



Environmental Appeal Board

DECISION NO. 2005-WIL-019(a)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN: Randall M. Smith **APPELLANT**

AND: Regional Manager **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Cindy Derkaz, Panel Chair

DATE: November 17, 2005

PLACE: Cranbrook, BC

APPEARING: For the Appellant: Randall Smith
For the Respondent: Wayne Stetski

APPEAL

This is an appeal of the June 3, 2005 decision of Wayne Stetski, Regional Manager (the "Regional Manager"), Kootenay Region, Ministry of Environment (formerly the Ministry of Water, Land and Air Protection) (the "Ministry"), to issue Permit CB0510852 (the "Permit") to Randall Smith pursuant to section 70(1)(b) of the *Wildlife Act*. The Permit authorizes Mr. Smith to guide anglers from June 3, 2005 to March 31, 2006 on Skookumchuck Creek, for 14 guided angler days¹, and on St. Mary River, for 24 guided angler days.

The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act*, and section 101.1 of the *Wildlife Act*. Section 101.1(5) of the *Wildlife Act* provides that the Board may:

- a) send the matter back to the regional manager or director, with directions,
- b) confirm, reverse or vary the decision being appealed, or

¹ Section 1 of the *Wildlife Act* defines "angler day" as follows:

"**angler day**" is a unit representing one person angling during any part of a day and is used to determine the extent to which a stream, lake or area specified under section 53 may be used for angling, for example, "a limit of 1 000 angler days" means that the total obtained by adding together the number of anglers using the stream, lake or area on each day of a specified period must not exceed 1 000.

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

Mr. Smith requests that the Board amend the Permit to:

- a) increase his guided angler days on Skookumchuck Creek from 14 to 25;
- b) increase his guided angler days on St. Mary River from 24 to 30; and
- c) authorize his use of 12 guided angler days on the Elk River.

BACKGROUND

Skookumchuck Creek, St. Mary River and the Elk River are located in the East Kootenay region of south-eastern British Columbia. The area is renowned, both nationally and internationally, as a world-class sport fishing destination. In the past two decades, there has been a dramatic increase in the number of anglers, both guided and unguided, seeking a quality fishing experience in the East Kootenay area. The increase can be attributed to the growth in the number of people living within a one-day drive of the region and to the recovery of sport fish populations in accessible rivers.

Mr. Smith is a lifelong resident of Kimberley, BC, and has been a sport fisherman in the East Kootenay area for most of his life. He is the owner-operator of Hidden Valley Alpine Adventures, a business based in Kimberley that offers guided fishing trips, big game hunting trips and other outdoor experiences.

The Regional Manager approved Mr. Smith's Angling Guide Operating Plan and issued his first Non-Tidal Angling Guide Licence in 2000.

Mr. Smith commenced guiding anglers in the East Kootenay region in 2001. He is trying to establish a year-round business with a focus on fly-fishing using the Elk River, St. Mary River, Skookumchuck Creek, Kootenay River and some of the numerous lakes in the region. The number of guided angler days allotted by the Ministry to Mr. Smith for the Elk River, St. Mary River and Skookumchuck Creek directly affect his ability to offer guided fishing expeditions in the region.

At present, Mr. Smith supplements his business income with employment at a local ski hill and in the construction industry.

Jeffery Burrows, Senior Fisheries Biologist, Kootenay Region, gave evidence about the process undertaken by the Ministry to develop an angling management plan for the East Kootenay region. He stated that there is a limited opportunity to fish for wild trout and char in north-western North America, resulting in a high demand for sport fishing in the region, particularly on the Elk River. The increased use of the area's popular rivers led to complaints from anglers, guides and residents about crowding and the attendant degradation of the outdoor experience for anglers. The Ministry also had a concern about the effect of intensive sport fishing on the health of fish stocks.

The Ministry provided some figures for the Elk River to illustrate the increase in the sport fishery in the region:

- The number of licensed angling guides (including assistant guides) on the Elk River increased from 9 in 1995 to 52 in 2002. Over the same period, guided angler days per year increased from 149 to more than 1500.
- Although figures are not available to accurately determine the increase in unguided use of the Elk River, there are indications that it has also grown significantly. An angler use survey², conducted from July to October 2002, found that total angler effort on the Elk River during the study period exceeded 10,000 angler days (81% of which were unguided). Non-residents, mostly from the United States or Alberta, accounted for 79% of the angler days (23% of which were guided).
- During the study period over 98,000 fish were caught, the vast majority of which were released. However, there is a concern that even a low catch and release mortality rate of up to 5% may lead to conservation problems.

On March 14, 2003, the then Minister of Water, Land and Air Protection issued Ministerial Order 190 (the "Ministerial Order"), pursuant to section 52(3) of the *Wildlife Act*. The Ministerial Order states:

I, Joyce Murray, Minister of Water land [sic] and Air Protection, order the regional manager to restrict the issue of angling guide licences or endorsements for the following water bodies to persons who, on the date of the order, hold an angling guide licence or endorsement for that stream, lake or area:

Kootenay River upstream of the confluence of the White and Kootenay Rivers, excluding its tributaries;

White River and its tributaries;

Elk River and its tributaries;

Wigwam River and its tributaries;

Bull River and tributaries;

St. Mary River and its tributaries; and

Skookumchuck River [sic] and its tributaries.

An Information Bulletin, issued by the Ministry on March 24, 2003, states:

CRANBROOK – Government has imposed a moratorium on new angling-guide licences in the Kootenay River watershed until a long-term angling management plan is developed for the area.

...

No new angling-guide licences will be issued for the next 18 months. Established guides will continue to operate at existing levels.

² Elk River Creel Survey 2002, Quality Waters Strategy (River Guardian Program) by K.D. Heidt.

An angling management plan will be developed by ministry staff in consultation with members of the public and interest groups, including resident anglers and guides. The plan will consider ways to manage the high angler demand on the Kootenay watershed and thereby protect fish stocks and maintain the fishery over the long term.

Mr. Burrows headed the initiative to develop an angling management plan for the region and chaired a committee of stakeholders, known as the East Kootenay Angling Management Plan Ad Hoc Committee. In addition to Mr. Burrows, there were four resident anglers, four angling guides and one First Nations representative on the committee. From June to November 2003, the committee held a total of 9 meetings in order to identify issues, gather information, suggest solutions to manage angling and conserve fish stocks, and produce an angling management plan.

In December 2003, the committee released a report titled "Status Report East Kootenay Angling Management Plan." The committee recommended that the *Angling and Scientific Collection Regulation*, B.C. 125/90 (the "*Regulation*"), enacted pursuant to section 53 of the *Wildlife Act*, be amended to designate the waters listed in the Ministerial Order as "classified waters." It also recommended an annual limit on the number of angler days for each of the waters listed in the Ministerial Order and proposed an allocation of total angler days among various classes of anglers as follows:

Unguided resident anglers - 45%

Unguided non-resident anglers - 30%

Angling guides - 25%

However, the committee did not recommend how the Ministry should allocate the available guided angler days among licensed angling guides in the region.

The report states, on page 1: "... reviews and acceptance, at senior levels of government, of a draft 'Management of Angling Use on Classified Waters' strategy as well as tenure harmonization are ongoing and further progress towards a final angling management plan for the moratorium waters requires their completion."

The moratorium on the issuance of new angling guide licences expired in September 2004.

On February 11, 2005 changes to Schedule A of the *Regulation* were enacted to designate the waters listed in the Ministerial Order as "classified waters" and to establish the maximum number of guided angler days on each water as follows:

Schedule A
 [en. B.C. Reg. 263/2005, s. 3.]
 Classified Waters

Column 1	Column 2	Column 3	Column 4		Column 5 STEELHEAD LICENCE MANDATORY	
STREAM (includes unspecified tributaries unless indicated by an * before the name)	NO. OF GUIDES	GUIDED ANGLER DAYS	FROM	TO	FROM	TO
Class II Inland Waters (non-anadromous)						
REGION 4						
Bull River	No limit	500	April 1	March 31	Exempt	
Elk River (excluding the following tributaries: Wigwam River; Coal Creek downstream of the old M.F. & M. Railway bridge located about 7 km upstream of the Elk River) (Elk)	No limit	2 950	April 1	March 31	Exempt	
Kootenay River (upstream of White River)	0	0	April 1	March 31	Exempt	
Skookumchuck Creek	No limit	150	April 1	March 31	Exempt	
St. Mary River (downstream of St. Mary Lake) ¹	No limit	1 250	April 1	March 31	Exempt	
St. Mary River (upstream of St. Mary Lake) ¹	0	0	April 1	March 31	Exempt	
White River	0	0	April 1	March 31	Exempt	
Wigwam River	No limit	150	April 1	March 31	Exempt	

¹ The two Class II portions of St. Mary River are considered a single classified water for the purposes of a classified waters angling licence.

Since 2000, the provincial government has been conducting an extensive review of its management of British Columbia's freshwater sport fishing opportunities with the stated goals of conserving fish stocks and returning social and economic benefit to the provincial economy through a healthy and sustainable recreational sport fishery. A new management model has been developed in consultation with resource managers, anglers, angling guides and other members of the public. The model is set out in the Quality Waters Strategy Resource Document dated April 11, 2005³.

Part 5 of the Quality Waters Strategy Resource Document establishes the framework to be followed in the development of an angling management plan. The stated purpose of angling management plans is to identify waters requiring classification and to establish a regulatory scheme for those waters to maintain the quality of the angling experience. Angling management plans may set the maximum number of guided angler days available for allocation on classified waters, but the plans do not allocate the available guided angler days among licensed angling guides.

In addition to the Quality Waters Strategy, the Ministry has produced the Provincial Guided Angler Day Allocation and Pricing Policy Working Document (the "Allocation Policy") dated January 28, 2005. The Allocation Policy addresses the competing interests of existing businesses (i.e. businesses with a history of guiding anglers on the classified waters), and new entrants seeking access to guided angler days. Part 8 of the Allocation Policy sets out the method to be followed by a regional manager for the initial allocation of guided angler days under an angling management plan.

On January 28, 2005, the Ministry sent application packages to 81 persons potentially interested in acquiring guided angler days on classified waters in the East Kootenay Region. The accompanying cover letter states:

Enclosed is your application package for guided angler days in that part of Region 4 defined by the East Kootenay Angling Management Plan. The application package includes:

- An application form for guided angler days
- A document that describes the method used to allocate guided angler days

This package is sent to you in anticipation of the proposed East Kootenay Angling Management Plan coming into force for the upcoming season. Should that not happen, your completed application and your application fee will be returned to you.

We strongly recommend that you read the enclosed "BC Guided Angler Day Allocation and Pricing Policy." This document explains in full detail how guided angling days are to be allocated to existing guides and new angling guides in Region 4.

³ For the purpose of the strategy, "quality waters" are" 1) waters designated as classified waters under Schedule A of the *Regulation*, and 2) waters that have been identified as candidates for such designation.

...

The East Kootenay Angling Management Plan did not come into force for the 2005-06 licence year. Mr. Burrows stated that the Ministry plans to “re-visit” the recommendations contained in the December 2003 Status Report East Kootenay Angling Management Plan, with the intention of having an angling management plan in place for the 2006-07 licence year.

Mr. Smith was one of 42 guides who applied for guided angler days on classified waters in the East Kootenay region in 2005. He requested 30 guided angler days on St. Mary River, 25 guided angler days on Skookumchuck Creek and 16 guided angler days on the Elk River.

On March 31, 2005, the Regional Manager issued Non-Tidal Angling Guide Licence AGCB0510450 to Mr. Smith. The licence is valid from April 1, 2005 to March 31, 2006.

On April 27, 2005, the Regional Manager sent the 42 applicants, including Mr. Smith, a letter setting out an “interim” allocation (subject to review after one year) of guided angler days on the classified waters in the East Kootenay region. Mr. Smith was allocated:

- 19 base days and 5 growth days for a total of 24 guided angler days on St. Mary River⁴;
- 13 base days and 1 growth day for a total of 14 guided angler days on Skookumchuck Creek;
- 0 guided angler days on the Elk River.

On June 2, 2005, the Regional Manager determined that the *Regulation* does not provide for the allocation of guided angler days on an interim (time limited) basis. The Regional Manager sent a letter dated June 2, 2005, to the 42 angling guides participating in the allocation of the guided angler days, stating:

Further to the distribution of guided angler days on Classified Waters in Region 4, we will be issuing you a permit for guided angler days for 2005-06. Enclosed is a form showing the number of days by classified waters that will appear on your permit.

...

The cost of this annual permit is \$150. This permit fee replaces the \$11 per guided angler day annual fee, the \$25 per growth day fee for this year, and the original \$500 application fee.

...

We expect allocations of guided angler days to occur next year under the auspices of the East Kootenay Angling Management Plan.

⁴ Part 8 of the Allocation Policy establishes the criteria for allocating “base” days according to an angling guide’s verified historical use of a classified water and “growth” days which are a portion of the available days that are surplus to the total base days allocated for that water. Part 8 of the Allocation Policy is explained in more detail in the “Discussion and Analysis” section of this decision.

...

The Regional Manager issued the Permit to Mr. Smith on June 3, 2005. The Permit is a one-page document that states in part:

For Randall Smith and his or her assistant guides to guide anglers on **Skookumchuck Creek**. This permit authorizes the use of 14 guided angler days.

AND

For Randall Smith and his or her assistant guides to guide anglers on **St. Mary River (downstream from St. Mary Lake)**. This permit authorizes the use of 24 guided angler days.

Terms and Conditions of this Permit

- This permit is not valid unless the holder also holds an angling guide licence.
- All relevant provisions of the Wildlife Act and Regulations apply.
- All relevant provisions related to the angling guide licence and angling guide operating plan(s) of Randall Smith apply for activities authorized under this permit.
- All reporting requirements (Conditions of an Angling Guide Licence) apply to activities carried out under this permit as though they were authorized under an angling guide licence.
- This permit is not transferable.

This permit is not an allocation of angler days.

This permit is only valid from issue date to March 31, 2006.

[bold in the original]

Mr. Smith appealed the Permit to the Board on the grounds that the allocation has placed "an extreme burden" on his ability to maintain a viable guiding business. In particular, he submits that he has a history of guiding clients on the Elk River and should have been allocated guided angler days on that river. He feels that he has been treated unfairly in the allocation process, having regard to the number of guided angler days awarded to other licensed guides, including non-residents and new entrants. He asks the Board to amend the Permit to increase the number of his guided angler days as set out above.

Although Mr. Smith did not raise the issue, the Panel expressed a concern about the Regional Manager's jurisdiction under the *Wildlife Act* and/or the *Regulation* to issue the Permit. The Regional Manager addressed this issue in the course of the hearing.

The Regional Manager requests that the Board uphold the Permit.

ISSUES

1. Whether the Permit was issued in accordance with the *Wildlife Act* and the *Regulation*.
2. Whether the allocation of guided angler days to Mr. Smith was fair and appropriate in the circumstances.

RELEVANT LEGISLATION

Wildlife Act

In addition to the definition of "angler day", set out in footnote 1 above, the following definitions in the *Wildlife Act* are relevant:

Definitions and interpretation

- 1 (1) In this Act:

...

"angler day quota" means the number of angler days allocated by the regional manager to an angling guide for the use of the angling guide's clients, or a class of those clients, during a period specified under section 53;

...

"angling guide" means a person licensed as an angling guide under this Act;

"angling guide operating plan" means a description of the operations of an angling guide that is in the form and contains the information required by the regulations;

...

"director" means the director of the Wildlife Branch and, for matters relating to fish, includes a person designated by regulation of the Lieutenant Governor in Council;

...

Section 49 of the *Wildlife Act* prohibits a person from guiding for fish without an angling guide licence:

Compulsory angling guide licence

- 49** (1) A person commits an offence if the person acts as a guide for fish, or offers to act as a guide for fish, unless the person

(a) holds an angling guide licence, or

...

(5) An angling guide who guides for fish elsewhere than on the waters or in the area authorized by the angling guide's licence commits an offence.

...

Issue of angling guide licences

52 (1) A regional manager may issue an angling guide licence to a person who

...

(c) has submitted an angling guide operating plan that has been approved by the regional manager.

The following sections of the *Wildlife Act* authorize a regional manager to issue a permits:

Permits

19 (1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, or

...

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

...

Permit in guide area

70 (1) The regional manager may, by issuing a permit containing conditions the regional manager considers suitable, authorize

...

(b) a guide outfitter or angling guide to guide in an area other than that endorsed on his or her guide outfitter licence or angling guide licence.

...

Section 53 of the *Wildlife Act* provides for regulations to be enacted to restrict guiding for fish and angling:

Restrictions on guiding for fish and angling

53 (1) The Lieutenant Governor in Council, by regulation, may do one or more of the following:

...

- g) provide for the allocation of angler day quotas to and among angler guides and for the disposal of angler day quotas by auction or tender or any other means;

...

(3) A regulation made under this section may

- (a) provide for the attachment of an angler day quota to, or for the reduction or cancellation of an angler day quota attached to, an angling guide licence issued before or after this section or the regulation comes into force, and

- (b) impose limitations, restrictions and requirements relating to guiding for fish on an angling guide, even though the angling guide's licence was issued before this section or the regulation comes into force.

The relevant provisions of the *Regulation* are as follows:

Interpretation

1 In this regulation:

...

"classified water" means a water or a group of waters set out in Column 1 of Schedule A;

"licence year" means a period of 12 months beginning on April 1 in each year and ending on March 31 in the following year;

"management plan" includes, but is not limited to, the angling use plan for classified waters;

...

Allocation of angler day quotas

11 (1) For each water specified in Schedule A for which a regional manager is responsible, the regional manager **may** allocate guided angler days.

(2) For each water specified in Schedule A for which a regional manager is responsible, the regional manager **must**

- (a) if a management plan has been approved by the director for a water, allocate guided angler days in accordance with that management plan, and
- (b) if no management plan has been approved by the director for a water, use one of the following procedures to allocate guided angler days:
 - (i) require angling guides to bid for guided angler days by sealed tender, and award guided angler days to the highest bidder or bidders,
 - (ii) require angling guides to submit a written proposal for the use of guided angler days, including
 - (A) the relevant available resources of the angling guide, and
 - (B) the relevant experience and knowledge of the angling guide, and
 - (C) any other relevant information the regional manager requires,and award guided angler days to the angling guide or guides based on the best proposal or proposals as determined by the regional manager, or
 - (iii) require angling guides to submit a sealed tender referred to in subparagraph (i), together with a written proposal as described in subparagraph (ii), and award guided angler days to the angling guide or guides with the best combination of sealed tender and written proposal, as determined by the regional manager.
- (3) For each water specified in Schedule A for which a regional manager is responsible, the regional manager must not allocate

...

- (b) guided angler days in the period set out in column 4 of Schedule A in excess of the number set out in column 3 of Schedule A next to that water.

[emphasis added]

The relevant portions of Schedule A to the *Regulation* are set out in the "Background" to this decision, above.

DISCUSSION AND ANALYSIS

1. **Whether the Permit was issued in accordance with the *Wildlife Act* and the *Regulation*.**

The St. Mary River, Skookumchuck Creek and Elk River became classified waters on February 11, 2005, when Schedule A to the *Regulation* was amended. Section 11(1) of the *Regulation* gives the Regional Manager the discretion to allocate guided angler days for classified waters in his region:

11 (1) For each water specified in Schedule A for which a regional manager is responsible, the regional manager **may** allocate guided angler days.

[emphasis added]

Section 11(2)(a) of the Regulation provides that, if an angling management plan for a classified water has been approved by the director, the Regional Manager **must** allocate the guided angler days in accordance with the plan. The East Kootenay Angling Management Plan had not been approved by the director and was not in effect for the 2005-06 licence year.

Section 11(2)(b) of the *Regulation* provides that, if there is no approved angling management plan for a classified water, the Regional Manager **must** use one of three alternate procedures to allocate guided angler days. He must: (i) require guides to bid for guided angler days; (ii) require guides to submit a written proposal for the use of guided angler days; or (iii) require guides to submit a bid together with a written proposal.

In January 2005, the Ministry began the process to allocate guided angler days for the 2005-06 licence year, in anticipation of the proposed East Kootenay Angling Management Plan coming into force. The following is a summary of the steps undertaken by the Ministry:

- On January 28, 2005, an application package enclosing a "Classified Waters Guided Angler Day Application Form – East Kootenay Angling Management Plan" was sent to 81 potential applicants. The form refers applicants to both the East Kootenay Angling Management Plan and the Allocation Policy.
- On February 24, 2005, an amendment to the application package was sent to the potential applicants, requesting further information about their historical use of the classified waters.
- The deadline for submission of applications to the Ministry was March 15, 2005. A total of 42 angling guides submitted applications.
- From April 19 to 20, 2005, a three-person review panel reviewed the 42 applications. The review panel used the criteria in the East Kootenay Angling Management Plan and the Allocation Policy to determine the number of guided angler days that should be allocated to each applicant for the 2005-06 licence year. The Regional Manager allocated guided angler days for the 2005-06 licence year to each applicant, in accordance with the review panel's determination.
- On April 27, 2005, the Regional Manager sent a letter to each of the applicants advising of the "interim" allocation (subject to review after one year) of guided angler days on the classified waters in the East Kootenay region for the 2005-06 licence year.
- The Regional Manager subsequently determined that "the Regulation does not allow him to allocate guided angler days on a time limited basis and that the [Allocation] policy cannot be fully implemented as a

result⁵." He sent a letter to the applicants advising that he would be issuing one-year permits for the guided angler days they were offered as an allocation.

The Panel finds that the Regional Manager derives his authority to allocate guided angler days for classified waters from section 11(1) of the *Regulation*. If the Regional Manager chooses to allocate guided angler days, he must do so in accordance with section (11)(2). The Panel finds section 11(2) to be mandatory: it does not give the Regional Manager the discretion to allocate guided angler days other than as set out in subsections 11(2)(a) and (b). Section 11(2) provides that the Regional Manager **must**, rather than **may**, allocate guided angler days in accordance with subsections 11(2)(a) or (b).

In response to a question from the Panel, the Regional Manager stated that for the 2005-06 licence year, he allocated guided angler days pursuant to section 11(2)(b)(ii) of the *Regulation*. He submitted that the applications were "proposals" for use of guided angler days in accordance with the draft East Kootenay Angling Management Plan.

Section 11(2)(b)(ii) provides:

- (b) if no management plan has been approved by the director for a water, use one of the following procedures to allocate guided angler days:

...

- (ii) require angling guides to submit a written proposal for the use of guided angler days, including

- (A) the relevant available resources of the angling guide, and

- (B) the relevant experience and knowledge of the angling guide, and

- (C) any other relevant information the regional manager requires,

and award guided angler days to the angling guide or guides based on the best proposal or proposals as determined by the regional manager, ...

The Panel finds that the evidence does not support the Regional Manager's submission. The Panel finds that the entire process undertaken by the Ministry was founded upon the assumption that the East Kootenay Angling Management Plan would be in place for the 2005-06 licence year. The applicants were not asked to submit "a written proposal" pursuant to subsection 11(2)(b)(ii) of the *Regulation*. Instead, they were asked to complete a "Classified Waters Guided Angler Day Application Form – East Kootenay Angling Management Plan." The Regional Manager did not determine "the best proposal or proposals" in making his decision to award guided angler days. Instead, he followed the review panel's recommendations, based upon the criteria established by the East Kootenay Angling Management Plan and the Allocation Policy.

⁵ The Allocation Policy states that guided angler days initially allocated to existing and new angling guides will be issued for a term of 20 years, renewable for another 20 years after 10 years. (page 4)

The Panel finds that the Regional Manager would have been properly exercising his authority to allocate guided angler days pursuant to section 11(2)(a) of the *Regulation*, if the East Kootenay Angling Management Plan were approved by the director. However, the management plan was not approved. The Panel finds that the Regional Manager erred by failing to follow the provisions of section 11(2)(b) of the *Regulation* when he allocated guided angler days for the 2005-06 licence year.

The Regional Manager issued the Permit pursuant to section 70(1)(b) of the *Wildlife Act*. Therefore, the Panel has considered whether the Regional Manager had the authority under that section to award guided angler days to Mr. Smith, without following the provisions of section 11(2)(b) of the *Regulation*.

The Permit states: "This permit is not an allocation of angler days." However, the Panel does not find the statement to be determinative. Based on the evidence, the Panel finds that the effect of the Permit was to allocate guided angler days to Mr. Smith for the 2005-06 licence year.

Section 70(1)(b) of the *Wildlife Act* provides that the Regional Manager may issue a permit to authorize an angling guide "to guide in an area other than that endorsed on his or her angling guide licence."

The Panel has reviewed Mr. Smith's Non-Tidal Angling Guide Licence AGCB0510450 issued March 31, 2005 (valid from April 1, 2005 to March 31, 2006). The licence does not state if it is for classified or unclassified waters.

The Panel finds that there is no area clearly endorsed on Mr. Smith's licence. The licence states that it "is valid only in those regions for which there is an approved Angling Guide Operating Plan." Appendix A sets out conditions of the licence, including:

- (6) The holder of this licence is restricted to guiding only on those waters listed in their approved Operating Plans.

...

Note: This appendix and operating plan are an integral part of your Angling Guide Licence and must remain attached thereto.

[Bold and italics in original]

There is no operating plan physically attached to Mr. Smith's licence.

Mr. Smith testified that his operating plan was approved by the Regional Manager at the time he received his first angling guide licence in 2000. He stated that the operating plan identified waters upon which he intended to offer guided fishing expeditions including the Elk River, St. Mary River and Skookumchuck Creek.

In *Robert K. Gordon v. Regional Manager* (Environmental Appeal Board, Appeal No. 2003-WIL-032(a), January 7, 2004)(unreported), the Board considered the relationship between an angling guide licence and an approved operating plan, in the context of the statutory licensing scheme. The Board held that it is the licence, not the operating plan, which authorizes the guiding activity.

In the present appeal, the Panel does not need to determine if, by condition 6 of Appendix A of Mr. Smith's licence, the areas in his approved operating plan are

"areas endorsed on his angling guide licence" within the meaning of section 70(1)(b). The classified waters at issue in the appeal were included in his approved operating plan.

The Panel finds that the Permit does not operate to authorize Mr. Smith to "guide in an area other than that endorsed on his angling guide licence." Rather, it purports to allocate guided angler days to Mr. Smith for the 2005-06 licence year.

The Panel finds that there is nothing in section 70(1)(b) of the *Wildlife Act* that authorizes the Regional Manager to issue a permit to allocate guided angler days in a manner not contemplated by section 11(2) of the *Regulation*. As stated above, the Panel finds that the Regional Manager did not comply with section 11(2) when he issued the Permit.

Although the Permit was issued under section 70(1)(b) of the *Wildlife Act*, the Panel has also considered the Regional Manager's authority to issue a permit under section 19 as follows:

19 (1) A regional manager ... may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that ... the person is prohibited from doing by this Act or the regulations,

...

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

[emphasis added]

The Panel finds that if the Regional Manager were to issue a permit under section 19 to allocate guided angler days, the provisions of section 11(2) of the *Regulation* must be followed. The Panel has already found that this was not done in respect to the issuance of the Permit.

The Panel finds that the Permit was not issued in accordance with the *Wildlife Act* and the *Regulation*. Therefore, the Panel has decided to rescind the Permit.

Mr. Smith stated that his angling guiding season for 2005-06 is "essentially over". He does not anticipate using any guided angler days for the balance of this licence year. The Regional Manager confirmed that the allocation of guided angler days for the 2006-07 licence year will be done in accordance with an approved angling management plan. He stated that, in the future, the allocation of guided angler days will be a condition of an angling guide licence. In view of these factors, the Panel has decided not to refer the Permit back to the Regional Manager, with directions, or to make any decision in respect to the allocation that the Regional Manager could have made.

2. Whether the allocation of guided angler days to Mr. Smith was fair and appropriate in the circumstances.

The Panel's decision to rescind the Permit concludes the appeal. However, both Mr. Smith and the Regional Manager addressed the issue of whether the allocation of guided angler days to Mr. Smith was fair and appropriate in the circumstances. The Panel will consider their submissions in order to provide some guidance in respect to future allocations of guided angler days.

Mr. Smith submits that the Regional Manager's allocation of guided angler days has placed an "extreme burden" on his ability to maintain a viable guiding business.

Mr. Smith testified that he commenced guiding anglers in 2001 and has been slowly building his business. He applied for a total of 55 guided angler days on the Elk River, St. Mary River and Skookumchuck Creek, which is "the extent of [his] goal for the business." He received a total of 38 guided angler days for the 2005-06 licence year.

In particular, Mr. Smith submits that his business has suffered, and will suffer in the future, because he did not receive any allocation of guided angler days on the Elk River. He testified that clients, who had booked in 2004 for a 3-day fishing trip on the Elk River, St. Mary River, and Skookumchuck Creek in 2005, cancelled when they learned that he could not guide them on the Elk River. The clients chose to hire another angling guide who could guide them on all three rivers. Mr. Smith submits that he needs to be able to offer a few guided angler days to clients requesting trips on the Elk River.

Mr. Smith does not dispute that there is over-crowding on the popular rivers in the region and that there is a need to control angler use. However, he submits that the allocation process is unfair.

The allocation was based on an angling guide's best year in the 5 licence years from 1999-00 to 2003-04. Mr. Smith testified that his best year in the angling guide business was 2004-05, which was not considered in the allocation. He guided anglers for the first time on the Elk River in 2004-05. If the Ministry had considered the 2004-05 licence year in the allocations, he would have received guided angler days on the Elk River.

Mr. Smith submits that he has been treated unfairly, having regard to the number of guided angler days awarded to other licensed guides, including non-residents and new entrants. He notes that 47 guided angler days on the St. Mary River were allocated to a guide with no history of use on the St. Mary River and that a number of "big players" in the business, some of whom are non-residents, received a disproportionate number of guided angler days on the classified waters in the region. For example, Victor Bergman and David Brown received 303 and 526 guided angler days, respectively⁶.

⁶ Victor Bergman's 303 guided angler days include Elk River – 274 days, Skookumchuck Creek – 1 day, and St. Mary River – 6 days. David Brown's 526 guided angler days include Elk River – 429 days, Skookumchuck Creek – 0 days, and St. Mary River – 67 days. The balance of Mr. Bergman's and Mr. Brown's guided angler days are on classified waters that are not in issue in this appeal.

Mr. Smith submits that the Ministry should limit the number of guided angler days issued to any one guide, on a classified water, to a maximum allocation of 200 to 250 days. He argues that the Allocation Policy favours the large operators and that the industry would be better served if the process encouraged the growth of small, local operators.

Dr. Nancy South, PhD., Manager, Revenue and Analysis, Fish and Wildlife Recreation and Allocation Branch, testified about the methodology used to allocate guided angler days in the East Kootenay region for the 2005-06 licence year. In accordance with a recommendation of the Provincial Quality Waters Strategy Joint Steering Committee, a three-person review panel was struck to review the applications for guided angler days. The members of the review panel were: Dr. South, chair; Dick McMaster, representing angling guides; and Tom Protheroe, representing resident anglers. None of the review panel members were from the East Kootenay region.

Dr. South stated that the review panel applied the criteria established by the East Kootenay Angling Management Plan and the Allocation Policy. According to the preface of the Allocation Policy, the Ministry considers the allocation of guided angler days in the East Kootenay region for the 2005-06 licence year to be a "pilot project", and plans to review the policy's effectiveness in order to develop a provincial policy applicable to all regions requiring allocation and pricing of guided angler days. Dr. South stated that the Allocation Policy has not been "signed off for the entire province."

Pursuant to Part 8 of the Allocation Policy, the number of "base days" a licensed angling guide will be allocated on a classified water is determined by the guide's best guided angler day year in the reference period (in the East Kootenay region the reference period is the 5 licence years from the April 1, 1999/March 31, 2000 licence year to and including the April 1, 2003/March 31, 2004 licence year). If an angling management plan provides for more guided angler days than have been historically used by existing licensed guides during the reference period (i.e. there is a "surplus" of available guided angler days), the surplus is allocated as follows:

- 50% of the surplus is allocated to existing guides for growth opportunities, taking into account a guide's current investment in the region and business development;
- 30% of the surplus is allocated to new guides entering the business; and
- 20% of the surplus is available to all eligible guides on an annual basis by auction or a bid process conducted by the regional manager.

For the Elk River, the review panel found that the number of base days used by existing guides exceeded the number of guided angler days available for allocation. Pursuant to the East Kootenay Angling Management Plan (and Schedule A of the *Regulation*), 2950 guided angler days are available for allocation on the Elk River. The number of base days requested by existing guides, and verified by historical angling guide reports, was 3184. The review panel concluded that the Elk River is "over-subscribed" and that there are no "surplus" days available for allocation either as "growth" days for existing guides or to new angling guides.

Mr. Smith did not receive any allocation of base days on the Elk River because he did not have any history of guiding on the river during the reference period established by the Allocation Policy. He guided anglers on the Elk River during the 2004-05 licence year, but this was not within the reference period and, therefore, not relevant in determining his allocation of guided angler days.

The Regional Manager submits that using historical records that were submitted by guides, prior to the Ministry indicating that the records might be used to determine allocations, removes the incentive for guides to inflate their use of days to obtain a larger allocation. The Regional Manager notes that no applicants were allocated guided angler days on the Elk River unless it was verified that they had “use history” on the river during the reference period.

Pursuant to the East Kootenay Angling Management Plan (and Schedule A of the *Regulation*), the number of guided angler days available for allocation on the St. Mary River and Skookumchuck Creek are 1250 and 150, respectively. The number of base days requested by existing guides, and verified by historical angling guide reports, on these waters were 847 and 78, respectively. The review panel concluded that there were “surplus days” available for allocation on both of these waters.

Dr. South referred to Part 10 of the Allocation Policy to explain the formula used by the review panel to determine the allocation of surplus days for existing and new guides. Briefly, growth days and days for new guides are allocated by a point system whereby the investment value of an angling guide business has a weight of 60% and the number of years the guide has held an angling guide licence has a weight of 40%.

Existing angling guides, including Mr. Smith, who applied for “growth” days on the St. Mary River and Skookumchuck Creek were offered some portion of their request based on the formula set out in Part 10 of the Allocation Policy.

The Allocation Policy provides that 20% of the surplus days on a classified water will be available to all eligible guides on an annual basis by auction or a bid process. The Regional Manager stated that, due to the overwhelming request for growth days, he decided to use these surplus days to fulfill the applicants’ requests for growth days.

According to a table prepared by the Ministry (Exhibit 2), for some of the classified waters, the number of guided angler days allocated for the 2005-06 licence year exceeded the available guided angler days set out in Column 3 of Schedule A of the *Regulation*. This was the case for the Elk River and St. Mary River:

Elk River:	2950 days set out in Column 3 2973 days allocated by the Regional Manager
St. Mary River:	1250 days set out in Column 3 1379 days allocated by the Regional Manager

Section 11(3) (b) of the Regulation provides:

(3) For each water specified in Schedule A for which a regional manager is responsible, the regional manager must not allocate

...

(b) guided angler days in the period set out in column 4 of Schedule A in excess of the number set out in column 3 of Schedule A next to that water.

Dr. South stated that the Ministry deemed it appropriate to “deviate slightly” in the initial year of allocating guided angler days for classified waters in the East Kootenay. She stated that this was the year to “iron out the bumps”. The Ministry wanted to be flexible in order to accommodate guides who would experience a decrease in their ability to guide on these rivers. She explained that the Ministry chose to use a permit system to allocate the guided angler days for one year. The Ministry plans to implement fully the East Kootenay Angling Management Plan and the Allocation Policy in 2006.

Dr. South confirmed that some guides will find their guided angling day quota “ratcheted back” next year in order to meet the requirements of the East Kootenay Angling Management Plan and the Allocation Policy.

The Regional Manager submits that the allocation process was fair. He notes that Mr. Smith was offered a total allocation of 38 days on St. Mary River and Skookumchuck Creek, which is an increase of 6 days from his historical use of 32 guided angler days. The Regional Manager points out that in addition to the guided angler days that Mr. Smith was allocated for the classified waters, he may guide anglers on any of the approximately 1200 unclassified water bodies in the East Kootenay region.

The Regional Manager submits that the Allocation Policy supports the buying and selling of guided angler days among licensed guides. Mr. Smith can attempt to acquire guided angler days on the Elk River by buying them from another licensed guide holding an allocation of days for the Elk River.

The Panel finds that Mr. Smith has not demonstrated, on a balance of probabilities, that the allocation of guided angler days to him was unfair or unreasonable. The Panel finds that the use of historical records submitted by guides for the 5-year reference period ending with the 2003-2004 licence year is reasonable. While it is unfortunate that Mr. Smith's best year in the angling guide business was after the reference period, the Panel finds the Ministry's rationale for the reference period to be reasonable in the circumstances. Mr. Smith did not have any history of guiding on the Elk River during the reference period and therefore it was appropriate that he did not receive an allocation of base days for the Elk River.

With respect to the St. Mary River and Skookumchuck Creek, the Panel finds that the application of the formula set out in the Allocation Policy to allocate growth days was appropriate. Mr. Smith did not produce any evidence that would lead the Panel to conclude that the review panel failed to apply the formula correctly or unfairly.

Mr. Smith's suggestions about a cap on guided angler days may be worthy of consideration by the Ministry in its assessment of the pilot project and refinement of the Allocation Policy. However, it is outside the parameters of this appeal.

The Panel is concerned that the Regional Manager appears to have allotted more guided angler days by permit for the 2005-06 licence year than authorized by section 11(3)(b) of the *Regulation*, however the Panel does not make any finding on this point.

As noted above, the Panel's finding on the first issue decides the appeal. However, the Panel finds that if the allocation of guided angler days were in accordance with the *Regulation*, the number of days allocated by the Regional Manager to Mr. Smith would have been fair and appropriate in the circumstances.

DECISION

In making this decision, the Panel has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

For the reasons stated above, the Panel rescinds the Permit.

The appeal is allowed.

"Cindy Derkaz"

Cindy Derkaz, Panel Chair
Environmental Appeal Board

January 5, 2006