

Annual Report 2021/2022



**Environmental
Appeal Board**





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Dear Ministers:

Please find enclosed the 2021/2022 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 2021/2022 Annual Report of the Environmental Appeal Board (the “Board”).

The Board has been working to improve its operations and to improve the services it provides to the people of British Columbia.

The Board launched a new website in 2021/2022. The website features an updated look and feel, as well as completely updated content. The reading level for the Board’s materials on the website has been reduced from, on average, college-level to a Grade 9. This improves access to justice and responds to feedback that our materials be made more understandable to those using our services.

The Board created a new Notice of Appeal form, effective April 1, 2022. This form, which begins the appeal process, now allows appellants the choice to self-identify as Indigenous. This allows the Board to better respond to the unique priorities and concerns of our Indigenous appellants. This is one step towards reconciliation the Board has implemented and it also furthers access to justice.

The new Notice of Appeal also allows appellants and their representatives to identify their gender, including non-binary gender identities. This allows all parties to be correctly identified and reinforces proper terms of address during hearings. This ensures that appeal processes – which may be daunting enough at the best of times – are supportive and safe spaces for all people filing appeals with the Board.

The Board introduced a Code of Conduct for all participants. The Code requires that all participants behave respectfully, and promotes a safe and accessible hearing. The Code sets expectations from the start, on how parties and representative are to behave throughout the appeal process, and what they can expect the Board to do, to ensure that they do so.

The Board is taking concrete steps to respond to the Truth and Reconciliation Calls to Action, the implementation of United Nations’ *Declaration on the Rights of Indigenous Peoples* and British Columbia’s *Declaration on the Rights of Indigenous Peoples Act* by asking Indigenous and non-Indigenous partners to work on devising a Reconciliation plan. The Reconciliation Advisory Committee is comprised of representatives from the Board, legal experts, and Indigenous leaders with relevant expertise. The Committee meets virtually from all across the province, and will make recommendations, likely in 2023, for the Board to use in creating a reconciliation plan, and to ensure that the Board’s rules and procedures align with the rights recognized in the United Nations’ *Declaration on the Rights of Indigenous Peoples* and British Columbia’s *Declaration on the Rights of Indigenous Peoples Act*.

The Board added two new members in 2021/2022: James Carwana and Dr. Diana Valiela. Both are seasoned adjudicators and have stepped in immediately to support the Board’s efforts to quickly and expertly resolve appeals.

The Board ended this reporting period with the same number of appeals as it had at the start: 65. The Board closed and opened 53 appeals over the reporting period. Most appeals closed in 2021/2022 were concluded without a final decision, as a result of the Board's more robust case management process. Parties were encouraged to participate in resolving appeals through settlement, and the Board mediated several cases with a view to that goal. This resulted in an increase in the proportion of appeals that were resolved by those most directly impacted by it, or being withdrawn as a result of facilitated communications brokered by the Board.

Additionally, a significant number of appeals were dismissed by the Board because the appeals were filed after statutory deadlines to do so, the appellants lacked standing to appeal, or the Board lacked jurisdiction to consider them.

The appeal process in 2021/2022 took, on average, 253 days to complete. This was 293 days less than the average from the three preceding reporting periods (546 days). Decisions on the merits took, on average, 241 days in 2021/2022, 375 days less from the average of the previous three years (616 days). Appeals completed without decisions on the merits took, on average, 256 days in 2021/2022, 241 days less than the preceding three-year average (497 days).

While the improved processing time for appeals is encouraging, this decrease stems from the fact that the appeals resolved in 2021/2022 were those that have been undertaken since the Board began more actively managing cases in 2020. These times are likely to increase in 2022/2023, as the Board addresses the remaining backlog of appeals that predate my appointment as Chair in 2019.

There are 20 such appeals, which account for more than two-thirds of the appeal inventory's total age. They remain a focus of the Board, and the Board hopes to resolve most of these appeals within the 2022/2023 reporting period, with the rest hopefully to resolve in the 2023/2024 period. As such, the Board predicts that the average time it takes to resolve appeals will be prolonged, while it works through this backlog. The Board anticipates a reduction in appeal processing times, to levels similar to this year, once the backlog is resolved.

The Board's expenditures in the reporting period totalled roughly \$1,335,700. This was approximately \$315,000 less than the average from the five preceding fiscal years. The cost savings related mostly to delayed hearings. As such, the expenditures for the 2022/2023 reporting period are expected to increase, but will remain within the Board's operating budget.



Darrell Le Houillier
Chair



Introduction

The Board was established in 1981, when the *Environment Management Act* came into force. The Board primarily exists to provide an independent level of appeal from some decisions made by government officials. It currently hears appeals from certain decisions 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 the legislation and common law 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 to decide 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 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.

Appeal Procedures

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 dispersion 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.

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 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;
- 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 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 2021/2022 reporting period, the appeal process took, on average, 253 days to complete. Where decisions were issued on the merits of an appeal, the average was 241 days. Where decisions were resolved without a decision on the merits (by rejection, abandonment, withdraw, consent order, or dismissal), the average was 256 days.

Over the three previous reporting periods, appeals were resolved, on average, in 497 days without a decision on the merits, in 616 days with a decision on the merits, and 546 days overall. While the improvement in the time to resolve appeals is encouraging, it relates to more efficient processes and active appeal management the Board implemented in 2020. The Board did not resolve any of the 20 appeals in its inventory from before July 2019. These appeals account for more than two-thirds of the age of the overall appeal inventory. The Board hopes to resolve most of these in 2022/2023, the Board expects to report significantly higher times to resolve appeals in its next annual report.

Judicial Reviews

Five judicial reviews of Board decisions were active in the 2021/2022 reporting period.

Comptroller of Water Rights v. Harrison Hydro Project Inc. et al (BC Court of Appeal)

On January 20, 2020, the Comptroller of Water Rights filed a petition for a judicial review of the Board's decisions: 2017-WAT-003(b) & 004(b), and 2017-WAT-003(c) & 004(c), *Harrison Hydro Project Inc., Fire Creek Project Limited Partnership, Lamont Creek Project Limited Partnership, Stokke Creek Project Limited Partnership, Tipella Creek Project Limited Partnership, and Upper Stave Project Limited Partnership v. Comptroller of Water Rights*. In these decisions, the Board varied a decision made by the Comptroller of Water Rights in 2017, to retroactively increase the water rental fees for the years 2011 and 2012 paid under several water licences by billing them as a single project, instead of billing them as separate projects, as was done at the time. The Board concluded that the Comptroller of Water Rights had no authority to retroactively adjust fees for water use, and it ordered a sum of money returned to the appellants. In supplemental reasons, the Board found that interest was payable on the amount to be returned by the Comptroller to the appellants. The Comptroller does not seek judicial review of the Board's order concerning interest.

In February 2021, the BC Supreme Court dismissed the Comptroller of Water Right's application for judicial review and confirmed the Board's decision. The Comptroller of Water Rights then appealed to the Court of Appeal.

The BC Court of Appeal issued its decision on January 7, 2022. The Court found that the Board's interpretation of the legislation was reasonable and appropriately considered the jurisprudence and the presumption against interpreting legislation retroactively. The appeal was dismissed, and the Board's decision was confirmed.


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

Three railways appealed orders from 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 added 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 were 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 not heard before the end of the reporting period.

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, 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 that 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 Board panel members showed bias or a reasonable apprehension of bias during the hearing. The District Director's petition has not yet been heard by the Court.

Dougan v. Deputy Director, Wildlife and Habitat Branch (BC Supreme Court)

In 2016, Mr. Dougan was found guilty of hunting-related offences that occurred in 1999, but the Court did not impose a sentence because too much time had passed since the offences took place. Additionally, Mr. Dougan had committed hunting-related offences in the Yukon in 2011, and pled guilty in 2014.

Based on his history of non-compliance with hunting regulations, including those offences, the Deputy Director of Wildlife and Habitat cancelled Mr. Dougan's hunting licences and prohibited him from applying for hunting licences for two years. These were related to personal hunting privileges, not Mr. Dougan's work as a guide outfitter.

Mr. Dougan appealed the Deputy Director's decision. He argued that no punishment could be based on the offences because of an 18-month limitation period for prosecuting offences under the *Wildlife Act*. Mr. Dougan also argued that the decision should be reversed because it violated his rights under sections 7 and 11 of the *Canadian Charter of Rights and Freedoms*, and because of unreasonable delay in the process, duplication in court proceedings and the decision, misconduct by various officials, and a lack of evidence on other compliance issues. Mr. Dougan also argued that the penalty in his case was inappropriately harsh.

The Board rejected all of Mr. Dougan's arguments. The Board found that the Deputy Director was entitled to rely on the findings of guilt in court, and Mr. Dougan was not entitled to reargue the issue after having been found guilty of those offences. The Board confirmed the penalties imposed in the circumstances.

The Supreme Court of British Columbia confirmed the Board's decision and dismissed the petition for judicial review.

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 add 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. At the end of the reporting period, the judicial review was still in its preliminary phases.

Cabinet Reviews

Cabinet did not vary or rescind any decisions of the Board in 2021/2022.



Applications and Appeals in the 2021/2022 Reporting period

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

Fifty-six percent of the appeal inventory filed under the *Environmental Management Act* over the reporting period relate to Part 9.1 of that Act (Compliance). Thirty-eight percent related to Part 2 (Prohibitions and Authorizations), while 31% relate to Part 7 (Powers in Relation to Managing the Environment). There was single appeal related to Part 4 (Contaminated Site Remediation). Five of the appealed decisions touched on multiple Parts of that Act.

There was less variability in the appeal inventory brought under the *Water Sustainability Act*. Slightly over half of the appeals (56%) filed over the reporting period related to Part 4 (Enforcement), while roughly 44% related to Part 2 (Licensing, Diversion and Use of Water).

Three appeals were filed under the *Mines Act* (relating to the imposition of an administrative penalty).

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

The diversity of appeals is typical of the year-to-year variability encountered by the Board.

The table below summarizes the number of appeals in the Board's inventory at the start of the 2021/2022 reporting period, as well as those filed in and 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							
	40 (24)	16 (16)	1 (1)	3 (3)	6 (6)	5 (5)	41 (25)
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							
	2 (2)	0	0	0	1 (1)	1 (1)	0
Mines Act							
	1 (1)	3 (3)	0	0	1 (1)	0	3 (3)
Water Act							
	1 (1)	0	0	0	0	0	1 (1)
Water Sustainability Act							
	16 (16)	23 (16)	2 (2)	17 (10)	0	3 (3)	17 (17)
Water Users' Communities Act							
	2 (2)	0	1 (1)	0	0	1 (1)	0
Wildlife Act							
	3 (3)	11 (7)	7 (3)	2 (2)	1 (1)	1 (1)	3 (3)
Zero Emission Vehicles Act							
	0	0	0	0	0	0	0
TOTAL	65 (49)	53 (45)	10 (6)	22 (15)	9 (9)	11 (11)	65 (48)

The Board convened oral hearings with respect to three appeals in 2021/2022 and took five workdays to do so. The Board also conducted a one-day mediation with respect to one appeal. The mediation resulted in settlement of the appeal.



Forecast of Workload

In the five years before this reporting period, from 2016/2017 to 2021/2022, the Board received between 42 and 92 appeals each year, for an average of 63 per year. In 2021/2022, the Board received 53. The Board expects to see a return to more typical numbers in 2022/2023, as the impacts from the COVID-19 pandemic continue to lessen. The Board projects 55 to 65 appeals to be filed during the upcoming reporting period.

Forecast of Trends and Special Problems

The Board has not observed any trends of note. The Board is unaware of any systemic problems related to its areas of authority.

Surveys

There were no surveys undertaken in the reporting period.

Plans for Improving Board Operations

The Board is investigating further enhancements to its operations through use of information technology. The Board is in the process of assessing document management software to improve the efficiency of its operations, and will investigate the feasibility of adding features to its new website in order to improve users' experience.

The Board is engaged in a comprehensive service delivery realignment project. The Board is actively working to improve its accessibility, efficiency, efficacy, responsiveness, and timeliness. While the Board has seen improvement in appeal processes with more active appeal management, further improvements will require a deeper redesign of its appeal processes. This process will continue throughout 2022, as the Board ensures that its draft processes and procedures leverage the technology the Board has secured, and maintain a user-focus on efficiently, fairly, and accessibly resolving appeals. The Board anticipates that it will present draft processes, procedures, and rules to stakeholders in 2023, before implementing these changes.

The Board will be using the recommendations from the Reconciliation Advisory Committee to ensure that changes to its appeal processes are integrated with, and promote, reconciliation with British Columbia's Indigenous peoples.



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 ensure its 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, 2022, as well as changes in membership during the 2021/2022 reporting period.

Members of the Environmental Appeal Board with Special Duties as of March 31, 2022

Name	End of Term
Darrell Le Houillier (Chair)	July 29, 2022
David Bird (Vice Chair, Service Delivery)	December 31, 2023

Members of the Environmental Appeal Board as of March 31, 2022

Name	End of Term	Name	End of Term
Maureen Baird, Q.C.	December 31, 2023	Ian Miller	December 31, 2022
Shannon Bentley	December 31, 2022	Teresa Salamone	December 31, 2022
James Carwana	December 24, 2023	Howard M. Saunders	December 31, 2022
Dr. Daniela dos Santos	December 31, 2022	Daphne Stancil	December 31, 2023
Brenda L. Edwards	December 31, 2022	R. Michael Tourigny	December 31, 2023
Jeffrey Hand	December 31, 2022	Dr. Diana Valiela	December 24, 2023
Cynthia Lu	December 31, 2022	Reid White	December 31, 2022
James Mattison	December 31, 2022	Reginald Whiten	December 31, 2022
Linda Michaluk	December 31, 2023	Robert Wickett, Q.C.	December 31, 2022

New and Former Members of the Environmental Appeal Board

New Members	Start of Term	Former Members	End of Term
James Carwana	December 24, 2021	n/a	
Dr. Diana Valiela	December 24, 2021		

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 Industry Training Appeal Board, and the Oil and Gas Appeal Tribunal. 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 2021/2022 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 2021/2022, and averaged over the five preceding reporting periods (2016/2017 to 2020/2021, inclusive).

Area of Expenditure	Fiscal Years 2016-2021, Averaged	2021/2022 Fiscal Year
Staff Salary and Benefits	\$1,123,000	\$1,078,200
Member Fees and Expenses	\$185,400	\$87,100
Staff Travel	\$14,800	\$400
Professional Services	\$49,600	\$44,800
Office Expenses	\$278,500	\$125,000
Other Expenses	\$700	\$0
TOTAL	\$1,652,000	\$1,335,700





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