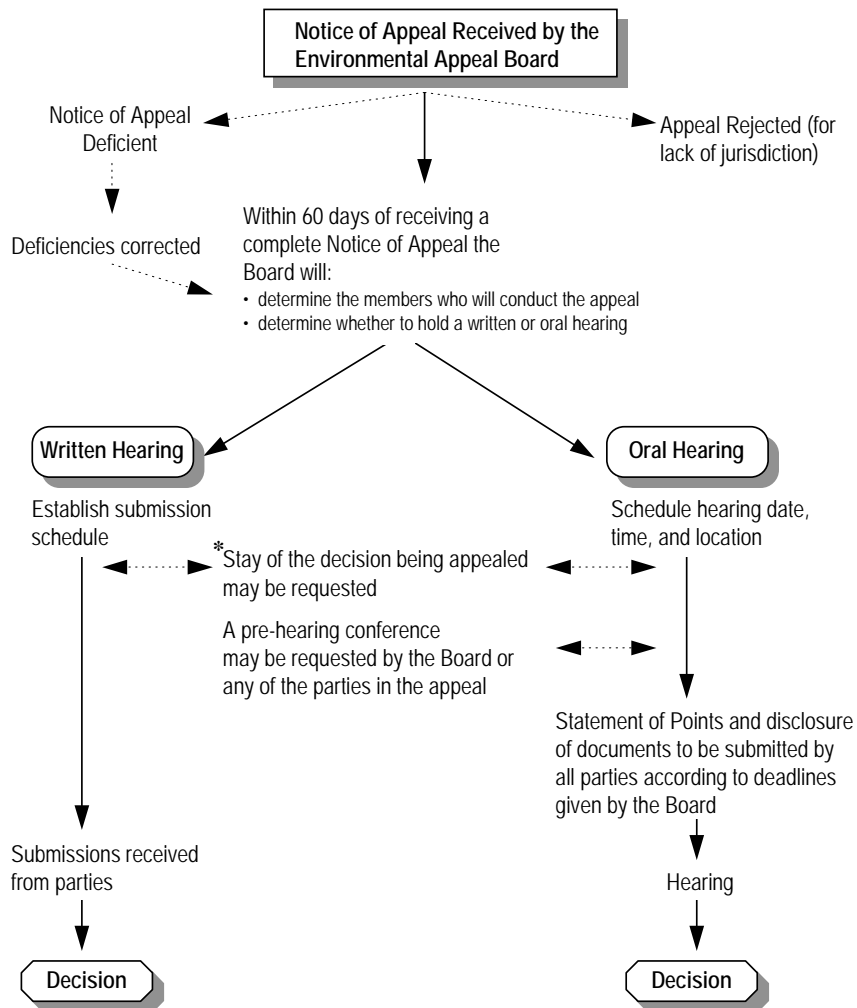


A Guide to the Effective Presentation of your Case Before the Environmental Appeal Board

This document has been prepared to answer the most commonly asked questions about the appeal process. For more information, see the last page of this guide.

It should be noted that parties are free to discuss a case and resolve some issues or settle the matter even though an appeal has been filed. At times, appeals are resolved before a hearing. The Board encourages all parties to communicate with each other, if possible, throughout the appeal process. This facilitates a more efficient and less adversarial appeal process and it may result in settlement of the appeal.



* The Board's authority to issue a stay varies from one Statute to the next.

The Board has authority to hear appeals from the following statutes:

Environmental Management Act, S.B.C., c. 53, as amended

Integrated Pest Management Act, S.B.C., c. 58

Water Act, R.S.B.C. 1996, c. 483, as amended

Wildlife Act, R.S.B.C. 1996, c. 488, as amended

Ω THE APPEAL PROCESS - GENERAL

Q: *Once a complete Notice of Appeal is filed, what happens?*

A: The government official who made the decision being appealed will be notified of the appeal and added as a party (the respondent) to the appeal. The Board may also ask other people who may be affected by the Board's decision to be a full party or a participant.

The other parties will be notified if this offer occurs.

Q: *Is the permit, licence or order in effect once an appeal is filed?*

A: They are effective or "valid" unless the Board makes an order to prevent them from taking effect until after the appeal is decided. The Board may only do this in specific circumstances, which are set out below.

Q: *Can I prevent the decision I am appealing from taking effect until after the appeal is decided?*

A: Maybe. All of the statutes specifically give the Board the power to postpone the decision being appealed until the Board renders its decision. This power is referred to as a "stay." A request for a stay should be in writing and set out the reasons why a stay should be granted and address the issues of balance of convenience and irreparable harm.

In addressing the issue of irreparable harm, the party seeking the stay must explain what harm it would suffer if the stay was refused and why this harm is "irreparable" meaning, it could not be remedied if the party ultimately wins the appeal.

In addressing the issue of balance of convenience, the party seeking the stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties if the stay is granted.

The other parties to the appeal will be allowed to respond to the request for a stay. They should set out their positions on whether a stay should be granted and should also address the issues of balance of convenience and irreparable harm. The Board will not grant a stay in every case.

Q: *Will the hearing be conducted in person (orally) or in writing?*

A: The Chair of the Board will decide whether to hold an oral hearing or a hearing in writing. In most cases, a full oral hearing will be conducted. However, the Board will consider any requests for a hearing to be conducted in writing and, in some circumstances, will order a written hearing on its own initiative. A request for a written hearing should be made as early as possible.

Q: *How long will it take for the appeal to be heard by the Board?*

A: Oral hearings will be held as early as conveniently possible depending on a number of factors including: the urgency of the appeal issues, the availability of all of the parties to an appeal and any witnesses, and seasonal conditions. A written hearing may be scheduled to begin earlier, but usually takes longer to complete because each party is given the opportunity to respond to the written submissions of the other parties.

Q: *Will the entire Board hear my appeal?*

A: No. It would be exceptional for the entire Board to decide an appeal. Oral hearings are normally conducted by a panel of one or three members of the Board who will then make a decision on the appeal. A written hearing is normally reviewed and decided by one member of the Board.

Q: *When and where will the hearing be held?*

A: If the hearing is in writing, the Board will provide you with a schedule of the deadlines for your written submissions. If there is to be an oral hearing, the Board will set the hearing date and the location. When scheduling an oral hearing, the Board attempts to provide the parties with sufficient notice of a hearing to allow them to prepare. The hearings are usually held in the closest major city to where the subject matter of the appeal arose.

Q: *What if I need the date changed?*

A: A party that needs the date changed should write to the office of the Board as soon as possible to explain the reasons for the change and ask for a postponement. The Board will not normally change the dates unless all parties agree to the change or there are special circumstances involved.

Q: *What if I miss the submission deadline or the hearing?*

A: If, without first notifying the Board, the appellant does not provide its written submissions or does not attend the hearing on the scheduled date, the appeal may be considered abandoned.

If, without first notifying the Board, the respondent or other party does not attend the hearing or provide their written submissions, the appeal may be decided in their absence.

Q: *Can I talk to the members of the Board about my case or the decision in my case?*

A: No. The Board members cannot discuss an appeal with a party unless all other parties are included in the discussion or consent to the discussion taking place, nor can a member discuss his or her reasons for a decision. Once a decision is rendered in an appeal, the decision "speaks for itself".

Ω PREPARATION

Q: *What am I responsible for in an appeal?*

A: If you are an appellant, you have what is known as the “burden of proof” in an appeal. You need to provide evidence that proves the allegations you have made in your grounds of appeal on a balance of probabilities.

If you are the respondent in an appeal, you will provide evidence that supports the original decision. If there are problems with the appeal (e.g., the appellant does not have standing to appeal, no decision has been made which can be appealed, etc.), you should bring them to the attention of the Board as soon as possible to avoid further expense and delay.

If you are participating in an appeal as a third party, you will provide evidence in support of your position.

The only information the Board will consider in an appeal is the information the parties provide. Therefore, everything you think is **relevant** to the case should be given to the Board and the other parties.

Q: *How do I prepare for a hearing?*

A: The best way to prepare for either an oral or written hearing, is to have a clear understanding of the issues to be decided in the appeal and sound reasons for supporting, opposing or suggesting alternatives to the decision under appeal. Parties should concentrate on gathering the information needed to build a strong and convincing case to bring before the Board. This includes documents, reports, studies, witnesses, and possibly experts.

The Board needs solid evidence upon which to base its decision. Evidence includes oral testimony, affidavits, witness statements, written records, documents, demonstrations, physical objects, maps, etc. Evidence does not include a person’s belief, speculation or argument.

You should ensure that all the evidence that you wish the Board to consider in making its decision is provided to the Board. The only evidence the Board will consider is that which is provided to it by the parties. It does not automatically receive the evidence, argument, nor the appellant’s file that was considered by the previous decision-maker.

Q: *What is a pre-hearing conference?*

A: A pre-hearing conference is an informal meeting, which may occur before an oral hearing. All of the parties to an appeal and a member of the Board will generally participate in a pre-hearing conference, which is conducted either in person, or more commonly by telephone conference call.

A party to an appeal, or the Board on its own initiative, may request a pre-hearing conference.

A pre-hearing conference may be scheduled for complicated appeals or appeals which involve numerous parties. It provides an opportunity to clarify the hearing procedures, narrow the issues to be dealt with at the hearing, discuss any preliminary concerns and, in some cases, to settle or resolve the matter.

Q: *Do I have to arrange for witnesses to attend an oral hearing?*

A: Yes. It is up to each party to decide whether to ask other people to come to the hearing to testify as a witness. The parties should approach the people they want as witnesses as early as possible to ensure the person is able to attend the hearing on the scheduled date.

Q: *Can an appellant ask a government employee to appear as a witness at an oral hearing?*

A: Yes. There is no "ownership" in a witness. However, the appellant should first ask the respondent whether that employee will be called as a witness for the respondent at the hearing. If the person is going to be a witness for the respondent, the other parties will have an opportunity to ask the employee questions (cross-examine) at the hearing.

Q: *What can I do if my witness refuses to voluntarily attend an oral hearing or someone refuses to give me documents?*

A: You may ask the Board to issue a summons. A summons requires a person to attend at a hearing to testify and/or requires a person to provide documents at a hearing. You should make a written request for a summons **at least two weeks in advance** of a hearing. Please include: the name of the witness, the reasons why the person is needed at the hearing (what issue will the person address in his or her evidence), why the document(s) is required, and the attempts you have made to have the person voluntarily attend the hearing or produce the documents.

If the Board decides to grant a summons, you will be responsible for serving the summons on the person. The person summoned to attend the hearing may ask the Board to "vacate" (cancel) the summons.

Q: *Can I have an expert testify at a hearing or provide a written expert report?*

A: Any party may arrange to have an expert witness testify at a hearing. However, that party should provide the Board, and all other parties to the appeal, with **at least 30 days notice** that an expert will be called to give an opinion. The notice should include: a statement of the expert's qualifications, areas of expertise, the opinion to be provide at the hearing, and the facts on which the opinion is based.

If you intend to produce a written statement or report prepared by an expert at an oral or written hearing, a copy of the statement or report should be provided to the Board, and all parties to the appeal, **30 days prior to the hearing date or the date of your submission.**

Any requests for an adjournment as a result of a late notice of an expert will be dealt with on a case-by-case basis.

Q: *Can I find out what the other parties are going to be saying at the hearing?*

A: Yes. The Board asks each party to provide an outline of its case (Statement of Points) and any relevant documents (e.g. maps, letters, legislation, policies) prior to the hearing. More information about the Statement of Points and disclosure of documents will be sent to you by the Board office early in the appeal process.

Q: *Can I present new evidence which was not before the previous decision-maker?*

A: Yes. A hearing before the Board, whether written or oral, is a “new hearing”. This means that the Board may: hear new evidence and argument that was not before the previous decision-maker, make findings of fact on the evidence presented to it, and decide questions of law.

Q: *What if I want to use audio-visual equipment at an oral hearing?*

A: If you want to use an overhead projector, flip chart, VCR, etc., at a hearing, you should confirm the availability of such items with the venue scheduled for the hearing (e.g., hotel or Board office) and make arrangements accordingly. The Board will not pay for the rental of such equipment.

ORAL HEARINGS

Q: *How long are the hearings?*

A: The length of a hearing depends on the complexity of the appeal and the number of witnesses each party calls to testify. Some hearings take 1/2 a day; others take one week. The average length is between one and three days. To reduce the length of a hearing, parties should communicate with the other parties and be well prepared for the hearing (see “How do I prepare for a hearing” above).

Q: *What happens at an oral hearing?*

A: Each party has an opportunity to present his or her case to the Board. Each party can testify (give oral evidence) which may be supplemented by documents and visual aids (e.g. maps, photographs etc.). Witnesses, including the parties, will be asked to swear or affirm the truthfulness of their evidence before testifying.

Although oral hearings are structured, the Board makes every effort to be flexible and accommodate the needs and experience of the parties. The Board will send the parties a summary sheet titled “Environmental Appeal Board Appeal Hearing Practice and Procedure” which provides more detail about the order of presentation at a hearing.

Q: Will the hearing be recorded?

A: Yes. The legislation requires that the hearings be recorded. A transcript of the Board's proceedings may be ordered; the cost of which will be borne by the applicant.

Q: What if a party "surprises" me at a hearing with new allegations or evidence?

A: If you could not reasonably expect that certain allegations would be made or certain evidence would be presented at the hearing, you may request an adjournment to give you an opportunity to review the new information and prepare a response. The Board will decide whether or not to grant an adjournment on a case-by-case basis.

Q: Can I make an objection during the hearing?

A: If you want to object to something at the hearing (e.g. questions or evidence), you may raise an objection. An objection should be made in a courteous fashion stating the reasons for the objection. The Board will provide the other party(s) with an opportunity to respond before making a decision on the objection.

Q: Can I bring documents to the hearing which I have not already provided to the other parties and the Board?

A: Yes. However, you are responsible for bringing enough copies for the other parties, the Board members and the official recorder (usually 6 copies).

Q: Can I ask the Board to visit the site that is the subject of the appeal?

A: Yes. If you want to schedule a site visit, please write to the Board as early as possible. Additional time may be required to accommodate the site visit in the hearing schedule.

The Board may also, on its own initiative, schedule a site visit.

HEARINGS IN WRITING

Q: What should I include in my written submissions?

A: Everything you want the Board to know about the case should be included in your submissions. This includes all evidence such as documents, reports, studies, charts, maps etc. In addition, affidavit evidence or written statements from witnesses may also be included. Parties should not assume that someone else will provide the information or evidence to the Board, or that the Board will already know something. The Board does not automatically receive information considered by the previous decision-maker.

If the Board has questions about the evidence, it may ask for further information from the parties.

Ω DECISIONS

Q: *Can I ask to the Board to order another party to pay the cost I incurred in the appeal?*

A: Yes. The Board has the power to require a party to pay all or part of the costs of another party in connection with the appeal.

If you want the Board to order costs, you must make your request for costs at the conclusion of the hearing. Costs will only be awarded in special circumstances.

Q: *When will I get a decision?*

A: A decision is not normally made right after a hearing. The Board members that heard the appeal or considered the written submissions will take time to consider all the evidence and provide a formal written decision after the completion of the hearing (oral or written). The written decision will be sent to all the parties and will also be posted on the Board's website.

Q: *What can I do if I do not agree with the Board's decision?*

A: Generally, once the Board releases a decision, it cannot change its decision. A party dissatisfied with a decision of the Board can apply to Cabinet for a review of the decision or apply to the Supreme Court for a judicial review.

Ω OTHER QUESTIONS AND ANSWERS

Q: *Can the public attend a hearing?*

A: Yes. The hearings are open to the public; members of the public are welcome to attend. Participation in the appeal, however, is restricted to the parties and their witnesses.

Q: *Is it possible to give evidence in another language or have an interpreter present at the hearing?*

A: Yes, but any services allowing a party or witness to give evidence in another language and/or to have the evidence of others interpreted into that other language must be arranged for and paid by the party making the request.

Q: *Can I abandon an appeal?*

A: An appellant may withdraw his or her appeal at any time by so informing the Board in writing.

Q: *Are the Board's policies and procedures flexible?*

A: Yes. The Board can dispense with a particular policy or procedure where it is appropriate in the circumstances unless the procedure is required by statute. The

Board will do whatever is necessary to enable it to adjudicate fairly, effectively and completely on an appeal.

Q: *How can I find out more about the appeal process or the Board?*

A: If you need more information about the appeal process or you did not receive the information from the office on "Environmental Appeal Board Appeal Hearing Practice and Procedure" or "Statement of Points", please contact the Board office at:

Environmental Appeal Board
4th Floor, 747 Fort Street
Victoria, British Columbia
Phone: 250.387.3464
Fax: 250.356.9923
Internet: www.eab.gov.bc.ca

Also available from the Board office are the following publications:

Environmental Appeal Board Annual Reports
Environmental Appeal Board Procedure Manual

Any statutes relevant to appeals to the Board are available from:

Crown Publications
546 Yates Street
Victoria, BC, V8W 1K8
Phone: 386-4636
Fax: 386-0221

Decisions of the Board may be viewed at the following libraries:

University of British Columbia Law Library
British Columbia Court House Library Society
West Coast Environmental Law Library
University of Victoria Law Library

Copies of decisions of the Board are available from:

The office of the Environmental Appeal Board
The Board's Internet address: www.eab.gov.bc.ca
Quicklaw Data Base