



# Environmental Appeal Board

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## **DECISION NO. 2013-WIL-046(a) and 2013-WIL-047(a)**

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

<b>BETWEEN:</b>	Darren DeLuca	<b>APPELLANT</b>
<b>AND:</b>	Regional Manager of Fish and Wildlife	<b>RESPONDENT</b>
<b>AND:</b>	Coastal British Columbia Guide Outfitter Association	<b>PARTICIPANT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board David H. Searle, CM, QC, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on October 9, 2013	
<b>APPEARING:</b>	For the Appellant: Darren DeLuca For the Respondent: Michael Stalberg For the Participant: Eric Mikkelson	

## **APPEALS**

[1] There are two appeals being decided by this decision.

[2] On May 13, 2013, the Appellant filed two Notices of Appeal against two separate decisions of Michael Stalberg, the Regional Manager, Recreational Fisheries and Wildlife Programs, West Coast Region (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The decisions under appeal are guide outfitter licence GONA13-86152 ("licence 152"), and guide outfitter licence GONA13-86153 ("licence 153"), both dated April 16, 2013, and both valid from April 1, 2013 to March 31, 2014. The licences set a 1-year quota for Roosevelt Elk, but in different hunt zones, and each provided a 1-year 2013 Annual Harvest Guideline.

[3] The Reasons for Appeal are the same in each appeal. The Appellant maintains that, when the Regional Manager issued the above-noted licences, he:

- a. "failed to provide a 5-year quota", and
- b. "failed to provide administrative guidelines in respect to the Roosevelt Elk allocations".

[4] 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* (the "Act"). Section 101.1(5) of the *Act* provides as follows:

On an appeal, the appeal 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.

[5] The relief sought in each of the Notices of Appeal, again, was the same: "For the Regional Manager to provide a 5-year quota and administrative guidelines for Roosevelt Elk." This relief was later expanded upon by the Appellant. The Appellant now asks the Board to direct the Regional Manager to provide written reasons for his decisions, as required by section 101(1) of the *Act*, and to add one extra bull elk to his quota under licence 153.

[6] These appeals were conducted by way of written submissions.

## **BACKGROUND**

[7] The Appellant resides in Port Alberni, BC. He operates his guide outfitter business through a limited company, Vancouver Island Guide Outfitters Inc., of which he is the President, but the guide outfitter licences are issued to him in his personal capacity.

[8] The guide outfitter licences allow the Appellant to guide hunters in certain "hunt zones", all of which are located on Vancouver Island: licence 152 allows him to hunt in hunt zone 1-07A; licence 153 allows him to hunt in hunt zone 1-03A, and in part of management unit 1-05 (hunt zones 1-05A or 1-05B).

[9] By letter to the Appellant dated January 23, 2013, the Regional Manager purported to set the Appellant's "tentative" quota for the licence year 2013/14, as well as the Appellant's "tentative" allocation for the 2012 - 2016 allocation period. The following is an excerpt from that letter:

Species/Class: Bull Elk

Your tentative bull elk allocation for the 2012 – 2016 allocation period is 6 animals, with a maximum of 2 bull elk per year;

- Maximum of 1 bull elk from Hunt Zone 1-03A;
- Maximum of 2 bull elk from Hunt Zone 1-05A;
- Maximum of 1 bull elk from Hunt Zone 1-05B and,
- Maximum of 2 bull elk from Hunt Zone 1-07A.

This represents your target harvest for bull elk for the 2012 – 2016 allocation period.

Your bull elk allocation for the 2007 – 2011 allocation period was 6

animals. Your allocation was not significantly impacted by the full implementation of the Harvest Allocation Policy.

Your tentative bull elk quota for this licence year is 2 animals:

- Maximum of 1 bull elk from Hunt Zone 1-03A;
- Maximum of 1 bull elk from MU 1-05 (Hunt Zone 1-05A or 1-05B); and,
- Maximum of 1 bull elk from Hunt Zone 1-07A.

Please be aware that in harvesting your 2013/2014 quota, you must comply with your allocation and harvest guidelines for the 2012-2016 period.

If you would like to see the specific details of how I calculated your quotas for this licence year, please contact me by phone ... or by email at ....

[10] Following the above "tentative" quota for the 2013/2014 licence year, and "tentative" allocation for the 2012 – 2016 allocation period, the guide outfitter licences in question were issued on April 16, 2013, for the period April 1, 2013 until March 31, 2014. On a separate page attached to the licences, the Regional Manager provided the following quotas and harvest guidelines. For licence 152, the Appellant was given the following 1-year quota and 1-year harvest guideline:

SPECIES	QUOTA FOR 2013	2013 ANNUAL HARVEST GUIDELINES
Roosevelt Elk	1 bull elk	<ul style="list-style-type: none"> <li>• Maximum 1 bull elk from Hunt Zone 1-07A</li> </ul>

[11] For licence 153, the Appellant was given the following 1-year quota and 1-year guideline:

SPECIES	QUOTA FOR 2013	2013 ANNUAL HARVEST GUIDELINES
Roosevelt Elk	1 bull elk	<ul style="list-style-type: none"> <li>• Maximum 1 bull elk from Hunt Zone 1-03A</li> <li>• Maximum 1 bull elk from Hunt Zone 1-05 (1-05A or 1-05B)</li> </ul>

[12] The Regional Manager did not provide any written reasons when he made these April 16, 2013 quota and annual harvest guideline decisions.

[13] On appeal, the Appellant argues that:

- the Regional Manager erred in not issuing a 5-year quota for 2012 – 2016;
- the Regional Manager erred by not providing a written decision respecting his quotas, by management unit, in accordance with section 101(1) of the *Act*; and

- the Regional Manager should be directed to give reasons that include an explanation as to why he was not given a 5-year quota allocation.

[14] The Appellant also claims that he should have been given an additional quota of one bull elk under licence 153. He explains his position as follows:

8. In part (b) of my request, I am asking that the Respondent apply my Quota and Administrative Guidelines by Management Unit, as required by the allocation policy. On my Guide Outfitter Licence GONA13-86153 the Respondent has attached my Quota in the following manner.

SPECIES	QUOTA FOR 2013	2013 ANNUAL HARVEST GUIDELINES
Roosevelt Elk	1 bull elk	<ul style="list-style-type: none"> <li>• Maximum 1 bull elk from Hunt zone 1-03A</li> <li>• Maximum 1 bull elk from Hunt zone 1-05 (1-05A or 1-05B)</li> </ul>

9. The harvest allocation policy states '*... the Regional Manager should apply the allocation share specified by the director to each MU with an allocated hunt.*' In this case the Respondent has only issued 1 bull elk despite there being two MU's, each of which has an allocated hunt.

10. I am requesting that my Quota be amended and 1 elk be issued in each of the Management Units 1-03 and 1-05, for a total of 2 elk in 2013/14, and that my Guide Outfitter Licence GONA13-86153 be amended in the following manner.

SPECIES	QUOTA FOR 2013	2013 ANNUAL HARVEST GUIDELINES
Roosevelt Elk	1 bull elk	<ul style="list-style-type: none"> <li>• Maximum 1 bull elk from Hunt zone 1-03A</li> </ul>
Roosevelt Elk	1 bull elk	<ul style="list-style-type: none"> <li>• Maximum 1 bull elk from Hunt zone 1-05A (105A or 1-05B)</li> </ul>

[15] The Appellant advised that the elk hunting season is now underway, having opened on October 10th.

[16] In his submissions on the appeal, the Regional Manager states that the Roosevelt Elk is a sub-species of elk that are found on Vancouver Island and in the Lower Mainland of BC. Elk harvest within these regions is managed within special management units called "elk population units."

[17] The Regional Manager states that population estimates for each elk "hunt zone" are derived using the best available techniques and the best available science. In his submissions on the appeals, the Regional Manager explained, in detail, the process used to determine elk quota for the Appellant's guiding territories. He also described his communications with the Appellant in relation to the "projected 5-year allocation" and the quota decisions. The Regional Manager asks that the appeals be dismissed.

[18] The Coastal British Columbia Guide Outfitter Association (the "Association") applied for participant status in these appeals on the grounds that the appeals could impact its members' interests. In particular, its members have an interest in how category A species (such as Roosevelt Elk) are managed through the provincial allocation process. The Appellant opposed the application; the Regional Manager did not.

[19] On September 17, 2013, the Board granted the Association limited participant status in the appeals, allowing it to provide a written submission explaining its particular perspective on the appeals.

## **ISSUES**

[20] There are two issues that arise in this appeal, which are the following:

1. Does the Regional Manager's letter of January 23, 2013, setting "tentative" quotas and allocations, satisfy the requirement of section 101(1) of the *Act*, which provides that the Regional Manager "must give written reasons for a decision that affects" a licence or a guide outfitter certificate?
2. Should the Board add 1 bull elk to the 2013 quota attached to licence 153 for Hunt Zone 1-05A or 1-05B?

## **RELEVANT LEGISLATION**

[21] The following sections of the *Act* are relevant to these appeals:

**1(1)** In this Act:

...

"guide outfitter" means a person licensed as a guide outfitter under this Act;

...

"person", for the purposes of issuing a licence, ... or guiding territory certificate ... means a natural person;

...

"quota" means

- (a) the total number of a game species, or
- (b) the total number of a type of game species

specified by the regional manager that the clients or a class of client of a guide outfitter may kill in the guide outfitter's guiding area, or part of it, during a licence year, or part of it, but does not include an angler day quota;

...

**Issue of guide outfitter licence**

**51** (1) A regional manager

(a) may issue a guide outfitter licence to a person if all of the following apply:

(i) the person is a citizen of Canada or a permanent resident of Canada;

(ii) the person has public liability insurance prescribed by regulation;

(iii) the person has other qualifications prescribed by regulation, and

(b) must issue a guide outfitter licence to a person if the person is a person to whom the regional manager is obliged under the *Labour Mobility Act* to issue a guide outfitter licence.

...

(2) A guide outfitter licence authorizes the holder to guide persons to hunt only for those species of game and in the area described in the licence.

...

**Guiding territory certificate**

**59** (1) A regional manager may issue a guiding territory certificate to a person who, or to a group of persons each of whom,

(a) is a citizen of Canada or a permanent resident of Canada,

(b) is 19 years of age or older, and

(c) has other qualifications prescribed by regulation.

(2) The director may specify the form of and conditions contained in a guiding territory certificate.

...

**Quotas**

**60** (1) If a regional manager issues a guide outfitter licence, the regional manager may attach a quota as a condition of the licence and may vary the quota for a subsequent licence year.

(2) If a guide outfitter has a quota assigned as a condition of his or her guide outfitter licence and allows his or her clients to kill game to the extent that the number killed exceeds the quota assigned to the guide outfitter, the regional manager may reduce or take away his or her quota for a period and may take action under section 61.

**Reasons for and notice of decisions**

**101**(1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

- (a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or
  - (b) an application by a person for anything referred to in paragraph (a).
- (2) Notice of a decision referred to in subsection (1) must be given to the affected person.
- (3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, 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.
- (4) For the purposes of applying this section to a decision that affects a guiding territory certificate, if notice of a decision referred to in subsection (1) is given in accordance with this section to the agent identified in the guiding territory certificate, the notice is deemed to have been given to the holders of the guiding territory certificate as if the agent were an affected person.

## **RELEVANT POLICIES AND PROCEDURES**

[22] The following sections of the Ministry's Procedure Manual are relevant to an understanding of allocations and quotas:

01.03.1 - Harvest Allocation

01.05.1 - Quota

01.05.2 – Administrative Guidelines

[23] The Harvest Allocation procedure states:

### **Procedure:**

The director should determine the allocation shares for each category A species based on the process outlined in Appendix A. ["Category A species" are defined in this document as "big game species, population, or class for which guided hunters' harvest is limited by quota in any portion of a region" and, in this case, includes bull elk.]

The regional manager should apply the allocation shares determined by the director as outlined in Appendix B.

## **APPENDIX A: PROCEDURE FOR MAKING ALLOCATION DECISIONS**

The regional manager of each region should maintain a complete list of category A species in their region and forward this list to the director as changes are made.

The director may use the "allocation calculator" to assist in determining allocation shares for each category A species. The allocation calculator

automatically performs the steps outlined below upon insertion of the necessary data.

*STEP 1 – APPLY INITIAL ALLOCATION*

The director should assign an initial allocation of 75% of the allowable harvest to resident hunters and 25% to guided hunters for each category A species in each region.

*STEP 2 – ALTER INITIAL ALLOCATION ACCORDING TO RELATIVE IMPORTANCE*

For each category A species in each region, the director should then alter the initial 75/25 allocation according to the relative importance of that category A species to each hunter group.

*2A) DETERMINE RELATIVE IMPORTANCE TO RESIDENT HUNTERS*

- 1) For each category A species in each region:
  - a. Determine the number of applicants, defined as the average annual number of hunters who apply to the limited entry hunting (L.E.H.) draw using the most recent five year period.
  - b. Determine the number of authorizations, defined as the average annual number of L.E.H. authorizations issued using the most recent five year period.
  - c. Determine the number of licensed hunters, defined as the average annual number of successful L.E.H. applicants who purchase species licenses using the most recent five year period.
  - d. Determine the actual participation rate, defined as the number of licensed hunters divided by the number of authorizations.
  - e. Determine the potential number of hunters, defined as the actual participation rate multiplied by the number of applicants.
- 2) Determine the total potential number of hunters, defined as the sum of all the individual potential number of hunters for each category A species in each region.
- 3) Calculate a relative importance value for each category A species in each region by dividing each hunt's potential number of hunters by the total potential number of hunters.
- 4) List all of the relative importance values for all category A species and region combinations in ascending order.
- 5) Categorize the values in the list generated in 4) based on the percentile to which they belong, ...

*2B) DETERMINE RELATIVE IMPORTANCE TO GUIDE OUTFITTERS*

- 1) For each category A species in each region:
  - a. Determine the number of guided hunters, defined as the average annual number of guided hunters using the most recent five year period based on Guide Declaration information.



- b. Determine the average hunt price, defined as the average price that a guided hunter pays to a guide outfitter for the sole purpose of hunting a particular category A species at a given time and location.
  - c. Determine the individual hunt values, defined as the number of guided hunters multiplied by the average hunt price.
- 2) Determine the total guided hunt value, defined as the sum of all the individual hunt values for all species and regions.
  - 3) Calculate a relative importance value for each category A species in each region by dividing each individual hunt value by the total guided hunt value.
  - 4) List all of the relative importance values for all category A species and region combinations in ascending order.
  - 5) Categorize the values in the list generated in 4) based on the percentile to which they belong, as follows: ...

#### *2C) ALTERNATIVE MEASURES OF RELATIVE IMPORTANCE*

If a category A species is not managed by a L.E.H. season in a region, the director should disregard Steps 2A) 1) and substitute the number of hunters hunting that species in that region for the potential number of hunters in 1) in the formulas in 2) and 3).

#### *2D) COMPARE RELATIVE IMPORTANCE AND ALTER INITIAL ALLOCATION*

The director will then directly compare the relative importance categories for each category A species in each region between hunter groups.

The director should alter the initial 75/25 allocation according to the matrix below. ...

#### *STEP 3 – ALTER ALLOCATION ACCORDING TO DEGREE OF UTILIZATION*

After determining the relative importance of each category A species to each hunter group and altering the allocation accordingly, the director should consider the degree to which each hunter group is likely to use their allocated shares of the harvest according to the following procedure:

##### *3A) DETERMINE DEGREE OF UTILIZATION*

For each category A species in each region, divide (i) the average annual number of those animals harvested by resident hunters by (ii) the average annual number of those animals allocated to resident hunters, using data from the most recent five year period. Repeat for guided hunters.

##### *3B) ALTERNATIVE MEASURE*

If a species has not previously been allocated, or insufficient data have prevented a precise assessment of the average degree of utilization as required by Step 3A), it should be assumed that on average resident hunters were allocated a 75% share in a region and guided hunters were allocated a 25% share.

*3C) RANK*

The director should rank the average regional degree of utilization for each category A species according to the following: ...

*3D) ALTER ALLOCATION BASED ON COMPARISON OF UTILIZATION*

The director should then compare the degree of utilization of each hunter group for the species in question and alter the allocated shares determined in Step 2D), according to the matrix below. ...

*STEP 4 – MINIMUM SHARES**4A) RESIDENT HUNTER MINIMUM SHARE*

If, for any reason, the above steps (1-3) lead to an allocation share in which resident hunters are allocated less than a specified minimum share, the director shall increase the resident hunters' share of the AAH to that specified minimum share and decrease the guided hunters' share accordingly. The minimum shares for resident hunters are as follows:

- ⇒60% for allocated sheep, goat, and grizzly bear hunts;
- ⇒98% for allocated antlerless hunts; and
- ⇒70% for all other category A species.

*4B) COMMERCIAL HUNTER MINIMUM SHARE*

If, for any reason, the above steps (1-3) lead to an allocation share in which guided hunters are allocated less than a specified minimum share, the director shall increase the guided hunters' share of the AAH to that specified minimum share and decrease the resident hunters' share accordingly. The minimum shares for guided hunters are as follows:

- ⇒20% for allocated sheep and goat hunts; and
- ⇒10% for all other category A species.

*STEP 5 – DETERMINE THE ALLOCATION*

Informed by Steps 1 through 4, the director should determine the allocation shares for each category A species. This allocation share shall be effective until the director determines a new allocation share at the beginning of a new allocation period.

**APPENDIX B: PROCEDURE FOR APPLYING ALLOCATION DECISIONS**

Unless otherwise specified by the director, the regional manager should apply the allocation share specified by the director to each M.U. with an allocated hunt.

[24] The Quota procedure states:

**Procedure:****1. Calculation of quotas**

- 1.1 Allocations of harvest opportunities to guided hunters by means of a quota should be based on the calculation of an annual allowable harvest (AAH), and be consistent with the Ministry ... policy and procedure concerning harvest allocations.
- 1.2 Quotas should be calculated by the regional section head, in accordance with the allocation share determined by the director.
- 1.3 Quotas recommended by the regional section head should not exceed the guided hunters' portion of the total allocated harvest for the big game population.
- 1.4 Quotas should be calculated to reflect guided hunters' share of the harvestable portion of the population within each guide outfitter's territory, if available.
- 1.5 If a limited entry hunt (L.E.H.) has been instituted;
  - (a) the harvest by any guided resident hunter with a L.E.H. authorization should not be included in the quota;
  - (b) a resident hunter without a L.E.H. authorization may purchase the services of a guide outfitter, and the harvest should be included in that guide outfitter's quota.
- 1.6 If no L.E.H. has been instituted, the harvest by resident hunters (guided or unguided) should not be included in the quota.
- 1.7 The harvest by any guided non-resident is included in the quota.

## **2. Recommendation and approval of quotas**

- 2.1 Once calculated, quotas should be recommended by the regional section head to the regional manager.
- 2.2 The regional manager should provide final approval of quotas in a timely manner and in accordance with regulation setting policy and procedure.
- 2.3 The regional manager should enter approved quotas onto the guide outfitter's licence as a condition of the licence.

[25] The Administrative Guideline procedure states at section 2, as follows:

2. The regional manager should apply an administrative guideline to the quota of a guide outfitter as follows:
  - a) The annual quota will apply for five years;
  - b) Up to 30% of the cumulative five year quota (obtained by multiplying the annual quota by 5) may be harvested in any one year;
  - c) Notwithstanding 2 b), no more than 5 times the annual quota may be harvested in the five year period.

NOTE: The annual quota is not to be rounded before being multiplied by 5 to obtain the cumulative 5 year quota.

## DISCUSSION AND ANALYSIS

### General Discussion

[26] Before the discussion and analysis of the issues, it is essential to understand the scheme of the *Act* as it applies to guide outfitters.

[27] Under the *Act*, "guide outfitter" is a defined term. "Guide outfitter" is defined in section 1 as a "person licensed as a guide outfitter under the *Act*". "Person" is defined as a "natural person". This is why the licences at issue are in the name of Darren DeLuca, the Appellant, rather than in the name of his company. Therefore, the scheme of the *Act* ties licensed rights and responsibilities to natural persons.

[28] Section 51 of the *Act* deals with the issuance of guide outfitter licences. The use of the word "may" gives a wide discretion to the Regional Manager, who may issue a guide outfitter licence to a person who meets the qualifications set out in section 51(1). Section 51(2) states that a guide outfitter licence allows the licensee to "guide persons to hunt only for those species of game and in the area described in the licence".

[29] The scheme of the *Act* further provides, at section 59, that a guide outfitter may be issued a guiding territory certificate in a form, and containing conditions, that the director may specify. The certificate gives a guide outfitter the exclusive privilege to guide hunters in an area described in the certificate for a period of time not exceeding 10 years. A renewal may be applied for at the 5th anniversary of the date that the certificate was issued. The Appellant's guide outfitter licences refer to two such certificates, referenced as Guiding Territory Certificate numbers 100671 and 100677.

[30] Section 60(1) of the *Act* provides that, if a Regional Manager issues a guide outfitter licence, the Regional Manager may attach a quota as a condition of the licence, and may vary the quota from year to year. "Quota" is defined in section 1 as the total number and type of a game species "specified by the regional manager that the clients ... of a guide outfitter may kill in the guide outfitter's guiding area, or part of it, during a licence year, or part of it".

[31] It is clear from the above-noted sections that the scheme of the *Act* grants a broad discretion to issue guide outfitter licences and guide territory certificates, set conditions, describe hunt areas and set quotas by number and type of game species.

[32] Outside of the *Act*, as an aid to officials as to how they "should" exercise their discretion in certain circumstances, the Ministry has created policies and procedures. Referenced in these appeals were the Harvest Allocation procedure, the Quota procedure and the Administrative Guidelines procedure.

[33] The Harvest Allocation procedure sets out a 5-step process that the Director may/should use, or he may use the "allocation calculator", which automatically performs the 5-steps upon insertion of the necessary data. This 5-step process enables the Director to determine the share of the harvest of category A species that will be allocated to resident hunters and guided hunters, respectively. Appendix B of the Harvest Allocation procedure states that "unless otherwise

specified by the Director”, the Regional Manager should (not shall) apply the allocation share specified by the director to each management unit with an allocated hunt.

[34] A review of the Ministry’s Quota procedure, again, reveals the procedure for calculating quotas with the word “should” used throughout, plus recommendations, as follows:

## 2. Recommendation and approval of quotas

- 2.1 Once calculated, quotas should be recommended by the regional section head to the regional manager.
- 2.2 The regional manager should provide final approval of quotas in a timely manner and in accordance with regulation setting policy and procedure.
- 2.3 The regional manager should enter approved quotas onto the guide outfitter’s licence as a condition of the licence.

[Emphasis added]

[35] Similarly, the Administrative Guidelines procedure states that the “regional manager should apply an administrative guideline to the quota of a guide outfitter ...”. [Emphasis added]

[36] By way of conclusion to this discussion, the scheme of the *Act* grants wide discretion to officials: the procedures constitute non-binding advice/guidance for officials only, to assist them in the exercise of that discretion.

[37] With the benefit of an understanding of the scheme of the *Act* and the role of procedural guidelines, the Panel now turns to the issues in these two appeals.

### 1. Does the Regional Manager’s letter of January 23, 2013, setting “tentative” quotas and allocations, satisfy the requirement of section 101(1) of the *Act*, which provides that the Regional Manager “must give written reasons for a decision that affects” a licence or a guide outfitter certificate?

#### *The Appellant’s submissions*

[38] The Appellant submits that the January 23, 2013 letter cannot be the written reasons for the decisions: it is only an “advice” letter of what the Regional Manager’s intentions “might be”.

[39] The Appellant submits that the Ministry has established the Harvest Allocation procedure, which outlines the procedures for distribution of hunting opportunities between resident and guided (non-resident) hunters. Of note, the Director performs a 5-step process to determine the share of the harvest between resident and guided hunters. The Appellant does not take issue with how this process occurs.

[40] However, he notes that the Director then returns the percentage allocation shares to the Regional Manager under Appendix B which states:

Unless otherwise specified by the director, the regional manager should apply the allocation share specified by the director to each M.U. [management unit] with an allocated hunt.

[41] The Appellant emphasizes that the Ministry's procedure is clear that "the regional manager should apply the allocation share ... to each M.U." He submits that a management unit means "a specific and legally designated land area denoted by the initials M.U. and a hyphenated number ie M.U. 1-05."

[42] The Appellant states that, under the procedures, the Regional Manager then instructs the Regional Section Head to calculate quotas by following the Quota procedure, as set out in section 1.1 of that procedure:

### **1. Calculation of quotas**

1.1 Allocations of harvest opportunities to guided hunters by means of a quota should be based on the calculation of an annual allowable harvest (AAH), and be consistent with the Ministry ... policy and procedure concerning harvest allocations. [Appellant's emphasis]

[43] Finally, he submits that the Regional Manager should provide an annual quota, by management unit, on the guide outfitter licence as set out in subsections 2.1 to 2.3 of the Quota procedure as follows:

- 2.1 Once calculated, quotas should be recommended by the regional section head to the regional manager.
- 2.2 The regional manager should provide final approval of quotas in a timely manner and in accordance with regulation setting policy and procedure.
- 2.3 The regional manager should enter approved quotas onto the guide outfitter's licence as a condition of the licence.  
[Appellant's emphasis]

[44] The Appellant states that the Regional Manager failed to provide a written decision respecting his quotas, by management unit, in accordance with the procedures and section 101(1) of the *Act*.

[45] In addition, the Appellant submits that the Regional Manager failed to attach an administrative guideline to his quota, by management unit, and failed to explain why this was not done. The Ministry's Administrative Guideline procedure states:

2. The regional manager should apply an administrative guideline to the quota of a guide outfitter as follows:
  - d) The annual quota will apply for five years;
  - e) Up to 30% of the cumulative five year quota (obtained by multiplying the annual quota by 5) may be harvested in any one year;
  - f) Notwithstanding 2 b), no more than 5 times the annual quota may be harvested in the five year period.

[46] The Appellant states that the decision-making process contemplated by the Ministry requires the Regional Manager to provide final approval, a decision, of quotas. He submits that determining 5-year allocations are “foundational in determining Quotas and Administrative Guidelines”, and is practiced in other regions of BC. He states:

5. The Respondent, by choosing to send by general mail an advisory letter with ‘notional’ allocations on January 23, 2013, has obligated himself to provide his written reasons for the decision when issuing my annual Quota and Administrative Guidelines on my 2013/14 Guide Outfitter Licences ... . Those written reasons, which I have not received, must include the assumptions used in establishing 5-year allocations.

6. The necessity to include the assumptions used in determining the 5-year allocation in his written reasons, can be found in the procedure adopted by other Regional Managers, and in the Respondent’s submissions, ‘If the underlying presumptions and projections are accurate ...’ recognizing the inherent uncertainty in the assumptions of;

- i. Elk populations and assessments
- ii. Size and location of EPU’s [elk population units]
- iii. Harvest rates used in EPU’s
- iv. Estimated First Nations harvest.

7. For the reasons that I have specified above, I am requesting the Respondent provide full written reasons for his decisions that have affected my guide outfitter licences ....

*The Respondent’s submissions*

[47] In his submissions to the Board, the Regional Manager described the step-by-step process used to determine the Appellant’s allocation and quota for elk under each licence.

[48] In relation to licence 152, the Regional Manager explains that, after determining the population estimates for each elk hunt zone, the sustainable harvest rate for bull elk and deducting the needs of the First Nations, the allocation share (or split) between resident hunters and guided hunters was determined in accordance with the Harvest Allocation procedure (above). In hunt zone 1-07A, the split was 87% of the bull Roosevelt Elk to resident hunters under the limited entry hunting system (=3.1 bull elk), and 13% to the guided hunters (=0.47 bull elk). The Appellant is the only guide in this hunt zone.

[49] To allocate the guided hunters’ share of the 0.47 bull elk harvest in this hunt zone, the Regional Manager multiplied the allocation by 5 to determine the 5-year allocation (rounded to the nearest whole number) for the Appellant, which came to 2 bull elk. This number is then “summed by guiding territory” on the certificate.

[50] The Regional Manager explains that the “rounded 5-year allocation for the guiding territory is multiplied by a 30% administrative guideline (per the procedure), to derive a “recommended quota” by guiding territory. His policy is to set quota at a minimum of 1 animal if the rounded 5-year allocation for the territory is 1 or greater. The result in the present case is shown by the Regional Manager at Table 8, as follows:

<b>5 Year Rounded Guided Hunter Allocation by Guiding Territory</b>	2
<b>30% Administrative Guideline</b>	0.6
<b>Quota for 2013/2014 Licence Year by Guiding Territory</b>	1

[51] The Regional Manager then explains that:

In circumstances where the quota exceeds the number of hunt zones in a guiding territory, it is the respondent’s policy to provide annual harvest guidelines as a condition of the guide outfitter licence to direct that harvest occurs in specific areas. In this circumstance the appellant has a quota of 1 elk and 1 hunt zone available to harvest this elk from.

[52] The Regional Manager considered section 1.04 of the *Wildlife Act Commercial Activities Regulation*, B.C. Reg. 338/82, which states:

**Guide outfitter licence with quota**

- 1.04** Where a regional manager issues a guide outfitter licence which attaches a quota as a condition of licence, he may specify
- (a) species of game and their age, sex, horn or antler classification, and numbers of each class or classification of game that may be harvested,
  - (b) the area or areas within which the harvest may occur,
  - (c) the time period within which the game may be harvested, or
  - (d) the number of hunters or a class of hunters that may hunt a species in a defined time and area.

[53] The Regional Manager explains that he provided a “tentative 5-year allocation and tentative quota estimate” to guide outfitters in a letter dated January 23, 2013. He later provided the Appellant’s licence and quota, as well as a 2013 annual harvest guideline, which is now the subject of the appeal. That quota was for 1 bull elk for hunt zone 1-07A, with a maximum of 1 bull elk from that hunt zone.

[54] In regards to licence 153, the Regional Manager went through the same analysis and description of the elk population estimates in the management units within the Appellant’s certificate area, the sustainable harvest rate, deductions for



First Nation's needs, and applying allocation share (or split) between resident hunters and guided hunters. The Regional Manager explains that in hunt zone 1-05A and 1-05B, the Appellant is the only guide. The 13% guided hunter allocation for hunt zone 1-05A is 0.48 bull elk; in hunt zone 1-05B it is 0.14 bull elk.

[55] However, in hunt zone 1-03A, there are two guides to split the guided hunter allocation of 0.27 bull elk. The Regional Manager explains that the 5-year allocation is distributed between guides who share a hunt zone based on the percentage of area that the guiding territory represents within the hunt zone; the Appellant holds 32.5% of hunting zone 1-03A.

[56] As occurred under licence 152, the Regional Manager multiplied the guided hunter allocation by 5 to calculate the 5-year allocation for the guide, and rounded to the nearest whole number. He then "summed by guiding territory" on the certificate. The results in this case are reflected in Table 16, as follows:

<b>Common Name Management Unit (MU) Hunt Zone</b>	Lower San Juan 1-03A	Nanaimo Lakes 1-05A	Nanaimo River Camp 1-05B
<b>5 Year Rounded Allocation</b>	1	2	1
<b>5 Year Rounded Guided Hunter Allocation by Guiding Territory</b>	4		

[57] The Regional Manager then took the rounded 5-year allocation for the guiding territory and multiplied it by a 30% administrative guideline. As above, his policy is to set quota at a minimum of 1 animal if the rounded 5-year allocation for the guiding territory is 1 or greater. The result in the present case is shown by the Regional Manager at Table 17, as follows:

<b>Five Year Rounded Guided Hunter Allocation by guiding territory</b>	4
<b>30% Administrative Guideline</b>	1.2
<b>Quota for 2013/2014 Licence Year by Guiding Territory</b>	1

[58] After explaining his policy to provide annual harvest guidelines as a condition of a licence to direct that harvest occurs in specific areas, the Regional Manager states, "In this circumstance the appellant has a quota of 1 elk and 3 hunt zones available to harvest this elk from."

[59] As was his practice in relation to licence 152, the Regional Manager then provided a "tentative 5-year allocation and tentative quota estimate" to guide outfitters in a letter dated January 23, 2013. He later provided the Appellant's licence and quota, as well as a 2013 annual harvest guideline, which is now the subject of the appeal.

[60] Although the Regional Manager did not make specific argument on whether he complied with section 101(1) of the *Act*, he explained his communications with the Appellant which are summarized as follows:

- January 23, 2013, letter advising guides operating in the West Coast Region of their projected 5-year allocation and tentative quota estimate.
- January 29-30, 2013, emails between the Appellant and the Regional Manager to arrange a meeting regarding the January 23, 2013 letter.
- February 8, 2013 meeting with guides in the regional office to discuss the allocation process. A PowerPoint presentation was made by Ministry staff explaining, among other things, elk population objectives, the implementation and results of the harvest allocation policies and procedures, 5-year allocation by hunt zones, and outlook for the future.
- Email dated August 30, 2013, and letter dated September 5, 2013 inviting the Appellant to discuss matters further. These did not occur, apparently due to scheduling difficulties.

#### *The Association's submissions*

[61] The Association supports the Regional Manager's decision, stating that he was "wise" to issue advisory letters instead of quotas for the balance of the 5-year cycle.

#### *The Panel's Findings*

[62] Section 101(1) of the *Act* is clear and unequivocal in its requirement that the Regional Manager must give written reasons for a decision that affects a licence held by a person. In these two appeals, the Appellant is a person whose guide outfitters licences were affected by the Regional Manager's decisions.

[63] While there is no statutory definition in the *Act* of "decision", the Panel has no doubt that the above referenced letter of January 23, 2013, expressing "tentative" views on allocations and quotas does not constitute a "decision", such as is contemplated under section 101(1) of the *Act*. A "decision" requires a high level of finality.

[64] However, the description in that letter is consistent with the quota actually given to the Appellant in the decisions under appeal, and advises the Appellant of the 5-year allocation (target harvest). The Regional Manager gives a combined "tentative" quota of 2 bull elk for the licences (1 per licence). That is the same total number of bull elk given in the April 16, 2013 licence decisions.

[65] In his submissions, the Regional Manager explains that, for licence 153, the Appellant can take the 1 bull elk from any one of his three hunt zones described in that licence. He does not explain why there is no 5-year allocation guideline in either licence, as was described in the January 23, 2013 letter. However, the Panel does not find this to be a fatal flaw. It is apparent from the Regional Manager's submissions that he chose to apply a 1 year annual harvest guideline instead and, in any event, there is no indication that the 5-year target harvest of 6 bull elk, as stated in the January 23, 2013 letter, has changed.

[66] The Panel also finds that the submissions of the Regional Manager in these proceedings, although given after the decisions were made, constitutes an explanation such as is contemplated by section 101(1) of the *Act*. As such, it violates common sense to ask that the decisions be re-written in a different format. In addition, as the Panel has heard all of the evidence and argument afresh, this proceeding has corrected any procedural errors in the proceedings below.

**2. Should the Board add one bull elk to the 2013 quota attached to licence 153 for Hunt Zone 1-05A or 1-05B?**

[67] The Panel answers this question in the negative.

[68] The Appellant argues that the Ministry's procedures stipulate that the quota and guidelines be attached "by management unit". He submits that he should have been given an allocation of Roosevelt Elk in the two management units covered by licence 153 – not just a quota of 1 bull elk to be taken in any one of the three hunt zones.

[69] Bearing in mind the scheme of the *Act*, which is to allow officials wide discretion in the setting of quotas, and having considered the Regional Manager's detailed explanation of how the Appellant's quotas and harvest guidelines were set, the Panel finds that there are no compelling reasons for interfering with the Regional Manager's exercise of discretion. Although the Appellant has provided a thorough analysis of the Ministry procedures in support of his case, the Panel finds that all of the procedures relied upon by the Appellant have the discretionary words "may" or "should", which are not binding on either the Regional Manager or the Board. In the circumstances, the Panel agrees with the Regional Manager's decisions.

## **DECISION**

[70] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

[71] For the reasons stated above, the guide outfitter licences, their terms and conditions, including their quotas, are confirmed.

[72] The appeals are dismissed.

"David H. Searle"

David H. Searle, CM, QC, Panel Chair  
Environmental Appeal Board

October 31, 2013