



# Environmental Appeal Board

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## **DECISION NOS. 2013-WAT-015(a), 017(a), 018(a) and 019(a)**

In the matter of four appeals filed under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

<b>BETWEEN:</b>	Greg Whynacht Ian R. Poyntz Catherine Willows Woodrow Michael Dix (on behalf of himself and the Cowichan Lake Recreational Community Inc.)	<b>APPELLANTS</b>								
<b>AND:</b>	Deputy Comptroller of Water Rights	<b>RESPONDENT</b>								
<b>AND:</b>	Catalyst Paper Corporation	<b>THIRD PARTY</b>								
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board: Alan Andison, Panel Chair									
<b>DATE:</b>	Conducted by way of written submissions concluding on August 22, 2013									
<b>APPEARING:</b>	For the Appellants: <table><tbody><tr><td>Greg Whynacht:</td><td>Greg Whynacht</td></tr><tr><td>Ian R. Poyntz:</td><td>Ian R. Poyntz</td></tr><tr><td>Catherine Willows Woodrow:</td><td>Catherine Willows Woodrow</td></tr><tr><td>Michael Dix:</td><td>Michael Dix</td></tr></tbody></table> For the Respondent: Brian Symonds For the Third Party: Janice H. Walton, Counsel		Greg Whynacht:	Greg Whynacht	Ian R. Poyntz:	Ian R. Poyntz	Catherine Willows Woodrow:	Catherine Willows Woodrow	Michael Dix:	Michael Dix
Greg Whynacht:	Greg Whynacht									
Ian R. Poyntz:	Ian R. Poyntz									
Catherine Willows Woodrow:	Catherine Willows Woodrow									
Michael Dix:	Michael Dix									

## **PRELIMINARY ISSUE OF JURISDICTION**

### **APPLICATION**

[1] This application relates to four appeals filed against a May 30, 2013 Order of Approval (the "Order") issued by the Deputy Comptroller of Water Rights, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), to Catalyst Paper Corporation ("Catalyst"). The Order revised the requirements governing the operation of certain storage works on Cowichan Lake. The storage works are authorized and regulated under conditional water licences held by Catalyst.

[2] In a letter dated July 30, 2013, Catalyst questions whether these appeals were filed outside of the 30-day appeal period established by section 92(4) of the

*Water Act*. If so, the Board has no jurisdiction over the appeals and they must be dismissed.<sup>1</sup>

[3] The Board has decided this issue on the basis of written submissions.

## **BACKGROUND**

[4] Cowichan Lake is a large freshwater lake located on southern Vancouver Island, British Columbia. It is located along the Cowichan Valley in the Cowichan Valley Regional District, and is the source of the Cowichan River. Catalyst operates a weir which regulates water flow from Cowichan Lake into the Cowichan River for much of the year pursuant to certain conditional water licences. The Order describes these licences briefly as follows.

[5] Conditional water licence 22864 authorizes the diversion and use of a certain amount of water from Cowichan River for industrial purposes; specifically, the Croften pulp mill. Conditional water licences 23085 and 29542 (together, the “storage licences”) authorize the storage of water in Cowichan Lake to support the industrial purpose licence. The works authorized in the storage licences are a dam, consisting of four control gates, an overflow control weir on the dam and boat lock, which are located at or near the outlet of Cowichan Lake. According to the Order, the operational regime for water storage in Cowichan Lake has been governed by a “rule curve” which has been in place since 1990.

[6] In or about 2007, changes were proposed by the Cowichan Valley Regional District to the 1990 operating rule curve. It requested that the Province implement a “rule band” protocol for managing Cowichan Lake in place of the rule curve.

[7] After a process of notification and consultation, the Deputy Comptroller issued the Order on May 30, 2013.

[8] Catalyst received a copy of the Order by email at 4:35 pm on May 30, 2013.

[9] The Deputy Comptroller sent letters dated June 4, 2013 to “objectors” by registered mail, notifying the recipients of the May 30, 2013 Order. The objectors included the subject Appellants.

[10] The Deputy Comptroller advises that the registered letters were received by the subject Appellants as follows:

Michael Dix (and Cowichan Lake Recreational Community Inc.)	June 5, 2013
Ian Poyntz	June 5, 2013
Greg Whynacht	June 5, 2013
Catherine Willows Woodrow	June 6, 2013

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<sup>1</sup> Two additional appeals were filed against the Order: one by Ellen Weir (Appeal No. 2013-WAT-013), and one by D’Arcy Lubin (Appeal No. 2013-WAT-016). However, Catalyst accepts that these two appeals were filed within the 30-day appeal period.

[11] In addition to advising of the Order, the Deputy Comptroller's letter also advised the recipients of their right to appeal the Order to the Board, as follows:

A right of appeal from my decision lies to the Environmental Appeal Board. Notice of an appeal must be:

1. In writing,
2. Include grounds for appeal,
3. Be directed by registered mail to ... [the Board's mailing address]

OR

4. Personally delivered to the office ... [the Board's street address],
4. Delivered within 30 days of receiving this letter, and
5. Be accompanied by a fee of \$25, payable to the Minister of Finance.

[12] The Board received six appeals, four of which are the subject of this jurisdictional issue. The subject appeals are as follows:

<b>APPEAL NO.</b>	<b>APPELLANT(S)</b>	<b>DATE OF NOTICE OF APPEAL</b>	<b>DATE RECEIVED BY THE BOARD</b>
2013-WAT-015	Whynacht, Greg	July 2, 2013	July 3, 2013
2013-WAT-017	Poyntz, Ian R.	July 2, 2013	July 3, 2013
2013-WAT-018	Willows Woodrow, Catherine	July 3, 2013	July 3, 2013
2013-WAT-019	Dix, Michael (& Cowichan Lake Recreational Community Inc.)	Undated	July 4, 2013

[13] Each of these Appellants are lakeshore property owners. Among other things, their respective notices of appeal raise concerns that the Order will result in higher water levels on their properties.

## **ISSUES**

[14] The sole issue to be decided is whether the Appellants filed their respective appeals within the statutory time period.

## **RELEVANT LEGISLATION**

[15] The appeal provisions are set out in section 92 of the *Water Act*. The relevant sections are as follows.

### **Definitions**

**1** In this Act:

...

“order” includes a decision or direction, whether given in writing or otherwise;

...

### **Appeals to Environmental Appeal Board**

**92** (1) Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by

- (a) the person who is subject to the order,
- (b) an owner whose land is or is likely to be physically affected by the order, or
- (c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

...

(4) The time limit for commencing an appeal is 30 days after notice of the order being appealed is given

- (a) to the person subject to the order, or
- (b) in accordance with the regulations.

(5) For the purposes of an appeal, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on

- (a) the 14th day after the notice was deposited with Canada Post, or
- (b) the date on which the notice was actually received by the person, whether by mail or otherwise,

whichever is earlier.

(6) An appeal under this section

- (a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*, and
- (b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

...

[Emphasis added]

### **DISCUSSION AND ANALYSIS**

[16] Catalyst submits that section 92(4) of the *Water Act* requires appeals to be filed within 30 days “after notice of the order being appealed is given to the person who is subject to the order”, and that the Board has no power under the *Act* to extend this time limit.

[17] Catalyst submits that it is the only “person subject to” this Order (*Watutco Enterprises Ltd. et al. v. Deputy Water Comptroller* (2003-WAT-018(a), March 4, 2005): there is no other party named in or required by the Order to take any action. As such, Catalyst argues that the appeal period ended 30-days after it received notice of the Order. In this regard, Catalyst states that it received the Order at 4:35 pm on May 30, 2013; therefore, the 30-day appeal period expired on June 30, 2013. However, as June 30th was a Sunday and July 1st was a statutory holiday, according to section 25 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, the deadline for the appeals to be filed was Tuesday, July 2, 2013. Since Mr. Whynacht, Mr. Poyntz, Ms. Willows Woodrow and Mr. Dix filed their respective appeals on either July 3rd or July 4th, 2013, Catalyst argues that the Board does not have jurisdiction over their appeals: they were filed out of time.

[18] Mr. Dix submits that the Deputy Comptroller’s letter states that he had 30-days to appeal from the date that he received the Deputy Comptroller’s letter. Since he signed for the registered letter on June 5, 2013, and filed his notice of appeal on July 4, 2013, he met the 30-day appeal period. Mr. Whynacht, Ms. Willows Woodrow and Mr. Poyntz also state that they followed the directions provided by the Deputy Comptroller and that their appeals were filed in time and should be accepted by the Board.

[19] Although some of the Appellants also made submissions on how they are affected by the Order, their standing to appeal is not in question at this time. The sole question is whether they have filed their appeals within the statutorily imposed deadline.<sup>2</sup>

[20] The Deputy Comptroller submits that, while Catalyst is clearly a person subject to the Order and the 30-day requirement for Catalyst to appeal expired on July 2, 2013, the deadline for the objectors is not the same. The Deputy Comptroller submits that the appeal provisions should be given a purposive interpretation. If this is done, the people who are “subject to the order” would extend to riparian owners as a class of legal objectors who are, like Catalyst, also subject to the Order. The Deputy Comptroller submits that a riparian owner is subject to this Order because the regulation of the levels of Cowichan Lake potentially affects the land of riparian owners around the lake. Therefore, these people should be given the same amount of time as is given to the person named to the Order, i.e., 30-days from their notice of the Order.

[21] In support, the Deputy Comptroller references a number of previous Board decisions, all of which addressed the section of the *Water Act* regarding who can appeal (who has “standing” to appeal), as opposed to the wording of section 92(4) and the meaning of the words “the person subject to the order” in that section. It appears that the Deputy Comptroller provided those cases to show that the *Act* gives a number of different classes of people standing to appeal due to the potential impact that a water licence or other type of order may have on their interests, and

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<sup>2</sup> D’Arcy Lubin also made a submission in support of his appeal (2013-WAT-016) being filed within the 30-day time period. However, as stated in the previous footnote, Catalyst has not challenged Mr. Lubin’s appeal as it was received by the Board on July 2, 2013. Therefore, the Board need not discuss his submission further in this decision.

that the time to appeal provision should be interpreted broadly to ensure that these classes of people are given a fair opportunity to appeal once they are notified of the licence or order.

[22] In summary, the Deputy Comptroller submits that these Appellants had 30 days from their notice of the Order to file an appeal. However, if the Board finds that it does not have jurisdiction over these appeals, the Deputy Comptroller suggests that the Board exercise its discretion to add them as participants to the two appeals that have not been challenged by Catalyst (i.e., the appeals by Ms. Weir and Mr. Lubin).

[23] In its reply to the Deputy Comptroller's submissions, Catalyst argues that being a riparian owner or a person whose land may be physically affected by an order does not make a person "subject to an order". Even if the Appellants fall within these categories of people and have standing to appeal under section 92(1) of the *Water Act*, Catalyst states that they must still file their appeals within the statutory time period. Catalyst submits that the Deputy Comptroller's position renders the differentiation between the three categories of potential appellants in section 92(1) of the *Water Act* "without meaning".

[24] Catalyst further submits that, contrary to the Deputy Comptroller's position, the time period under section 92(4) of the *Water Act* is counted from the date that Catalyst received notice of the Order, not the date upon which these people received their notice of the Order. In this regard, Catalyst submits that the Deputy Comptroller erred in his letter to the subject Appellants. It states, "The letter should have informed the Appellants that the Appeals needed to be filed no later than July 2, 2013, as this was the last day for an appeal to be filed given that Catalyst received it by email from the Respondent on May 30, 2013." Catalyst argues that the Board does not have the power to ignore or relax the deadline despite the error in the Deputy Comptroller's letter.

[25] Finally, if the Board finds that these four appeals have been filed out of time, and given the error in the Deputy Comptroller's letter, Catalyst states that it is "prepared to support" the participation by these Appellants in the other two appeals on certain conditions.

#### *The Panel's Findings*

[26] Section 92(4) of the *Water Act* is repeated for convenience as follows:

- (4) The time limit for commencing an appeal is 30 days after notice of the order being appealed is given
  - (a) to the person subject to the order, or
  - (b) in accordance with the regulations.

[27] Although section 101(2)(d) of the *Act* gives the Lieutenant Governor in Council express power to may make regulations "(d) specifying how notice of a decision may be given for the purposes of section 92(4)(b) [*appeals to Environmental Appeal Board*]", no regulation has even been created. Therefore, the Appellants must meet the 30-day limitation period in subsection 92(4)(a) for

their appeals to be accepted by the Board. As noted by Catalyst, the Board has no authority to extend the time limit for filing an appeal.

[28] In order to determine the meaning of “the person subject to the order”, the Board has considered section 8 of the *Interpretation Act* which states:

- 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[29] In doing so, the Board notes that the Legislature has given the following three groups or classes of people standing to appeal decisions and directions under the *Water Act* in section 92(1):

- (a) the person who is subject to the order,
- (b) an owner whose land is or is likely to be physically affected by the order, or
- (c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

[30] The subject Appellants are all riparian owners and/or owners whose land is or is likely to be physically affected by the Order. If the Board accepts Catalyst’s argument that “the person subject to the order” in section 92(4) is limited to the person named in or required by the Order to take any action, then the 30-day limitation period would necessarily depend on when Catalyst received notice of the Order. Based upon the evidence provided, the Deputy Comptroller sent the Order and a cover letter to Catalyst, by email, at 4:35 pm on Thursday, May 30, 2013. The Panel agrees with Catalyst’s analysis that 30-days from this date is July 2, 2013. If this interpretation of section 92(4) is accepted as applying to all appeals of the Order, then three of the Appellants filed their appeals one day late and one filed his appeal two days late. All four of the appeals would, therefore, have to be dismissed as beyond the jurisdiction of the Board.

[31] However, the Deputy Comptroller sent separate letters by registered mail to the subject Appellants and advised them that they had 30-days from receipt of his letter to appeal. The Deputy Comptroller submits that, as riparian owners, each of these Appellants are “subject to the order” because the Order has the potential to affect their land. If the Board accepts the Deputy Comptroller’s interpretation of section 92(4) of the *Water Act*, the four subject Appellants each filed their appeals within the 30-day appeal period, albeit close to the expiry of that period.

[32] In arguing that the Appellant riparian owners are not persons “subject to the order”, Catalyst cites the Board’s decision in *Watutco Enterprises Ltd. et al. v. Deputy Water Comptroller*, supra. In that case, the issue was whether one of the joint appellants (Pacific Playground Holdings Ltd.) had standing to appeal; the Board did not consider the statutory provision establishing the time to appeal. The Panel also notes that, when finding that this appellant was a “person subject to the order” because it was one of the subjects of, and was subject to, the decision in that case, the Board also noted that it was “materially impacted” by the decision.

[33] The Panel has carefully considered the legislation and the remedial objectives of the appeal provisions. If the Board accepts Catalyst's interpretation, then all other potentially affected property owners, riparian owners, and other classes of persons expressly granted standing to appeal under section 92(1) would be left in an untenable situation as they would have no idea when the limitation period would begin to run, and when it would expire. It is inconceivable that the Legislature intended to give these classes of people standing to appeal a decision, but then to leave the deadline for filing the appeal to mere speculation or guesswork. How would these people know how Catalyst was given notice of the Order (by registered mail or otherwise), or when Catalyst actually received the Order, in order to calculate their own limitation period? As a practical matter, this could render their right to appeal a decision meaningless. Given the potential importance to, and impact of *Water Act* decisions on, these classes of people, the Legislature chose to give them the right to appeal the decisions. To exercise this right, Catalyst's interpretation cannot be correct.

[34] Although the subject Appellants are riparian owners and/or owners whose land "is or is likely to be physically affected" by the Order, the evidence is that they are also, as a result of its breadth and terms, subject to the Order. Given a large and liberal interpretation of the appeal provisions, and in the absence of specific regulation dealing with notice, the Board finds that these persons can fit within more than one category for the purposes of interpreting section 92(4).

[35] Therefore, the Panel finds that the subject Appellants are persons subject to the Order and that they have filed their appeals within the applicable 30-day time period.

## **DECISIONS**

[36] The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

[37] For the reasons stated above, the applications to dismiss these four appeals for lack of jurisdiction are denied. The appeals are accepted as being filed within the 30-day appeal period.

"Alan Andison"

Alan Andison, Panel Chair  
Environmental Appeal Board

August 23, 2013

## **RECOMMENDATION**

[38] Although the Panel's decision in this case would not have eliminated all appeals of this Order, the issue raised by Catalyst highlights the potential for confusion and unfairness in other cases.



[39] The Panel recommends that the Ministry consider making a regulation under section 92(4)(b) and section 101(2)(d) of the *Water Act* to ensure that qualified appellants have clear direction on when the notice period to appeal begins.