



Province of  
British Columbia

# Environmental Appeal Board

Fourth Floor 747 Fort Street  
Victoria British Columbia  
**Telephone:** (250) 387-3464  
**Facsimile:** (250) 356-9923

Mailing Address:  
PO Box 9425 Stn Prov Govt  
Victoria BC V8W 9V1

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## DECISION NO. 2005-WIL-027(a)

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

<b>BETWEEN:</b>	Gordon Silverthorne	<b>APPELLANT</b>
<b>AND:</b>	Regional Manager	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Cindy Derkaz, Panel Chair	
<b>DATE:</b>	November 18, 2005	
<b>PLACE:</b>	Cranbrook, BC	
<b>APPEARING:</b>	For the Appellant: Gordon Silverthorne For the Respondent: Wayne Stetski	

## APPEAL

This is an appeal of the June 17, 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 CB0510875 (the "Permit") to Gordon Silverthorne pursuant to section 70(1)(b) of the *Wildlife Act*. The Permit authorizes Mr. Silverthorne to guide anglers from June 17, 2005 to March 31, 2006 as follows:

- on the Bull River, for 2 guided angler days<sup>1</sup>;
- on the Elk River, for 218 guided angler days;
- on the St. Mary River, for 4 guided angler days; and
- on the Wigwam River, for 23 guided angler days.

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<sup>1</sup> 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.

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

Mr. Silverthorne requests that the Board amend the Permit to increase his guided angler days on each of the Bull River, Elk River and Wigwam River.

## **BACKGROUND**

The Bull River, Elk River, St. Mary River and Wigwam 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. Silverthorne is the owner-operator of Kootenay Fly Shop & Guiding Co. Ltd. in Fernie, BC. The company's business includes a tackle shop, guided angling trips (primarily on the Elk River and its tributaries), accommodation and fly fishing educational programs.

Mr. Silverthorne started the business in 1996 and is the licensed angling guide for the company. He stated that the company relies on the sport fishing industry "as its primary and only source of income." It operates year-round, employing one full-time person and up to 5 seasonal workers.

Kootenay Fly Shop & Guiding Co. Ltd. actively promotes recreational fly fishing and strives to advance the sport locally, provincially and internationally. Over the years, the company has initiated and/or supported a number of community projects, including: fly tying courses for local elementary schools; BC Family Fishing Day every June; the Fernie boat launch; the founding of the first local women's fly fishing club; participation in a women's wellness clinic; hosting a breast cancer retreat in Fernie through the "Casting for Recovery" program; and numerous donations to local not-for-profit organizations.

The company also offers instructional programs that include an opportunity to fish on the Elk River. It has positioned itself as "an educational center for fly fishing" to promote fly fishing as a healthy Canadian lifestyle and to foster stewardship of rivers and the environment.

In addition to its activity in the Fernie area, Kootenay Fly Shop & Guiding Co. Ltd. markets its services extensively throughout Canada, the United States, and Europe. It is currently developing weekly trips to Fernie through two different tour operators in France.

Mr. Silverthorne stated that the company's investment in the business exceeds \$500,000 in property, buildings, equipment and marketing costs.

The number of guided angler days allocated to Mr. Silverthorne directly affects the company's ability to offer guided angler expeditions.

Mr. Silverthorne also has a business in Mexico and spends between 6 and 7 months a year in that country.

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 and Wigwam 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 survey<sup>2</sup>, 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;

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

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.

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
<b>Class II Inland Waters (non-anadromous)</b>						
<b>REGION 4</b>						
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) <sup>1</sup>	No limit	1 250	April 1	March 31	Exempt	
St. Mary River (upstream of St. Mary Lake) <sup>1</sup>	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, 2005<sup>3</sup>.

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.

Mr. Burrows stated that drafts of the Quality Waters Strategy Resource Document were circulating in the Ministry, following the Ministerial Order. Mr. Burrows used the drafts to develop the East Kootenay Angling Management Plan, outlined in the December 2003 Status Report.

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.

During the first week of February 2005, the Ministry sent application packages, by registered mail, to 81 persons potentially interested in acquiring guided angler days on classified waters in the East Kootenay region. The accompanying cover letter, dated January 28, 2005, 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 [Classified Waters Guided Angler Day Application Form – East Kootenay Angling Management Plan]
- 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

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<sup>3</sup> 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.

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.

...

The East Kootenay Angling Management Plan did not come into force for the 2005-06 licence year. Mr. Burrows stated that the Ministry planned to re-convene the East Kootenay Angling Management Plan Ad Hoc Committee in December 2005 to determine if the recommendations contained in the December 2003 Status Report should be endorsed or modified. The Ministry plans to have the East Kootenay Angling Management Plan in place for the 2006-07 licence year.

Mr. Silverthorne was in Mexico when he received an email from the Ministry advising potential applicants about the allocation process. On February 21, 2005, Mr. Silverthorne sent an email from Mexico to Dr. Nancy South, PhD., Manager, Revenue and Analysis, Fish and Wildlife Recreation and Allocation Branch of the Ministry, advising that he would be out of the country on business until April 15, 2005 and requesting an extension of time to complete an application for guided angler days.

Following an exchange of emails and a telephone call, Mr. Silverthorne and the Ministry agreed that Danette Salter, bookkeeper for Kootenay Fly Shop & Guiding Co. Ltd., would complete and file the application form on behalf of Mr. Silverthorne. Mark Messmer, Senior Economist, Fish and Wildlife Recreation and Allocation Branch, assisted Ms. Salter in completing and submitting the application form.

The Ministry received 42 applications, including Mr. Silverthorne's, for guided angler days on classified waters in the East Kootenay region in 2005.

From April 19 to 20, 2005, a three-person review panel chaired by Dr. South, reviewed the 42 applications. The review panel used the criteria in the December 2003 Status Report East Kootenay Angling Management Plan and the Allocation Policy to determine the number of guided angler days to 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 the 42 applicants a letter setting out an "interim" allocation (subject to review after one year) of guided angler days. The Regional Manager subsequently determined that the *Regulation* does not provide for the allocation of guided angler days on an interim (time limited) basis and sent the applicants another letter dated June 2, 2005, advising that permits would be issued for their guided angler days for 2005-06.

Mr. Silverthorne maintains that the Ministry's allocation of guided angler days to him was based on erroneous information contained in the application form completed by Ms. Salter. He contacted the Ministry on a number of occasions to rectify the problem.

On June 16, 2005, at the request of Mr. Silverthorne, the Ministry convened a conference call to discuss the offer to him of guided angler days under permit. Mr. Silverthorne, a business associate of Mr. Silverthorne, Dr. South, Al Martin (Director, Fish and Wildlife Branch) and Bob Keating (Constituency Assistant to the Hon. Bill Bennett, MLA for East Kootenay), participated in the conference call.

On June 17, 2005, the Regional Manager issued Non-Tidal Angling Guide Licence AGCB0514396 to Mr. Silverthorne. The licence is valid from the date of issue to March 31, 2006. Also on June 17, 2005, the Regional Manager issued the Permit to Mr. Silverthorne. The Permit is a one-page document that states in part:

For Gordon Silverthorne and his or her assistant guides to guide anglers on the **Bull River**. This permit authorizes the use of **2** guided angler days.

AND

For Gordon Silverthorne and his or her assistant guides to guide anglers on the **Elk River (excluding the following tributary: Coal Creek below the old M.F. & M. Railway bridge located about 7 km above the Elk River)**. This permit authorizes the use of **218** guided angler days.

AND

For Gordon Silverthorne and his or her assistant guides to guide anglers on the **St. Mary River (downstream from St. Mary Lake)**. This permit authorizes the use of **4** guided angler days.

AND

For Gordon Silverthorne and his or her assistant guides to guide anglers on the **Wigwam River**. This permit authorizes the use of **23** 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 Gordon Silverthorne 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. Silverthorne appealed the Permit to the Board on the grounds that:

- there were substantive errors in the data used by the Ministry to allocate his guided angler days for the 2005-06 licence year;
- the allocation process is unfair because it fails to take into account the differences in guiding businesses, and in particular it does not recognize his company's large investment and unique year-round business;
- in order to continue to operate his angling guide business, he requires at least the same number of guided angler days that he was using prior to the angling management plan;
- there should be a provision for instructional days in addition to the allocated guided angler days; and
- there must be certainty in the allocation of guided angler days for his business to be sustainable and to enable effective planning and marketing of the company's angling guide services.

Mr. Silverthorne asks the Board to amend the Permit to increase his total guided angler days to 500, as follows: 50 guided angler days on the Bull River, 75 guided angler days on the Wigwam River and the balance of 371 days on the Elk River.

Mr. Silverthorne stated that the St. Mary River is a 2-hour drive from Fernie and his clients do not want to travel that distance to go fishing. He did not guide any clients on the St. Mary River in 2005. Mr. Silverthorne is not seeking any increase in his allocation of guided angler days on the St. Mary River.

Although Mr. Silverthorne did not raise the issue, the Panel asked the Regional Manager to address the issue of his jurisdiction under the *Wildlife Act* and/or the *Regulation* to award guided angler days by permit. The Regional Manager made submissions on this point during 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. Silverthorne was correct and fair 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 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*.

This issue was before the Board in *Randall Smith v. Regional Manager* (Environmental Appeal Board, Appeal No. 2005-WIL-019(a), January 5, 2006) (unreported) (hereinafter *Smith*).

Mr. Smith was one of the 42 angling guides who applied for guided angler days on classified waters in the East Kootenay region in 2005. Mr. Smith, like Mr. Silverthorne, appealed the Regional Manager's allocation of guided angler days to him by permit for the 2005-06 licence year. The application for guided angler days and the Regional Manager's decision-making process appear to be identical in both appeals. Similar to the *Smith* case, the rivers at issue in the Silverthorne appeal (namely the Bull River, Elk River and the Wigwam River) became classified waters on February 11, 2005, when Schedule A to the *Regulation* was amended.

This Panel adopts the Board's reasons and conclusions in respect to this issue, set out in detail in the Discussion and Analysis section (pages 14 to 17) of the *Smith* decision. For convenience, part of that discussion and analysis is repeated here.

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).

...

... The Panel finds that the entire process undertaken by the Ministry was founded upon the assumption that the East Kootenay Angling Management Plan would come into force 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.

...

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.

As stated above, these findings apply equally to Mr. Silverthorne's case.

Mr. Silverthorne's Non-Tidal Angling Guide Licence AGCB0514396 issued June 17, 2005, is valid to March 31, 2006. As in the *Smith* case, Mr. Silverthorne's licence does not state whether it is for classified or unclassified waters.

Also similar to the *Smith* case, the Panel finds that there is no area clearly endorsed on Mr. Silverthorne'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, which includes the identical provision (condition 6) found in Appendix A to Mr. Smith's licence set out above.

An "Angling Guide Operating Plan Unclassified Waters Only", approved by the Regional Manager on June 16, 2005, is attached to Mr. Silverthorne's licence. The plan lists a number of waters in the East Kootenay region as "waters fished", but does not include any classified waters.

The Panel finds that it does not need to determine if, by condition 6 of Appendix A of Mr. Silverthorne's licence, the "waters fished" listed in his approved operating plan are "areas endorsed on his angling guide licence" within the meaning of section 70(1)(b). As in the *Smith* appeal, the Panel finds that the Permit does not operate to authorize Mr. Silverthorne to "guide in an area other than that endorsed on his angling guide licence." Rather, it purports to allocate guided angler days to Mr. Silverthorne 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.

As in the *Smith* case, this Panel has also considered the Regional Manager's authority to issue a permit under section 19 but finds that, even 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.



The Permit expires on March 31, 2006. The Regional Manager stated that "in order to limit the economic impact on Angling Guides for the 2005 season I used a permit process to phase in implementation of the legal allocation of rod days... ." The Ministry expects to allocate guided angler days for the 2006-07 licence year in accordance with an approved angling management plan. In future, the allocation of guided angler days will be a condition of an angling guide licence rather than by permit.

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. Silverthorne was correct and fair in the circumstances.**

The Panel's decision to rescind the Permit concludes the appeal. However, both Mr. Silverthorne and the Regional Manager addressed the issue of whether the allocation of guided angler days to Mr. Silverthorne was correct and fair 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. Silverthorne submits that there were substantive errors in the data relied on by the Ministry to allocate his guided angler days for the 2005-06 licence year. He stated that, because he was in Mexico when the Ministry sent out the application form, he arranged for his bookkeeper, Ms. Salter, to complete the form and to provide supporting documentation. He testified that Ms. Salter is not fully familiar with the business and erred when she extrapolated the historical information required for the application form.

In order to follow Mr. Silverthorne's submission on this point, it is necessary to briefly summarize the provisions of the Allocation Policy. 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 years from the 1999-00 licence year to and including the 2003-04 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 ("growth days"), taking into account a guide's current investment in the region and business development. Angling guides may apply for an allocation of growth days when they complete the application form;
- 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.

Mr. Silverthorne did not apply for any growth days. He relied on his past use of the classified waters to determine his allocation of base days.

Mr. Silverthorne's application form states the number of guided angler days actually used during the 5-year reference period as follows:

**TABLE 1: FOR EXISTING GUIDES ONLY AS DEFINED ON PAGE 2 OF THIS APPLICATION**

Number of Guided Angler Days Actually Used (you must provide documentation to verify the year in which the greatest number of guided angler days was used)					
River/Water	April 1 <sup>st</sup> , 1999 to March 31 <sup>st</sup> , 2000	April 1 <sup>st</sup> , 2000 to March 31 <sup>st</sup> , 2001	April 1 <sup>st</sup> , 2001 to March 31 <sup>st</sup> , 2002	April 1 <sup>st</sup> , 2002 to March 31 <sup>st</sup> , 2003	April 1 <sup>st</sup> , 2003 to March 31 <sup>st</sup> , 2004
Bull					3
Elk		296	282	199	165
Skookumchuk					
St. Mary (downstream from St. Mary Lake only)		4	0	0	0
Wigwam		22	27	10	6

Ms. Salter's covering letter, sent to the Ministry by fax on March 7, 2005, states:

Please find enclosed a copy of "Classified waters guided angler day application form, East Kootenay Angling Management Plan," and copies of financial statements and letter from Ken MacLeod, Chartered Accountant signifying the amount of days is in accordance with their financial records, **the days were based on clients booking forms.**

We have supplied some financial statements working toward Table 2 & 3, however, Gord does not wish to apply for more days at this point.

[emphasis added]

The enclosed letter from Mr. MacLeod, dated March 7, 2005, states in part:

**Re: Review of Records**

*As requested I have reviewed the records of the Company and advise as follows:*

**Angler Guiding Days**

2003	174 Days	Revenue	277,588
2001	309 Days	Revenue	383,933
2000	322 Days	Revenue	326,950

[bold and italics in original]

Mr. Silverthorne testified that Ms. Salter used the till [cash register] receipts to determine the number of guided angler trips that were sold during the reference period. He submits that this has resulted in a very significant error because typically more than one person is guided on an angler trip. Each person being guided on a trip represents one guided angler day.

Mr. Silverthorne stated that almost 95% of guided angler trips consist of two anglers and a guide. On a few trips there may be just one angler and a guide but other trips may have three anglers and a guide.

According to Mr. Silverthorne, the 2001-02 licence year was the "peak" year for the company's angling guiding business. At the hearing, Mr. Silverthorne produced a letter dated November 17, 2005 from Mr. MacLeod, C.A., that states:

*To Whom It May Concern*

**Re: Angler Guide Days/Revenue**

*Please be advised that the information reported on my letter of March 7, 2005 was based on information regarding rod days which is not correct.*

*The 2001 angling rod days of 309 is incorrect and represents day trips.*

*The actual guiding revenue for 2001 was \$120,869 which reflects actual rod days of 537.*

...

[bold and italics in original]

Mr. Silverthorne explained that the revenue of \$383,933, previously confirmed by Mr. MacLeod for 2001, included income from the tackle shop and other business activities in addition to the company's angling guide services. He testified that the figure supplied by Mr. MacLeod on November 17, 2005 of \$120,869 is the correct amount of revenue generated from guiding anglers in 2001. Mr. Silverthorne stated that to determine the number of guided angler days (Mr. MacLeod uses the term "rod days") for 2001, Mr. MacLeod divided the revenue of \$120,869 by \$435, representing the approximate cost of an angler trip. The assumption being that each angler trip would use two guided angler days. The Panel notes that Mr. MacLeod must have used \$450 as the value of an angler trip to reach the figure of 537 guided angler days in 2001. Mr. MacLeod's correspondence does not indicate which rivers were used for the 537 guided angler days in 2001.

Mr. Silverthorne testified that not all of the 537 guided angler days used in 2001 were on the Elk River. He would have used a number of the days on the Wigwam River and on other tributaries of the Elk River.

Dr. South testified about the process used by the three-person review panel to allocate guided angler days in the East Kootenay region for the 2005-06 licence year. The review panel applied the criteria established by the December 2003 Status Report East Kootenay Angling Management Plan and the Allocation Policy.

For each of the Elk River and the Wigwam 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 Status Report East Kootenay Angling Management Plan (and Schedule A of the *Regulation*), there are 2950

guided angler days available for allocation on the Elk River and 150 days available on the Wigwam River. The number of base days requested by existing guides, and verified by historical angling guide reports, were 3184 on the Elk River and 426 on the Wigwam River.

The review panel concluded that both the Elk River and the Wigwam River are "over-subscribed". There are no "surplus" days available for allocation as "growth" days for existing guides or to new angling guides on either river. The only criterion used by the review panel to allocate guided angler days on the Elk River and the Wigwam River was the historical use of the waters by existing angling guides during the reference period.

Section 13(b) of the *Regulation* requires all angling guides, as a condition of their angling guide licences, to file reports with the Ministry:

**Conditions of licence**

**13** (1) The conditions of an angling guide licence are that the holder

...

(b) report to the regional manager on or before the date specified in his licence,

- (i) the number of resident, non-resident and non-resident alien angler days guided,
- (ii) the species, number and location of fish caught by each class of person the holder or holder's assistant guides have guided for fish, and
- (iii) the classified waters licence number of each guided angler on a classified water,

...

The reports must be filed annually.

The review panel used the angling guides' annual reports to verify the historical use of guided angler days stated in their applications. Dr. South testified that in Mr. Silverthorne's case, there were discrepancies between the number of guided angler days stated in his application and the annual reports he had submitted to the Ministry.

Mr. Silverthorne's application for the 2000-01 licence year, stated the number of guided angler days actually used on the Elk River to be 296. After submitting the application, he requested that the Ministry increase this number to 332. From Mr. Silverthorne's application form, as amended, the 2000-01 licence year appears to be his best year on the Elk River during the 5 year reference period. According to the annual reports, his best year on the Elk River was the 2001-02 licence year, when he used 222 guided angler days.

For the Wigwam River, the application stated that 27 guided angler days were used in the 2001-02 licence year. At Mr. Silverthorne's request, the Ministry increased this number to 48. According to the annual reports, he used 33 guided angler days that year, which was his best year on the Wigwam River.

For the Bull River, the application stated that he used 3 guided angler days in the 2003-04 licence year. According to the annual reports, he used 2 guided angler days that year, which was his best year on the Bull River.

The review panel considered the financial information submitted by Mr. Silverthorne and concluded that it did not clarify his historical use of guided angler days. There appears to be no relationship between the amount of annual revenue and the number of days used in a given year. Mr. Silverthorne did not produce copies of any annual reports, or any other documentation, to support the number of guided angler days he claims to have used. The review panel relied on the information contained in the annual reports to recommend Mr. Silverthorne's allocation of guided angler days.

Dr. South stated that 24 of the 42 guides who applied for an allocation of guided angler days in 2005, received days on the Elk River. Mr. Silverthorne received 218 days which makes him the sixth largest holder of guided angler days on the Elk River. She explained that Mr. Silverthorne was allocated fewer days than his verified historical use of 222 days because the Elk River is over-subscribed.

For the Wigwam River, 20 of the 42 applicants were allocated guided angler days. The Wigwam River is heavily over-subscribed: verified use by existing guides totals 450 days and 150 days are available for allocation. Dr. South stated that, with an allocation of 23 days, Mr. Silverthorne is the fifth largest holder of guided angler days on the Wigwam River.

At the hearing, Mr. Silverthorne relied on the November 17, 2005 letter from his accountant to prove that he actually used 537 guided angler days in the 2001-02 licence year on the Elk River, Wigwam River and other tributaries of the Elk River. He did not provide any evidence to establish the number of days used on each river.

The Panel finds that Mr. Silverthorne has failed to establish, on the balance of probabilities, the number of guided angler days he actually used on each of the Elk River, the Wigwam River and the Bull River during the 5-year reference period. The Panel does not find the calculation produced by Mr. Silverthorne's accountant, Mr. MacLeod, to be conclusive. It fails to specify the number of guided angler days used by Mr. Silverthorne on each of the classified waters.

The Panel finds that it is reasonable for the Ministry to require specific historical information, supported by documentation, in an application for guided angler days. All angling guides are required to collect and submit this information to the Ministry annually as a condition of their angling guide licences (and pursuant to section 13 of the *Regulation*). This information should, by law, be accurate and the Ministry should be able to rely upon it to calculate the base days. When a licensee seeks to rely upon a different number than in his or her annual report, the Panel finds that it is appropriate for the Ministry to require information that can be verified.

Mr. Silverthorne did not provide any specific evidence about the number of clients he guided on each of the Elk River, Wigwam River and Bull River during the reference period. It is reasonable to expect that a well-established guiding business would have appropriate records from which it could be easily determined how many clients were guided on a river in each year. Some examples of such records are: client booking forms, liability waiver forms, daily logs, and

appointment diaries. The Panel notes that although Ms. Salter stated in her March 7, 2005 letter that the information in the application form was based on "client booking forms", Mr. Silverthorne did not produce these forms.

The Panel finds that, in the absence of better evidence, it was reasonable for the review panel to rely on the annual reports filed by Mr. Silverthorne. His angling guide licence and section 13 of the *Regulation*, clearly require him to report the number of angler days guided each year. It is reasonable to conclude that Mr. Silverthorne accurately reported this information each year.

The Panel finds that the allocation of base days to Mr. Silverthorne was correct, given the information provided to the Ministry.

Although there were no growth days available for allocation on the Elk River and the Wigwam River, the Bull River is not fully allocated. Pursuant to the Status Report East Kootenay Angling Management Plan (and Schedule A of the *Regulation*), 500 guided angler days are available for allocation on the Bull River, 481 of which were allocated for the 2005-06 licence year. The Panel notes that Mr. Silverthorne did not apply for any growth days this year. However, he may consider applying for an allocation of growth days on the Bull River in the future.

Mr. Silverthorne submits that the allocation process is unfair because it fails to take into account the differences in guiding businesses. In particular, it does not recognize his company's large investment, its unique year-round business and contribution to the community. He notes that many angling guides operate home based businesses without a large capital investment. He points out that his business has much higher operating costs than a home based business and submits that this should be taken into consideration in the allocation of guided angler days. Mr. Silverthorne also submits that there must be certainty in the allocation of guided angler days for his business to be sustainable and to enable effective planning and marketing of the company's angling guide services.

In addition, Mr. Silverthorne submits that an angling management plan should provide for instructional days. He uses up to 80 guided angler days per year instructing classes and family groups on the art of fly fishing. He stated that the instructional days do not focus on catching fish and the students do not use the river for most of the day. However, under the present legislation and the proposed East Kootenay Angling Management Plan, any use of the river by a student during an instructional day is the use of one guided angler day. Mr. Silverthorne submits that in order for the sport of fly fishing to flourish, new anglers must be introduced to, and educated about, the sport.

Dr. South stated that the Allocation Policy attempts to balance the competing interests of existing guides and new entrants to the guiding business. Existing guides are allocated base days in accordance with their historical use of the classified waters without considering the guide's business investment. If there are surplus days available on a classified water, a guide's business investment and number of years in business are considerations in determining the number of days the guide may be allocated as growth days, in addition to his or her base days.

Dr. South noted that when the Ministry fully implements the Allocation Policy for the 2006-07 licence year, guided angler days will be issued for a term of 20 years, renewable for another 20 years, after 10 years. She also noted that the Allocation

Policy supports the buying and selling of guided angler days among licensed guides, subject to the Regional Manager's approval.

The Regional Manager submits that the allocation process was fair. He states that the process provides benefits to the greatest number of angling guides, recognizes the historical use of the classified waters by angling guides, and is based on information that can be verified. He points out that in addition to the guided angler days that Mr. Silverthorne was allocated for the classified waters, he may guide on the numerous unclassified waters in the East Kootenay Region.

The Panel finds that Mr. Silverthorne has not demonstrated, on a balance of probabilities, that the allocation of guided angler days to him under the Permit was incorrect or unfair. The Panel finds that the application of the formula set out in the Allocation Policy to allocate base days to Mr. Silverthorne, was appropriate. Mr. Silverthorne did not produce any evidence that would lead the Panel to conclude that the review panel failed to apply the formula correctly or fairly.

The Panel finds that, once fully implemented, the provision for a 20-year term will provide business certainty upon which angling guides can plan and market their services.

Mr. Silverthorne's submissions about a provision for instructional days may be worthy of consideration by the Ministry in its assessment of the proposed East Kootenay Angling Management Plan and the Allocation Policy. The Panel also notes that Mr. Silverthorne could carry out his instructional activities on unclassified waters and, accordingly, not compromise his allocated days on classified waters.

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. Silverthorne would have been correct and fair 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 24, 2006