



Court File No. VLC-S-S-262930
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of Environment Appeal Board decision EAB-EMA-25-A019(a);
And in the matter of *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
And in the matter of the *Environmental Management Act*, S.B.C. 2003, c. 53

Between:

DEEP WATER RECOVERY LTD.

Petitioner

and:

**ENVIRONMENTAL APPEAL BOARD and the MINISTRY OF ENVIRONMENT
AND PARKS – COMPLIANCE AND ENFORCEMENT BRANCH**

Respondents

RESPONSE TO PETITION

Filed by: The Director, Environmental Management Act (the “Director”)

THIS IS A RESPONSE TO the petition filed April 23, 2026.

The respondent estimates that the application will take 1 day.

Part 1: ORDERS CONSENTED TO

The respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the petition: **None**

Part 2: ORDERS OPPOSED

The respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the petition: **All**

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The respondent takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the petition: **None**

Part 4: FACTUAL BASIS

A. *Overview of the relevant legislative framework*

1. Where the Director is satisfied that a substance is causing pollution, s. 83 of the *Environmental Management Act* (“*EMA*”) authorizes the Director to issue an order aimed at controlling, abating or stopping the pollution.
2. Where the Director is satisfied that a person has failed to comply with a pollution abatement order, s.115(1) of *EMA* authorizes the Director to serve the person with a determination requiring the person to pay an administrative penalty.
3. Section 133(2)(c) of *EMA* states that anything that must be served on a corporation may be served by sending it by email to the last known email address of a director, officer, or employee of the corporation.
4. Section 133(4) of *EMA* states that anything sent by email for the purposes of *EMA* is deemed to be received by the person to whom it is addressed on the third day after it is sent.
5. Section 8(a) of the *Administrative Penalties (Environmental Management Act) Regulation* requires that a person who is the subject of an administrative penalty determination must pay the penalty within 30 days of the date the determination is served on the person.
6. Pursuant to s. 100 of *EMA*, a person aggrieved by a decision of the Director may appeal the decision to the Environmental Appeal Board (“*EAB*”).

7. Section 101 of *EMA* states that the time limit for commencing an appeal to the EAB is “30 days after notice of the decision is given.”

8. Section 31(1)(b) of the *Administrative Tribunals Act* authorises the EAB to dismiss an appeal if it determines the appeal was not filed within the applicable time limit.

B. *Background facts*

9. Deep Water Recovery Ltd. (“Deep Water”) operates a marine vessel dismantling and waste disposal facility on a property located near Union Bay, B.C.

10. The property on which Deep Water operates is adjacent to the foreshore of Baynes Sound.

11. On March 15, 2024, the Director issued Deep Water a Pollution Abatement Order (“PAO”) pursuant to the Director’s authority under s. 83 of *EMA*. The PAO imposed numerous obligations on Deep Water including:

- i) requiring Deep Water to cease discharging effluent to the environment with concentrations of copper, zinc and lead above BC Water Quality Guideline levels, and
- ii) requiring Deep Water to develop and implement an Effluent Sampling and Management Plan.

12. On April 12, 2024, Deep Water filed a notice of appeal with the EAB contesting the issuance of the PAO.

13. On December 12, 2024, the Director issued Deep Water two Determinations of Administrative Penalty. One of the penalties related to introducing waste into the environment in contravention of s. 6 of *EMA*, and the other related to a contravention of the PAO requirement that Deep Water cease

discharging effluent with concentrations of copper, zinc and lead above BC Water Quality Guideline levels.

14. On January 9, 2025, Deep Water filed two notices of appeal with the EAB contesting the issuance of the two December 12, 2024, administrative monetary penalties.

15. On May 6, 2025, the Director amended the PAO.

16. On June 3, 2025, Deep Water filed a notice of appeal with the EAB contesting the issuance of the May 6, 2025, amended PAO.

C. *The decision under review*

17. On July 17, 2025, the Director issued Deep Water another Determination of Administrative Penalty. In the July 17, 2025 determination, the Director imposed:

- i) a \$51,000.00 penalty on Deep Water for failing to comply with the PAO requirement relating to the discharge of effluent to the environment with concentrations of copper, zinc and lead above BC Water Quality Guideline levels, and
- ii) a \$21,050.00 penalty on Deep Water for failing to comply with the PAO requirements relating to the implementation of an Effluent Sampling and Management Plan.

18. The Determination of Administrative Penalty was delivered to Deep Water by email on July 17, 2025, addressed to a Deep Water representative named Mark Jurisch. The July 17, 2025, email was also delivered to Deep Water's counsel, Graham Walker.

19. The Director's July 17, 2025, determination includes a section entitled "Right to Appeal" which reads in part:

If you disagree with this Determination, Division 2 of Part 8 of EMA provides information for how to appeal my decision to the Environmental Appeal Board ("EAB"). In accordance with EMA and with the EAB Procedures Regulation, the EAB must receive Notice of the Appeal no later than 30 calendar days after the date you receive this Determination of Administrative Penalty.

20. On August 19, 2025, Deep Water filed a notice of appeal with the EAB contesting the Director's July 17, 2025, Determination of Administrative Penalty.

21. Deep Water's notice of appeal indicates it received the decision on July 17, 2025.

22. By email dated August 28, 2025, the EAB informed Deep Water that Deep Water's notice of appeal appeared to have been filed outside the 30-day time limit set out in s. 101 of *EMA*.

23. The EAB's correspondence to Deep Water indicated the EAB was considering dismissing the appeal but would provide Deep Water the opportunity to deliver a written submission to the EAB before it made a final decision on the issue.

24. On August 29, 2025, Deep Water provided the EAB with a written submission opposing the dismissal of Deep Water's notice of appeal. In its submission Deep Water argued:

- i) the day on which the 30-day appeal period began to run is governed by s. 133(4) of *EMA* which states "Anything sent by electronic mail for the purposes of this Act is deemed to be received by the person to whom it is addressed on the third day after it is sent."
- ii) information in the Ministry's *Administrative Penalties Handbook* supports the interpretation that the appeal period begins three days after a decision is delivered by email, and

- iii) the date Deep Water was deemed to have received the Director's decision was July 22, 2025, with the result that its August 19, 2025, notice of appeal was filed within the 30-day statutory deadline.
25. On February 4, 2026, the EAB issued a decision dismissing Deep Water's notice of appeal as it was not filed within the applicable time limit.
26. The key findings of the EAB decision were:
- i) The EAB has no authority to extend the time in which a decision made under *EMA* may be appealed.
 - ii) Section 101 of *EMA* establishes that the time limit for commencing an appeal is "30 days after notice of the decision is given."
 - iii) Deep Water received the Director's decision on July 17, 2025.
 - iv) The deemed service provision in s. 133(4) of *EMA* is not determinative of when notice of a decision was "given" and when the 30-day time to file a notice of appeal began.
 - v) Even if the provision were applicable, a deemed service date established under s. 133(4) is rebuttable in circumstances where there is evidence as to when the document was actually received by the recipient.
 - vi) For the purposes of determining when the appeal period began, notice of the Director's decision was given to Deep Water on July 17, 2025.
 - vii) As Deep Water did not file its notice of appeal within 30 days of July 17, 2025, the EAB had no jurisdiction to hear the appeal.

Part 5: LEGAL BASIS

A. *The petition names an improper respondent*

27. As it is not a legal entity, “The Ministry of Environment and Parks – Compliance and Enforcement Branch” is not an appropriate respondent to this application for judicial review. In the circumstances, the appropriate respondent to the petition is “The Director, *Environmental Management Act*”. The petition should be amended accordingly.

B. *The petition raises issues that were not before the EAB*

28. As a rule, a petitioner should not be permitted to raise an argument on judicial review that it did not raise with the administrative decision-maker whose decision it seeks to review.¹

29. Here, the petition raises arguments relating to officially induced error, procedural fairness, and natural justice that Deep Water did not include in its written submission to the EAB. The arguments all involve the allegation that Deep Water was misled by and relied on a communication from a Ministry official as to the date by which its notice of appeal was to be filed.

30. Allowing Deep Water to advance arguments on judicial review that it did not raise with the EAB:

- a) undermines the intent of the Legislature in delegating decision-making powers to an administrative body, as opposed to the court;
- b) does not accord with the principle of deference to the decisions of statutory decision-makers, particularly where, as here, the decision-maker has specialized functions and expertise; and,

¹ *Canada Lands Company CLC Limited v. Schlieper*, 2025 BCCA 145 at paras. 54 to 56

c) is prejudicial to the EAB as it presents issues to the court without the EAB's position on those issues being documented in the record.

31. In light of these concerns, the court should not permit Deep Water to advance any argument on its application for judicial review that it did not raise in its submission to the EAB.

C. Standard of review

32. The court's review of the merits of the EAB's decision is to be conducted on the reasonableness standard.

33. In *Vavilov*, the Supreme Court describes "reasonableness" as a deferential standard that finds its starting place in judicial restraint and "respects the distinct role of administrative decision makers"². The purpose of reasonableness review is to "give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law".³

34. In general, the central line of inquiry for a reviewing court is whether the decision exhibits "an internally coherent and rational chain of analysis...that is justified in relation to the facts and law that constrain the decision maker."⁴

35. In all cases, a court must refrain from deciding the matter under review itself, with a view to measuring the decision under review against the outcome the court would have reached.

² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") at para. 75.

³ *Vavilov* at para. 82.

⁴ *Vavilov* at para. 85.

36. To the extent the petition raises any issue relating to procedural fairness, the issue should be separately reviewed on the correctness standard.⁵

D. The EAB's decision was a reasonable exercise of discretion

37. The EAB's decision was a reasonable exercise of its discretion under s. 31(1)(b) of the *Administrative Tribunals Act* to dismiss Deep Water's appeal for not having been filed within the applicable time limit.

38. On its face, it is apparent that s. 101 of *EMA* is the provision prescribing the time period in which a person may commence an appeal to the EAB. As stated in s. 101, an appeal must be filed within 30 days after "notice of the decision is given".

39. It was reasonably open to the EAB to determine the date on which notice of the Director's decision was given to Deep Water by reference to the date of the decision itself (July 17, 2025), the date the decision was provided to Deep Water by email (July 17, 2025) and the date Deep Water indicated it received the decision in its notice of appeal (July 17, 2025).

40. It was also reasonable for the EAB to conclude that s. 133(4) of *EMA* was not instructive as to when notice of the Director's decision was "given" to Deep Water. As the EAB's decision rightly observed, there is a meaningful difference between the date notice of a decision is "given" for the purposes of s. 101 and the date a document sent to a person by email is "deemed to be received" for the purposes of s. 133(4).

41. Given the difference in language between the two provisions, it was reasonable for the EAB to consider s. 101 of *EMA* as being determinative as to when the appeal period begins. On a plain reading, s. 101 speaks directly to the circumstance of when an appeal to the EAB must be filed. In the circumstances,

⁵ *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 3

the EAB made no error in relying on s. 101 rather than applying s.133(4), a general provision that makes no reference to the EAB appeal process.

42. Despite its view that s. 101 governs the determination of when the appeal period begins, the EAB's decision nevertheless considered whether s. 133(4) operated in the way argued by Deep Water. The EAB's subsequent conclusion that the law allows a deemed receipt date to be rebutted by evidence of when a document was actually received reveals no error.

43. It was also reasonable for the EAB to subsequently conclude that if the provision was potentially applicable in the circumstances, s.133(4) was not engaged with respect to the Director's decision because of the information available to the EAB indicating the decision was actually received by Deep Water on July 17, 2025.

E. Support for the EAB's interpretation in the broader legislative scheme

44. Reference to the *Administrative Penalties (Environmental Management Act) Regulation* supports the EAB's conclusion that the appeal period for a penalty determination begins when notice of the decision is "given" rather than the date on which the decision was deemed to have been served on the regulated party.

45. In particular, support for the EAB's interpretation is found in s. 8 of the *Administrative Penalties (Environmental Management Act) Regulation* which requires that an administrative penalty determination be paid within 30 days of the later of certain events, one being "the date the determination is served on the person."

46. The fact that the legislative scheme contains a provision setting a time limit based specifically on the date on which a determination was "served" is a strong indicator that date of service is irrelevant to determining the time for commencing an appeal to the EAB under s. 101 of *EMA*.

47. In sum, the legislature's choice not to use any language relating to date of "service" in s. 101 of *EMA* must be respected with the result that the appeal period for a penalty determination begins on the date "notice of the decision is given", precisely as the EAB concluded.

F. No relief based on officially induced error, procedural fairness or natural justice

48. The petition alleges that Deep Water was "led into error" by a July 21, 2025, email from a Ministry official on which Deep Water relied in calculating when its notice of appeal was to be filed. Deep Water's petition claims the Ministry's communication gives rise to relief based on officially induced error, procedural fairness and natural justice.

49. The Director maintains the court should not entertain this line of argument as it was not raised in Deep Water's submission to the EAB. If the court decides to consider the argument, the Director says it has no merit for the following reasons:

- i) There is no evidence at all in either Deep Water's submission to the EAB or in the record before the court on judicial review to support the allegation that Deep Water was "led into error" by the Ministry's July 21, 2025, email or that Deep Water relied on the information in the email in any way.
- ii) The July 21, 2025, Ministry email makes no mention whatsoever of an appeal to the EAB, let alone the date by which Deep Water's notice of appeal was required to be filed. If Deep Water relied on the information in the email for the purposes of calculating when its notice of appeal was due, Deep Water alone is responsible for that calculation.
- iii) Deep Water's petition omits to mention another July 21, 2025, email it received from the same Ministry official in which Deep Water was provided an invoice for payment of the administrative penalty. The due

date on the Ministry's invoice is August 21, 2025, i.e. 30 days after the July 22, 2025 date on which the Ministry official deemed the determination to have been served. The Ministry's deemed service date calculation appears therefore to have been made for the purpose of determining when the administrative penalty must be paid, rather than determining the date on which Deep Water's notice of appeal to the EAB was due, as alleged in the petition.⁶

iv) Contrary to what is asserted in the petition, the Ministry's Administrative Penalty Handbook does not confirm "that the time to file an appeal of an administrative penalty begins when service is effected." The actual language of the handbook relating to when an appeal must be filed indicates an appeal must be filed "within 30 days after a Determination has been made: s.14(4) IPMA, s.101 EMA."

50. In light of the above, there is no basis for the court to set aside the EAB's decision based on the petitioner's arguments relating to officially induced error, procedural fairness or natural justice.

G. Order sought

51. The petition raises no ground on which to interfere with the EAB's decision. The petition should be dismissed.

⁶ Note that extra-record evidence is admissible on an application for judicial review to address an issue of procedural fairness: *Chestacow v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 389 at para. 27

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Yeiin Shim made June 15, 2026.

Date: June 16, 2026



David Cowie
Lawyer for the respondent

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