Environmental Appeal Board
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DECISION NOS. EAB-EMA-20-A011(a), A012(a), A013(a), A014(a), A015(a), A016(a), A017(a), and A018(a)

In the matter of eight appeals under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	Brookswood Fernridge Community Association, IronGait Ventures Inc., Inge and Carl Thielemann, Nicomekl Enhancement Society, Little Campbell Watershed Society, Semiahmoo Fish and Game Club, Sonja Kroecher, Gabriel Farms Ltd.	**APPELLANTS**
AND:	District Director, *Environmental Management Act*	**RESPONDENT**
AND:	Ebco Metal Finishing L.P.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Panel Chair Maureen Baird, Q.C., Panel Member Howard M. Saunders, Panel Member	
DATE:	Conducted by way of written submissions concluding on December 10, 2021	
APPEARING:	For the Appellants: Terry McNeice, Phillip Milligan, Dianne Orringe, Murray McFadden, Bill Ridge, David Riley, John Hewitt, Shari and Chris Tompe, Sonja Kroecher, Frank Mueggenburg For the Respondent: Susan Rutherford, Counsel For the Third Party: Nicholas Hughes and Katherine Booth, Counsel	

DECISION ON APPLICATIONS TO STRIKE

[1] This preliminary decision addresses two applications that have come before the Environmental Appeal Board (the "Board"). The first was made by Ray Robb, the District Director for the Greater Vancouver Regional District (the "District Director" and "Metro Vancouver", respectively). The second was made by Ebco

Metal Finishing L.P. ("Ebco"). Both applications are to strike certain grounds of appeal advanced by the Appellants in this case.[1]

[2] The Board's authority to strike grounds of appeal, in whole or in part, is derived from section 31 of the *Administrative Tribunals Act,* SBC 2004, c. 45 (the "*ATA*"). Section 31(1) allows the Board to dismiss any part of an appeal - or application, in the words of the *ATA* - if:

(a) the application is not within the jurisdiction of the tribunal;
(b) the application was not filed within the applicable time limit;
(c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
(d) the application was made in bad faith or filed for an improper purpose or motive;
(e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;
(f) there is no reasonable prospect the application will succeed; or
(g) the substance of the application has already been dealt with in another proceeding.

BACKGROUND

The Permit

[3] On March 28, 2018, the District Director issued permit GVA1093 (the "Permit") to Ebco. The Permit, which was issued under both section 14 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*") and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008 (the "Bylaw"), authorizes Ebco to discharge contaminants to the air from a hot dip zinc galvanizing facility located at 18699 25 Avenue, Surrey, BC.

[4] The Permit, as it was on March 28, 2018 (the "Original Permit") authorized the emission of air contaminants from three emissions sources:

- exhausts from two baghouses ("Emissions Source 01a" and "Emissions Source 01b"), each treating emissions from a galvanizing dip pan enclosure; and
- a collection of eight roof vents venting general room air (collectively, "Emissions Source 02"), including emissions from a degreasing tank, pickling tanks, and a flux tank.

[1] The Appellants in this case have decided to work and make decisions in coordination. In some cases, different appellants are represented by the same representative (who may be, in some cases, also an appellant). The nature of representation in this group has been fluid, and for the sake of simplicity, despite these changes over time, the group is referred to as a collective in this decision.

[5] The Original Permit was subject to a number of conditions. These included monitoring and reporting requirements, with reports to be provided based on a schedule defined in the Original Permit. The reports to be submitted included:

- Stack Test Reports, which describe the concentration of a list of potential air contaminants, as measured during testing of Emissions Sources 01a and 01b, every two years;
- Soil, Plant Tissue, and Water Sampling reports, detailing the results of sampling programs conducted every two years, to determine the impacts emissions have had on soil, plant life, and water near Ebco's facility;
- Baghouse Reports, detailing the frequency and outcome of inspections performed on Emissions Sources 01a and 01b, and any actions taken or proposed to deal with any problems identified; and
- Complaint Summary Reports, summarizing complaints received about air emissions from the "neighbouring community", as well as any follow-up actions that were taken or proposed.

[6] The Board received sixteen appeals against the Original Permit. One appeal was dismissed for being submitted outside of the statutory timeframe imposed under the *Act*. The Board joined the remaining appeals, to be considered by way of a single oral hearing. Three appellants withdrew their appeals before the start of the hearing. The remaining twelve appeals were to be considered as the oral hearing began in April 2019.

The First Permit Amendments

[7] The District Director amended the Original Permit on February 7, 2019, to change the due dates for Soil, Water Tissue and Water Analysis reports. The new version of the Permit is referred to as the "February 2019 Permit". The Board received one appeal against the February 2019 Permit. This appeal was filed by Mr. Frank Mueggenberg, who is one of the twelve Appellants with ongoing appeals of the Original Permit.

[8] The District Director amended the Original Permit again on March 26, 2019, resulting in a version referred to in this decision as the "March 2019 Permit". The March 2019 Permit requires Ebco to submit annual Principal Products and Raw Materials Reports to the District Director. These reports detail the types and quantities of principal raw materials used and principal products produced at the facility, over the preceding year. The Board received one appeal against the March 2019 Permit. This Appellant, Gabriel Farms Ltd., is one of the twelve Appellants with ongoing appeals against the Original Permit.

The Oral Hearing and the Latest Permit Amendment

[9] The appeals of the February 2019 Permit and the March 2019 Permit were joined to the group of appeals of the Original Permit.

[10] All parties were required to submit Statements of Points, leading up to the hearing. Statements of Points are required by the Board's Rule 19, which stipulates

that the Statements of Points must contain a summary of the argument that party intends to make at the hearing, and must attach all documents that the party will be referring to or relying upon at the hearing.

[11] In April 2019, the Board held ten days of oral hearing to consider this expanded group of appeals. At the end of this time, the hearing was adjourned. Afterward, two Appellants with appeals of the Original Permit withdrew their appeals, leaving ten appeals of the Original Permit, one appeal of the February 2019 Permit, and one appeal of the March 2019 Permit.

[12] The oral hearing reconvened for five days in February 2020. It was scheduled to resume for four days in April 2020, but it could not be done because of complications related to the novel coronavirus (COVID-19) public health emergency. The hearing was scheduled to continue in August 2020; however, the District Director amended the Permit again in July 2020. This resulted in a version of the Permit that is referred to as the "2020 Permit".

[13] There are three substantive changes associated with the 2020 Permit.

[14] First, the 2020 Permit authorizes emissions from a new baghouse ("Emissions Source 01c") at Ebco's facility. This baghouse, like the other two already authorized, treats air emissions from the galvanizing dip pan enclosure at the facility. Emissions Source 01c is subject to the same monitoring and reporting requirements as Emissions Sources 01a and 01b (with an initial Stack Test Report due date of October 31, 2021).

[15] Second, there are greater requirements associated with Stack Test Reports; thallium is to be included in Stack Test Reports and stack testing must be done within 120 days of the reports' due dates.

[16] Third, the 2020 Permit requires a Fugitive Emission Management Plan for emission sources 01a, 01b, and 01c, subject to certain conditions, to be submitted by June 30, 2021.

[17] In the 2020 Permit, reporting requirements were also updated. The requirements for plans and reports that had already been submitted were removed. Also, in a table listing Ebco's reporting requirements, the next due date for each report was described as its initial due date. Additionally, the Soil, Plant Tissue, and Water Sampling Reports were to address surface water and storm water, not "water", as listed in previous versions of the Permit. The Baghouse Reports were to address baghouses and dust collectors, not just bag houses, as stated in previous versions of the Permit.

[18] By this point, all parties had provided opening statements in the hearing. The Appellants had completed the presentation of their evidence and the other parties had cross-examined the Appellants' witnesses. The Appellants' evidence was complete. The District Director had completed the presentation of his evidence in chief, with his last witness, the District Director himself, under cross-examination by the Appellants. The Third Party had not presented any evidence.

[19] When the oral hearing was to resume, the Appellants were to finish cross-examining the District Director, and the District Director was to provide testimony in rebuttal. This was to conclude the District Director's evidence. Ebco was to present its case, with cross-examination by the other parties, and any rebuttal evidence to be presented. All parties were to provide their closing statements, and the hearing was to conclude. The changing jurisdictional picture because of the 2020 Permit required a change in process, however.

[20] To discuss the changes resulting from the 2020 Permit, the Chair of the Board convened a case management conference on July 27, 2020. He followed up with a letter, dated July 29, 2020, which provided a summary of the case management conference. The Chair's letter stated, in part:

> I began by explaining how the Board has dealt with similar situations in the past, where a permit under appeal has been amended and new appeals have been filed in respect of the amended permit. The key case is *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, (Decision No. 2017-EMA-012(a), September 27, 2017) [*Revolution Organics*]. I explained that the Board would use the analysis in *Revolution* if there is no application and argument from the parties for some other analysis.
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> According to *Revolution Organics*, the Board's authority to consider an appeal under the *Environmental Management Act* is tied to decision-making authority being exercised under that legislation, including the amendment of permits. Where a permit is amended, only those portions of the permit that are amended give rise to a right of appeal from the amending document. I explained that, by extension, this meant that the rights of appeal of the unamended portions remain tied to the previous version of the permit.
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> In the circumstances of this case, this means that the aspects of the permit that were amended in July 2020 must be the subject of new appeals, while the aspects of the permit that were not amended in July 2020 (terms either present in the original, issued on March 28, 2018, or as amended on March 26, 2019, depending on the appeal) must be argued against through the existing appeals.

[21] After the 2020 Permit was issued, the Board continued with the hearing as scheduled in August 2020. The panel of the Board that is hearing the appeals received no request from any party about how to proceed, other than as provided above. As a result, following the analysis from *Revolution Organics*, the panel limited discussion in the hearing to consideration of the surviving elements of the earlier versions of the Permit. The panel explained to the parties that the elements of the 2020 Permit that were new or changed could be addressed in any appeals filed of the July 2020 Permit amendment.

[22] The Appellants completed their questioning of the District Director on issues related to the Original Permit. The District Director completed the presentation of his case. To date, Ebco has not called any evidence in the oral hearing. All parties' closing statements are to follow.

[23] Subsequently, the Board received eight appeals of the 2020 Permit. Although Mr. Mueggenberg did not appeal the 2020 Permit personally, he did so on behalf of

his incorporated business, which is also an Appellant of the Original Permit. The District Director and Third Party are also parties to the appeals of the 2020 Permit. The Board has joined those appeals to the existing group.

The Appeals of the 2020 Permit

[24] After the appeals of the 2020 Permit were filed, the Board directed pre-hearing processes for those appeals. The Board facilitated updated document disclosure between the parties. The Board also assisted the Appellants to submit grounds of appeal. Sixteen grounds were identified. The Board worked with all parties to refine those grounds of appeal by consent. The parties have reached an impasse about certain grounds of appeal, which the Board must now adjudicate.

[25] The Appellants originally described some grounds of appeal related to the 2020 Permit in their various Notices of Appeal of that version of the Permit. The grounds were unclear, and after two case management conferences, the Appellants provided a list of grounds of appeal on March 2, 2021. Three more case management conferences ensued, during which these grounds of appeal were refined to resolve disagreements between the parties about the nature of those grounds. Ultimately, the parties continued to disagree about the appropriateness of six grounds of appeal, after some refinement of those issues to address some of the concerns of the District Director and Ebco.

[26] The Chair summarized the six remaining grounds of appeal most recently in a letter dated June 2, 2021. The wording used in the grounds of appeal is, to the extent possible, that of the Appellants. This includes referring to the Emissions Sources with the prefix "ES" (for example, ES01(a), ES01(b), etc.). It also includes referring to the 2020 Permit as the "amended permit", "July 2020 permit amendment", "Amendment", and "permit". The relevant grounds of appeal, as summarized in the Chair's letter of June 2, 2021, are:

- Ground #2 – The new authorized levels of emissions of metals from ES01(c) are, when conjoined with ES01(a) and ES01(b), inadequately protective of the environment. Metal emissions should be defined as a total, but should distinguish between elemental forms, soluble forms, metal salt forms, and their chemical reactions.

- Ground #5 – Soluble nickel and/or nickel salts should not be allowed under the amended permit.

- Ground #7 – An updated dispersion modelling analysis is required to account for the larger quantity of emissions authorized under the July 2020 permit amendment.

  A stormwater management plan that is protective of the environment is required. This plan must address the impact of emissions authorized under the July 2020 permit amendment to Erickson Creek, the Brookswood Aquifer and the Little Campbell Watershed, including with updated data obtained

from updated dispersion modelling analysis. The plan must ensure discharges to the environment in a way that is consistent with requirements imposed under the Federal *Fisheries Act*, BC *Riparian Area Protection Regulation* and *Water Sustainability Act*.[2]

- Ground #14 – The Amendment should require Ebco to post, in a public and visible way, a phone number/email address so that concerns could then be addressed by the Permit holder. Further, Metro Vancouver would be informed what was received and how they responded and what rectification was taken.

- Ground #15 – Stack testing as provided in the permit should include provisions that require:

    - documentation of process-related variables, including the identification and quantification of mist suppressants, flux, additives to the galvanizing tank, and material being galvanized;
    - stack tests reflect the processes undertaken at the facility that have the potential to generate the greatest emission of air contaminants; and
    - stack testing to be performed by an (as yet unidentified) third party.

- Ground # 16 – The permit should include a provision for mass balancing, such that there should be weighing and balancing of the inputs and outputs of all substances authorized to be emitted under the permit.

ISSUE

[27] The preliminary issue to be decided is whether grounds of appeal #2, 5, 7, 14, 15, and 16 should be struck, in whole or in part, from consideration in the appeals of the 2020 Permit.

DISCUSSION AND ANALYSIS

General Comments

The District Director's Submissions

[28] The District Director noted that the Board, in previous correspondence, advised that "Where a permit is amended, only those portions of the permit that are amended give rise to a right of appeal from the amending document."[3] The

[2] The legislative reference is to the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "*Fisheries Act*"). The regulatory reference is to the *Riparian Areas Protection Regulation*, B.C. Reg. 178/2019 (the "*RAPR*"), a regulation under the *Riparian Areas Protection Act*, S.B.C. 1997, c. 21.
[3] A letter from the Chair, Darrell Le Houillier, dated July 29, 2020.

District Director says this position is consistent with natural justice and procedural fairness.

[29] The District Director further argues that the new appeals should not be used as a means for the Appellants to submit evidence and make arguments that they could have submitted or made with the exercise of due diligence, before the Permit was amended in July 2020. To allow the Appellants to supplement their earlier arguments and evidence would be duplicative, inefficient, and potentially unfair to the other parties.

[30] The District Director acknowledges that, in some circumstances, it may be appropriate to allow a party to reopen their case and present further evidence, after having finished calling evidence. The panel notes, however, that the Appellants have not requested to reopen their appeals of the various versions of the Permit which predate July 2020. As such, it would be inappropriate and unfair for the Board to make a ruling on reopening at this juncture. As such, these submissions will not be discussed in any further detail.

[31] The District Director acknowledges that the Appellants have not had the chance to make closing statements. The District Director emphasizes his application to strike elements of the Appellants' pleadings pertain to the appeals of the 2020 Permit only. The District Director acknowledges that this decision does not limit the Appellants' rights with respect to their closing statements on all appeals that predate the 2020 Permit.

Ebco's Submissions

[32] Ebco agrees with the submissions provided by the District Director but advances a different line of argument. Ebco notes that the Chair had previously advised the parties to the appeals that the Board would follow the line of reasoning from *Revolution Organics*. Referencing paragraph 64 of that decision, the Third Party argues that the grounds of appeal must be read down to pertain only to the new, amended terms of the Permit. The Third Party says the Board lacks the jurisdiction to address the portions of the Permit that were not amended in July 2020, or to allow the Appellants to advance grounds of appeal that remain tied to appeals of previous versions of the Permit.

[33] Ebco says the Appellants have not applied to reopen their cases. That is a different issue and is not relevant for the purposes of defining the issues that properly may be advanced under the appeals of the 2020 Permit.

The Appellants' Submissions

[34] The Appellants defer to the Board's assessment of its jurisdiction. They say, however, that the analysis in *Revolution Organics* is not necessarily applicable to the present appeals. The Appellants say that differences in the factual circumstances and timeframes may warrant a different outcome.

[35] The Appellants say the three key Permit amendments in July 2020 were: authorization of Emissions Source 01c, an increase in the allowed emission of air contaminants from Ebco's facility, and a requirement for a fugitive emissions plan

for the facility. The Appellants note that considerable time has been spent in the hearing up to February 2020, discussing those issues. The Appellants queried whether the Permit was amended in July 2020 for an improper purpose.

[36] The Appellants noted that the District Director had previously described the Permit as a "living document", indicating that it is constantly in a state of change. The Appellants query whether the July 2020 Permit amendment should be interpreted to address issues of environmental concern or to affect the outcome of a hearing. They say that the focus should be on the intent behind the relevant legislation and/or regulation: the protection of the environment. The law must be seen to be upheld, argue the Appellants.

The District Director's Reply

[37] The District Director denied any allegation that he amended the Permit in July 2020 for an improper purpose, and he describes such allegations as unhelpful to the appeal.

The Panel's Findings

[38] The principles underlying this preliminary decision involve two key concepts. First, section 101 of the *Act* provides that a 30-day limitation period applies to all appealable decisions made under that legislation. This includes the appeals of the various versions of the Permit, at issue in this decision.

[39] The Appellants have, in the appeals of the Original Permit, the February 2019 Permit, and the March 2019 Permit, presented their evidence and submissions. Their cases are closed, and it is not appropriate to allow new appeals to address the substance of the Original Permit. This would violate the limitation period that exists as a result of section 101 of the *Act*.

[40] The second key concept is that, when an appeal is being argued, the parties should not ordinarily be allowed to split their case and present new evidence after they have closed their case and another party has presented evidence. Case-splitting runs against the way the Board normally handles appeals. The Board's usual practice, as described in its *Practice and Procedure Manual*, is that each party in an oral hearing will present all of its witnesses before the next party does so. The Appellants must ask the panel to be given the chance to call "reply evidence"—to respond to evidence presented by the other parties. They can only do so "… if the appellant could not have reasonably anticipated the evidence tendered by the other parties."[4] This was the process the panel outlined for the parties at the start of the oral hearing.

[41] While the Board may, at times, separate appeals into phases, where preliminary decisions precede the final decision, this is not what would occur here. Here, there is a concern about substantially similar evidence on similar issues being

[4] Page 49 of the Board's *Practice and Procedure Manual*.

presented by the Appellants and the Respondent twice, once before hearing Ebco's evidence and again afterward.

[42] It may be unfair to the other parties, when one party is allowed to split their case in this way. If each party does not establish their case when presenting their evidence, but rather splits their case, it leads to the segmentation of the appeals, as issues are repetitively discussed, which results in repetitive replies from the other parties. This is neither a fair way to proceed nor an efficient way to obtain the evidence in the circumstances of these appeals.

[43] The Board previously considered case-splitting in *Stannus, Toews, and Unifor Local 2301 v. Director, Environmental Management Act* (Decision Nos. 2014-EMA-003(d), 004(d), 005(d), June 25, 2018) [*Rio Tinto 2*]. At paragraphs 107 to 110, the then-Chair of the Board wrote:

> As stated in para. of *CUPE*, "the doctrine of abuse of process engages 'the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute'". Although the Board does not have the inherent powers of a superior court, the Board, as an administrative tribunal, has common law procedural powers to manage its own procedures in a manner that is consistent with the principles of procedural fairness, in addition to its statutory powers. As stated in *Unifor 2* at para. 38:
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> > … The tribunal undoubtedly has the power, as master of its own procedures, to ensure that appeals before it proceed efficiently and are not abusive of the process. It can, for instance, order the consolidation of appeals, or schedule appeals in a manner and in an order that it considers efficient. It can, as long as it did not violate the requirements of procedural fairness, direct that appeals be heard in a more summary fashion than usual where issues have already been fully aired in previous proceedings.
> >
> > [underlining added]
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> Further, the Board has broad statutory powers under the *Administrative Tribunals Act* to control its own procedures, in addition to its summary dismissal powers under section 31 of that Act. For example, section 14(c) of the *Administrative Tribunals Act*, which applied to the Board as of December 17, 2015, states that "[i]n order to facilitate the just and timely resolution of an [appeal]", the relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings." In the Board's recent decision in *Unifor Local 2301 v. Director, Environmental Management Act* (Decision Nos. 2014-EMA-003(c), 004(c), 005(c), May 15, 2018), the Board found at para. 40 that an order under further considerations may be relevant depending on the circumstances. Thus, the Board has broad discretion to control its own proceedings, including making orders to prevent abuses of the appeal process, regardless of whether the power stems from the common law or the statutory powers provided under the *Administrative Tribunals Act*.

At para. 37, *CUPE* states that the doctrine of abuse of process is a "flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel." Para. 37 further states that:

> … Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (technically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.
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> [underlining added]

Based on the principles expressed in *CUPE* regarding the doctrine of abuse of process, and in *Unifor 2* regarding the Board's common law powers to manage its own procedures in accordance with the principles of procedural fairness, the Panel finds that the Board may take a flexible approach when considering an application under section 31(1)(c) of the *Administrative Tribunals Act*. When deciding whether allowing the ground for appeal to proceed to a full hearing on the merits would amount to an abuse of the hearing process, the Board may consider factors such as whether the matter has been "fully aired in previous proceedings" as stated in *Unifor 2*, or whether allowing the ground to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice" as stated in *CUPE*.[5]

[44] The panel agrees with this rationale and also notes that, beyond section 31(1)(c) of the *ATA*, section 31(1)(g) also allows the Board to dismiss an appeal if "… the substance of the [appeal] has been appropriately dealt with in another proceeding."

[45] In *Revolution Organics*, the Board considered case-splitting in the context of appeals of an amendment to a decision that was, itself, already under appeal. The original appeal in that case stemmed from an appeal of a decision by the then-Acting Deputy Director appointed under the *Environmental Management Act*. The decision came in the form of a letter setting deadlines by which the appellant in that case (Revolution Organics) needed to comply with certain notice requirements related to its application for a waste permit.

[46] Revolution Organics appealed the then-Acting Deputy Director's decision. Revolution Organics applied for a stay of that decision, pending the outcome of the appeal. While the Board was considering this application, the District Director in that appeal consented to a stay, to extend as late as August 31, 2017. On June 20, 2017, the Board denied Revolution Organics' application for a stay, pending the outcome of the appeal.

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[5] References to "*CUPE*" are to *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77. References to "*Unifor 2*" are to *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 300.

[47] After the voluntary stay expired on August 31, 2017, the Director, *Environmental Management Act*, issued a letter that provided new, later timelines by which Revolution Organics had to satisfy the notice requirements described in the original decision. Revolution Organics appealed that decision and asked for a stay.

[48] In its decision, the Board summarized the position of the District Director in that appeal, that allowing appeals to be filed of the amended permit would be an abuse of process because it would allow "relitigation" of matters that had already been appealed. The Board then stated at paragraph 64:

> The Panel finds that acceptance of the new appeal does not constitute an abuse of process. There will be no relitigation. The Board has found that the decision under appeal in the September Letter is the extension of the timelines only. Revolution's extensive grounds for appeal, which, as noted by the Director, essentially duplicate the grounds in its existing appeal, can be read down such that they only apply to the appealable decision in the new appeal ….

[49] The Board declined to consider the second stay application. The Board explained, at paragraph 71:

> This new application amounts to a "second kick at the can" – an attempt to stay the material or substantive requirements in the Original Decision despite the fact that the September Letter just amends/extends the dates for compliance with those <u>existing</u> requirements. It is an attempt to relitigate the subject matter of the Stay Decision under the guise of a new decision; a new decision which only adjusts the dates for compliance established in the Original Decision.
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> [emphasis in original]

[50] While the Appellants in the present case have argued that each case should be decided on its own factual basis, they have not persuasively explained why the panel in this case should deviate from the Board's reasoning in *Revolution Organics*. We find the reasoning in *Revolution Organics* to be persuasive, and to correctly weigh the two overarching concerns discussed above: the requirement to adhere to limitation periods set under the *Act*; and, the need to avoid relitigation of matters that have already been put before the Board, including through case-splitting, as a matter of procedural fairness. The analysis in *Revolution Organics* will be applied to the circumstances in this case and the Board will consider whether to strike aspects of the Appellants' grounds for appealing the 2020 Permit, using the authority it has under the common law and section 31 of the *ATA*.

Ground 2

[51] Ground 2 reads:

> The new authorized levels of emissions of metals from ES01(c) are, when conjoined with ES01(a) and ES01(b), inadequately protective of

the environment. Metal emissions should be defined as a total, but should distinguish between elemental forms, soluble forms, metal salt forms, and their chemical reactions.

The submissions of the parties

[52] With respect to ground 2, the District Director says that emissions reporting requirements for total zinc and total nickel were unchanged with the July 2020 permit amendment.

[53] Ebco advances the same argument, adding that 10 different documents attached to the Appellants' Statement of Points address this ground of appeal. Ebco also argues that the Appellants presented evidence, from Dr. McFadden, on the issue of soluble nickel before the joint hearing of the Original Permit, February 2019 Permit, and March 2019 Permit was adjourned.

[54] Ebco argues that, in addition to being beyond the jurisdiction of the Board to allow this ground of appeal to proceed, it would be procedurally unfair for it to do so. The Appellants have, "… in many instances closed their cases in the 2018 Appeals", after many documents attached to their Statement of Points were ruled to be inadmissible. The Appellants should not have the chance to relitigate the issue and re-do their evidence on this issue. As confirmed in *Revolution Organics*, this would be an abuse of process, which is why grounds of appeal should be read down, to address only the amended portions of the 2020 Permit.

[55] The Appellants argue that the concern expressed in Ground 2 is whether the increase to the emissions authorized by the Permit, as amended in July 2020, are more than 10% greater than the emissions previously authorized by the Permit. This would mean that the amendment was invalid.

[56] The Appellants also argue that the documents attached to their Statement of Points discussed by Ebco were not submitted as evidence because of ties between one of the witnesses, Mr. Armstrong, has to the Nicomekl Enhancement Society ("NES"), one of the Appellants. As such, the Appellants argue, it is inappropriate to refer to them for the purposes of this preliminary application.

The Panel's Findings

[57] There are two distinct elements described in Ground 2.

[58] First, the Appellants argue that the emissions from Emissions Source 01(c) are too high, when conjoined with those from Emissions Source 01(a) and Emissions Source 01(b). This reads as a straightforward argument, that the increased emissions allowed under the 2020 Permit are excessive. While the Appellants have argued that the level of emissions allowed even under the Original Permit was too high, it is open to them, as an alternative argument, that the levels in the Original Permit should not have been increased. The first element of Ground 2 sets out exactly such a pleading. The submissions from the District Director and Ebco do not provide sufficient justification to strike this portion of Ground 2.

[59] In reaching this conclusion, the panel has considered both section 31(1)(c) and 31(1)(g) of the *ATA*. Section 31(1)(c) was described in paragraph 110 of *Rio Tinto 2*, where the Board stated:

> … the Board may take a flexible approach when considering an application under section 31(1)(c) of the *Administrative Tribunals Act*. When deciding whether allowing the ground for appeal to proceed to a full hearing on the merits would amount to an abuse of the hearing process, the Board may consider factors such as whether the matter has been "fully aired in previous proceedings" as stated in *Unifor 2*, or whether allowing the ground to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice" as stated in *CUPE*.

[60] Even taking a flexible approach, the panel finds that the Appellants' argument that the increased emissions authorized under the 2020 Permit has not been "fully aired" to date. It would not violate judicial economy, consistency, finality, or the integrity of the administration of justice because the Appellants have not had the opportunity to present evidence or make arguments about the increased emissions authorized under the 2020 Permit. While there may be some inefficiency involved in the submission of such evidence, given that related evidence pertaining to earlier versions of the Permit has already been submitted, this is insufficient to implicate judicial economy. Judicial economy involves efficiency in considering the matters that ought to be considered, and the Appellants' argument about increased emissions under the 2020 Permit is one such matter.

[61] *Rio Tinto 2* also considered section 31(1)(g) of the *ATA*, which provides that the Board may dismiss all or part of an appeal where "the substance of the [appeal] has been appropriately dealt with in another proceeding." In *Rio Tinto 2*, the Board stated at paragraph 112 that a proceeding "… includes hearings and other processes conducted by a tribunal for the purpose of carrying out its mandate … and court actions, … including judicial reviews." We agree with this interpretation, and note that the first element of Ground 2 has not been considered on its merits in any hearing or other process by the Board. The District Director and Ebco have not established that the first element of Ground 2 has been considered in any similar process external to the Board.

[62] The second element of Ground 2 is the argument that the emissions reporting for metals under the Permit should be presented as a total figure, with breakdowns provided for elemental, soluble, and metal salt forms, as well as "… their chemical reactions."

[63] As stated by the District Director and Ebco, the requirements associated with emissions reporting in the Permit were generally established in the Original Permit. The Appellants raised this in their appeals of the Original Decision, including through testimony provided by Dr. McFadden. The Appellants had the opportunity to discuss this concern and they submitted evidence related to the differences between nickel, for example, in its elemental, soluble, and metal salt forms. It was open to the Appellants to do so for any other metals as well, and they remain free

to reference, in their closing submissions, any such evidence they put before the Board.

[64] We note that the District Director also provided evidence with respect to the various types of metals, including nickel, during the oral hearing. The Appellants cross-examined the District Director himself at length—for more than one week in total—and had ample opportunity to ask questions on this point. It was open to the Appellants to present evidence and challenge the evidence of the District Director (and his witnesses) on these various types of metals and the reporting requirements included in the Permit. Allowing the Appellants to have a "second kick at the can" (as described in *Revolution Organics*) would amount to an abuse of process.

[65] The only exception to this relates to thallium. Thallium is a metal that was not part of the reporting requirements in the Permit at any point before July 2020. It was added to the reporting requirements in the 2020 Permit. As such, the Appellants are free to present evidence and argument that supports more detailed reporting requirements for thallium specifically.

[66] Consistent with the approach in *Revolution Organics*, we consider it appropriate to read down Ground 2, so that it does not lead to relitigating the matters already put before the Board or allowing the Appellants to split their case. The Appellants will be allowed to only advance the second element of Ground 2 with respect to thallium. As a result, the panel strikes a portion of Ground 2, as authorized by section 31(1)(c) of the *ATA*, to read as follows:

> The new authorized levels of emissions of metals from ES01(c) are, when conjoined with ES01(a) and ES01(b), inadequately protective of the environment. **Thallium** emissions should be defined as a total, but should distinguish between elemental forms, soluble forms, metal salt forms, and their chemical reactions.
>
> [Emphasis added to indicate the Board's additions]

Ground 5

[67] Ground 5 reads, "Soluble nickel and/or nickel salts should not be allowed under the amended permit."

The submissions of the parties

[68] With respect to ground 5, the District Director says that soluble nickel was authorized under the Permit before the July 2020 amendment and that, consequently, an argument that none should be permitted is not an appropriate argument to make under the appeals of the 2020 Permit.

[69] Ebco says that the Board should not allow ground 5 to advance for the same reasons that apply with respect to ground 2.

[70] The Appellants did not specifically address this ground of appeal.

The Panel's Findings

[71] We agree with the District Director that the emission of nickel, in any form, was authorized under the Permit before the July 2020 amendment. The Appellants presented evidence, including through Dr. McFadden's testimony, about various forms of nickel. They likewise had the opportunity to ask questions of the District Director (and his witnesses) about soluble nickel and nickel salts, and they did so.

[72] To allow the Appellants to advance this ground of appeal at this stage would be allowing them to relitigate an issue that has already been put before the Board, and for which the Appellants have finished calling evidence. It would allow the Appellants to split their case without sufficient reason for doing so, and would prolong what has already been a long and procedurally difficult appeal. Allowing this ground of appeal to proceed would run counter to the usual practice, which was described at the outset of the hearing, and it would amount to an abuse of process.

[73] For these reasons, the panel concludes that ground #5 should be struck in its entirety. Pursuant to section 31(1)(c) of the *ATA*, this ground of appeal is struck.

Ground 7

[74] Ground 7 reads:

> Ground #7 – An updated dispersion modelling analysis is required to account for the larger quantity of emissions authorized under the July 2020 permit amendment.
>
> A stormwater management plan that is protective of the environment is required. This plan must address the impact of emissions authorized under the July 2020 permit amendment to Erickson Creek, the Brookswood Aquifer and the Little Campbell Watershed, including with updated data obtained from updated dispersion modelling analysis. The plan must ensure discharges to the environment in a way that is consistent with requirements imposed under the Federal *Fisheries Act*, BC *Riparian Area Protection Regulation* and *Water Sustainability Act*.

The submissions of the parties

[75] With respect to Ground 7, the District Director says the request for updated air dispersion modelling is moot as that has been obtained and would be fresh evidence that was unavailable when the earlier appeals of the Permit were heard. Furthermore, the District Director says that some of the arguments in ground 7 relate to the location of the facility and the applicability of various federal and provincial laws. The District Director says the location of the facility has not changed and these laws are not new since the earlier versions of Permit, amended in July 2020. Further, the District Director says the Appellants introduced evidence on these grounds already and there is no fresh evidence that warrants a reopening of the Appellants' cases.

[76] Ebco provided a similar argument, saying that the location of the facility and its proximity to bodies of water were established in the original Permit and were not amended in July 2020. Ebco argues that arguments under this ground of appeal

appropriately relate to a previous version of the Permit. Ebco says that Dr. McFadden's first Notice of Appeal references this issue, as do thirteen documents attached to the Appellants' Statement of Points and the report of Mr. Armstrong. Furthermore, Ebco notes that Mr. Armstrong's testimony did not rely on any specific emissions quantities, so is unaffected by the amendments to the Permit that occurred in July 2020.

[77] The Appellants say that the capacity of the baghouses, after the July 2020 amendments, is 150 times what was previously authorized. The Appellant also say that the *RAPR* was amended in July 2019, with changes that came into effect in December 2019. Regardless of "semantics" and the "arbitrary" application of the analysis in *Revolution Organics*, there is no evidence that the Permit complies with that regulation, which requires a riparian assessment to consider the impacts of the increase in the authorized levels of emissions from Ebco's facility.

[78] The District Director replied that the requirements of the *RAPR* are not within the District Director's jurisdiction to administer, and they are not properly considered in these appeals.

[79] Ebco replied that the *RAPR* applies to the development of properties that contain riparian assessment areas, as defined in that regulation. The *RAPR* protects riparian areas by prohibiting local governments from issuing land use permits that authorize development in a riparian assessment area, unless a riparian areas assessment is conducted, as set out in that regulation. Ebco says that the present appeals do not concern a land use permit, but rather an air emissions permit from a facility that was developed (and approved for development by the appropriate authority) many years ago. Accordingly, the *RAPR* does not apply.

[80] In light of the additional argument raised by Ebco about the *RAPR*, the panel requested additional submissions from the parties.

[81] All but two of the Appellants filed submissions collectively. The majority of the Appellants say that the effective date of the *RAPR* means that the *RAPR* is appropriate to consider in the appeals of the 2020 Permit. They also argue that the language of the *RAPR*, including defined terms within that regulation, extend beyond development. Specifically, the majority of the Appellants say that the definitions of "natural features, functions and conditions", "active floodplain", and "protected fish" support a broader application of the *RAPR*. The Appellants also note that the *RAPR* applies to Metro Vancouver.

[82] The majority of the Appellants say that the *RAPR* recognizes that riparian areas link water to land, and that this extends to the protection of farmland, streamside areas, and the prohibition of pollution entering waterways. The majority of the Appellants argue that it defies common sense that the protection of the *RAPR* would apply only during development. The *RAPR* was written to protect riparian areas.

[83] The Little Campbell Watershed Society ("LCWS") argues that it would have thought Ebco would have aimed to be a model of environmental leadership in the area and that Ebco was not doing so. The LCWS says it works to understand,

restore and enhance the watershed of the Little Campbell River, and the *RAPR* is consistent with these aims. The LCWS says the *RAPR* was created to protect the health of waterway, and those near Ebco's facility are in need of such protection. The LCWS says Ebco should have engaged in a riparian assessment, as required under the *RAPR*, while building its facility, but there would still be benefit to doing so. The LCWS says the *RAPR* assists local governments to ensure their bylaws meet a specified standard for the protection of riparian areas, and that this was done for good reason. The LCWS says that the *RAPR* should apply to Ebco.

[84] A member of the NES submits that the Board has the ability to interpret and apply the *RAPR*. The NES' position, as advanced by this member, is that the *RAPR* was created to protect riparian environments and that those near Ebco's facility are in particular need of protection. The NES recognizes that Ebco's activities are "… not technically captured by the explicit language of the *RAPR* …". However, the NES submits that the Board has the implicit authority to examine Ebco's activities, given its oversight of decision-making affecting the environment.

[85] The District Director argues that he has no authority to apply the *RAPR* because he is neither a local government nor a decision-maker appointed by a local government. Furthermore, an application for an air emissions permit does not meet the definition of a "development" as described in the *RAPR*. Additionally, any authority that Metro Vancouver has to impose requirements on land use planning, development, and zoning does not extend to areas within the City of Surrey's municipal boundaries (where Ebco's facility is located).[6] Each of those concerns individually disqualifies the *RAPR* from applying in the circumstances of this appeal.

[86] The District Director says that concerns over monitoring and assessment are addressed in the Permit, but in any event, the Board must not receive evidence on land use planning, Surrey's land development process, or related decision-making. The District Director lacked the jurisdiction to apply the *RAPR* and could not, in fairness, do so. The Board lacks the same jurisdiction and has no authority to hear appeals of decisions under the *RAPR*.

[87] Ebco responded by discussing the *RAPR* and its historical context, including preceding regulations, which Ebco asserted had the same purpose and application. Neither addressed air emissions. Precursor regulations featured schedules describing how riparian assessments were to be carried out, while the *RAPR* refers to a technical manual that does the same thing. None of the schedules or the technical manual addressed air emissions, air contaminants, or contamination. None of the changes that occurred with the *RAPR* were substantively new or relevant to the appeals.

[88] Ebco adds that the *RAPR* relates to developments only, and it cannot be used to compel a riparian assessment after development is complete. It does not address the regulation of air emissions, which is a separate matter governed by the *Act*, and at issue in these appeals. The Board's jurisdiction in this case is limited to decision-

[6] See Part 14 and, within it, section 456 of the *Local Government Act*, R.S.B.C. 2015, c. 1.

making under the *Act*, and to the jurisdiction of the District Director. Ebco says the Board cannot address the *RAPR*.

[89] The Appellants replied that the District Director cannot ignore or overrule legislative or regulatory requirements put in place for the protection of the environment. Furthermore, the LCWS (and possibly the NES) added that Ebco's position unduly constrains the Board's ability to review broader implications of the Permit, including its impacts on sensitive riparian areas. The LCWS (and possibly the NES) argue that the permitting process was flawed and should be rejected in favour of the more rigorous standards described in the *RAPR*. The LCWS (and possibly the NES) say the Board should take a flexible approach, governed by common sense, to consider the requirements of the *RAPR*. Otherwise, the Appellants will be constrained in advancing their appeals by a "legal straightjacket".

The Panel's findings

[90] The first element of Ground 7 speaks to the need for an updated air dispersion modelling analysis based on the increased emissions authorized under the 2020 Permit. The District Director says this ground of appeal is moot.

[91] The legal test for mootness is set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*]. The Board has previously applied this test in deciding applications to dismiss appeals for mootness (see, for example, paragraphs 51 to 66 of *Newberry v. Deputy Regional Manager, Cariboo Regional Operations Division*, Decision no. 2017-WIL-005(a), February 1, 2018). The test for mootness as described in paragraph 15 of *Borowski* is:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to hear the case … Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. …
>
> [underlining removed]

[92] Turning to the facts of this case, it is unclear whether the Appellants agree that an updated analysis has been completed, based on the emissions authorized under the 2020 Permit. The District Director did not enclose a copy of any updated analysis and has not indicated that one was disclosed to the Appellants. We note that, even if the updated analysis is now complete, the Appellants may wish to refine this ground of appeal if they do not consider the analysis to be properly done. To strike this ground of appeal would make it procedurally harder for them to do so, without any just reason.

[93] We are not satisfied that the first element of Ground 7 is moot at this point. There is insufficient evidence to persuade us that there is no longer a live controversy between the parties about whether the updated air dispersion modelling analysis is still required.

[94] The second element of Ground 7 is whether a stormwater management plan that is protective of the environment is required. We agree with the District Director and Ebco, that the locations of Ebco's facility and the various waterways and aquifer recharge zones have not changed. This is not, however, the full answer to the question; the 2020 Permit allows a greater amount of air emissions to be released from Emissions Sources 01(a), 01(b), and 01(c). It is a valid argument to say that, even if the emissions authorized under previous versions of the Permit did not require a stormwater management plan, the greater level of authorized emissions under the 2020 Permit do.

[95] As noted by Ebco, the Appellants already discussed this issue in the oral hearing. They asked questions of the District Director about the stormwater system at the facility, and his thoughts about the impacts of air emissions from Ebco's facility on nearby waterways. As such, a complete relitigation of this issue is inappropriate for the same reasons described above (chiefly, that it deviates from the Board's procedures, which were outlined at the start of the oral hearing, and will unduly lengthen and complicate an already long and complicated appeal).

[96] We recognize that the District Director does not have decision-making authority with respect to the *RAPR*. It is also true that the District Director is not empowered as a decision maker under the *Fisheries Act*. This does not mean, however, that this legislation cannot be a relevant consideration in the exercise of the District Director's discretion. In the oral hearing, the District Director described relying on aspects of the *Workers Compensation Act*, RSBC 1996, c. 492, and its subordinate policies and regulations, in assessing whether emissions from Ebco's facility might be harmful to human health. This demonstrates how the application of other statutes and regulations may inform the District Director's decision-making and, as a result, we are not persuaded that references to other legislation or regulations should be struck on that basis. Similarly, neither the District Director nor Ebco argue that the *Fisheries Act* could not have been considered by the District Director, or that it is irrelevant.

[97] As noted by Ebco and the District Director, however, the *RAPR* imposes requirements on local governments with respect to zoning and approvals for "developments". It does not apply to authorizations for air emissions or the introduction of potential contaminants into waterways. The District Director's authority to authorize the discharge of air emissions within Metro Vancouver (the decision-making that underlies these appeals) is separate from the provisions of the *RAPR*. While the *RAPR* contains broad definitions that pertain to the environments to which it applies, this does not mean that it applies to the authorization of air emissions permits under the *Act*. Furthermore, it is not enough that there may be some environmental benefit to doing a riparian study. The *RAPR* applies in limited circumstances and it cannot be used to compel Ebco to undertake any riparian studies outside of those circumstances.

[98] It is not open to the Board to substitute a different process for the one prescribed by the Legislature in the *Act* (and, indirectly, by Metro Vancouver in the Bylaw), to authorize the release of air emissions. The Board is empowered to consider the appealed decision in this case, within its legislative context. The Board cannot apply standards from other pieces of legislation, that the District Director does not have the authority to impose. This is not an undue constraint to the Appellants being able to advance their arguments, it is the proper definition of the Board's jurisdiction.

[99] Because the District Director does not have any decision-making authority under the *RAPR*, it is not within the Board's jurisdiction to consider it. The appeals in this case were filed under section 100 of the *Act*. Section 103 of the Act describes the Board's powers with respect to appeals brought under that section. Those powers are to:

> (a) send the matter back to the person who made the decision, with directions;
> (b) confirm, reverse or vary the decision being appealed, or
> (c) make any decision that the person whose decision is being appealed could have made, and that the appeal board considers appropriate in the circumstances.

[100] As the District Director cannot make a decision under the *RAPR*, the Board cannot send the matter back to him with any directions pertaining to the *RAPR*. There is no decision made related to the RAPR, to confirm, reverse or vary. Furthermore, the District Director could not have made any decision related to the *RAPR*. Accordingly, the *RAPR* does not fall within the Board's jurisdiction.

[101] Section 31(1)(a) of the *ATA* allows the Board to dismiss any appeal that is not within the jurisdiction of the Board. For the reasons provided above, we dismiss that element of Ground 7, pursuant to section 31(f) of the *ATA*.

[102] For these reasons, as we have dismissed part of Ground 7, it now reads as follows:

> An updated dispersion modelling analysis is required to account for the larger quantity of emissions authorized under the July 2020 permit amendment.
>
> A stormwater management plan that is protective of the environment is required. This plan must address the impact of **the increased emissions** authorized under the July 2020 permit amendment to Erickson Creek, the Brookswood Aquifer and the Little Campbell Watershed, including with updated data obtained from updated dispersion modelling analysis. The plan must ensure discharges to the environment in a way that is consistent with requirements imposed under the Federal *Fisheries Act* and the BC *Water Sustainability Act*.
>
> [Emphasis added to indicate the Board's additions]

Ground 14

[103] Ground 14 reads:

> The Amendment should require Ebco to post, in a public and visible way, a phone number/email address so that concerns could then be addressed by the Permit holder. Further, Metro Vancouver would be informed what was received and how they responded and what rectification was taken.

The submissions of the parties

[104] With respect to Ground 14, the District Director says the only change to the complaint management plan were amending it to include Emissions Source 01(c) added in the 2020 Permit. The reporting requirements and deadlines were unchanged. The District Director also notes that the deadline for submitting the complaint management plan for approval was also removed from the 2020 Permit because that deadline had already been met and the approval granted.

[105] Ebco argues that the 2020 Permit did not affect the complaint management plan. As such, it cannot be addressed in appeals of the Permit as amended at that time. Ebco adds that this ground of appeal is moot, as it has a website-based form and an email for the public to submit complaints about odour, dust, or other air contaminants.

[106] The Appellants did not specifically address this ground of appeal in their submissions.

The Panel's findings

[107] The complaint management plan describes how Ebco will record, and report to Metro Vancouver on, the complaints it receives. The complaint management plan was unchanged in the 2020 Permit, compared with previous versions of the Permit. The only aspect of the plan that was removed from the 2020 Permit pertained to having the complaint management plan approved. This was already done and there was no need to include it in the 2020 Permit. Its omission is a matter of housekeeping and has no substantive impact on the Permit or its requirements.

[108] The Appellants raised the topic of the complaint management plan in the oral hearing. They have presented evidence and asked questions about this plan. They will be free to ask questions of Ebco's witnesses about this plan and its implementation when Ebco's witnesses give their evidence. The Appellants may refer to this issue during closing arguments, but they will not be allowed to present new evidence as part of the appeals of the 2020 Permit on this issue, for the same reasons as described previously in this decision. Most importantly, allowing this ground in the appeals of the 2020 Permit, such that the Appellants could present new evidence and recross-examine the District Director's witnesses about this ground at this stage of the proceeding, would lead to an abuse of process.

[109] Having decided that this is not an appropriate issue to be considered under the 2020 Permit appeals, the panel does not need to address whether it is moot.

[110] For the reasons above, using the authority granted in section 31(c) of the *ATA*, the panel strikes Ground 14 in its entirety.

Ground 15

[111] Ground 15 reads:

> Stack testing as provided in the permit should include provisions that require:
>
> - documentation of process-related variables, including the identification and quantification of mist suppressants, flux, additives to the galvanizing tank, and material being galvanized;
> - stack tests reflect the processes undertaken at the facility that have the potential to generate the greatest emission of air contaminants; and
> - stack testing to be performed by an (as yet unidentified) third party.

The submissions of the parties

[112] The District Director did not provide submissions on this ground of appeal as part of this preliminary application.

[113] Ebco argues that some elements of this ground of appeal are moot, as stack testing is provided by a third party and is reflective of operating conditions at the facility. Additionally, Ebco says that nothing in the 2020 Permit amendment changed the requirements for stack testing, so this ground of appeal is not properly argued in the appeals of the 2020 Permit. Ebco says the ground of appeal does not relate to the requirements for Emissions Source 01(c) specifically, but rather, the stack testing plan generally. This argument was raised by multiple Appellants. Furthermore, the Appellants questioned the District Director's witnesses about the stack test process and plan, and suggested that the stack tests were not reflective of normal operating conditions.

[114] The Appellants did not specifically address this ground of appeal in their submissions.

The Panel's findings

[115] The stack testing requirements were first described in section 3 of the Original Permit, titled "Reporting Requirements", and are unchanged in subsequent versions of the Permit. In the table listing the reports that Ebco must submit to Metro Vancouver, the stack test report has the following requirement specified: "The sampling program must adhere to the methodologies and criteria as outlined in the approved plan and must be conducted by qualified personnel."[7]

[7] The Original Permit required that the stack test plan be submitted by August 31, 2018.

[116] Furthermore, in the same table, the stack test reports state, under the heading "Test Method" [block capitalization removed], "Those approved by the District Director, EPA Test Method 5, EPA Test Method 29".

[117] We find that this is an example of staged decision-making, which the courts have confirmed may occur under the *Act* in certain circumstances, as discussed below. The stack testing methodology was not completely defined in the Original Permit. The Original Permit imposed some requirements (including test methodologies that conform to the EPA Test Methods 5 and 29), but contemplated that there may be additional requirements imposed by the Stack Test Plan, which was to be submitted by August 31, 2018. Accordingly, the conclusion of the District Director's decision as to the stack testing methodology required under the Permit was not complete until after August 31, 2018.

[118] The Board considered appeal rights in a staged decision-making process in *Stannus, Toews, and Unifor Local 2301 v. Director, Environmental Management Act* (Decision No. 2014-EMA-003,004,005(a), December 4, 2014) [*Rio Tinto 1*].

[119] In that case, the Board considered a 2013 decision by a Director under the *Act* to increase the sulphur dioxide emissions authorized under a permit granted to a facility owned by Rio Tinto. This increase was subject to Rio Tinto implementing an Environmental Effects Monitoring Plan (the "EEMP"), which was to include defined impact threshold criteria. When those criteria were met or exceeded, emission reduction measures and/or mitigation measures would be imposed on Rio Tinto automatically. The EEMP was to be used in a further, comprehensive review of the permit undertaken in 2019. The details of this review are not important for the purposes of this decision.

[120] The impact threshold criteria were not defined in the 2013 decision, but rather in a letter dated October 7, 2014. In that letter, the Director approved the impact threshold criteria submitted by Rio Tinto. Unifor Local 2301 sought to appeal the Director's October 2014 letter, but the Board stated the letter did not qualify as a decision under the *Act* and so could not be appealed.

[121] Unifor Local 2301 sought a judicial review of the Board's decision. The BC Supreme Court overturned the Board's decision in *Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2015 BCSC 1592 (CanLII). At paragraphs 29 to 31, the Court discussed the Board's decision:

> In response to Unifor's submission that it could not comply with the 30-day appeal period to appeal the 2013 Amendment Letter because it did not at that time know what the details of the monitoring program would be, the EAB ruled that Unifor should have taken an appeal of the 2013 Amendment Letter within the appeal period, and then have applied to amend its appeal after the details of the 2014 Letter of Approval were made known.
>
> With all due deference to the expertise of the EAB in interpreting and applying the *Act*, I find that the EAB Decision in this respect is unreasonable. It is not within the range of acceptable and rational outcomes.
>
> This aspect of the EAB Decision effectively requires that in any case of staged decision-making, any person who believes that they could possibly be

> adversely affected by a subsequent stage must nevertheless bring a prophylactic appeal of the first stage, just in case the second part of the decision-making process contains aspects that turn out to be objectionable. Such a rule would only encourage the proliferation of appeals, many of which would turn out to be pointless if the second stage of the decision-making process proved to be unobjectionable.

[122] The decision of the BC Supreme Court was confirmed by the BC Court of Appeal in *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 300. At para. 35, the Court of Appeal held that the lower court judge correctly concluded that the permit amendment was done in two stages, as the imposition of the EEMP requirements on Rio Tinto was a power conferred by section 14(1)(e) of the *Act*.

[123] We agree with the analysis of the courts; however, this case is factually distinct from what the Board considered in *Rio Tinto*. In overturning *Rio Tinto*, the BC Supreme Court explained that potential appellants do not need to file "prophylactic" appeals to safeguard their rights, but it did not say that they cannot do so. In the present case, the Appellants filed appeals of the Original Permit, which partially defined the stack test methodology Ebco would need to use. The Appellants had the chance to present evidence about the stack testing process, and they did so in detail. They had the chance to ask the District Director and his witnesses questions on this issue, and they did so.

[124] Furthermore, in this case, the District Director must have completed the staged decision-making process defining the requirements of the stack testing before Ebco submitted its first Stack Test Report. Under the Original Permit, the due date for the first Stack Test Report was October 31, 2018. According to the District Director, that report was filed as required (allowing the date for the "initial", or next, report under the 2020 Permit to be on October 31, 2020). Subsequent versions of the Permit did not change the Stack Test Report requirements.

[125] In any event, by the time they learned that the February 2019 Permit was issued, without any alteration to the Stack Test Report requirements, the Appellants would have known that a Stack Test Report had already been submitted based on a procedure already defined by the District Director. It may be, accordingly, that the Appellants' appeal rights related to the second stage of the District Director's decision-making on the stack test methodology crystallized as late as with the issuance of the February 2019 Permit.

[126] On February 8, 2019, the District Director's counsel (at the time) emailed all of the Appellants with a copy of the amending document that gave rise to the February 2019 Permit. The email addresses used were the same ones that were used by all Appellants before and after that point, during the life of the appeals. The February 2019 Permit was discussed and available to all parties in the April 2019 oral hearing. Accordingly, we find that the Appellants received notice of the February 2019 Permit, and the second stage of the District Director's decision defining the stack test methodology required under the Permit, by April 2019.

[127] There were no further changes to the stack test requirements in the 2020 Permit. The only change introduced in the July 2020 amendment with respect to

the stack test reporting was the added requirement that stack testing be completed within 120 days of the due date of the stack test report. Ground 15 does not take issue with this requirement.

[128] As such, Ground 15 is an attempt to relitigate matters that were unchanged in the 2020 Permit. The stack testing methodology is not part of the 2020 Permit, but the Original Permit (in part) and some second stage of decision-making by the District Director, of which the Appellants had notice by February 9, 2019. Allowing any ground of appeal regarding the stack testing methodology to proceed as part of the appeal of the 2020 Permit would be an abuse of process.

[129] The Appellants will be able to ask questions of Ebco's witnesses about the stack testing, and to address the issue in their closing arguments, related to their earlier appeals. Neither the District Director nor Ebco have taken issue with the Appellants' ability to do so (rightly, in our view), and this ground of appeal will be addressed within the context of the appeals of the Original Permit or the February 2019 Permit.

[130] For the reasons provided above, and pursuant to section 31(c) of the *ATA*, the panel strikes Ground 15 in its entirety.

Ground 16

[131] Ground 16 reads:

> The permit should include a provision for mass balancing, such that there should be weighing and balancing of the inputs and outputs of all substances authorized to be emitted under the permit.

The submissions of the parties

[132] With respect to ground 16, the District Director says mass balancing was not part of the Permit at any point. It was open to the Appellants to introduce evidence on mass balancing in the earlier hearing days, and they did so. The District Director says the introduction of additional evidence on this point would be improper.

[133] Ebco echoes the arguments provided by the District Director, noting that the Appellants' expert witness, Dr. Bolton, specifically addressed mass balancing in his testimony. Ebco says this argument is not tied to any specific level of emissions and, as a result, it is not properly advanced through the appeals of the July 2020 Permit amendment.

[134] The Appellants did not specifically address this ground of appeal in their submissions.

The Panel's findings

[135] As noted by the District Director and Ebco, mass balancing was never part of the Permit. This was not removed in the 2020 Permit. The Appellants presented evidence, including expert evidence, on the issue of mass balancing, and asked questions of the District Director and his witnesses about the practice.

[136] The Appellants will be able to ask Ebco's witnesses about mass balancing and they can address it in their closing arguments. However, for the same reasons as provided previously, it would be inappropriate to allow them to present new evidence on mass balancing, or recross-examine the district director's witnesses on that topic, under the appeals of the 2020 Permit.

[137] Accordingly, we exercise our discretion granted under section 31(c) of the *ATA*, and strike Ground 16 in its entirety.

DECISION

[138] The Board has considered all of the evidence and submissions provided by the parties, whether or not they have been specifically referenced in this decision.

[139] For all the reasons set out above, the Board grants the applications of the District Director and Ebco, in part.

[140] Grounds of appeal #5, 14, 15, and 16 are struck in their entirety. They cannot be advanced in the appeals of the 2020 Permit.

[141] Ground of appeal #2 is struck in part, and is amended to read as follows:

> The new authorized levels of emissions of metals from ES01(c) are, when conjoined with ES01(a) and ES01(b), inadequately protective of the environment. **Thallium** emissions should be defined as a total, but should distinguish between elemental forms, soluble forms, metal salt forms, and their chemical reactions.

[142] Ground of appeal #7 is struck, in part, and is amended to read as follows:

> An updated dispersion modelling analysis is required to account for the larger quantity of emissions authorized under the July 2020 permit amendment.
>
> A stormwater management plan that is protective of the environment is required. This plan must address the impact of **the increased emissions** authorized under the July 2020 permit amendment to Erickson Creek, the Brookswood Aquifer and the Little Campbell Watershed, including with updated data obtained from updated dispersion modelling analysis. The plan must ensure discharges to the environment in a way that is consistent with requirements imposed under the Federal *Fisheries Act* and the BC *Water Sustainability Act*.

"Darrell Le Houillier"

Darrell Le Houillier, Panel Chair
Environmental Appeal Board

"Maureen Baird"

Maureen Baird, Q.C., Panel Member
Environmental Appeal Board

"Howard M. Saunders"

Howard M. Saunders, Panel Member
Environmental Appeal Board

January 27, 2022