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

The Honourable Penny Priddy
Minister of Health and Minister Responsible for Seniors
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Ministers:

I respectfully submit herewith the annual report of the Environmental Appeal Board for the period April 1, 1998 through March 31, 1999.

Yours truly,

Toby Vigod

Chair

Environmental Appeal Board

Table of Contents

Message from the Chair

Toby Vigod

I am pleased to submit the eighth Annual Report of the Board.

Prior to 1997, there were two levels of appeal from the decisions of Ministry of Environment, Lands and Parks officials. The first level was to senior officials in the Ministry and the second appeal was to the Environmental Appeal Board. As a result of statutory amendments made during 1997, appeals are now made to the Board. The removal of a level of appeal helped streamline the appeal process

This fiscal year was the first year in which there was only one level of appeal. As anticipated, the number of administrative decisions appealed to the Board has increased from 103 in fiscal 1997/98 to 168 in fiscal 1998/99. I am pleased to report that the Board is more than adequately dealing with this increase in its workload. We are ensuring that hearings take place soon after appeals have been filed and that decisions are rendered in a timely fashion.

The Board continues to be faced with many challenging and interesting issues. This is especially true in the area of appeals under the new *Contaminated Sites Regulation* under the *Waste Management Act* proclaimed on April 1, 1997. The Board continues to address questions of standing, costs and aboriginal rights.

The British Columbia Supreme Court recently upheld a decision of the Board in relation to standing. In its reasons, the Court deferred to the expertise of the Board. The Court found that on questions of mixed fact and law the appropriate standard of review is the standard of patent unreasonableness.

The composition of the Board reflects an increased professionalism in areas such as biology, engineering and law. This expertise will continue to be invaluable in meeting the challenges that will face us in the coming year.

Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period of time between April 1, 1998 and March 31, 1999.

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

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

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

Decisions are also available through the Quicklaw Data Base.

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

Environmental Appeal Board

Fourth Floor, 836 Yates Street

Victoria, British Columbia

V8W 1L8

Telephone: (250) 387-3464

Facsimile: (250) 356-9923

Website Address:

http://www.eab.gov.bc.ca/

Mailing Address:

PO Box 9425 Stn Prov Govt

Victoria, British Columbia

V8W 9V1

The Board

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

Board Membership

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

The Board	From
Chair	
Toby Vigod	Victoria
Vice-chair	
Judith Lee	Vancouver
Members	
Sheila Bull	Salt Spring Island
Robert Cameron	Vancouver
Richard Cannings	Naramata
Don Cummings	Richmond
Cindy Derkaz	Salmon Arm
Jackie Hamilton	Victoria
Harry Higgins	Salmon Arm
Katherine Hough	Nelson
Marilyn Kansky	Richmond
Elizabeth Keay	Victoria
Helmut Klughammer	Nakusp
Jane Luke	Vancouver
William MacFarlane	Revelstoke
Ken Maddox	Prince George
Christie Mayall	Williams Lake
Carol Quin	Hornby Island
Bob Radloff	Prince George
Gary Robinson	Surrey

The Board Office

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

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

The Forest Appeals Commission, set up under the *Forest Practices Code of British Columbia Act*, hears appeals from forestry-related administrative decisions made under that *Act*, in much the same way that the Board hears environmental appeals.

The Forest Appeal Board hears appeals from administrative decisions made under the *Forest Act* and the *Range Act*.

The Environmental Assessment Board is established under the *Environmental Assessment Act*, which establishes a formal method for the review and assessment of environmental, economic, social, cultural, heritage, and health effects of major projects. The Environmental Assessment Board may be required to conduct a public hearing as part of this process.

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

Policy on Freedom of Information

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

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

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

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

Legislative Amendments Affecting the Board

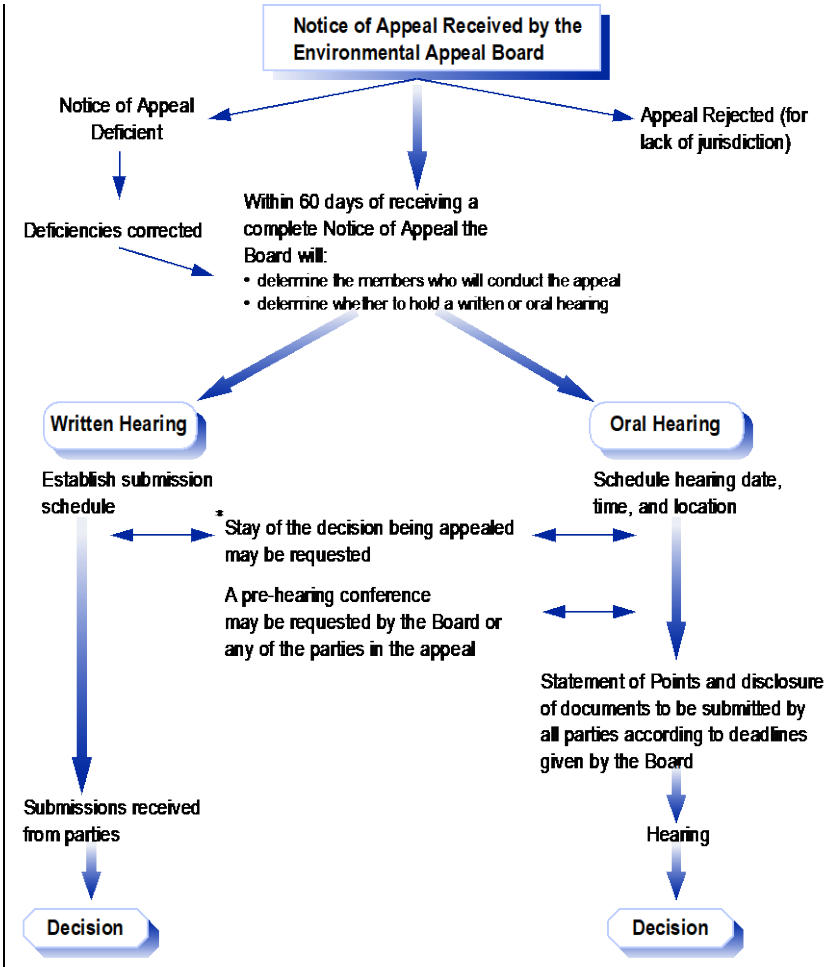
There were no significant amendments in this report period to the statutes and regulations under which the Board has jurisdiction to hear appeals.

The Appeal Process

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

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

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



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

Recommendations

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

1. *Health Act*

The Board recommends that the *Health Act* and regulations be amended to provide a 30 clear day appeal period from notification. Under sections 3.2 and 3.3 of the *Sewage Disposal Regulation*, a person who is issued a permit to construct, install, alter or repair a sewage disposal system must post a notice not more the 3 days from the date that the permit was issued. Section 3.4 of the *Regulation* provides that the notice must be published as soon as possible, but no more that 10 days after the permit is issued. When notification is received by way of posting or advertisement the appeal period is reduced by up to 10 days. This results in confusion as to when the appeal period begins and ends. The Board is concerned that this may result in unfairness and uncertainty to appellants, property owners, and others affected by the appeal process. The *Health Act* provides for a 30-day appeal period for all persons affected by the issuance or refusal of a sewage disposal permit. To achieve this legislated objective the *Health Act* should be amended to ensure that all parties are given a full 30 days to appeal from the date of posting, publication, or receipt of the decision.

2. *Pesticide Control Act*

A number of local governments have come before the Board appealing the issuance of pesticide use permits by the Ministry of Environment, Lands and Parks to railway companies within their boundaries. One of their grounds of appeal has been the lack of notice of the pesticide use application and the lack of opportunity to provide meaningful input. The Board recommends the *Pesticide Control Act Regulation* be amended to require specific notification to local governments where major pesticide use permit applications within their boundaries are being considered. Local governments in the application area should be directly informed of the pesticide use applications and given ample time for input and comment.

3. Environment Management Act

The Board recommends that the *Environment Management Act* be amended to provide the Board with the power to order pre-hearing disclosure of documents. The Board's policy is to request that parties disclose relevant documents in advance of the hearing. This policy ensures parties are prepared for the hearing and avoids parties being surprised at the hearing. Disclosure at the hearing results in delays and, in some cases adjournments, leading to increased cost and reduced efficiency. However, the Board has no authority to order pre-hearing exchange of documents except through the issuance of a summons under the *Inquiry Act*. A summons issued under the *Inquiry Act* requires a witness to attend before the Board and

bring certain documents with them. The Board finds that this is an inadequate and administratively onerous method of providing for pre-hearing documentation. An amendment to the *Environment Management Act* to give the Board the authority to order that parties exchange documentation in advance of a hearing without the need for a summons would serve to expedite proceedings before the Board.

Statistics

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

Between April 1, 1998 and March 31, 1999 a total of 200 appeals were filed with the Board against 168 administrative decisions.

April 1, 1998 - March 31, 1999

Total appeals filed	**200**
Number of administrative decisions appealed	**168**
Appeals abandoned, withdrawn, or rejected	**46**
Hearings Held	
Oral hearings held	64
Written hearings held	18
Total hearings held	**82**
Total decisions issued	**94**
Final decisions	62
Appeals allowed	24
Appeals dismissed	32
Referred back to original decision-maker	6
Decisions on preliminary matters	32
Costs	
Costs awarded	0
Costs denied	10
Total Decisions on requests for costs	**10**
Security	
Security awarded	0
Security denied	2
Decisions on security for costs	2

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

Appeal Statistics by Act	*HEA*	*PES*	*WAS*	*WAT*	*WIL*
Appeals filed during report period	42	14	66	39	39
Number of administrative decisions appealed	31	8	42	48	39
Appeals abandoned, withdrawn or rejected	14	1	10	13	7
Hearings held					
Oral hearings	11	7	8	15	23
Written hearings	2	0	7	3	6
Total hearings held	**13**	**7**	**15**	**18**	**29**
Decisions Issued					
Final decisions	15	11	7	11	18
Preliminary decisions	4	6	13	9	0
Total decisions issued	**19**	**17**	**20**	**20**	**18**

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

Decisions issued by the Board by Act

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

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

Health Act

Administrative	Preliminary Matter	Appeal Allowed	Appeal Dismissed

Decision Appealed				
Refusal to issue a permit			3	5
Issuance of a permit	4		3	4

Pesticide Control Act

Administrative Decision Appealed	Preliminary Matter	Appeal Allowed	Appeal Dismissed	Referred back to Original Decision-maker
Refusal to issue a permit				2
Issuance of a permit	4	4	2	2
Licence suspension	2		1	

Waste Management Act

Administrative Decision Appealed	Preliminary Matter	Appeal Allowed	Appeal Dismissed
Issuance of a permit	2	1	
Amendment of a permit	3	3	2
Remediation Order	4		
Issuance/amendment of a pollution abatement and/or pollution prevention order	4		1

Water Act

Administrative Decision Appealed	Preliminary Matter	Appeal Allowed	Appeal Dismissed	Referred back to Original Decision-maker
Issuance of a licence	2		3	
Refusal to issue a licence	2			
Cancellation of a licence			2	
Issuance of an Order	5	1	2	1

Project Authorization		1	1	

Wildlife Act

Administrative Decision Appealed	**Preliminary Matter**	**Appeal Allowed**	**Appeal Dismissed**	**Referred back to Original Decision-maker**
Refusal to issue a permit		4	3	
Conditions on a licence		2	2	
Cancellation of a licence		2	4	1

Summaries of Environmental Appeal Board Decisions

April 1, 1998 ~ March 31, 1999

The following are summaries of decisions reached by the Environmental Appeal Board between April 1, 1998 and March 31, 1999. They are organized according to the statute under which the Ministry official's decision was appealed.

Commercial River Rafting Safety Act

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

Health Act

95/61 Michael Lawrence v. Environmental Health Officer

Decision Date: August 31, 1998

Board: Carol Quin

Mr. Lawrence appealed a decision by the Environmental Health Officer (EHO) refusing to issue a permit for a holding tank on Mr. Lawrence's property. His permit was refused because the local government had not enacted a bylaw to address regular maintenance of the tank, and the pumping and disposal of effluent. Mr. Lawrence sought an order that a permit be issued on grounds that the proposed system met the requirements of the *Health Act* and *Sewage Disposal Regulation.*

The Board held that the EHO was correct in interpreting the *Regulation* and rejecting the application for public health reasons. The Board accepted that the Ministry of Health policy states that holding tanks should not be permitted unless there is a local government bylaw regarding safe pumping and disposal of effluent. The Board found that the proposed holding tank would create a risk of effluent escaping into the nearby lake, given that there was no local authority to ensure regular effluent pumping and disposal. The appeal was dismissed.

97-HEA-34 Dan Lenko v. Environmental Health Officer

Decision Date: June 15, 1998

Board: Bob Radloff

This was an appeal against the decision of the EHO refusing to issue a permit for a sewage disposal system. The EHO rejected the permit on the basis that the disposal field did not meet the setback required by Health Unit's policy. The lot was very wet, the potential for breakout was high, and that there was a Class A fish bearing stream flowing through the proposed field.

The Board found that the watercourse was not a Class A stream, but was a man-made ditch. The Board found that the proposed system met or exceeded the standards in the *Sewage Disposal Regulation* and found that the policy setback requirement was inconsistent with the *Regulation*. The Board held that the policy was applied inflexibly and unreasonably and accepted the Appellant's evidence that the travel time to potential breakout points was acceptable to protect public health. The Board held that the permit should be issued, subject to conditions set out by the Board. The appeal was allowed.

97-HEA-35 Chris Blumhagen v. Environmental Health Officer

Decision Date: June 15, 1998

Board: Bob Radloff

This was an appeal against the decision of the EHO refusing to issue a permit for a sewage disposal system. The EHO rejected the system because the field was less than 30.5 metres from a boundary line, contrary to Health Unit guidelines. Additionally, the lot was very wet and the interceptor ditches were too close to the field and represented a potential breakout to a ditch that was connected to a fish bearing river.

The Board found that if an ozonator was used instead of a chlorinator, there would be no negative impact on fish, the ditch, or the river. The Board concluded that it was unlikely that the disposal field would affect local wells, especially because the field location met setback requirements in the *Sewage Disposal Regulation*. The Board found that the guideline was applied inflexibly and unreasonably in the circumstances of the case. The Board also found that the sewage effluent would be attenuated before it reached breakout points and left the property. The Board ordered the EHO to issue the permit, subject to the conditions set out by the Board. The appeal was allowed.

97-HEA-38 Larry Perkins v. Environmental Health Officer

Decision Date: August 24, 1998

Board: Carol Quin

Mr. Perkins appealed an EHO's decision to refuse a permit for an "alternate" package treatment plant system for Mr. Perkins' property, located within an Environmental Control Zone, designated by the Ministry of Health. The permit was refused on the grounds that the minimum 30-metre setback from a creek could not be met, as measured from the "toe" of the proposed raised field. As well, the field length was too short and the property did not have a designated reserve field area, which could be used if the system failed. Mr. Perkins argued that the EHO erred in the way he measured the setback distance and in his calculation of the required field length.

The Board found that the *Regulation* does not permit "alternate" disposal systems in an Environmental Control Zone and, therefore, Mr. Perkins' system must meet the requirements of a

"conventional" system. The Board found that the 30-metre setback in this case must be measured from the toe of the mound and that the EHO correctly determined that this distance could not be met. The Board also found that the length of the field was not determined properly and that a much larger field area would be required than the one proposed, and that the proposed pipe size did not comply with the mandatory requirements of the *Regulation.* The Board concluded that there is no discretionary authority to relax the mandatory setbacks to a creek. The appeal was dismissed.

98-HEA-02 Roderick and Frances Walker v. Environmental Health Officer

Decision Date: June 22, 1998

Board: Don Cummings

This was an appeal against the decision of the EHO to refuse issuance of a sewage disposal permit for construction of a package treatment plant and low rate sand filter. The proposed field was to be located within three metres of the culverted Benes Creek. The permit was refused primarily on the ground that the absorption field was within 30 metres of the high water mark in Benes Creek. The Appellants argued that since Benes Creek had been culverted, it should be considered an interceptor drain, pipeline or ditch with only a three-metre setback required to an absorption field.

The Board found that the culverted creek was not a pipeline because a water pipeline is designed to convey flow under pressure, whereas a culvert is designed to convey flow under gravity. The Board found that Benes Creek was not a ditch, but a stream, as defined by the *Water Act*. The Board found that constructing a culvert to convey a stream's water did not change the fact that it was a stream in this case. The Board concluded that the Appellants' absorption field did not meet the 30-metre setback requirement of the *Sewage Disposal Regulation* and that neither the EHO, nor the Board, had the discretion to reduce this setback. The appeal was dismissed.

98-HEA-05 Linda Waugh on behalf of the Price Road Property Owners v. Environmental Health Officer (Walco Enterprises Ltd., Permit Holder)

Decision Date: June 30, 1998

Board: Don Cummings

This was an appeal against the decision of the EHO to issue a sewage disposal permit to Walco Enterprises for construction of a package treatment plant system for a mobile home subdivision. The Appellant argued that the sewage disposal system would have a negative impact on fish and local wells, and that the Permit Holder and the EHO may have been misled about the accuracy of soil testing at the site. The Appellant argued that the estimated daily sewage flow shown in the permit was questionable and should fall under the provisions of the *Waste Management Act*.

The Board found that there was no evidence to support the claim that the proposed system would have an impact on fish or would affect nearby wells, nor was there evidence to support the suggestion that the test pits at the site were "salted" with imported soil. The Board noted that the proposed system

satisfied the requirements of the *Sewage Disposal Regulation*. The Board also found that the proposed sewage flows exempted the system from the *Waste Management Act.* The appeal was dismissed.

98-HEA-08 Carolyn Klassen v. Environmental Health Officer (Cidalia Wensley, Permit Holder)

Decision Date: June 8, 1998

Board: Toby Vigod

This was an application to dismiss the appeal filed by Carolyn Klassen against the decision of the EHO to issue a permit to Ms. Klassen's neighbour, Ms. Wensley, for an on-site sewage disposal system.

In an earlier appeal, by Ms. Klassen, of a sewage disposal permit for the site (Appeal No. 97-HEA-27), the Board rescinded the permit because of deficiencies in the procedure used to ascertain the average percolation rate of the absorption field and the lack of drainage information. New percolation tests were conducted and a new permit was issued. Ms. Klassen appealed this permit on the grounds that the percolation tests were not performed in accordance with the *Regulation* and a drainage plan had not been provided in accordance with a previous decision of the Board. In an attempt to resolve the percolation issues, new percolation tests were completed. The EHO asked that the appeal be dismissed. Ms. Klassen argued that the testing was incomplete and therefore that the appeal should proceed.

The Board found that Ms. Klassen's grounds of appeal had been addressed in accordance with the *Regulation* and the Board's previous decision. The Board found that the matter should not proceed further at significant expense to the public and the parties. The application to dismiss was therefore granted and the appeal was dismissed.

98-HEA-08(a) Carolyn Klassen v. Environmental Health Officer

Decision Date: August 31, 1998

Board: Toby Vigod

This was an application by Cidalia Wensley for costs related to an appeal filed by Carolyn Klassen in response to a decision by the EHO to issue a permit for a sewage disposal system on Ms. Wensley's property. The application for costs was denied.

98-HEA-09 Utility Waterworks District and Dana Hummel v. Environmental Health Officer (Bev Kendall, Permit Holder)

Decision Date: October 7, 1998

Board: Carol Quin

This was an appeal of a decision by the EHO to issue a permit authorizing the repair of a failing sewage disposal system, originally installed before 1985. The Appellants sought to have the permit rescinded on the grounds that the site plan was inaccurate, the new disposal field was too close to domestic waterlines and to a potential breakout point, and the proposed works were not a repair of an existing system as the existing system was not "legal".

The Board found that the proposed system was properly considered a repair under the *Regulation* even though the original system may not have been built under permit. The Board found that the *Regulation* did not require the location of waterlines and setbacks to be shown on the site plan. Further, the Permit Holder was not required to meet the usual setbacks, provided that a health hazard was not created. The Board found that the repairs provided sufficient safeguards to ensure that public health would be protected. The Board upheld the permit subject to minor amendments. The Board also considered and rejected a request for costs. The appeal was dismissed.

98-HEA-12(a) Friends of Cortes Island, Larry Cohen, Comox-Strathcona Regional District, British Columbia Shellfish Growers Association v. Environmental Health Officer (Triple R Developments Ltd., Permit Holder)

Decision Date: July 22, 1998

Board: Toby Vigod

This was a decision on the Board's jurisdiction to hear an appeal of the EHO's decision to issue a sewage disposal permit to Triple R for a proposed resort development on Cortes Island. The Board found that it had jurisdiction to hear the appeal.

98-HEA-12(b) Friends of Cortes Island, Larry Cohen, Comox-Strathcona Regional District, British Columbia Shellfish Growers Association v. Environmental Health Officer (Triple R Developments Ltd., Permit Holder)

Decision Date: September 23, 1998

Board: Toby Vigod

This was an application by Triple R that the appeal hearing be conducted by way of written submissions, and that the Appellants be ordered to post a bond to cover Triple R's costs in the appeal. The Board refused the Permit Holder's applications.

98-HEA-12(c) Friends of Cortes Island, Larry Cohen, Comox-Strathcona Regional District, British Columbia Shellfish Growers Association v. Environmental Health Officer (Triple R Devlopments Ltd., Permit Holder)

Decision Date: March 3, 1999

Board: Jane Luke, Sheila Bull, Bob Radloff

This was an appeal of a decision of the EHO to issue a permit to Triple R for a sewage disposal system. The Appellants argued that some of the information in the new permit application had been filled out by the EHO, not Triple R, and that the application contained inaccurate information. They argued that the newly permitted system would not safely treat sewage and that a hydrogeological assessment was required. Triple R argued that the Board should only consider issues in relation to the un-built portion of the system, not the entire system as permitted by the original permit, and that Triple R should be awarded its costs in the appeal.

The Board found that the permit under appeal was a new permit for an entire system and, therefore, portions of the system approved under the previous permit were not exempt from consideration in this appeal. The Board found that the EHO had filled in the estimated sewage flow on the application, but the estimates were provided by Triple R from its 1995 application for this system. The Board rescinded the permit on the basis that an inaccurate estimation of sewage flows may have a negative impact on public health.

The Board held that a hydrogeological assessment was not required and that there had been sufficient site assessment. However, the Board directed the EHO to reconsider these issues in the event that Triple R submitted a new permit application based on its newer plans. Triple R's application for costs was denied. The appeal was allowed.

98-HEA-14 Connie Malone v. Environmental Health Officer (Sheehan Construction Ltd., Permit Holder)

Decision Date: September 10, 1998

Board: Don Cummings

This was an appeal of the decision of the EHO to issue a permit for a package treatment plant system on the property adjacent to Ms. Malone's property. The EHO had added conditions to the permit to upgrade the system as there had been concern about breakout at the northern boundary of the subject property. Prior to issuing the new permit, the EHO considered a report done by an engineer on the breakout potential.

Ms. Malone appealed the new permit on the grounds that the engineering report contained errors, the report did not state definitively that breakout to her property would not occur, there was no contingency plan should breakout occur, and there were untrue statements in the permit application.

The Board noted that there were errors in the engineer's report, but they were minor and did not affect its technical findings. As well, the Board found that the errors in the application did not affect the approval of the system and were not designed to mislead. The Board also found that the probability of effluent breakout was minimal, and that even if a breakout occurred there would be adequate safeguards in place. The Board found that the system complies with the *Act*, *Regulation* and Ministry Policy. The Board directed the EHO to consider adding further conditions to the permit. The appeal was dismissed, and the Board rejected the Permit Holder's request for costs.

98-HEA-16 Roy Truswell v. Environmental Health Officer

Decision Date: December 21, 1998

Board: Toby Vigod, Jackie Hamilton, Robert Cameron

Mr. Truswell appealed a decision of the EHO refusing to issue a sewage disposal permit for Mr. Truswell's property on the grounds that the proposed absorption field would not meet the 30-metre setback requirement from the high water mark of a non-tidal water body. Mr. Truswell argued that there is

a municipal drainage system near his property, but there is no non-tidal body of water. He also argued that approval of the proposed system posed no risk to public health.

The Board found that there was once a non-tidal water body near the Appellant's property but as the creek now flows into a concrete-walled pond and through an enclosed culvert the creek no longer has all the characteristics associated with a natural watercourse. The Board concluded that the proposed field was within 30 metres of the concrete-walled pond. The Board found the pond to be a non-tidal water body, with a "shoreline" on its concrete walls, and a measurable high water mark. The Board concluded that a shoreline need not be a boundary between water and natural land for the purposes of determining setback. The Board also noted that the pond may be more susceptible to contamination. The Board upheld the EHO's decision refusing the permit. The appeal was dismissed.

98-HEA-17 Canadian Heritage - Parks Canada v. Environmental Health Officer (John Van Egmond, Permit Holder)

Decision Date: January 20, 1999

Board: Carol Quin

Parks Canada appealed a decision of the EHO to issue a sewage disposal permit to Mr. Van Egmond for his property located near the West Coast Trail corridor of Pacific Rim National Park. Due to the extremely fast percolating sandy soil, poor drainage, proximity to wetlands and foreshore, heavy rainfall and the lack of vehicle access to the property, Parks Canada argued that the system may lead to the contamination and nutrification of water, land and beaches in the park. Parks Canada was also concerned that the EHO was not aware of changes to the information contained in the original application.

The Board found that the permit application no longer accurately reflected the original application, and the EHO should have required a winter assessment of the property given the evidence of high rainfall and fast percolating soils. Without such an assessment, the Board concluded that the EHO could not have known whether the soils would be suitable for treating effluent, and could not have known of the existence of water bodies or seasonal streams and whether the regulatory setbacks could be met. Further, without vehicle access to the property, the Board was not convinced that the system could be constructed as designed and properly maintained. The Board found that the permit should be rescinded. The appeal was allowed.

98-HEA-18 Brian Bray, Larry Rappel, Rudolph Maarsman, John Biel, Ron Pittman v. Environmental Health Officer (R.W. McDermid, Coba Sunbow Holdings, Permit Holder)

Decision Date: March 15, 1999

Board: Don Cummings

Brian Bray and four other local residents appealed the decision of the EHO to issue a sewage disposal permit authorizing the construction of a package treatment plant system to service five lots located on a large property. The Appellants argued that the estimated daily sewage flows indicated on the permit application were unrealistic, the water conditions on the site had not been adequately considered,

the entire property should have been studied, and that the system would not adequately protect their properties and their domestic water supply. The Permit Holder argued that the system was sound, the appeals were unnecessary, and it should be awarded costs.

The Board found that the estimated daily sewage flows were realistic, accurate, and in accordance with the *Regulation,* and that the EHO was correct in evaluating only the five lots to be serviced, not the entire property. However, the Board noted that the site was marginal, more testing may be necessary, and the technical report relied upon by the EHO to approve the system should have been evaluated by an engineer with the Ministry. The Board was particularly concerned about the potential for effluent breakout. The Board gave conditional approval to the Permit, subject to a number of conditions being met. The appeal was allowed, in part. The application for costs was dismissed.

98-HEA-19 David C. Wallis and Katherine L. Wallis v. Environmental Health Officer

Decision Date: January 6, 1999

Board: Toby Vigod

David and Katherine Wallis appealed an EHO's decision refusing to issue a permit for a sewage disposal system on their property. They appealed on the grounds that the proposed absorption field would be less than 30 metres from the "high water mark" of a body of non-tidal water on the property, contrary to the *Sewage Disposal Regulation*. The Appellants submitted that the surface water was not a registered watercourse but an "occasional ditch" that appeared only after the Ministry of Transportation and Highways installed a culvert beyond the property boundary and that it did not meet the definition of watercourse in the Ministry's Environmental Protection Compendium.

The Board applied the Ministry of Health's On-Site Sewage Disposal Policy guideline on identifying a non-tidal water body. The Board found that the relevant consideration was whether the source water above the culvert was a natural watercourse that existed before the culvert was installed. The Board found that the water flowing across the property was a diversion of a stream that existed before the culvert was installed, which had an identifiable shoreline and high-water mark, and was thus a body of non-tidal water. Since the nearest edge of the proposed field was less than 30 metres from the water channel, and the EHO had no discretion to vary the setback requirement. The Board also noted that the flow proceeds directly into Pinantan Lake which is a source of drinking water for some residents of the area. The Board upheld the decision of the EHO. The appeal was dismissed.

98-HEA-26 Pal Horvath v. Environmental Health Officer (Virginia and Eugene Monahan, Permit Holder)

Decision Date: March 8, 1999

Board: Toby Vigod

Pal Horvath appealed a decision of the EHO to issue a permit to construct a sewage disposal system on his neighbours' property on Quadra Island. Mr. Horvath asked that the sewage disposal system be

located at an alternative site, on the grounds that the outflow from the approved system might contaminate his well.

The Board refused to assess the suitability of an alternative site for the sewage disposal system, stating that it is not the role of the Board to make determinations or assessments regarding sites that are not the subject of a permit under appeal. The Board accepted the EHO's evidence that Mr. Horvath's well was located more than three times the required 100-foot setback from the disposal field, and found that Mr. Horvath had not successfully shown that the permitted system posed a risk of contamination to his well. The appeal was dismissed.

99-HEA-02 Frances Walker v. Environmental Health Officer

Decision Date: February 25, 1999

Board: Toby Vigod

Frances Walker appealed the EHO's decision refusing a sewage disposal permit for her property. Prior to a hearing of the appeal, a mediation session was held with all parties present. The appeal was allowed, by consent.

Pesticide Control Act

97-PES-04/05/06 Shuswap Thompson Organic Producers Association v. Deputy Administrator, *Pesticide Control Act* (C.N. Railway and B.C. Rail Ltd., Permit Holders)

Decision Date: May 28, 1998

Board: Toby Vigod, Elizabeth Keay, Carol Quin

The Shuswap Thompson Organic Producers Association (STOPA) appealed two decisions of the Deputy Administrator of Pesticide Management (Deputy Administrator): (1) to issue a Pesticide Use Permit to C.N. Railway for treating its rail ballast and right-of-way, and (2) to issue a permit to B.C. Rail for the same purposes. The two appeals were heard together.

STOPA appealed on the grounds that the notification of the Permits was inadequate and the Ministry did not fulfil its fiduciary duty to consult with First Nations. STOPA was also concerned about the environmental, health and economic impact of the pesticides and that alternatives to the use of the proposed pesticides and herbicides had not been adequately considered. In addition, STOPA argued that federal registration of a pesticide does not imply safety because its process and data are inadequate.

The Board was satisfied that the notification requirements of the *Pesticide Control Act Regulation* were met. The Board found that there had been adequate consultation with the First Nations. After considering the environmental and health impacts of the pesticides, the Board ordered various amendments to the respective Permits. The appeals were allowed, in part.

97-PES-08 Tsilhoqot'in National Government v. Deputy Administrator, *Pesticide Control Act* (Ministry of Forests, Permit Holder)

Decision Date: May 26, 1998

Board: Toby Vigod

The Tsilhqot'in National Government appealed the decision of the Deputy Administrator to issue a Pesticide Use Permit to the Ministry of Forest. The Permit allowed the Ministry to apply the herbicide glyphosate to two cutblocks. The Tsilhqot'in appealed the Permit on the grounds that there was a failure to consult with the Tsilhqot'in, that the proposed spray program would result in an unjustifiable infringement of its aboriginal rights and would have an "unreasonable adverse effect." The Tsilhqot'in sought an order rescinding the Permit and requested that the Board place a complete moratorium on chemical spraying in its traditional territory.

The Board found that adequate attempts were made to consult with the Tsilhqot'in, in that an effort was made to provide the Band with full information on glyphosate, and to solicit input from the Band. The consultation process undertaken was adequate to meet the Crown's fiduciary obligation to consult and the fact that the consultation did not result in agreement or consensus did not invalidate the process.

The Board also found that the Tsilhqot'in failed to establish aboriginal rights or aboriginal title to the Permit area in that they failed to communicate any specific information relating to the boundaries of territories, traditional uses of the land base, and locations where traditional uses were practiced. The Tsilhqot'in claimed that lack of resources from government agencies was the reason it could not provide evidence of its specific rights. The Board noted that the court in *Halfway River First Nation* v. *B.C.* did not accept that the fiduciary duty of the Crown includes a duty to provide funding so a Band can provide meaningful input.

Based on limited evidence the Board found that there was no adverse effect as defined under the *Pesticide Control Act*. Even if there had been an adverse effect, the Board found that the permitted application was reasonable. The appeal was dismissed.

98-PES-01 Raincoast Research Society *et al.* and Mainland Enchancement of Salmonid Species Society v. Deputy Administrator, *Pesticide Control Act* (International Forest Products Limited, Permit Holder)

Decision Date: June 26, 1998

Board: Christie Mayall, Harry Higgins, Elizabeth Keay

Raincoast and the Mainland Enhancement of Salmonid Species Society each appealed the issuance of a Pesticide Use Permit authorizing the use of glyphosate for conifer release on selected clearcuts in the Thompson Sound area. The Appellants appealed on the grounds that the Permit would result in an unreasonable adverse effect on the environment and the Deputy Administrator had insufficient site specific information before him to properly assess the environmental effects. The main concern related to the identification and classification of fish-bearing streams within the blocks.

The Board found that glyphosate can be harmful to fish and noted that the label for the product stated that it should not be used where an adverse impact on aquatic species is likely. The Board found that

the Deputy Administrator did not have complete and accurate maps showing the location of streams within the blocks when he considered the application and that the streams within certain cutblocks were improperly classified as non-fish-bearing. The Board concluded that the application of glyphosate to certain blocks presented some unreasonable risk to the environment and the appeal should be allowed for two of the cutblocks. The appeal was allowed, in part.

98-PES-03(a) Resident Advisory Board *et al.* v. Deputy Administrator, *Pesticide Control Act* (Canadian Food Inspection Agency, Permit Holder)

Decision Date: April 3, 1998

Board: Toby Vigod

This was an application for a stay of a Pesticide Use Permit issued by the Deputy Administrator to the Canadian Food Inspection Agency. The Board concluded that the balance of convenience favored the issuance of an interim stay against the Pesticide Use Permit until 12:00 noon on April 15, 1998.

98-PES-03(b) Resident Advisory Board *et al.* v. Deputy Administrator, *Pesticide Control Act* (Canadian Food Inspection Agency, Permit Holder)

Decision Date: April 15, 1998

Board: Toby Vigod, Cindy Derkaz, Gary Robinson

The Resident Advisory Board and several other organizations and individuals appealed a decision of the Deputy Administrator to issue a Pesticide Use Permit authorizing the aerial application of a bacteriological pesticide over parts of Victoria. The Appellants appealed on the grounds that the spraying may not achieve the stated goal of eradication, the spraying created a risk to human health and to non-target species, there would be an impact on organic farm and nursery operations, and there are alternative methods of eradication or control. The Appellants sought an order cancelling the Permit or, alternatively, an order varying the Permit so that it would not allow indiscriminate aerial or ground spraying.

Applying the test set out in the legislation, as interpreted by the courts, the Board compared the risk of adverse effects from the proposed spray program with its intended benefits. It found that the aerial spraying would create an unacceptable risk to local residents with health problems and to non-target species. The Board determined that reasonable alternative methods to aerial spraying exist and that, to allow aerial spraying over heavily populated urban areas when alternatives are available, poses an unreasonable adverse effect. The Board referred the Permit back to the Deputy Administrator with directions. The Board limited the application of herbicides to ground spraying and trapping. The appeal was allowed, in part.

98-PES-04 Interior Pest Control v. Deputy Administrator, *Pesticide Control Act*

Decision Date: May 19, 1998

Board: Toby Vigod

This was an application for a stay of the decision of the Deputy Administrator to suspend Interior Pest Control's Service Licence. The application for a stay was allowed.

98-PES-04(a) Interior Pest Control v. Deputy Administrator, *Pesticide Control Act*

Decision Date: July 13, 1998

Board: Toby Vigod

This was an application by the Deputy Administrator to set aside the stay granted to Interior Pest Control because Interior Pest Control had failed to comply with the conditions required by the Board in its May 19, 1998 decision. The Board refused the application to set aside the stay.

98-PES-04(b) Interior Pest Control v. Deputy Administrator, *Pesticide Control Act*

Decision Date: November 6, 1998

Board: Toby Vigod

Interior Pest Control appealed the Deputy Administrator's decision to suspend its Service Licence to apply pesticides, to require that certain conditions be met prior to the licence being reinstated and to place an Official Warning Letter on its file. These actions had been taken by the Deputy Administrator when an audit revealed that Interior Pest Control's Operations Records were inaccurate and/or incomplete contrary to the *Pesticide Control Act* and regulations. Interior Pest Control argued that the Ministry had accepted incomplete records in the past and, therefore, lost its right to take enforcement action with respect to incomplete records now.

The Board found that Interior Pest Control had repeatedly violated the legislation and that the suspension was appropriate. The Board concluded that despite past acceptance of incomplete or inaccurate records, the Ministry retained the right to take action against Interior Pest Control. The Board rejected a request by the Deputy Administrator to impose a probationary period or a restriction on Interior Pest Control's right to apply for future licences. Regarding the Warning Letter, the Board found that it did not constitute a "decision" under the *Act* and, therefore, could not be appealed to the Board. The appeal was dismissed.

98-PES-05(a) City of Port Coquitlam, City of Coquitlam and City of Port Moody v. Deputy Administrator, *Pesticide Control Act* (Canadian Pacific Railway, Permit Holder)

Decision Date: July 20, 1998

Board: Toby Vigod

The cities of Port Coquitlam, Coquitlam and Port Moody appealed the issuance of a Pesticide Use Permit to CP Rail for the use of herbicides on its tracks and ballast from Lytton to Vancouver, and on the company's yards in Port Coquitlam. By the time CP Rail had finished all the spraying from Coquitlam to Vancouver, and 80% of the spraying in its yards the cities requested a stay of the decision to issue the Permit, pending the Board's decision on the appeal.

The Board applied the usual three-part test to determine whether to issue a stay in this case. The Board found that there was a serious issue to be tried regarding possible harm to fish and wildlife habitat near the spray areas and the cities' interest in protecting wildlife. In weighing the balance of convenience, the Board noted that the rail yards were not a natural habitat for the wildlife. In addition, the Board noted that if a stay were granted, it would effectively prevent CP Rail from using the spray, as the appropriate time for application would have passed. Thus, the Board found the potential harm to CP Rail, its employees, and the public through fires, derailment and injury was serious and outweighed the potential harm to the environment. The application for a stay was denied.

98-PES-05(b) City of Port Moody, City of Port Coquitlam and City of Coquitlam v. Deputy Administrator, *Pesticide Control Act* (Canadian Pacific Railway, Permit Holder)

Decision Date: January 13, 1999

Board: Toby Vigod, Robert Cameron, Helmet Klughammer

The cities of Port Coquitlam, Coquitlam and Port Moody appealed the issuance of a Pesticide Use Permit to CP Railway for the use of herbicides on its track ballast and around signal facilities. The cities appealed on the grounds that the proposed herbicide application would have an unreasonable adverse effect on human health and the environment, that steam treatment could have been used instead of herbicide spraying, and that there had been inadequate notification and consultation prior to the issuance of the permit.

The Board found that waterbodies would be adequately protected with a permit requirement of a pesticide free zone but refused to order specific buffer zones to be specified in the permit, leaving it to the discretion of the applicator. The Board concluded that the Permit should not have an adverse impact on birds feeding along the track. As well, the Board noted that signs advising of impending herbicide application should be posted at main access points to treatment areas. The Board found that there were no viable non-chemical alternatives for the total control of vegetation on the ballast of the track. The Board found that the minimum notification requirements set out in the *Act* and *Regulation* were followed. However, as Port Coquitlam and Coquitlam were not notified of the Permit application, the Board recommended that the Ministry consider amending the *Pesticide Control Act Regulation* to require notification to municipalities of major Pesticide Use Permit applications in their jurisdiction. The Board upheld the Permit, subject to certain amendments. The appeal was dismissed.

98-PES-07(a) City of Parksville, Regional District of Nanaimo, Cowichan Valley Regional District, Lucien L. Bisson, Roy and Angela McCune v. Deputy Administrator, *Pesticide Control Act* (Canadian Pacific Railway, Permit Holder)

Decision Date: October 5, 1998

Board: Toby Vigod

This was an application by the City of Parksville, Regional District of Nanaimo, Cowichan Valley Regional District, and several individuals for a stay of a Pesticide Use Permit issued to CP Rail pending a decision on the merits of their appeals of the Permit. The Permit authorized the application of glyphosate

and triclopyr on certain railway tracks on Vancouver Island. The Applicants raised concerns about the adequacy of public notice regarding the permit application, and the possibility of harm to water quality, human health, food, and wildlife arising from herbicide use.

The Board applied the usual three-part test to determine whether to issue a stay in this case. Evidence was presented with respect to the safety of herbicides, but the Board found that at this preliminary stage it was not appropriate to assess the evidence. However, the Board did find that if the Applicants' claims were true, they raised serious issues about the validity of the Permit. On the issue of irreparable harm, the Board accepted that, if conditions in the Permit to protect the environment and human health were inadequate as alleged by the applicants, there could be harm to water quality and human health that is neither reparable nor compensable. The Board found that the balance of convenience favoured granting a stay. The potential for irreparable harm to the Applicants outweighed the potential harm associated with vegetation on the tracks (e.g. fires or derailment) for the duration of a stay. The application for a stay was allowed.

98-PES-07(b) City of Parksville, Regional District of Nanaimo, Cowichan Valley Regional District, Lucien L. Bisson, Roy and Angela McCune v. Deputy Administrator, *Pesticide Control Act* (Canadian Pacific Railway, Permit Holder)

Decision Date: November 19, 1998

Board: Toby Vigod

CP Rail applied for an adjournment of the appeal hearing, asking that it be postponed for four weeks because it had agreed to sell the railway to Rail America. The application was allowed.

98-PES-08(a) CP Rail v. Deputy Administrator, *Pesticide Control Act* (Third Parties - City of Parksville, Town of Qualicum Beach, Regional District of Nanaimo, Cowichan Valley Regional District, Lucien L. Bisson, Roy and Angela McCune)

Decision Date: November 19, 1998

Board: Toby Vigod

CP Rail applied for an adjournment of the appeal hearing, asking that it be postponed for four weeks because it had agreed to sell the railway to Rail America. The application was allowed.

98-PES-10 Raincoast Research Society v. Deputy Administrator, *Pesticide Control Act*

Decision Date: March 9, 1999

Board: Toby Vigod

Raincoast Research Society appealed the decision of the Deputy Administrator to issue a Pesticide Use Permit to the Ministry of Forests, authorizing the application of the herbicide glyphosate to three areas on the mainland coast of British Columbia, and to the Campbell River airport. The appeal was allowed, by consent.

98-PES-11/12 Merrill & Ring Timber & Land Management v. Deputy Administrator, *Pesticide Control Act*

Decision Date: February 17, 1999

Board: Toby Vigod

Merrill & Ring appealed the Deputy Administrator's refusal to approve the aerial application of glyphosate to logging sites near Discovery Passage and on East Thurlow Island. The Appellant sought an order that its Pesticide Use Permits for the sites be amended to allow the aerial application of glyphosate. They appealed on the grounds that the Deputy Administrator's refusal appeared to be arbitrary and was because of his dislike of helicopter applications of herbicides, and was not based on concerns regarding the protection of public health and the environment.

The Board found that the Deputy Administrator did not act arbitrarily or improperly exercise his discretion when he refused the aerial spraying. However, the Board concluded that the proposed aerial treatments would not cause an unreasonable adverse effect to human health or the environment provided that "low drift" nozzles are used, and other conditions for aerial spraying are included in the Permits. The appeal was allowed and the Permits were referred back to the Deputy Administrator with directions.

Waste Management Act

94/22(a) 7437 Holdings Ltd. v. Deputy Director of Waste Management (Greater Vancouver Regional District and Corporation of Delta, Third Parties)

Decision Date: August 4, 1998

Board: Judith Lee, Christie Mayall, Robert Cameron

7437 Holdings Ltd. had withdrawn its application to amend its permit and had formally abandoned the permit. This was an application by 7437 to "revive" the application and the permit. The Board refused to grant the application to revive the permit and the application to amend.

95/31(b) Celgar Pulp Company v. Deputy Director of Waste Management (Pulp, Paper and Woodworkers of Canada, Third Party)

Decision Date: May 29, 1998

Board: Katherine Hough, Harry Higgins, Elizabeth Keay

This was an appeal of two decisions of the Deputy Director of Waste Management concerning permit amendments issued by the Regional Waste Manager to Celgar. Celgar operates a pulp and paper mill near Castlegar, B.C. The parts of the permit under appeal included the requirement that Celgar institute a comprehensive monitoring program of emission limits for nitrogen oxides ("NOx") on the #2 Power Boiler and the lime kiln.

The Board found that the Deputy Director allowed the use of the #2 Power Boiler as a concentrated non-condensable gases incinerator in emergency circumstances or when the lime kiln was inoperable and that this use was not to exceed 5% per month. The Board further found that no stand-alone incinerator was required and that the monitoring stations already in operation were satisfactory indicators of the contaminants being introduced into the environment. The requirement in the decision for five more years of monitoring from a stack-height on-site monitor was unnecessary. Finally, the Board re-imposed NOx emission levels, in order to meet the intent of the original permit. The Board found that continuous monitoring was not required and that the current quarterly monitoring was sufficient to determine whether the emission levels were being met. The appeal was allowed, in part.

This decision has been varied by Cabinet in OIC 1462/98.

97-WAS-10(d) Paddy Goggins and John Keays v. Assistant Regional Waste Manager (MacMillan Bloedel Paper Limited, Third Party)

Decision Date: July 30, 1998

Board: Toby Vigod, Don Cummings, Ken Maddox

Two appeals were filed against a decision by the Assistant Regional Waste Manager to issue MacMillan Bloedel an amended permit authorizing the discharge of contaminants from a new wood and sludge fired boiler in place of an existing steam plant. The Appellants argued that the amendment should have undergone public consultation; that the project should have been subject to an environmental assessment; that the project involves experimental technology; that the new boiler would use imported waste and increase the amount of dangerous emissions; and that the amendments ran contrary to various Ministry policies.

The Board found that no public notice or consultation was required and that the new boiler was not a reviewable project. It also found that the new boiler does not use experimental technology, and that there was no evidence to support the Appellants' claim that a new permit should have been obtained. The Board noted that the Ministry's policies, while not binding, were followed. The Board found no evidence that the new boiler would increase the amount of "dangerous emissions." The Board upheld the amended permit, but directed the Regional Manager to consider certain monitoring issues. The appeals were dismissed.

97-WAS-18 Bullmoose Operating Corporation v. Deputy Director of Waste Management

Decision Date: June 30, 1998

Board: Toby Vigod

This was an appeal by Bullmoose against the decision of the Deputy Director to uphold the decision of the Regional Waste Manager to amend Bullmoose's permit. The permit authorized Bullmoose to discharge air contaminants to the air from its coal preparation plant at its open-pit coal mine. The amendments increased the stack sampling frequency of Bullmoose's coal dryer from once every two years to three times every two years and lowered the Ministry's objectives for total suspended particulate for the ambient air quality data collected by Bullmoose.

Bullmoose appealed on the grounds that an increase in stack sampling would increase its annual operating costs by $4,000, but would not do anything to control emissions or improve the quality of the environment at the mine.

The Board found that the Regional Waste Manager could only amend the permit for the protection of the environment and that amending the monitoring frequency would not provide any such protection. The Board found that lowering the Ministry's objective values was an appropriate amendment to the permit because the permit did not suggest that Bullmoose would be held solely responsible if the ambient air levels were found to be above the objective levels. The appeal was allowed, in part.

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

Decision Date: November 20, 1998

Board: Toby Vigod

This was an application by Beazer to adjourn the hearing of its appeal of a Remediation Order of a contaminated site on the grounds that resolution of the matter may be achievable in the coming months through a negotiated settlement. Beazer argued that the parties were close to defining the work required under the Order and that the cost of remediation would likely be substantially less than initially anticipated. CN Railway supported the adjournment, but Atlantic and the Waste Manager strongly opposed it.

After balancing the rights and interests of the parties, the Board decided to proceed with the hearing as scheduled. Although a negotiated settlement is normally in the best interests of all parties, the Board noted that it is only a realistic option if all the parties are willing to participate in the process. In this case, the Board found that settlement of the appeal did not appear to be imminent, and two of the parties objected to the adjournment and wanted to proceed with the hearing without further delay. The application to adjourn was denied.

98-WAS-02(b) Cloverdale Fuels Limited, Dixon Bulldozing Limited, Raintree Lumber Specialties Limited and International Forest Products Limited, Hammond Cedar Division v. Deputy Director of Waste Management (Naranjan Ball and Paul Dhaliwal, Third Parties)

Decision Date: April 1, 1998

Board: Toby Vigod

This was an application for a stay of an Amended Pollution Abatement/Pollution Prevention Order. The application for a stay was granted.

98-WAS-03(a) Service Corporation International (Canada) Limited on behalf of First Memorial Services (1993) Ltd. v. Regional Waste Manager (The Adeline Residents Association, Third Partt)

Decision Date: July 21, 1998

Board: Toby Vigod

This was an appeal against the decision of the Regional Waste Manager to issue a Pollution Prevention Order against First Memorial. The Appellant argued that the Regional Waste Manager lacked jurisdiction to issue the Order, or any order that could affect the disposition of human remains by facilities licensed to operate under the *Cemetery and Funeral Services Act*.

The Board found that the *Waste Management Act* and the *Cemetery and Funeral Services Act* could be read together. The Board found that section 3(5) of the *Waste Management Act* generally exempts crematoria from the provisions of the *Act* provided that the crematoria are operating in compliance with the *Cemetery and Funeral Services Act*. The Board found that when a crematorium is not operating in compliance with a permit or regulation under the *Cemetery and Funeral Services Act*, then the exemption for crematoria in section 3(5) of the *Waste Management Act* ceases to apply. Once that has occurred, the Regional Waste Manager has the jurisdiction to issue a Pollution Prevention Order to the operators of the crematorium. The Board concluded that the Regional Waste Manager has the jurisdiction to issue a Pollution Prevention Order with regard to an activity regulated under the *Cemetery and Funeral Services Act*. The Board also ordered an interim stay of the Order until there was a decision on the merits of the appeal.

98-WAS-05 Howe Sound Pulp and Paper Ltd. v. Deputy Director of Waste Management (Terry Jacks, Third Party)

Decision Date: July 17, 1998

Board: Toby Vigod

Howe Sound owns and operates a pulp and paper mill in Port Mellon, B.C. Terry Jacks, founder of the environmental group "Environmental Watch," appealed the issuance of an amended Waste Management Permit to Howe Sound. Howe Sound challenged the standing of Mr. Jacks. The Deputy Director ruled that Mr. Jacks had standing and that the time to commence the appeal should be extended. Howe Sound appealed this decision to the Board.

The Board found that the test for standing was a person who "considers" himself aggrieved, but there must be reasonable grounds for this belief. The Board found that Mr. Jacks had a reasonable belief that he would be negatively affected by the amended permit because of his proximity to the mill and because he was a frequent traveller in and around the location of the mill. Further, the Board found that Mr. Jacks did not need to provide evidence that the air emissions would likely reach him or his family, as these requirements were found to be too onerous and went to the merits of the appeal. In addition, the Board found that the delay in appeal was due to Mr. Jack's belief that his environmental group was a "person" that could appeal. The Board found that Howe Sound would not be prejudiced by the delay. The matter was returned to the Deputy Director for a hearing on the merits.

On April 28, 1999, the B.C. Supreme Court upheld the decision of the Board and concluded that the Board's test to determine standing was appropriate and the conclusion of the Board to extend the time was reasonable. The Court held that the question before the Board was a mixed question of fact and law and

held that the appropriate standard of review of the Board's decision is the standard of "patent unreasonableness."

98-WAS-06(a) Frank Bergen v. Deputy Director of Waste Management

Decision Date: June 4, 1998

Board: Toby Vigod

This was an application for a stay of the decision of the Regional Waste Manager issuing a Pollution Prevention Order to Mr. Bergen, pending the Board's decision on his appeal. The Board granted a stay for the second part of the Order.

98-WAS-07 Quinsam Coal Corporation v. Deputy Director of Waste Management

Decision Date: June 30, 1998

Board: Toby Vigod

Quinsam Coal Corporation appealed a decision by the Assistant Regional Waste Manager making certain amendments to its waste permit. The permit authorized Quinsam to discharge refuse, including coarse and fine coal rejects, from its coal preparation plant to the land. Quinsam argued that coal rejects are not "waste" as defined in the *Waste Management Act*, that it already had authorization to discharge refuse under a *Mines Act* permit, and that the waste permit was superfluous since the *Mines Act* permit achieved adequate environmental protection. Quinsam asked the Board to cancel or rescind the waste permit, confirm that the *Mines Act* permit regulates the mine's refuse and tailings, and confirm that the Ministry of Energy and Mines has jurisdiction over these matters.

The Board found that coarse and fine coal rejects are "waste" as defined in the *Waste Management Act*. The Board rejected Quinsam's argument that it had proper authorization to discharge its waste under the *Mines Act* permit. The Board found that the amended waste permit was not superfluous or unnecessary, as it dealt with different aspects of the mine operation than the Mines permit. The Board upheld the amended permit except those sections dealing with coarse coal refuse, as coarse coal refuse had been made exempt from the *Waste Management Act* after the Regional Manager's decision. Those sections were sent back to the Regional Manager for reconsideration. The appeal was allowed, in part.

98-WAS-09(a) The Corporation of Delta v. Assistant Regional Waste Manager (Pineland Peat Farms Ltd., Approval Holder; New West Gypsum Recycling Inc., Third Party)

Decision Date: May 26, 1998

Board: Toby Vigod

This was an application for a stay of certain aspects of the Approval issued to Pineland Peat Farms Ltd. authorizing it to discharge composted gypsum waste paper to its property for the purpose of land reclamation. The Board denied the application.

98-WAS-11 Brandy Farms v. Regional Waste Management

Decision Date: October 7, 1998

Board: Christie Mayall

Brandy Farms appealed a decision of the Deputy Director, upholding the issuance of a Pollution Prevention Order requiring Brandy Farms to cease application of agricultural waste (manure) to its land and develop a Best Agricultural Waste Management Plan.

The Board found that Brandy Farms had not complied with the applicable guidelines regarding manure application. The Board found that contaminant levels found in the ditch were not caused by Brandy Farms but were a result of leaching from the fields which occurred when heavy rains followed the application of the manure, combined with the lack of a well-established cover crop. The Board found that the levels of contaminants in the ditch water impaired the usefulness of the water for livestock and irrigation and, if continued, would render the water unfit for aquatic life. The Board found that if the manure application was continued, the elevated levels of contaminants could impair the usefulness of the environment. The Board held that there were reasonable grounds to issue the Order. The Order was upheld and the appeal was dismissed.

98-WAS-14(a) North Fraser Harbour Commission, General Chemical Canada Ltd., CGC Inc., GN Industries Ltd., Thomas Lawson, CBR Cement Canada Limited v. Deputy Director of Waste Management

Decision Date: August 27, 1998

Board: Toby Vigod

This was an application for a stay of a Remediation Order issued by the Deputy Director to address coal tar contamination at 9250 Oak Street, Vancouver, and adjacent lands and waters. Six appeals were filed against the Order. Three of the Appellants applied for a stay of the Order pending the appeal hearings.

The Board applied the usual three-part test to determine whether to issue a stay of the Order. It found that the issues to be decided were neither frivolous nor vexatious, nor pure questions of law. The Board found that the Applicants failed to show that they would suffer irreparable harm if the stay was not granted. The Board noted that the *Waste Management Act* contemplates compensation for the Applicants' participation in the remediation effort, that lost opportunity costs have never been the test for irreparable harm, and that none of the parties argued that their potential losses would bankrupt them or cost them significant market share. The Board noted that the public interest favoured dealing with the ongoing contamination as quickly as possible and that, granting a stay against one or more persons, but allowing remediation to proceed with respect to other responsible persons, would result in confusion and additional delays in the remediation effort. The application for a stay was denied.

98-WAS-15(a) Harvest Environmental Services Inc. v. Deputy Director of Waste Management

Decision Date: June 23, 1998

Board: Toby Vigod

This was an application for a stay of a Pollution Prevention Order issued to Harvest, which operated a special waste storage and treatment facility. The application for a stay was denied.

98-WAS-16 Village of Belcarra v. Assistant Regional Waste Manager (Farrer Cove Waste Water Management Association, Permit Holder)

Decision Date: February 5, 1999

Board: Don Cummings

Belcarra appealed a decision of the Regional Waste Manager to issue a sewage permit under the *Waste Management Act* to Farrer Cove. The permit allowed an amount of discharge into Indian Arm, a tidal water body, through a marine outfall. Belcarra argued that the permit should be rescinded as it should have been considered under the *Health Act* and *Sewage Disposal Regulation*. Alternatively, it argued that the permit was deficient in that it did not address maximum levels of faecal coliform, disinfection, a backup system, maintenance of the access roads, and continuing maintenance of the system. It also argued that the Regional Waste Manager should have ordered investigation of other land-based options for sewage disposal before issuing the permit.

The Board found that the Regional Waste Manager did not exceed his jurisdiction by issuing the permit. The Board found that the estimated daily sewage flows needed to be recalculated, that a maximum level of faecal coliform discharge should be defined in the permit, and that the permit should be amended to make dechlorination mandatory. The Board found that a minimum emergency storage capacity should be determined and added to the permit as the system relied on mechanical treatment processes. The Board was satisfied that the permit required the proper use, operation and maintenance of the system, by the Permit Holder. The Board found that there was no compelling reason to order the investigation of land-based options for sewage disposal and there was no need to add a condition to the permit regarding maintenance of access roads. The appeal was allowed, in part.

98-WAS-18(a) Halme's Auto Service Ltd., Petro Canada Limited v. Regional Waste Manager (Chardale Enterprises Ltd., Third Party)

Decision Date: August 28, 1998

Board: Toby Vigod

This was an application for a stay of a Remediation Order issued to Halme's Auto Service, Petro Canada, and Chardale Enterprises to address hydrocarbon contamination at a service station site. Halme's appealed the Order and requested a stay pending an appeal decision.

The Board applied the usual three-part test to determine whether to issue a stay in this case. It found that there was a serious issue to be tried and that the appeal was neither frivolous, vexatious, nor dealt with pure questions of law. However, the Board found that Halme's failed to show that it would suffer irreparable harm if a stay was not granted. It found that any costs Halme's reasonably incurred by complying with the Order would be easily quantifiable and recoverable in damages. Further, there was no evidence that the potential losses would bankrupt Halme's or cost it significant market share. The Board also rejected Halme's claims of lost opportunity costs. On the question of balance of convenience, the Board found that the public interest in dealing with the contamination as quickly as possible carried considerable

weight and did not favour the granting of a stay of the Order in this case. The application for a stay was denied.

98-WAS-18(b) Halme's Auto Service Ltd., Petro Canada Limited v. Regional Waste Manager (Chardale Enterprises Ltd., Third Party)

Decision Date: October 9, 1998

Board: Toby Vigod

Petro Canada applied to the Board to reconsider its refusal to grant a stay of the Remediation Order issued to Halme's Auto Service, Petro Canada, and Chardale Enterprises pending a decision on the appeal. Petro Canada's application was denied.

98-WAS-22(a) Delbert Secord v. Deputy Director of Waste Management

Decision Date: November 19, 1998

Board: Toby Vigod

This was an application for a stay of an amendment made to Noranda Mining and Exploration Ltd.'s waste permit, authorizing the discharge of treated effluent from Brenda Mine, which closed in 1990, into a creek. The application for a stay was denied.

98-WAS-27 City of Richmond v. Regional Waste Manager (Metalex Products Ltd., Permit Holder)

Decision Date: March 26, 1999

Board: Toby Vigod

Richmond appealed a decision of the Regional Waste Manager to issue an amended permit to Metalex, allowing Metalex to store up to 4,000 litres of Waste Type 81 at its Richmond facility. Richmond appealed on the grounds that its Fire-Rescue Department did not have the specialized chemical protective clothing to handle a spill of Waste Type 81, should one occur at the Metalex facility.

The Board found that the decision of the Regional Waste Manager to issue the permit was reasonable and appropriate in the circumstances. When Richmond and the Fire Department had been consulted prior to the issuance of the permit, Richmond had indicated that its concerns had been addressed, and the Fire-Rescue Department provided no comment at all. The Board found that the Regional Waste Manager had assessed Metalex's operations to ensure the environment was protected and the Fire-Rescue Department had offered no evidence to the Board in support of its concerns. The appeal was dismissed.

98-WAS-29(a) Philip Fleischer, Don Fodor, Grant and Sally Keays, John Keays, Georgina Lapointe, Janet Morrison v. Assistant Regional Waste Manager (Pacifica Papers Inc., Third Party)

Decision Date: January 8, 1999

Board: Toby Vigod

This was an application for a stay of the Regional Waste Manager's decision to amend an Air Permit issued to Pacifica. The application for a stay was denied.

Water Act

91/16(b) Okanagan Indian Band v. Deputy Comptroller of Water Rights

Decision Date: August 25, 1998

Board: Toby Vigod

This was a preliminary decision on the Board's jurisdiction to hear disputes regarding the constitutionality of certain provisions of the *Water Act* and aboriginal rights. The Band appealed a decision by the Deputy Comptroller of Water Rights to grant a Conditional Water License to the Third Parties on the grounds that the decision infringed the Band's aboriginal or treaty rights. The Deputy Comptroller and the Band argued that the Board is without jurisdiction to reopen this matter.

The Board found that it was appropriate to reconsider the jurisdictional issue in light of recent developments in the case law. The Board found that its enabling legislation bestowed an express authority for it to consider questions of fact, law and jurisdiction. Questions of law include interpretation of the *Constitution*. The Board also found that it had an implied jurisdiction to consider constitutional questions of aboriginal rights. The Board found that it had expertise in fact-finding, resource management and environmental protection, which are relevant to determining questions of aboriginal rights. In addition, the Board found that it would be inappropriate and unfair for aboriginal people to have the courts as their only avenue for protecting aboriginal rights. Therefore, the Board held that it has the jurisdiction to hear the issues under appeal.

97-WAT-05 Raymond Creed v. Deputy Comptroller of Water Rights

Decision Date: September 28, 1998

Board: Judith Lee, Elizabeth Keay, Helmut Klughammer

Raymond Creed appealed a decision of the Deputy Comptroller, upholding an Engineer's Order requiring Mr. Creed to cease depositing materials into, and to restore and remediate changes in and about a stream channel (Shawnigan Lake). Mr. Creed had failed to obtain approval for the retaining wall he built on the lake foreshore. Mr. Creed argued that the works were not performed in a "stream channel": they were above the "natural boundary" of the channel, and that the construction had no impact on the lake.

The Board found that the best evidence of the natural boundary of the lake was the winter lake level, and that Mr. Creed's works were constructed below that boundary (i.e., within the channel). The Board noted that Mr. Creed's property survey showing a different natural boundary was not relevant to this determination. The Board further found that the construction would have some impact on the lake as it had damaged riparian vegetation and resulted in debris in the lake. The Board found that the Engineer had jurisdiction to issue the Order and that its terms were appropriate in the circumstances. The appeal was dismissed, and the Engineer was directed to set a new date for completion of Order.

97-WAT-06(c) Albert Petersen and Mill Bay Waterworks District v. Regional Water Manager (Alpex Development Corporation Ltd., Third Party; Mill Bay Concerned Citizens Society, Participant)

Decision Date: May 7, 1998

Board: Judith Lee, Don Cummings, Sheila Bull

Albert Petersen and the Mill Bay Waterworks District filed separate appeals against the decision of the Regional Manager to authorize Alpex Development Corporation to construct a dam, storm detention reservoir and outflow control works to divert and store water from the Goodhope Creek for land improvement (storm detention) purposes. The Board upheld the Regional Manager's decision to authorize the works in an interim decision but added certain conditions (97-WAT-06(b)). This decision set out the Board's reasons for the interim decision and the conditions.

The Board found no evidence that the works would impact negatively on fish habitat or water quality below the works. The Board therefore held that no order for more complex treatment was necessary. The Board found, however, that there was a need for better recording and reporting of the maintenance performed and amended the authorization accordingly. Mr. Petersen's appeal was dismissed. Mill Bay's appeal was allowed, in part.

97-WAT-08 Mike and Jackie Austin v. Regional Water Manager

Decision Date: September 18, 1998

Board: Carol Quin, Christie Mayall, Cindy Derkaz

The Austins sought an order that a Conditional Water Licence, issued by the Regional Manager, be amended to allow some water from a diverted creek to flow down its original channel which flows through their property. The licence authorized diversion of the entire flow of the creek into a pond for wildlife and waterfowl habitat conservation. An earth plug had been diverting the flow of the creek, under various licences, since 1939. The Austins argued that none of the previous licences for the structure had authorized diversion of the entire flow and that, since the last licence had been abandoned, the diversion structure was illegal at the time the licence was issued. They further argued that some of the flow from the creek had previously made its way into the original channel and an amendment to the licence was needed to ensure that this remained the case.

The Board found that the Regional Manager had the authority to licence the complete diversion of a creek for beneficial use. The Board found that the Austins were not licensees and did not have any "right" to continued flow of the water under the *Act*. The Board found that any flow experienced by the Austins was likely due to seepage and local runoff, which would not change. The Board noted that an increase of flow into the original channel could cause problems for other residents living along the original channel. The Board upheld the Regional Manager's decision. The appeal was dismissed.

97-WAT-09 Leisure Valley Park v. Assistant Regional Water Manager

Decision Date: January 25, 1999

Board: Jane Luke, Sheila Bull, Robert Cameron

Leisure Valley Park appealed an order of the Regional Manager to remove gravel and rock rip rap material placed along the left bank of Frosst Creek, and to restore the channel of the stream to its "original natural condition." The Park had not received a permit under the *Water Act* for the works, as it believed that an official with the Fish and Wildlife Branch had given an "oral guarantee" that the works could be done provided certain conditions were met. In fact, this official had no authority to issue a permit for the works, which constituted a change in and about a stream.

The Board emphasized the importance of obtaining a permit and ensuring compliance with the *Water Act* before doing work that alters stream banks. However, the Board found that the language in the order, "original natural condition," was unnecessarily extensive and otherwise unclear. The Board found that the Park acted in good faith, with a reasonable belief that it had official permission to have the work done, and that the work was done expertly and carefully. The Board found that there was no apparent disruption to the stream, and that the works had not created any erosion problems, which was the primary concern of the Water Branch. The Board revoked the order and remitted the matter back to the Regional Manager.

97-WAT-16 Atlantic Pacific Land Corporation and Gary Lycan v. Engineer for the New Westminister Water District

Decision Date: June 29, 1998

Board: Cindy Derkaz

Atlantic Pacific and Gary Lycan appealed an Engineer's order regarding a culvert that was installed to allow North Millionaire Creek to flow beneath a road crossing. The appeal was allowed, by consent.

98-WAT-04(a) Cook's Ferry Indian Band v. Assistant Regional Water Manager (John Zahradnik, Third Party)

Decision Date: August 25, 1998

Board: Toby Vigod

The Band appealed an Order of the Regional Manager amending Mr. Zahradnik's Conditional Water Licence. The Order extended the deadline for Mr. Zahradnik to construct works and make beneficial use of the water. Among other things, the Band argued that the licence potentially impacts its reserve land, and the Crown had a duty to meaningfully consult with it. The Band requested that the amendment be rescinded and the entire licence be cancelled. The Regional Manager challenged the Board's jurisdiction to consider questions of aboriginal rights and title and its jurisdiction to cancel the licence. Upon agreement of the parties, these two issues were dealt with as a preliminary matter.

The Board noted that its enabling statute states that a person that is given full party status to an appeal may make submissions as to law and jurisdiction. The Board noted that the determination of aboriginal rights or title involves questions of resource management and is, a fact-based inquiry which is within the Board's expertise. The Board also noted that if it did not have jurisdiction, a bifurcated appeal

system would be created as the Band would have to go to court on some issues and to the Board on others. The Board found it had the implied, if not express, jurisdiction to address questions of aboriginal rights and title. The Board also found that it did not have jurisdiction to cancel the entire licence because the amendment at issue was made pursuant to section 18 of the *Water Act*, which does not deal with the suspension and cancellation of licences. The applications were allowed, in part.

98-WAT-04(b) Cook's Ferry Indian Band v. Assistant Regional Water Manager (John Zahradnik, Third Party)

Decision Date: September 23, 1998

Board: Toby Vigod

Mr. Zahradnik applied to the Board for a further one-year extension of the deadline for completing the proposed works, and an order requiring the Band to pay his costs associated with the appeal. Both applications were refused.

98-WAT-04(c) Cook's Ferry Indian Band v. Assistant Regional Water Manager (John Zahradnik, Third Party)

Decision Date: September 25, 1998

Board: Toby Vigod

Cook's Ferry Indian Band applied for a stay of an Order, issued by the Regional Manager, extending the deadline for Mr. Zahradnik to construct works and make beneficial use of the water from Twaal Creek. The Board granted a stay of the Order. The application was allowed.

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

Decision Date: June 17, 1998

Board: Toby Vigod

This was a request by Cadillac Fairview for a stay of the Order of the Deputy Comptroller that required the Appellant and Cranbrook to engage the services of a professional engineer to carry out an assessment of the hydraulic capacity of the existing works on Joseph Creek. The application for a stay was allowed.

98-WAT-08 Robert Sansom v. Assistant Regional Water Manager (Ann Cousineau, Third Party)

Decision Date: October 22, 1998

Board: Cindy Derkaz

Robert Sansom appealed a decision of the Regional Manager to issue a water licence to Ann Cousineau authorizing the diversion of water from Canby Spring for domestic purposes. Mr. Sansom owns the property on which Canby Spring rises. He argued that the Water Manager erred in issuing the licence

without first investigating alternative water sources and without ensuring that Ms. Cousineau had legal access to the spring. Mr. Sansom asked for the licence to be canceled or, alternatively, amended to require that the existing water line be upgraded and reinstalled, that restrictions be placed on access, that compensation for access be paid and an indemnity provided. He also asked for costs to be awarded against the Respondent.

The Board found that there was no legal requirement for the Regional Manager to investigate or consider alternative water sources before issuing the licence. The Board also found that the *Water Act* does not confer any power on the Water Manager with respect to access over private property. Legal access to the spring must be obtained by the licensee through negotiations with the property owner, or in accordance with the expropriation provisions of the *Water Act*. The Board found the existing water line was not in need of alteration or relocation at this time and that there were provisions in the *Act* to address future problems. Finally, the Board held that it did not have authority to order compensation or indemnity. The licence was upheld. The application for costs was denied. The appeal was dismissed.

98-WAT-09 City of Trail v. Regional Water Manager

Decision Date: October 21, 1998

Board: Toby Vigod

Trail appealed an order by the Regional Manager to cancel one of its water licenses for the Cambridge Creek/Violin Lake water system. Trail conceded that it had not used the water system since 1994, as a new water supply system had been completed, but argued that it had been maintaining the works and that the Cambridge system could be used as a backup source of water in the event of an emergency. It also argued that the water may be needed for other purposes, and that the Manager's decision to cancel the licence was arbitrary.

The Board found that the City had not made beneficial use of the water for at least three years, the system had not been properly maintained, and could not provide an emergency water supply without significant repairs. The Manager, therefore, had sufficient reason to cancel the licence under the *Water Act*. The Board noted that the City may re-apply for a water licence should it be able to provide evidence of a need for a backup system as suggested. Although the Manager did not provide reasons for his decision in the order of cancellation, the Board found that the City had adequate knowledge of his reasons. The appeal was dismissed.

98-WAT-10(a) District of Salmon Arm v. Deputy Comptroller of Water Rights (John Suffield *et al.*, Third Parties)

Decision Date: August 13, 1998

Board: Toby Vigod

This was an application for a stay of the Deputy Comptroller of Water Rights' decision requiring the District of Salmon Arm to decommission an unauthorized creek diversion. The application for a stay was denied.

98-WAT-10(b) District of Salmon Arm v. Deputy Comptroller of Water Rights (John Suffield *et al*, Third Parties)

Decision Date: November 27, 1998

Board: Toby Vigod

Salmon Arm appealed a decision by the Deputy Comptroller requiring the Salmon Arm to decommission an unauthorized creek diversion. Before the appeal could be heard on its merits, Salmon Arm abandoned its appeal. Four Third Parties asked the Board to order the District to pay the costs they had incurred to date in relation to the appeal, alleging that the District's appeal was frivolous, vexatious, and/or abusive.

The Board found that Salmon Arm's grounds of appeal were substantial, and without the benefit of a hearing on the merits, the Board could not conclude that the appeal was frivolous or vexatious. It noted that prior to abandoning its appeal, Salmon Arm appeared to be acting in good faith despite evidence that one of its employees had warned that an appeal to the Board was unlikely to succeed. The Board found that Salmon Arm acted reasonably in abandoning its appeal several months before the hearing was scheduled to occur, thereby avoiding significant costs to the parties. It concluded that the circumstances did not warrant an award of costs. The applications were denied.

98-WAT-11 Riverview Feed Lots (1967) Ltd. v. Assistant Regional Water Manager

Decision Date: November 24, 1998

Board: Cindy Derkaz, Harry Higgins, Helmet Klughammer

Riverview appealed an Order of the Assistant Regional Manager to cancel its Conditional Water Licence for failure to construct works within the time specified in the licence. Riverview sought an order from the Board authorizing the use of "excess" water from two creeks for irrigation purposes, without constructing works to store water, as it was unwilling to pay the cost of the works. The Third Parties all had irrigation and/or domestic water licences on one of the creeks in question.

The Board found that the Assistant Regional Manager correctly exercised his discretion to cancel the licence. The Board found that Riverview was given an opportunity to extend the time for construction, it was given proper notice of the cancellation under the *Water Act*, but it did not want to construct the works required by the licence. The Board concluded that Riverview did not want the licence to be reinstated, it wanted a different licence. The Board held that it did not have the jurisdiction to grant Riverview the new licence that it sought. An application for a new licence must be submitted to the Water Management Branch for consideration. The appeal was dismissed.

98-WAT-22 Dalton Jones v. Comptroller of Water Rights

Decision Date: November 10, 1998

Board: Toby Vigod

Dalton Jones appealed the Comptroller's decision to confirm Mr. Jones' outstanding debt to the Crown of $90.02 for rental fees owing on his water licence from 1984 to 1996, and for a licence amendment charge. Mr. Jones argued that he had not exercised his rights under the licence for 15 years and, accordingly, he should not be required to pay the fees. Alternatively, he argued that his lack of use and his failure to pay the annual rental fees amounted to an implicit abandonment of the licence. He noted that the Ministry had not billed him during those 15 years so it could reasonably be assumed that the Ministry accepted his implicit abandonment.

The Board found that Mr. Jones' failure to pay the annual rental fees could not be accepted as an intention to abandon as it was most likely because the Ministry had not billed him. In any event, the Board found that the *Water Act* requires notice of abandonment to be given in writing. The Board found that Mr. Jones had not given written notice until 1997. Therefore, he was liable for monies owed up to that date. The Board found that the 15-year delay between billings by the Ministry was unreasonable, but it did not excuse Mr. Jones from paying the debt. The Board noted that he had not been financially prejudiced by the delay in billing and he had retained a valid licence over those years, even though he may not have exercised his rights under the licence. The appeal was dismissed.

98-WAT-27(a) Raymond Kerr v. Engineer empowered under the *Water Act* (Department of Fisheries and Oceans, City of Kamloops, and Kamloops Indian Band, Third Parties)

Decision Date: January 22, 1999

Board: Toby Vigod

This was an application, by Raymond Kerr, for a stay of an Engineer's Order requiring him to breach a dam on his property and drain the reservoir. The application for a stay was denied.

98-WAT-28(a) Raymond Glen Creed and Gordon Frank Creed v. Engineer under the *Water Act*

Decision Date: March 11, 1999

Board: Toby Vigod

Raymond Glen Creed and Gordon Frank Creed appealed an Engineer's Order requiring them to remove a concrete retaining wall and fill material from their property, and restore the bank of Shawnigan Lake. They maintained that the Order was inaccurate and improperly named them. The Board received submissions on whether it had jurisdiction to accept the appeal given that the Board had upheld an Engineer's Order containing the same substantive provisions which had been issued to the previous owner of the property. Consideration was given to whether the Board was barred from hearing the appeal on the basis of *functus officio*, *res judicata,* issue estoppel, or on any other ground.

The Board concluded that the appeal was not barred on the basis of *functus officio*, *res judicata,* or issue estoppel. The Board found that the remediation requirements of the previous Order ran with the land and therefore applied to the new owners of the property. The Board found that the new Order simply

confirmed what was already required by law. As there was no dispute left for the Board to decide, the Order was upheld against the Appellants. The appeal was dismissed.

98-WAT-30(a) Cook's Ferry Indian Band v. Assistant Regional Water Manager (John Zahradnik, Third party)

Decision Date: December 18, 1998

Board: Christie Mayall

The Band requested a stay of Conditional Water Licence issued to Mr. Zahradnik by the Regional Water Manager. The application for a stay was denied.

Wildlife Act

96/25(b) Dennis Dunn v. Deputy Director of Wildlife

Decision Date: December 10, 1998

Board: Toby Vigod, Richard Cannings, Jane Luke

This was a rehearing of Mr. Dunn's appeal of the decision of the Deputy Director of Wildlife to refuse Mr. Dunn a permit to possess the head and cape of a male thinhorn mountain sheep. The Board had previously upheld the Deputy Director's decision (Appeal No. 96/25), but the Board's decision was set aside by the B.C. Supreme Court, with the consent of the parties. Mr. Dunn sought an order from the Board requiring the Deputy Director to reconsider the permit application, notwithstanding that the parties agreed that the ram was not of legal size or age when killed. He argued that the Deputy Director had erred when he initially considered the application and that his killing of the undersized ram may have been the result of an officially induced error.

The Board upheld the Deputy Director's decision. The Board found that while Mr. Dunn's mistake as to the legality of the ram was honest, it was not reasonable given his hunting experience. The Board found that the Deputy Director had not misconstrued or improperly considered the evidence before him, did not fetter his discretion, and had not exceeded his jurisdiction or taken irrelevant considerations into account. Mr. Dunn's defence of officially induced error was rejected by the Board. The appeal was dismissed.

97-WIL-08 Ron Thompson v. Deputy Director of Wildlife

Decision Date: August 10, 1998

Board: Toby Vigod, Richard Cannings, Marilyn Kansky

This was an appeal by Mr. Thompson of the Deputy Director's decision upholding the decision of the Regional Fish and Wildlife Manager with respect to Mr. Thompson's Angling Guide Operating Plan. Mr. Thompson sought an order to remove a restrictive condition from his Angling Guide Operating Plan and 1996/97 licence. He argued that there was no authority to add the condition to the licence and, in any event, the condition was unreasonable.

The Board found that there is statutory authority for conditions to be attached to an angling licence. However, the Board found that the Manager failed to properly exercise his discretion when applying the restrictive condition. The Manager's conduct over the years indicated that he routinely applied a 1991 condition to Mr. Thompson's plans and licences without considering the merits of the current application, and whether the rationale for the restrictive condition was still applicable.

The Board found that the Deputy Director did not consider the issue of the Manager's exercise of discretion, nor did she have all of the relevant documentation before her. The Board ordered that the restrictive condition be deleted from Mr. Thompson's plans and licences. The appeal was allowed.

97-WIL-09 Kevan Bracewell v. Deputy Director of Wildlife

Decision Date: August 6, 1998

Board: Toby Vigod, Richard Cannings, Marilyn Kansky

This was an appeal by Kevan Bracewell of the Deputy Director's decision to uphold the decision of the Regional Manager to allocate Mr. Bracewell a quota of zero grizzly bear for the 1997-1998 hunting season. Mr. Bracewell argued that the Manager was biased against him and that the Manager failed to apply the Ministry's policy and procedures in his case.

The Board found that both the Regional Manager and the Deputy Director followed the Ministry's policies and procedures when allocating Mr. Bracewell's grizzly bear harvest quota. The Board found that the Ministry properly balanced its goal of conservation with its policy of maximizing hunting opportunity and ensuring the viability of the guiding industry. The Board also found that any decision regarding a temporary quota of grizzly bear for Mr. Bracewell was best left to the Regional Manager as part of the review that would occur prior to the 1999 season.

The Board found that, although there was a long history of a bad relationship between Mr. Bracewell and the Regional Manager, there was no evidence that the Regional Manager improperly exercised his discretion in allocating a zero quota for grizzly bear to him. Likewise, the Board did not find that the Deputy Director was biased or had erred in upholding the Regional Manager's quota allocation. The appeal was dismissed.

97-WIL-11 Michael A. Richey v. Deputy Director of Wildlife

Decision Date: June 18, 1998

Board: Toby Vigod

In July 1997, Michael Richey pled guilty to discharging a firearm in a "no shooting area" and hunting over cultivated land without the consent of the owner, contrary to the *Wildlife Act*. Subsequent to this court action, the Deputy Director cancelled Mr. Richey's licence and firearms carrying privileges for two years. Mr. Richey appealed the decision to the Board on the grounds that the weather conditions prevented him from recognizing he was shooting into a "no shooting area," and because the arresting Conservation Officer led him to believe that his hunting licencing privileges would not be cancelled if he pled guilty to the charges.

The Board found that there was no legitimate expectation or officially induced error of law caused by the Conservation Officer's statements to Mr. Richey as no erroneous legal advice was given. Based on the picture Mr. Richey filed of the area where the incident occurred, the Board found that a fence was visible and should have been a clue that it was private property and further inquiries should have been made. The Board found that Mr. Richey had been remorseful since the incident occurred and that it was unlikely he would contravene the *Wildlife Act* again. He has held licence for 28 years with a clean record and is a C.O.R.E. examiner. The Board found that a two-year cancellation was excessive and varied the decision of the Deputy Director by finding that an 18-month cancellation was reasonable, given all the circumstances. The appeal was allowed.

98-WIL-01 Michael Kibala v. Deputy Director of Wildlife

Decision Date: July 21, 1998

Board: Toby Vigod

This was an appeal against the decision of the Deputy Director to extend Mr. Kibala's angling licence ineligibility period for an additional year. Mr. Kibala had already had his licence automatically cancelled for one year as a consequence of receiving two convictions under the *B.C. Sport Fishing Regulations* for catching fish far in excess of his daily quota. The Deputy Director exercised his discretion to extend the period of ineligibility for an additional year under section 24(2) of the *Wildlife Act*, after giving Mr. Kibala an opportunity to be heard by way of written submissions. Mr. Kibala argued that he was not given an adequate opportunity to be heard before the Deputy Director as he could not write in English, and that the extension was not fair as he had already been punished for the two convictions.

The Board found that Mr. Kibala had been given an adequate opportunity to make submissions as he was allowed to make oral submissions, he had people who could have assisted him and he was provided with a 1-800 number to call. The Board found that, pursuant to section 24(12) of the *Wildlife Act*, the Deputy Director had authority to extend the period of ineligibility to obtain or renew a licence where a person has been convicted of an offence, but does not presently hold a licence. The authority does not come from section 24(2) as that section only applies to a person holding a licence and Mr. Kibala's licence had already been cancelled. The Board concluded that there were no compelling reasons to alter the Deputy Director's decision, given the seriousness of the offences and Mr. Kibala's history of noncompliance. The appeal was dismissed.

98-WIL-03 Alvie Rema v. Deputy Director of Wildlife

Decision Date: June 12, 1998

Board: Toby Vigod

Before the appeal came to a full hearing, Mr. Rema and Deputy Director requested that the matter be sent back to the Deputy Director with directions. The Board issued a consent order to send the matter back to the Deputy Director.

98-WIL-04 Peter Leveque v. Deputy Director of Wildlife

Decision Date: January 8, 1999

Board: Toby Vigod

Mr. Leveque appealed the Deputy Director's decision to cancel his hunting licence for four years and require that he successfully complete the C.O.R.E. program before his licence could be reinstated. The Deputy Director cancelled his licence for the "illegal killing of a mountain goat and a caribou." Mr. Leveque sought an order setting aside the Deputy Director's decision, or reducing the duration of the cancellation. He appealed on the grounds that the Deputy Director's decision was unreasonable and unsupported by the evidence, was inconsistent with the acquittal of Mr. Leveque on wildlife charges in Provincial Court, violated the principle of *res judicata*, and was harsh and excessive.

The Board did not accept the version of the events put forward by Mr. Leveque with respect to the caribou and found that, on a balance of probabilities, Mr. Leveque had taken the caribou in contravention of the *Wildlife Act*. It further concluded that the Deputy Director's decision was not inconsistent with Mr. Leveque's acquittal on criminal charges and did not violate the principle of *res judicata*. The Board found that the Deputy Director did not err in failing to consider the Provincial Court transcripts as evidence, since they had not been placed before him. However, the Board concluded that there was no credible evidence to support the Deputy Director's finding that Mr. Leveque unlawfully killed a mountain goat. Accordingly, the Board upheld the Deputy Director's decision to cancel the licence but reduced the duration of the cancellation to three years. The appeal was allowed, in part.

98-WIL-05 Thomas Schreiber v. Deputy Director of Wildlife

Decision Date: September 1, 1998

Board: Jane Luke

Mr. Schreiber was convicted in Provincial Court of hunting wildlife (a Bighorn ram) in an area closed to sheep hunting; possession of dead wildlife not authorized by a licence or permit; knowingly making a false statement (that he had shot the ram in a different area); and violating the *Mines Act*. Two types of DNA testing had been conducted to determine whether the ram was killed in the closed area. The first did not match the ram head to the carcass found in the closed area, but the second test produced a match. On appeal, the B.C. Supreme Court overturned all but one of the convictions due to the Crown's failure to provide evidence on the statistical probability that the match was a coincidence.

The DNA testing laboratory later provided statistical evidence to the Deputy Director that the match was extremely unlikely to be a coincidence. After receiving oral and written submissions from Mr. Schreiber, the Deputy Director cancelled his hunting and firearm licences for 6 years, and required him to successfully complete the C.O.R.E. examinations. Mr. Schreiber appealed this decision to the Board on the grounds that the Deputy Director did not have the DNA result from the first test, the cancellation was unreasonable since three of the convictions were overturned, and there was unreasonable delay between the hunt (1993) and the licence cancellation (1998).

The Board was satisfied that the Deputy Director's decision to cancel the licence was reasonable and proper. The Board found that an administrative tribunal is not prevented from imposing serious

sanctions even though criminal proceedings have been concluded in the accused's favour. It also found that there was overwhelming evidence to conclude that Mr. Schreiber illegally killed the ram and lied about it, notwithstanding that he was not convicted in a criminal court. The Board found that the Charter provision concerning a trial within a reasonable time does not apply to proceedings concerning a person's fitness to maintain licence privileges in administrative proceedings. However, the Board found that excessive and unexplained delay is a relevant factor to consider when issuing a penalty. In the circumstances of this case, the Board found the delay was neither excessive nor unexplained and the cancellation was in the normal range. The appeal was dismissed.

This matter is now before the court on an application for judicial review of the Board's decision.

98-WIL-08 David Robb v. Director of Wildlife

Decision Date: September 29, 1998

Board: Toby Vigod

David Robb, an American citizen, appealed a decision of the Director of Wildlife denying him a permit to possess and export a cast off moose antler. The antler was seized by Conservation Officers as Mr. Robb was leaving Canada because he did not have the required permit. Mr. Robb appealed the decision to the Director, who also refused to issue a permit on the grounds that the antler was lawfully seized, and that she had no authority to reverse that decision.

The Board found that Mr. Robb did not need a permit to possess a cast off antler, but did need a permit for its export. The Board found that Director's refusal to issue a permit was based, in part, on improper considerations. The Board found that the Director did not properly define the issue to be decided, failed to properly address the request made by Mr. Robb, failed to adequately consider all of the relevant factors, and incorrectly interpreted her jurisdiction in relation to the ability to reverse a legal seizure. The Board found that the Director had the implied power to release the seized antler. It found that the evidence supported issuing a permit to export the antler and that a permit should be issued. The appeal was allowed.

98-WIL-09 *et al* Robert Fontana, Barry Scott, Wilf Boardman, Steven Leuenberger, Harry Leuenberger, Henry Fercho v. Regional Wildlife Manager

Decision Date: October 26, 1998

Board: Toby Vigod, Richard Cannings, William MacFarlane

Robert Fontana and 5 other Appellants appealed decisions of the Regional Wildlife Manager regarding reductions in their three-year Administrative Guideline allocations (1997-99) and annual quotas for grizzly bear. The Appellants are all guide-outfitters in southeastern B.C., who lead hunting expeditions for non-residents. The Appellants argued that the Manager did not follow proper procedures for calculating the allocations and quotas, and did not use the best bear population estimates available. The Appellants sought to have their respective allocations or quotas adjusted, and requested that the system for calculating allocations and quotas be simplified.

The Board found that the Administrative Guideline allocations were calculated incorrectly. Consequently, the Board allowed this part of the appeal and adjusted the allocations and quotas for the Appellants, directing the Manager to reallocate the remaining bears available after consultation with the guide-outfitters. The Board found that the existing method of estimating bear populations (Fuhr-Demarchi) is the best available method. It also noted that the Mountain Block system adds complexity to the already complicated system, but recommended that it be retained until a more acceptable system is negotiated by the relevant stakeholders. The appeal was allowed, in part.

98-WIL-18 Kenneth Hall v. Deputy Director of Wildlife

Decision Date: September 23, 1998

Board: Toby Vigod

Mr. Hall appealed a decision of the Deputy Director to cancel his hunting licence for 7 months. Mr. Hall was apprehended after being observed shooting at a deer decoy on private land in an area where illegal hunting had been a problem for many years. Mr. Hall was convicted in court of hunting over cultivated land without consent and fined $650. The Director cancelled his licence and Mr. Hall appealed this decision on the grounds that the conviction and fine were sufficient penalty, that suspension of his licence was unduly harsh, and that he committed the offence but that it was due to a mistake as to property boundaries. He stated that he has been a C.O.R.E. instructor for many years, and has shown himself to be a responsible member of society.

The Board found that the Deputy Director was correct in suspending Mr. Hall's licence for 7 months. The Board found that the factors which guided the Deputy Director in making his decision were relevant and appropriate, including the nature of the charges, intent and remorse, and the need for general and specific deterrence. The Board also found that the appropriate standard of proof is the civil standard, as the revocation of a hunting licence is not a "penal consequence." Finally, the length of the suspension was relatively short compared to other cases of illegal hunting, and was appropriate given the facts of the case. The appeal was dismissed.

98-WIL-20 Shayne Quintal v. Deputy Director of Wildlife

Decision Date: December 8, 1998

Board: Toby Vigod

Mr. Quintal appealed a decision of the Deputy Director to cancel his hunting licence for one year and require him to complete the C.O.R.E. program on the grounds that Mr. Quintal killed a mature bull moose without authorization and made a false statement to a Conservation Officer. Mr. Quintal argued that the cancellation should be reduced since the Deputy Director improperly considered two charges that had been stayed by the Crown in return for his plea of guilty to making a false statement. In addition, he contended that the Deputy Director considered inaccurate information regarding the plea bargain and the Director gave no consideration to important mitigating factors such as his remorse, his Metis background, and his family's reliance on wild game for sustenance.

The Board found that the *Act* allows the Deputy Director to consider the charges against an individual even if a court acquits the person of those charges, or the charges are stayed. The Board found that the circumstances surrounding the guilty plea had no bearing on the Deputy Director's decision and that information regarding the "mitigating factors" was before the Deputy Director. The fact that the "mitigating factors" were not mentioned in the decision indicates that they did not play a large part in the outcome. The Board also noted that hunting meat for food, rather than for trophy, is not a mitigating factor. The Board concluded that the penalty was within the normal range and was reasonable in the circumstances. The appeal was dismissed.

98-WIL-23 David Beranek v. Regional Wildlife Manager

Decision Date: October 5, 1998

Board: Judith Lee

David Beranek appealed a decision of the Regional Wildlife Manager to deny him a permit to possess mountain sheep horns. Mr. Beranek found the horns on a carcass while conducting a government-approved, helicopter survey of sheep populations for his employer, a coal mining company. The Manager denied the permit on grounds that persons participating in a government approved survey should not profit from the opportunity to collect wildlife parts. Further, to allow the permit would set a bad precedent, as the aerial survey was interrupted to allow Mr. Beranek to collect the horns.

The Board found that a Ministry policy disallowing government employees from retaining wildlife parts found in the course of their employment did not apply to Mr. Beranek since the survey was privately funded. Any advantage that Mr. Beranek's profession may give him would be negated by the policy that prohibits the granting of a permit to possess wildlife when a similar permit has been issued within 5 years. The Board found the concerns about setting a precedent not to be persuasive since each case must be decided on its merits. On the evidence presented, the Board found that the horns were picked up by consensus - and before Mr. Beranek expressed an interest in possessing them.

Finally, the Manager added two additional reasons for denying the permit: (1) he didn't know if the ram had been killed illegally, and (2) the monetary value of the horns was estimated at over $3200. The Board found that there was no evidence to indicate illegal activity. The Board found that monetary value cannot, by itself, be a reason for refusal but that it can be considered in special circumstances but none were provided in this case and there was no indication that Mr. Beranek was intending to profit from the horns. The Board allowed the appeal, and ordered that Mr. Beranek be granted a possession permit for the horns on condition that he not sell them for profit.

98-WIL-24 Allan John v. Deputy Director of Wildlife

Decision Date: February 16, 1999

Board: Christie Mayall

Mr. John appealed the Deputy Director's decision denying him a permit to possess six African Gaboon vipers. The Deputy Director found that Gaboon vipers fell under the description "Viperidae - pit

vipers" in section 1(v) of Schedule A of the *Designation and Exemption Regulation*, and were therefore "wildlife" under the *Wildlife Act*. He denied the permit on the grounds that the Ministry had a policy not to allow the private possession of venomous snakes except in special circumstances, none of which were present in this case. The issue in the appeal was whether the Gaboon viper was properly found to be wildlife under the *Act* given that Gaboon vipers are Viperidae, but are not pit vipers.

The Board found that Gaboon vipers are not prescribed as "wildlife" under the *Act* and therefore the Ministry policy is not applicable in this case. The Board concluded that the term "pit vipers" was meant to narrow the application of Viperidae to only include the pit viper subfamily. Further, to include the Gaboon viper within this section would be to disregard the use of the common name "pit viper", or to interpret it as meaningless, contrary to the principles of statutory interpretation. The Board found that Gaboon vipers are "animals" under the *Act*, for which no permit is required. Accordingly, the Board rescinded the decision of the Deputy Director. The appeal was allowed.

98-WIL-28 Allan Crawford v. Regional Fish, Wildlife and Habitat Manager

Decision Date: February 4, 1999

Board: Toby Vigod

Mr. Crawford appealed the Manager's decision to deny him a permit to possess the horns of a mountain sheep that he had found. Mr. Crawford wanted the horns for personal use and enjoyment only. The Manager denied the permit on the grounds that the horns were of considerable monetary value, there was "no specific reason" to issue the permit, and Mr. Crawford had removed the horns without a permit.

The Board agreed with the Manager that the horns were valuable and that commercial value is a legitimate consideration when deciding whether to issue a permit. However, the Board found "specific reasons" to issue a permit in that Mr. Crawford had an above average interest in wildlife and the outdoors, placed great personal value on these particular horns, and had no intention of disposing of the horns for financial gain. Further, the Ministry policy at the time provided that disposal of wildlife parts for "private possession" should take priority over "commercial sales." The Board noted that Mr. Crawford had promptly taken the horns to the Ministry and had acted in good faith throughout. The Board ordered that Mr. Crawford be granted a permit to possess the horns. The appeal was allowed.

98-WIL-29 Darcy Gent v. Regional Wildlife Manager

Decision Date: February 1, 1999

Board: Toby Vigod

Mr. Gent appealed the Manager's decision to deny him a possession permit for the carcass of a bald eagle that he found in the garbage. The Manager concluded that Mr. Gent wanted the carcass primarily for private use, which, according to Ministry policy, took a lower priority than ceremonial (aboriginal) use. Mr. Gent appealed on the grounds that he also wanted the eagle for education use in classrooms, that the Branch had been holding the carcass for over one year contrary to its policy, and that he had initially been given the incorrect Branch policy.

The Board found that the Branch held the carcass in accordance with its policy and that the failure to give Mr. Gent the correct policy did not compromise his rights in this case. The Board agreed that the aboriginal demand for eagles was better met by giving aboriginal uses high priority when dead eagles are turned in than by having to allocate a harvest of live eagles for such purposes. Finally, the Board found that Mr. Gent primarily wanted the eagle for private use, and that he focused on educational uses only after he became aware that the Branch may consider this as a reason to deviate from its policy of placing ceremonial uses higher than private possession. The appeal was dismissed.

98-WIL-33 Kevin Ratushniak v. Deputy Director of Wildlife

Decision Date: March 23, 1999

Board: Toby Vigod

Mr. Ratushniak appealed a decision of the Deputy Director canceling his hunting licence for five years for illegally killing a bull moose without having a moose-species licence, and for manipulating the evidence in an attempt to foil the conservation officers investigation into the hunt. Mr. Ratushniak argued that this penalty was excessive given that he was under the age of 19 at the time and he had been fined $2000 by the Court and had his firearm seized. He stated that peer pressure, inexperience and a fear of the consequences played a part in his lying and deceit after the kill.

The Board found that the sanction imposed by the Deputy Director accurately reflected the seriousness of Mr. Ratushniak's offence, and that the Deputy Director had not erred in imposing an administrative penalty in addition to the Court imposed penalty. The Board found that the Deputy Director properly considered all of the relevant factors in making his decision, including Mr. Ratushniak's age and the sanctions already imposed upon him by the Court. The appeal was dismissed.

98-WIL-36 Dawson Smith v. Deputy Director of Wildlife

Decision Date: March 26, 1999

Board: Toby Vigod

Dawson Smith appealed the Deputy Director's decision to deny him a permit to accompany an American friend (a non-resident alien) to hunt big game in British Columbia without a guide. The Deputy Director declined to issue a permit because Mr. Smith and his friend had no familial connection as required by the *Wildlife Act Permit Regulations*. Mr. Smith argued that under the *Wildlife Act*, wildlife officials have the discretion to "circumvent" the familial connection requirement.

The Board found that Mr. Smith was asking for a permit to be granted in circumstances that were clearly prohibited by the *Regulations* and that there was no discretion to circumvent these regulatory requirements. The Board noted that this interpretation of the legislation was consistent with the general purpose of the *Act* and the hierarchy of restrictions set out for different categories of hunters in the legislation. Accordingly, the Board upheld the Deputy Director's decision. The appeal was dismissed.

Summaries of Court Decisions Related to the Board

Deputy Director of Wildlife Branch of the Ministry of the Environment, Lands and Parks v. Environmental Appeal Board and Lynn Ross

Decision Date: April 28, 1998

Court: B.C.C.A., Mr. Justice Donald, Mr. Justice Hall, Madame Justice Proudfoot

The Deputy Director of Wildlife suspended Mr. Ross' guide outfitter licence and cancelled his certificate effective two weeks after the date of his decision. Mr. Ross appealed the suspension and cancellation to the Board. The Board upheld the cancellation and suspension but found that the Deputy Director erred when he, effectively, prevented a transfer of the licence within that two week period (see Environmental Appeal Board Appeal No. 93/25). The Board found that the Deputy Director decided a matter not properly before him (transfer) and fettered the ability of the Regional Manager to exercise an independent discretion. The Board ordered that the licence be renewed for 90 days so Mr. Ross could apply for a transfer of the licence. The Deputy Director applied for a judicial review by the Supreme Court.

The Supreme Court found that, under the *Wildlife Act*, the Board's jurisdiction was limited and it does not have special expertise on questions of law. The Board's decision was therefore assessed on a standard of correctness. The Court found that the Deputy Director's comments regarding the transfer of Mr. Ross' licence were not part of an order and, therefore, were not properly a matter before the Board. The Court also noted that the cancellation and suspension of a licence is punitive and the Board's order to allow time to transfer the licence would undermine the Deputy Director's sanction. The Court confirmed the Deputy Director's decision and quashed the Board's order. Mr. Ross appealed this decision to the Court of Appeal.

The Court of Appeal upheld the Supreme Court's decision that the Board had made an order that exceeded its jurisdiction under the then-applicable legislation. The Court found the Board erred in concluding that the 14-day period discussed by the Deputy Director was an order of the Deputy Director. Thus, because it was not an order, the Board could not review it. In addition, the Court noted that the Ministry had a published policy that stated the right to transfer a certificate is forfeited upon cancellation of the certificate.

The Court also agreed with the lower court that the "standard of correctness" should have been applied to the provisions of the *Wildlife Act* at issue in the case because it was a jurisdictional issue. However, the Court of Appeal noted that the Board should be recognized as having special expertise in environmental matters and that decisions requiring the Board's expertise should not be interfered with unless they are patently unreasonable.

Summaries of Cabinet Decisions Related to the Board

Order in Council No. 1462 Varying Decision 95/31(b), Celgar Pulp Company *v.* Deputy Director of Waste Management (Pulp, Paper and Woodworkers of Canada, Third Party)

Date: December 1, 1998

Pursuant to section 12 of the *Environment Management Act*, Cabinet varied the Environmental Appeal Board's decision in Appeal 95/31(b) (May 29, 1998), and varied the terms of an amended permit held by Celgar. Celgar had appealed the Regional Waste Manager's decision to amend the permit by requiring that Celgar institute a comprehensive monitoring program of emission limits for nitrogen oxides on the #2 Power Boiler and the lime kiln at its pulp mill in Castlegar. The Board allowed the appeal in part, but made several orders concerning allowable emission levels, and ordered Celgar to install a sulphur dioxide scrubber on the #2 Power Boiler by December 1, 1998.

Cabinet rescinded the Board's order that Celgar install a scrubber by December 1, 1998. The Board's orders concerning sulphur dioxide and nitrogen oxide emission levels were rescinded and substituted. Cabinet also repealed and substituted other parts of the amended permit, particularly regarding the amount of time that the lime kiln and #2 Power Boiler may burn concentrated non-condensable gases, and how frequently this is reported to the Regional Waste Manager. Finally, Cabinet added "for greater certainty," that the Regional Waste Manager is fully empowered to exercise his or her statutory authority to consider new information and make new amendments to the permit for the purposes of environmental protection.

APPENDIX I
Legislation and Regulations

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

Environment Management Act

Environmental Appeal Board

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

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

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

(4) The Lieutenant Governor in Council may

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

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

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

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

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

(8) The members of the board are to sit

(a) as a board, or

(b) as a panel of the board.

(9) If members sit as a panel,

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

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

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

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

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

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

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

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body,

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

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

(a) be represented by counsel,

(b) present evidence,

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

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

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

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

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

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

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

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

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

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

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

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

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

Varying and rescinding orders of board

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

Environmental Appeal Board Procedure Regulation

Interpretation

1 In this regulation

"Act" means the Environment Management Act;

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

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

"chairman" means the chairman of the board;

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

Application

2 This regulation applies to all appeals to the board.

Appeal practice and procedure

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

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

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

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

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

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

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

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

Procedure following receipt of notice of appeal

4 (1) On receipt of a notice of appeal, or, in a case where a notice of appeal is returned under section 3(5), on receipt of an amended notice of appeal with the deficiencies corrected, the chairman shall immediately acknowledge receipt by mailing or otherwise delivering an acknowledgement of receipt together with a copy of the notice of appeal or of the amended notice of appeal, as the case may be, to the appellant, the minister's office, the Minister of Health if the appeal relates to a matter under the Health Act, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(2) The chairman shall within 60 days of receipt of the notice of appeal or of the amended notice of appeal, as the case may be, determine whether the appeal is to be decided by members of the board sitting as a board or by members of the board sitting as a panel of the board and the chairman shall determine whether the board or the panel, as the case may be, will decide the appeal on the basis of a full hearing or from written submissions.

(3) Where the chairman determines that the appeal is to be decided by a panel of the board, he shall, within the time limited in subsection (2), designate the panel members and,

(a) if he is on the Board, he shall be its chairman,

(b) if he is not on the panel but a vice chairman of the board is, the vice chairman shall be its chairman, or

(c) if neither the chairman nor a vice chairman of the board is on the panel, the chairman shall designate one of the panel members to be the panel chairman.

(4) Within the time limited in subsection (2) the chairman shall, where he has determined that a full hearing shall be held, set the date, time and location of the hearing of the appeal and he shall notify the appellant, the minister's office, the Minister of Health if the appeal relates to a matter under the *Health Act*, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(5) Repealed. {B.C. Reg. 118/87, s.2.}

Quorum

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

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

Order of decision of the board or a panel

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

Written briefs

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

Public hearings

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

Recording the proceedings

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

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

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

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

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

Transcripts

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

Representation before the board

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

Commercial River Rafting Safety Act

Appeals

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

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

Health Act

Power to make regulations

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

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

…

(ii) the location, design, installation, construction, operation and maintenance of

(C) sewage disposal systems,

…

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

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

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

Pesticide Control Act

Appeals to Environmental Appeal Board

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

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

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

(4) An appeal under this section

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

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

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

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

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

whichever is earlier.

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

(7) On an appeal, the appeal board may

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

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

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

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

Waste Management Act

Definition of "decision"

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

(a) the making of an order,

(b) the imposition of a requirement,

(c) an exercise of a power,

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

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

Appeals to Environmental Appeal Board

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

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

Time limit for commencing appeal

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

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

(b) in accordance with the regulations.

Procedure on appeals

46 (1) An appeal under this Part

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

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

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

Powers of appeal board in deciding appeal

47 On an appeal, the appeal board may

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

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

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

Appeal does not operate as stay

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

Water Act

Appeals to Environmental Appeal Board

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

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

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

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

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

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

(b) in accordance with the regulations.

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

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

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

whichever is earlier.

(4) An appeal under this section

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

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

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

(6) On an appeal, the appeal board may

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

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

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

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

Wildlife Act

Appeals to Environmental Appeal Board

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

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

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

(b) in accordance with the regulations.

(3) An appeal under this section

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

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

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

(5) On an appeal, the appeal board may

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

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

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

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