

**NOTICE OF APPEAL**

**Time Limit for Commencing Appeal**

An appeal must be filed with the Environmental Appeal Board within the statutory appeal period. The Board does NOT have the authority to extend the filing period.

**Filing Fee**

For a notice of appeal to be complete, it must include the appeal fee of \$25.00 for each decision being appealed. This fee is required by section 2(2) of the *Environmental Appeal Board Procedure Regulation* and cannot be waived by the Board. The fee may be paid by cheque, money order or bank draft made payable to the Minister of Finance.

**Person Filing the Appeal**

<b>1. Name of Appellant</b>		
Address	City	Postal Code
Phone Number	Fax Number	Email
<b>2. Name of Appellant's agent/ spokesperson/ representative (if applicable)</b>		
Address	City	Postal Code
Daytime Phone Number	Fax Number	Email
<b>3. Address for delivery: provide the address where you want official correspondence regarding the appeal to be sent (from the Board and from the other parties). The Board's Rules state that the "address for delivery" may be a postal address, fax number or email address:</b>		

**Details of Decision to be Appealed** (The Board hears appeals from decisions made under eight (8) different statutes: the *Environmental Management Act*, the *Greenhouse Gas Industrial Reporting and Control Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Mines Act*, the *Water Sustainability Act*, the *Water Users' Communities Act* and the *Wildlife Act*.)

Who made the Decision (include the name of the Government Agency – Provincial Ministry or Metro Vancouver) and what is the Decision Date (PLEASE ATTACH A COPY OF THE DECISION, IF POSSIBLE)
When did you receive the decision?



## **REASONS FOR APPEAL AND PARTICULARS**

### **A. Background and the Permit at Issue**

The permit at issue is Wildlife Permit No. SU20-609-433 (the “Permit”), issued pursuant to the *Wildlife Act*, RSBC 1996, c. 488, and the *Permit Regulation*, B.C. Reg. 253/2000. This Permit was issued by Joshua Malt who is with the Ministry of Forest, Lands, Natural Resources.

The Permit exempts the Permit Holder under s. 3(a)(d)(ii) of the *Permit Regulation* from the prohibitions in section 34(b) of the *Wildlife Act* against possessing, taking or destroying nest(s) of a Peregrine Falcon, located at 40251 Quadling Road, Abbotsford, BC.

The Permit Holder is Mountainside Quarries Ltd, which owns the rights to mine rock and gravel at a property located at 40251 Quadling Road, Abbotsford, known as the “Quadling Quarry”, a property that has been used in the past as a rock and gravel quarry mine. Previously the Quadling Quarry was owned by a different owner who went bankrupt in or about 2015, at which time the Quadling Quarry mine ceased operations. Of note, a mated pair of Peregrine falcons have nested and successfully reared young at the site and are still using a now-remnant portion of the original natural bluff.

Another entity, Carlium Developments Inc., presumably an entity associated with Mountainside Quarries Ltd., has a Quarry Permit Q-7-086, amended on April 29<sup>th</sup>, 2020, pursuant to the *Mines Act*, RSBC 1996, c. 293 (the “Quarry Permit”). The Quarry Permit requires that the Quarry Permit holder acquire a Wildlife Permit for removal of the peregrine falcon nest prior to commencing any drilling or blasting operations, the Permit at issue on this appeal.

### **B. The Appellant**

The Appellant, Christopher Shawn Kitt, seeks to appeal the decision made by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (FLNRORD or the “Ministry”), on or about January 14, 2021, to issue the Permit.

Mr. Kitt was informed that the Permit had been issued on January 14, 2021, but did not receive a copy of the Permit at that time, or at any time since. Mr. Kitt was provided a copy of the “Peregrine Falcon Mitigation Agreement” and “Peregrine Falcon Mitigation Plan”, documents included with and integral to the Permit, on January 19, 2021, by the Section Head, Terrestrial Wildlife Resources, South Coast Resource Management, FLNRORD (the

“Section Head”). Mr. Kitt was then provided an unexecuted and incomplete draft of the Permit on January 27, 2021, by the same Section Head.

Mr. Kitt is a local businessman who worked for BC Fisheries for 15 years and he has a biology degree in Fisheries and Aquaculture. Mr. Kitt owns a property located 40372 No. 1 Rd., Abbotsford, in the Barrowtown neighbourhood of Abbotsford, about 500 metres from the Quadling Quarry where he has resided with his family for 12 years. Mr. Kitt has been making submissions to the Ministry since July 2019 on his own behalf and on behalf of other residents in his neighbourhood opposing the destruction of the Peregrine falcon nest that would necessarily result by the mining activities allowed under the permits in issue. The neighbours started an online petition two years ago and have almost 4000 signatures in support of protecting the provincially Red-listed Peregrine falcons. The neighbours also have the support of larger organizations such as The Hancock Foundation, O.W.L Foundation, Canadian Peregrine Foundation and The Great Blue Heron Nature Reserve, as well as Nature Chilliwack, Burke Mountain Naturalists, Wild Bird Trust, Hope Mountain Centre, BC Nature, Defend Them All, Garden City Conservation Society, Langley Field Naturalists, and Birds Canada. These are all groups that have expressed support for Mr. Kitt and the residents he represents, and are expected to play a role in the appeal either as supporters of Mr. Kitt or as applicants for party status.

Mr. Kitt has communicated with the Ministry as a representative of a stakeholder group, local residents, on numerous occasions since July 2019 by email and phone conferences.

Mr. Kitt asserts, based on the above facts, that he has standing to file this Notice of Appeal as a person affected by the decision of the Ministry to issue the Permit, and to be an Appellant in appeal proceedings of the Permit.

### **C. Grounds for Appeal and Particulars**

The Appellant submits that the Ministry erred in law, in fact, and in mixed law and fact, as follows:

1. The Ministry erred in law by engaging in a discretionary decision to issue the Permit by employing an incorrect legal standard that is contrary to the non-discretionary legal standard for the issuance of exemption permits prescribed by section 5 of the *Permit Regulation*.

**Particulars:** At page 2 of Schedule A of the Permit, the “Peregrine Falcon Mitigation Plan”, the Ministry states: “Under the BC Wildlife Act a permit can be granted for the destruction of the nest of a provincially regulated species when necessary or acceptable” [underlined for emphasis]. The Ministry’s iteration of the legal standard it applied indicates an incorrect interpretation of the governing legislation, which does not provide for discretionary

decision making, nor does it provide for discretionary decision making “when necessary or acceptable”.

The correct legal standard, as prescribed by s. 5 of the *Permit Regulation*, is as follows:

Restrictions on issuing permits generally

5 (1) Before issuing a permit under section 2, 3 or 4 the regional manager or the director, as applicable, must be satisfied

(a) that the applicant meets the specific requirements, if any, for the permit as set out in this regulation, and

(b) that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia.

[emphasis added]

2. The Ministry erred in law by denying the Appellant procedural fairness, a requirement of natural justice, by issuing the Ministry’s decision to grant the Permit prior to receiving the submissions of the Appellant, despite the Appellant’s request for more time to provide those submissions due to an outstanding and delayed freedom of information request.

Particulars: The Appellant had been making submissions as a representative of an important stakeholder group, the residents of Barrowtown, since July 2019, and had been engaged in dialogue as a representative stakeholder with agents of the Ministry during that time.

The Appellant submitted a Freedom of Information (FOI) for copies of the application FOI Request FNR-2020-06390 November 4, 2020 for the Permit submitted by the Permit Holder. The Appellant was informed by the government of B.C. that the response to the Appellant’s FOI had been postponed from December 14, 2020 to January 29, 2020. On December 16, 2020, the Appellant sent an email to the Section Head, and copied that message to the Minister and other agents of FLNRORD, requesting that the Ministry delay its decision regarding issuance of the Permit until after the Appellant had received the FOI response material and had the opportunity to consider those materials and to make meaningful submissions to the Ministry as an important stakeholder in the decision under consideration.

The Appellant received no response from the Section Head or from any other agent of FLNRORD, and issued the Permit on January 14, 2021, without further consultation with

the Appellant, fifteen days prior to the FOI response deadline. Subsequently, the FOI Deadline has been extended a second time to March 15, 2021.

3. The Ministry erred in fact in its determination that the population of Peregrine falcons, in particular the *anatum* subspecies, has been increasing in the South Coast Region of BC, when in fact the increased population of *anatum* in the province has only occurred in the Interior region of BC.

Particulars: The Ministry cited the recent federal review of the status of the Peregrine falcon in Canada (COSEWIC 2017) for its assertion that the *anatum* population has been increasing in BC. That study concluded that the population of *anatum* appears to be increasing in Canada, including in BC, generally. However, according to data from that same study, the increase in BC generally is the result of a steady rise in numbers associated with the Interior Region, whereas the South Coast Region has not exhibited a similar trend over the 20-year period from 1995 to 2015. Further to the contrary, the COSEWIC 2017 data demonstrates that there has been an overall decrease in *anatum* territorial pairs in the South Coast region of BC during 1995 to 2015. Occupancy rates of nest sites and young production per occupied site are also below norms associated with an increasing population (COSEWIC 2017).

4. The Ministry erred in fact, or in mixed fact and law, by relying on incorrect information provided in the Permit Holder's application for the Permit, and without proper consideration of correct information provided by the Appellant prior to the issuance of the permit, in particular with respect to the following facts:
  - a. The nesting site at the Quadling Quarry was "man-made" when in fact the nesting site is on a bluff on the original mountainside;
  - b. In 2019 there were no young falcons produced at the Quadling Quarry nesting site, and only one young was produced in 2020, when in fact there was at least one young falcon produced (but did not fledge) in 2019 and two young fledged in 2020.
  - c. That mining activities at the Quadling Quarry will preclude the Peregrine falcons from nesting, when in fact mining activities themselves will not necessarily preclude the falcons from nesting as long as the bluff itself is protected and associated disturbances limited during seasonally sensitive periods.

5. The Ministry erred in mixed fact and law in its determination that granting the Permit authorizing the destruction of the Quadling Quarry Peregrine falcon nesting site is not contrary to the proper management of wildlife resources in British Columbia, as required by s. 5 of the *Permit Regulation*.

Particulars: Contrary to the Ministry's characterization of the Peregrine falcon population in the South Coast region of BC as undergoing a significant rebound, the wild Peregrine population in the South Coast region is one characterized by widely dispersed spatially separated breeding units supported by only a few successful territorial pairs. Based on the population metrics noted above (i.e., decreased territorial pairs, low occupancy rates of historical sites, young production per occupied site), there are insufficient sub-adults available to back-fill sites occupied by only one adult, recolonize historical sites, or expand to new locations.

Consequently, the Mountainside Quarry nesting site is a keystone site of critical importance to the survival and recovery of *anatum* in the South Coast region, due to the nesting site being:

- a. the last active site in the southern Fraser Valley, an area that formerly supported five other such sites;
- b. the most productive non-urban site in the entire South Coast Region, making it a key source of young birds for maintaining the few breeding territories left in the region.

The proper management of wildlife resources in BC therefore requires preservation and protection of this critical peregrine falcon breeding site.

6. The Ministry erred in mixed fact and law in its determination that the construction of artificial nesting sites at other locations in the southern coast of BC would mitigate the destruction of the Quadling Quarry nest, and therefore be in accordance with proper management of wildlife resources in BC, as required by s. 5 of the *Permit Regulation*.

Particulars: Provincial policy as stated in guidance documents prepared by the Ministry [i.e., *Develop with Care: Environmental guidelines for urban and rural land development in British Columbia (2014)*; *Guidelines for raptor conservation during urban and rural land development in British Columbia (2013)*], requires that natural capital be preserved using excellent practices for sustainability and stewardship. There is no justification for destroying the Quadling Quarry nesting site due to there being an absence of equivalent nesting sites in the region, particularly any sites with the proven productivity of the

Quadling Quarry site. Given the population data at the regional level, the complete loss of other nesting sites in the southern Fraser Valley, and the inherent productivity of this last site, the decision to destroy the site is completely at odds from both science and provincial policy, and thus contrary to proper management of wildlife resources in BC.

7. The Ministry erred in mixed fact and law in its determination that its decision to issue the Permit to destroy the Quadling Quarry nesting site on the basis that the destruction of that nesting site could be mitigated by construction of artificial sites, and as such would constitute “ecologically-equivalent offsets” in accordance with BC Environmental Mitigation Policy, constitutes the proper management of wildlife resources in BC, as required by s. 5 of the *Permit Regulation*.

Particulars: Provincial guidance indicates mitigation is a last resort to be applied in cases where planning, flexible management and project design cannot avoid or otherwise minimize the impact. The Ministry has not engaged in consideration of measures to avoid or minimize impacts for this site, and no evaluation of such measures was provided in the Permit application.

Peregrine falcons have been associated with the Quadling Quarry site for well over a decade. Leaving the remnant bluff intact and applying no-disturbance buffers during the appropriate season would likely be compatible with ongoing nesting success, and would still leave most of the mining material on site available for extraction.

According to provincial guidance for mitigation, mitigation is considered an option only if there is compelling justification for the impact, and alternatives for avoiding or minimizing the impact cannot be identified. At that point, mitigation options must then be considered from the perspective of ecological equivalence. Considering the history of reproductive output from this nesting site, the loss of all other active sites in the area, and the overall high vacancy rates and the below replacement level young production in the South Coast region, this site meets the definition of “critical habitat” in terms of the overall viability of the South Coast peregrine population. From this perspective, the proposed mitigation measures do not provide restoration or otherwise equivalent offsets with any reasonable degree of certainty of success, for the reasons that follow:

- a. Leaving an artificial nesting ledge on the site after the extraction is completed means an interruption in the nesting cycle of 10 - 12 years, based on the estimate provided in the application. Thus, given this duration, there is a low probability that any of the adults or their young would still be remaining in the area, and further uncertainty as to whether they would find the artificial ledge suitable as a nesting site. The fact

that the Final Land Use for the site after operations are completed, is Light Industrial, further reduces any probability for accepting the artificial ledge as a nesting site.

- b. Installation of artificial nesting ledges on nearby cliffs provides no assurance that they will actually be accepted by the Peregrine falcons, and the territory not abandoned completely. Use of artificial nest structures has been successfully applied with eagles and ospreys, and with Peregrine falcons in urban settings, but it remains unknown whether wild Peregrines accustomed to nesting on natural features will adopt an artificial nesting site; indeed, the limited data available suggest no reason for optimism in this regard.

A science-based mitigation approach that would accord with proper management of wildlife resources in BC would necessitate establishing the artificial nesting sites on nearby cliffs and monitoring them for a period of time to establish their success before declaring them a suitably equivalent offset for the Quadling Quarry nesting site.

Consequently, the Ministry's decision to issue the Permit to destroy the existing nesting site because of the proposed mitigation measures does not meet the legal requirement of ensuring the proper management of wildlife resources in BC prior to issuing an exemption permit.

#### **D. Request for Interim Stay of the Permit Pending Hearing of a Stay Application**

The Appellant requests an interim stay of the Permit, effective until a stay application is determined.

The Appellant intends on filing a stay application within the next two weeks.

From the time of the filing of the stay application until issuance of a decision on the stay application could be several months. In the meantime, the Peregrine falcon nesting site at the Quadling Quarry could be irreversibly damaged and/or destroyed, by way of cutting down trees in the vicinity of the nesting site and actual physical destruction of the site by way of mining activities.

According to the legal test for a stay application the applicant must demonstrate:

1. A serious question to be tried;
2. Irreparable harm if the stay is not granted; and
3. The balance of convenience between the parties.

For the reasons stated above in the "Grounds for Appeal and Particulars" section of this Notice of Appeal, there are serious questions to be tried.

Destruction of the Peregrine falcon nesting site by way of nearby tree cutting and physical removal of the rock and other material of the site itself, cannot be repaired. The harm will be irreparable.

The Permit Holder has not yet commenced mining activities and does not require mining of the area of the Peregrine falcon nest at this time, since the mining period under the Quarry Permit lasts for an undefined period, and under the Mitigation Plan states the mine will be in operation for 10-12 years (p. 7). Considering the irreparable harm that will be caused by the destruction of the nesting site, and the lack of any apparent inconvenience to the Permit Holder, the balance of convenience favours the applicant.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



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Matthew J. Jackson

Lawyer/Representative for the Appellant, Christopher Shawn Kitt