



Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
Email: eabinfo@gov.bc.ca

DECISION NO. 2019-WSA-001(a)

In the matter of an appeal under section 105 of the *Water Sustainability Act*, S.B.C. 2014, c. 15

BETWEEN:	Vincent Smoluk	APPELLANT
AND:	Assistant Water Manager	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Darrell LeHouillier, Chair	
DATE:	Conducted by way of written submissions concluding on March 23, 2020	
APPEARING:	For the Appellant: Jeffrey G. Frame, Counsel For the Respondent: Livia Meret, Counsel	

APPEAL

[1] Vincent Smoluk appeals an order (the "Order") issued on October 1, 2019, under section 93 of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "WSA"). The Order was issued by Tracy Meldrum, an Engineer and Assistant Water Manager (the "Water Manager") with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). The Appellant is the registered owner of a property located adjacent to the Nicola River in Merritt, BC.

[2] The Order states that the Appellant modified the channel and floodplain of the Nicola River by adding a soil berm without authorization. Among other things, the Order requires the Appellant to retain a professional engineer to submit to the Water Manager an assessment of the functional viability of the unauthorized works, and of the incremental flood risk to other property owners resulting from the unauthorized works. If the Water Manager accepts recommendations in the assessment report, the Appellant must complete the actions required in the report and file an assurance from a professional engineer that any required work was completed according to the accepted design and work plan.

[3] The Appellant submits that the berm prevents flooding on the property. He requests that the Board reverse the Order.

[4] Under section 105(6) of the *WSA*, the Board may, on appeal:

- (a) send the matter back, with directions, to the ... water manager ... who made the order being appealed,

- (b) confirm, reverse or vary the order being appealed, or
- (c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

BACKGROUND

[5] The Appellant resides on the property, and he has owned it since 1982.

[6] In the late 1980's, in anticipation of flooding from the Nicola River, the City of Merritt (the "City") placed sandbags on properties along the river, including on the Appellant's property, between the river and both Garcia Street and his driveway, over a distance of approximately 65 yards (59 metres). The City also put sandbags at two doors of the ground floor of the Appellant's house. The sandbags around the doors remained for a few years before they started to disintegrate.

[7] The City eventually replaced the sandbags running from the river along Garcia Street and the Appellant's driveway. The new sandbag barrier was two-bags wide, approximately two feet tall (0.61 metres), and was covered with fill. The Appellant understood that the intended purpose of this barrier was to prevent flooding on Garcia Street.

[8] In the late 1990's and 2002, the Nicola River again flooded the Appellant's property.

[9] In 2003, the Appellant subdivided his property into two lots. One contained his home while, on the other, he had an 80-suite seniors' facility (the "Facility") built in 2005. The Facility's lot is located farther from the river, and at a higher elevation, than the Appellant's home lot.

[10] In 2007 and in 2017, the river flooded. To protect his home, the Appellant placed sandbags (two bags wide and two bags tall) along the river, on his lot. Water seeped through the sandbags each time and the water reached the Appellant's home each time. The 2017 flood was more significant for him, as it damaged his home more significantly and covered Garcia Street with water. In both floods, the Facility was not flooded.

[11] In 2018, the river flooded again. The sandbags were still in place and the Appellant reinforced the barrier with a third, and in places, a fourth level of sandbags. The floodwater still came over the sandbags, resulting in about 16 inches (40.6 centimetres) of water in the ground floor of the Appellant's home, causing significant damage. The Facility was not touched by the water.

[12] After the 2018 flood, the Appellant decided to build a higher and more substantial barrier to prevent flooding. In Summer 2018, he hired a local contractor to design and build a soil berm in the location of the sandbags. The Appellant says the berm is about two feet higher (0.61 metres), than the sandbags were, and has a 15-foot wide base (4.5 metres). While the sides were being shaped, the berm was compacted by an excavator. The berm was surveyed to ensure that it was the correct height. The Appellant had erosion control material placed over the river side

of the berm. After the erosion control material was placed on the berm, it was topped with additional soil and was seeded.

[13] The 2018 flood also affected the Appellant's next-door neighbor, Mr. Ware. Following the 2018 flood, Mr. Ware raised the height of a soil berm he had built in 2017 along the driveway and homes on his property. In addition, he used dirt to raise the edge of his field along the Nicola River.

[14] According to an affidavit sworn by the Water Manager in support of her submissions on this appeal, the berms on Mr. Ware's and the Appellant's properties "are connected and behave functionally as one structure." The Water Manager asserts that, together, their total length "is in excess of 550 metres of artificial stream channel which is acting in a way such to protect multiple properties."

[15] On November 7, 2018, Ministry staff inspected the site after receiving a complaint about unauthorized dikes being built along the Nicola River. They spoke to Mr. Ware and inspected the berms on the Appellant's and Mr. Ware's properties. They photographed the berms in three locations. The Ministry's Compliance and Enforcement Report states that it was "not immediately clear whether authorizations were needed" for the berms, and a dike inspector or similar specialist would need to be contacted "to determine whether there are any contraventions."

[16] On August 1, 2019, the Water Manager and Jephtha Ball, a Flood Safety Engineer and Deputy Inspector of Dikes with the Ministry, inspected the berm. The Appellant was not in attendance. They took photographs and measured the Appellant's berm at a location near Garcia Street. They found the berm to be approximately 1.6 metres high, 3.5 metres wide at the base, and 1 metre wide at the crest. According to the Water Manager, the berm extends to the northeast around a bend in the Nicola River and southeast to a side channel of the river, and is approximately 0.5 metres high and 2.0 metres wide at its end point.

[17] Section 11(2) of the *WSA* provides that changes in and about a stream may only be made in accordance with the terms and conditions of a change approval, the regulations, the terms and conditions of an authorization, or an order. Section 11(1) requires an application for a change approval to be made in accordance with section 12. In the present case, there is no dispute that the Appellant did not apply for any change approval or authorization before building the berm. The Appellant says he built the berm on his property and not within a "stream", and no approval or other authorization under the *WSA* is required.

The Order

[18] On October 1, 2019, the Water Manager issued the Order pursuant to section 93(2)(e)(i) of the *WSA*. This subsection authorizes the Water Manager, who is designated as an Engineer under the *WSA*, to order "a person who makes changes in and about a stream or any person who derives a benefit from the changes in and about a stream to restore or remediate those changes".

[19] The Order states that the "stream channel and associated floodplain" of the Nicola River "have been modified by the addition of soil berms without

authorization" on the property, and those activities "are likely to cause detrimental impacts to other land owners". In summary, the Order requires the Appellant to:

1. retain a professional engineer qualified in flood risk and design of flood control structures to submit for the Water Manager's acceptance an assessment on the functional viability of the unauthorized works on the property and the incremental flood risk to other property owners resulting from the unauthorized works;
2. submit the assessment report including design drawings and workplan to the Water Manager no later than December 1, 2019 for review;
3. once the Water Manager has accepted any recommendations, undertake and complete those recommendations within 90 days;
4. file with the Water Manager, within 30 days of completion of the works, an assurance from a professional engineer that the work has been completed in all material respects with the accepted design and workplan; and
5. retain onsite a copy of the Order and the design accepted by the Water Manager where work is being done so it is available for inspection by Ministry officials.

[20] On October 1, 2019, the Water Manager issued an order to Mr. Ware that is almost identical to the Order.

The Appeal

[21] I have summarized the Appellant's grounds of appeal, based on his Notice of Appeal and submissions, as follows:

1. The berm is built entirely on the Appellant's property, and does not modify the "stream channel" of the Nicola River as defined in the *WSA*.
2. The floodplain associated with Nicola River does not fall within the definitions of "stream" or "stream channel" in the *WSA*.
3. The *WSA* does not require property owners to seek authorization before modifying a part of their property that is within a floodplain.
4. The berm is not located "in and about a stream".
5. There is no evidence that the berm is likely to cause detrimental effects on neighbouring properties.
6. The Appellant is entitled to prevent water from escaping onto his property, and the Appellant should not suffer flooding due to the inaction of governmental authorities and/or private parties responsible for controlling flooding throughout the Nicola Valley.

[22] Mr. Ware also appealed the order that was issued to him. Mr. Ware's appeal is addressed in a separate decision of the Board, issued concurrently with this decision (*Gary Ware v. Assistant Water Manager*, (Decision No. 2019-WSA-002(a))).

Events after the Order was issued

[23] On October 22, 2019, the Water Manager attended the site, along with Mr. Smoluk, Mr. Ware, Mr. Ware's son, and Sarah Simon, a Flood Safety Engineer and Deputy Inspector of Dikes with the Ministry. Various issues were discussed.

ISSUES

[24] The appeal raises the following issues:

1. What is the "stream" at issue in the Order?
2. Is the berm an unauthorized "change in and about a stream" within the meaning of the *WSA*?
3. Should the Order be varied or reversed as requested by the Appellant because the berm will cause no detrimental effects on the stream or neighbouring properties?

[25] If I find that the berm is not a change in and about a stream, the Order may be reversed on that basis alone, and there would be no need to decide issue 3.

LEGISLATION AND SUBMISSIONS

[26] The phrase "changes in and about a stream" is defined in section 1 of the *WSA* as follows:

- (a) any modification to the nature of a stream, including any modification to the land, vegetation and natural environment of a stream or the flow of water in a stream, or
- (b) any activity or construction within a stream channel that has or may have an impact on a stream or a stream channel;

[Emphasis added]

[27] This definition uses the words "stream" and "stream channel", which are also defined in section 1 of the *WSA*. "Stream" is defined to mean:

- (a) a natural watercourse, including a natural glacier course, or a natural body of water, whether or not the stream channel of the stream has been modified, or

- (b) a natural source of water supply,

including, without limitation, a lake, pond, river, creek, spring, ravine, gulch, wetland or glacier, whether or not usually containing water, including ice, but does not include an aquifer;

[28] "Stream channel" is defined as:

... the bed of the stream and the banks of the stream, both above and below the natural boundary and whether or not the channel has been modified, and includes side channels of the stream; [Emphasis added]

[29] The Appellant submits that the berm is located entirely on his property, and he did not modify the “stream channel” of the Nicola River as defined in the *WSA*. He maintains that the berm is not “in and about a stream” within the meaning of the *WSA*.

[30] In addition, the Appellant submits that a floodplain is not within the definition of “stream” or “stream channel” under the *WSA*. He maintains that there is no requirement in the *WSA* for property owners to obtain authorization before modifying their property solely on the basis that the area modified is within a floodplain. He argues that such a requirement would be irrational given that many parts of the City, including fully developed residential streets, are within a floodplain.

[31] In support of his submissions, the Appellant provided an affidavit describing his knowledge of past flooding and flood prevention measures on the property, and the steps he took to build the berm. Several documents are attached to his affidavit, including maps of the City showing areas designated as floodplain in the City's Zoning Bylaw 2187, as well as areas within the 200-year flood elevation (which is larger than the area designated as floodplain in the Bylaw).

[32] In addition, the Appellant argues that a property owner is entitled to prevent water from escaping onto his property: *Caplin v. Gill* (1977) CanLII 253 (BCSC) [*Caplin*].

[33] The Water Manager submits that the Nicola River is a “stream” within the meaning of the *WSA*. Although some changes in and about a stream are authorized by Part 3 of the *Water Sustainability Regulation*, B.C. Reg. 36/2016 (the “*Regulation*”), without the need for an approval, the *Regulation* does not authorize placing fill on a stream bank and consequently diverting water into new channels created by the berm. These changes in and about a stream require an approval under section 11 of the *WSA*. The Water Manager emphasizes that the definition of “stream channel” includes the banks of the stream “above ... the natural boundary” to its full extent (i.e., to the top of the bank) “whether or not the channel has been modified, and includes the side channels of the stream”.

[34] The Water Manager maintains that:

- the berm extends the stream bank vertically at the top of the bank, and creates an artificial stream channel where none would normally exist;
- by constructing the berm, the Appellant has altered the nature of the stream and modified the stream channel, which also has the potential to create artificial side channels; and
- the Appellant has built on a floodplain, thereby exposing his property to the risk of flooding, whereas the Facility is built at a higher elevation and has not been affected by flooding.

[35] In support of these submissions, the Water Manager provided an affidavit sworn by her on February 20, 2020, attached to which are several documents and photographs of the berm taken on November 7, 2018 and August 1, 2019.

[36] In response to the Appellant's reliance on *Caplin* to argue that he was entitled to build the berm to prevent water from escaping onto his property, the Water Manager submits that the facts in *Caplin* are different from the facts in the Appellant's case. The Water Manager notes that *Caplin* involved surface water running off land, not flood water from a stream. The Water Manager also submits that according to paragraphs 8 to 9 of *Caplin*, the Appellant is not entitled to deflect onto another person's property any surface water runoff which would not have reached that property naturally.

[37] In reply, the Appellant argues that the berm is built above, outside and back from the top of the river bank, and not in the stream channel. The Appellant argues that the Water Manager is trying to extend the meaning of "stream" to include an associated floodplain, but nothing in the *WSA* or the regulations supports the proposition that work done in a floodplain is a "change in and about a stream" for the purposes of the *WSA*. Moreover, the Appellant submits that the berm neither creates a new river channel, nor constricts or diverts the river. Rather, it keeps the river in its channel.

[38] I note that the Appellant and the Water Manager also disputed whether the Appellant owned the land on which the berm was built, as he asserted, or whether this was accreted land that was owned by the Crown. This is irrelevant to the appeal and, as a result, I will not address the substance of this argument.

[39] If the Appellant is correct and he owns that land, the prohibition against making unauthorized changes in and about a stream still apply. The Water Manager retains the authority to issue orders to address violations of that prohibition. If the Crown is correct and it owns that land, it may have other remedies or options to address the Appellant constructing a berm on Crown land; however, none of those remedies or options are at issue in the appeal. The Order was made under the authority contained in section 93(2)(e)(i) of the *WSA*, which may be used against anyone—property owner or not—who affects unauthorized changes in and about a stream. The question in this case is whether the Appellant did so.

DISCUSSION AND ANALYSIS

1. What is the "stream" at issue in the Order?

[40] As noted previously, "stream" is defined in section 1 of the *WSA* to mean:

(a) a natural watercourse, including a natural glacier course, or a natural body of water, whether or not the stream channel of the stream has been modified, or

(b) a natural source of water supply,

including, without limitation, a lake, pond, river, creek, spring, ravine, gulch, wetland or glacier, whether or not usually containing water, including ice, but does not include an aquifer;

[41] The parties agree that the Nicola River is a "stream" as defined in the *WSA*. I agree as well; it is a natural watercourse specifically included in the statutory definition. It is a river that serves as a water supply and is a natural body of water,

albeit with a channel that has been modified in places. The question at the heart of this appeal relates to the boundaries of that stream and its associated stream channel. This is a matter of statutory construction. The first question I will consider was raised by the Appellant, whether the floodplain is also a stream, such that the berm constitutes a “change in and about a stream”.

[42] My role in interpreting the *WSA* is to read it in its entire context, and to consider the relevant portions in their ordinary and grammatical sense, harmoniously with the objects and schemes of the *WSA* and the intention of the Legislature in passing it.¹ Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, requires that I read the *WSA* in a liberal and remedial manner.

[43] The *WSA* is a large statute with several purposes, at times in tension. It provides for the stewardship of water resources by the province, while allowing for its beneficial use by members of the public in a variety of contexts. It grants to the province the authority and means to protect water resources, including streams, stream channels, and water resources themselves. It allows for changes in rights and responsibilities in emergency circumstances and it allows the province to monitor and enforce the use of water and the protection of water resources, including streams and stream channels.

[44] The parties did not describe any particular legislative intent relevant to this issue. The overall objects and schemes of the *WSA* do not provide a conclusive answer to the questions at the heart of the appeal. The terms at issue are used for a variety of purposes in the *WSA*, aimed at a balancing of interests for the proper use, stewardship, and protection of water resources in British Columbia. This appeal seeks to clarify the appropriate balance between individual rights and the government’s roles in protecting water resources. The precise wording of the legislation, and its context, takes particular significance in these circumstances; however, there is no singular overarching intent that supports a particular outcome. The *WSA* is, at its heart, a statute aimed at balancing competing interests.

[45] The definition of stream does not mention floodplains. This alone does not necessarily mean that the definition of stream excludes floodplains, particularly given that the list of watercourses and water bodies in the definition starts with the words “including, without limitation”, which means that the list is not exhaustive.

[46] I note that the fact that flooding causes temporary standing water on a floodplain does not mean that the floodplain is a wetland, which is included in the definition of stream. Wetlands are saturated at or near the surface throughout the year, or have standing water for at least some intermittent periods of time, which result in specific soil and vegetation characteristics. Here, there is insufficient evidence to conclude that the floodplain in issue meets any of the criteria for a wetland.

[47] Because floodplains are not necessary wetlands and this particular floodplain has not been established to be a wetland, the floodplain is not explicitly included or

¹ See *Rizzo & Rizzo Shoes Ltd. (Re)*, (1998) CanLII 837 (SCC) and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII).

excluded in the definition of a stream. Accordingly, this question is one of statutory interpretation.

[48] The list provided in the definition of a stream, which applies to both branches of the definition (a natural watercourse or body of water on one hand, and a natural source of water supply on the other), refers to standing bodies of water/ice, or channels that are expected to transmit water (i.e., “gulch” and “ravine”).

[49] The Legislature’s intent in including that list is unclear. As noted in *National Bank of Greece (Canada) v. Katsikonouris*, 1990 CanLII 92 (SCC), “... the generality of a term can be limited by a series of more specific terms which precede or follow it”; however, here the Legislature specifically indicated that the list was not intended to limit the definition of a stream.

[50] There is also some question about broader maxims of statutory interpretation, historically called *ejusdem generis* and *noscitur a sociis*, which assist interpretation by considering various details, including whether the specific items in a list precede or follow a general term. In a modern context, these concerns may distill to the specific wording and context at issue. Here, where the parties have not addressed the issue in detail, I am reluctant to make a finding on such nuanced scrutiny of the relevant clauses.

[51] A point addressed by the parties is determinative, however. In this case, the Appellant’s property is, in large part, on the 200-year floodplain of the Nicola River. This is also the case for much of the City. If the definition of a “stream” included a floodplain, significant portions of the City would be included.

[52] In assessing the legislative intent of the WSA, I do not think the balance and tension between government rights and citizens’ rights as I have described it would be served with such a broad definition of “stream”. Even interpreting the legislation liberally and broadly, the outcome is an absurd result, where life in the City could be said to be occurring in a stream. Citizens of the City planting gardens and doing other work would have to seek authorization from the Ministry to do so. An interpretation that the floodplain is necessarily part of a stream in this case fails to strike the balance between individual and collective rights that is the objective of the WSA and leads to an absurd result. I therefore conclude that the 200-year floodplain of the Nicola River, at least at the time that the Appellant had the berm built, was not captured within the definition of a “stream”.

[53] I note that the evidence in this case shows that the dimensions and course of a stream may vary over time. It is not necessary, however, to consider how this affects the interpretation of “stream” under the WSA for the purposes of this appeal.

[54] For the reasons above, the only “stream” at issue in this appeal is the Nicola River.

2. Is the berm an unauthorized “change in and about a stream” (i.e., the Nicola River) within the meaning of the WSA?

[55] There are two prongs or components in the definition of “changes in and about a stream”:

- (a) any modification to the nature of a stream, including any modification to the land, vegetation and natural environment of a stream or the flow of water in a stream, or
- (b) any activity or construction within a stream channel that has or may have an impact on a stream or a stream channel;

[56] Because the stream channel is more easily defined and understood, I begin my analysis with that concept.

Is the berm a construction within the stream channel of the Nicola River that may have an impact on the stream or stream channel?

[57] As noted previously, the WSA defines “changes in and about a stream” to include “activity or construction within a stream channel that has or may have an impact on a stream or stream channel”. “Stream channel” is defined, in turn, as the bed and banks of a stream (including side channels of the stream), above and below the natural boundary of the stream, and regardless of whether or not the channel has been modified.

[58] The stream channel is, accordingly, a morphological feature made up of a bed and banks, which contains the natural boundary of a stream. The natural boundary has a lengthy definition imported from the *Land Act*, but broadly speaking it marks the common high water mark in a waterway year-to-year, evident based on changes in stream banks, vegetation, and soil. The stream channel is defined in the WSA such that its banks extend above and below the natural boundary and, as such, the natural boundary is not helpful in determining the boundaries of the Nicola River’s stream channel.

[59] In assessing these boundaries, I considered the ordinary meaning of relevant terms. Neither “floodplain” nor “stream bank” are defined in the WSA or the *Regulation*. According to the Merriam-Webster Dictionary, “floodplain” means “level land that may be submerged by floodwaters”. The Merriam-Webster Dictionary provides several definitions of “bank”, but the most relevant in the context of a stream is “the rising ground bordering a lake, river, or sea or forming the edge of a cut or hollow”. Based on those definitions, a key characteristic of a floodplain is “level land”, whereas a key characteristic of a stream bank is “rising ground”. The boundary between the two is, therefore, delineated in this case by the point at which the rising ground of the stream bank levels off into the floodplain.

[60] Although the definition of “stream channel” includes “side channels”, a side channel would still be a channel marked by sloped banks. The same considerations apply to the side channels as applies to the main stream channel. Thus, for both the main channel and any side channels, the focus in this case is the boundary between the rising ground of the stream bank, regardless of whether that is above the natural boundary of the stream, and the level ground of the floodplain.

[61] I find that constructing a berm that extends a pre-existing stream bank vertically may have an impact on a stream or its channel, including the stream’s banks. In this case, where the berm was built by adding soil to the top of the Nicola River’s stream bank, such that the berm is now contiguous with the bank, it

changed the pre-existing stream bank by raising its height. By raising the height of the stream bank, it changed the dimensions of the stream channel. Logically, this may affect the flow of water in the river during freshet in some years because, assuming that the berm is strong enough to contain the water, a greater volume and depth of water will remain in the new channel created by the berm, whereas in the past the water would have spilled over the pre-existing bank and onto the floodplain.

[62] The Appellant maintains that he placed the berm “above, and back from the top of the bank”, but the Water Manager says that at least some parts of the berm were built on the stream bank by extending the stream channel vertically at the top of the bank. Both parties provided descriptions of the location and dimensions of the berm. They also provided photographs of the berm and the surrounding landscape from various viewpoints. Some of the photographs show the berm in 2018 when it was bare soil and could be easily distinguished from the pre-existing vegetation, and others show the berm in 2019 with grasses growing on it. The Appellant also provided a map showing his property, and he drew a line on the map indicating the approximate location of the berm.

[63] Based on the parties’ evidence, I conclude that some of the berm is constructed on top of or contiguous with the Nicola River’s stream bank, while some of it is constructed on the floodplain, set back from the pre-existing stream bank. However, the evidence is insufficient for me to determine exactly what portion of the berm is built on top of the Nicola River’s stream bank. Such a determination would require site inspections and measurements. As a portion of the berm is located on the Nicola River bank, I find that portion is “within the stream channel.” Additionally, I find that extending or reshaping the wall of the channel may have an impact on the channel, thus meeting the second prong (“b”) of the definition of “changes in and about a stream”.

Is the berm a modification to the nature of a stream?

[64] Having concluded that part of the berm is within the stream channel and may impact the channel, I turn to the rest of the berm, not within the stream channel. The question I must answer is whether the construction of that portion of the berm satisfies the first prong of the definition of “changes in and about a stream”. The question, therefore, is whether the berm amounts to a “modification to the nature of the stream”. This includes, by definition, “... any modification to the land, vegetation and natural environment of a stream or the flow of water in a stream ...”.

[65] The wording of the first prong of that definition contains an ambiguity, as “nature” has many meanings. Given the context, two meanings arguably make sense. I have used definitions from Collins Unabridged English Dictionary, although a survey of other sources revealed similar definitions. “Nature” could refer to:

- the basic character or quality of a stream (as in, “It is the nature of the river to wind its way from east to west ...”), or

- the non-anthropogenic environment of a stream (as in, "Nature in the area is comprised of floodplains, trees, and other features ...").

[66] The context provided by the rest of the definition indicates that the former is the correct meaning of "nature". This is a narrow reading of the definition because it restricts the first prong of the definition of "changes in and about a stream" to those that alter the basic character or quality of a stream. The other interpretation offers a more expansive definition, where a stream (however it is defined) and its surroundings, all fall within the definition of the stream itself.

[67] The broadness of the latter interpretation is the main reason to not apply that interpretation. Doing so would mean that the Legislature defines the nature through which a stream flows as including its "land, vegetation and natural environment". A stream's nature, using this definition, and its natural environment, are one and the same. This interpretation creates a confusing duplication of near-identical terms that do not offer any clarification.

[68] Contextually, the former interpretation makes more sense. It provides that one prong of the definition of "changes in and about a stream" are changes to the basic character or quality of that stream, including changes to the land, vegetation, and natural environment of the stream or to the flow of water in the stream.

Is the berm a modification to the basic character or quality of the land, vegetation or natural environment of the Nicola River or the flow of water in the river?

[69] "Natural environment" is not a defined term under the WSA. It is mentioned at one other point in the WSA, to define "aquatic ecosystem", in relation to a stream. The definition of "aquatic ecosystem" is:

... in relation to a stream, means the natural environment of the stream, including

- (a) the stream channel, the vegetation in the stream and the water in the stream,
- (b) fish, wildlife and other living organisms insofar as their life processes
 - (i) are carried out in the stream, and
 - (ii) depend on the natural environment of the stream;

[70] I am entitled to presume that the same term will be used to mean the same thing within the same (or even similar) pieces of legislation. Here, "natural environment" is used in two definitions, both relating to streams. I consider that the Legislature intended for these to have the same meaning.

[71] Reading both instances together provides a context useful for interpreting the term. In one instance, "natural environment" appears in a list, alongside the land, vegetation and flow of water of a stream, to give meaning to the term "nature of the stream". In the other, "natural environment" is, in turn, defined by some of its constituent elements: the stream channel, the vegetation in the stream, the water in the stream, and living organisms that carry out life processes in the stream or rely on the stream to carry out their life processes.

[72] The near overlap in terms is significant. In the context of “nature of a stream”, a stream’s natural environment includes the stream channel, but not the “land ... of a stream”, which is another item, apart from “natural environment”, in the list. This suggests that “land of a stream” is not the same as “the stream channel” or even the “natural environment”. The use of both terms together suggests that they do not overlap entirely. As a result, I conclude that “land of a stream” extends beyond the stream channel, or else there would be no reason to include it in the definition of “nature of a stream” and, thus, in the definition of “changes in and about a stream”.

[73] As noted previously, I must give the legislation a broad and purposive reading. While I have already concluded that there is no clear, overarching legislative intent that can inform the balancing of individual and government rights for the purposes of stewardship and use of water resources, a review of specific provisions within the *WSA* overall supports this interpretation.

[74] Section 46(1)(b) of the *WSA*, for example, prohibits individuals from allowing “debris”—a defined term including material I would expect to be found in the berm, such as rocks, clay, and silt—or other matter or substances to be introduced “... into a stream, a stream channel or an area adjacent to a stream”. This expresses a clear legislative intention that land areas adjacent to streams are to be protected under the *WSA*.

[75] There is some uncertainty as to how far an “area adjacent to a stream”, “land of a stream”, “vegetation of a stream”, and similar words extend; however, I do not need to resolve those questions for the purposes of this appeal. Here, the portion of the berm I am now considering was built within a few feet of the stream channel, significantly modifying the land adjacent to the stream. I am satisfied that a modification to the land in such proximity to a stream falls within the definition of “land of a stream”.

[76] I find that altering the ground surface to redirect flood waters away from one side of a river over the length of a property alters a basic characteristic of the land of the stream. The whole purpose of the berm is to affect the way flood waters move within the land of the stream and, on a balance of probabilities, I conclude the berm will have such an effect on the basic character or quality of the land of the stream. There is no evidence that it this alteration will have a detrimental impact, but that is not required by this prong of the definition. This prong of the definition simply addresses a “modification” to the nature of a stream. One of the purposes of the Order is to obtain information to determine any detrimental impacts. The terms of the Order are considered in issue 3.

[77] Furthermore, I find that *Caplin* does not assist the Appellant because it is distinguishable based on the facts. *Caplin* involved a dike built on the defendant’s land to divert surface water that was running from the plaintiffs’ land and other neighbouring properties onto the defendant’s land. In contrast, the past flooding on the Appellant’s property was not caused by surface water running off a neighbour’s private land. Rather, it was caused when water in the Nicola River naturally flowed over top of the river bank and onto the Appellant’s land. At paragraph 6 of *Caplin*, the Court held that:

If the water in the case at bar had been running in a natural channel, the defendants would have had no right to divert it. But this is surface water. Thus the defendants had a right to build a dyke for the purpose of preventing water from the plaintiffs' land running onto their land.

[78] *Caplin* did not involve water flowing onto land that is within a floodplain, from the associated water source. Additionally, *Caplin* was not decided based on the statutory definitions contained in the *WSA*, which modifies any applicable common law concepts. Thus, the facts in *Caplin* were significantly different from those in the present appeal.

[79] As both parties have agreed to the fact that the construction of the berm was unauthorized, I conclude that it was an unauthorized modification to the "nature of the stream", and so a "change in and about a stream" as defined under the *WSA*.

Conclusion

[80] I find that the berm is an unauthorized "change in and about a stream" within the meaning of the *WSA*.

3. Should the Order be varied or reversed as requested by the Appellant because the berm will cause no detrimental effects on the stream or neighbouring properties?

[81] The parties disagree on whether the berm may have any detrimental effects on the stream or neighbouring properties as a result of water being displaced. The Water Manager contends that the berm may have such detrimental effects, whereas the Appellant says the berm simply send water back into the Nicola River and there is no evidence that it is likely to cause detrimental impacts to other land owners. The Water Manager also questions whether the berm is built well enough to withstand future flood events.

The Panel's findings

[82] In an appeal under the *WSA*, my authority under section 105(6) extends beyond ensuring the validity of the Order: I am able to make any order that the Water Manager could have made. I will therefore consider whether the content of the Order was reasonable in the circumstances.

[83] Although opinion evidence was offered in the affidavits provided by the Water Manager and Mr. Ball that the berm does or may alter the hydrological conditions of the river, this appears to be in the nature of expert evidence. As the Water Manager did not give advance notice of expert opinion evidence, as required by the Board's Rules, it would be unfair to admit this evidence. However, this evidence is not needed in this case as the parties agree that the berm is intended to function as a means of redirecting flood waters once they rise to a certain level.

[84] Even if I did admit this as expert opinion evidence, there is insufficient information for me to make any conclusive findings on the extent of the berm's effects on stream flow, water displacement, the incremental flood risk to

neighbouring properties. There is likewise insufficient information for me to determine the functional viability of the berm including whether it will withstand future flood events. The purpose of the Order is to have an engineer examine those very questions and make recommendations for the Water Manager's consideration.

[85] I find that it is in the interests of both the public and the Appellant to have an engineer examine the functional viability of the berm and make recommendations to the Water Manager, as required in the Order. This will provide information to help assess whether the berm is built to withstand future floods, or whether there is a risk it may fail, which could endanger public safety and/or the safety of the Appellant and other people residing on his property. In addition, it is in the public interest to have an engineer determine whether the berm presents any incremental flood risk to other property owners (and a risk to their safety) and make recommendations to the Water Manager, as required by the Order.

[86] I emphasize that this appeal only relates only to the Order made under the *WSA*. I will not comment on the *Dike Maintenance Act* and whether it may apply to the Appellant's berm or on whether the berm may, in the future, offend other portions of the *WSA* or other legislation.

Conclusion

[87] There is insufficient evidence to conclude that the berm will cause no detrimental effects on the stream or neighbouring properties, as the Appellant asserts. Furthermore, I find that the terms of the Order are reasonable and I do not use my discretion under section 105(6) of the *WSA* to modify the Order. As a result, the Order should not be varied or reversed as requested by the Appellant.

DECISION

[88] In making this decision, I have fully considered all of the evidence and submissions made, even those not specifically referred to in this decision.

[89] Based upon the findings above, the appeal is dismissed and the Order is confirmed.

"Darrell LeHouillier"

Darrell LeHouillier, Chair
Environmental Appeal Board

May 20, 2020