

In the matter of the *Professional Governance Act*, S.B.C. 2018, c. 47  
and Rule 9-15 of the Bylaws of the College of Applied Biologists

And in the matter of:

**College of Applied Biologists**

(the “College”)

And:

**Kenneth Mackenzie, Former R.P. Bio #837**

(the “Respondent”)

**Reasons for Decision and  
Order of the Discipline Committee**

Counsel for the College of Applied Biologists:

Mark Underhill, K.C.  
Julia Riddle

Counsel for the Respondent:

The Respondent declined to participate

Members of the Hearing Panel of the  
Discipline Committee:

Nyssa Temmel, R.P. Bio. (Chair)  
Rhonda Maskiewich, R.P. Bio.  
Trevor Swan (Public Member)

Independent counsel for the Panel:

Sean Hern, K.C.

Form of Hearing:

In Writing

Date of Reasons for Decision and Order:

August 30, 2024

## Background

1. On October 25, 2023, the College of Applied Biologists (the “**College**”) issued a Citation to the Respondent, Kenneth Mackenzie, pursuant to section 66(1)(d) of the *Professional Governance Act*, SBC 2018, c.47 (the “**Citation**”).
2. The Citation advanced two allegations of professional misconduct:
  - (a) that the Respondent was in breach of section 7-1(1) of the College Bylaws (the “**Bylaws**”), and in breach of principles 2(4), 2(6), and 2(7) of the Code of Ethics and Professional Conduct that appears as Schedule 1 of the College Bylaws (the “**Code**”) by failing to respond to client communications in connection with a Riparian Assessment the Respondent was contracted to perform; and
  - (b) that the Respondent was in breach of section 9-4(3) of the College Bylaws and Principle 7(b) of the Code by failing to respond to requests for information from the College in respect of a complaint made against the Respondent.
3. In its Notice of Hearing dated March 27, 2024, the College gave notice that the hearing of this matter would take place by way of written submissions and established a schedule for delivery by the College and by the Respondent of their submissions and associated documents.
4. The College sent the Citation and the Notice of Hearing to the Respondent by registered mail to the address the Respondent had provided the College. Counsel for the College advises that Canada Post’s tracking system shows that delivery was accepted of both packages.
5. On April 10, 2024, the Respondent’s registration with the College was cancelled because the Respondent failed to pay dues and failed to comply with professional development requirements.
6. The College’s Book of Submissions and Authorities dated April 26, 2024 (the “**College’s Submissions**”), was sent by registered mail to the Respondent, and the College advises that according to Canada Post’s tracking system, the package was accepted for delivery on April 29, 2024.
7. The College also attempted to send the Notice of Hearing and the College’s Submissions to the email address that the Respondent had provided to the College as required under section 10-2 of the Bylaws, but the email address delivered a “bounce-back” response to each, indicating it was no longer functional. An individual who answered the phone at the Respondent’s household provided the College with a Gmail account for the Respondent, and the College emailed the College’s Submissions to that address. No “bounce-back” email was received, nor any reply.

8. No communication or submission was received by the Hearing Panel of the Discipline Committee (the “**Panel**”) from the Respondent or anyone on his behalf in relation to this proceeding.

**Notice to the Respondent**

9. As a result of the absence of any communication from the Respondent in relation to this proceeding, in a letter dated July 16, 2024 from the Panel’s counsel, the Panel asked the College to outline its position on whether the Respondent had been served with notice of this proceeding. The College replied in a letter dated July 31, 2024, explaining the steps that had been taken to deliver the relevant materials to the Respondent, including the information noted above. In addition, the College advised that its records showed that the Respondent last logged into the College’s “membership portal” on February 14, 2024, shortly after a letter from the College’s Registrar was delivered to the Respondent’s address informing him of the disciplinary proceeding and that a hearing panel would be appointed.
10. In view of the steps taken by the College to deliver the Citation, Notice of Hearing and the College’s Submissions to the Respondent, together with the other communications made to the Respondent, the Panel is satisfied that the Respondent has received notice of this proceeding in accordance with the Bylaws and the principles of procedural fairness, and that he has chosen not to respond.

**Exhibits in the Hearing**

11. The Panel marked the following as exhibits to the proceeding:

<b>Exhibit #</b>	<b>Date</b>	<b>Description</b>
Exhibit 1	February 8, 2023 to May 2, 2023	Email chain, including emails between the Complainant and the Respondent
Exhibit 2	June 30, 2023	Complaint from the Complainant
Exhibit 3	August 4, 2023	Letter from the Deputy Registrar of the College to the Respondent
Exhibit 4	September 14, 2023	Email from the College’s Manager of Registration and Compliance to the Respondent, with enclosures

Exhibit 5	September 18, 2023	Registrar[’s] Initial Report to the Investigation Committee
Exhibit 6	October 25, 2023	Citation
Exhibit 7	February 6, 2024	Letter from the Registrar of the College to the Respondent
Exhibit 8	February 7, 2024	Email from the College’s Manager of Compliance to the Respondent
Exhibit 9	March 27, 2024	Notice of Hearing
Exhibit 10	June 30, 2023-March 27, 2024	Complaints Communication Log
Exhibit 11	July 16, 2024	Letter from counsel for the Panel to counsel for the College
Exhibit 12	July 31, 2024	Letter from counsel for the College to counsel for the Panel

**Facts**

12. The Respondent’s lack of response to this proceeding is consistent with the underlying facts that led to the Citation.
13. The Respondent had been hired by a surveying company to complete a Riparian Assessment for a certain property as part of a subdivision process. The Respondent completed the assessment, but the Cariboo Regional District raised a question about a proposed plan change that could have an impact on some cottonwood trees on the property in question. The question was posed to the Respondent sometime prior to February 8, 2023 by an Associate Planner at the regional district, who then followed up with the Respondent’s client when the Respondent failed to reply.
14. On February 13, 2023, the client then asked the Respondent to respond to the regional district, and the Respondent did not answer that request either.
15. The client followed up with the Respondent on February 17, 2023, and again the Respondent did not answer.

16. On May 2, 2023, the client asked again for an answer from the Respondent and emphasized the urgency of the request as a result of the Respondent's failure to respond previously. The Respondent did not answer that email.
17. On June 30, 2023, the client submitted a complaint to the College. The complaint advised that in addition to the emails sent, the client had left many messages (implying telephone messages) and had also spoken by telephone to the Respondent's wife and requested that the Respondent answer the emails sent to him, but there had been no communication from the Respondent.
18. On August 4, 2023, the Deputy Registrar of the College sent a letter to the Respondent by email and mail, informing the Respondent of the complaint and asking for a response. The Respondent did not answer that communication either.
19. The Deputy Registrar called the Respondent on September 7, 2023 but there was no answer. On September 14, 2023, the Deputy Registrar emailed the Respondent another copy of the August 4, 2023 letter and reiterated the request for a response. That same day, the College called and left voicemails on the Respondent's mobile and home phones. No response was received to either the email or voicemails.
20. On October 25, 2023, the Investigation Committee issued the Citation to the Respondent.
21. On February 7, 2024, the Registrar sent the Respondent a further letter (dated February 6) explaining that the Citation had been issued against him and that a discipline panel would be convened to hear it. The letter explained the gravity of the penalties the Respondent would potentially face if the allegations in the Citation were proven. No response was received by the Respondent and as noted above, the Respondent has not participated in any respect in this proceeding.

## **Issues**

22. At issue is whether, on a balance of probabilities, the Respondent committed the professional misconduct described in the two allegations in the Citation.

## **Analysis and Determinations**

### First Allegation – Failure to Communicate with Client

23. The first allegation is that in failing to respond to his client's follow-up inquiries regarding his Riparian Assessment, the Respondent breached Principles 2(4), 2(6) and 2(7) of the Code, with which section 7-1(1) of the Bylaws requires all registrants to comply.
24. Section 7-1 of the Bylaws states:

7-1 (1) All registrants must comply with the Code of Ethics and Professional Conduct (Schedule 1), the Standard of Professional Practice Competencies and Competence, applicable Guidance Documents, and the Standard of Continuing Professional Development.

(2) All registrants must possess and maintain competence in the following seven categories:

- (a) scientific knowledge and concepts;
- (b) laws, regulations, and policy;
- (c) standards and practices;
- (d) project or work product management;
- (e) records or data management and informatics;
- (f) professional accountability; and
- (g) communication.

25. The preamble to the Code states:

1 (1) Integrity, competence, accountability, and adherence to all applicable laws and regulations are the cornerstones of this Code of Ethics. College registrants are required to conduct themselves in a manner consistent with these precepts as outlined in principles enumerated in section 2, and to uphold the principles of stewardship of aquatic and terrestrial ecosystems and biological resources.

26. Sections 2(4), 2(6) and 2(7) of the Code provide as follows:

In dealings with the public, employers, clients, and other registrants of the profession, registrants of the College of Applied Biologists must: ...

(4) Provide a professional standard of service to clients and employers by conducting business practices fairly, avoiding conflict of interest, and respecting client or employer confidentiality. To meet this principle registrants must:

- (a) recognize that the requirement to provide a professional standard of service applies whether the registrant provides services in the private or public sector, as a contracting professional, volunteer, sole proprietor, or an associate in a corporation, or working at the staff or management level;
- (b) exercise fairness in business practices by following practices that are just and reasonable, open and honest, fair and respectful, and undertaken properly;
- (c) consider employer or client materials confidential;
  - i. a registrant must not use the proprietary or confidential information for personal gain or the advantage of other parties;
- (d) recognize the expectation of confidentiality does not hold where:

- i. the employer or client actions are unlawful, in which case the registrant is obliged to report the activity to the appropriate authority; or
- ii. the registrant has been otherwise directed by the employer, client or legal authority;
- iii. where the registrant is required by law to disclose confidential information, the registrant must so advise the employer or client, unless directed otherwise by the legal authority;

(e) avoid situations and circumstances where there is a conflict of interest;

- i. there is a real or perceived conflict of interest where a registrant's interests conflict or appear to conflict with the registrant's professional responsibilities;
- ii. in determining whether a conflict exists or appears to exist, registrants should consider whether a reasonably well-informed individual in possession of the facts would believe a conflict exists;
- iii. registrants must take measures necessary to ensure a conflicting interest does not bias decisions or recommendations that the registrant may be called upon to make; in extreme situations this might require the registrant to withdraw from a project.

(f) ensure conflicts of interests, real or perceived, are properly disclosed to employers, clients, and others who may be affected by the conflict; and

(g) ensure that accurate information in respect of qualifications and experience are provided to employers or clients.

\* \* \*

(6) Uphold professional obligations to the College while in the workplace. To meet this principle registrants must:

- (a) ensure professional obligations override all other work related obligations; and
- (b) refuse requests and pressures to compromise professional obligations to the College.

(7) Maintain a standard of personal and professional conduct that does not reflect adversely on the College or its registrants. To meet this principle registrants must:

- (a) behave in a manner that recognizes a registrant's conduct, both in private and professional life, shapes the perception the public and others have of the individual and, by association, the College and other registrants of the College;
- (b) be mindful that they are accountable to the College for both personal and professional conduct; and

(c) refrain through their words or actions, threatening, intimidating, or harassing any complainant, witness, or other person involved in an issue that is before the Investigation Committee or Discipline Committee, or any Board Member, committee member, Officer, employee, contractor, or other person acting on behalf of the College.

27. In its written submissions, the College did not make submissions in respect of Principle 2(4) but made a submission regarding a violation of Principle 2(3). Since Principle 2(3) was not a principle referred to in the Citation, the Panel will disregard that submission.

28. With reference to Principle 2(6), the College submits as follows, drawing upon *Palmer (Re)*, 2024 LSBC 2 at para 37, a Law Society discipline decision:

Similar logic underlies the requirement in Principle 2(6) that a registered professional biologist uphold their obligations to the College, including by “ensur[ing] professional obligations override all other work related obligations”. As the Law Society stated in disciplining a member of that body who had failed to respond to a client, “[i]t is a fundamental expectation that lawyers adequately communicate with their clients to obtain instructions, notify them of updates, and complete the work within a reasonable period.” The same principle applies to registered professional biologists.

29. In relation to principle 2(7), the College writes:

Finally, the respondent’s failure to communicate with his client is a clear failure to “[m]aintain a standard of personal and professional conduct that does not reflect adversely on the College or its registrants” as required in Principle 2(7). A repeated failure to respond to a client undermines the public’s trust in registered professional biologists. It shows disrespect for the client and their interests, impedes the progress of a client’s work, and “frustrates all parties’ ability to meet their respective duties to the public”. [quoting from *In the Matter of Shawna Reed*, R.P.Bio #1133 at para 78 (“*Reed*”)], In this case, the complainant has explained that the respondent’s failure to communicate with them had a real impact on their work and their ability to serve their clients.

30. There is no stand-alone statement in the Code to the effect that registrants must communicate adequately with their clients. However, the Panel is of the view that such an obligation is incorporated into Principle 2(4) in the concept of fair communication with clients. Principle 2(4) includes the following language (underlining added):

Registrants of the College of Applied Biology must... exercise fairness in business practices by following practices that are just and reasonable, open and honest, fair and respectful, and undertaken properly.

31. A business practice of not responding to a client for months, even after the client has informed the registrant that the lack of a response is causing prejudice to the project for

which the registrant consulted, is unreasonable, unfair, and disrespectful. Accordingly, the Panel finds the alleged breach of Principle 2(4) of the Code is established.

32. With respect to the alleged breach of Principle 2(6), the Panel does not agree with the College that Principle 2(6) was violated in this instance. In the Panel's view, Principle 2(6) relates to situations such as where a client or other party in the workplace environment asks a registrant to do something that is at odds with the registrant's obligations under the Bylaws, including the Code. In such a case, Principle 2(6) requires that the registrant prioritize their obligations to the College over work-related obligations, requests and pressures. On the evidence before the Panel, that is not a concern in this case.
33. Turning to Principle 2(7), the Panel finds that it does apply to the Respondent's conduct. In requiring registrants to "behave in a manner that recognizes a registrant's conduct, both in private and professional life, shapes the perception the public and others have of the individual and, by association, the College and other registrants of the College", Principle 2(7) obviously applies to overt conduct that undermines the reputation of the profession, but it also applies in a case of a complete failure to respond to reasonable professional inquiries. While the decision in *Reed*, cited by the College, concerned a failure to provide complete and timely monitoring results and did not specifically engage Principle 2(7), the observation that such conduct frustrated all parties' ability to meet their respective duties to the public applies here.
34. In this case, the Cariboo Regional District needed information from the Respondent for the purposes of a subdivision application, and the client surveyors needed the information as a component of performing their duties to the underlying client and presumably to maintain their own reputation with both the client and the regional district as a reliable and responsive service provider. The Respondent's conduct undermines the reputation of the College and its registrants, by inviting the public and other service providers to question whether disrespectful and unresponsive conduct is typical in the profession or permitted by the College. The Respondent's failure to communicate with a client and other professionals is conduct that reflects adversely on the College and its registrants, and therefore the Panel finds the Respondent breached Principle 2(7).
35. In summary, in relation to the first allegation in the Citation, the Panel finds the Respondent breached Principles 2(4) and 2(7) of the Code.

#### Second Allegation – Failure to Communicate with the College

36. The second allegation in the Citation is more straightforward because there is a clear rule in the Bylaws requiring registrants to respond to the College's requests for information. Section 9-4(3) of the Bylaws is the subject of the Citation and it is useful to refer to it in the context of section 9-4 as a whole:

9-4 (1) Upon receipt of a complaint, the Registrar must review the complaint, and within 10 days, notify the CEO and the chair of the Investigation Committee of the complaint, and make one of the following decisions:

- (a) dismiss the complaint pursuant to sections 9-5 and 9-6;
- (b) refer the complaint to the Audit and Practice Review Committee;
- (c) refer the complaint to the Investigation Committee; or
- (d) request further information from the complainant, respondent, or a third party that is relevant to the complaint.

(2) If the Registrar requests further information pursuant to section 9-4(1)(d), or if the Registrar refers the complaint to the Investigation Committee, the Registrar may:

- (a) forward the complaint in its entirety to the respondent for a response subject to section 9-13(2);
- (b) forward any response from the respondent to the complainant for comment; and
- (c) prepare a summary report for the Investigation Committee based on submissions from the respondent and complainant.

(3) Unless otherwise specified, all requests for information by an Officer, investigator, or panel must be complied with within 20 days.

[emphasis added]

- 37. In the Bylaws, an Officer is defined in Part 1 to mean “the Chief Executive Officer, the Registrar, and the Deputy Registrar”.
- 38. The Deputy Registrar of the College sent to the Respondent a letter dated August 4, 2023, by mail and email, enclosing a copy of the complaint and requesting a response within 20 business days. Although there was a typo in the greeting line of the letter, the letter was addressed to the Respondent, the enclosed complaint concerned the Respondent and the letter was sent to the Respondent, so there could be no reasonable confusion as to whether a response was required from the Respondent.
- 39. No response was received to the August 4 letter, and a follow-up email and two voice messages in September similarly received no response. Clearly the Respondent breached section 9-4(3) of the Bylaws.
- 40. The College also alleges that Principle 2(7)(b) of the Code was breached by the Respondent because of his failure to respond to the College’s correspondence. There is, however, a typo in the Citation such that it alleged that “Principle 7(b)” of the Code

was at issue. There is no Principle 7(b) in the Code, so perhaps the Respondent would have inferred that it was in fact Principle 2(7)(b) that was at issue.

41. In any event, Principle 2(7)(b), quoted above, is focused on conduct by a registrant that reflects adversely on the College or its registrants. In the Panel's view, a registrant's private response or non-response to the College's correspondence is not conduct of that nature. Rather, it is a matter between the College and the registrant that is likely only made public by the College in a disciplinary proceeding (as required by the *Professional Governance Act*, S.B.C. 2018, c. 47 ("**PGA**"). A published disciplinary decision upholding and enforcing professional standards is expected to build public confidence in the profession, not derogate from it. As a result, the Panel does not find that a breach of Principle 2(7)(b) has been established.
42. In summary, in relation to the second allegation, the Panel finds the Respondent breached section 9-4(3) of the Bylaws.

### **Penalty and Costs**

43. Section 75(6) of the *PGA* provides as follows:

(6) If, under subsection (5), an adverse determination is made against a respondent, other than a trainee, the discipline committee must do one or more of the following:

- (a) reprimand the respondent;
- (b) impose a penalty on the respondent in an amount that is,
  - (i) in the case of an individual, not more than \$100 000, and
  - (ii) in the case of a firm, not more than \$250 000;
- (c) impose conditions on the respondent's registration as a registrant of the regulatory body;
- (d) suspend the respondent's registration in the regulatory body
  - (i) for a specified period of time,
  - (ii) until the respondent complies with a requirement under paragraph (f),  
or
  - (iii) for a specified minimum period of time and until the respondent complies with a requirement under paragraph (f);
- (e) cancel the respondent's registration in the regulatory body;
- (f) require the respondent to

(i) complete a remedial program to the satisfaction of the board or the audit and practice review committee, or

(ii) appear before a committee established by the board and satisfy the committee that the respondent is competent to practise the registrant's regulated practice.

44. The College submits that the appropriate remedial orders are a reprimand and a \$3,750 penalty for each of the two allegations in the Citation, along with the following conditions imposed on any application by the Respondent for reinstatement:
- a. prior to resuming his practice, he must complete the Code of Ethics and Professional Conduct course offered by the College; and
  - b. within 12 months of his reinstatement, he must undergo a practice review conducted by the Audit and Practice Review Committee and pay the costs associated with the practice review, the timing and process of which will be determined by the Audit and Practice Review Committee.
45. In addition, the College seeks an order that costs be payable by the Respondent in the amount of \$5,000, pursuant to section 81(1) of the *PGA*. This amount is said to be partial compensation for the College's internal administrative costs and the costs of external counsel.
46. The College submits that the principles developed in the disciplinary decisions of the Law Society are a useful guide in assessing the appropriate remedies, and in particular cites *Dent (Re)*, 2016 LSBC 05 ("*Dent*"). In *Dent*, the discipline panel reviewed and consolidated some prior decisions of Law Society discipline panels, which had developed a non-exhaustive set of factors for panels to consider in determining the appropriate remedy for a lawyer found in breach of their duties or obligations. Those factors are:
- (a) the nature, gravity and consequences of the conduct;
  - (b) the character and professional conduct record of the respondent;
  - (c) whether there has been acknowledgement of the misconduct and remedial action; and
  - (d) the public confidence in the profession, including public confidence in the disciplinary process.
47. Applying these, the College submits that the Respondent does not have a past history of misconduct such that factor (b) is neutral, but says that the other factors are all applicable and that the Respondent's conduct falls at the serious end of the spectrum.

48. With respect to comparable cases from which an appropriate range of penalty might be established, the College cites two cases: *Reed, supra*, and *Chiasson (Re)*, 2020 LSBC 5 (“*Chiasson*”).
49. *Reed*, as noted above, was a case in which there were two citations issued to the respondent, a registered professional biologist. The first concerned the quality of the registrant’s work in relation to a Construction Environmental Management Plan. The second concerned a failure to respond to requests from the College for information within a reasonable period of time in relation to the initial citation. Both allegations were made out and with respect to the allegations in the second citation, the panel imposed a reprimand and a fine in the amount of \$2,000.
50. In *Chiasson*, the citation alleged the respondent lawyer failed to take substantive steps to advance the client’s civil sexual assault claim for over five years and also failed to adequately communicate with the client during that period. For both the substantive inaction and the non-communication, the disciplinary panel of the Law Society imposed a fine of \$10,000. That penalty followed a conditional admission by the respondent and the amount was what the respondent had proposed. The panel noted that the respondent had cooperated with the investigation and implemented changes to his office management procedures.
51. Here, the College argues that the Respondent’s conduct is more serious than that of the respondent in *Reed*, but less serious than the respondent’s in *Chiasson*, so an appropriate monetary penalty should fall somewhere between the two, for each citation.
52. Considering those submissions and the circumstances of this case, the Panel is of the view that a monetary penalty is appropriate in this circumstance. The Panel considers the misconduct to be serious and the Respondent has not taken any responsibility for his actions. Considering those factors, and the need to maintain public confidence in the profession and in the College’s disciplinary process, the Panel orders a monetary penalty of \$3,750 for each of the two allegations.
53. In addition, the Panel agrees with the appropriateness of the conditions on reinstatement proposed by the College as set out above in paragraph 44, and so orders.
54. Lastly, with respect to costs, they are governed by section 81 of the *PGA*, which states as follows:

81 (1) A discipline committee or panel, in the context of a discipline hearing under section 75, may require the respondent to pay the costs of one or both of the following:

- (a) an investigation;
- (b) the hearing under section 75.

(2) Costs assessed under subsection (1)

(a) must not exceed the actual costs incurred by the regulatory body during the course of the investigation and hearing, and

(b) may include the salary costs for employees or officers engaged in the investigation and hearing.

(3) The board may make bylaws governing the assessment of costs under subsection (1), including the following:

(a) the factors to be considered in assessing costs;

(b) the maximum amount of costs that may be assessed within the limits set out in subsection (2);

(c) the time allowed for payment of costs;

(d) the extension of time for payment of costs.


(4) The amount of costs assessed against a respondent under subsection (1) may be recovered as a debt owing to a regulatory body and, when collected, that amount is the property of the regulatory body.

55. With reference to subsection 81(3)(c), the Bylaws do not contain any provisions regarding costs, so that has not formed a part of the Panel's deliberations.
56. The Panel has considered the College's submission in which it seeks a \$5,000 award as partial compensation for its costs. In the circumstances, the Panel considers \$5,000 to be a reasonable and appropriate amount and so orders.

**Order**

57. In summary, the Panel's order is as follows:
1. The Respondent is hereby reprimanded for committing professional misconduct in failing to communicate with his client, in breach of Principles 2(4) and 2(7) of the Code, and section 7-1(1) of the Bylaws;
  2. The Respondent is hereby reprimanded for committing professional misconduct in failing to respond to requests for information by an Officer or investigator of the College, in breach of section 9-4(3) of the Bylaws;
  3. The Respondent is ordered to pay penalties in the amounts of \$3,750 for each of the two instances of professional misconduct for a total of \$7,500;

4. Should the Respondent apply and be accepted for reinstatement to the College, the following conditions shall be imposed on his registration:
  - a. prior to resuming his practice, he must complete the Code of Ethics and Professional Conduct course offered by the College; and
  - b. within 12 months of his reinstatement, he must undergo a practice review conducted by the Audit and Practice Review Committee and pay the costs associated with the practice review, the timing and process of which will be determined by the Audit and Practice Review Committee;
5. The Respondent is ordered to pay costs of this proceeding in the amount of \$5,000 to partially defray the costs incurred by the College in the investigation and discipline hearing.



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Nyssa Temmel, R.P. Bio



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Rhonda Maskewich, R.P. Bio.



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Trevor Swan