

Annual Report 2022/2023



**Environmental
Appeal Board**





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Dear Ministers:

Please find enclosed the 2022/2023 Annual Report for the Environmental Appeal Board.

Yours Truly,

A handwritten signature in blue ink that reads "D. Le Houillier".

Darrell Le Houillier
Chair
Environmental Appeal Board

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Message from the Chair

I am pleased to present the 2022/2023 Annual Report of the Environmental Appeal Board (the “Board”).

The Board’s principal responsibility is to resolve the appeals filed with it. Seventy-three new appeals, related to 64 separate statutory decisions, were filed with the Board over the 2022/2023 reporting period. This represents a high since the 2016/2017 reporting period. The Board closed 58 appeals in the reporting period, resulting in an increase in the Board’s appeal inventory, from 65 appeals to 85. The average age of appeals decreased slightly, from roughly 689 days to 622 days, as the Board addressed longer-standing appeals.

In the next reporting period, the Board expects to resolve 22 of its oldest (2020 and earlier) appeals. As of April 1, 2023, these appeals had an average age of approximately 1,478 days, and without them the average age of appeal (as of April 1, 2023) was roughly 323 days. As a result, the Board anticipates reducing the age of its appeal inventory, although intake rates remain high and an increase in appeal inventory is likely.

The factual and legal complexity of some appeals heard by the Board also continues to increase year over year. This is unsurprising given that the financial implications of many appeals are significant, and parties are motivated to present robust cases before the Board. By contrast, many appeals are advanced by those without significant resources available for legal processes, and access to justice remains an issue. The Board is focusing on ways to modernize our operations to improve access to justice.

Most appeals that were closed in the 2022/2023 reporting period were decided without a decision on their merits. Roughly 46% of appeals were summarily dismissed or rejected, while roughly 34% were settled, withdrawn, or abandoned. Roughly 21% of the appeals resolved in the reporting period were concluded by a final decision.

The appeal process took, on average, 386 days to complete. While this is an increase from the previous reporting period (253 days), it is shorter than the average from the three preceding reporting periods (546 days). Where appeals were resolved by a decision on the merits, they took, on average, 447 days (the median of the five preceding reporting periods). Where appeals were resolved without a decision on the merits, these averaged 372 days (the second-shortest of the past five reporting periods).

Given that the Board expects to resolve a significant proportion of its older appeals in the next reporting period, I expect the average time to complete decisions to increase significantly in the next reporting period, reflecting the conclusion of these older appeals. Afterward, I expect the time to resolve appeals to drop below 2022/2023 levels.

Beyond handling appeals, the Board has worked to improve the efficiency and user-focus of its operations. Its service delivery realignment project, a multi-year effort aimed at a cover-to-cover redesign of its appeal processes, continued throughout the 2022/2023 reporting period and is expected to continue into the next one. This redesign follows a period of stakeholder engagement and a survey of system-users, and emphasizes more active appeal management by the Board, greater preparation of parties for hearings, and more efficient assignment of appeals to panel members.

The Board improved access to justice by moving its catalogue of decisions to CanLII, a free-to-use repository of legal resources with improved search functionality over what the Board can independently offer. Ongoing decisions will be added to CanLII on a rolling basis, and will also continue to be posted on the Board's website.

The Board continued its path toward reconciliation and the fulfilment of its obligations under the Truth and Reconciliation Commission's 94 Calls to Action. Its Reconciliation Advisory Committee, comprised of legal experts, representatives from the Board, and Indigenous leaders in British Columbia continues to meet and work toward drafting recommendations. These recommendations, when complete, will inform the Board's reconciliation plan.

The Board also continued to revitalise a roster of long-standing members. The Board welcomed three new members: Subodh Chandra, Dr. Gary Lin, and Bijan Pourkarimi. These were the best candidates of an outstanding pool of applicants and are already an asset to the Board. The Board also had several members move on from their positions: Dr. Daniela Dos Santos; Brenda Edwards; James Mattison; Susan Ross; Teresa Salamone; Howard Saunders; Reid White; and Robert Wickett, K.C. The Board is grateful for the years of service provided by our departing members.

The Board's expenditures in the reporting period totalled roughly \$1,596,200. This was approximately \$10,500 less than the average from the five preceding fiscal years (\$1,606,927). The Board anticipates that expenditures in the next reporting period will be similar to the 2022/2023 reporting period.



Darrell Le Houillier
Chair



Introduction

The Board was established in 1981, when the *Environment Management Act* came into force. The Board exists primarily to provide an independent level of appeal from some decisions made by government officials. It currently hears appeals from certain categories of decision made under nine statutes and their associated regulations: the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Mines Act*, the *Water Sustainability Act*, the *Water Users' Communities Act*, the *Wildlife Act*, and the *Zero Emission Vehicles Act*. The Board addresses issues related to the use and stewardship of natural resources and to the environment.

In deciding appeals, the Board weighs evidence and makes findings of fact. It interprets both relevant legislation and common law principles and applies those sources of law to its factual findings. The Board may compel the production of evidence and must ensure that its processes are procedurally fair to those involved in appeals.

Cabinet may, in the public interest, vary or rescind an order or decision of the Board.

Many significant decisions made by the Board are available on the website, www.bceab.ca. The Board's website also has other resources including its Rules, Practice and Procedure Manual, and information sheets, aimed at helping unrepresented parties.

Review of Board Operations

The principal work of the Board is deciding appeals from certain authorized decisions made under the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Mines Act*, the *Water Sustainability Act*, the *Water Users' Communities Act*, the *Wildlife Act*, and the *Zero Emission Vehicles Act*.

The Board, through its annual reports, also provides the ministers responsible for its oversight with information gathered over the preceding reporting year: a review of its operations, performance indicators, its appeal inventory, the results of any surveys undertaken, a forecast of the upcoming workload for the tribunal, any foreseen trends or special problems, and plans for improving operations in the future.

PIDA Disclosures

In the 2022/2023 reporting period, there were no disclosures, as defined in the *Public Interest Disclosure Act*, submitted to the Board. The Board is aware of no disclosures pertaining to it or its staff or its members (past or present), that would have been submitted in the 2022/2023 reporting period.

Appeal Procedures

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An appeal begins when a notice of appeal is filed against a particular decision made by a decision-maker under the nine statutes listed above. The Board assesses whether the appeal meets threshold requirements: that the appellant has the ability to appeal the decision, that the decision is appealable, that the appeal was filed within the 30-day statutory timeframe allowed, and whether the Board has the authority to grant the requested outcome of the appeal. Decisions that can be appealed and who can appeal those decisions depends on the statute under which the decision was made.

The Board may conduct appeals in writing or through an oral hearing, depending on the needs of the parties and based on principles of procedural fairness in administrative law. Written evidence and arguments are exchanged in either case. In written hearings, only written material is exchanged; in oral hearings, written summaries of the arguments to be presented precede the oral hearing itself. The Board now offers in person and electronic oral hearings.

A summary follows, outlining the nine statutes allowing for appeals to the Board.

Environmental Management Act

The *Environmental Management Act* governs the disposal and dispersal of solid, gaseous, and liquid waste into the environment of British Columbia, including through regulation of landfills and contaminated sites. Governmental decision-makers may issue permits, approvals, operational certificates, orders, and administrative penalties to accomplish the aims of the Act.

The *Environmental Management Act* is broad legislation divided into 13 parts:

- Introductory Provisions;
- Prohibitions and Authorizations, which contains general provisions for the protection of the environment and governmental authority to allow the release of contaminants into the environment;
- Municipal Waste Management;
- Contaminated Site Remediation;
- Remediation of Mineral Exploration Sites and Mines;
- Clean Air Provisions;

- Greenhouse Gas Reduction, which applies to waste management facilities;
- Powers in Relation to Managing the Environment, including provisions dealing with pollution assessment, prevention, and abatement, as well as spill preparedness, response, and recovery;
- Appeals;
- Conservation Officer Service;
- Compliance, including authorization of government decision-makers to carry out inspections and seizures, make inquiries, and issue administrative penalties;
- General, which relates to offences, penalties, immunity of conservation officers from provincial offences, miscellaneous administrative provisions, provisions related to the ownership of waste, and powers to make regulations; and
- Transitional Provisions and Consequential Amendments.

Any person “aggrieved by a decision” of a director or district director named under the *Environmental Management Act* can appeal that decision to the Board. The definition of “decision” under the Act is broad, and includes:

- making orders;
- imposing requirements;
- exercising any power other than delegation;
- issuing, amending, renewing, suspending, refusing, cancelling, or refusing to amend a permit, approval, or operational certificate;
- including requirements or conditions in orders, permits, approvals, or operational certificates;
- imposing an administrative penalty; and
- determining that the terms and conditions of an agreement for the reduction or cancellation of an administrative penalty have not been met.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal pending the final outcome of the case.

Greenhouse Gas Industrial Reporting and Control Act

The *Greenhouse Gas Industrial Reporting and Control Act* enables the government to set performance standards for industrial facilities or sectors by listing them within a Schedule to the Act. Presently, the Schedule sets a greenhouse gas emissions benchmark for liquified natural gas facilities.

The Act is divided into seven parts:

- Interpretation, which provides definitions for the legislative scheme;
- Emission Reporting;
- Emission Control, including use of offsets and credits to be applied to emissions;
- Compliance and Enforcement;
- Appeals to the Environmental Appeal Board;

- General, which discusses procedures, responsibility for operators of facilities or sectors regulated by the Act, and regulatory powers; and
- Transitional Provision, Repeal and Consequential Amendments.

A person who is served with a determination to impose an administrative penalty for non-compliance with requirements to accurately report emissions may appeal the determination or extent of non-compliance to the Board. A person who is served with a determination to impose an administrative penalty for non-compliance with other requirements of the Act or regulations may appeal the determination or extent of non-compliance, and/or the amount of the penalty, to the Board. The Act also allows other decisions to be designated as appealable, by regulation.

The *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation* provides that certain decisions a director makes under the *Greenhouse Gas Emission Reporting Regulation* are appealable:

- approvals of changes in emissions measurement methodology, and
- decisions refusing to accept a verification statement of an emissions report.

The *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation* also allows for appeals of certain decisions by a director, under the *Greenhouse Gas Emission Control Regulation* and the *Greenhouse Gas Emission and Reporting Regulation*:

- suspension or cancellation of an account in the emissions cap-and-trade registry;
- refusal of a validation or verification statement;
- refusal of an emissions offset project;
- refusal to credit offset units based on an offset project report;
- approval of a change in the methodology used to quantify emissions; and
- refusal of a verification statement relating to an emissions report on the grounds that verifications performed by the verification body do not comply with the regulation or certain standards.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* requires suppliers of transportation fuels to supply a prescribed percentage of renewable fuels and to submit annual compliance reports to the government. The Act empowers government officials to impose administrative penalties for non-compliance.

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* allows appeals to the Board of certain decisions by a director, under the Act:

- where an administrative penalty has been imposed for failure to meet fuel requirements, the underlying determination of non-compliance or the extent of non-compliance;

- where an administrative penalty has been imposed for non-compliance with other requirements, the underlying determination of non-compliance, the extent of non-compliance, or the amount of the penalty;
- refusal to accept a proposed, alternative calculation of the carbon intensity of certain fuels; and
- other decisions prescribed by regulation.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board does not have the discretion to stay any other decisions under appeal from the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

Integrated Pest Management Act

The *Integrated Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application, and disposal of pesticides in British Columbia. It requires permits for certain pesticide uses and certification for individuals seeking to apply pesticides in certain circumstances. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect on the environment, and empowers government decision-makers to impose administrative penalties for non-compliance.

The *Integrated Pest Management Act* is divided into seven parts:

- Introduction, including definitions and emergency provisions;
- Prohibitions and Authorizations of Pesticide Use and Sale;
- Administration, including provisions relating to inspection and monitoring;
- Appeals to the Environmental Appeal Board;
- Compliance;
- General, including provisions relating to offences, sentencing orders, notice provisions, and authorizations to make regulations; and
- Transitional and Consequential Provisions.

The *Integrated Pesticide Management Act* allows a “person” to appeal a decision to the Board. Decisions, for the purposes of that Act, include:

- orders, other than those made by the Minister;
- specification of terms and conditions in a licence, certificate, or permit, other than those prescribed by the administrator appointed under that Act;
- amendments or refusals to issue, amend, or renew a licence, certificate, or permit;
- revocations or suspension of a licence, certificate, permit, or confirmation;
- restrictions on the ability of a holder of a licence, certificate, permit, or pest management plan to apply for another licence, certificate or permit, or to receive confirmation of receipt, by the administrator, of a pesticide use notice or amended pesticide use notice;
- determinations to impose an administrative penalty; and
- determinations that the terms and conditions of agreements between the administrator and a person subject to an administrative penalty have not been performed.

Certain decisions made in emergency situations cannot be appealed to the Board.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Mines Act

The *Mines Act* regulates mining in British Columbia through a system of permits, regulations, and the Health, Safety and Reclamation Code. The *Mines Act* and associated Code applies to mining operations through exploration, development, construction, production, closure, reclamation, and abandonment. The *Mines Act* allows for inspections, investigations, orders, and enforcement by the Chief Inspector of Mines and inspectors appointed by him or her.

The *Mines Act* allows appeals to an “appeal tribunal” of decisions by the Chief Inspector of Mines, for which notice must be given under section 36.3. That section applies to the imposition of an administrative penalty by the Chief Inspector of Mines and the Chief Inspector’s finding that someone has contravened or failed to comply with provisions related to:

- orders made under the *Mines Act*;
- terms or conditions imposed in permits, permit exemptions, cancellations of notices of government debt applied to abandoned mines, and orders for the recommencement or reopening of certain mining operations following closures as a result of regulatory actions;
- prescribed provisions of the Act, regulations, or Health, Safety and Reclamation Code.

The *Administrative Penalties (Mines) Regulation* provides that administrative penalties can be imposed for a wide variety of contraventions or non-compliances under the legislation, regulations, *Workplace Hazardous Materials Information System Regulation (Mines)*, and the Health, Safety and Reclamation Code. The *Administrative Penalties (Mines) Regulation* also defined the Board as the “appeal tribunal” referred to under the *Mines Act*.


Deadlines for payment of administrative penalties are automatically postponed upon appeal to the Board, although the Board cannot stay decisions under the *Mines Act*. The administrative penalty must be paid within 40 days after the date that the Board’s decision is given to the parties unless the Board overturns the penalty.

Water Sustainability Act

The *Water Sustainability Act* regulates the use and allocation of groundwater and surface water, works in and about streams, and the construction and operation of groundwater wells. It includes provisions for the protection of fish and aquatic ecosystems, dam safety, and enforcement and compliance. It empowers government officials to issue licences, permits, approvals, orders, and administrative penalties.

The *Water Sustainability Act* is divided into eight parts:

- Interpretation and Application;
- Licensing, Diversion and Use of Water;
- Protecting Water Resources;
- Enforcement;

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- General;
 - Regulations;
 - Transitional Provisions; and
 - Consequential and Related Amendments.

The *Water Sustainability Act* allows, subject to some exceptions created in that Act, any order (defined to include a decision or a direction, whether or not it is in writing, but not a request) resulting from an exercise of discretion by the comptroller, water managers, or engineers designated under the Act to be appealed by:

- the person who is the subject of the order;
- an owner whose land is likely to be physically affected by the order;
- the owner of works that are subject to an order; and
- the holder of an authorization, riparian owner, or an applicant for an authorization who considers that his or her rights are or will be prejudiced by the order.

The exceptions created by the *Water Sustainability Act* that do not allow for appeals to the Board relate to certain:

- certain decisions affecting power operators;
- directions that licences that have lasted 30 years or more must be reviewed;
- directions related to information or declarations of beneficial use of water;
- certain orders related the creation of water sustainability plans;
- orders for determining critical environmental flow thresholds for streams in certain circumstances;
- cancellation of authorizations, in whole or part, due to non-payment of fees;
- decisions as to whether to enter into, and on what terms to enter into, compliance agreements made in relation to administrative penalties;
- certain orders made consistent with consents given for drilling authorizations; and
- certain decisions related to compensation to be paid by the government, if defined by regulation.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Water Users' Communities Act

The *Water Users' Communities Act* allows for the creation of water users' communities, which are groups of six or more licensees under the *Water Sustainability Act*, who create and maintain a system to store and deliver water. The *Water Users' Communities Act* defines rights of and obligations on water users' communities, and empowers the comptroller to make certain decisions affecting water users' communities.

The *Water Users' Communities Act* uses the general appeal provisions from the *Water Sustainability Act*, which includes appeals of decisions by the comptroller to cancel a water users' community and dispose of its assets.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions under appeal.

Wildlife Act

The *Wildlife Act* regulates the use, allocation, import and export of fish and wildlife in British Columbia, including activities such as hunting, angling in non-tidal waters, guide outfitting, and trapping. The Act empowers government officials to issue licences, permits, certificates, and orders, and to impose administrative penalties for non-compliance.

The *Wildlife Act* grants rights of appeal to applicants for and holders of licences, permits, registrations for traplines, and certificates for guiding territories. Those individuals may appeal to the Board any decision by a regional manager or director that affects their licence, permit, registration for a trapline or guiding territory certificate.

The Board has the discretion to stay decisions under appeal.

Zero Emission Vehicles Act

The *Zero Emission Vehicles Act* requires automakers to meet an increasing annual percentage of new light-duty zero emission vehicle sales and leases, starting with 10% in 2025 and reaching 100% by 2040. Compliance with these directives is monitored by requiring vehicle suppliers to submit annual, auditable reports to the director appointed under the Act, who then issues assessments and possible reassessments in reply. The Act empowers government officials to impose administrative penalties for non-compliance.

The Act allows appeals to the Board of certain decisions made by a director under the Act:

- an assessment or reassessment of a report from a vehicle supplier;
- a determination of non-compliance, the extent of that non-compliance, or of the amount of an administrative penalty; and
- other decisions prescribed by regulation.

So far, no other appealable decisions have been prescribed by regulation.

Decisions to impose administrative penalties are automatically stayed on appeal. The Board has the discretion to stay all other decisions that may be appealed under the *Zero Emission Vehicles Act*.

Statutory Framework

The statutory framework governing the operation of the Board is generally found in Part 8 of the *Environmental Management Act*, sections 93 to 98. The following sections of the *Administrative Tribunals Act* apply to the Board:

- Parts 1, 2, 3, 4 (except sections 23, 24, 33, 34(1), and 34(2)), 6, 7, and 8; as well as
- Sections 57, 59.1, 59.2, and 60.

For appeals filed under the *Mines Act*, the applicable sections of the *Administrative Tribunals Act* are slightly different. The sections that apply to appeals filed under the *Mines Act* are:

- Parts 1, 2, 3, 4 (except sections 23, 24, 25, 34(1), and 34(2)), 6, 7, 8, and 9 (except section 58).

Performance Indicators

Board Processes

In the 2022/2023 reporting period, the appeal process took, on average, 386 days to complete. Where decisions were issued on the merits of an appeal, the average was 447 days. Where decisions were resolved without a decision on the merits (by rejection, abandonment, withdraw, consent order, or dismissal), the average was 372 days.

These figures all represent increases over last year, as none of the appeals that were filed with the Board before 2019 were completed in the 2021/2022 reporting period. Last year, the Board's average time to resolve appeals was 241 days where a hearing was required, 256 days where no hearing was required, and 253 days overall. The Board's average times to complete appeals in this past reporting period were still less than the preceding five-year average, from 2017 to 2022, inclusive. Over that period, the Board took, on average, 471 days to resolve an appeal where a hearing was held, 422 days where no hearing was held, and 460 days overall.

In the next reporting period, the Board expects to resolve 22 of its 24 appeals dating from 2020 or earlier. These 22 appeals had an average age, as of April 1, 2023, of approximately 1,478 days. As a result, the Board anticipates that the average time to resolve appeals will be significantly higher than in recent years, although it will then have few long-standing appeals in its inventory. Continued high volumes of appeals will likely mean an increase in the number of appeals in the Board's inventory, however, as it is unlikely to be able to address both incoming and long-standing appeals concurrently.

Most appeals closed in the 2022/2023 reporting period were decided without a decision on their merits. Roughly a third of appeals were summarily dismissed, while roughly 37% were settled, withdrawn, or abandoned. Roughly 7% of appeals were rejected. Eleven of the 53 appeals resolved in the reporting period were concluded by a final decision (roughly 21%).

The Board monitors these proportions closely, as it is motivated to ensure that appeals are either resolved between the parties, or heard and decided responsively, on their merits, in a procedurally fair way. While there is a concerning number of rejected or summarily dismissed appeals (22), a closer assessment of this category reveals:

- ten were dismissed as moot;
- five were dismissed for not being filed within the appropriate statutory timeframe, which the Board had no discretion to extend;
- two were dismissed because an appeal pertained to a decision that could not be appealed to the Board (hunting regulation contravention tickets);
- two were dismissed with the parties' consent, as they were corporate appellants whose interests were already represented by individual appellants;
- one was dismissed because of a lack of standing by the party who filed the appeal;
- one was dismissed because the appellant failed to diligently pursue it by stopping all communication with the Board, after the decision-maker rescinded the decision under appeal; and
- one was dismissed because the appellant failed to diligently pursue it, by repeatedly not responding to the Board, or not providing responses on particular questions to the Board, over the span of several months.

Judicial Reviews

Four judicial reviews of Board decisions were active in the 2022/2023 reporting period.


Chief Inspector of Mines v. Sunrise Resources Ltd. **(BC Supreme Court)**

This judicial review arises from a preliminary decision of the Board, in which it concluded that one of two administrative penalties levied against Sunrise Resources Ltd. was not issued within a legislated timeframe. The Court heard the appeal during the 2022/2023 reporting period but a decision has not yet been issued.

Director, Environmental Management Act et al v. Canadian National Railway Company et al **(BC Supreme Court)**

Three railways appealed orders issued by the Director of the Environmental Emergency Program (the "Director"), requiring them to report shipping information about crude oil through the province, from 2018 to 2020. The orders required that the information would be published unless it could not be disclosed under the *Freedom of Information and Protection of Privacy Act*.

The orders were issued under Division 2.1 of the *Environmental Management Act*, which authorizes the Director to request information about certain substances transported by a "regulated person". The *Spill Response, Preparedness and Recovery Regulation* includes those shipping a certain volume of crude oil by railway. All the railways in these appeals met that threshold.



The railways argued that the legislation used to issue the orders is unconstitutional or inapplicable to the railways as federal undertakings. The railways also argued that the orders were unnecessary and unreasonable.

The Board concluded that the *Environmental Management Act*, coupled with the *Spill Response, Preparedness and Recovery Regulation*, was predominantly intended to allow the Director to assess the railways' spill preparedness resources and plans, and dictate that spill preparedness resources be deployed in a manner acceptable to him. This could significantly affect the railways' operations. As a result, the Board concluded that the Director lacked the constitutional authority to make the orders that the railways had appealed.

The Board went on to address whether the *Environmental Management Act*, coupled with the *Spill Response, Preparedness and Recovery Regulation*, were applicable to the railways. The Board concluded that the railways' safety and related operational management was a core federal power, and for provincial officials to be able to assess and request changes to spill response planning would have a serious effect on that operational management. Accordingly, the railways must be allowed to manage their security and safety without provincial interference, under the principle of interjurisdictional immunity.

The Board added that another constitutional doctrine, paramountcy, was not applicable in this case; however, given the Board's findings that the orders were made without constitutional authority and were inapplicable to the railways, the Board allowed the railways' appeals and rescinded the orders.

While these appeals were underway, the Board also issued confidentiality orders that required certain security-related evidence and testimony be kept from the public.

The Director requested a judicial review of both the confidentiality orders and the Board's decision on the constitutional issues.

On January 28, 2022, the Supreme Court of British Columbia issued its decision. The Court found that the Board unreasonably issued the confidentiality orders by concluding there was an overlap between the railways' private interest in keeping security information confidential and the public interest, and by providing insufficient discussion about the public interest in open hearings. The Board also misstated the position of the Director, on the scope of security-related evidence that would be tendered by the railways.

The Court also found that the Board incorrectly determined that the legislation at issue targeted the railways, rather than the "... planning, preparedness and response to toxic spills when transporters such as railways, trucks and others carry dangerous substances in large quantities." The Court stated this validly fell under provincial authority. The Court also found that the Board incorrectly concluded that interjurisdictional immunity did not apply, as the railways continue to be part of the provinces in which they are situated. The Court agreed with the Board's conclusion that paramountcy was inapplicable.

The railways and the Director appealed the decision of the Supreme Court of British Columbia to the Court of Appeal. The appeal was heard in the 2022/2023 reporting period, but the decision is not yet issued.

District Director, Metro Vancouver v. Environmental Appeal Board et al. (BC Supreme Court)

This case relates to composting operations conducted in Delta, British Columbia, by GFL Environmental, Inc. ("GFL"). In 2018, the District Director of Metro Vancouver issued a permit to GFL, allowing it to emit certain air contaminants as part of its composting operations. The permit covered the existing, open-air operation in place in 2018, a transition to an enclosed facility, and composting occurring entirely in the enclosed facility (scheduled to start in March 2020). The permit allowed GFL to emit air contaminants for less than three years, once operating only in the enclosed facility.


The District Director set various terms and conditions on the 43-page permit. The permit included requirements for operations, design and engineering plan approvals, and document submissions. The permit also included requirements related to limiting the release of odours from the facility, either to be measured via "odour units" or where "Approved Persons" appointed by the District Director could identify "odorous air contaminants".

GFL appealed the permit, arguing that the District Director had exceeded his authority and imposed unnecessary conditions on the permit. GFL also argued that "odour units" were not an appropriate compliance measure. Seventeen local residents from Delta also appealed, arguing for tighter controls in the permit, particularly involving the release of odours. The City of Delta was granted third-party status in the appeals.

The parties raised several preliminary applications throughout the appeals. GFL applied for a stay of the permit provisions that it had appealed, which the Board denied. After the hearing was underway, GFL twice applied for interim relief, seeking to vary dates in the permit as a result of delays in constructing the enclosed facility. The Board granted those applications. Shortly before the end of the appeal hearing the District Director asked two of the three Board members hearing the appeal to recuse themselves because of actual or perceived bias against him. The Board denied that application and the panel completed the hearing.

Several issues were advanced and argued by all parties. In short, the Board determined that it owed no deference to the District Director regarding any aspect of the permit. The Board concluded that the District Director's decision-making process was unfair because he did not provide written reasons when issuing the permit, although the unfairness was cured through the appeal process.

The Board also concluded that "odour units" are not sufficiently measurable or reliable to be used as a compliance mechanism, and the Board varied the permit accordingly. Further, the Board determined that the District Director had no authority to regulate odours, but he had the ability to regulate air contaminants (which may or may not be odorous). The Board also concluded that the District Director's process for appointing "Approved Persons" to measure odours was "completely lacking in scientific rigour". Accordingly, the Board removed all references to "odorous air contaminants" and "Approved Persons" from the permit. The Board directed, however, that the District Director amend the permit to require GFL to create an odour management plan, subject to the District Director's approval. The Board recommended that the plan include use of a "Sniff Test" for odorous air contaminants, to be used for informational purposes, rather than as a compliance measure. The Board also directed certain contaminants, known to be odorous, be monitored at their point of discharge from the enclosed facility. Further, the Board recommended that the permit be



amended to require GFL to submit an operational monitoring plan, to assist in the definition of contaminant emissions sources and the treatment of emissions.

The Board also found the term of the permit to be inappropriately brief, given the investment GFL made by enclosing its facility. The Board amended the permit so that it runs for six years from when GFL's composting operations were all contained in the enclosed facility.

Furthermore, the Board concluded that several aspects of the permit exceeded the District Director's authority by trying to regulate the composting process, rather than the release of air emissions. The Board considered these requirements to be overly prescriptive and not advisable for the protection of the environment. The Board also identified terms that related to open-air operations that were not relevant to the enclosed operations, and removed them from the permit. The Board also directed that "placeholder" provisions that were to be later defined by the District Director, were overly vague and must be quantified in the permit. The Board further removed some requirements in the permit that the District Director approve of works to be installed, as the works had been installed and were satisfactory. The Board also directed that various terms of the permit be defined for clarity.

The Board also made several recommendations to improve relations between the parties, and responded to concerns raised by local resident appellants that the permit did not adequately balance their interests with GFL's interests.

The District Director sought a judicial review of this decision. Referencing several procedural rulings throughout the 44-day oral hearing convened for these appeals, the District Director argued that two of the three Board panel members showed bias or a reasonable apprehension of bias during the hearing. The Court heard this appeal in the 2022/2023 reporting period, but a decision has yet to be issued.

Mount Polley Mining Corporation v. Environmental Appeal Board et al. (BC Supreme Court)

The Mount Polley Mining Corporation runs the Mount Polley Mine. The mine's operations involve the discharge of effluent, authorized under a permit issued by a Director under the *Environmental Management Act*. The permit required the corporation to install bio-chemical reactors to treat effluent. The introduction of these reactors was to involve three steps, with three due dates specified under the permit: creating bench scale testing plans; creating a detailed design of a pilot system; and, constructing the system, with "as built" drawings completed. With each phase, the corporation was to submit drawings for review by the Director.

The Director's staff subsequently inspected the mine. None of the drawings were provided by the due dates in the permit, and the system was not built by the date of the inspection. The Director's staff and the corporation exchanged correspondence, including staff reminding the corporation it could ask for the due dates specified in the permit to be amended. The corporation did not, and ultimately, the Director levied an administrative penalty of \$9,000 on the corporation, for failing to comply with its permit.

On appeal, the corporation argued that the Board should conduct a "true appeal" and not allow new evidence to be presented. The corporation also argued that it did not violate the terms of its permit because it could not complete the steps required while adhering to the Ministry's policies on selecting the best available technology for reducing contaminants from the mine's effluents. The corporation also argued that the deadlines in the permit were unattainable, and therefore, it should not be found to have violated the

permit. Lastly, the corporation argued that the penalty should be reduced, given all the relevant factors in the case.

The Board concluded that it was appropriate to consider new evidence in the appeal. The Board also stated that policy or guidance on the selection of technology did not matter; the requirements of the permit were instructive. Furthermore, the Board stated that the corporation was able to complete the steps required by the permit and, if the timelines set were impossible, it could have asked for those deadlines to be amended. As a result, the Board held that the permit terms were not impossible to achieve. Lastly, the Board found that the amount of the penalty was appropriate in the circumstances of the case. The Board dismissed the appeal.

In November 2021, Mount Polley Mining Corporation filed a petition for judicial review on all of those aspects of the Board's decision. In 2022/2023 the Court dismissed the application for judicial review, stating that the Board's decision was reasonable.

Cabinet Reviews

Cabinet did not vary or rescind any decisions of the Board in the 2022/2023 reporting period.



Applications and Appeals in the 2022/2023 Reporting period

The Board is responsible for considering appeals on a broad range of subjects, as indicated by its appeal inventory.

The diversity of appeals was less in the 2022/2023 reporting period than previously. Decisions appealed related to administrative penalties or other enforcement actions taken under various legislative schemes and decisions related to permitting and other authorizations.

Over 80% of the appeals filed under the *Environmental Management Act* during the reporting period relate to Part 9.1 of that Act (Compliance). Most of these 19 appeals involved alleged contraventions of permits granted under the *Environmental Management Act*; however, four were based on contraventions of Part 2 (Prohibitions and Authorizations) and three were based on contraventions of subordinate legislation (provisions of regulations or codes enacted under the *Environmental Management Act*). The remainder of the appeals filed pertained to decisions made with respect to permits or approvals under Part 2.

All 13 appeals filed under the *Integrated Pest Management Act* related to Part 2 (Prohibitions and Authorizations of Pesticide Use and Sale). One of those appeals also related to an administrative penalty levied under Part 5 (Compliance).

All six appeals filed under the *Water Sustainability Act* related to Part 4 (Enforcement).

There was one appeal filed under the *Mines Act*. This related to the only provision for which appeals may be brought to the Board under the *Mines Act*: the imposition of an administrative penalty.

All 31 appeals under the *Wildlife Act* related to Part 1 (General), which covers nearly the whole of that statute.

The table below summarizes the number of appeals in the Board's inventory at the start of the 2022/2023 reporting period, as well as those filed in, and those completed in, the reporting period. These figures are broken down by the legislation under which each appeal was filed. The number of appeals appears as the first number in each field, while the second number (in parentheses) provides the number of government decision letters that were the subject of appeals (as one decision letter may generate one or more appeals).

	Inventory (Start of Period)	New Appeals in Period	Matters Resolved via...			Inventory (End of Period)	
			Rejection or Dismissal	Abandonment or Withdraw	Consent Orders		Final Decisions
Environmental Management Act							
	41 (25)	22 (22)	7 (7)	4 (4)	4 (4)	3 (3)	45 (29)
Greenhouse Gas Industrial Reporting and Control Act							
	0	0	0	0	0	0	0
Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act							
	0	0	0	0	0	0	0
Integrated Pest Management Act							
	0	13 (4)	8 (2)	0	0	0	5 (2)
Mines Act							
	3 (3)	1 (1)	0	0	0	1 (1)	3 (3)
Water Act							
	1 (1)	0	0	1 (1)	0	0	0
Water Sustainability Act							
	17 (17)	6 (6)	1 (1)	7 (7)	0	6 (6)	9 (9)
Water Users' Communities Act							
	0	0	0	0	0	0	0
Wildlife Act							
	3 (3)	31 (31)	6 (6)	2 (2)	2 (2)	1 (1)	23 (23)
Zero Emission Vehicles Act							
	0	0	0	0	0	0	0
TOTAL	65 (49)	73 (64)	22 (15)	14 (14)	6 (6)	11 (11)	85 (65)

The Board convened several oral hearings in the 2022/2023 reporting period:

- twenty-four days of an in-person hearing in respect of 19 appeals, grouped together, of a permit authorizing a galvanizing plant to release of air contaminants into the environment;
- two days of an in-person hearing with respect to a permit authorizing a mine to discharge water contaminants into the environment;
- one day of an electronic hearing with respect to an administrative penalty levied under the *Mines Act*; and
- one day of electronic hearings with respect to eight grouped appeals of a permit authorizing the aerial application of pesticides in and around urban areas throughout British Columbia.

The Board also convened two days of mediations, each related to a different appeal. Both appeals settled or were withdrawn following the mediations.

Forecast of Workload

In the five years before this reporting period, from 2017/2018 to 2021/2022, the Board received between 42 and 67 appeals each year, for an average of roughly 55 per year. In 2022/2023, the Board received 73. The Board expects to see continued, elevated appeal intake in 2023/2024, as the province returns to pre-COVID levels of activity. The Board projects that 65 to 80 appeals will be filed during the upcoming reporting period.

Forecast of Trends and Special Problems

Apart from an increasing volume of appeals over the last two years, the Board has not observed any trends of note.

The Board has observed a problem related to the availability of legislated appeal rights in certain decisions under the *Integrated Pest Management Act*. The problem arose in both the 2021/2022 and 2022/2023 reporting periods, in the context of spongy moth eradication programs undertaken by the Province.

The year-to-year spongy moth eradication strategy is based on recommendations by the Province's Spongy Moth Technical Advisory Committee, which reviews trapping data gathered in the summer each year, before recommending eradication strategies throughout the province, which may include aerial spraying of a pesticide. This pesticide is only effective in a particular phase of the spongy moth's larval development, typically occurring in May and June each year.

The Spongy Moth Technical Advisory Committee completes its recommendations in or around November each year, after having analyzed data from the trapping program, which becomes available in the fall each year. In December or January, the Province submits applications under the *Integrated Pest Management Act* where it intends to eradicate spongy moth populations using pesticides.

The government is required to engage with the public while the pesticide use permit application is being considered. In or around March each year, the statutory decision-maker empowered under the *Integrated Pest Management Act* issues any associated permits for the Province's use of pesticides. It follows that the time limit for the submission of appeals to the Board under the *Integrated Pest Management Act* extends until April, or thereabouts.

In both of the last reporting periods, the Board has been unable to undertake complete appeal processes before the spongy moth eradication programs complete. In both periods, the Board denied applications by appellants to stay the permits. However, if those applications had been granted, the Board would not have been able to complete an appeal process before the spongy moths would have progressed to the point that the pesticide would no longer be effective. There is simply not enough time between the issuance of a permit

and the end of the effective pesticide period for the appeal period to expire, and then for the parties to exchange documents, obtain and disclose new evidence (including expert evidence), and organize for a hearing, and then for the Board to complete a decision.

The 2022 appeals of the permits authorizing pesticide spraying to control spongy moth populations were dismissed as being moot after the spray programs concluded. This year, the respondent has applied to dismiss the 2023 appeals as moot following conclusion of the spray program. A decision on that application is pending.

I conclude that, unless there are changes to the timelines above, anyone wishing to appeal permits authorizing the government's use of pesticides to combat spongy moth populations will be unable to have a hearing on the merits of the case before any extermination program is carried out. The appeal process does not, and cannot, fit within the time requirements outlined above. As such, I recommend that the government consider what judicial or quasi-judicial recourse the public should have where they disagree with the issuance of permits authorizing pesticide use to combat spongy moths.

Options that the government may wish to consider include: exempting treatment for spongy moths from permitting requirements under the *Integrated Pest Management Act*, authorizing spongy moth eradication programs via regulation instead of by permits, requiring permits to be completed a minimum length of time before treatments can begin (this may involve shortening other time requirements, including for public engagement), or encouraging/requiring multi-year permits for treatment of spongy moths, subject to annual treatment plans being approved by a decision-maker under the *Integrated Pest Management Act*. This last method may allow the Board to consider the broad terms of a permit if it is appealed upon issuance, and the particular strategies in subsequent years, as annual treatment plans are approved, within the confines of the permit.

Surveys

There were no surveys undertaken in the reporting period.



Plans for Improving Board Operations

The Board will continue its service delivery realignment in the 2023/2024 reporting period. Based on feedback the Board has received from stakeholders, and upon review of its 2020 survey of historical system-users, the Board is reworking its appeal processes to focus on several objectives:

- ensuring better preparation of parties to present evidence and participate in hearings,
- improving the efficiency of hearings,
- ensuring that self-represented and layperson-represented parties receive appropriate levels of assistance throughout the life of their appeals while maintaining the impartiality of the Board,
- improving the clarity and responsiveness of the Board’s rules and correspondence,
- ensuring that in-person hearings are offered where feasible and appropriate,
- increasing active case management by the Board throughout appeals,
- training panels in the consistent and fair application of rules and procedures,
- emphasizing clarity and responsiveness in decision-writing, and
- fostering more professional, respectful, and culturally aware oral hearings.

The Board will continue to improve its internal processes and leverage recent improvements in its case management software to accomplish many of these aims. The Board will continue to train its members and create more robust materials to assist the public in navigating the appeal process.

Lastly, the Board will work with its Reconciliation Advisory Committee to identify meaningful steps, both within the service delivery realignment project and outside of it, to foster reconciliation with British Columbia’s Indigenous population. The Reconciliation Advisory Committee is likely to make recommendations in the 2023/2024 reporting period, and the Board looks forward to incorporating the Committee’s feedback into a reconciliation plan.

Board Membership

Members of the Board are appointed by the Lieutenant Governor in Council under Part 2 of the *Administrative Tribunals Act*. The Board has diverse, highly qualified members, including biologists, engineers, and agrologists. The Board also has lawyers with expertise in natural resource and administrative law. Members are appointed from across British Columbia and the Board is committed to soliciting applications to foster a membership reflects the diversity of British Columbians, while ensuring members have the requisite expertise and experience to carry out their responsibilities to the highest standards.

The following tables summarize the membership of the Board as of March 31, 2023, as well as changes in membership during the 2022/2023 reporting period.

Members of the Environmental Appeal Board with Special Duties as of March 31, 2023

Name	End of Term
Darrell Le Houillier (Chair)	July 29, 2027
David Bird (Vice Chair, Service Delivery)	December 31, 2023

Members of the Environmental Appeal Board as of March 31, 2023

Name	End of Term	Name	End of Term
Maureen Baird, K.C.	December 31, 2023	Linda Michaluk	December 31, 2023
Shannon Bentley	December 31, 2024	Ian Miller	December 31, 2024
James Carwana	December 24, 2023	Bijan Pourkarimi	December 31, 2024
Subodh Chandra	December 31, 2024	Daphne Stancil	December 31, 2023
Jeffrey Hand	December 31, 2025	R. Michael Tourigny	December 31, 2023
Dr. Kuo-Ching Lin	December 31, 2024	Dr. Diana Valiela	December 24, 2023
Cynthia Lu	December 31, 2025	Reginald Whiten	December 31, 2024

New and Former Members of the Environmental Appeal Board

New Members	Start of Term	Former Members	End of Term
Subodh Chandra	December 31, 2022	Dr. Daniela dos Santos	May 26, 2022
Dr. Kuo-Ching Lin	December 31, 2022	Brenda L. Edwards	April 4, 2023
Bijan Pourkarimi	December 31, 2022	James Mattison	December 31, 2022
		Teresa Salamone	December 31, 2022
		Howard M. Saunders	December 31, 2022
		Reid White	December 31, 2022
		Robert Wickett, K.C.	December 31, 2022

The Board Office and Use of Resources

The Board provides administrative support for seven other appeal bodies: the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Forest Appeals Commission, the Health Professions Review Board, the Hospital Appeal Board, the Oil and Gas Appeal Tribunal, and the Skilled Trades BC Appeal Board. Administrative support includes registry services, legal advice, research support, systems support, financial and administrative services, professional development, and communications support.

Some expenses associated with the Board's operations are shared with the other appeal bodies. Such shared expenses include professional services for information technology, information systems, office expenses, and small-scale miscellaneous expenses.

With that limitation in mind, I have provided a summary of the Board's direct expenses in the 2022/2023 reporting period and historically. The figures below account for administrative support offered to the other appeal bodies, but do not account for shared expenses proportionately distributed among those appeal bodies.

The following table summarizes the Board's expenditures, rounded to the nearest hundred dollars, for 2022/2023, and the average of the five preceding reporting periods (2017/2018 to 2021/2022, inclusive).

Area of Expenditure	Fiscal Years 2017 to 2022, Averaged	2022/2023 Fiscal Year
Staff Salary and Benefits	\$1,125,900	\$1,116,100
Member Fees and Expenses	\$178,000	\$196,400
Staff Travel	\$13,100	\$12,000
Professional Services	\$46,600	\$67,300
Office Expenses	\$243,300	\$204,400
Other Expenses	\$0	\$0
TOTAL	\$1,606,900	\$1,596,200



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