water Act*, the *Wildlife Act* and the *Commercial River Rafting Safety Act*. The sixth statute, the *Health Act*, is administered by the Ministry of Health.

Board Membership

The Board members are appointed by the Lieutenant Governor in Council (Cabinet). The members are drawn from across the Province, representing diverse business and technical experience, and have a wide variety of perspectives. Board membership consists of a full-time chair, a part-time vice-chair and, a number of part-time members.

The Board	From
Chair	
Toby Vigod	Victoria
Vice- Chair	

Judith Lee (to March 31, 2000)	Vancouver
Members	
Sheila Bull	Salt Spring Island
Robert Cameron	North Vancouver
Richard Cannings	Naramata
Tracey Cook (from November 12, 1999)	Victoria
Don Cummings	Richmond
Cindy Derkaz	Salmon Arm
Jackie Hamilton	Victoria
Fred Henton (from November 12, 1999)	Nanoose Bay
Harry Higgins (to October 29, 1999)	Salmon Arm
Katherine Hough	Nelson
Marilyn Kansky	Richmond
Elizabeth Keay (to October 29, 1999)	Victoria
Helmut Klughammer	Nakusp
Jane Luke	Vancouver
William MacFarlane (to October 29, 1999)	Revelstoke
Ken Maddox	Prince George
Christie Mayall	Williams Lake
Carol Quin	Hornby Island
Bob Radloff	Prince George
Gary Robinson (to October 29, 1999)	Surrey
Barbara Thomson (from November 12, 1999)	Victoria
Phillip Wong (from November 12, 1999)	Richmond

The Board Office

The Environmental Appeal Board office staffs nine full-time employees reporting to a General Counsel/Executive Director and the Chair. The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board.

The Environmental Appeal Board shares its staff and its office space with the Forest Appeals Commission and the Environmental Assessment Board.

The Forest Appeals Commission, set up under the *Forest Practices Code of British Columbia Act*, hears appeals from forestry-related administrative decisions made under that *Act*, in much the same way that the Board hears environmental appeals. As of April 1999, the Commission also hears appeals of administrative decisions made under the *Forest Act* and the *Range Act.* Prior to that time, the Forest Appeal Board heard appeals under those statutes, and was administered through the shared office.

The Environmental Assessment Board is established under the *Environmental Assessment Act*, which establishes a formal method for the review and assessment of environmental, economic, social, cultural,

heritage and health effects of major projects. The Environmental Assessment Board may be required to conduct a public hearing as part of this process.

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

Policy on Freedom of Information

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.

If information regarding an appeal is requested by a member of the public, that information may be disclosed. The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that *Act*.

Unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*, it will be disclosed.

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

Legislative Amendments Affecting the Board

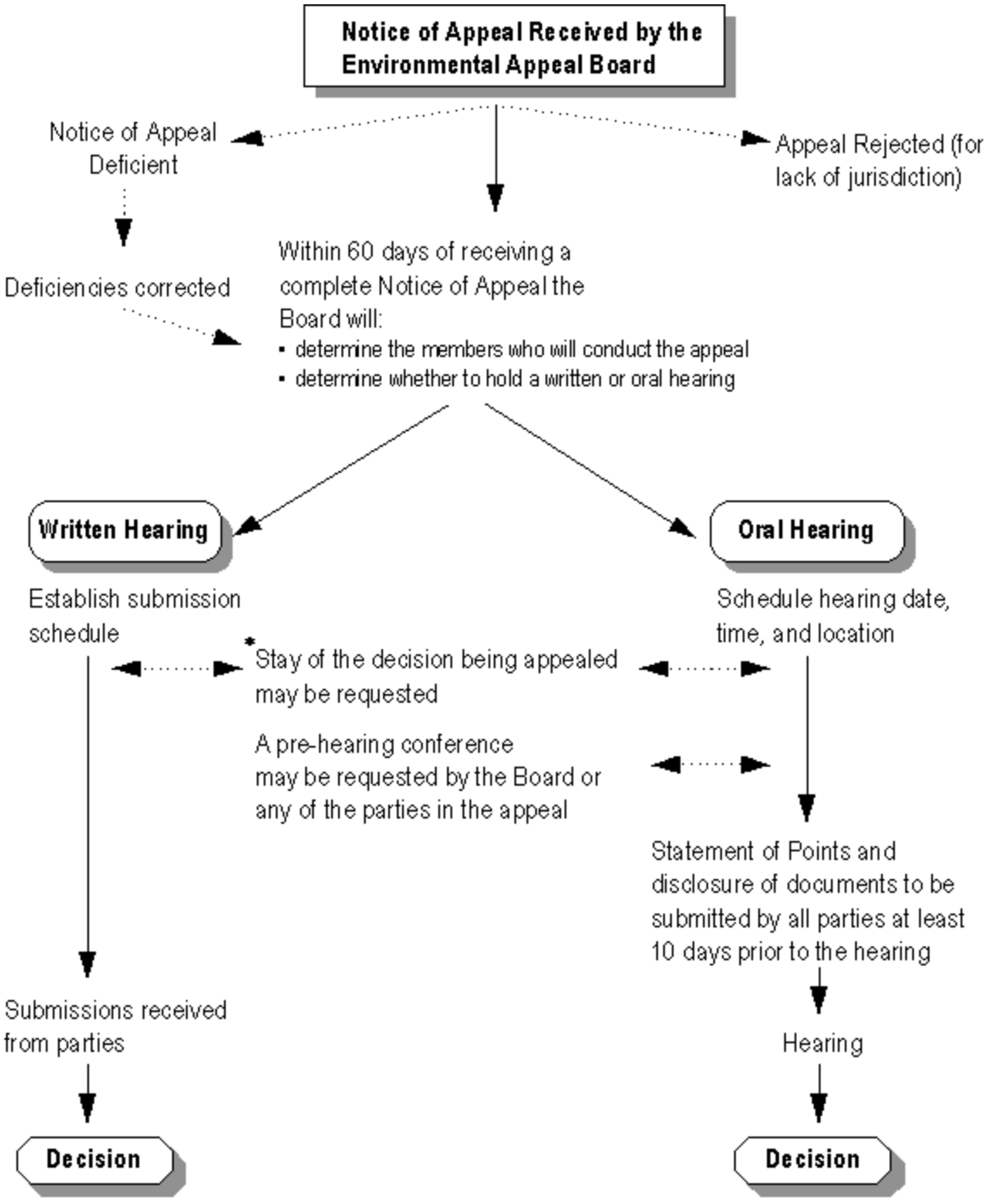
In this report period, there were no significant amendments to the statutes and regulations under which the Board has jurisdiction to hear appeals.

The Appeal Process

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

In order to ensure that the appeal process is open and understandable to the public, the Board has developed the Environmental Appeal Board Procedure Manual. The manual contains information about the Board itself, the legislated procedures that the Board is required to follow and the policies the Board has adopted to fill in the procedural gaps left by the legislation.

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



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

Recommendations

The Board is not required by legislation to make recommendations for amendments to the Statutes in its annual report. However, it is hoped that making recommendations will lead to changes that promote fairness, accessibility and efficiency. The following are recommendations from the Board:

1. *Health Act*

In the Board's 1998/99 annual report, it recommended that the *Health Act* and regulations be amended to provide a 30-clear-day appeal period from notification. Under sections 3.2 and 3.3 of the *Sewage Disposal Regulation*, a person who is issued a permit to construct, install, alter or repair a sewage disposal system must post a notice not more the 3 days from the date that the permit was issued. Section 3.4 of the *Regulation* provides that the notice must be published as soon as possible, but no more that 10 days after the permit is issued. When notification is received by way of posting or advertisement, the appeal period is reduced by up to 10 days.

The Board continues to be concerned that this results in confusion as to when the appeal period begins and ends. The Board is concerned that this may result in unfairness and uncertainty to appellants, property owners, and others affected by the appeal process. It receives a number of inquiries and complaints on this matter annually.

The *Health Act* provides for a 30-day appeal period for all persons affected by the issuance or refusal of a sewage disposal permit. To achieve this legislated objective, the Board reiterates its previous recommendation that the legislation be amended to ensure that all parties are given a full 30 days to appeal from the date of posting, publication, or receipt of the decision.

2. *Environment Management Act*

The Board continues to recommend that the *Environment Management Act* be amended to provide the Board with the power to order pre-hearing disclosure of documents. The Board has no authority to order pre-hearing exchange of documents except through the issuance of a summons under the *Inquiry Act*. A summons issued under the *Inquiry Act* requires witnesses to attend before the Board and bring certain documents with them. The Board finds that this is an inadequate and administratively onerous method of providing for pre-hearing documentation. An amendment to the *Environment Management Act* to give the Board the authority to order that parties exchange documentation in advance of a hearing without the need for a summons would serve to expedite proceedings before the Board.

3. *Wildlife Act*

The Board recommends that the *Angling and Scientific Collection Regulation* be amended to clarify a number of matters concerning the licencing of angling and angler guides. During this reporting period, the Board dealt with several appeals concerning this *Regulation* and the relevant provisions of the *Wildlife Act*, and found the legislation to be unclear in several ways. There is a need to clarify the provisions in the *Regulation* regarding unspecified tributaries and their designation as classified waters. There is also a need to clarify what information should be contained in the angling guide operating plans submitted annually by applicants for angler guide licences, as these plans form the terms and conditions of an angling guide licence. In addition, if the Ministry intends to continue to use angling use plans as a management tool, the *Wildlife Act* and the *Regulation* should be amended to clearly define what an angling use plan entails, the process involved in developing such a plan, the approval process and its relationship to the granting of licences and quotas.

Finally, the Board notes that there is a need to pass a regulation pursuant to section 53(g) of the *Wildlife Act*, as regional managers currently have no legal authority to dispose of unallocated angler days which have reverted to the Crown by way of issuing a licence under section 52(1).

Statistics

The following tables provide information on the appeals filed with the Board during the report period.

Between April 1, 1999 and March 31, 2000 a total of 170 appeals were filed with the Board against 140 administrative decisions.

April 1, 1999 - March 31, 2000

Total appeals filed	**170**
Number of administrative decisions appealed	**140**
Appeals abandoned, withdrawn, or rejected	**63**
Hearings held	
Oral hearings held	40
Written hearings held	34
Total hearings held	**74**
Total hearings issued	**154**
Final decisions	58
Appeals allowed	21
Appeals dismissed	33
Referred back to original decision-maker	3
Decisions on preliminary matters	83
Consent orders	10
Costs	
Costs awarded	0
Costs denied	3
Total decisions on request for costs	**3**
Security	
Security awarded	0
Security denied	1
Decisions on security for costs	**1**

This table provides an overview of the total appeals filed, hearings held, and 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 there has been a change to the method of numbering appeals and recording decisions in this report period. Whereas a group of appeals were previously given the same appeal number, the Board now numbers each appeal as it comes in the door, resulting in a more accurate reflection of the volume of appeals filed and decisions issued by the Board.

Appeal Statistics by Act

	Health Act	Pesticide Control Act	Waste Management Act	Water Act	Wildlife Act
Appeals filed during report period	25	39	34	39	33
Number of administrative decision appealed	23	23	27	34	33
Appeals abandoned, withdrawn or rejected	13	18	9	17	9
Hearings held					
Oral hearings	7	2	10	9	12
Written hearings	1	9	13	7	4
Total hearings held	8	11	23	16	16
Decisions issued					
Final decisions	7	6	16	11	18
Preliminary Applications	1	43*	32*	4	3
Application for Costs	1	0	1	1	0
Consent Orders	3	0	2	3	2
Total decisions issued	12	49	51	19	23

This table provides a summary of the appeals filed, hearings held and decisions issued by the Board during the report period, categorized according to the statute under which the appeal was brought. There were no appeals filed, heard or decisions issued under the *Commercial River Rafting and Safety Act* during the report period.

* There were a number of decisions on applications under these statutes which applied to groups of five or more appeals.

Decisions issued by the Board by Act

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

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

Health Act

Administrative Decision Appealed	Preliminary Matter	Appeal Allowed	Appeal Dismissed	Consent Order	Application for Costs
Refusal to issue a permit			3		

Issuance of a permit	1			4	3	1

Pesticide Control Act

Administrative Decision Appealed	Preliminary Matter	Appeal Allowed	Appealed Dismissed	Referred back to Original Decision - maker	**Consent Order**	**Application for Costs**
Refusal to issue a permit						
Issuance of a permit	43		6			
Licence suspension						

Waste Management Act

Administrative Decision Appealed	**Preliminary Matter**	**Appeal Allowed**	**Appealed Dismissed**	**Referred back to Original Decision - maker**	**Consent Order**	**Application for Costs**
Amendment of a permit	25	7	1		2	
Remediation Order	4		2			
Issuance/amendment of a pollution abatement order	1	2	2			1
Other	2		2			

Water Act

Administrative Decision Appealed	**Preliminary Matter**	**Appeal Allowed**	**Appealed Dismissed**	**Referred back to Original Decision - maker**	**Consent Order**	**Application for Costs**
Issuance of a licence	1				1	
Refusal to issue a licence			3			
Cancellation or Suspension of a licence		1	2		1	
Issuance of an Order	3	2	2		1	
Refusal to cancel a licence			1			1

Wildlife Act

Administrative Decision Appealed	Preliminary Matter	Appeal Allowed	Appealed Dismissed	Referred back to Original Decision - maker	Consent Order	Application for Costs
Refusal to issue a licence or permit	2	3	1	3		
Conditions on a licence		3	3			
Suspension or Cancellation of a licence or permit	1	3	2		2	

Summaries of Environmental Appeal Board Decisions

April 1, 1999 - March 31, 2000

The following are summaries of decisions issued by the Environmental Appeal Board between April 1, 1999 and March 31, 2000. They are organized according to the statute under which the Ministry official's decision was appealed.

Commercial River Rafting Safety Act

No appeals were heard under the *Commercial River Rafting Safety Act* during the report period.

Health Act

98-HEA-22 Al Raabe v. Environmental Health Officer

Decision Date: October 18, 1999

Panel: Carol Quin

Al Raabe appealed a decision of an Environmental Health Officer (EHO) refusing to issue a sewage disposal permit for a residential lot in Kelowna, British Columbia. The permit was refused because the lot was situated in an environmental control zone ("ECZ") and the proposed alternate sewage disposal system was not allowed in an ECZ under the *Sewage Disposal Regulation*. Mr. Raabe appealed on the grounds that the lot was exempt from the ECZ because it was created prior to 1992.

The Board found that subsection 7(3) of the *Regulation* specifically excluded the use of alternate methods of sewage disposal in ECZ's, even on lots created prior to 1992. The appeal was dismissed.

98-HEA-27 Gil Nicholls v. Environmental Health Officer (Sharron and Brian Miller, Permit Holders)

Decision Date: April 1, 1999

Panel: Toby Vigod, Dr. Robert Cameron, Carol Quin

Gil Nicholls appealed a decision of the EHO to issue a permit to the Appellant's neighbours, the Permit Holders, allowing them to construct a sewage disposal system on their property for a single family home. The Appellant alleged that the permit had been transferred, that there was insufficient distance between

the absorption field and the Permit Holders' well, that there was a need to pre-soak test holes prior to percolation testing and that the soil was not suitable for safe sewage disposal. He also submitted that the absorption field was improperly constructed and that there was a likelihood of effluent breakout. He sought an order that the permit be rescinded.

The Board found that the permit had not been transferred, and that the horizontal distance between the absorption field and the well casing on the property was greater than the required distance. The Board also found that the percolation test holes on the property did not require pre-soaking, as the soil did not contain considerable amounts of silt or clay. The Board concluded that the soils in the absorption field were properly tested and suitable for the proposed system. On the issue of effluent breakout, the Board found that the system would not create a threat to public health, and that the permit requirement to obtain authorization before back filling was a sufficient safeguard to ensure that the permit stipulations of shallow, flat and level trenches would be met. The Board also found that the design and large storage capacity of the system would ensure a high quality of effluent and that this would provide a further safeguard for public health. The appeal was dismissed.

99-HEA-04 Abdul M. Mousa v. Environmental Health Officer

Decision Date: October 14, 1999

Panel: Jane Luke, Sheila Bull, Don Cummings

Mr. Mousa appealed the EHO's decision to refuse a permit for the repair of Mr. Mousa's pre-1985 sewage disposal system. The permit was refused on the grounds that the existing wooden septic tank was substandard in size and design and that the water table at the site was less than four feet below the ground surface. At the outset of the appeal hearing, Mr. Mousa questioned whether the Board was biased against development projects.

The Board found that Mr. Mousa offered no specific evidence to suggest that there was a reasonable apprehension of bias on the part of any members of the Board, and rejected the allegation. On the merits of the case, the Board found that a dye test of the septic system had been conducted fairly by the EHO and the Board was satisfied that the proposed system would not protect the public health. Specifically, the Board found that the existing wooden septic tank did not meet present standards, was substandard in capacity and that the possibility of discharge of improperly treated effluent into surface waters in an urban centre was sufficient to warrant concern about a health hazard. The appeal was dismissed.

99-HEA-06; 99-HEA-09; 99-HEA-10 Virginia F. Walden et al. v. Environmental Health Officer (Eric McCook, Permit Holder; Ken Sargent, Participant)

Decision Date: May 28, 1999

Panel: Toby Vigod

Before the Board heard these appeals against Mr. McCook's permit, the parties entered into an agreement to resolve the issues raised in the appeals and sought the Board's approval of the agreement.

With the consent of the parties, the Board ordered that certain amendments be made to the sewage disposal permit.

99-HEA-11 S.L. Lott v. Environmental Health Officer (Frances Walker, Permit Holder)

Decision Date: July 30, 1999

Panel: Judith Lee, Rob Radloff, Carol Quin

This was an appeal against a decision of the EHO to issue a permit for a sewage disposal system on a property owned by Frances Walker, near Deep Cove in North Saanich, British Columbia. The Appellant resided down slope from the property at issue. One of the conditions of the permit was that a perforated drainage pipe along the south side of the municipal storm drain be capped. The Appellant claimed that the perforated pipe was placed by the District of North Saanich to control flooding on her property, that North Saanich was unwilling to seal it and that the conditions of the permit could not be met. The Appellant further claimed that the Board had already dealt with this matter in a previous decision, and asked the Board to rescind the EHO's decision to issue the permit and to award him costs.

The Board found that although a previous Board decision conclusively dealt with the facts and issues in that appeal, different circumstances and issues were raised in the new appeal and the Board had jurisdiction to hear it. The Board found that it was appropriate to rescind the condition in the permit that the perforated pipe be capped, provided that certain conditions be added to the permit. The permit was upheld subject to the conditions and, the Board declined to award costs. The appeal was dismissed.

99-HEA-12 Ralph Wayne Allen and Pirkko Sinikka Allen v. Environmental Health Officer

Decision Date: October 7, 1999

Panel: Toby Vigod

This was an appeal of a decision of the EHO to refuse the issuance of a permit for a sewage disposal system for two residential lots on the shore of Cowichan Bay. The Appellants sought an order that a permit be issued to allow installation of either one or two package treatment plants connecting to an existing sewage disposal field, so that the sewage disposal system could serve an existing home on one of the lots and a new home proposed for the other. In addition to making arguments on the technical merits, the Appellants submitted that the EHO had fettered his discretion by failing to consider the technical merits of their application.

The Board found that the EHO did consider the technical information available to him at the time and that he had not fettered his discretion. However, an appeal before the Board is a hearing *de novo,* and the Board has the power to grant or deny a permit based on all available information, including information that becomes available after the time the decision being appealed was made. Based on all the information presented, the Board found that the Appellants did not establish that the proposed sewage disposal system would adequately protect public health. The Board found that the proposed system would double the effluent load contemplated in the permit application which presented too great a risk of breakout. The appeal was dismissed.

99-HEA-22(a) Lorene Rilkoff v. Environmental Health Officer (405689 B.C. Ltd., doing business as Hide-A-Way Mobile Home Park, Permit Holder)

Decision Date: September 16, 1999

Panel: Judith Lee

The Board's jurisdiction to accept Lorene Rilkoff's appeal of an EHO's decision was challenged on the grounds that her appeal was filed almost three months after the issuance of the permit. The Appellant argued that her appeal should be accepted because she did not receive proper notice of the permit.

The Board found that the notice met the requirements of the *Regulation*, and that the publication used for giving notice satisfied the definition of "newspaper" in the *Interpretation Act*. However, the Board found that the Permit Holder failed to publish the notice within the 10-day limitation period, commencing on the date the permit was issued. The Board found that non-compliance with the notice requirements of the *Regulation* was not fatal to the validity of the permit in this case, and that the Board had jurisdiction to accept the appeal. The Board also found that, since the notice was published late, the circumstances may have warranted allowing the Appellant a reasonable extension of time to file her Notice of Appeal. However, the Board found that her delay in submitting her Notice of Appeal was too long, that she provided no satisfactory explanation for the delay and that it would not be a reasonable exercise of the Board's discretion to accept the Notice of Appeal. The appeal was rejected.

99-HEA-24 and 99-HEA-25 Jack & Barbara Ackerman and Art & Louise Laviolette v. Environmental Health Officer (Walco Enterprises Ltd., Permit Holder)

Decision Date: November 18, 1999

Panel: Toby Vigod

These were two appeals of a decision of the EHO to issue a permit for a sewage disposal system for 19-lot mobile home subdivision near Errington, British Columbia. The Appellants appealed on the grounds that effluent from the sewage disposal system would have an adverse impact on the quality of water in local wells and surface waters. In particular, they were concerned that this was to be the second such development on the same property, effectively doubling the volume of domestic sewage that could be discharged on the property. The Appellants sought an order rescinding the permit.

The Board accepted the evidence of the EHO that the planned absorption field sites were at a distance greater than the required distances from the nearest source of domestic water and the natural watercourse running through the property. The Board also accepted the EHO's submission that the system design and the soil conditions at the proposed absorption field sites were more than adequate to treat the volume of effluent authorized by the permit. The Board further found that the aquifer that provided water to domestic wells in the area was 80-feet below the surface, and that it was confined by layers of material with low permeability. Therefore, the Board found that the system would not have an adverse impact on water quality in groundwater wells or surface waters in the area, and that the decision of the EHO was reasonable. The appeals were dismissed.

Pesticide Control Act

98-PES-07(c) City of Parksville et al. v. Deputy Administrator, *Pesticide Control Act* (Canadian Pacific Railway, Permit Holder)

Decision Date: April 8, 1999

Panel: Toby Vigod, Dr. Robert Cameron, Helmut Klughammer

The City of Parksville, Regional District of Nanaimo, Cowichan Valley Regional District, Lucien Bisson and Roy and Angela McCune appealed a decision of the Deputy Administrator to issue a Pesticide Use Permit to CP Rail, for spraying herbicides on certain railway tracks on Vancouver Island. The Appellants sought an order that the permit be cancelled. These appeals were heard together with CP Rail's appeal of the permit on other grounds [see 98-PES-08(b)].

The Board found that, to be successful, the Appellants needed to show that the proposed herbicide application would cause an unreasonable adverse effect to human health or the environment. The Board concluded that drinking water supplies would not be adversely affected by the proposed spraying of Roundup, and that the 10-metre pesticide free zone ("PFZ") was an adequate safeguard to protect aquatic life. Similarly, the Board found that the use of Garlon 4 would not cause an adverse impact on human health and the environment. However, the Board made several amendments to the permit, including requiring a 100-metre PFZ from water intakes and domestic wells for mixing and loading of the herbicides, extending the PFZ for Roundup where the general 10 metre PFZ had been relaxed, requiring that no herbicide be applied to blackberry or raspberry plants between the months of April and September, and requiring that CP Rail consult with Parks officials to determine if portions of the track going through provincial parks should be sprayed. The Board also found that buffer zones did not need to be specified in the permit, reduced the treatment area and total quantity allowed for Roundup, and recommended that the Ministry of Environment, Lands & Parks ("MELP") give the permit priority for monitoring.

With respect to alternatives to spraying, the Board found that the Appellants had not established that steam was a viable alternative to herbicide application. With respect to notification, the Board found that adequate notification had occurred, but recommended that MELP amend the *Pesticide Control Act Regulation* to require that notification of application of major pesticide use permits be given to municipalities in the areas affected by the proposed spraying. Finally, the Board found that any aboriginal rights to harvest berries along the railway, should they exist, would not be subject to an unreasonable adverse impact. The Board upheld the permit, subject to several amendments. The appeals were dismissed.

98-PES-08(b) Canadian Pacific Railway v. Deputy Administrator, *Pesticide Control Act* (City of Parksville et al., Third Parties)

Decision Date: April 8, 1999

Panel: Toby Vigod, Dr. Robert Cameron, Helmut Klughammer

CP Rail appealed a decision of the Deputy Administrator issuing it a Pesticide Use Permit for spraying herbicides on certain railway tracks on Vancouver Island. CP Rail sought an order to have condition "z" of the permit rescinded, and also requested that the permit be extended. CP Rail argued that condition "z", which restricted glyphosate applications to spot treatments within the municipalities of Parksville and Qualicum Beach, was not justified on either a scientific or technical basis. The appeal was heard together with appeal number 98-PES-07(c) (above).

The Board found that the Deputy Administrator had the discretion to include requirements, restrictions and conditions as terms of a permit. The Board found that the restriction for spot treatments over only a small portion of the track, where there had historically been restrictions on treatment, was a reasonable one. The Board also found that it was reasonable to extend the permit for the period of the stay that preceded this appeal. The appeal was dismissed.

99-PES-01/02 Northwest BC Coalition for Alternatives to Pesticides and Gordon Wadley v. Deputy Administrator, *Pesticide Control Act* (Ministry of Forests, Permit Holder)

Decision Date: April 8, 1999

Panel: Toby Vigod

Northwest BC Coalition for Alternatives to Pesticides and Gordon Wadley both appealed the issuance of a Pesticide Use Permit to the Ministry of Forests and both applied for a stay of the permit pending a decision on the merits of their appeals.

The Board applied the usual three-part test for stay application and found that a stay of the permit was justified. The applications for a stay were granted.

99-PES-03(a)(b)(c) to 08(a)(b)(c); 13(a)(b) to 15(a)(b); 18(a); 20(a); 21(a); 22(a)(b) and 23(a)(b) Fort Nelson First Nation v. Deputy Administrator, *Pesticide Control Act* (Slocan Forest Products Ltd. and Ministry of Forests, Permit Holders)

Decision Dates: July 13, 1999, August 20 1999, August 27, 1999, August 31, 1999 and February 15, 2000

Panel: Toby Vigod

A number of preliminary applications were made in relation to these appeals.

The Fort Nelson First Nation applied for stays of nine Pesticide Use Permits issued to Slocan Forest Products Ltd. and five permits issued to the Ministry of Forests, all of which authorized the application of herbicides to various cutblocks in north-eastern British Columbia. The Board stayed six of the permits issued to Slocan and denied a stay of three of the permits (see decisions 99-PES-03(a) to 08(a) and 99-PES-16(a) to 18(a)). The Board granted a stay, in part, of all five of the permits issued to the Ministry of Forests (see decision 99-PES-13(a) to 15(a) and 99-PES-22(a) to 23(a)).

In separate applications, the Deputy Administrator challenged the Board's authority to hear and decide the aboriginal rights and title issues raised by the First Nation. In decisions 99-PES-03(b) through 08(b), the Board concluded that it had the jurisdiction to determine constitutional issues, including questions of aboriginal rights, title and treaty rights, by virtue of its enabling legislation. These applications were denied.

Finally, the Fort Nelson First Nation applied to adjourn the hearing of its appeals against eleven Pesticide Use Permits issued to Slocan and the five permits issued to the Ministry of Forests. In decisions 99-PES-03(c) to 08(c) and 99-PES-16(b) to 18(b) (appeals of the Slocan permits), and decisions 99-PES-13(b) to 15(b), 22(b) and 23(b) (appeals of the Ministry of Forests' permits) the Board concluded that any inconvenience to the First Nation from not granting an adjournment was outweighed by the risk of prejudice to the other parties, particularly the Permit Holders. These applications were denied.

99-PES-09(a) Raincoast Research Society v. Deputy Administrator, *Pesticide Control Act* (International Forest Products Ltd., Permit Holder)

Decision Date: August 6, 1999

Panel: Toby Vigod

The Raincoast Research Society applied for a stay of a decision of the Deputy Administrator to issue a Pesticide Use Permit to International Forest Products Ltd., authorizing the use of glyphosate on a number of cutblocks. The application for a stay was granted.

99-PES-09(b) Raincoast Research Society v. Deputy Administrator, *Pesticide Control Act* (International Forest Products Ltd., Permit Holder; Tsawataineuk Band Council, Third Party)

Decision Dates: September 13, 1999 [amendment to the decision on September 16, 1999]

Panel: Judith Lee

This was a reconsideration of the earlier stay decision [Appeal No. 99-PES-09(a)]. In the initial decision, the Board granted a stay of the entire permit. Shortly after the stay decision was issued, the Tsawataineuk Band Council was granted Third Party status in the appeal. The Board granted an adjournment of the hearing to allow time for the Council to prepare which meant that the appeal would not be completed until later than initially planned. Consequently, the Board agreed to reconsider its stay decision.

After considering the submissions of the parties, the Board concluded that the stay should be vacated for three of the priority cutblocks. The application was granted, in part.

99-PES-10(a), 99-PES-11(a), and 99-PES-12(a) Grant McMahon, Kaslo and District Community Forest Society, and Nelson Eco Centre v. Deputy Administrator, *Pesticide Control Act* (Ministry of Forests, Permit Holder)

Decision Date: July 22, 1999

Panel: Toby Vigod

Grant McMahon, the Forest Society and the Eco Centre each applied for a stay of a Pesticide Use Permit that was issued to the Ministry of Forests. The Board refused to issue a stay for the limited herbicide applications for 1999. However, the Board stayed certain portions of the permit dealing with site preparation. The application for a stay was granted, in part.

Waste Management Act

97-WAS-02 Charles S. Dunkley and Glenwood Beach Properties Ltd. v. Deputy Director of Waste Management (Wild Rose Bay Properties Ltd., Permit Holder)

Decision Date: June 14, 1999

Panel: Robert Radloff

Glenwood Beach Properties Ltd. and Charles S. Dunkley appealed the decision of the Deputy Director amending a waste permit issued to Wild Rose Properties Ltd. The permit allowed Wild Rose to dispose of treated sewage effluent by spray irrigation over a forested lot located about 300 metres away from the shoreline of Shuswap Lake, British Columbia. They appealed on the grounds that the irrigation spray technology had never been used on moderately or steeply sloping forested terrain within the interior wet belt of British Columbia and that it was, therefore, considered to be highly experimental. The Appellants also submitted that there was a risk of contamination because of the proximity of the site to Shuswap Lake, because the site was not capable of accepting the effluent load, and because the permit conditions were inadequate to safeguard the environment.

The Board found that the monitoring provisions were inadequate and that the level of testing recommended by the Deputy Director be included in any future permits. The Board also found that that runoff and seepage from the proposed effluent storage lagoon had the potential to increase the wastewater volume applied to the site and to affect the stability of the lagoon structure. The Board concluded that additional study of the groundwater table was needed to ensure the acceptability of the 30-metre buffer zone between spray areas and surface water on the site. Finally, the Board held that standby areas for spray irrigation should be acquired or designated as a precautionary measure, and that pilot testing should be undertaken to determine the extent of land required. The Board rescinded the permit. The appeal was allowed.

98-WAS-01(b) Beazer East, Inc. and Atlantic Industries Ltd. v. Assistant Regional Waste Manager (Canadian National Railway, Third Party)

Decision Date: March 29, 2000

Panel: Toby Vigod, Dr. Robert Cameron, Marilyn Kansky

Beazer East, Inc. ("Beazer") and Atlantic Industries Ltd. ("Atlantic") appealed the Assistant Regional Waste Manager's decision to issue a remediation order in relation to the property at 8335 Meadow Avenue, Burnaby, British Columbia. The property was contaminated with creosote as a result of a wood treatment operation that took place on the site between 1931 and 1982. Beazer and Atlantic each sought an order rescinding the order against them. In the alternative, Atlantic sought a stay of the order.

The Board considered the meanings of "owner", "operator" and "producer" as set out in the *Waste Management Act*. It found that Beazer, the parent of the company that leased and operated on the site when the contamination took place, met the definitions of "owner" and "operator" by virtue of its involvement at the site. Thus, Beazer was a "responsible person" pursuant to sections 26(1) and 26.5(1)(b) of the *Act*. However, the Board found that Beazer was not a "responsible person" pursuant to subsection 26.5(1)(c) of the *Act*, as it did not meet the definition of "producer." The Board found that Beazer was not entitled to the "environmental consultant" exemption under the *Act,* and that Beazer contributed "most substantially" to the contamination of the site. Therefore, the Board found that the Assistant Manager properly exercised his discretion in naming Beazer to the order.

With respect to Atlantic, the Board found that it also was a "responsible person" as it also met the definitions of "owner" and "operator" in sections 26(1) and 26.5(1)(b) of the *Act*, as a result of Atlantic's amalgamation with the company that leased and operated on the site when the contamination took place. Further, the Board found that there were no grounds for relieving Atlantic from liability. The Board found that the "innocent acquisition" exemption did not apply to Atlantic, and that Atlantic should not be exempt on the basis of a private agreement. Further, the Board found that the Assistant Manager properly exercised his discretion in naming Atlantic to the order, and that it was not an abuse of process for the Assistant Manager to have named Atlantic.

With respect to Atlantic's request for a stay of the order, the Board found that its jurisdiction is limited to the granting of a stay pending a decision on the merits of an appeal. Therefore, it had no jurisdiction to issue a stay after it has made its decision on the appeals.

Accordingly, the Board upheld the remediation order, with the deletion of the reference to subsection 26.5(1)(c) in relation to Beazer. The appeals were dismissed.

98-WAS-14(b) and 98-WAS-28(a) North Fraser Harbour Commission, General Chemical Canada Ltd. and Thomas Lawson v. Deputy Director of Waste Management (B.C. Hydro and Power Authority, BC Lands, Canadian Pacific Railway, CBR Cement Canada Ltd. (now Lehigh Portland Cement Ltd.), Ocean Construction Supplies Ltd., CGC Inc., HAL Industries Inc., Zeal Industries Ltd., Third Parties)

Decision Date: August 23, 1999

Panel: Toby Vigod, Don Cummings, Judith Lee

The Board heard two applications in regard to preliminary issues of law and jurisdiction relating to a remediation order issued by the Deputy Director to address coal tar contamination at a property and in adjacent lands and waters in Vancouver, British Columbia. The first application was for an order remitting the remediation order back to the Deputy Director to determine whether BC Hydro should be added as a

responsible person. The second application was for an order setting aside the remediation order insofar as it named Thomas Lawson, a non-resident, as a responsible person.

On the BC Hydro issue, the Board examined the 1965 amalgamation legislation relating to BC Electric and BC Hydro, and found that BC Hydro could not avoid liability for the past acts of BC Electric unless there was a clear legislative intent to stop this liability from flowing. The Board further found that amendments to the applicable legislation since the amalgamation clearly show a legislative intention that BC Hydro may be a responsible person liable under the *Waste Management Act*. Based on these and other considerations, the Board found that BC Hydro could be named a responsible person under Part 4 of the *Waste Management Act* and ordered that the matter be remitted back to the Deputy Director for a determination as to whether it should be named in the order.

With regard to the issue of Mr. Lawson, the Board found that any non-resident can be a responsible person under the *Waste Management Act* and can be subject to a civil action brought by any person to recover reasonable costs of remediation. The Board also found that the language of section 27(1) of the *Act*, dealing with the civil cause of action applies to any responsible person, and that it does not restrict the definition to a resident of British Columbia. The Board also affirmed that the Deputy Director had the authority to issue a remediation order against Mr. Lawson. The first application was granted; the second application was denied.

98-WAS-20 Lion Park Properties Ltd. v. Assistant Regional Waste Manager (438081 B.C. Ltd. and The Regional District of Central Okanagan, Permit Holders)

Decision Date: January 20, 2000

Panel: Toby Vigod

Lion Park Properties Ltd. appealed a decision of the Assistant Regional Waste Manager to issue an amended waste management permit to the Permit Holders. Lion Park was the named permittee prior to the amendment at issue and sought an order that the original permit be restored to Lion Park as previously constituted, or that the Board vary the amended permit, or issue a separate permit for the hotel it was developing. It argued that it was not given an opportunity to be heard before the amended permit was issued, and that it did not give its formal consent to the amendment which created a single permit for all three development projects.

The Board found that the amendment effectively transferred the permit from Lion Park to the Permit Holders, and that Lion Park had consented to the transfer. The Board found that while the terms of the amendment application were either not communicated clearly to Lion Park by the Permit Holders, or were not understood by Lion Park until after the amendment was issued, this was not an error of law. Therefore, the Assistant Manager did not fail to comply with his duty to act fairly. Furthermore, the Board found that the Assistant Manager's amendment of the permit was guided by a concern for the protection of the environment as required by section 13 of the *Waste Management Act* and, therefore, was reasonable in the circumstances. Based on these findings, the Board confirmed the decision of the Assistant Manager to amend the original permit. The appeal was dismissed.

98-WAS-22(b) Delbert Secord v. Deputy Director of Waste Management (Noranda Mining and Exploration Inc., Third Party)

Decision Date: September 1, 1999

Panel: Toby Vigod

Delbert Secord appealed a decision of the Deputy Director that confirmed a decision of the Assistant Regional Waste Manager to amend a waste permit held by Noranda. The amended permit authorized and set conditions for the discharge of molybdenum-bearing effluent into MacDonald Creek from a closed mine site (the Brenda mine) near Peachland, British Columbia. Mr. Secord submitted that the concentrations of molybdenum authorized by the amended permit were too high and that the permit, as amended, did not adequately protect human health and the environment.

During the course of the appeal process, the parties commenced discussions relating to the hearing and possible settlement of the appeal. The Board subsequently ordered, by consent of the parties, that certain amendments would be made to the permit and that the decision of the Deputy Director was otherwise upheld.

98-WAS-29(b) Philip Fleischer et al. v. Assistant Regional Waste Manager (Pacifica Papers Inc., Third Party; Communications, Energy & Paperworkers Union of Canada, Locals #1 and #76, Participants)

Decision Date: April 27, 1999

Panel: Toby Vigod

Pacifica applied to limit the scope of the appeals brought by Philip Fleischer, Don Fodor, Grant and Sally Keays, John Keays, Georgina Lapointe and Janet Morrison. The appeals were filed against a decision of the Assistant Manager to amend Pacifica's air permit. Pacifica also applied to dismiss John Keays' appeal or order him to provide a security deposit to cover the costs of the Respondent and the Board.

The application to limit evidence presented in the individuals appeals was granted, in part. The application to stay or dismiss John Keays' appeal and to require him to deposit security for costs was denied.

98-WAS-29(c) Philip Fleischer et al. v. Assistant Regional Waste Manager (Pacifica Papers Inc., Third Party; Communications, Energy & Paperworkers Union of Canada, Locals #1 and #76, Participants)

Decision Date: April 27, 1999

Panel: Toby Vigod

Pacifica applied to dismiss all six of the appeals filed against the Assistant Manager's decision to amend its air permit on the grounds that the Appellants were not "persons aggrieved", as defined in the *Waste Management Act*, and, therefore, had no standing to bring the appeals. It submitted that the Appellants had to provide evidence in the form of wind data to show that air emissions from the mill flowed in their direction and would likely affect them.

The Board found that the onus was on the Appellants to demonstrate that they were "persons aggrieved" under the *Act*, but found that the Appellants did not have to produce wind data to support their claims. The Board was satisfied that the Appellants' interests could be affected by the amendments and that the Appellants were all "persons aggrieved" under the *Act*. The applications were dismissed.

98-WAS-29(d) Philip Fleischer et al. v. Assistant Regional Waste Manager (Pacifica Papers Inc., Third Party; Communications, Energy & Paperworkers Union of Canada, Locals #1 and #76, Participants)

Decision Date: January 12, 2000

Panel: Toby Vigod, Dr. Robert Cameron, Christie Mayall

Six appeals were filed against a decision of the Assistant Manager to amend an air permit issued to Pacifica Papers Inc. One appeal was subsequently withdrawn. The amendments provided for an extension of the compliance dates for imposition of "Level A" requirements for total particulate emissions and Total Reduced Sulfur ("TRS") emissions from Pacifica's Recovery Boiler in its Powell River pulp and paper mill. The Appellants sought an order cancelling the extensions or adding certain conditions to the permit.

The Appellants argued that extending the deadlines for compliance with stricter standards lessens environmental protection, contrary to section 13 of the *Waste Management Act.* The Board rejected this argument. It considered section 13(4)(h) of the *Act* and section 1(2) of the *Public Notification Regulation* and found that the legislature contemplated that there would be circumstances where extending time lines to meet requirements under a permit could be granted.

The Board also considered whether the extension of the compliance dates would cause an unacceptable adverse effect on the environment and human health. Based on the expert evidence, the Board agreed with Pacifica that extending the compliance date for total particulate matter was reasonable and should be upheld. With respect to TRS, the Board concluded that an earlier compliance date for Level A could and should be set. The Board ordered that the deadline be changed from 2003 to 2001.

The Board also made a number of directions and recommendations based on proposals made by the Appellants. The appeals were allowed, in part.

98-WAS-32 Coast Tractor & Equipment Ltd. v. Regional Waste Manager

Decision Date: August 9, 1999

Panel: Don Cummings

Coast Tractor appealed a decision of the Regional Waste Manager to refuse to issue Coast Tractor an Approval in Principle for an independent remediation plan (the "AIP"). Coast Tractor was seeking the AIP to support its application to the City of Nanaimo for a development permit.

The Board found that Coast Tractor had embarked on a government review process for site remediation by submitting a site profile, and that it had done so without indicating that it would pursue independent remediation. In doing so, it became bound to follow that government review process to its conclusion. The Board found that independent remediation was a privilege and that the privilege must be requested at the beginning of the remediation process. Further, the Board found that Coast Tractor's remediation was not sufficient and that the Regional Manager was justified in refraining from granting the AIP. The appeal was dismissed.

99-WAS-02 Quinsam Coal Corporation v. Assistant Regional Waste Manager

Decision Date: July 15, 1999

Panel: Toby Vigod, Jackie Hamilton, Carol Quin

Quinsam appealed the decision of the Assistant Manager to issue an amended waste permit to Quinsam, which authorized the discharge of coal mining waste. Quinsam sought an order releasing it from the nutrient monitoring requirements of the permit and the biological river and lake monitoring requirements at all locations. Quinsam also sought to amend the permit to add the phrase "upon commencement of operations in Block 242" to all sections relevant to Block 242, to ensure that costly equipment and work need not be done as the block remains "on hold." Finally, Quinsam sought to change the wording of a section that referred to a study being done under the direction of Environment Canada.

The Board held that it had no jurisdiction to deal with the request for the deletion of the nutrient monitoring requirements and that the appeal on this ground was premature. At the request of the Board, a recess was taken to discuss a possible resolution of the other two grounds for appeal. With the consent of the parties, the Board ordered that the Assistant Manager vary the permit with regard to composite sampling and flow monitoring in the Iron river.

99-WAS-06, 08, and 10-13 Houston Forest Products Co., Northwood Inc., West Fraser Mills Ltd., Laurie Mutschke and Emily Dodd, Dave Stevens, Dr. Elizabeth Bastian v. Assistant Regional Waste Manager

Decision Date: April 30, 1999

Panel: Toby Vigod

Preliminary applications were made to the Board concerning the appeals brought by Houston Forest Products Co., Northwood Inc., and West Fraser Mills Ltd. ("the Corporate Appellants"), and Laurie Mutschke and Emily Dodd, Dave Stevens, and Dr. Elizabeth Bastian ("the Individual Appellants") regarding the Corporate Appellants' beehive burner permits. The Individual Appellants applied to have all six appeals heard together or "consolidated" to provide for greater efficiency and consistency in the appeal process.

The Corporate Appellants expressed concern that a consolidation of the appeals could jeopardize their right to raise preliminary issues with respect to the appeals of the Individual Appellants.

The Board found that the Board may, in appropriate cases, address two or more separate, but related, appeals in a single proceeding. The Board found that there were many common questions of fact and law that were likely to be raised by the six appeals, although some of the legal issues raised by the Individual Appellants were distinctly different from those raised by the Corporate Appellants. The Board also found that joining the appeals would not affect the ability of any party to raise preliminary issues. The Board held that the appeals would be heard together, to the extent that doing so would eliminate repetition, but that the separate character of the individual appeals would be maintained. The applications were allowed.

99-WAS-06(b), 08(b) and 11-13(b) Houston Forest Products Co., Northwood Inc., Laurie Mutschke and Emily Dodd, Dave Stevens, Dr. Elizabeth Bastian v. Assistant Regional Waste Manager (West Fraser Mills Ltd., Third Party)

Decision Date: January 21, 2000

Panel: Toby Vigod

This was an application by the British Columbia Lung Association for participant status in the hearing of the six appeals regarding the Corporate Appellants' beehive burner permits (see decision 99-WAS-06, 08 and 10-13). The Association sought participant status for the purposes of providing medical and scientific evidence on respiratory health, and the risk to public respiratory health arising from, or contributed to by the operation of beehive burners.

The Board adopted the two pronged test articulated by the Forest Appeals Commission for dealing with intervenor applications. The Board found that, given the focus of the Association on respiratory health, the Association had a valid interest in the issues raised in the appeals, namely, the risk of adverse health effects posed by the inhalation of wood smoke produced by the beehive burners. The Board also found that the Association had a relevant, and possibly unique perspective that may be of assistance to the Board in the appeals, and that its participation would not unduly prejudice the parties provided that the Association avoided duplicating evidence, and kept to its estimated one hour time frame. The application for limited participant status was granted.

99-WAS-06(c), 08(c) and 11-13(c) Houston Forest Products Co., Northwood Inc., Laurie Mutschke and Emily Dodd, Dave Stevens, Dr. Elizabeth Bastian v. Assistant Regional Waste Manager (West Fraser Mills Ltd., Third Party; British Columbia Lung Association, Participant)

Decision Date: February 3, 2000

Panel: Toby Vigod

Houston Forest Products Co. applied to dismiss the appeals of Dr. Elizabeth Bastian, Dave Stevens, and Laurie Mutschke, on behalf of herself and the infant, Emily Dodd (collectively, the "Appellants"), on the grounds that the Appellants did not have standing to appeal, and that the Board did not have jurisdiction to hear the appeals. The appeals were against a decision of the Assistant Manager to amend Houston's waste permit which authorized Houston to discharge emissions into the air from its beehive burner.

The Board found that, because air pollutants can affect air quality at large distances, there is no defined distance beyond which persons are necessarily precluded from having standing to appeal. Further, under the "person aggrieved" test, a person is only required to disclose enough evidence for one to conclude, on reasonable grounds, that the person's interests will be prejudicially affected beyond that of the general public. The Board found that the Appellants had adduced such evidence in this case and, therefore, had standing to appeal.

With respect to jurisdiction, the Board found that it did not have jurisdiction to quash or prevent Houston from operating its beehive burner completely as the *Wood Residue Burner and Incinerator Regulation* authorized Houston to use it until December 31, 2000. However, the Board found that it had jurisdiction over the alternate remedies requested by the Appellants, namely, to issue an order amending the permit to reduce emissions from the burner, or to remit the permit back to the Director to be amended in accordance with the instructions of the Board. Houston's applications to dismiss were denied.

99-WAS-07 7437 Holdings Ltd. v. Assistant Regional Waste Manager (Corporation of Delta, Greater Vancouver Regional District, Third Parties)

Decision Date: October 15, 1999

Panel: Toby Vigod, Cindy Derkaz, Carol Quin

7437 Holdings Ltd. appealed a decision of the Assistant Manager imposing certain requirements dealing with the closure, security and monitoring of its disposal site following the abandonment of its waste permit. 7437 sought an order reversing the Assistant Manager's decision.

The Board found that the issue in this case was whether the Assistant Manager had jurisdiction to impose requirements for permit abandonment under section 16(5)(b) of the *Waste Management Act*, when the Notice of Abandonment of the permit submitted by 7437 stated that it was given under subsection 16(1) of the *Act*.

The Board found that the correct interpretation of section 16 is that, while a Permit Holder may elect to abandon a permit, it is not up to the Permit Holder to decide whether the abandonment is pursuant to subsection 16(1) or 16(3). The Board found further that the Assistant Manager did not make a decision and was not required to make any decision in respect of the correctness of the Notice of Abandonment, and that the principle of irrevocability did not apply. The Board confirmed the requirements for the abandonment of the permit except for the deadline for submission of a site closure plan, which it ordered the Assistant Manager to extend. The appeal was dismissed.

99-WAS-16 Valleyview Enterprises Ltd. v. Regional Waste Manager

Decision Date: August 3, 1999

Panel: Toby Vigod

This was an appeal against a decision of the Regional Manager to amend a waste permit issued to Valleyview, the owner and operator of a landfill for municipal solid waste in Kamloops, British Columbia. Valleyview appealed on the grounds that it was not given adequate notice of the amendment and, therefore, did not have an adequate opportunity to make submissions.

The Board found that Valleyview had received adequate notice of the proposed amendment. However, the Board also found that the Regional Manager erred by not providing adequate reasons for the amendment in his decision. However, since the appeal before the Board constituted a new hearing, the appeal corrected the Regional Manager's error. Based on the evidence before it, the Board confirmed the amendment, except for one requirement. The appeal was allowed, in part.

99-WAS-18 Ronald Opp v. Assistant Regional Waste Manager

Decision Date: July 20, 1999

Panel: Don Cummings

Ronald Opp appealed an order of the Assistant Manager requiring Mr. Opp to cease the discharge of waste onto his land and remove all of the deposited waste to an approved location. Mr. Opp submitted that the dumping of waste had ceased and he requested that the Board amend the order by deleting the portion requiring him to remove all deposited waste.

At the hearing, the matter was largely resolved by the parties. The Assistant Manager told the Board that he would be satisfied if Mr. Opp secured the site and restricted the dumping to those materials that do not require a permit. The Board therefore upheld the requirement in the order that the discharge of business waste onto the site cease immediately and rescinded the requirement to remove the waste already on the site. However, as the Board wanted to ensure that the commitments to restrict dumping would be honoured, it sent the matter back to the Assistant Manager with directions to add certain additional requirements to regulate dumping. The appeal was allowed, in part.

99-WAS-23(a) City of Cranbrook v. Assistant Regional Waste Manager (Canadian Pacific Railway, Third Party)

Decision Date: May 10, 1999

Panel: Toby Vigod

This was an application for a stay of a decision of the Assistant Manager to amend a waste permit held by the City of Cranbrook. The amendments required Cranbrook to manage the water level in a sewage

effluent storage lagoon so that it would not exceed a stipulated level. Cranbrook appealed the decision and requested a stay of the amendments until engineering opinions were made available that justified a significant change to the effluent storage elevation, or until the Board made a decision on the merits of the appeal.

The Board found that while there was a serious issue to be tried, Cranbrook had failed to show that it would suffer irreparable harm if a stay was not granted. The Board found that the amendment did not require Cranbrook to reduce the effluent level immediately, but that it undertake a survey and initiate a plan to lower the level. The Board found further that any harm that Cranbrook could suffer would be economic and did not constitute irreparable harm, as the economic harm would be quantifiable and recoverable as damages. On the question of the balance of convenience, the Board found that the interest in preventing harm to the environment, the public health and CP Rail outweighed the relatively minimal harm, if any, to Cranbrook. The Board denied the application for a stay, but granted an extension of the deadline for compliance with the amendments.

99-WAS-27 Ray Partridge Trucking Ltd. v. Assistant Regional Waste Manager

Decision Date: August 6, 1999

Panel: Carol Quin

Ray Partridge Trucking Ltd. appealed the issuance of a pollution abatement order by the Assistant Manager. The order required the removal of burnt demolition debris dumped in an unauthorized site on Crown land, known as the Stoney Creek gravel pit.

The Board found that the material fit the definition of "waste" under the *Waste Management Act*, and that the Appellant did not hold a valid permit or approval to dump waste at that location. The Board also found that the partially burned demolition waste could cause pollution. The Board held that the issuance of the order was both reasonable and correct, and concluded that the Appellant should remove all of the subject waste material to an approved site by August 20, 1999. The appeal was dismissed.

99-WAS-30 Alpha Manufacturing Inc., Burns Industrial Park Ltd., Fauna Landfill Ltd., Burns Development Ltd., and Burns Developments (1993) Ltd. v. Assistant Regional Waste Manager (Corporation of Delta, Third Party)

Decision Date: February 3, 2000

Panel: Toby Vigod, Dr. Robert Cameron, Ken Maddox

This was an appeal against a decision of the Assistant Manager to issue a pollution abatement order that required the Appellants to remove 55,000 m^3 of demolition waste dumped at an unauthorized site. The Assistant Manager named the five companies, stating that they were "run as one" for a common purpose. The Appellants argued that the site was zoned for the purpose that required it to be filled and that, in any event, the order should be stayed until the court proceedings against it are decided. It also argued that the order should be cancelled against Burns Industrial Park Ltd. ("BIPL") and Fauna Landfill because these companies were not involved in the landfilling activities, and asked the Board to reconsider an earlier decision of the Board regarding the boundaries of the site. The Respondent and Third Party requested an order for costs against the Appellants.

The Board found no evidence to substantiate the Appellants' claim that the land in question was zoned for a purpose that allowed it to be filled. The Board also found that the doctrine of issue estoppel prevented it from reconsidering an earlier Board decision on the boundary of the site. Based on expert evidence and the previous decision on the boundary issue, the Board concluded that the landfilled materials constitute

pollution, and that the requirements in the order were necessary and reasonable for the rehabilitation and protection of the environment. It found that BIPL controlled access to the unauthorized site from its adjoining property and was, therefore, properly named under section 31 of the *Act*. However, the Board held that Fauna Landfill should not have been named - it was only named because it was associated by common ownership with the other Appellants.

Finally, the Board rejected the Appellants' request for a stay pending a decision on a prosecution before the courts as, even if the court arrived at a different conclusion than the Board, the court's decision is based on a higher standard of proof and would not affect the Board's decision. The appeal was allowed, in part. The application for costs was denied.

99-WAS-34(a) Slocan Forest Products Ltd. v. Regional Waste Manager

Decision Date: September 27, 1999

Panel: Toby Vigod

Slocan Forest Products Ltd. appealed a decision of the Regional Manager to issue a pollution abatement order requiring Slocan to abate pollution from an unmodified silo burner at its sawmill in Slocan City. This was a preliminary application challenging the jurisdiction of the Regional Manager to issue the order. Slocan sought a declaration that the order was null and void.

Slocan argued that the Regional Manager was without jurisdiction to make the order because it affected deadlines for filing a burner phase-out plan that already existed under the *Wood Residue and Incinerator Regulation*. In the alternative, Slocan submitted that the Regional Manager lost his jurisdiction by failing to take into account all relevant factors, by issuing the order for improper purposes, and because the decision discriminated against Slocan. The Board noted that its powers do not include the ability to issue a declaration that an order issued under the authority of the *Waste Management Act* is null and void, but that it does have the power to rescind an order or make any decision that the Regional Manager could have made.

The Board found that the mere issuance of a pollution abatement order is not necessarily, in itself, in conflict with the *Regulation*. Pollution abatement orders are meant to address specific situations where a substance is "substantially" altering or impairing the usefulness of the environment. In contrast, the *Regulation* has a general focus in terms of dealing with the phase-out of certain categories of waste emitters. The Board concluded that the Regional Manager had the jurisdiction to issue the order. The Board also found that the requirements of the order are consistent with section 31 of the *Act* and are not in excess of the Regional Manager's jurisdiction. The application was denied.

99-WAS-35(a) West Fraser Mills Ltd. (doing business as Eurocan Pulp and Paper Co.) v. Regional Waste Manager

Decision Date: October 15, 1999

Panel: Toby Vigod

West Fraser Mills Ltd. applied for a stay of the Regional Manager's decision which required West Fraser to fund, to a maximum of $18,075, the participation of a representative of the Haisla First Nation in a committee set up to develop taint compliance testing for eulachon fish harvested near the Eurocan pulp mill in Kitimat, British Columbia. The application for a stay was denied.

99-WAS-37 Peg-Rin Enterprises Ltd. v. Assistant Regional Waste Manager

Decision Date: January 28, 2000

Panel: Cindy Derkaz

Peg-Rin Enterprises Ltd. appealed a pollution abatement order amendment made by the Assistant Manager in relation to dust emissions from Peg-Rin's sandblasting operation in Thornhill, British Columbia. Peg-Rin sought to have the order reversed on the grounds that it is not causing "pollution" and the order is unreasonable because Peg-Rin has limited financial resources and is operating at a higher standard than others.

Based on evidence from the Assistant Manager and neighbouring residents, and on dust sample analyses, the Board found that the sandblasting emissions were causing "pollution" and that the terms of the order were reasonable in the circumstances. The Board rejected the argument that Peg-Rin should not have to comply with the order because its financial resources are limited or that others are not obeying the law. Furthermore, the Board found that while Peg-Rin's newly purchased dust collector and fibreglass sheeting might abate the sandblasting emissions, this was a matter for the Assistant Manager to decide upon receiving a plan in accordance with the order. The appeal was dismissed.

99-WAS-40(a) Sumas Environmental Services Inc. v. Assistant Regional Waste Manager

Decision Date: November 23, 1999

Panel: Toby Vigod

This was a stay application in an appeal against a decision of the Assistant Manager to issue an order revoking the exemptions that applied to the operation of Sumas' special waste storage facility located on Byrne Road in Burnaby, British Columbia. The application for a stay was granted.

99-WAS-41(a)(b), 99-WAS-42(a)(b), 99-WAS-43(a)(b) Canadian Occidental Petroleum Ltd., BC Rail Ltd., BCR Properties Ltd., British Columbia Railway Company, International Forest Products Ltd. v. Director of Waste Management (FMC Chemicals Ltd., FMC Corporation, FMC of Canada Ltd., Third Party)

Decision Dates: December 3, 1999 and December 7, 1999

Panel: Toby Vigod

Canadian Occidental Petroleum Ltd. ("COPL") applied for a stay of the security requirement in a remediation order issued against it. The order required COPL to post financial security in the amount of almost $3.5 million by December 6, 1999. Due to a delay in receiving submissions from the parties, the Board was unable to issue its decision before the security was required on December 6, 1999. Accordingly, the Board granted an interim stay of the security requirement until noon on December 8, 1999 (see decision 99-WAS-41(a) to 43(a)).

In its final decision on the application (99-WAS-41(b) to 43(b)), a stay of the security requirement was granted.

Water Act

97-WAT-16(Amendment) Atlantic Pacific Land Corp. and Gary Lycan v. Engineer for the New Westminster Water District

Order date: June 14, 1999

Panel: Toby Vigod

At the request of the parties, the Board ordered, by consent, that its previous consent order dated June 29, 1998, be amended.

98-WAT-05(b) Cadillac Fairview Corporation Ltd. v. Deputy Comptroller of Water Rights (City of Cranbrook and Gerald and Beverly Tames, Third Parties)

Decision Date: August 20, 1999

Panel: Katherine Hough

Cadillac Fairview appealed an order of the Deputy Comptroller of Water Rights setting aside the Regional Water Manager's order requiring Cadillac Fairview to construct a permanent channel for a creek in Cranbrook, British Columbia. The Deputy Comptroller directed Cadillac Fairview and the City of Cranbrook to assess the hydraulic capacity of a temporary channel constructed in 1976 under a conditional water licence. After the assessments had been completed, the Regional Manager was ordered to reconsider the necessity of upgrading the temporary channel. Cadillac Fairview sought to have the order rescinded, alleging that the City's purpose in seeking realignment of the creek was not to address a flooding potential, but was due to the potential development of an adjacent property. Cadillac Fairview also alleged that the Regional Manager was biased. Finally, Cadillac Fairview submitted that it should not be responsible for the assessment as it did not own the land on which the channel was situated.

The Board found that there was a potential flooding hazard along the existing creek channel, and that the assessment directed by the Deputy Comptroller was warranted. The Board also found that the issue of bias was rendered moot by the Regional Manager's impending retirement, as his successor was capable of conducting the review in an unbiased manner. The Board also noted that, if the new Regional Manager was unacceptable to Cadillac Fairview, it could apply for an independent assessment by a Regional Manager from a different region. Finally, the Board found that the conditional water licence was appurtenant to land owned by both Cadillac Fairview and the City; therefore, both were licencees, and both should be responsible for undertaking the assessment. The Deputy Comptroller's decision was affirmed. The appeal was dismissed.

98-WAT-24 Cressida Holdings Ltd. v. Assistant Regional Water Manager (Lac Le Jeune Conservation Society, BC Environment Fish and Wildlife Branch, Ridgmount Estates Water Users Society, Lower Nicola Indian Band, BC Parks, Fisheries and Oceans Canada, Phyllis Leese, Third Parties)

Decision Date: August 20, 1999

Panel: Toby Vigod

Cressida Holdings appealed an order by the Assistant Manager, cancelling its conditional water licence. During the appeal, the Board was provided with a letter of agreement between Cressida and the Assistant Manager, and a request that the Board issue a consent order reflecting the terms of the agreement. None of the Third Parties had a "substantive objection" to the consent order. Accordingly, the Board confirmed the licence cancellation, except for the right to divert and use 500 gallons of water a day from Lac Le Jeune, which would be reinstated.

98-WAT-25 Doug Horth v. Assistant Regional Water Manager

Decision Date: September 9, 1999

Panel: Marilyn Kansky

Doug Horth appealed a decision of the Assistant Manager to refuse his application for making changes in and about the Cheekeye River. Mr. Horth sought an order allowing the removal of gravel from the river. He was concerned that erosion of the riverbank, caused by the positioning of gravel in the river, would eventually result in flooding in the area and destruction of a tree plantation in his Woodlot Licence. The Assistant Manager objected to the removal of the gravel because it may negatively impact fish and fish habitat. The Assistant Manager submitted that the river is inherently unstable, and it is inadvisable to exacerbate its instability by removing gravel from the river.

The Board found that the removal of gravel from the river would have a negative impact on fish and fish habitat. The Board also found that there was no evidence of a threat from flooding that would justify removal of the gravel. Further, construction of a bridge across the river would have to be considered in a separate application under section 9 of the *Water Act*. The Board found that the Assistant Manager had the authority to refuse Mr. Horth's application, and that his decision was reasonable. The appeal was dismissed.

98-WAT-26 Louis Etcheverry v. Assistant Regional Water Manager (Lesley and Cynthia Bentley, Melvin and Anne Campbell, Darlene Volk, Norman and Delores Marshall, Keith and Penny Prigmore, Third Parties)

Decision Date: October 27, 1999

Panel: Jane Luke, Harry Higgins, Helmut Klughammer

Louis Etcheverry appealed a decision of the Assistant Manager refusing his application for a water licence on Richards Spring, and ordering the removal of his unauthorized works at the spring, and the restoration of the spring to its natural state. Mr. Etcheverry asked that he be granted the water licence, and that he be allowed to retain use of the pond and intake that he had constructed.

The Board agreed with the Assistant Manager that the drainage system, of which Richards Spring is a part, has insufficient water to support Mr. Etcheverry's licence request. The Board also found that it was reasonable for the Assistant Manager to order removal of the works, although it noted that the long delay in processing Mr. Etcheverry's licence application was unacceptable. However, this delay could not negate the reasons for refusing the licence or for removing the works. The Assistant Manager's decision was confirmed. The appeal was dismissed.

98-WAT-29 A.M. Anderson, R.J. Anderson, S.G. Anderson and M.P. Edwards v. Assistant Regional Water Manager (Pagebrook Inc. and Kamlands Holdings Ltd., Third Parties)

Decision Date: December 3, 1999

Panel: Toby Vigod, Cindy Derkaz, Katherine Hough

This was an appeal of a decision of the Assistant Manager refusing to cancel a number of water licences authorizing the diversion, storage and use of water for irrigation purposes on Kamlands' property, known as Six Mile Ranch, near Savona, British Columbia. The Appellants sought an order reversing the decision and cancelling the licences on the grounds that Kamlands, and previous licence holders, failed to make beneficial use of the licensed water for more than three successive years.

The Board considered the definition of "licensee" in the *Water Act* and found that the question is whether the *current* owner of the property (Kamlands) has made beneficial use of the water. Based on the evidence, the Board concluded that Kamlands had not established that it made beneficial use of the water

for three successive years in accordance with the terms and conditions of the licences. However, the Board noted that section 23 of the *Act* does not require cancellation in these circumstances – the decision to cancel is discretionary. The Board found that economic factors (including the viability of a development), as well as fishery conservation and the public interest are proper criteria upon which to base a decision, and that the Assistant Manager's decision was appropriate. Although Ministry policy was persistently ignored in this case, it was a hearing *de novo*, and the Board arrived at the same conclusion as the Assistant Manager on the facts.

Kamlands applied for costs against the Assistant Manager and the Appellants, submitting that they failed to advise it in a timely manner about the issue of non-beneficial use of the licences. Kamlands asserted that, if it had been advised about this issue, it could have moved expeditiously to use the licences and avoided the expense of the appeal.

The Board found that there were no special circumstances in this case that warranted the awarding of costs. The application for costs was denied. The appeal was dismissed.

99-WAT-01 Jim Dunn v. Assistant Regional Water Manager (Ministry of Transportation and Highways, Ministry of Environment, Lands and Parks, Strata VIS432, Third Parties)

Decision Date: October 25, 1999

Panel: Jane Luke

Jim Dunn appealed a decision of the Assistant Manager refusing his application to construct a culvert on a 65-metre section of stream on his property. The Assistant Manager refused the application on the grounds that the culvert would alter the integrity of the watercourse and affect downstream wetlands and water quality. Mr. Dunn sought an order overturning the decision and permitting him to construct the culvert.

The Board noted that the property in question was subject to a restrictive covenant prohibiting changes to the riparian zone adjacent to the stream without written permission from the Regional Fish and Wildlife Manager. The Board found that Mr. Dunn did not seek that permission, and that the Fish and Wildlife Manager opposed construction of the culvert. The Board found that it was important to maintain the natural environment of the stream and riparian zone wherever possible. The Board also found that refusing permission to construct the culvert would not prevent Mr. Dunn from developing the property. The appeal was dismissed.

99-WAT-04 and 99-WAT-05 Minister of Indian Affairs and Northern Development and William Berscheid v. Deputy Comptroller of Water Rights

Decision Date: February 28, 2000

Panel: Katherine Hough, Ken Maddox, Carol Quin

This decision involved two appeals of a decision by the Deputy Comptroller, upholding the suspension of the Minister's conditional water licence on Marlow Spring, and finding that certain water works near Marlow Spring are not authorized under the licence. The appeals were filed by the Minister and William Berscheid, the owner of the property on which Marlow Spring and the works are located. The Minister sought to have the order reversed while Mr. Berscheid sought to have the licence cancelled.

The Board found that any procedural errors made by the Deputy Comptroller were cured by the hearing before the Board. The Board also found that it was appropriate to cancel the licence, because the existing works did not consist of the structures authorized in the licence and were not located at Marlow Spring.

Therefore, the existing works did not comply with the conditional water licence, which provides grounds for cancelling the licence pursuant to section 23(2)(f) of the *Water Act*. The Board also found that groundwater cannot be licenced under the *Water Act,* and that the existing works were drawing ground water. Therefore, the works did not comply with the *Act*, providing further grounds for cancelling the licence pursuant to section 23(2)(e) of the *Water Act*. In addition, the Board found that the Minister had, for thirty successive years, failed to make beneficial use of the water licenced under the licence, and offered no reasonable explanation for this. This provided yet further grounds for cancelling the licence, pursuant to section 23(2)(a) of the *Water Act*. Finally, the Board found that the Minister had no way of accessing the property to restore beneficial use of the water unless it expropriated an easement, which the Minister had shown no intention of doing. Therefore, the Board ordered that the licence be cancelled. Mr. Berscheid's appeal was allowed and the Minister's appeal was dismissed.

99-WAT-10 Gordon and Cynthia James v. Engineer under the *Water Act*

Decision Date: April 13, 1999

Panel: Jane Luke

Gordon and Cynthia James appealed the order of an Engineer under the *Water Act* requiring them to remove a tarp covered with sand fill from the foreshore of their leasehold property on Paul Lake. They argued that the order should be overturned on the grounds that the lake's current high water mark is not its natural boundary, and the tarp and sand are well above the lake's natural boundary.

The Board found that the natural boundary of the lake is its current high water mark and not the level that existed prior to the construction of a dam forty years earlier. The Board found that the impact of the tarp and sand on the beach was not minimal, and the fact that a sand beach had been constructed at a park on the lake was no reason to permit similar changes at other sites on the lake. While the tarp covered only 40 square metres, the Board noted that the natural vegetation and invertebrate life under it had been completely destroyed. The Board concluded that the sand covered plastic tarp constituted unauthorized "changes in and about a stream," and that the order was reasonable and appropriate. The appeal was dismissed.

99-WAT-11(a) Atco Lumber Ltd. v. Deputy Comptroller of Water Rights (Arrow Lakes Power Development Corporation, Third Party)

Decision Date: April 30, 1999

Panel: Toby Vigod

Arrow Lakes Power Development Corporation applied to dismiss Atco Lumber Ltd.'s appeal of the Deputy Comptroller's decision to grant a water licence to Arrow Lakes, authorizing the construction of a transmission line. The licence had been issued in accordance with a Project Approval Certificate under the *Environmental Assessment Act*. Arrow Lakes applied to dismiss the appeal on the grounds that Atco did not have standing to appeal, its grounds for appeal were deficient and the Board had no jurisdiction to grant the remedy requested by Atco.

The Board found that Atco's land would be physically affected by the issuance of the licence, and could be expropriated as a result of the licence. If a person's land can be expropriated as a direct result of the granting of a licence, the Board found that the person must have a right of appeal under section 40(1)(b) of the W*ater Act*. Therefore, the Board found that Atco had standing to appeal. The Board also found that Atco had provided some grounds for appeal, and Atco was not barred from adding new grounds for appeal in an amended Notice of Appeal. The Board held that Atco's request that the project be "put on hold" was beyond the Board's jurisdiction. However, Atco now appeared to be seeking the relocation of the transmission line, or the setting aside of the Deputy Comptroller's decision pertaining to the location of

the line, and the Board found that it had jurisdiction to consider those remedies. The application was denied.

99-WAT-11(b) Atco Lumber Ltd. v. Deputy Comptroller of Water Rights (Arrow Lakes Power Development Corporation, Third Party)

Decision Date: August 31, 1999

Panel: Toby Vigod

Atco Lumber Ltd. appealed the decision of the Deputy Comptroller to grant a water licence to Arrow Lakes Power Development Corporation, authorizing the construction of a 49-kilometre transmission line as part of the Keenleyside Power Plant Project. Atco and Arrow Lakes subsequently negotiated an agreement that resolved the issues raised in the appeal. As a result, the Board issued a consent order to dispose of the appeal.

99-WAT-14 and 99-WAT-15 Fred Helfrick and John Ross v. Engineer under the *Water Act*

Decision Date: November 19, 1999

Panel: Toby Vigod

Fred Helfrick and John Ross appealed two separate orders issued by an Engineer under the *Water Act*. One order was issued to Mr. Helfrick; the other was issued to Mr. Ross. Both orders were issued to address "the unauthorized removal and clearing of foreshore rocks" on the foreshore of Shuswap Lake fronting two Crown lease blocks where the Appellants were tenants. The Appellants argued that the orders should be cancelled because the Engineer did not have jurisdiction to make the orders. They submitted that the Engineer made the orders to protect fish habitat, a matter under the jurisdiction of the federal *Fisheries Act*.

The Engineer failed to provide his submissions in accordance with the schedule set out by the Board, and advised that he was unable to respond due to other work matters. After granting two extensions, the Board notified the Engineer that if it did not receive his response by a set date, it would cancel the orders as requested by the Appellants. The Engineer then advised the Board that he had not been able to address the appeals, and that he would be closing his files.

Based on the information available, the Board found that the orders should be cancelled. However, the Board made no finding on the jurisdictional issue, noting that this was an important legal question which the Board was not prepared to decide without the benefit of full argument by all interested parties. The appeals were allowed.

99-WAT-21 Vera Hambly v. Regional Water Manager

Decision Date: November 18, 1999

Panel: Toby Vigod

Vera Hambly appealed a decision of the Regional Manager to cancel a conditional water licence held by her and two other property owners. She appealed on the grounds that she did not receive notice of the pending cancellation and was not aware that a failure to make beneficial use of water under the terms of the licence could result in cancellation of the licence. Ms. Hambly sought an order rescinding the Regional Manager’s decision and restoring the licence.

The Board found that Ms. Hambly had changed her address some time after the licence was transferred to her, and that it was her responsibility to notify the Ministry of Environment, Lands and Parks of her change of address. As she failed to do so, it was not the Ministry's fault that the notice had not reached her. The Board found that the Regional Manager had complied with the notice requirements of the *Water Act* and that the notice was sufficient. The Board also found that her intended use of the water was for irrigation only, and not for domestic purposes as authorized in the licence. Therefore, the Board found that cancellation of the licence was appropriate in the circumstances. The appeal was dismissed.

99-WAT-31(a) Earl Devlin v. Engineer under the *Water Act* (Duncan Devlin, Third Party)

Decision Date: July 28, 1999

Panel: Toby Vigod

Earl Devlin applied for a stay of the Engineer's order requiring him to drain the water impounded by two dams that he had constructed on his property, and to completely remove the two dams. Mr. Devlin had constructed the dams to provide a water source in the event of a fire in the area.

The Board found that any financial loss to Mr. Devlin, or the remote possibility of fire, did not outweigh the more imminent possibility of loss of life and property should the dams fail. The application for a stay was denied.

99WAT-32(a) and 36(a) Shirley M. Daigle v. Assistant Regional Water Manager (Judith and David Oliver, Third Party)

Decision Date: September 13, 1999

Panel: Judith Lee

Shirley Daigle applied for a stay of the order of the Regional Manager requiring her to excavate a channel to drain water from a meadow on an adjacent property. Ms. Daigle requested a stay of the order until such time as she could afford to put in a deeper well or secure a water licence on a nearby stream. The application for a stay was granted.

99-WAT-37(a) Duncan Devlin v. Engineer under the *Water Act* (Earl Devlin, Third Party)

Decision Date: August 30, 1999

Panel: Toby Vigod

Duncan Devlin applied for a stay of the Engineer's order requiring him to drain the water impounded by a dam that he had constructed on his property, and completely remove the dam. Mr. Devlin had not obtained a water licence before beginning the construction of the dam. Mr. Devlin requested that the order be stayed until such time as he could afford to put in a deeper well to supply his domestic water needs, or until he could secure a water licence on the creek at issue.

The Board found that any financial loss or inconvenience to Mr. Devlin of finding an alternative water source in the summer months was outweighed by the more imminent possibility of downstream damage should the dam fail. The application for a stay was denied.

Wildlife Act

98-WIL-07 and 98-WIL-11 Heidi Gutfrucht and Guy Anttila v. Regional Wildlife Manager

Decision Date: April 16, 1999

Panel: Toby Vigod, Richard Cannings, Christie Mayall

Heidi Gutfrucht and Guy Anttila were licenced guide outfitters in the Skeena Region. They filed separate appeals of two decisions of the Regional Wildlife Manager regarding their annual quotas for grizzly bears for the 1998/99 hunting season. Ms. Gutfrucht requested that her quota be increased, and Mr. Anttila requested that his 1997/98 quota be reinstated. They argued that the Regional Manager had acted arbitrarily in deciding their 1998/99 quotas. Ms. Gutfrucht argued that the Fuhr-Demarchi model used by the Regional Manager to estimate the grizzly bear population produced very conservative population estimates, resulting in similarly conservative quotas. She also argued that it was unreasonable for the Regional Manager to use the guideline, which included unreported kill (including non-hunting mortality) in the estimates of total kill. Mr. Anttila argued that the bear population had been underestimated, as there was a large discrepancy with his own sightings of bears.

The Board found that the discrepancy between the Regional Manager's estimates and Mr. Anttila's sightings could have been due to the difficulty of ensuring that animals were not double counted. The Board found that unreported kills should be expressed as a percentage of the maximum harvest rate in order to reflect the incidence of poaching in a given area or cripple loss. The Board also found that there had been a recommendation for the closure of hunting in the region due to overkill of female grizzlies. The Board accepted that the Fuhr-Demarchi model of estimating grizzly bear populations was reasonable, and that the Regional Manager did not act arbitrarily in setting the quotas. The appeals were dismissed.

98-WIL-10 Harry McCowan v. Regional Wildlife Manager

Decision Date: May 5, 1999

Panel: Toby Vigod

Harry McCowan appealed the decision of the Regional Manager to assign quotas for the harvest of black bears in the region in which Mr. McCowan operated as a licenced guide. The Regional Manager had imposed the quota to allow time to consult with the Haisla First Nation, who had made a claim for the harvest of black bears in the area, and had raised concerns about the declining populations of bears in the Kitlope watershed. Mr. McCowan requested that any quota for black bear be eliminated from his licence. Mr. McCowan argued that the Regional Manager's discretion was fettered by a decision of the Director of Wildlife acknowledging the Haisla's rights. He also contended that the population of black bears in the region was both healthy and increasing, and that the quota was not based on sound wildlife management. Mr. McCowan also requested that the current boundary lines dividing his guide territory be eliminated.

The Board found that it was reasonable for the Regional Manager not to adjust Mr. McCowan's quota as consultation with the Haisla was underway. In addition, the Board found that aboriginal hunting rights were a relevant consideration for the Regional Manager. The Board noted that the Regional Manager was willing to consider options other than a quota for the next season, as the black bear population in the region was healthy. The Board found that the option of setting a non-binding guideline rather than a quota was a reasonable approach. The Board refused to change the boundaries of Mr. McGowan's guide territory, but urged the Regional Manager to reconsider the boundaries. The appeal was dismissed.

98-WIL-19 Stuart Maitland v. Regional Wildlife Manager

Decision Date: May 17, 1999

Panel: Marilyn Kansky

Mr. Maitland appealed the decision of the Regional Manager refusing his application for angling days on McKusky Creek, Hendrix Creek, Spanish Creek, and Deception Creek and for considering them as "classified waters." Mr. Maitland requested that his 1998/99 angling guide licence and angling guide operating plan be amended, to grant him angler days for those creeks. Mr. Maitland submitted that, although each of the four subject creeks eventually flow into classified waters, none of the creeks themselves should be considered classified. Mr. Maitland also raised the question of whether he should be allowed to use angler days allocated for the Horsefly River on any unspecified tributary of the Horsefly River, such as McKusky Creek.

The Board found that Hendrix Creek, Spanish Creek and Deception Creek were tributaries of an unclassified portion of a river, and that unspecified tributaries of the unclassified portion of a river are not classified waters within the meaning of the *Angling and Scientific Collection Regulation*. The Board found that the application for angling days with respect to Hendrix Creek, Spanish Creek, and Deception Creek should have been dealt with by the Regional Manager as an application for unclassified waters. However, the Board found that McKusky Creek, as an unspecified tributary of a classified river, is a classified water under the *Regulation*. The Board noted that Mr. Maitland's request to amend his angling guide licence and angling guide operating plan for 1998/1999 could not be accommodated, as that licencing season was over. The Board directed the Regional Manager to consider Hendrix, Spanish and Deception creeks as unclassified waters if Mr. Maitland applied for angler days on those creeks for the next season. Regarding McKusky Creek, the Board found that the intent of the licence was not to include any unspecified tributaries of the Horsefly River. The appeal was allowed, in part.

98-WIL-25 Keith Douglas v. Regional Wildlife Manager

Decision Date: July 14, 1999

Panel: Toby Vigod

Keith Douglas appealed a 1998 decision of the Regional Manager refusing to grant him an angling guide licence and quota for the "Class I" section of the Zymoetz River ("Zymoetz I"). Following his decision, the Regional Manager amended his reasons for refusal. He stated that he could not approve a plan that would grant angler days that had been returned to the Crown and were consequently unallocated. Mr. Douglas appealed to the Board on the grounds that the Regional Manager did not properly exercise his discretion.

The Board found that the Regional Manager had no legal authority to dispose of an angling day quota that had reverted to the Crown. Nevertheless, the Board found that Mr. Douglas could obtain guided angler days on Zymoetz I by the Regional Manager issuing a permit pursuant to section 70(1) of the *Wildlife Act*. The Board appreciated that this would create a fourth guide on Zymoetz I, but found that there was no legal impediment to issuing a permit to a fourth guide. The Board sent the matter back to the Regional Manager with directions to issue a permit to Mr. Douglas for 1999-2000 for 25 guided angler days for Zymoetz I.

98-WIL-26 and 98-WIL-27 Marty Loring and Greg Loring v. Deputy Director of Wildlife

Decision Date: April 26, 1999

Panel: Christie Mayall

Marty and Greg Loring filed separate appeals of the decisions of the Deputy Director to cancel their hunting licences (5 years for Marty and 4 years for Greg), cancel their firearm carrying privileges (two years), and requiring that they successfully complete the Conservation Outdoor Recreation Education (C.O.R.E.) examinations before their hunting licence privileges could be reinstated. The Lorings had been hunting with Mr. Testawich, a status Indian with hunting rights under Treaty 8. The hunting party killed a three-point buck out of season. The Lorings argued that their role in the hunt was to assist Mr. Testawich, who is disabled, in exercising his aboriginal right to hunt. They argued that the Deputy Director failed to consider the fact that neither of the Lorings discharged a firearm at any point during the incident and that, in a Provincial Court trial, they were acquitted of six charges under the *Wildlife Act*.

The Board found that the acquittal did not prevent the Deputy Director from taking action against the Lorings. In addition, the Board found that the Lorings' evidence was not credible and should not be given much weight. The Board concluded that Marty Loring was the driver of the truck that the hunting party had been using, and that he fired at least one shot at the buck. The Board found that Marty Loring's actions in shooting the deer and Greg Loring's participation in the illegal hunt constituted "sufficient cause" to cancel their hunting and firearm licences. The Board also concluded that the length of the hunting suspensions was reasonable, as the Lorings demonstrated poor hunting ethics and an intent to violate the law. The Board found that the four-year cancellation of Greg Loring's hunting licence takes into account his lesser role in the hunt. The Board varied Greg Loring's firearm suspension, reducing it to one year. Marty Loring's appeal was dismissed. Greg Loring's appeal was allowed, in part.

98-WIL-32 Robert Mason v. Regional Wildlife Manager

Decision Date: July 27, 1999

Panel: Christie Mayall

Robert Mason appealed a decision of the Regional Manager refusing to issue him an assistant guide licence. In 1996, Mr. Mason was as an assistant guide. While he was guiding an American hunter, the hunter shot from a road at a decoy on cultivated land. Mr. Mason pled guilty to three offences under the *Wildlife Act,* was fined $3,000, had his hunting licence suspended for 18 months, and was required to take the C.O.R.E. course before he could have his licence reinstated. When Mr. Mason applied for an assistant guide licence in 1998, the Regional Manager refused the licence on the basis that the offences for which Mr. Mason had been convicted for the 1996 incident "were of a very serious nature and reflected upon his inability to act responsibly as a guide." Mr. Mason argued that the Regional Manager fettered his discretion by not taking into account the individual merits of his case.

The Board found that the Regional Manager had taken into consideration the objective of consistency in decision making, as well as the specific merits of Mr. Mason's case. The Board found that the Regional Manager has discretion under section 61(1)(a) of the *Act* to refuse to renew a person's licence where that person has been convicted of an offence under the *Act*. The Board noted that assistant guides are responsible to ensure that they, and their clients, respect the province's laws concerning wildlife and are in a position of public trust. Therefore, the Board found that the Regional Manager was correct in deciding not to issue Mr. Mason a licence for the 1998/99 season. However, the Board recommended that the Regional Manager consider granting Mr. Mason an assistant guide licence for the next season if he applied. The appeal was dismissed.

98-WIL-39 Thomas Schreiber v. Regional Wildlife Manager

Decision Date: July 23, 1999

Panel: Toby Vigod

Thomas Schreiber appealed a decision of the Regional Manager to issue him a trapping licence with a condition restricting the calibre of firearm he was allowed to carry. Mr. Schreiber argued that the restriction was unreasonable and that he should be able to carry a firearm of his choice when he is trapping. He submitted that, despite a history of animosity between himself and the Conservation Officer service, there was no evidence that he had misused a firearm or that he would be a threat to the public. He submitted that the restriction was inappropriate because, in the course of trapping, he is around carcasses and blood that can attract grizzlies and cougars and that he needs a higher calibre rifle for protection.

The Board found that the area where Mr. Schreiber trapped did contain grizzly bears and that a .22 calibre rifle would not be an effective tool for protection. The Board also found that Mr. Schreiber had demonstrated safety in using firearms. The Board concluded that, although Mr. Schreiber may have a quick temper and may have made some unfortunate remarks, there was no evidence that he would use his gun in an inappropriate manner. The Board concluded that the condition restricting the calibre of Mr. Schreiber's rifle was not reasonable in the circumstances. The appeal was allowed.

99-WIL-01 Alvie Rema v. Deputy Director of Wildlife

Decision Date: October 18, 1999

Panel: Toby Vigod

Alvie Rema appealed a decision of the Deputy Director cancelling his hunting and firearm licences for three years and requiring that he successfully complete the C.O.R.E. program before his licence could be reinstated. He was also required to deliver his B.C. Resident Hunter Number Card to the Deputy Director. These actions were taken after Mr. Rema was found to have committed two hunting and firearms violations (discharging a firearm from a vehicle and hunting grizzly bear without a species licence). Mr. Rema submitted that the length of the suspension was inordinate and vindictive considering the offence and the fact that his conviction on one of the charges was overturned on appeal. He also submitted that there were other factors that the Deputy Director did not consider in making his decision, and that these points raised a reasonable apprehension of bias. He asked that the decision be rescinded.

The Board found that the Deputy Director was not biased in making his decision. The Board found that the Deputy Director had properly considered all but one of the relevant factors in making his decision. The Board found that the Deputy Director may consider that charges have been laid against a person, even if a court acquits the person or stays those charges, and that the range for licence cancellation is circumscribed by the other periods in the regulations. The Board reviewed the suspension periods ordered in similar past cases before the Board, and found that the three-year suspension period was excessive. The Board found that a two-year suspension was appropriate. The appeal was allowed, in part.

99-WIL-05 Ken Robins v. Regional Wildlife Manager (Guide Outfitters Association of B.C., Third Party)

Decision Date: October 8, 1999

Panel: Christie Mayall, Richard Cannings, Elizabeth Keay

Ken Robins appealed the decision of the Regional Manager to assign a quota of one grizzly bear to Mr. Robins' guide area for the spring 1999 hunting season. Mr. Robins submitted that the reduction of his quota would not have occurred if a translocated female "problem" bear that had been brought into the management area and subsequently killed had not been included in the Regional Manager's calculations. Mr. Robins sought an order revoking the decision and assigning his guide area a quota of two grizzly bears for the season. He further requested that, because the spring season was almost over by the time

the appeal was heard, the additional grizzly be carried forward as additional quota in the next three-year allocation period.

The Board found that it was reasonable to discount the translocated bear from the population of the management unit area when it had only been moved there five weeks previously. The Board found that there was no evidence that this bear was settled enough in its new area to count as a kill against a quota calculated from habitat carrying capacity. The Board also found that a new calculation, discounting the translocated female bear kill, indicated that the same harvest margin was available as when Mr. Robins was issued a quota for three bears in 1997 and 1998. Therefore, the Regional Manager was not correct in issuing Mr. Robins a quota of one bear for 1999. The Board directed the Regional Manager to discount the problem bear from the balance sheet. The Board found that it did not have jurisdiction to carry forward the bear to the 2000-2002 period. However, it recommended that the Regional Manager add one bear to Mr. Robins' quota for 2000. The appeal was allowed.

99-WIL-08 and 98-WIL-23(a) David Beranek v. Regional Enforcement Manager and Regional Fish, Wildlife and Habitat Manager

Decision Date: May 11, 1999

Panel: Toby Vigod

Two applications were made to the Board regarding David Beranek's appeal of the Regional Enforcement Manager's letter advising Mr. Beranek that he would not be able to obtain a permit for the possession of the horns of a mountain sheep that he had found. The Enforcement Manager applied to dismiss the appeal arguing that a warning is not an appealable decision. The Regional Manager applied to have a previous appeal involving Mr. Beranek reopened [Appeal No. 98-WIL-23].

The Board found that the Enforcement Manager had no authority to issue or to refuse permits. The Board found that when the Enforcement Manager notified Mr. Beranek that he would not be able to obtain a permit, he was dealing with an enforcement issue and was not refusing to grant a permit. As section 101 of the *Wildlife Act* limits the Board's jurisdiction to hearing appeals from certain decisions, the Board found that the Enforcement Manager's decision was not appealable to the Board. The Board also found that the circumstances did not justify reopening its previous decision. The Board was not convinced that new evidence was available and, in any case, the new information would not have changed the Board's earlier decision. The application to dismiss the appeal was granted. The application to reopen the previous appeal was denied.

99-WIL-10(a) Steelhead Society of British Columbia v. Regional Fish and Wildlife Manager

Decision Date: April 1, 1999

Panel: Judith Lee

The Society applied for a stay of the decision of the Regional Manager to suspend its fish collection permit for two weeks. The permit allowed the Society to capture steelhead for the purposes of developing a steelhead population estimate for the Bulkley and Morice Rivers ("the Project"). The Regional Manager suspended the permit to allow for an independent review of the scientific validity of the Project, as there were concerns that the methodology being used departed significantly from standard mark and release techniques. The Society argued that, if the stay application was denied, it would not have adequate opportunity to sample the river and the Project might fail.

The Board found that the Society might suffer irreparable harm if the stay was not granted due to the loss of its opportunity to sample during a critical time period. However, the Board accepted that there was

some question as to the scientific validity of the methodology and techniques being used, and found that, on balance, the protection of the fisheries resource took precedence over the Project. The application for a stay was denied.

99-WIL-11 Normand Gagné v. Senior Conservation Officer

Decision Date: December 22, 1999

Panel: Katherine Hough

Normand Gagné appealed the decision of a Senior Conservation Officer to deny his application for a permit to own or possess the hides of a female black bear and her two cubs. The bears had been shot by a third party as problem wildlife on private property. Mr. Gagné had collected the carcasses after being assured by the third party and a Conservation Officer, who happened to be his son-in-law, that he would receive a permit to possess and sell the hides. Mr. Gagné sought an order returning the hides to him and issuing a permit allowing him to sell the hides.

The Board found that the mother bear was killed for the purpose of protecting property and that the *Wildlife Act* provides that wildlife killed in such a circumstance remains the property of the government. However, it found that the cubs were killed for humane reasons, and with the verbal authorization of a Conservation Officer. In these circumstances, the *Act* provided that the cubs were the property of the third party who killed them. Accordingly, the Board found that Mr. Gagné was entitled to the cubs' hides by way of transfer of ownership from the third party. With regard to the hide of the mother bear, the Board found that the Senior Conservation Officer's refusal to issue a permit was unreasonable. However, Mr. Gagné wanted ownership of the hides and the provisions of the *Wildlife Act* were such that the issuance of a permit to possess the mother bear's hide would not pass ownership of the hide to Mr. Gagné. The Board therefore ordered the Senior Conservation Officer to offer Mr. Gagné a permit to possess the hide of the mother bear and, should he refuse the offer, to notify him of the time and place of the public auction at which the hide would be sold. In the event that the hide was not sold at auction, the Senior Conservation Officer was ordered to offer to sell the hide to Mr. Gagné in accordance with the ministry's policy. The appeal was allowed.

99-WIL-15 Manfred Rodenkirchen v. Deputy Director of Wildlife

Decision Date: May 28, 1999

Panel: Toby Vigod

Mr. Rodenkirchen appealed a decision of the Deputy Director prohibiting Mr. Rodenkirchen from acting as a guide outfitter for one year, and preventing him from benefiting from his guide area for six months. Prior to a hearing, the parties agreed to dispose of the appeal on terms set out in a consent order.

The Board ordered, by consent, that the Deputy Director's decision be amended to reduce the penalty slightly.

99-WIL-17 Ron Thompson v. Regional Wildlife Manager

Decision Date: February 21, 2000

Panel: Marilyn Kansky

This was an appeal by Ron Thompson of a decision of the Acting Regional Manager with respect to Mr. Thompson's angling guide operating plans and angling guide licences for 1999/2000. Mr. Thompson

argued that the Regional Manager erred in limiting his guiding activities on the Chilcotin River to "below Hanceville," in allocating him 600 days on the West Road River when he asked for 1040 days, and in refusing to grant him a quota of 50 angling days for the Nazko, Euchiniko and Baezaeko Rivers as unclassified waters. He also argued that the seasonal distributions added to his operating plans were unreasonable.

The Board found that the "below Hanceville" restriction was based, in part, on information resulting from a public consultation process that was flawed, and on an unreliable angling use plan. It referred this matter back to the Regional Manager for a new consideration. Regarding the West Road River quota, the Board noted that the total days to be allocated for that river is set out in Schedule A of the *Angling and Scientific Collection Regulation*. Since those days were fully subscribed, the Regional Manager did not err in limiting Mr. Thompson to 600 days. Further, as unspecified tributaries of the West Road River, the Board found that the Nazko, Euchiniko and Baezaeko Rivers are classified waters within the meaning of the legislation, and no additional days could be allocated to him. However, Mr. Thompson could operate on those rivers as part of his West Road River allocation.

Finally, the evidence indicated that there was no expectation that the seasonal distribution would be complied with, yet it could be enforced under the *Act*. The Board found that it was unreasonable to include terms and conditions that are not expected to be complied with, and ordered that the distribution be deleted from Mr. Thompson's operating plans. The appeal was allowed, in part.

99-WIL-19 Kin Hung Chan v. Deputy Director of Wildlife

Decision Date: March 17, 2000

Panel: Katherine Hough

This was an appeal by Kin Hung Chan of a decision of the Deputy Director of Wildlife canceling Mr. Chan's hunting licence for a period of five years, two and one-half months, for hunting with a firearm during prohibited hours and pitlamping. Mr. Chan and his companion, Mr. Rodrigues, had both shot at a deer decoy from beside their vehicle, 37 minutes after the close of hunting. Mr. Rodrigues' cancellation was one year less than Mr. Chan's. Mr. Chan appealed on the grounds that his licence cancellation was excessive.

The Board concluded that Mr. Chan shot at the decoy because he thought it was a wounded animal already shot by Mr. Rodrigues. Upon considering videotape evidence not viewed by the Deputy Director, the Board also found that the Deputy Director erred in finding that Mr. Chan was pitlamping. However, the Board found that Mr. Chan's actions showed poor judgment, especially given his years of hunting experience. The Board found that his experience, prior conviction and warning, and the fact that he initially denied shooting at the decoy, distinguished his circumstances from those of Mr. Rodrigues and warranted a longer suspension. Accordingly, the Board reduced Mr. Chan's cancellation by five months. The appeal was allowed, in part.

99-WIL-24 Calvin Schuk v. Regional Wildlife Manager

Decision Date: March 6, 2000

Panel: Katherine Hough

This was an appeal against a decision of the acting Regional Manager to refuse Mr. Schuk a permit to possess the hide of a grizzly bear that he shot, believing that it was the bear that killed one of his calves. Mr. Schuk sought a permit to possess the hide as compensation for the loss of the calf that it killed. The Regional Manager refused the permit on the grounds that he had no authority to issue a permit for

compensation purposes and that government policy only allows personal possession of a dead grizzly bear where the circumstances of the killing of the bear are sufficiently exceptional.

The Board found that a permit for possession of wildlife killed as nuisance or dangerous animals is authorized under section 1 of the *Wildlife Act Permit Regulations* or section 19 of the *Wildlife Act*. It also found that there was nothing in the legislation that prohibited issuing a permit as compensation for the loss of property or livestock due to predation by wildlife. However, in accordance with government policy, the Board found that there were sufficiently exceptional circumstances in this case for issuing a permit to possess the bear hide. Mr. Schuk's family had suffered livestock losses over the years due to wildlife predation, the grizzly bear had killed one of the calves from his herd and it was likely that the bear would come back for others. Accordingly, the Board found that there were no alternative measures available to Mr. Schuk in the circumstances. The Board ordered the Regional Manager to issue Mr. Schuk a permit to possess the grizzly bear hide and to release the hide to him. The appeal was allowed.

99-WIL-26 Blaine Stark v. Deputy Director of Wildlife

Decision Date: February 15, 2000

Panel: Carol Quin

This was an appeal by Blaine Stark of a decision of the Deputy Director of Wildlife, which canceled Mr. Stark's hunting licence privileges and made him ineligible to obtain a hunting licence until after January 1, 2002. Mr. Stark failed to appear at the hearing for the appeal without prior notice or explanation. The Board, therefore, ordered that the appeal be dismissed as abandoned.

99-WIL-27 and 99-WIL-28 Abe Crimeni and Ken Russell v. Senior Conservation Officer, acting under the delegated authority of the Regional Wildlife Manager

Decision Date: January 25, 2000

Panel: Toby Vigod

Abe Crimeni and Ken Russell appealed the Senior Conservation Officer's decisions refusing them a permit to possess the bald eagle carcasses they found under Hydro lines. The Appellants sought their respective possession permits so they could "live mount" the eagles for display. The permits were refused because "regional policy stipulates that there will be no permits issued for possession of bald eagles to non-First Nations people." The Appellants appealed on the grounds that the decisions and the regional policy were discriminatory, the regional policy was without statutory authority, and the Senior Conservation Officer acted without authority, or arbitrarily and contrary to the rules of natural justice.

The Board found that the Appellants' assertions that the decisions and policy were discriminatory were insufficient to make out their respective cases on the point. The Board found that the Minister and his/her delegates may make policy in relation to possession permits, and that it was within the authority of the Senior Conservation Officer to make the decisions being appealed. However, the Board found that the regional policy, on its face, fetters the discretion to be exercised under section 1 of the *Wildlife Act Permit Regulations*, and that the Senior Conservation Officer fettered his discretion by rigidly applying that policy when he denied the Appellants' applications. The Board concluded that the appropriate remedy was to send the matters back to the Regional Office for reconsideration with directions.

99-WIL-29 Scott Ellis v. Deputy Director of Wildlife

Decision Date: October 21, 1999

Panel: Toby Vigod

Scott Ellis appealed a decision by the Deputy Director revoking his hunting licence privileges. After the Deputy Director made the decision, Mr. Ellis supplied him with additional evidence of his fitness to hunt and to hold a hunting licence. The Deputy Director acknowledged that, had he seen this evidence before making the decision, his decision would have been different. The parties agreed to dispose of this according to the terms of a consent order.

With the consent of the parties, the Board ordered that Mr. Ellis' hunting licence be reinstated, that he was eligible to obtain a new hunting licence without completing the C.O.R.E. examination, that his B.C. hunter number and card were no longer suspended, and that he was no longer required to submit his hunter number card to the Deputy Director.

Summaries of Court Decisions Related to the Board

Howe Sound Pulp and Paper Ltd. v. Environmental Appeal Board, Deputy Director of Waste Management, Regional Waste Manager, and Terry Jacks

Decision date: April 29, 1999

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

Howe Sound Pulp and Paper Ltd. ("HSPP") owns and operates a pulp and paper mill in Port Mellon, British Columbia. HSPP operates the mill under the authority of a pollution permit issued by the Regional Waste Manager. In 1997, HSPP applied to the Regional Manager for an amended permit, as it found the conditions attached to the permit to be onerous. In April 1997, the Regional Manager issued an amended permit that provided for specified levels of sulphur dioxide and nitrogen dioxide emissions into the air. An environmental group called Environmental Watch, founded by Terry Jacks, notified the Deputy Director of Waste Management that they were going to appeal the decision to amend the permit. The Deputy Director granted standing in the appeal to HSPP, which then raised the issue of whether Environmental Watch should have standing. The Deputy Director decided that Environmental Watch had no standing to appeal, but granted standing to Mr. Jacks.

In March 1998, HSPP appealed the decision to grant Mr. Jacks standing to the Board. The Board upheld the decision of the Deputy Director. The Board found that, because of his proximity to the mill, Mr. Jacks could reasonably be expected to be affected by the emissions. The Board also found that he did not need to provide evidence that his interests will likely or necessarily be affected; only that they may be affected. HSPP applied for a judicial review of the Board's decision.

The Supreme Court held that, with respect to environmental matters, the Board has expertise that the court does not have, and the question of standing is one that was intended by the legislature to be left to the exclusive jurisdiction of the Board. The Court further held that the Board's decision upholding the decision of the Deputy Director to grant Mr. Jacks standing to appeal was reasonable and should not be disturbed. The petition by HSPP was dismissed.

Summaries of Cabinet Decisions Related to the Board

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

APPENDIX I

Legislation and Regulations

The Environmental Appeal Board is established under section 11 of the *Environment Management Act*. That *Act* defines the structure of the Board and provides the Board with the authority to hear appeals of administrative decisions made under six statutes; five of which are administered by the Ministry of Environment, Lands and Parks, and the sixth is administered by the Ministry of Health. Relevant provisions from the *Environment Management Act*, the *Environmental Appeal Board Procedure Regulation*, and each of the statutes from which the Board hears appeals are reproduced below.

Environment Management Act

Environmental Appeal Board

11 (1) The Lieutenant Governor in Council must establish an Environmental Appeal Board to hear appeals that under the provisions of any other enactment are to be heard by the board.

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

(3) The board consists of a chair, one or more vice chairs and other members the Lieutenant Governor in Council appoints.

(4) The Lieutenant Governor in Council may

(a) appoint persons as temporary members to deal with a matter before the board, or for a period or during circumstances the Lieutenant Governor in Council specifies, and

(b) designate a temporary member to act as chair or as a vice chair.

(5) A temporary member has, during the period or under the circumstances or for the purpose for which the person is appointed as a temporary member, all the powers of and may perform all the duties of a member of the board.

(6) The Lieutenant Governor in Council may determine the remuneration and expenses payable to the members of the board.

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

(8) The members of the board are to sit

(a) as a board, or

(b) as a panel of the board.

(9) If members sit as a panel,

(a) 2 or more panels may sit at the same time,

(b) the panel has all the jurisdiction of and may exercise and perform the powers and duties of the board, and

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

(10) The number of members that constitute a quorum of the panel or a Board may be set by regulation of the Lieutenant Governor in Council.

(11) The board, a panel and each member have all the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the Inquiry Act.

(12) In an appeal, the board or a panel

(a) may hear any person, including a person the board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body,

whose decision is the subject of the appeal or review, must give that person or body full party status.

(13) A person or body that is given full party status under subsection (12) may

(a) be represented by counsel,

(b) present evidence,

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

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

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

(14.1) The appeal board may require the appellant to deposit with it an amount of money it considers sufficient to cover all or part of the anticipated costs of the respondent and the anticipated expenses of the appeal board in connection with the appeal.

(14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:

(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

(b) if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal.

(14.3) An order under subsection (14.2) may include directions respecting the disposition of money deposited under subsection (14.1).

(14.4) If a person or body given full party status under subsection (12) is an agent or representative of the government,

(a) an order under subsection (14.2) must not be made for or against the person or body, and

(b) an order under subsection (14.2) (a) may instead be made for or against the government.

(14.5) The costs required to be paid by the government under an order under subsection (14.4) (b) must be paid out of the consolidated revenue fund.

(15) If the board or a panel makes an order or decision with respect to an appeal the chair must send a copy of the order or decision to the minister and to the parties.

Varying and rescinding orders of board

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

Environmental Appeal Board Procedure Regulation

Interpretation

1 In this regulation

"Act" means the Environment Management Act;

"board" means the Environmental Appeal Board established under the Act;

"minister" means the Minister of Environment, Lands and Parks;

"chairman" means the chairman of the board;

"objector" in relation to an appeal to the board means a person who, under an express provision in another enactment, had the status of an objector in the matter from which the appeal is taken.

Application

2 This regulation applies to all appeals to the board.

Appeal practice and procedure

3 (1) Every appeal to the board shall be taken within the time allowed by the enactment that authorizes the appeal.

(2) Unless otherwise directed under the enactment that authorizes the appeal, an appellant shall give notice of the appeal by mailing a notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.

(3) A notice of appeal shall contain the name and address of the appellant, the name of counsel or agent, if any, for the appellant, the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested.

(4) The notice of appeal shall be signed by the appellant, or on his behalf by his counsel or agent, for each action, decision or order appealed against and the notice shall be accompanied by a fee of $25, payable to the Minister of Finance and Corporate Relations.

(5) Where a notice of appeal does not conform to subsections (3) and (4), the chairman may by mail or another method of delivery return the notice of appeal to the appellant together with written notice

(a) stating the deficiencies and requiring them to be corrected, and

(b) informing the appellant that under this section the board shall not be obliged to proceed with the appeal until a notice or amended notice of appeal, with the deficiencies corrected, is submitted to the chairman.

(6) Where a notice of appeal is returned under subsection (5) the board shall not be obliged to proceed with the appeal until the chairman receives an amended notice of appeal with the deficiencies corrected.

Procedure following receipt of notice of appeal

4 (1) On receipt of a notice of appeal, or, in a case where a notice of appeal is returned under section 3(5), on receipt of an amended notice of appeal with the deficiencies corrected, the chairman shall immediately acknowledge receipt by mailing or otherwise delivering an acknowledgement of receipt together with a copy of the notice of appeal or of the amended notice of appeal, as the case may be, to the appellant, the minister's office, the 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.

(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 Board, 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 of 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, the Minister of Health if the appeal relates to a matter under the *Health Act*, and to 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.

Commercial River Rafting Safety Act

Appeals

6 (1) If the registrar suspends or cancels a registration, licence or permit or refuses to register or issue a licence, the person may appeal to the Environmental Appeal Board established under the Environment Management Act.

(2) Section 40 (2) to (7) of the Water Act applies to an appeal under subsection (1).

Health Act

Power to make regulations

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

> (m) the inspection, regulation and control, for the purposes of health protection provided in this Act, of
>
> …
>
> (ii) the location, design, installation, construction, operation and maintenance of

(C) sewage disposal systems,

…

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

(4) If a person is aggrieved by the issue or the refusal of a permit for a sewage disposal system under a regulation made under subsection (2) (m), the person may appeal that ruling to the Environmental Appeal Board established under section 11 of the Environment Management Act within 30 days of the ruling.

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

Pesticide Control Act

Appeals to Environmental Appeal Board

15 (1) For the purpose of this section, **"decision"** means an action, decision or order.

(2) Any person may appeal a decision of the administrator under this Act, or of any other person under this Act, to the appeal board.

(3) The time limit for commencing an appeal is the time limit prescribed by regulation.

(4) An appeal under this section

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

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

(5) For the purposes of an appeal under this section, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise,

whichever is earlier.

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

(7) On an appeal, the appeal board may

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

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

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

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

Pesticide Control Act Regulation

Appeals

45 (1) A person who intends to appeal to the board against the action, decision or order of the administrator or of any other person under the Act shall file the appeal in the manner required by subsection (2) within 30 days from the date of the action, decision or order against which the appeal is taken.

(2) The appellant shall file the appeal by mailing notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.

(3) A notice of appeal shall contain the name and address of the appellant, the name of counsel or agent, if any, for the appellant, the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested, and shall be signed by the appellant or on his behalf by his counsel or agent.

(4) Where a notice of appeal does not conform to subsection (3), the chairman may by mail or another method of delivery return the notice of appeal to the appellant together with written notice

(a) stating the deficiencies and requiring them to be corrected, and

(b) informing the appellant that under this section the board shall not be obliged to proceed with the appeal until a notice or amended notice of appeal, with the deficiencies corrected, is submitted to the chairman.

(5) Where a notice of appeal is returned under subsection (4) the board shall not be obliged to proceed with the appeal until the chairman receives an amended notice of appeal with the deficiencies corrected.

(6) Repealed. [B.C. Reg. 132/82.]

(7) The procedures on the appeal shall be those set out in the Environmental Appeal Board Procedure Regulation.

Waste Management Act

Definition of "decision"

43 For the purpose of this Part, **"decision"** means

(a) the making of an order,

(b) the imposition of a requirement,

(c) an exercise of a power,

(d) the issue, amendment, renewal, suspension, refusal or cancellation of a permit, approval or operational certificate, and

(e) the inclusion in any order, permit, approval or operational certificate of any requirement or condition.

Appeals to Environmental Appeal Board

44 (1) Subject to this Part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.

(2) Nothing in this section is to be construed as applying in respect of a decision made by the minister under this Act or by the Lieutenant Governor in Council.

Time limit for commencing appeal

45 The time limit for commencing an appeal is 30 days after notice of the decision being appealed is given

(a) to the person subject to the decision, or

(b) in accordance with the regulations.

Procedure on appeals

46 (1) An appeal under this Part

> (a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environment Management Act*, and
>
> (b) subject to this Act, must be conducted in accordance with the *Environment Management Act* and the regulations under that Act.

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

Powers of appeal board in deciding appeal

47 On an appeal, the appeal board may

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

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

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

Appeal does not operate as stay

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

Water Act

Appeals to Environmental Appeal Board

40 (1) An order of the comptroller, the regional water manager or an engineer may be appealed to the Environmental Appeal Board established under the *Environment Management Act* by

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

(b) an owner whose land is or is likely to be physically affected by the order, or

(c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

(2) The time limit for commencing an appeal is 30 days after notice of the order being appealed is given

(a) to the person subject to the order, or

(b) in accordance with the regulations.

(3) For the purposes of an appeal, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on

(a) the 14th day after the notice was deposited with Canada Post, or

(b) the date on which the notice was actually received by the person, whether by mail or otherwise,

whichever is earlier.

(4) An appeal under this section

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

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

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

(6) On an appeal, the appeal board may

(a) send the matter back to the comptroller, regional water manager or engineer, with directions,

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

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

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

Wildlife Act

Appeals to Environmental Appeal Board

101.1 (1) The affected person referred to in section 101 (2) may appeal the decision to the Environmental Appeal Board established under the *Environment Management Act*.

(2) The time limit for commencing an appeal is 30 days after notice is given

(a) to the affected person under section 101 (2), or

(b) in accordance with the regulations.

(3) An appeal under this section

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

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

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

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director, with directions,

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

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

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