The Honourable Moe Sihota
Minister of Environment, Lands and Parks
Parliament Buildings
Victoria, British Columbia
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Sir:

I respectfully submit herewith the annual report of the Environmental Appeal Board for the period July 1, 1993, through March 30, 1995.

Yours truly,

David Perry
Chair
Environmental Appeal Board

Table of Contents

1.	**Introduction**		5
2.	**The Board**		6
	2.1	Administrative Law	6
	2.2	Board Membership	6
	2.3	Forest Appeals Commission	8
3.	**Launching An Appeal**		9
	3.1	Before the Hearing	9
	3.2	Hearings	10
	3.3	After the Hearing	11
4.	**Decisions**		12
	4.1	*Commercial River Rafting Safety Act*	12
	4.2	*Health Act*	12
	4.3	*Pesticide Control Act*	13
	4.4	*Waste Management Act*	14
	4.5	*Water Act*	15
	4.6	*Wildlife Act*	16
5.	**Summary**		17
Appendix I	Summary of Environmental Appeal Board Decisions		18
Appendix II	Summary of Court Decisions related to the Board		31

Introduction

Set up in 1981, the Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. This Annual Report of the Environmental Appeal Board will describe how the Board is set up, how the appeal process operates and provide other information about the Board.

In addition to giving a broad outline of how the Board works, this report will outline the types of appeals which were considered by the Board and how they were dealt with. The information contained in this annual report is based on the hearings which were held between July 1, 1993, and March 30, 1995. If you are interested in more detailed information about the cases, summaries of all the decisions covered by this report can be found in Appendix I.

For the exceptionally interested, a variety of sources of information about the Environmental Appeal Board are available. 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
- 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 and are reported in the *Environmental Law Digest*.

In addition, there are pamphlets explaining the appeal procedure under each of the relevant Acts which are available through the Environmental Appeal Board Office. Also, please feel free to contact us if you have any questions, or would like additional copies of this report.

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The Board

The Environmental Appeal Board was created when the *Environment Management Act* was passed in 1981. It is an independent agency which hears appeals from administrative decisions made under six statutes. Five of these 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 since 1988 the *Commercial River Rafting Safety Act*.

The sixth statute is the *Health Act*, which was amended during the 1993 legislative session to allow the Environmental Appeal Board to hear appeals against permits related to sewage dispel systems. This amendment came into force on August 24, 1994. The Board heard its first appeal under this Act during the period covered by this report.

2.1 Administrative Law

Unlike a court, the Board is not bound by precedent; present cases of the Board do not necessarily have to be decided in the same way that old ones were. However, the Board is governed by the principles of Administrative Law. Most importantly, the Board must treat all the people involved in a hearing fairly, giving each individual a chance to explain their position.

If the Board uses an unfair procedure or fails to observe administrative law in some other principle way, the decision may be appealed to a court. In such a case the court could declare that the decision was void, or invalid, and send the issue back to the Board to reconsider.

2.2 Board Membership

The Board members are appointed by the Lieutenant Governor in Council (cabinet). The positions are part-time and none of the members are civil servants. The appointments are for a two-year term. Because the members are drawn from across the province, representing diverse business and technical experience, they have a wide variety of perspectives.

During the almost two years covered in this report, the Board membership has included doctors, lawyers, teachers, professional agrologists, professional engineers, nurses, professional biologists, biochemists and consultants, along with other backgrounds and interests related to environment and business.

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

Environmental Appeal Board Members

Member	Term	From
Chair		
Linda Michaluk	to June 1994	Victoria
Judith Lee	July 1994 to March 1995	Vancouver
Vice-Chair		
Harry Hunter	to June 1994	Surrey
Christie Mayall	July 1994 to December 1994	Tatla Lake
David Perry (Chair)	January 1995 to March 1995	Victoria
Past Members		
Olga Barrat	to June 1994	Vancouver
Deborah Davies	to October 1994	Saltspring
Kathleen Gibson	to October 1994	Vancouver
Scott Hall	to June 1994	Victoria
Hugh Hodgkinson	to June 1994	Hudson Hope
Vicky Huntington,	to June 1994	Ladner
Heather Michel	to June 1994	Burnaby
Colin Palmer	to June 1994	Powell River
Majorie Ryan	to June 1994	Powell River
Baldev Seehra	to October 1994	Surrey
Max Smart	to June 1994	Abbotsford
John Smith	to June 1994	Vancouver
Current Members (as of March 31, 1995)		
Johnder Basran		Lillooet
Shiela Bull		Abbotsford
Harry Higgins		Salmon Arm
Elizabeth Keay		Saturna Island
Helmut Klughammer		Nakusp
Jack Lapin		Barriere
Bill MacFarlane		Revelstoke
Carol Martin		Hornby Island
Christie Mayall		Williams Lake
Laurie Nowakowski		Nelson
Bob Radloff		Prince George
Gary Robinson		Surrey
Joan Rysavy		Smithers
Elinor Turrill		Lumby

2.3 Forest Appeals Commission

Since January 1, 1995, the Environmental Appeal Board has been sharing offices with the new Forest Appeals Commission.

The Forest Appeals Commission, set up under the Forest Practices Code, hears appeals from forestry-related administrative decisions, in much the same way that the Board hears environmental appeals. Because the same type of issues will arise for both tribunals, the government has decided that both will run out of a single office. The Environmental Appeal Board support staff are now also Forest Appeals Commission staff.

This gives both tribunals access to greater resources, at the same time cutting down on bureaucracy. With a larger staff, expertise can be shared and work can be done more efficiently. The Board is looking forward to a cooperative working relationship with the Forest Appeals Commission.

Launching an Appeal

Once an appeal is underway it will usually result in a hearing at which the parties will be given a chance to speak. This is the main forum for the Board to get the information it needs to make a decision. However, this is only the most obvious part of the appeal process.

In launching an appeal, an appellant should realise that the Board's appeal process will vary depending on which Act the appeal is being heard under. There are pamphlets outlining the appeal process for each Act available from the Board office.

In addition, the Board has compiled the policies and procedures it uses in the appeal process into one book. Readers seeking more information on the appeal process should obtain the *Environmental Appeal Board Policy and Procedure Manual* through the Board office. Due to the size of the manual, there is a cost attached. However, the Board also has an abridged version available free of charge. Please contact the Board office for more information.

3.1 Before the Hearing

To start an appeal an appellant (the person who commences an appeal against an administrative decision) prepares a *Notice of Appeal* and delivers it to the Environmental Appeal Board office along with a cheque for $25 for each order being appealed. The notice should contain the reasons the appellant believes that the order is incorrect (the grounds for appeal), what she or he wants the Board to order and the name and mailing address of the government officer responsible for the order. If the Board office does not receive the appeal within a limited time period (defined in each of the five Acts) it will be unable to consider it.

To make it easier to identify main issues and arguments in the appeal, the Board requires the parties to submit written materials in addition to giving oral evidence. The respondent (the government official whose decision is being appealed) is asked to give copies of any documents, regulations, policies, etc. which he or she will be using at the hearing to the appellant and the Board within 30 days after it receives notice of the appeal from the Board. Similarly, the appellant must provide the respondent with copies of any materials which will be used at the hearing.

Board policy requires both the appellant and respondent to provide a brief, written Statement of Points. Copies of the statement must be received by the other parties, and filed with the Board, at least ten clear days before the Hearing. In addition, the Board may grant other interested individuals or groups the right to participate in the hearing, "party status" and these third parties should also provide a Statement of Points, with copies to the Board, appellant and respondent by the same deadline.

A Statement of Points should outline:

i) the participant's objections to the respondent's decision or to the appellant's appeal;

ii) the arguments which the participant will present; and

iii) any legal authority or precedent supporting the participant's position.

A Statement of Points should be in summary form – an outline rather than a written argument. Four copies should be sent to the Board and one to each party to the appeal. If the appellant's Statement of Points is not provided before the deadline, the appeal may be adjourned.

Disclosure of all evidence in advance of the hearing is desirable so that all parties will be prepared for the hearing. Advance notice of expert evidence should include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing and the basis for it.

It may not always be possible for all evidence to be disclosed to all the parties before a hearing. If a party could not have anticipated the evidence which is given and consequently is unprepared, he or she may request an adjournment. The Board will exercise discretion in deciding whether to grant such a request. The party should use such a delay to consider the evidence, to prepare for cross-examination and, if necessary, to arrange for witnesses to address it.

Even after information has been exchanged the Board may order a pre-hearing conference. Pre-hearing conferences are less formal than a hearing and follow an agenda which is set by the participants. It is an opportunity for the parties to talk, to attempt to resolve the matter themselves, and gives them more control over the final decision. Both parties are encouraged to speak freely, to air their views and information.

Usually a pre-hearing conference will involve the spokespersons for the parties and one Board member. If any agreement is reached between the participants, it can be set down and instituted through a memorandum signed by both parties. It may be that a pre-hearing conference will resolve the issue and there will be no need for an appeal; or it may be that nothing will be agreed on and the appeal will move on to a hearing.

3.2 Hearings

A hearing is a more formal process than a pre-hearing conference which allows the Board to receive the evidence it uses in making a decision. Once the Board has accepted an appeal a date will be set for the hearing and the parties involved will be notified. In most cases it will take place between 45 and 60 days after the appeal is filed, although this time line may be extended or shortened as circumstances require. The Board will exercise discretion in considering any requests from the hearing's participants to change the date.

Before a hearing the Chair of the Environmental Appeal Board will assemble a panel to hear the appeal. A panel will consist of one, three or five members of the Board, selected because they have the necessary expertise to properly adjudicate the appeal.

Hearings are often held in the community closest to the area affected by the order which is being appealed, which is usually the home community of the appellant. Although the panel members may have to travel to the community for the hearing, this approach has its advantages. It allows concerned members of the public from the affected areas to attend the hearing (which is encouraged). It also allows the panel to view the area if they need to.

The decision whether or not to order a written or oral hearing is made by the Chair of the Board. On occasion an appeal which has begun as an oral proceeding will be concluded in writing in order to ensure that the proceedings are timely and orderly.

In making its decisions the Board is called on to decide between the rights of parties and determine what occurred. Because of this it has adopted a procedure for hearings which is similar to the rules used in courts; parties are sworn, evidence is presented and witnesses are cross-examined.

The rules of evidence, however, used in a hearing are slightly different from those used in court. The Board has full discretion to receive any information it considers relevant and then may determine, subject to the rules of natural justice, what weight to give the evidence.

The Board has a number of powers to control its appeal process. It has the power to summon witnesses to give evidence and produce documents related to the hearing. If it issues a summons and the witness does not appear at the hearing the Board has the same powers as a judge of the Supreme Court of British Columbia to enforce their order. If, during a hearing, a party requests a summons, they must prepare it. The Board will then issue the summons if it is satisfied that there are sufficient grounds to do so. The applicant is responsible for serving the summons on the witness in the correct way.

3.3 After the Hearing

The Board will not normally make a decision at the end of the hearing. Instead, the final decision will be given in writing, within a reasonable time following the hearing. Copies of the decision are mailed to the parties involved and the Minister of Environment, Lands and Parks or the Minister of Health (in appeals under the *Health Act*).

Once a party has received a decision, he or she may wish to appeal the Board’s ruling. Decisions of the Board are final and the Board may not reconsider or comment on a decision once it is set down. However there are other avenues of appeal in some cases.

The Lieutenant Governor in Council (Cabinet) may, if it believes it to be in the public interest, change or overturn an order of the Board. This type of review is not automatic and Cabinet may choose whether or not to hear a review.

Someone who is unsatisfied with a Board decision may also challenge it by taking it to court. This involves applying to the B.C. Supreme Court for a Judicial Review. The Court will determine whether the Environmental Appeal Board followed the principles of administrative law. Most often the courts will either leave the Board’s decisions alone or overturn the decision and send the matter back to the Board to reconsider.

Decisions

The Environmental Appeal Board made 36 decisions during the period covered by this report. Summaries of all of the cases may be found in Appendix 1 of this report. As noted earlier in this report, the appeals were heard under several acts, and the following information has been grouped by the Act from which the appeal came.

4.1 *Commercial River Rafting Safety Act*

Under section 6 of the *Commercial River Rafting Safety Act*,

6. Where the registrar suspends or cancels a registration, license or permit or refuses to register or issue a license, the person may appeal to the Environmental Appeal Board established under the *Environment Management Act*, and the board may confirm the decision of the registrar or may reverse or vary it.

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

4.2 *Health Act*

Under section 5 of the *Health Act*, as amended by the *Miscellaneous Statutes Amendment Act (No. 2)* in 1993,

5. **(1)** The Lieutenant Governor in Council may make regulations for the prevention, treatment, mitigation and suppression of disease and regulations respecting the following matters: …

(mm) the inspection, regulation and control, for the purposes of health protection provided in this Act, of …

(c) sewage disposal systems …

and requiring a permit for them and requiring compliance with the conditions of the permit and authorising inspections for that purpose …

(3) If a person is aggrieved by

(a) the issue or the refusal of a permit for a sewage disposal system ...

under a regulation made under subsection (1)(mm), 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.

(4) On hearing an appeal under subsection (3), the Environmental Appeal Board may confirm, vary or rescind the ruling under appeal.

Section 5(3)(b-d) would allow appeals on related matters, but has not been brought into force.

The *Sewage Disposal Regulation*, issued in 1985, requires that a permit be obtained to “construct, install, alter or repair a sewage disposal system …” Although relatively few appeals have been heard under the *Health*

Act, the types of appeals are narrow, restricted to the issuance or refusal of a permit for a sewage disposal system issued under this regulation.

During the reporting period the Environmental Appeal Board heard its first appeal under the *Health Act*. The issue concerned an appeal from the issuance of a Sewage Disposal Permit and the Respondent was the Environmental Health Officer. The Appellants chose to use legal representation, while the Respondent was unrepresented. The appeal was dismissed with comments (*See Appendix 1 ~ Summary of Environmental Appeal Board Decisions*).

4.3 *Pesticide Control Act*

Under section 15 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.....

In hearing appeals against pesticide use permits, the Board must decide, based on the evidence before it, whether using the pesticide in the way the permit allows will result in an "unreasonable adverse effect" on the environment.

According to the Board's interpretation of the *Pesticide Control Act* anything that negatively affects the land, air, water and/or living things has an adverse environmental impact; however, it is the degree of that impact that determines if it is unreasonable.

The Board does not rigidly assign standards which define whether an impact is "unreasonable", preferring, instead, to consider the characteristics of the site and other factors in reaching a decision. The Board considers the following questions in making their decision:

1. Will the quality of the air, land or water be impaired?;

2. Will plant or animal life, or property, be injured or damaged?;

3. Will any person's welfare be impaired?;

4. Will plant or animal life or property be rendered unfit for use?;

5. Will people lose the opportunity to enjoy their property?;

6. Could the purpose of the permit be accomplished by another method with a less severe environmental risk?;

7. Are there any other factors relevant to the matter under appeal which have been brought to the Board's attention?

To the Board "unreasonable" will be whatever is not suitable under the circumstances.

The pesticides that are the subject of appeals before the Board have almost always been registered by the federal government. Since such a pesticide has had extensive testing, the courts have instructed the Board to assume that a federally registered pesticide is generally safe. However, what is generally safe might not be safe in all circumstances. The Board must determine the safety of the pesticide on a permit-by-permit basis, considering the specifics of the local environment, the details of the permit and any other relevant factors.

During the period covered by this report seven decisions were issued under the *Pesticide Control Act*. They involved appeals filed by 38 individuals (33 in one hearing) and four groups, against 13 Pesticide Use Permits. All hearings were conducted orally.

The Respondents included: the Ministry of Environment, Lands and Parks, Deputy Administrator, *Pollution Control Act* (1 appeal); the Ministry of Forests (1 appeal); the Canada Minister of Agriculture (3 appeals); the Thompson-Nicola Regional District (1 appeal) and the Revelstoke Community Forest Corp., Evans Forest Products Ltd. (1 appeal).

Of the thirteen permits appealed, eight allowed the application of VISION for forestry related purposes; one the application of ROUNDUP and Tordon 22K for use on crown lands and public by-ways; one the application of ROUNDUP and Tordon 22K for use on public highway verges; and three the use of Foray 48B (BtK) for European gypsy moth eradication.

In four of the seven decisions the permits were amended and the appeals dismissed. In one decision the appeal was dismissed with no permit amendments. The remaining two decisions allowed the appeals.

4.4 *Waste Management Act*

Under section 26 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.

The Environmental Appeal Board hears appeals from a wide range of decisions under the Act: from challenges to *Pollution Abatement Orders* to complaints about permits for sewage disposal. A variety of factors are considered depending on the type of appeal.

In the period covered by this report, 5 decisions, addressing appeals by six appellants (two individuals and four groups or corporations), were set down under the *Waste Management Act*. Two of the appeals were filed by the permit holder, while three were filed by citizen's groups or members of the public against a permit.

The Respondent in four of the appeals was the Deputy Director, Waste Management of the Ministry of Environment, Lands and Parks. In the fifth appeal the Greater Vancouver Regional District was the respondent. Where the appeals were filed by members of the public, the permit holder also had party status.

The appeals concerned a pollution abatement order requiring the investigation and clean-up of contaminated soil, the burning of waste wood in a greenhouse and sewage disposal and/or treatment (3 decisions). All of the appeals were dismissed, with amendments made to the permit in three of the decisions.

In addition, two decisions were made under the Act which examine procedure, rather than challenges to permits or refusals. In one the appellant sought an extension of the deadline for an appeal under the Act. In the other, the appellant sought a stay of appeal proceedings before the Deputy Director of Waste until after a related matter was heard in court. Both appeals were denied.

4.5 *Water Act*

Under section 9 of the *Water Act*,

(1) A licensee, riparian owner or applicant for a license who considers that his rights would be prejudiced by the granting of an application for a license 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, …

Like most of the other acts, the Board hears appeals on a variety of decisions under this Act. Decisions to approve the use of water without a license, to issue a license, to refuse a license and to amend a license, are just a few of the types of decisions which could be considered. The Board considers other existing water rights, the environment and other issues in reaching its decisions.

There were four decisions issued under the *Water Act* during the report period, involving five appellants (4 individuals and one group) and five Conditional Water Licences, and one order. In all appeals, the Deputy Comptroller of Water Rights was the Respondent.

Three of the appeals concerned regulating water use – two for private use and the third for a hydro-electric project. The fourth related to an order of Water Management Branch authorising the filling of a swamp. In this decision the Board affirmed its power to issue a stay, ex parte if necessary, of an order.

Of the appeals heard by the Board, one appeal was denied and two were denied with comments. The fourth resulted in an earlier ex parte stay being vacated.

4.6 *Wildlife Act*

Under section 103 of the *Wildlife Act*,

(1) Where the regional manager makes a decision that affects

(a) a license, 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. For appeals under the *Wildlife Act*, however, the Supreme Court of British Columbia has ruled that the Board cannot substitute its opinion for the Director's, as long as the Director was lawfully exercising his discretion. The Board must determine "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.).*

Furthermore, even when a decision can be reviewed by the Board, the Board still cannot replace the decision. Instead they must return it to the Director who made the decision to reconsider. The Board will usually attach comments indicating what factors they believe that he or she should consider.

During the period covered by this report there were fourteen decisions issued under the *Wildlife Act* addressing issues raised by fifteen appellants. The Respondent in all hearings was the Deputy Director of Wildlife. Five of the appeals related to guide outfitter harvest quotas, five to the suspension of hunting privileges, two to the cancellation of guide outfitter licences and two to the refusal to exempt the appellants from requirements in obtaining guide outfitter licences.

Twelve of the appeals were dismissed, two of those with recommendations. The remaining two appeals were returned to the Deputy Director (one in part, and the other in its entirety) with recommendations on how they should be reconsidered. The Board was later notified that in each case the Deputy Director had taken the actions suggested by the Board.

In addition, a preliminary hearing was held on an appeal under the *Wildlife Act*, in which the Board considered its ability to consider constitutional issues. The Board held that constitutional issues are within its mandate. A final decision on this appeal is still pending.

Summary

There were 36 decisions made 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:

	Act	Hearings
n	*Pesticide Control Act*	7 hearings
n	*Waste Management Act*	5 hearings
n	*Water Act*	4 hearings
n	*Wildlife Act*	14 hearings
n	*Health Act*	1 hearing
	Procedural Hearings *	5 hearings

* – Procedural hearings, including four preliminary hearings and one final decision are not included in the statistics for each Act, as they do not deal directly with the issues raised by those acts but with the powers and procedures of the Appeal Board. See below.

The seven decisions under the *Pesticide Control Act* included:

- 4 decisions dismissing the appeals with the permits amended
- 1 decision dismissing the appeals without amendments
- 2 decisions allowing the appeals

The five decisions under the *Waste Management Act* included:

- 3 decisions dismissing the appeals with the permit amended
- 2 decisions dismissing the appeals with recommendations

The five decisions under the *Water Act* included:

- 3 decisions dismissing the appeals with comments
- 1 decision dismissing an appeal

The fourteen decisions under the *Wildlife Act* included:

- 10 decisions dismissing the appeals with comments
- 2 decisions dismissing the appeals
- 2 decisions allowing the appeals in whole or in part

The one appeal under the *Health Act* was dismissed.

Decisions relating to procedure arose out of applications under the *Waste Management Act* (3 decisions), the *Pesticide Control Act* (1 decision), and the *Wildlife Act* (1 decision). The decisions dealt with issues including: the Board's ability to consider constitutional issues; extension of appeal deadlines; preliminary motions; and other issues.

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

Summary of Environmental Appeal Board Decisions July 1, 1993 – March 30, 1995

The following are summaries of decisions reached by the Environmental Appeal Board as a result of appeals heard between July 1, 1993 and March 30, 1995. They are organised by the Act which the appeal was brought under. There are four preliminary hearings reported, two for which the final decisions are pending (93/05(a) and 94/05(a)).

Commercial River Rafting Safety Act

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

Health Act

94/10 M. and C. de Goutiere v. Environmental Health Officer et al.

Albacho Industries was issued a Sewage Disposal Permit under the *Health Act* authorising it to construct a sewage disposal field for 9-10 housing units. Cynara and Mark de Goutiere owned land immediately adjacent and appealed the permit.

The Board voiced disappointment about the lack of communication between the Environmental Health Officer and the de Goutieres. However, the Board found that Albacho Industries had attempted to design a "responsible development" and the permit complied with the *Health Act* and its regulations. The permit was modified to include recommendations from the Environmental Health Officer, and the appeal was dismissed.

Pesticide Control Act

92/27 Treaty 8 Tribal Association v. British Columbia Minister of Forests

The Ministry of Forests obtained seven Pesticide Use Permits allowing the use of a pesticide, VISION, in forest brushing and weeding. Although the pesticides were to be used on the traditional territory of native Canadians represented by the Treaty 8 Tribal Association, the Ministry obtained the permits without waiting for the Tribal Association to give them information about the lands. The Tribal Association appealed the permits.

According to the evidence, the pesticide would affect medicinal and food plants traditionally used by the members of the Tribal Association. Also, it was found that fur-bearing animals were unable to use a site for a period after the spraying.

The Board considered the treaty which the tribes of the area had signed, and from which the Tribal Association takes its name, Treaty No. 8. The treaty indicates a special concern that the traditional native lifestyle be protected. This clear intent, along with recent court rulings on aboriginal rights, give the government an obligation to consult with the Treaty 8 Tribal Association on land use decisions. The Board decided that in order

to obtain enough information to decide if the Pesticide Use Permits should be issued, the Ministry of Forests should have spent more effort consulting the Tribal Association. The permits were cancelled.

93/03 Thompson Watershed Coalition v. Deputy Administrator, *Pesticide Control Act* et al.

The Ministry of Transportation and Highways (MOTH) obtained a Pesticide Use Permit which allowed them to use two pesticides along highway verges. Before the permit was granted, a local environmental group, the Thompson Watershed Coalition, wrote to the Environmental Appeal Board objecting to the permit and expressing an intention to appeal. A copy was also sent to the Pesticide Management Branch, but the Deputy Administrator did not consider this letter in his decision to issue the permit.

The Board decided that the Deputy Administrator did not have to consider the letter, since it did not contain "information about the site." Furthermore, the Board found that the Pesticide Control Branch made no error in issuing a permit to MOTH.

However, the Board did find that MOTH was using the chemicals incorrectly (or reporting their use inaccurately), that the areas outlined in the permit were unrealistic, and that the label requirements of one of the pesticides had not been complied with. On these grounds the Board allowed the appeal, and made several recommendations concerning the issuance of permits for use on highway right-of-ways.

93/07 Revelstoke Environmental Action Committee v. Revelstoke Community Forest Corporation, Evans Forest Products Ltd.

Westar Timber Ltd. obtained a permit allowing the spraying of VISION to 292.8 ha of forest land. The lands in question were subsequently transferred to the Revelstoke Community Forest Corporation and Evans Forest Products Ltd. The Revelstoke Environmental Action Committee, a local concerned group, appealed the permit.

Although there was no evidence that the use of the permit would result in loss of biodiversity, soil degradation or erosion, the Board was concerned that the permit was issued before all of the comments of the Regional Pesticide Review Committee were received. The comments of the Committee's wildlife expert had not been received when the permit was issued. Although the permit would probably have been amended to include these comments, the Board was concerned that this made wildlife appear secondary to the other factors that were considered. This approach deprived the public and the permit holder of valuable information about the area's wildlife population. Also, there would be no obligation to advertise an amendment to the public. The Board amended the permit to minimise any impact on wildlife and then dismissed the appeal.

93/11 C. Hargrave v. Canada Minister of Agriculture

After discovering the existence of gypsy moths and their eggs, Agriculture Canada applied for a pesticide use permit for the use of Foray 48B as part of an eradication programme. Although Agriculture Canada did not advertise the spraying in one of the local papers, as required by the permit, it made reasonable efforts to provide the public with information about the eradication programme. There was no evidence that the pesticide causes health risks to people or has any effect on the natural enemies of economically important pests. Aerial spraying, in conjunction with other measures, was held to be the most appropriate method of eradication in the circumstances. The Board felt that such a programme was in the public interest.

The BC Court of Appeal has ruled that considering federal pesticide registration was outside the Board's jurisdiction. Adopting this judgement, the Board decided not to comment on the safety of the pesticide. The appeal was dismissed.

93/12 Vancouver Appellant Group v. Canada Minister of Agriculture

After an unsuccessful attempt to eradicate gypsy moths without the use of pesticides, Agriculture Canada applied for a Pesticide Use Permit for Foray 48B. Because the pesticide was registered federally, the Board was unable to consider its safety. However, there is no evidence of an impact from the pesticide on humans, soil flora and fauna, most invertebrates, small mammals or the natural enemies of economically important pests.

Although academic opinion is split over whether the gypsy moth poses a threat in B.C., it was held that an eradication programme is desirable for economic and other reasons. The Board was concerned that there is no requirement that inert ingredients in Foray 48B, or other pesticides, be disclosed. However, there were sources of information for anyone concerned about suffering potential effects from the pesticide. The Board rejected an argument that the pesticide was not intended to be applied to urban areas.

At the request of the Minister of Agri-culture, the Board amended the permit, restricting it to ground application over a smaller area. The appeal was dismissed.

93/13(a) Victoria Area Appellant Group v. Canada Minister of Agriculture

An interim decision was issued amending the Pesticide Use Permit because of the early hatch of gypsy moth larvae.

93/13(b) Victoria Area Appellant Group v. Canada Minister of Agriculture

Agriculture Canada sprayed an area of about 80 hectares with Foray 48B in 1993, but soon afterwards found gypsy moths in the same area. It concluded that further spraying was required and obtained a new pesticide use permit. Thirty-three local residents objected to the spraying and appealed.

Many of the Appellants reported health problems associated with the previous spraying. However, there was no convincing evidence to show that these problems were a result of the spraying and the Board found that the pesticide was generally safe, both to humans and to most animals, when used according to its label. The Appellants offered to organise volunteers to help with non-pesticide gypsy moth control and presented a list of as many as two hundred people who were willing to help. However, the Board did not feel that this would be sufficient, and held that the serious economic consequences of a gypsy moth infestation justified an aerial spraying programme in the area.

Although the Board did not find a connection between the spraying and any negative effects, it modified the permit to ensure that the public was well informed of the spraying and to monitor the extent and duration of drift of the pesticide. The appeals were dismissed.

94/04 Shuswap-Thompson Organic Producers Association v. Thompson-Nicola Regional District

The Thompson-Nicola Regional District obtained a Pesticide Use Permit authorising the use of two pesticides on Crown lands and public rights of way throughout the District. The Shuswap-Thompson Organic Producers Association appealed.

The Board would not examine the toxicity of a contaminant in one of the pesticides, as the pesticide was federally registered and therefore beyond its jurisdiction. The Association was concerned that a permit covering such a large area removed any need for site specific application. However, individual sites had been assessed by the District, even though the permit covered a larger area. The District had notified the public of when they intended to spray, but had treated these times as guidelines only. The Board found that spraying at unposted times was a violation of the permit, and amended it to clarify the need for notification.

There were also contradictions between statements from federal government sources on the use of one of the pesticides, and evidence that it should not be applied to certain types of soils. To address these concerns the Board amended the permit to require that precautions be taken against soil and water contamination.

The District requested that the Board award costs against the Association because the action was frivolous. The Board refused. The Association had attempted to avoid the appeal and had spent considerable effort in preparing for it. Subject to the amendments to the permit, the appeal was dismissed.

Waste Management Act

93/04(a) Maple Bay Ratepayers Association and Seaworthy Board Owners Association v. Deputy Director, Waste Management et al.

The Maple Bay Ratepayers Association and the Seaworthy Boat Owners Association objected to a permit allowing a sewage out-fall in Maple Bay. Before the issue could be heard on appeal, the Board was asked to consider some preliminary issues.

The Associations argued that the Deputy Director of Waste Management could not issue a permit dealing with sewage treatment under s. 8 of the *Waste Management Act*, since sewage treatment is dealt with more specifically under s. 16. The Board disagreed, noting that s. 16 provided municipalities with the option of participating in a liquid waste management plan, but did not preclude others from applying for a permit under s. 8.

Next, the Associations suggested that the Deputy Director was acting as a Manager when he issued the permit. If this was the case, the Associations should have two chances to appeal – first to the Director of Waste Management, and then to the Environmental Appeal Board. However, the Board found that the *Waste Management Act* allowed the Deputy Director to issue permits under s. 8 in his capacity as Deputy Director, thus negating the first right of appeal to the Director. The preliminary motions were dismissed.

93/04(b) Maple Bay Ratepayers Association et al. v. Deputy Director, Waste Management et al.

When Maple Bay Resorts Inc. sought to expand their facilities, increased sewage disposal was needed and the resort applied for a permit to discharge the effluent. The Maple Bay Ratepayers Association and the Seaworthy Boat Owners Association were concerned with the impact of this proposed expansion on the bay and the surrounding area, and appealed the permit.

The Board found that the standards in the permit were actually more stringent than those required by the Pollution Control Objectives, and that effluent discharged under the permit would not affect swimming beaches or shellfish. Also, the Board rejected arguments that the permit was not within the power of the Ministry of Environment, Lands and Parks.

However, both the Appellants and the Deputy Director expressed concern that the security bond posted by Maple Bay Resorts Inc. was inadequate, and the Board required that it be re-evaluated. The Board also amended the permit, requiring odour control facilities, sludge monitoring and pre-treatment for any effluent from holding tanks containing odour suppressing chemicals. Aside from these changes, the Board dismissed the appeal.

93/10 Shell Canada Products Ltd. et al. v. Deputy Director, Waste Management

An appeal against a pollution abatement order.

Leaking underground storage tanks at a gas station resulted in soil contamination. After discussions with the site's owners, Sage Brush Services Ltd., the Waste Management Branch issued a pollution abatement order against Sage Brush and Shell Canada Products Ltd. Shell had been one of several companies which had operated the gas station between 1961 and 1992. The Deputy Director ordered Sagebrush and Shell to investigate the contamination and perform a cleanup.

Shell Canada Ltd. objected that it was not responsible for the site. However, the Board disagreed, pointing out that Shell had "possession, charge or control of the substance (fuel) at the time it escaped …" It dismissed complaints that the Waste Management Branch should have met with Shell before issuing a Pollution Abatement Order. Discussions were not necessary, and in any case Shell had declined an offer of a meeting. Finally, even though the Deputy Director had only limited evidence about the pollution, the order was reasonable since it demanded an investigation to determine what, if any, action was necessary. It was only after Shell and Sage Brush determined what needed to be done that they would be required to do it.

93/20 R. Emsley v. Greater Vancouver Regional District et al.

Roger Emsley's neighbour, Houweling Nurseries Ltd., was granted an Air Quality Discharge Permit to allow it to operate a greenhouse heated by burning wood waste. Mr. Emsley made a series of complaints about the burning to the Greater Vancouver Regional District and then, when the permit was re-issued and amended, appealed the matter to the Board.

Although there had been some previous violations of the Permit, the Board was satisfied that Houweling Nurseries was making real efforts to comply with the permit. The Board had questions about the criteria used to determine the discharge levels required by the District's Air Quality Director for the protection of the environment, but found that the levels set out in the permit did meet this standard. Finally, the Board felt that the District's responses to earlier complaints from Mr. Emsley were adequate. The appeal was denied, but the Board did recommend a series of steps to more closely monitor the emissions resulting from the permit holder and to mitigate any pollution.

94/05(a) Alpha Manufacturing Inc. v. Deputy Director of Waste Management

A pollution abatement order was issued against Alpha Manufacturing Inc.. Alpha Manufacturing appealed the order to the Deputy Director of Waste Management, but before the appeal could be heard the company was charged with two violations of the *Waste Management Act*, related to the same incident. Concerned that information raised in, or conclusions arising from, the appeal could be used against it in court, Alpha Manufacturing applied to the Board to have the appeal proceedings stayed until the charges were dealt with in court. Alpha Manufacturing also appealed the Deputy Director's decision to grant the Corporation of Delta full party intervenor status in its appeal.

While the quasi-criminal charges and the appeal proceedings may deal with similar issues of fact, different issues of law are considered. A court decision could not help solve the issue before the Deputy Director of how and what action should be taken to control, abate or stop the pollution. While the appeal proceedings might be prejudicial to the Appellant, this was speculative; and the balance of convenience was in favour of continuing the appeal.

The Board felt that the ordinary meaning of the standing provisions in the *Waste Management Act* did not allow the Deputy Director to grant full party status to Delta, and granted a stay on that decision.

94/06 West Fraser Timber Company Ltd. v. Deputy Director of Waste Management

West Fraser Timber Company Ltd. held two permits authorising the burning of waste wood. They were amended to expire after certain dates and West Fraser was given 21 days to appeal the amendments, which it did not do. Some time later West Fraser applied for an extension on the time to appeal, stating that it had just realised the implications of the amendments. The Deputy Director refused to allow an extension, and West Fraser appealed to the Board.

The Board noted that there was "virtually no evidence … giving any reason for the delays". Court decisions granting extensions involved "unusual facts, or circumstances, or changes in the law … such that there was an obvious injustice," factors which were not present in this case. The appeal was dismissed.

94/08 District of Sparwood v. Deputy Director of Waste Management

The District of Sparwood operated a wastewater treatment plant for which it held a Waste Permit. The Regional Manager, acting on a provincial policy, amended the permit requiring all plant operators to be certified as Class I operators by the B.C. Wastewater Operators Certification Program Society (BCWWOCPS) and one operator to be certified as Class II and designated as the Chief Operator with "Directly Responsible Charge" (DRC). The District appealed the amendment to the Deputy Director who felt that he would be in a conflict of interest, since his Branch developed the policy. The appeal was referred to the Board.

The power to impose operator standards is granted to the Regional Manager by necessary implication from the *Waste Management Act*. Identifying BCWWOCPS as the source of those standards did not amount to unlawful sub-delegation of the Regional Manager's authority.

However, the Board acknowledged difficulties with the certification in this case. Because of the work schedule of the employees, it would be
difficult for employees to reach the pre-requisite for the Class I certification – one year of experience. Furthermore, the Board felt that the phrase "Directly Responsible Charge" was ambiguous. The Board amended the permit to allow for a "grandfathering" clause which would exempt employees who had been with the District for 10 years from the certification requirements and deleted a clause requiring that operators in training be certified within 15 months.

94/09 R. and D. Roberge et al. v. Deputy Director of Waste Management et al.

The Deputy Director of Waste Management amended a permit held by Joachim Bauer to allow Edelweiss Mobile Home Park to develop and use a septic field. Rick and Dawn Roberge, who were neighbours to the 98-unit mobile home park were concerned that the amendments were not sufficient to protect their land. The Board

noted that the amended permit was one of the most stringent issued in the area and that flooding, surface seepage and outbreaks were unlikely. The appeal was dismissed.

Water Act

93/09 A. Juthens et al. v. Deputy Comptroller of Water Rights et al.

In 1988 Ron Williams was granted two conditional water licenses which allowed him to use water from Morehead Lake for irrigation and residential power needs. The permits allowed him to build a dam, raising the level of the lake by 24 inches. In 1990 Mr. Williams applied for a third conditional water license to allow him to build and operate a hydroelectric project on the lake. In addition, the original licenses were replaced with two licenses covering the same water rights, but authorising the use of the water for the hydroelectric project. The Appellants owned land near Morehead Lake and appealed all three licenses.

Because appeals under the *Water Act* must be filed within 30 days after the original decision is made, the Board could not consider Mr. William's right to store water and raise the level of the lake – rights which were granted in 1988. However, the amendments to the licences, and the new license allowing a hydro-electric project, were closely examined.

The Board found that Mr. Williams followed the correct procedure in applying for his new licences. The Board also found that many of the Appellants' concerns could be dealt with by an Operation and Maintenance Plan, which would have to be approved by the Comptroller of Water Rights. These Appellants were worried about the impact on the environment, the fluctuation in the lake's water level and the effect on existing licenses. The Board ordered that an interim operation plan be shown to a representative of the Fish and Wildlife Branch before it was authorised. The appeal was dismissed.

93/21 B. Giacomazzi v. Deputy Comptroller of Water Rights et al.

An appeal against the granting of a Conditional Water License.

When Mr. Mohinder Singh Paul was granted a Conditional Water License allowing him to take water from Perry Homestead Brook, Mr. Bruno Giacomazzi appealed, fearing that the water use might damage fish habitat and result in water shortages. All parties agreed that for most years there was enough water for all licenses. In years where there wasn't the Appellant's earlier water rights would have precedence under the *Water Act.* The Board made recommendations on establishing a minimum flow required to support the brook's fish population, water flow monitoring, water shortage procedures, and other matters. The appeal was dismissed.

93/22 T. Penner v. Deputy Comptroller of Water Rights et al.

Mr. Terry Penner failed to pay a rental fee on his Conditional Water License for over three years, despite receiving 7 requests for payment. As a result the Deputy Comptroller cancelled the license. The Board noted that the *Water Act* clearly allows a Conditional Water License to be cancelled if the licensee fails to pay rentals. The appeal was dismissed.

94/03 East Kootenay Environmental Society v. Deputy Comptroller of Water Rights et al.

Windermere Lake Resort Ltd. began filling in a swamp, acting on the belief that it did not require permission from the Water Management Branch. The East Kootenay Environmental Society's lawyer wrote to the Regional Water Manager pointing out that the Branch's authorisation was required. After receiving this letter, the Branch quickly gave Windermere permission. The Society appealed to the Board seeking to stop the development until an environmental assessment could be conducted, and the Board issued a temporary *ex parte* order staying the filling. The Board heard from all parties to consider whether to vacate the stay.

Windermere Lake Resort Ltd. argued that the authorisation did not amount to an "order" under the *Water Act* and that there was consequently no grounds for appeal. The Board disagreed, holding that an order, under the *Water Act*, includes any "decision or direction whether given in writing or otherwise". Nor does the *Act* restrict who can appeal an order; the Society was found to have public interest standing. Irregularities in the application for appeal were not sufficient to defeat it.

The Board's jurisdiction to issue an *ex parte* stay was challenged. The Board rejected the narrow interpretation of the *Water Act* suggested by the Deputy Comptroller and found that the broad power to make orders "that to the Tribunal appears just" encompassed a power to order an ex parte stay.

Although the Board found that the Society had a serious issue to be tried, it had not shown that it would suffer irremediable harm which could not be adequately compensated for by an award of damages. Although the wetlands would be damaged, there was little evidence as to the cost of reconstruction, while the damages to Windermere Lake Resorts Ltd. were clear. The stay was vacated.

Although the stay was vacated, Windermere Lake Resorts appealed the decision to the B.C. Supreme Court. A summary of the resulting decisions is provided in Appendix 2.

Wildlife Act

92/26 D. Ethier v. Deputy Director of Wildlife

Mr. Dale Ethier had been a guide outfitter for 25 years in a remote area of northern British Columbia. In October of 1989 he informed the Regional Manager that he did not intend to use his guide territory for the 1990/91 and 1991/92 hunting seasons due to personal health problems. The Regional Manager, acting on his understanding of the *Wildlife Act*, told Mr. Ethier that he didn't have to use the territory for the 1990/91 season, but that for the following year he must renew his license and should do at least some guiding activity. Mr. Ethier did renew his license, but didn't make use of it as he had decided to sell his guiding business. The Regional Manager declared the territory vacant, and Mr. Ethier appealed to the Deputy Director of Wildlife and then to the Board.

Under the *Wildlife Act* the Regional Manager could only authorise Mr. Ethier to stop using his guiding area for one year at a time; however, there was nothing limiting the total number of years as long as Mr. Ethier made a new application each year. Since the Regional Manager didn't know that he had the option of allowing Mr. Ethier not to use the land for another year, the Board referred the decision back to the Deputy Director to reconsider.

The Deputy Director, on reconsidering the matter, decided that the Appellant could retain his guide license without using it for up to three years, as long as he pays his fees each year.

93/01 R. Solmonson v. Assistant Deputy Director, Wildlife

Mr. Solmonson, an experienced hunting guide, shot a lynx out of season. He was convicted under the *Wildlife Act* and fined $500. Soon afterwards the Assistant Director of Wildlife decided to suspend his hunting privileges for a year. Mr. Solmonson objected, arguing that the fine was punishment enough, and a one year suspension was too harsh.

The *Wildlife Act* has two separate sections dealing with penalties – one with criminal penalties and the other administrative penalties. Because they are separate the factors considered in one section do not need to be considered in choosing a penalty under the other. The Assistant Deputy Director did not need to consider the court's penalty in making an administrative decision (suspending the license). He was within his discretion to suspend the license for one year.

93/02 W. Schmidt v. Deputy Director, Fisheries

Mr. Hruby, an angling guide, promised to transfer 400 angler days to Mr. Schmidt, once Mr. Schmidt was able to acquire an angling guide spot. After a guide spot became available, Mr. Hruby refused to transfer the angler days. Although Mr. Hruby and Mr. Schmidt had earlier written to the Ministry of Environment requesting the transfer, this request was found to be invalid, since Mr. Hruby's name was not notarised. The Deputy Director decided that he could not allow the transfer until Mr. Hruby agreed to it.

Angler days are effectively personal property (personal possessions), and cannot be transferred without the owner's consent. There may have been a private agreement between Mr. Hruby and the Appellant, but issues related to contracts are considered by the courts, and not by the Board. The Deputy Director's decision was affirmed.

93/05(a) Bill Warrington v. Deputy Director of Fisheries

Mr. Warrington applied to the regional manager for an angling guide license. The *Wildlife Act* requires that angling guides be either a Canadian citizen or a permanent resident of Canada, and Mr. Warrington was neither. When the Regional Manager denied him a license, Mr. Warrington appealed to the Board, arguing that the Act violated his rights under the Canadian Charter of Rights and Freedoms. Although the appeal has not yet been resolved, the Board considered whether it was able to consider constitutional questions.

According to the courts, an administrative tribunal can address a *Charter* issue if the tribunal has "jurisdiction over the parties, the subject matter of the appeal and the remedy sought" or if the power to interpret law is conferred upon the tribunal in its enabling statute. The *Environmental Management Act*, when read with the other Acts which the Board hears appeals under, meets this test. However, the Board cannot "strike down" legislation as unconstitutional. Its decisions are limited to the matter before it. The Board decided that it may consider constitutional arguments.

93/06 L. Dougan and W. Wiebe v. Deputy Director, Wildlife

Because of a series of recent court decisions about aboriginal rights, the Ministry of Environment, Lands and Parks increased the allocation of elk to native hunters. This decreased the quotas of Larry Dougan and Wayne Wiebe, who appealed the decision.

The recent court decisions required the Ministry to guarantee native hunters enough elk for "sustenance use". Exactly how many elk this involved might be difficult to determine, but priority must still be given to native hunters. There was no evidence that the Deputy Director had acted improperly in setting the quotas, and the Board dismissed the appeal.

The Board did recommend, however, that if the Ministry were increasing the number of elk that native hunters could take, then it should re-allocate other quotas in order to minimise the impact on everyone affected.

93/08 T. Foster v. Deputy Director of Wildlife

Mr. Foster was planning to become a guide outfitter in B.C. Because he had experience as a guide in Alberta, the Wildlife Branch offered to exempt him from a requirement that guide outfitters must have worked as an assistant guide in B.C. for at least 24 months. Soon after, however, the Deputy Director of Wildlife learned that Mr. Foster had a Criminal Code conviction, as well as two convictions under Alberta statutes. The Deputy Director refused to grant Mr. Foster an exemption. Mr. Foster appealed the refusal.

It was appropriate for the Deputy Director to consider Mr. Foster's convictions, especially since the criminal conviction had involved a conservation officer and took place while he was working in the guiding industry in Alberta. The Deputy Director was entitled to exercise discretion and the refusal to grant the exemption was not inappropriate.

93/14 G. Warkentine v. Assistant Deputy Director of Wildlife

Gary Warkentine accidentally shot a doe deer out of season. He was under the incorrect impression that hunting season had begun. He was charged with hunting out of season and failing to cancel a species tag and was convicted. Soon afterwards the Assistant Deputy Director notified Mr. Warkentine that he was considering cancelling his hunting privileges. The Assistant Deputy Director received no response from Mr. Warkentine and decided on an 18 month suspension. Mr. Warkentine appealed.

In making his decision the Assistant Deputy Director was concerned that Mr. Warkentine had an earlier conviction under the *Wildlife Act*. He felt that two convictions in a relatively short period of time might indicate that "there was more to this than simply what appeared on the face of it." He had no real reason to believe that Mr. Warkentine had been involved in other incidents of illegal hunting and the Board felt that this was an improper exercise of his discretion.

Mr. Warkentine had believed that his license had been suspended by the judge on his conviction. Since he believed he could not use it anyhow, he did not buy a license for the year. If the Assistant Deputy Director had been aware of this he might have taken this into account in determining the duration of the suspension. The Board returned the issue of the length of the suspension to the Assistant Deputy Director for reconsideration.

The Assistant Deputy Director had also ordered that Mr. Warkentine should successfully complete the Conservation and Outdoor Recreation Education (CORE) examinations before regaining his hunting privileges. The board upheld this decision.

After reconsidering his decision the Assistant Deputy Director reduced the hunting prohibition by six months.

93/15 M. Collier v. Assistant Deputy Director of Wildlife

As a result of reports of illegal night hunting, conservation officers set up a moose decoy. They caught Mr. Maurice Collier shooting at it at night. He was charged under the *Wildlife Act* with shooting wildlife with the aid of a light and with violating a regulation setting out prohibited hours. As a result of plea bargaining, the first charge was stayed and Mr. Collier plead guilty to shooting during prohibited hours. Soon afterwards the Assistant Deputy Director cancelled the Appellant's hunting privileges for five years and ordered that he complete the CORE examinations.

Mr. Collins appealed the decision on the basis that the Assistant Deputy Director should not have considered the issue of using a light, when charges were stayed. The Board found that while Mr. Collier's headlights were not directed at the decoy, they did provide him with some light. Also, given the light, his shooting was unsafe. The Board felt it was appropriate to consider the charge of shooting with the aid of a light in deciding to suspend Mr. Collier's license. The Assistant Deputy Director is not restricted to the findings made in court, and may consider the use of headlights, despite the stay in proceedings. The appeal was dismissed.

93/16 H. Schroth v. Deputy Director of Wildlife

Mr. Hans Schroth applied for a guide outfitter license. Although he did not have the pre-requisite 24 months experience as an assistant guide, he had experience in the guiding industry in other provinces and he believed he should be exempted from that requirement. His application was rejected and he appealed.

A guide must be responsible for the clients' welfare and for upholding the *Wildlife Act*. A good deal of skill is required, which is why the Act ordinarily requires 24 months as an assistant guide. An exemption may be issued in "special circumstances". The Deputy Director considered the Appellant's submitted material and there was no evidence to show that he erred in holding that the Appellant did not meet the special circumstances.

93/17 J. Davis v. Deputy Director of Wildlife

Mrs. Jean Davis, a guide, had her quota for bull moose reduced under a new quota system. She appealed, arguing that the high quality moose habitat of her territory should result in a higher quota. The Board found that the quality of the moose habitat had been taken into account and, in fact, the Appellant had the highest moose quota per unit area of any of the surrounding guides. Mrs. Davis argued that the quota could be higher, pointing to a higher quota available to guides who had signed an administrative guideline agreement. The Board rejected this, noting that the agreement addresses different issues and the quotas need not be the same. There was no evidence to suggest that irrelevant or unfair criteria had been used in determining this quota. The appeal was dismissed.

93/18 G. K. Prinz v. Deputy Director of Wildlife

An appeal against actions taken against a guide outfitter.

Mr. Gebhard Prinz was charged with twenty-four violations of the *Wildlife Act* and convicted of five. Soon afterwards the Regional Manager conducted a hearing and decided to suspend his guide outfitter license and certificate, and refused to renew or issue a guide outfitter license or certificate, for a period of two years. Mr. Prinz appealed first to the Deputy Director and then to the Appeal Board.

The Board rejected the argument that an in-house appeal (to the Deputy Director) will involve bias, and found that there was nothing to suggest that it was present in this case. Since the Administrative and Quasi-criminal penalties of the *Wildlife Act* are separate, the Regional Manager was entitled to consider other factors

aside from the convictions. There was no evidence to show that the Deputy Director exercised his discretion improperly. The appeal was dismissed.

The Board recommended that where transcripts of a trial are used in an administrative hearing that personal copies be provided to all the parties to the proceeding.

93/19 R. G. Vince v. Deputy Director of Wildlife

Mr. Vince, owner of Muskwa Safaris Ltd., was a guide outfitter. His quota for Stone sheep for 1993/94 was 19 sheep. Mr. Vince felt that the
procedure used to allocate sheep to his guide outfitting business did not include all relevant factors and penalised him even though he had previously followed policy.

Although there was some disagreement on the allocation process, Mr. Vince's quota was allocated according to a Ministry policy. The policy recognised many factors and there was no evidence presented to show that the Deputy Director exercised his discretion improperly. Furthermore, a number of the issues raised were not within the jurisdiction of the Board. The appeal was dismissed.

94/01 K. Seymour v. Assistant Deputy Director of Wildlife

Mr. K. Seymour shot an elk which he then found had fewer than the required six-points (on its antlers). Fearing that it would be confiscated, he hid this first elk in the bush and continued to hunt until he shot and killed an elk with the legal six-points. He was convicted under the *Wildlife Act* for failing to remove the edible portions of wildlife and exceeding the possession limit. Soon afterwards the Assistant Deputy Director cancelled his license for two years and required that he complete the CORE examinations to regain his eligibility.

The Board found that Mr. Seymour did not intend to shoot the first elk, and regretted not removing the meat; however, this did not constitute grounds for appeal. The Assistant Deputy Director gave him an opportunity to be heard and did not err in his discretion. Finally, although Mr. Seymour was told during plea bargaining that his hunting privileges would not be lost because of the convictions, the offences and administrative penalties are separate in the *Wildlife Act* and must be considered separately. The Assistant Deputy Director was unable to consider the Court-imposed fine in deciding to suspend Mr. Seymour's license. The appeal was dismissed.

94/02 J. Barreira v. Assistant Deputy Director of Wildlife

An appeal against the decision to cancel the Appellant's hunting license.

Mr. Jose Barreira was charged with offences under the *Wildlife Act* for illegally killing an elk. After plea bargaining he was convicted of one charge with the understanding that his hunting license would not be revoked. However, after corresponding with him, the Assistant Director of Wildlife suspended Mr. Barreira's hunting license for two years and required that he complete the CORE examinations.

Since administrative penalties in the *Wildlife Act* are separate from quasi-criminal offences, the Assistant Deputy Director was not limited by the findings of the court in deciding whether the license should be cancelled. Furthermore, because of this division between the types of penalties, the conservation officers had no obligation to inform Mr. Barreira that his license could be suspended in addition to a conviction during the plea bargaining. The Assistant Deputy Director had the discretion to cancel the license and there was no evidence that it had been done in an unlawful, incorrect or arbitrary manner. The appeal was denied.

94/07 D. Blewett v. Deputy Director of Wildlife

Dick Blewett, a guide outfitter, participated in talks with resident hunters which he believed would result in a reallocation of grizzlies and an increase in his quota. In anticipation of this he took on extra clients and exceeded his quota. After the agreement was implemented, the Regional Manager penalised Mr. Blewett by reducing his quota. On appeal, the Deputy Director further decreased the quota, and Mr. Blewett appealed to the Board.

It may be difficult for a guide to know how many clients to book when a quota change is expected, but the guide is nonetheless responsible for meeting the quota. While communication between outfitters and the Fish and Wildlife Branch might be improved, this did not entitle the Appellant to presume the outcome of the talks. The Board found no evidence that the Appellant was treated unfairly and the appeal was dismissed.

APPENDIX II

Summary of Court Decisions related to the Board

Lake Windermere Resorts Ltd. v. Environmental Appeal Board **(1994), [1994] B.C.J. No. 2776 (unreported).**

An application was made to the B.C. Supreme Court to quash an order of the Environmental Appeal Board.

Lake Windermere Resorts Ltd. had its plans to fill in a swamp delayed when the Environmental Appeal Board granted an ex parte stay to a local environmental organisation (*East Kootenay Environmental Society v. Deputy Comptroller of Water Rights et al.* (Environmental Appeal Board 94/03 – See above)). Although the Board later vacated that stay, Windermere Resorts appealed to the B.C. Supreme Court to quash the Board's order.

Since the order had been vacated by the time the issue went to court, there was no issue for the court to quash. MacKinnon, J., noted that courts will rarely hear purely academic cases. However, the court considered a number of reasons why an exception might be made in this case.

Windermere Resorts argued that hearing the case might prevent a future appeal against the petitioner. The court found that a future appeal was unlikely, as the swamp had already been filled. However, even if an appeal were undertaken, the courts should not interfere unless it is necessary to do so.

Windermere Resorts also suggested that the courts had a general duty to supervise the inferior tribunal, such as the Board. Although the court ex-pressed concern about the process used by the Board, it did not feel that any such duty was broad enough to review a vacated order. Nor did the judge accept the suggestion that as a result of the order the Board could no longer be trusted. Not only does the decision not support the allegation, but there are safeguards, such as appeal and judicial review, to prevent abuses.

The petition for judicial review was dismissed.

Environmental Appeal Board v. Lake Windermere Resorts Ltd. et at. **(1994), [1994] B.C.J. No. 2775 (unreported).**

A petition by the Board requesting that Lake Windermere Resorts Ltd. be found guilty of civil contempt.

The petitioner, the Environmental Appeal Board, granted a stay to an environmental organisation prohibiting the Respondent from proceeding with plans to fill a swamp. Windermere Resorts informed the Board that it did not intend to obey the ruling. The Board appealed to the B.C. Supreme Court to have the Respondent found guilty of civil contempt, for disobeying the order.

The court found that the Board did not prove that Windermere Resorts actually ignored the order and deposited fill on the exact land described in it. The petition was dismissed.