Province of British Columbia

Environmental Appeal Board

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DECISION NO. 2005-WIL-012(a)

In the matter of an appeal under the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	Douglas Dale Neal	**APPELLANT**
AND:	Deputy Director of Wildlife	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Robert Wickett, Panel Chair	
DATE:	July 12, 2005	
PLACE:	Prince George, BC	
APPEARING:	For the Appellant: David Jenkins, Q.C., Counsel For the Respondent: Joseph G. McBride, Counsel	

APPEAL

This is an appeal by Douglas Neal of the March 23, 2005 decision of T.J. Ethier, Deputy Director of Wildlife (the "Deputy Director"), to cancel Mr. Neal's hunting licence effective March 18, 2005, and to declare Mr. Neal ineligible to hunt to obtain or renew a British Columbia Hunting licence until 23:59 hours on March 18, 2012.

The Deputy Director undertook this action pursuant to sections 24(2) and 24(5) of the *Wildlife Act*.

The Environmental Appeal Board has authority to hear this appeal under Part 8 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*.

Section 101.1(5) of the *Wildlife Act* provides:

> (5) On an appeal, the appeal board may
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> (a) send the matter back to the regional manager or director, with directions,
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> (b) confirm, reverse or vary the decision being appealed, or
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> (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

The Appellant, Mr. Neal, asks the Board to reduce the period of ineligibility.

BACKGROUND

The Appellant called no evidence at the hearing. He advised the Panel that he was content to rely upon the exhibits and evidence tendered by the Respondent. The Respondent called only one witness, T.J. Ethier, the Deputy Director. The Respondent also submitted the conservation investigation file, various reasons for judgment, and various documents relating to the opportunity to be heard.

The convictions leading to the licensing action

On January 26, 2001, the Appellant was convicted in Provincial Court in Prince George, British Columbia, of ten violations of the *Wildlife Act* and one violation of the *Waste Management Act*. He was sentenced to a total of 45 days of imprisonment and fines totaling $20,000 for these violations.

On February 9, 2001, the Appellant was convicted in Prince George Provincial Court of selling a shotgun to a person who did not have a Firearms Acquisition Certificate, contrary to the *Firearm Act*, R.S.B.C. 1996, c. 145. As a consequence of this conviction, the Appellant was given a ten-year firearms ban commencing February 9, 2001, and expiring February 8, 2011.

The *Wildlife Act* convictions and the *Firearm Act* conviction arose out of the same set of transactions, all of which resulted from an undercover operation undertaken by members of the Conservation Service in respect to the Appellant, Clifford Loring, and Paul Bruggeman.

The Appellant's activities leading to the convictions

There is no dispute about the nature of the substantive offenses for which the Appellant was found guilty in Provincial Court. The Appellant was convicted by Shupe P.C.J. of ten counts of breach of the *Wildlife Act* and one violation of the *Waste Management Act.* In substance, the Appellant was convicted of the following offenses:

1. Hunting a black or grizzly bear by using bait contrary to section 17(1)(m) of the *Wildlife Act*;

2. Depositing beer bottles, beer cans and rubbish in a public place thereby contributing to the defacement of those places by litter contrary to section 9.1(2) of the *Waste Management Act*;

3. Hunting big game (black bear) and unlawfully failing to immediately cancel his appropriate species licence in accordance with the instructions on that licence contrary to the *Firearm and Hunting Licensing Regulation* (the Appellant plead guilty to this offence);

4. Using another person's hunting licence contrary to section 81(b) of the *Wildlife Act*;

5. Hunting wildlife (a muskrat) at a time not within an open season contrary to section 26(1)(c) of the *Wildlife Act*;

6. Unlawfully injuring, molesting or destroying a bird (a hawk) contrary to section 34(a) of the *Wildlife Act*;

7. Hunting wildlife (a hawk) at a time not within an open season contrary to section 26(1)(c) of the *Wildlife Act*;

8. Unlawfully hunting a migratory bird (a Canada Goose) at a time not within an open season contrary to section 26(1)(c) of the *Wildlife Act*;

9. Hunting wildlife (a cow moose) without being authorized by a valid limited hunting authorization contrary to section 6(2) of the *Limited Hunting Regulation* pursuant to the *Wildlife Act*;

10. Hunting wildlife (a black bear) and, having killed that wildlife, unlawfully failing to make every reasonable effort to retrieve the wildlife and include it in his bag limit, and to remove the edible portions of the carcass to a residence, cold storage locker, or meat cutting plant, contrary to section 35(2) of the *Wildlife Act*; and

11. Unlawfully having dead wildlife (a black bear) or part of it in his possession contrary to section 33(2) of the *Wildlife Act*.

As previously noted, the Appellant was convicted with two co-accused, Clifford Loring and Paul Bruggeman. The undercover investigation that led to the convictions was prompted by a history of complaints made by confidential informants against Mr. Loring. Some confidential complaints had been made against the Appellant as well. In fact, between April 1997 and July of 1998, there were some 20 complaints that had been received by the Prince George Conservation Office about Mr. Loring and the Appellant for exceeding wildlife game limits, using other licenses, hunting out of season, and various other alleged infractions.

As a consequence of these complaints, in February of 1998, the Conservation Office commenced an undercover operation in an effort to observe the activities of the Appellant, Mr. Loring and Mr. Bruggeman. The investigation focused primarily on Clifford Loring. However, during the course of the investigation, the Conservation Officers made several observations in respect of the Appellant. Those observations resulted in the convictions in Provincial Court.

The Court described the series of illegal activities committed by Mr. Loring, Mr. Bruggeman and the Appellant. Mr. Loring was found guilty of a substantial majority of the offenses, and he was found to be the primary instigator in the variety of poaching activities described in the evidence. The evidence of poaching resulted

from the observations of the undercover operatives who went on a number of hunting trips with Mr. Loring, the Appellant and Mr. Bruggeman between May and October 1998.

In finding the Appellant guilty of the offenses noted above, the Court stated that "both the accused Loring and Neal were repetitive, apparently incorrigible poachers who regularly flaunted the *Wildlife Act"*, and "also showed little respect for the environment". The Court also noted that the Appellant was wasteful, leaving game he had killed to rot in the bush.

It is noted that the many substantive allegations against Mr. Loring involved trafficking in bear gall bladders. The Court found that there was no evidence linking the Appellant to Mr. Loring's schemes to traffic bear gall bladders.

As a consequence of his convictions in these matters, Mr. Loring was sentenced to 15 months imprisonment, and his firearms and meat cutting equipment were ordered forfeited to the Crown.

By contrast, the Appellant was sentenced to 45 days imprisonment and fined $20,000. The Court also ordered the seizure and destruction of the three firearms belonging to the Appellant.

In respect of the Appellant and Mr. Loring, the Court recommended that they receive a lifetime hunting ban. The Appellant did not appeal the criminal conviction nor the sentence.

Following those convictions, on February 9, 2001, the Appellant plead guilty to attempting to sell a shotgun to a person not in possession of a Firearms Acquisition Certificate, an offense under the *Firearm Act*. As a consequence of this conviction, the Appellant was given a ten-year firearms prohibition commencing February 9, 2001. This firearms prohibition has not been appealed.

Licensing Action

On April 29, 2002, the then acting Deputy Director of Wildlife, Elizabeth McMillan, wrote to the Appellant to give him an opportunity to be heard in respect of potential licensing action to be taken by the Deputy Director; specifically, the Deputy Director was contemplating making the Appellant ineligible to hunt for a period of time as a consequence of his various convictions in Provincial Court. The letter to the Appellant enclosed various documents relating to his conviction and required the Appellant to respond, in writing, with any submission he may have on or before May 31, 2002. The Appellant did not respond or provide any submissions.

Thereafter, nothing occurred until March 23, 2005, when the Deputy Director (now Mr. Ethier) issued the decision now under appeal. His decision was to cancel the Appellant's hunting licence and impose the seven-year period of ineligibility to hunt or obtain a B.C. hunting licence.

In imposing the hunting licence cancellation and seven-year period of ineligibility, the Deputy Director stated that several factors regarding the Appellant's actions w~~h~~ere considered in reaching his decision:

1. A substantial amount of your court imposed fine is still unpaid.

2. Your violations, especially selling firearms illegally, are very serious offences.

3. Offering to "tag out" wildlife for non-Aboriginal people is a serious offence, and one that has a negative impact on the wildlife resource. If more and more people begin to engage in such activity, the substance of the Aboriginal right to hunt will be significantly diluted – that right, intended solely for Native people, will effectively be extended to everyone.

4. It is important to deter such actions.

5. You were convicted on ten (10) counts.

6. The court recommended a lifetime hunting ban.

7. Your actions demonstrate an absolute disregard for the laws governing wildlife.

8. Your actions do not demonstrate those of an ethical hunter; your actions seem mean-spirited, where you kill simply for the sake of killing rather than for consumption or other reasons.

The Appeal

The Appellant appealed the decision of the Deputy Director on May 9, 2005.

The Appellant asserts that there has been a substantial, unexplained delay in the proceedings and that a remedy should be afforded to him as a consequence. The Appellant also asserts that the Deputy Director made an error of fact in his written decision, specifically item #3 (above), and that had he not made the error~~s~~, the period of ineligibility would have been shorter. He urges the Panel to reduce the period of ineligibility accordingly. The Appellant submits that, in all of the circumstances, the period of hunting licence ineligibility ought to be reduced so that it expires in 2008.

In the course of the hearing before the Panel, the Deputy Director advised that it had been his intention to impose a cumulative seven-year hunting ban upon the Appellant as a result of his convictions under the *Wildlife Act*. Given that the Appellant has been subject to a firearms ban since February 9, 2001, and that the Deputy Director did not impose the subject licence cancellation until March 18, 2005, the Deputy Director conceded that the effective hunting ban extends from February 9, 2001 through March 17, 2012, which is an eleven-year hunting ban.

Since it was not his intention to impose a hunting ban for that period of time, the Deputy Director submitted that the period of ineligibility ought to be reduced so as to expire on the same day as the firearms ban, being February 8, 2011.

ISSUES

This appeal raises the following issues:

1. Whether the seven-year period of ineligibility is excessive in the circumstances, particularly in light of the erroneous finding of fact made by the Deputy Director; and

2. Whether the delay in imposing the licence cancellation and period of ineligibility warrants a reduction in the period of ineligibility.

RELEVANT LEGISLATION

Section 24(2) of the *Wildlife Act* provides:

> (2) If a person holding a licence or limited entry hunting authorization issued under this Act or the regulations is convicted of an offence under:
>
> (a) this Act, other than section 22, subsection (6), (7), or (14) of this section, sections 26(1)(a), (e), (f) and (g), 28, 81 and 82,
>
> (b) section 9 of the *Firearm Act*,
>
> (c) the *Migratory Birds Convention Act, 1994* (Canada) or its regulations,
>
> (d) the *Fisheries Act* (Canada) or its regulations, or
>
> (e) the *Criminal Code* respecting the use or possession of firearms while the person in hunting,
>
> or for any other cause considered sufficient by the director, and after providing an opportunity for the person to be heard, the director may suspend the licence or limited entry hunting authorization and all rights under it for a period, within any prescribed limits, or may cancel it.

Section 24(5) of the *Wildlife Act* provides:

> (5) If a licence or limited hunting entry authorization is cancelled, the director may order that the person is ineligible to obtain or renew a licence or limited entry hunting authorization for a period, within the prescribed limits, and the director must inform the person of the period of ineligibility.

The maximum period of ineligibility with respect to Section 24(5) of the *Wildlife Act* is 30 years (Section 7.05 of the *Wildlife Act General Regulation*, B.C. Reg. 340/82)

DISCUSSION AND ANALYSIS

1. Whether the seven-year period of ineligibility is excessive in the circumstances, particularly in light of the erroneous finding of fact made by the Deputy Director.

The Appellant asserts that the Deputy Director made an erroneous finding of fact in his decision. Specifically, the Deputy Director considered as a factor in reaching his decision that the Appellant offered to "tag out" wildlife for non-aboriginal people.

The Deputy Director acknowledges that the Appellant was not found guilty of offering to "tag out" wildlife for non-aboriginal people. He testified at the hearing to explain this error.

The Deputy Director acknowledged that he knew that the Appellant had not been found guilty of offering to "tag out" wildlife for non-aboriginal people. He testified that he was making the decision in respect of the Appellant and of Mr. Loring at the same time. Mr. Loring had been found guilty of "tagging out" wildlife for non-aboriginal people and the form of letter used for Mr. Loring was mistakenly transferred into the Appellant's letter. The Deputy Director testified that the comment about "tagging out" for non-aboriginal people was a clerical mistake and that he did not, in fact, consider that the Appellant had tagged out wildlife for non-aboriginal people when he concluded that a seven-year period of ineligibility was appropriate for the Appellant.

The Deputy Director testified that he did not consider the Appellant to be in the same category as Mr. Loring, which was why Mr. Loring was given a period of ineligibility totaling 25 years. He considered that there was a vast difference between the culpability of Mr. Loring and the Appellant, and that seven years was the appropriate period of ineligibility to recognize the culpability of the Appellant.

The Panel accepts the Deputy Director's evidence that, in spite of what the letter says, he did not, in fact, consider that the Appellant had "tagged out" wildlife for non-aboriginals in imposing a seven-year period of ineligibility. Ultimately, however, the question of whether the Deputy Director made a "clerical mistake" or whether he did consider that the Appellant had "tagged out" wildlife for non-aboriginal people is only of limited value in determining whether the seven-year period of ineligibility is reasonable. The Panel has the statutory authority to consider whether the Deputy Director's determination that a seven-year period of ineligibility is reasonable in light of all of the evidence put before the Panel.

The Panel concludes that a seven-year period of ineligibility is an appropriate period of ineligibility, both in the context of the Appellant's culpability in relation to Mr. Loring, and in the context of other periods of ineligibility imposed by other panels of the Environmental Appeal Board in comparable circumstances.

The Panel concludes that the seven-year period of ineligibility is a proper period of ineligibility for the following reasons:

1. The Appellant was found to have committed a number of wildlife offences and to have sold firearms illegally. The sum total of his actions exhibit complete disregard for the wildlife resource.

2. The Provincial Court judge heard all of the evidence in relation to the activities of the Appellant and Mr. Loring in this affair, and he found the Appellant to be an "incorrigible poacher". The Court stated that it had been overwhelmingly proven, beyond all reasonable doubt, that:

> …. Both acknowledged in conversations with C.O.s Anderson and Zukewich, night hunting, poaching, bear baiting and trafficking poached game. They did so frequently with one another. Both were seen hunting illegally by the undercover conservation officers. The accused Loring and Neal also showed little respect for the environment by the way they threw out their beer cans while hunting.

   The Court recommended that the Appellant receive a lifetime hunting ban. The Court made the same comment in respect of Mr. Loring who was given a substantially longer period of ineligibility. Mr. Loring's ineligibility is the subject of a companion appeal to the Environmental Appeal Board. The Panel concludes that it is appropriate to distinguish between Mr. Loring and the Appellant in imposing a period of ineligibility.

3. The seven-year period of ineligibility is within the range of other periods of ineligibility imposed on hunters for similar behavior. See for example *Joseph D. Johnston v. Deputy Director of Wildlife* (Environmental Appeal Board, Appeal No. 95/45, September 4, 1996) (unreported) and *Thomas Schreiber v. Deputy Director of Wildlife* (Environmental Appeal Board, Appeal No. 98-WIL-05, September 1, 1998) (unreported). [The period of ineligibility imposed in *Schreiber* was upheld by the Court in *Schreiber v. Minister of Environment et al*, 2001 BCSC 515.]

Accordingly, the Panel finds that the seven-year period of ineligibility is not excessive in the circumstances.

2. Whether the delay in imposing the licence cancellation and period of ineligibility warrants a reduction in the period of ineligibility.

The Appellant was convicted in Provincial Court and sentenced on the *Wildlife Act* and *Waste Management Act* offenses on January 26, 2001. He was convicted and sentenced on the *Firearm Act* offense on February 9, 2001.

The period of ineligibility imposed by the Deputy Director was not imposed until March 23, 2005, over four years after the final sentencing proceedings in Provincial Court.

The Appellant submits that this period of delay is excessive and ought to result in a reduction in the period of ineligibility imposed on him. He submits that, even

though there is no evidence that the delay has caused him prejudice, the mere fact of this excessive and unexplained delay warrants a remedy.

The Appellant further submits that the delay in imposing the period of ineligibility demonstrated an extreme example of "slothfulness". He submits that although evidence of prejudice is usually required, the law establishes that, at some point, the mere fact of delay creates prejudice and ought to result in a remedy. He further contends that, at some point, this tribunal must state that a four-year delay is simply intolerable and a remedy must result.

The Appellant also submits that the appropriate period of ineligibility is a term of three years from the date of the hearing (July 12, 2005). In essence, therefore, the Appellant asserts that the delay should result in a reduction of the period of ineligibility from seven years, concluding March 17, 2012, to a period of three years and eight months, concluding July 11, 2008. This latter submission is not based upon case authority, but rather, the Appellant's submission that would be the fair result.

The Deputy Director admitted that the four-year period between the convictions in Provincial Court and the imposition of the period of ineligibility was excessive. However, he gave evidence about the reasons for the delay.

The Deputy Director testified that he had no explanation for the one-year period of delay from February 9, 2001 to February 14, 2002 when the Conservation Office first sent a letter to the Deputy Director recommending that licence action be taken against the Appellant. The Deputy Director testified that, after receiving the recommendation for licence action in February 2002, the then Deputy Director sent the Appellant a letter on April 29, 2002, offering him an opportunity to be heard in respect of the potential imposition of a period of ineligibility.

The Deputy Director testified that the reason for the three-year delay between the letter of April 29, 2002, and his decision rendered on March 23, 2005, was that in the spring of 2001 there was a change in government at the provincial level.

The Deputy Director testified that, soon thereafter, managers within the Wildlife Branch were instructed to restructure their departments as part of a "Core Review" process. The Wildlife Branch was integrated with the provincial Fisheries Branch. The Deputy Director inherited responsibly for fisheries regulation in addition to his wildlife responsibilities.

The Deputy Director testified that within a one-year period following implementation of the Core Review, the Wildlife Branch was reduced in staff from 89 full time equivalent employees to 36. During this process of staff reduction, the Deputy Director was also required to examine and suggest changes to legislation and to realign the goals of the Branch with new government policies.

In the context of all of these changes, all decisions with respect to imposition of periods of ineligibility upon hunters and fishers were determined to be of lower

priority and were, therefore, postponed pending completion of the government mandated changes.

Once the Core Review process had been completed and changes to the Wildlife Branch had been implemented, the Deputy Director testified that he then began to deal with each of the files in his office relating to section 24 of the *Wildlife Act*. The Appellant's case was processed and a decision rendered in the order in which it was received in the office. In making his decision with respect to the Appellant, the Deputy Director testified that he did not take into account the length of delay in imposing a period of ineligibility upon the Appellant. He has taken delay into consideration in respect of other hunters but not with respect to the Appellant. The Deputy Director testified that the reason he did not take delay into account in imposing a period of ineligibility upon the Appellant was because there was no compelling reason for him to do so. The Appellant had not responded to the offer to be heard in 2002, and the Deputy Director had no evidence before him with respect to the effect of the delay upon the Appellant.

The Deputy Director testified that the seriousness of the Appellant's actions in this case outweighed any consideration of delay in his mind. The Provincial Court's recommendation that the Appellant be "banned for life" was an over-riding factor in his determination. He testified that he would have sent the same letter and imposed the same period of ineligibility had he considered the matter expeditiously.

The law is well established that evidence of prejudice to an appellant is required before the court (or tribunal) may consider a remedy for excessive delay in the administrative process occasioned without the fault of the appellant. In this regard, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (hereinafter *Blencoe*), a 2000 decision of the Supreme Court of Canada is the leading authority.

In *Blencoe*, the Supreme Court of Canada found that the *Charter of Rights and Freedoms* applied to the actions of the British Columbia Human Rights Commission, and, by implication, other administrative tribunals. The Court held that section 7 of the *Charter of Rights and Freedoms* provides protection only in exceptional cases where the state interferes in profoundly intimate personal choices of an individual such that a state caused delay could trigger the section 7 security of the person interest. Section 7 states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Court further held that there are remedies available in the administrative law context to deal with state caused delay; however, there must be proof of significant prejudice resulting from that unacceptable delay. In this regard, the Court held that unacceptable delay may amount to an abuse of administrative process where prejudice has been demonstrated so as to impact the fairness of the hearing. Further, unacceptable delay may amount to an abuse of process even where the fairness of the hearing has not been impacted. Where there is no prejudice to the

fairness of the hearing, the delay must be unacceptable and have directly caused a significant prejudice to the appellant so as to bring the administrative process into disrepute.

The Supreme Court of Canada further held that a stay is not the only remedy available for an abuse of process in administrative law proceedings, and that other remedies may be considered.

The Supreme Court of Canada held further that a determination about whether any particular delay is inordinate is not based only upon the length of the delay, but upon the context within which the case and the decision occurred. In this regard, the decision-maker is to consider the nature of the case, its complexity, the purpose and nature of the proceedings and whether the appellant has contributed to or waived any objections to the delay.

In other cases, it has been held that the discretion to provide a remedy for delay is limited to circumstances where there has been both an unreasonable delay, and serious prejudice to the appellant as a consequence of the delay such that there has been a breach of the duty to afford natural justice (*Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.) and; *Crown Packaging Ltd. v. British Columbia (Human Rights Commission)*, [2002] 4 W.W.R. 242 (B.C.C.A.)).

From these authorities, it appears clear that there must be some evidence of either specific prejudice to the appellant's ability to defend him or her self, resulting in a finding that the hearing cannot be conducted fairly (i.e. unavailability of witnesses etc.) or, in cases of extreme delay, evidence linking the inordinate delay to psychological harm or damage to the person's reputation.

In this case, there is no evidence with respect to any prejudice that may have attached to the Appellant as a consequence of the delay in imposing the period of ineligibility. Indeed, the Appellant only argued that the extreme length of the delay, standing alone, warranted a remedy as an abuse of process.

The Deputy Director submitted that there should be no presumption of prejudice and no remedy is warranted without direct evidence of prejudice to the Appellant. He further submitted that the delay here, although excessive, was (as he explained) reasonable in the context of government's right to prioritize and allocate limited resources.

The Panel concludes that the delay in this case, although inordinate, is explained. The Panel attaches significance to the Deputy Director's evidence that the delay resulted from a re-organization and downsizing of the Wildlife Branch. This evidence is important because the Panel concludes that this delay is not systemic or grounded in a disregard for the fair process rights of the Appellant (or other appellants). This was a delay based upon a unique set of facts resulting from a change in government.

Government operates with finite financial resources and it must have the authority and flexibility to make decisions allocating those finite resources between various objectives. Having said this, the Panel also concludes that government priorities cannot "trump" the fair process rights of the Appellant. While the government must be given latitude in making spending decisions, there may reach a point where serious prejudice attaches to an appellant, and a remedy for delay must result.

The Panel concludes that, although there has been lengthy delay in these proceedings, in light of the uncontradicted reasonable explanation for that delay, it is not prepared to grant a remedy to the Appellant in the absence of evidence of extreme prejudice to him. The Panel specifically rejects the Appellant's submission that the four-year delay in these proceedings warrants a remedy, irrespective of the reasons for the delay and the absence of prejudice to him.

As there is no evidence of prejudice accruing to the Appellant as a consequence of the delay, the Panel concludes that the Appellant is not entitled to any remedy for delay.

DECISION

In making this decision, this Panel of the Environmental Appeal Board has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons expressed herein, the appeal is allowed only to the limited extent that the period of ineligibility is reduced from seven years to a period of five years and 11 months, expiring February 8, 2011, in accordance with the submission of the Deputy Director.

The appeal is allowed, in part.

"Robert Wickett"

Robert Wickett, Panel Chair
Environmental Appeal Board

October 6, 2005