

## ENVIRONMENTAL APPEAL BOARD ANNUAL REPORT 1992/93

### 1. INTRODUCTION

This third Annual Report of the Environmental Appeal Board is presented to help promote better understanding of the Board's duties and activities. It addresses Decisions rendered by Panels of the Board from hearings conducted between July 1, 1992, and June 30, 1993. Appeals which were withdrawn are not included.

Section 5 contains information on Decisions made by the Board under each *Act*. There is no section for the *Commercial River Rafting Safety Act* as there were no appeals received under this *Act* during this period. As a matter of interest, the Board has never received an appeal under this *Act*.

Summaries of the decision addressed by this report are contained in the Appendix.

This report also contains some very general information about the functions of the Board. For further information, the reader is referred to the specific *Acts*. Questions can also be addressed to:

**Environmental Appeal Board**  
Parliament Buildings  
Victoria, British Columbia  
V8V 1X4  
Telephone 387-3464 Fax 356-9923

Decisions of the Board may be viewed at any of the following libraries:

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

Decisions are also available through Quick Law Data Base and are reported in Environmental Law Digest.

Act-specific pamphlets explaining the appeal procedure are available through the Board office.



## **2. THE BOARD**

The Environmental Appeal Board is established under the provisions of the *Environment Management Act* (1981). It is an independent agency whose purpose is to hear appeals from Decisions under five statutes administered by the Ministry of Environment, Lands and Parks, namely: the *Pesticide Control Act*, the *Waste Management Act*, the *Water Act*, the *Wildlife Act* and since 1988 the *Commercial River Rafting Safety Act*.

During the 1993 legislative session, the Health Act was amended to enable the Environmental Appeal Board to hear appeals against decisions regarding the issuance or refusal of permits or authorizations for sewage disposal systems and terms or conditions attached to such permits or authorizations. In order for this amendment to become law, the Regulation must be prepared and the amendment proclaimed. At the time of writing this report, it was anticipated this would occur in January of 1994.

### **2.1 Administrative Law**

In deciding appeals, the Board applies the principles of Administrative Law. The principles of administrative law include the concept of jurisdiction, the rules of natural justice and the rule against bias.

In other words, the Board must treat all parties to the hearing fairly and consider only the evidence presented at the hearing when making a decision. Failure to observe the administrative law requirements for fair procedure may result in the court declaring a decision void and overturning it or sending it back for reconsideration.

### **2.2 Board Membership**

The Board, appointed by the Lieutenant Governor in Council, consists of part-time members, all of whom are outside the public service. The appointments are made by Order in Council and are for a two-year term. The membership of the Board is drawn from across the province and represents diverse business and technical experience.

In 1992, eleven members, including the Chair and Vice-Chair, were returned to the Board and ten new members were appointed.

During the 1992/93 period, the Board consisted of three medical doctors, three lawyers, three teachers, two professional engineers, two professional agrologists, a biochemist, a professional biologist and six members with assorted backgrounds and interests in environment and business endeavors. In addition, five members have experience in municipal government.

The Board for this report period consisted of the following members:

Ms. Linda Michaluk (Chair)	Victoria
Mr. Harry Hunter (Vice-Chair)	Surrey
Dr. Olga Barrat	North Vancouver
Ms. Deborah Davies	Saltspring Island
Ms. Kathleen Gibson	Vancouver
Mr. Scott Hall	Victoria
Mr. Harry Higgins	Salmon Arm
Mr. Hugh Hodgkinson	Hudson Hope
Ms. Victoria Huntington	Ladner
Dr. Elizabeth Keay	Vancouver
Ms. Judith Lee	Vancouver
Mr. Bill MacFarlane	Revelstoke
Ms. Christina Mayall	Tatla Lake
Ms. Heather Michel	Burnaby
Ms. Laurie Nowakowski	Nelson
Mr. Colin Palmer	Powell River
Mr. Gary Robinson	Surrey
Dr. Marjorie Ryan	Powell River
Mr. Baldev Seehra	Surrey
Dr. Max Smart	Abbotsford
Dr. John Smith	Vancouver

### **2.3 Board Policy and Procedure**

The Board has recently compiled the policies and procedures under one cover. The Environmental Appeal Board Policy and Procedure Manual will be available through the Board office in late 1993. Due to the size of the manual, there will be a cost attached. The Board is also planning to have an abridged version available free of charge. Please contact the Board office for more information.

### **3. HEARINGS**

The Board sits in Panels of one, three or five to hear appeals.

It is the responsibility of the Chair to structure the Panel for each appeal, ensuring the Panel members have the required expertise to properly adjudicate the appeal.

Hearings are generally held in the community closest to the area affected by the order under appealed. This is usually the home community of the Appellant. While this can represent a significant amount of travel for Panel members, it allows the

public in the affected area to attend should they so choose. It also allows the Panel to view the area if required.

Oral hearings are conducted unless both parties request to proceed by written appeal. The Board has on occasion ordered that an appeal which has begun as an oral procedure will conclude in writing so that matters may proceed in a timely and orderly fashion.

#### **4. APPEAL PROCEDURES**

The regulations governing appeals are found in the various acts. Each act has specific regulations regarding appeals and the reader is referred to the statutes for specific information.

##### **4.1 Notice of Appeal**

In general a prospective Appellant presents a Notice of Appeal to the Environmental Appeal Board office. This notice should contain the grounds for appeal, the orders sought, the name and mailing address of the responsible party and a cheque for \$25 for each order being appealed. The Notice must be filed within the time period identified in the relevant act.

##### **4.2 Timing and nature of Hearings**

There are two types of proceedings conducted by the Board: hearings and pre-hearing conferences. Pre-hearing conferences are a less formal proceeding, held on request, with an agenda that is set by the participants. Participation at these conferences is generally limited to the party spokespersons and one Board member. Discussions are without prejudice and decisions, if any, arising from these conferences are done by way of a memorandum of understanding signed by the party spokespersons.

In the past year, the Board has held six pre-hearing conferences, three of which resulted in the parties arriving at an agreement without the need of a formal appeal. The remaining three were used to refine the matters under appeal which allowed the parties to better prepare for the hearing.

A hearing is the more formal process by which the Board receives the evidence to be used in making its decision. Once an appeal has been accepted by the Board, the parties are identified and notified, and a hearing date is assigned. In most cases, the hearing date is within 45 days to 2 months of the appeal being filed although this can vary depending on the matter under appeal. The Board will consider requests from the parties for extending or shortening this period and will exercise discretion in deciding whether to grant these requests.

Because of the quasi-judicial nature of the hearing, the procedure is similar to that of a court. Parties are sworn, evidence is presented and witnesses are cross-examined. The public is welcome to attend.

### **4.3 Rules of Evidence**

Although the Board does not have the authority to order parties to exchange evidence in advance of a hearing, this practice is encouraged so as to enable all parties to be adequately prepared.

The Board rules of evidence differ somewhat from those of a court. These rules are:

The Board will receive all evidence submitted by the parties which the Board considers relevant.

The Board may determine, subject to the rules of natural justice, the manner in which evidence will be admitted.

The Board encourages parties to disclose to the other parties all evidence in advance of the hearing so all are prepared to proceed from an informed position. Advance notice of expert evidence should consist of a brief statement of the expert's qualifications and areas of expertise, the expert opinion to be tendered at the hearing and the basis of such opinion.

The Board accepts that it may not always be possible for disclosure of evidence to be given in advance of a hearing.

Where evidence, including expert evidence, which a party could not reasonably anticipate is presented at a hearing without any or adequate prior notice, a party may request an adjournment to consider the evidence, prepare for cross-examination and, if necessary, arrange for witnesses to address it. The Board will exercise discretion whether to grant such requests.

#### **4.4 Decisions of the Board**

Decisions are not stated at the conclusion of the hearing but are presented in writing and usually are released within one month of the conclusion of the hearing. Copies of the decision are mailed to the parties involved and the Minister of Environment, Lands and Parks. Copies of decision are available to the public once the Board has confirmation that all parties to the appeal have received their copies of the decision, or after two weeks, whichever is sooner.

#### **4.5 Appeals against Decisions of the Environmental Appeal Board**

Decisions of the Board are final; therefore, the Board may not reconsider or comment on a decision once it is set down. The Lieutenant Governor in Council (Cabinet) has authority under section 12 of the *Environment Management Act* to vary or rescind an order or decision of the Board in the public interest. Such appeals to Cabinet are not automatic and are heard at Cabinet's discretion.

Decisions of the Board can also be challenged through an application to the Court for a Judicial Review. The Court will examine the matter to determine whether or not the principles of

administrative law were followed and will rule accordingly. Generally, the ruling will either uphold the decision, or quash it and order the Board to reconsider the matter with certain qualifications.

## 5. DECISIONS

For the purposes of this report, the Decisions have been grouped together according to the Act under which appeals were filed.

### 5.1 *Pesticide Control Act*

Under s15 of the *Pesticide Control Act*,

- (1) An appeal may be filed by any person with the board against the action, decision or order of the administrator or of any other person under this Act.
  
- (4) On an appeal the board may make an order it considers appropriate.....

The duty of the Board in hearing appeals against pesticide use permits is to determine on the evidence presented, whether applying the pesticide in the manner authorized by the permit will result in unreasonable adverse effect.

The courts have ruled that the fact that a federally-registered pesticide has undergone extensive testing must have some probative value and that the Board may assume a federally registered pesticide is generally safe.

The Board recognizes that something that is generally safe is not necessarily safe in all circumstances. The Board must determine, on a permit-by-permit basis, whether the use of a pesticide as stipulated in a specific permit will result in an unreasonable adverse environmental impact.

The issue of unreasonable adverse effect arises from the *Pesticide Control Act*. Section 6 enables the Administrator to issue a permit once satisfied that the pesticide application will not cause an unreasonable adverse effect. While adverse effect is defined in the act as "an effect that results in damage to man or the environment", a definition of the qualifier "unreasonable" is not provided.

The Board has determined that the following will be considered in examining whether the use of a specific pesticide will cause an unreasonable adverse environmental impact:

1. will the quality of the air, land or water be impaired;
2. will injury or damage to property, plant or animal life result;
3. will the welfare of persons be impaired;
4. will property, plant or animal life be rendered unfit for use;

5. will loss of enjoyment of property occur;
6. can the intended benefit be achieved by a method with less inherent environmental risk;
7. those factors relevant to the matter under appeal which are brought to the Board's attention.

The Board considers anything that negatively affects the land, air, water and/or living things has an adverse environmental impact. The degree of that impact is what determines whether or not it is unreasonable. To rigidly define "unreasonable" by assigning acceptable versus unacceptable quantities, however, would fetter the Board's discretion in assessing the site-specific application under appeal. Unreasonable is, therefore, taken by the Board to mean that which is not suitable under the circumstances.

During the period covered by this report seven decisions under the *Pesticide Control Act* were issued. These decisions addressed 24 appeals filed by ten individuals and thirteen groups, one of which appealed two different permits, against seven Pesticide Use Permits. None of the Appellants chose to be represented by legal counsel. All hearings were conducted orally.

The Respondents included: the Ministry of Environment, Lands and Parks, Wildlife Branch (1 appeal); the Ministry of Forests (1 appeal); the Canada Minister of Agriculture (20 appeals); the City of Kamloops (1 appeal) and International Forest Products Ltd. (1 appeal). None of the Respondents chose to be represented by legal counsel.

Of the seven permits appealed, two allowed the application of VISION for forestry related purposes; one the application of ROUNDUP for knapweed control within a municipality; three the use of Foray 48B (BtK) for european gypsy moth eradication; and, one the use of Compound 1080 (Sodium Monofluoroacetate) for reactive control of coyotes and wolves.

In six of the seven decisions the permits were amended and the appeals dismissed. The remaining decision dismissed the appeals with no permit amendments but issued comments that were outside of the authority of the Panel to address in any other way.

## **5.2 Waste Management Act**

Under s26 of the *Waste Management Act*,

- (1) ... a person who considers himself aggrieved by a decision of
  - (b) the director or a district director may appeal to the appeal board.

Section 28 defines the powers of the Board under this *Act* as:

- (3) On considering an appeal, the board may

- (a) hold a new hearing,
- (b) confirm, reverse or vary the decision appealed from, and
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

In the period covered by this report, three decisions were set down under the *Waste Management Act* addressing four appeals. Two of the appeals were filed by the recipient of the refusal or permit and two appeals were filed by members of the public against the issuance of a permit. In one instance, two appeals were filed against one decision: one by the permit holder and one by members of the public.

The Respondent in all cases was the Ministry of Environment, Lands and Parks, specifically Industrial Waste and Hazardous Contaminants Branch (3 appeals) and Air Resources Branch (1 appeal). Where the appeals were filed by members of the public, the permit holder also had party status and in one appeal the Regional Manager requested and was granted party status.

The appeals concerned the denial of approval for an open burn (dismissed) and operating permits for a fish composting plant (upheld in part, permit amended) and an aluminum smelter (upheld in part, permit amended).

In addition to the permit amendments resulting from the aluminum smelter appeal, the Board ordered an environmental audit be undertaken. This was the first time the Board has issued an order of this type.

### **5.3 *Water Act***

Under s9 of the *Water Act*,

- (1) A licensee, riparian owner or applicant for a licence who considers that his rights would be prejudiced by the granting of an application for a licence may...file an objection to the granting of the application.

Section 38 further defines the appeal procedure by providing:

- (1.1) An appeal lies
  - (a) to the Environmental Appeal Board from every order of the comptroller...
- (5) The appeal tribunal may, on an appeal, determine the matters involved and make any order that to the tribunal appears just,...

There were five decisions issued under the *Water Act*. In all appeals, the Deputy Comptroller of Water Rights was the Respondent and four appeals involved Third Parties. In one appeal, the Regional Engineer requested and was granted party status. Although none of the Appellants were represented by

legal counsel, legal counsel was used by the Respondent in two appeals and by a third party in one appeal.

Two of the appeals pertained to regulating the private use of water; one concerned an assessment roll; one concerned the refusal of the Deputy Comptroller to allow the removal of a bedrock outcropping from a river channel; and, one concerned the cancellation of an order to remove an earth plug in a ditch.

Of the appeals heard by the Board, one appeal was denied, two were denied with comments and two were upheld.

#### **5.4 *Wildlife Act***

Under s103 of the *Wildlife Act*,

- (1) Where the regional manager makes a decision that affects
  - (a) a licence, permit registration of a trapline or guide outfitter's certificate held by a person,
  - (b) an application by a person for anything referred to in paragraph (a),

the person may appeal the decision of the regional manager to the director.

- (3) Where the director
  - (a) exercises the powers of a regional manager respecting the matters referred to in subsection (1),
  - (b) makes a decision in an appeal from a decision of a regional manager under subsection (1), or
  - (c) makes another decision that affects a matter referred to in subsection (1),

the person aggrieved by the decision may appeal the decision of the director to the Environmental Appeal Board.

- (5) In an appeal, the Environmental Appeal Board may
  - (a) dismiss the appeal,
  - (b) send the matter back to the regional manager or director with directions.

The duties of the Board are different under the *Wildlife Act* than the other acts with which the Board deals. In other acts, the Board has the specific authority to make decisions that the decision-maker whose decision is being appealed from could have made. This is not the case under the *Wildlife Act*.

The Supreme Court of British Columbia has ruled that in appeals under the *Wildlife Act*, the Board can not substitute its

opinion for that of the Director where the Director's decision was made in the lawful exercise of discretion. The Board is charged with determining "whether or not the Director properly exercised discretion, that is to say *bona fide* uninfluenced by irrelevant considerations and not arbitrarily or illegally" (Olsen v. Walker and others, [1989] No. 2286, Duncan Registry, Huddart, J.).

There were ten decisions issued under the *Wildlife Act* addressing eleven appeals. The Respondent in nine hearings was the Deputy Director of Wildlife and the Assistant Deputy Director of Wildlife in the remaining hearing. Five of the appeals concerned the suspension of hunting privileges, three concerned guide outfitter harvest quotas, one concerned the refusal to issue a night shooting permit for deer, one concerned the refusal to issue a replacement elk, and one concerned the cancellation of a guide outfitter's certificate and licence. All but one of the appeals were conducted as oral hearings.

Eight of the appeals were dismissed, five of those with comments. The remaining three appeals were returned to the Deputy Director with directions: one because of the Board finding an error in law; and two because the Board found the principles of natural justice had not been followed. The Board was later notified that in each case the Deputy Director had taken the actions directed by the Board.

## 6. SUMMARY

There were 22 decisions addressing 43 appeals issued during this report period. All but one of the decisions were the result of oral hearings.

Following is a summary of hearings held, by act:

<i>Pesticide Control Act</i>	7 hearings (24 appeals against 7 permits)
<i>Waste Management Act</i>	3 hearings (4 appeals against 3 permits/orders)
<i>Water Act</i>	5 hearings (5 appeals)
<i>Wildlife Act</i>	10 hearings (11 appeals against 11 orders)

The seven decisions under the *Pesticide Control Act* included:  
21 appeals dismissed, permits amended (6 permits)  
3 appeals dismissed with comments (1 permit)

The three decisions under the *Waste Management Act* included:  
1 appeal dismissed with comments  
2 appeals upheld in part, permits amended

The five decisions under the *Water Act* included:  
2 appeals dismissed with comments  
1 appeal dismissed  
2 appeals upheld

The ten decisions under the *Wildlife Act* included:

5 appeals dismissed with comments

3 appeals dismissed

3 appeals returned with directions

There were no appeals heard against decisions under the *Commercial River Rafting Safety Act*.

## **APPENDIX A            SUMMARY ENVIRONMENTAL APPEAL BOARD DECISIONS**

Brief summaries of decisions of the Environmental Appeal Board issued during this period follow. For specifics on a summarized appeal, the reader is referred to the actual decision.

### ***Pesticide Control Act***

#### **92/06            Thompson Watershed Coalition vs City of Kamloops**

An appeal against the issuance of PUP 296-012-92/94 authorizing the use of ROUNDUP for knapweed control in public use areas within the municipal boundaries of the City of Kamloops.

The grounds for appeal included concerns about the federal registration of pesticides, the presence of inert ingredients in the full formulation and the environmental effects of the pesticide. The Board found there was no evidence presented to support the Appellant's contentions and denied the request to cancel the permit. The permit was, however, amended to delete the authorization of the power hose application method and to address such things as locations of private wells and domestic water intakes.

Recommendations concerning the Branch policy of issuing endorsements, annual notification and use of manual control methods within pesticide free zones were also made. The Branch has since advised the Board their policies regarding endorsements are now under review.

#### **92/08            Revelstoke Environmental Action Committee vs British Columbia Minister of Forests and Pesticide Management Branch**

An appeal against the issuance of PUP 401-425-93/95 authorizing aerial and ground application of VISION for forest site preparation and brushing.

The grounds for appeal included information, ecological, and overseeing issues; buffers; herbicides as forestry tools; permit application comments and requirements; and, possible conflict of interest. The Appellant requested that authorization for aerial herbicide application be removed from the permit. As there was no evidence presented specific to VISION to substantiate the Appellant's position and none to show that the use of the permit would result in an unreasonable adverse environmental impact the request to cancel the permit was denied. The permit was amended to reflect a prior agreement between the Appellant and permit holder.

The Panel commented on perceptions surrounding the actions of Pesticide Review Committee members, and in the manner in which the size of the treatment area is presented on permits.

**92/12        Mr. F. Coffee and Ms. L. Lloyd vs Canada Minister of  
Agriculture**

Two appeals against the issuance of PUP 214-013-93/94 authorizing the aerial and ground spray of FORAY 48B (*BtK*) for eradication of european gypsy moth at Fulford Harbour, Salt Spring Island.

The grounds for appeal were based on health concerns and on possible damage to public perception regarding the organic status of Salt Spring produce. Also before the Panel were several permit amendments requested by the permit holder which reflected agreements reached with certain members of the public. While the Panel found there was no evidence presented to prove the Appellants' allegations and denied the appeals, the permit amendments were granted to ensure the permitted application matched the public expectation. As a result, the permit area was reduced significantly, the authorization for aerial application was withdrawn and the permit term was shortened to one year.

The Panel recommended, among other things, that Agriculture Canada require the release of the full formulation of any pesticide that is approved for use in urban areas.

**92/13        Citizens Association to Save the Environment,  
Ecological Health Alliance, and Sierra Club (Victoria)  
vs Canada Minister of Agriculture**

Three appeals against the issuance of PUP 214-014-93/94 authorizing the aerial and ground spray of FORAY 48B (*BtK*) for eradication of european gypsy moth in Saanich.

The grounds for appeal addressed impacts on non-target moths and butterflies (lepidopterans), birds and people. The Panel found that while non-target lepidopterans could be minimally affected by the spray, the establishment of the moth would also affect them. There was no evidence presented to support the Appellants' contention that use of the pesticide as authorized by the permit would result in an unreasonable adverse environmental impact. The appeals were denied.

The Panel recommended that if the permit holder found it necessary to exercise the second year of the permit, the permit holder contact the Appellants as soon as possible to review the possibility of using volunteers to conduct a seek and destroy program so as to avoid the need for further spraying.

**92/14        Lower Mainland Appellant Group (15 separate  
Appellants) vs Canada Minister of Agriculture**

Fifteen appeals against the issuance of PUP 214-026-93/94 authorizing the aerial and ground spray of FORAY 48B (*BtK*) for eradication of european gypsy moth in certain areas of Burnaby, Richmond and Vancouver.

The grounds for appeal concerned such things as the health and environmental effects of FORAY 48B, the need for the eradication program, violations of the label and *Pesticide Control Act* Regulation, and certain permit conditions including duration and

application methods. The Panel found there was no evidence to show that the use of the pesticide as authorized would result in an unreasonable adverse environmental impact and the requests to cancel the permit were denied. The permit was amended to reduce significantly the area authorized for treatment.

The Panel made several recommendations covering such areas as physical information, advertising of pesticide use permits, public information programs, label issues, worker safety and information regarding the full formulation of pesticides which are used in urban areas.

**92/16 Thompson Watershed Coalition vs Deputy Director  
Wildlife Branch**

An appeal against the issuance of PUP 139-043-93/95 authorizing use of Compound 1080 (Sodium Monofluoroacetate) for reactive control of coyotes and wolves.

The grounds for appeal addressed such issues as notification, risk, registration, lack of information on the full formulation and inadequate consideration of alternative methods. The Panel found there was no evidence presented to show that exercise of the permit would result in an unreasonable adverse environmental impact and denied the request to cancel the permit. The Panel also found the permit should be amended to reduce the number of baits allowed per calendar year.

**92/24 Sumas Mountain Conservation Association vs  
International Forest Products Ltd**

An appeal against the issuance PUP 215-094A-92/94 authorizing the use of VISION to 98.5 ha on North Sumas Mountain for conifer release

Sumas Mountain Conservation Association (SMCA) appealed the issuance of the permit because of concerns for water quality and biological diversity, the existence of alternative methods, and questions regarding adequacy of government pesticide testing. When the evidence presented was reviewed, the Panel found no evidence to show the exercise of the permit would result in unreasonable adverse environmental impact and so denied the request to cancel the permit. The Panel did, however, amend the permit by adding restrictions pertaining to aerial pesticide application, annual on-site inspections and public consultation.

The Panel also extended the term of the permit to reflect the time lost by the permit holder voluntarily staying the permit during the appeal process.

***Waste Management Act***

**91/25 Pacific Log Homes Ltd. vs Deputy Director of Waste  
Management**

An appeal against the decision of the Deputy Director of Waste Management Branch to refuse to issue a permit for an open burn.

The Appellant had requested and been refused an open burn permit to dispose of accumulated wood waste from a log home building operation. The Board found because of the proximity of the operation to the Village of 100 Mile House, the volume and nature of the waste to be burnt and the availability of alternative methods of disposal, that the appeal was denied.

Recommendations concerning communication practices of the Branch were made.

**92/15 Oyster River Settlers' Society and Pacific Bio-Waste Recovery Society/University of British Columbia vs Deputy Director of Waste Management**

Two appeals against the issuance of permit PR 10764 governing a fish composting facility near Campbell River.

The grounds for appeal filed by the Oyster River Settlers' Society (Appellant 1) concerned such things as the omission of a backup power system and odour minimization procedures from the permit. The grounds for appeal filed by the permit holder, Pacific Bio-Waste Recovery Society/University of British Columbia (Appellant 2), addressed jurisdictional issues and numerous restrictions included in the permit. The Panel found the Ministry did have jurisdiction to require the facility operate under a permit and that for the most part the permit reflected what had originally been applied for by the permit holder. As such, many of the changes sought by the permit holder were deemed to be permit amendment requests rather than appeals against the Deputy Director's decision and so the Panel declined to grant those requests and also declined to delete University of British Columbia from the permit. In addition, the Panel found that if the permit holder pursued the changes contained in the "sample permit", the Branch should require the amendment request be advertised.

As regards the appeal of Appellant 1, the Panel denied the requests to amend the permit to require backup power and to include certain oxygen monitoring protocols but granted the request that doors be kept closed except during access and egress.

**92/25 Kitamaat Village Council vs Deputy Director of Waste Management and Regional Manager Waste Management and Alcan Smelters and Chemicals Ltd**

An appeal against a decision of the Deputy Director amending permit PE-1494 (Alcan)

The Regional Manager had earlier amended Alcan's discharge permit and Alcan had appealed these amendments to the Deputy Director. The Deputy Director's decision upheld in part Alcan's appeal and, as a result, ordered certain amendments to the permit. The Deputy Director's decision was appealed to the Board by the Kitamaat Village Council on the grounds that the permit did not sufficiently protect the environment. The Panel upheld the appeal in part and amended the permit. In addition, the Panel

ordered Alcan and the Ministry to develop terms of reference for: a monitoring program for certain discharges; for effects of the Alcan discharge on the receiving environment; and, for an environmental audit. In the event Alcan and the Ministry were unable to develop the terms of reference for the above within a given time, the matters are to be returned to the Board.

### **Water Act**

#### **92/07 South Mallandaine Water Users' Association vs Deputy Comptroller of Water Rights and Mallandaine Water Users' Community.**

An appeal against a decision of the Deputy Comptroller of Water Rights regarding an assessment roll.

The grounds for appeal as filed by the South Mallandaine Water Users' Association (Appellant) concerned alleged violations of the Water Act by the Mallandaine Water Users' Community (Third Party) which led to the construction of a water line and the preparation of a disputed assessment roll. Also at issue was the development of a process by which the Appellant and Third Party could resolve their differences, and restitution of monies paid by the Appellant for water line repairs.

The Board found that although the Third Party had acted with good intentions and without malice, the *Water Act* had been violated. The appeal was upheld and the assessment roll amended to reflect the Board finding. The Board also found the Third Party was not liable for the cost of repairs experienced by the Appellant.

In terms of recommending a process for resolving the difficulties, the Board recommended the Water Community establish working rules and stay together as one body rather than splitting into two.

#### **92/17 Mr. and Mrs. W. Huwer vs Deputy Comptroller of Water Rights**

An appeal concerning the refusal of permission to remove a bedrock outcropping from a channel of the Shuswap River.

The Appellant had been refused permission by the Deputy Comptroller to remove a bedrock outcropping from the Shuswap River that was causing flooding and erosion of their farm land during high water events. The Panel found that removal of the outcropping would result in harmful alteration, disruption or

destruction of fish habitat and denied the appeal. Other options to address the situation were presented at the hearing, and the Panel recommended the Appellant and representatives of Federal and Provincial Fisheries work together to determine how the interests of all parties could be protected.

**92/19 J. and D. Neufeld vs Deputy Comptroller of Water and Mr. and Mrs. O. Floritto and Water Engineer**

An appeal against a decision of the Deputy Comptroller reversing an earlier decision of the Engineer concerning an earth plug in a ditch.

The Engineer had ordered Mr. Floritto to remove an earth plug he had placed in a ditch. Mr. Floritto appealed the order to the Deputy Comptroller who found there was no authority to make such an order and reversed the engineer's order. This decision was appealed to the Board by Mr. and Mrs. Neufeld. The Panel found the ditch in question was a "stream" within the definition of the *Water Act* and that the Engineer and Deputy Comptroller had authority to issue an order. The Panel rescinded the Deputy Comptroller's decision and reinstated the Engineer's order that the blockage be removed thus upholding the appeal.

**92/21 Meadow Valley Irrigation District vs Deputy Comptroller of Water Rights and D. Barron and C. McDougall**

An appeal against a decision of the Deputy Comptroller cancelling a Conditional Water Licence and issuing a replacement Conditional Water Licence.

Meadow Valley Irrigation District holds water licences on Darke Creek and its tributaries, which include Meadow Creek. The MVID appealed the granting of a water licence on Meadow Creek to Barron/McDougall as MVID considered there was already insufficient water in the system to meet their precedence protected needs. The Panel found Meadow Creek is only tributary to Darke Creek during freshet, and that when it is not tributary to Darke Creek, the MVID water licence would not apply to the flow. In addition, the Panel found the water shortages were only experienced when Meadow Creek was not tributary to Darke Creek and that as a result, the new water licence did not affect the rights of the MVID. The appeal was denied.

**92/22 F. Blom vs Comptroller of Water Rights and five parties**

An appeal against the decision of the Comptroller of Water Rights cancelling Conditional Water Licence 66124 (Campbell Creek, Blom).

The Appellant purchased his property in 1991 and only realized there was a water licence appurtenant to it when he received the notice of proposed cancellation. In appealing to the Board, the Appellant did not challenge the Comptroller's right to cancel the licence but asked for the licence to be restored so he could

investigate the practicality of making beneficial use of the water. The Panel found the intake and ditch had not been used for at least thirty years and that the new owners of the subdivided land parcels objected to the possibility of the works being reinstated. In addition, Campbell Creek is over-recorded and Appellant's land is now serviced by city water. The Panel upheld the cancellation and denied the appeal.

**Wildlife Act**

**91/24 I. Mota vs Deputy Director of Wildlife**

Appeal against decision to suspend hunting privileges for thirty years.

The Appellant had a history of charges and convictions under the *Wildlife Act* which dated back several years. Following his most recent court conviction of 30 counts under the *Act* and Regulation the Deputy Director suspended the Appellant's hunting privileges for 30 years. The appeal was dismissed as there was no evidence presented to show the Director erred in exercising his discretion. As it was conceivable that the Appellant could be physically capable of hunting upon the expiry of the suspension of hunting privileges, the Board recommended he be required to successfully complete the CORE program prior to being eligible to receive a hunting licence.

**92/03 J.R. Lucke vs Acting Deputy Director of Wildlife**

Appeal against decision to refuse to grant a replacement elk.

The Appellant had been charged with unlawfully possessing dead wildlife following a hunting trip. The Court ruled that the Appellant had not intended to shoot an illegal animal and therefore found him "not guilty" of the charges. No determination was made as to whether the animal was a calf as claimed by the Appellant, or a cow as claimed by the Branch. By the time the court had made its decision, the animal had been disposed of by the Branch, and the Appellant applied to the Branch for a replacement animal. The request was denied and an appeal was filed.

The Board denied the appeal as there was no evidence to show the Deputy Director had improperly exercised his discretion.

**92/04 URSUS Guide Outfitters vs Deputy Director of Wildlife**

Appeal against decision allocating harvest quotas for black bears in Management Units 2-09, 2-10, 2-18 and 2-19.

The Appellant's black bear allocation had been adjusted following a change in management unit boundaries. The Appellant considered his hunting patterns and, therefore, his business had been negatively affected and so appealed the allocation. The appeal was denied as the Board found there was no evidence presented to show the Deputy Director erred in the exercise of his discretion. The Board recommended compulsory reporting for bears in certain management units.

**92/05            D. Claridge vs Deputy Director of Wildlife**

Appeal against decision denying a permit for night shooting of deer.

The Appellant operates an apple orchard which has been subject to deer damage. In the past, he had received a permit authorizing the shooting of deer in the orchard at night. When he applied this year for a permit to shoot deer at night with the assistance of a one million candle power light, he was refused. He appealed the refusal to the Board. The Board found due to the increase in human population in recent years there was no longer a safe shooting corridor and the appeal was denied. Recommendations were made concerning alternative solutions for deer control.

**92/09            V. Scherm vs Deputy Director of Wildlife**

An appeal against a decision regarding allocation of grizzly bear harvest quota.

The Appellant was a guide outfitter whose grizzly bear quota had been reduced by one bear per year. He appealed the cut, as he considered the bear population had increased in his area. The Deputy Director agreed the bear population had increased but felt that to effectively manage the population, the Branch must assume that guides would kill all the animals they were entitled to under their quota. Because this would have resulted in sustainable harvesting being exceeded the Appellant's quota was reduced. Reductions had also been placed on other guides' quotas and on the amount of animals resident hunters could take.

The Panel found there was no evidence presented to show the Deputy Director erred in the exercise of his discretion and denied the appeal.

**92/10            R. Fontana vs Deputy Director of Wildlife**

An appeal against a decision regarding allocation of bull moose harvest.

The Appellant was a guide outfitter who received a bull moose allocation of 1 bull in licence year 1992 which was down from 2 bulls in 1991. The three issues in the appeal were the fairness of the hunting reductions and allocations between the non-resident and resident hunter groups; the accuracy of the inventory information; and, the fairness of the Appellant's 1992 allocation.

The Panel found the Board had no authority to consider the Resident/Non-Resident split as that had been the subject of

another earlier decision that had not been pursued to the Board.

While the Panel found there was no evidence to show the Branch had erred in estimating the bull moose population , the Panel did find that the Regional Manager had erred in law and discretion in awarding the allocation in the manner he did. As such the appeal was upheld and the Deputy Director's decision upholding the Regional Manager's decision was overturned. The matter was returned to the Deputy Director with directions.

The Board was later advised that the Deputy Director concurred with the Panel and that corrective measures were being put into place.

**92/11          N. DeAnna vs Deputy Director of Wildlife**

An appeal against the three year cancellation of hunting privileges and requirement to complete the CORE examinations.

Mr. DeAnna and a friend were hunting when both shot at an elk. The animal was wounded and Mr. DeAnna finished it off. He later obtained and cancelled another person's elk tag. During the investigation of the incident, Mr. Deanna lied to the Conservation Officer. He was later charged and convicted of using another persons's licence and of making a false statement to a Conservation Officer. In addition to the automatic one year hunting licence cancellation, the Deputy Director suspended Mr. DeAnna's hunting privileges for two additional years and ordered him to complete the CORE examinations.

The Panel found there was no evidence presented to show the Deputy Director reached his decision through the improper exercise of discretion or law, and supported the Deputy Director's decision. The appeal was denied. The Panel also made a recommendation regarding notification and automatic suspensions.

**92/18          J. Kerr and R. McMullen vs Deputy Director of Wildlife**

Two appeals against the cancellation of hunting privileges and orders that the Appellants complete the CORE examinations.

The Appellants had been charged and convicted following an incident that occurred during a hunting trip. In the grounds for appeal, the Appellants considered that the Deputy Director had erred in deciding not to consider their written submissions which arrived after the deadline set by the Deputy Director, and that the three year hunting privilege suspensions were harsh and unusual given the infractions of which the Appellants were convicted. The Panel found the Deputy Director did not err according to law but had violated the principles of natural justice in deciding to reject the written submissions. As a result, the appeals were upheld and the matters returned to the Deputy Director for his reconsideration. In revisiting his decision, the Deputy Director was to consider that the Panel found the Appellants to be without remorse and unaware of the severity of their actions, and also that the Conservation Officer Service had recommended the Appellants be prohibited from hunting for five years.

The Board was later advised that the Deputy Director had reconsidered his decisions in accordance with the Board order, and found the three year terms of cancellation should stand.

**92/20        D. Pronick vs Assistant Deputy Director of Wildlife**

An appeal against the two year cancellation of hunting privileges and order for successful completion of the CORE examinations

Following Mr. Pronick's conviction for killing wildlife out of season, the Assistant Deputy Director cancelled his hunting privileges for two years. Mr. Pronick appealed as he had only pleaded guilty out of economic necessity and on the basis on misleading information from the Conservation Officer. In addition, he considered the cancellation to be excessive given his circumstances. Mr. Pronick stated he fired his rifle into the woods to check the recoil and did not think he was responsible for shooting an illegal four point buck mule deer.

The Panel, while finding it had no reason to doubt Mr. Pronick's belief that he did not shoot the deer, considered Mr. Pronick's actions to in no way constitute safe use of a firearm. In addition, the Panel found no evidence to show Assistant Deputy Director had erred in the exercise of his discretion or in law.

The appeal was denied. The Panel made recommendations concerning the actions of the Conservation Officer Service.

#### **92/23      B. Dalziel vs Deputy Director of Wildlife**

An appeal against a decision suspending a guide outfitter licence and cancelling a guide outfitter certificate

Mr. Dalziel was a guide outfitter employed by Turnagain Holdings Ltd. Following a section 62 hearing, the Deputy Director decided to cancel Mr. Dalziel's guide outfitter certificate and suspend his guide outfitter licence for violations of the *Wildlife Act*. The grounds for appeal included the length of the suspension and the Deputy Director's treatment of Turnagain. The Deputy Director did not consider that Turnagain fell within the *Act's* definition for "person aggrieved" and so did not allow the company's spokesperson party status at the hearing before him. At the time, Mr. Dalziel requested Turnagain not be granted party status although in the appeal before the Board, Mr. Dalziel had changed his position. The Panel found the Deputy Director's duty in a section 62 hearing was to make an order that was in the best interests of wildlife management and that was fair to the affected licensee/certificate holder, and that the Deputy Director was not required to consider the financial implications of his order to those who do not have standing as of right at the hearing. The Panel found no evidence to show the Deputy Director erred in the exercise of his discretion or in law, and the appeal was denied.