



Environmental Appeal Board

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DECISION NO. 2016-WAT-006(a)

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

BETWEEN: Kulwinder Singh Gill and Avninderjit Kaur Gill **APPLICANTS**

AND: Assistant Regional Water Manager **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair

DATE: Conducted by way of written submissions
concluding on September 28, 2016

APPEARING: For the Applicants: Gordon J. Dykstra, Counsel
For the Respondent: Pamela Manhas, Counsel

STAY DECISION

APPLICATION

[1] On May 18, 2016, James Davies, Assistant Regional Water Manager (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), issued an order (the "Order") to Kulwinder Singh Gill and Avninderjit Kaur Gill (the "Applicants") pursuant to section 93 of the *Water Sustainability Act* (the "Act"). The Order was issued in response to the Applicants allegedly making a number of unauthorized changes in and about Lagace Creek, Bouchier Creek, and an unnamed oxbow tributary ("UT5") to Bouchier Creek.

[2] The Order requires the Applicants to do a number of things including to stop making unauthorized changes in and about any stream, submit a plan to remove a lock block wall along Lagace Creek and restore the stream bank, submit updated plans for erosion and sediment control on their property and for restoration of UT5, identify the source of water being used to irrigate their property, and remove all debris from Bouchier Creek and any other water course on their property.

[3] On June 16, 2016, the Applicants appealed the Order to the Board. In their Notice of Appeal, the Applicants requested a stay of the Order pending a final decision from the Board on the merits of the appeal.

[4] The application for a stay was conducted by way of written submissions. The Regional Manager opposes the stay application.

BACKGROUND

[5] The Applicants own property located at 11428 Stave Lake Road in Mission. The Applicants purchased the 26-acre property in or about September 2011, and operate a blueberry farm on the property. The property is within the Agricultural Land Reserve.

[6] Stave Lake Road runs along the west boundary of the property. The east boundary of the property is adjacent to Lagace Creek, which flows into Hatzic Lake downstream of the property. Bouchier Creek bisects the property, generally in a north-south direction. Both Lagace Creek and Bouchier Creek have been identified as habitat for fish, including salmon.

[7] The property is in an area where streams, including Lagace Creek, regularly experience high sediment loads, erosion, flooding, and unstable stream channels, especially during winter storms and spring freshet. The Executive Summary of June 2005 report titled "Flood Damage Recovery Plan, Lagace Creek, Hatzic Valley", prepared for the Fraser Valley Regional District by Northwest Hydraulic Consultants and Scott Resource Services ("SRS"), states that Lagace Creek has experienced "chronic flooding and erosion problems since at least the mid-1930's", and the majority of the sediment in its channel "is derived from the chronic occurrence of high-energy debris floods or debris flow events that regularly introduce vast quantities of sediment to the channel."

[8] Similarly, at page 6 of a February 19, 2013 report titled "Hatzic Region Hydrology and Watershed Stability Assessment", prepared by Tom Millard, a Research Geomorphologist with the Ministry, it states:

Landslides also deliver large volumes of sediment to stream channels. This sediment is deposited on alluvial fans along the valley bottom margins and result in unstable channels in areas of private land development. To contain unstable channels, dikes or other containment measures have been built on ..., Pattison Creek, Lagace Creek and Hatzic Slough. The high sediment load in these creeks raises the creek bed, lowers channel capacity and increases the frequency of overbank flood events. As a result, sediment excavation is required on most of these creeks.

Chronic sediment sources are a particular problem in Pattison Creek where they have resulted in frequent channel stability and flooding issues on the Pattison/Lagace fan, and downstream in Lagace Creek and Hatzic Slough.... Lagace Creek and Hatzic Slough have been excavated since at least the 1920's..., although the rate of excavation has increased since a large natural landslide occurred, likely in 1935, and subsequent forest management-related landslides....

Compliance and enforcement activities before the Order was issued

[9] The Regional Manager submits that, since 2012, the Applicants have made a number of unauthorized changes to watercourses on or adjacent to their property, and the present appeal is the latest development in a series of events involving

various government agencies. A partial summary of those events is provided below.

[10] In late June or early July 2012, several government agencies became aware of fill being deposited on the property, after the Fraser Valley Regional District received a complaint. On June 29, 2012, staff of the Ministry of Environment and the Agricultural Land Commission inspected the property.

[11] On July 4, 2012, the Ministry of Environment issued an advisory letter to the Applicants, stating that material had been removed from a tributary to Bouchier Creek and wood waste had been deposited in the tributary, in violation of the *Agricultural Waste Control Regulation* under the *Environmental Management Act*. The letter requested that the Applicants provide a detailed plan and schedule to address those matters.

[12] On July 5, 2012, the Agricultural Land Commission issued a stop work order to the Applicants, requiring them to cease placing fill material on the property.

[13] On July 6, 2012, the Ministry issued a "notice of non-compliance and advisory" to the Applicants. The notice states that a ditch on the property is considered a "stream" under the (then) *Water Act*¹, and is a tributary of Bouchier Creek which has recorded salmon species. The notice also states that the stream had been filled with wood waste and sediment without authorization under the *Water Act*. The notice required the Applicants, within 24 hours, to take several steps including installing sediment and erosion control measures to meet water quality guidelines for turbidity, in consultation with a Qualified Professional, and report to the Ministry on a daily basis regarding the status of the site. The notice also required the Applicants to provide, within 30 days, a summary report on environmental monitoring and any work conducted.

[14] On July 12, 2012, representatives from the Ministry, the Ministry of Environment, the Ministry of Agriculture, the Agricultural Land Commission, and Fisheries and Oceans Canada met with Mr. Gill and his contractor at the property. According to a Ministry Inspection Report summarizing the site visit, the Applicants were in the process of establishing a blueberry crop on the property, and in doing so, they had placed wood waste and sediment in "ditches" on the property including a tributary to Bouchier Creek. The Inspection Report states, in part, as follows:

GILL's perspective is that he is in the process of ensuring a water supply for his blueberries, which like high acidity. The process involves removing materials from 'ditches', filling with woody debris, and replacing the original material on top of the wood fill. He was subsequently informed that this practice will create leachate. All agencies concur that leachate requires containment.

GILL is required to hire a qualified professional to assess the site and provide a report to include remediation action, which is to be reviewed and approved by interested agencies.

¹ On February 29, 2016, most of the *Water Act* was repealed and replaced by the *Water Sustainability Act*; the remaining portions of the *Water Act* were renamed the *Water Users Community Act*.

[15] On July 20, 2012, the Ministry issued another “notice of non-compliance and advisory” to the Applicants. The notice advised that, during the July 12, 2102 site inspection, contraventions of the *Water Act* and its regulations were observed. The notice states, in part, as follows:

On... 11428 Stave Lake Road, Mission BC, a tributary of Bouchier Creek had materials removed from the tributary and had been filled with wood waste and sediment. The wood waste was generating a dark black leachate. There were visible signs of erosion and sedimentation into the watercourse. The site requires immediate action:

- Mr. Gill must notify the Qualified Professionals (i.e. Environmental Consultant) he has retained to contact... [a Ministry Water Stewardship Officer]. An appropriate action plan will be reviewed by [the Water Stewardship Officer] and accompanied by meetings and on site visit(s).
- Site isolation and containment of leachate and sediment laden water from discharging downstream. The qualified professionals are to immediately install appropriate measures to isolate the site and salvage any fish and amphibians present.
- Isolated site to undergo the appropriate prescriptions.
- If corrective actions are proven satisfactory, the required authorizations under the *Water Act* for water management will be reviewed.
- On site visit(s) scheduled for the week of July 23rd, 2012.

...

[16] The Applicants retained SRS to prepare a report dated September 12, 2012 (the “2012 SRS Report”), which set out assessments of: seven watercourses on the property including Bouchier Creek, UT5, and five other unnamed tributaries to Bouchier Creek; an unauthorized culvert that caused a loss of salmon habitat; and, the impacted watercourses. The report also sets out a remediation plan, which proposed the removal of wood waste and contaminated water from UT5 and rehabilitation of UT5 to its pre-impact condition.

[17] On September 26, 2014, staff from the Agricultural Land Commission visited the property, and observed that the remediation plan in the 2012 SRS Report had not been implemented. It also appeared that, since 2012, additional dredging and filling of watercourses had occurred and a road had been constructed on the property.

[18] On October 2, 2014, the Regional Manager issued a stop work order to the Applicants under section 88 of the *Water Act*, in relation to the unauthorized diversion and use of water and changes in and about Bouchier Creek, a tributary to Bouchier Creek, and unnamed ditches. The order required the Applicants to stop excavating and filling streams on their property, including ditches that flow into streams, and immediately commence erosion and sediment control measures for all areas of the property where sediment-laden water was entering a stream or ditch.

[19] On October 8, 2014, staff from the Ministry and the Agricultural Land Commission visited the property. They observed, among other things, dredging of a ditch connected to Bouchier Creek, recent placement of fill on, near and along the bank of Bouchier Creek, unauthorized culverts and water diversions, an access road constructed over UT5, sediment-laden water in water bodies including UT5 and Bouchier Creek, "bank erosion works" near Lagace Creek, recent blueberry planting over the infilled portion of UT5, and that no erosion and sediment control measures had been put in place contrary to the order issued on October 2, 2014.

[20] On November 7, 2014, the Regional Manager issued a further order to the Applicants under section 88 of the *Water Act*. Among other things, the order required the Applicants to immediately commence additional erosion and sediment control measures for all areas of the property where sediment-laden water was entering a stream, tributary or ditch, and to have a qualified environmental professional prepare and implement the erosion and sediment control measures. The order also required the Applicants to: remove any farm or agricultural waste from instream or riparian areas; hire a qualified engineer to inspect the two unauthorized culverts on the property and "sign off" that they would not flood the property or neighbouring properties; hire a qualified engineer to assess the stability of the bank of Lagace Creek where unauthorized bank protection works were constructed and ensure that the works would mitigate against future erosion; and hire a qualified environmental professional to prepare a report and habitat restoration plan for UT5, including the removal of the road built over UT5, and for the section of Bouchier Creek that had been disturbed by the placement of fill.

[21] Subsequently, SRS prepared an "Erosion and Sediment Control Plan", dated December 3, 2014 (the "2014 ESC Plan"), for Mr. Gill.

[22] SRS also prepared a report titled "Overview environmental impact assessment and environmental rehabilitation plan related to unauthorized works completed at 11428 Stave Lake Road, Mission, BC", dated January 20, 2015 (the "2015 SRS Report"). The 2015 SRS Report states that it was prepared following site assessments conducted on November 28 and December 15, 2014, and includes a summary of the additional unauthorized changes in and about streams on the property that occurred after the 2012 SRS Report was prepared.

[23] The 2015 SRS Report also includes an updated remediation plan. Notably, at page 5, the 2015 SRS Report acknowledges that the Regional Manager's November 7, 2014 order required the restoration of UT5 including removing fill from the channel, removing a culvert crossing, and planting riparian vegetation. However, the report proposes an "alternative rehabilitation plan" because the Applicants "indicated that removal of blueberry plants and restoration of UT5 is incompatible with existing land use, and that alternate options should be explored." The 2015 SRS Report also states that "riparian rehabilitation measures are recommended mainly for the banks of watercourses, and should not result in excessive encroachment into agricultural land or impinge upon normal farm practices."

[24] On March 6, 2015, the Regional Manager issued a letter to the Applicants summarizing the compliance and enforcement activities on the property from 2012 to 2014. The letter also discusses the 2012 SRS Report, the 2014 ESC Plan, and

the 2015 SRS Report. The letter rejects the conclusion in the 2015 SRS Report that riparian rehabilitation measures “should not result in excessive encroachment into agricultural land or impinge upon normal farm practices”. The letter states that aerial maps show that all of the disturbed or infilled watercourses existed before the Applicants purchased the property, and were disturbed or infilled without authorization. The letter concludes, in part:

Given the serious nature of the amount of disturbance and unauthorized changes in and about a stream on the property and the environmental impact that has occurred and is still occurring on the property along with the ongoing failure to communicate the information requests, ongoing disregard of the multiple governing legislative requirements, failure to implement ESC [erosion and sediment control] measures and to provide the necessary reports as described and in the timelines that have been set out in the November 7, 2014 Order and MOE July 4, 2012 letter, you are hereby placed on notice that to date, there has not been full cooperation to comply with the Order dated November 7, 2014 and that any further lack of communication and cooperation may result in the Ministry... taking action as described in Section 93 and/or Section 94 [which set out fines for offences] of the *Water Act*.

[25] The letter then lists several measures that the Applicants were to undertake “immediately” including implementing erosion and sediment control measures, hiring a qualified engineer to assess the stability of the bank along Lagace Creek, and revising and re-submitting the environmental assessment and remediation plan in the 2015 SRS Report with particular emphasis on UT5. The letter concludes that the Applicants must advise the Ministry by March 13, 2015 that the erosion and sediment control measures were in place, a qualified engineer had been hired, and the revised assessment was being completed. Finally, the letter states that the revised assessment was due by March 31, 2015.

[26] According to the Regional Manager’s submissions, the Ministry received no communication from the Applicants by the dates set out in the March 6, 2015 letter, or at all.

[27] On April 15, 2016, Ministry staff and several Conservation Officers attended the property, and they observed additional unauthorized fill placed in UT5 and along the bank of Lagace Creek, an unauthorized lock block wall along part of the bank of Lagace Creek, and debris in the instream and riparian areas of Bouchier Creek. They also observed a water line and pump which appeared to be for irrigation purposes, but the water source was unclear. The Applicants do not hold a water licence or an approval to divert and use water.

The Order

[28] On May 18, 2016, the Regional Manager issued the Order to the Applicants.

[29] The Order states that, during the April 15, 2016 site visit, the following unauthorized changes in and about a stream were observed:

- a. Additional length of the oxbow tributary (UT5) to Bouchier Creek has been infilled and blueberries have been planted overtop of the new infill;

- b. The culvert under the unauthorized road across oxbow tributary (UT5) appears to have been blocked so there is no longer any connection across the road of UT5;
- c. Fill has been placed at the east side of the property along the stream bank of Lagace Creek, and the fill is not sloped appropriately and is sloughing or eroding into Lagace Creek;
- d. That a lock block wall has been constructed along the right bank of Lagace Creek; and
- e. A water line was found constructed along Lagace Creek and appears to be providing water for irrigation purposes on the property. The source of the water has not been determined, and it is noted a water licence is required for diverting surface or groundwater for irrigation purposes.
- f. Debris was found within the riparian and in-stream of Bouchier Creek.
- g. A water pump was observed that appears to be pumping water from the main arm of Bouchier Creek to a ponded area of Bouchier Creek near the road crossing.

[30] The Order requires the Applicants to do the following:

- 1. To STOP WORK on the excavation of gravel, sands or silts from any stream; to cease the placement of fill adjacent to any stream, this includes any ditches that flow into a stream and within the bank of the stream; to stop the placement of any additional lock block wall adjacent to a stream; unless you have obtained lawful authority to do such changes in and about a stream.
- 2. To immediately update the Erosion and Sediment Control (ESC) measures for all areas on the property in which sediment laden water could enter a stream, tributary or ditch, which includes the oxbow tributary (UT5) to Bouchier Creek, Lagace Creek and Bouchier Creek. The Erosion and Sediment Control (ESC) measures to be implemented shall be prepared and supervised by a Qualified Environmental Professional (QEP).
- 3. To hire a Qualified Professional (QP) to submit a plan for the removal of the lock block wall along Lagace Creek and re-slope the fill behind this lock block wall or fill adjacent to the stream such that it does not slough or erode into Lagace Creek, and to restore the stream bank of Lagace Creek.
- 4. Hire a Qualified Environmental Professional (QEP), experienced with wetland habitat assessment and wetland habitat restoration to submit an updated restoration or compensation plan, due to:
 - a. The additional infilling of Oxbow Tributary UT5, as named in the report titled "Environmental impact assessment and environmental remediation plan related to unauthorized works at 11428 Stave Lake Street, Mission B.C.", dated September 12, 2012, prepared by Scott Resource Services.
 - b. The possible isolation of UT5 as a result of the unauthorized road and possible blocked culvert under the road.

The restoration plan should provide a qualitative and quantitative assessment of wetland form and function (physical and ecological), including the associated riparian values. The plan should also consider a riparian buffer along the Unnamed Tributary 5.

5. To identify the source of the water being used for irrigation purposes on the property. The report is to provide information such that the source of the water can be determined as diverted from an aquifer, diverted from a well hydraulically connected to a stream, or diverted from a stream.
6. If water is being diverted from a stream for irrigation purpose, immediately submit an application for a Water Licence to the FrontCounter BC office by June 6, 2016. If water is being diverted from an aquifer, submit the date in which groundwater was first used for irrigation purpose on the property, by June 6, 2016 to Sandra Jensen.
7. Remove all debris from the riparian and instream of Bouchier Creek and any other water course on the property.
8. The Landowner must notify Sandra Jensen, Authorizations Specialist, FLNR, by June 7, 2016 that the Qualified Professional (QP) and Qualified Environmental Professional (QEP) for clauses (2), (3), and (4), have been hired.
9. The Landowner must submit the plans or reports to Sandra Jensen, Authorizations Specialist, FLNR, for our review and approval, by June 17, 2016 for clauses (2), (3), (4) and (5).

[31] On May 19, 2016, the Agricultural Land Commission issued a stop work order to the Applicants requiring them to cease placing fill on the property.

The Appeal of the Order

[32] The Applicants' Notice of Appeal contains a list of "reasons" and "particulars" for the appeal, which the Panel has summarized as follows:

- The tributary to Bouchier Creek was constructed by previous owners of the property and is not a natural stream, and Bouchier Creek is blocked downstream and causes flooding on the property. The Applicants infilled the tributary to prevent flooding of their property, and installed a culvert to drain flood water from the property into Bouchier Creek.
- There is a field road over the culvert which is now broken and has not been replaced as it no longer serves a useful purpose.
- The fill placed along the bank of Lagace Creek was placed to prevent flooding of the property, and the fill does not slough off or erode into Lagace Creek.
- A lock block wall was placed on the bank of Lagace Creek to prevent flooding of the property.
- The water line was installed in the summer of 2015 to water plants for two days, and is not expected to be needed to water plants in the future.

- Building material was deposited on the property by trespassers unbeknownst to the Applicants, and the material has been removed.
- In December 2015, a pump was used to remove water from a flooded portion of the property into Bouchier Creek and the tributary. The pump ran for two days and has not been used since then.

[33] An eight-day oral hearing of the merits of the appeal is scheduled to commence on March 20, 2017.

The Stay Application

[34] In their application for a stay of the Order, the Applicants submit that the remedial work to comply with the Order will cost a significant amount of money, which will be lost to them and will interrupt their blueberry harvest. The Applicants also submit that the flow and overflow of Lagace Creek, Bouchier Creek, and UT5 is seasonal, and “none of the consequences of failing to comply with the [the] order will occur until wintertime.”

[35] In support of their stay application, the Applicants provided an affidavit sworn by Mr. Gill, and a letter from an engineer regarding the lock block wall.

[36] The Regional Manager submits that the Applicants have provided no evidence regarding the cost of complying with the Order, and they have grossly overestimated that cost. In addition, the Regional Manager submits that the Applicants seem to have misunderstood the requirements in the Order, and have provided no evidence that they cannot harvest blueberries while complying with the Order. The Regional Manager further submits that the Applicants have admitted the potential risks posed by the unauthorized works.

[37] In support of the submissions opposing the stay application, the Regional Manager provided an affidavit sworn by himself. Numerous documents are attached to that affidavit as exhibits, including the reports and plans that SRS prepared in 2012, 2014 and 2015, and various letters and orders that the Ministry and other agencies issued to the Applicants from 2012 to May 2016, many of which are mentioned in the “Background” of this decision.

ISSUE

[38] The only issue to be decided is whether the Board should grant a stay of the Order pending a final decision on the merits of the appeal.

RELEVANT LEGISLATION AND LEGAL TEST

[39] Together, section 105(4) of the *Act*, section 93.1 of the *Environmental Management Act*, and section 25 of the *Administrative Tribunals Act* provide the Board with the authority to order a stay. Section 25 of the *Administrative Tribunals Act* states:

- 25** The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

[40] In *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. The test requires an applicant to demonstrate the following:

- (1) There is a serious issue to be tried;
- (2) Irreparable harm will result if the stay is not granted; and,
- (3) The balance of convenience favours granting the stay.

[41] The onus is on the Applicants to demonstrate good and sufficient reasons why a stay should be granted under this test.

[42] The Board will address each aspect of the *RJR MacDonald* test as it applies to this application.

DISCUSSION AND ANALYSIS

Whether the Board should grant a stay of the Order pending a decision on the merits of the appeal

Serious Issue

[43] In *RJR MacDonald*, the Court stated as follows:

What then are the indicators of “a serious question to be tried”? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one.

[44] The Court also stated that, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

[45] The Applicants submit that the Order is a “serious matter” because the remedial work is extensive and will cost an estimated \$100,000 which the Applicants do not have, and it will make the operation of their farm uneconomic.

[46] In support of their submissions, the Applicants provided an affidavit sworn by Mr. Gill. It addresses the history of Lagace Creek and UT5, “compliance” with the Order, and the three-step test for stay applications.

[47] Regarding the first step of the three-step test for stay applications, Mr. Gill attests that the Order will result in “substantial expense” which is “more than our ability to pay.” In addition, Mr. Gill attests that “a substantial portion of our land will not be capable of being farmed as it will be wetlands” if the Order is implemented. He states that compliance with the Order “would result in the loss of our farm or a substantial portion of it.”

[48] Regarding “compliance” with clause 1 of the Order, Mr. Gill attests that the Applicants agree to stop any further work until the appeal is heard. Consequently,

the Panel finds that clause 1 of the Order is, in effect, not part of the Applicants' stay application.

[49] The Regional Manager submits that the Applicants' appeal is frivolous, and they have failed to identify a serious issue to be tried. The Regional Manager submits that, although the Applicants assert that the Order is a serious matter due to the cost of compliance and the impact on their farming, no evidence has been provided in support of that assertion.

[50] The Regional Manager also submits that the Applicants appear to have misunderstood the Order's requirements. The Regional Manager submits that the Order does not require the Applicants to re-purpose or transform their property into wetlands; rather, the Order aims to restore and remediate the Applicant's unauthorized changes to pre-existing watercourses, and address the risks posed to ecological values and neighbouring properties. Moreover, the only substantive work required under the Order is to implement erosion and sediment control ("ESC") measures. The Regional Manager argues that the Applicants have raised no issue regarding the required ESC measures.

[51] In addition, the Regional Manager submits that the Applicants admitted the risks associated with the unauthorized works. For example, the Applicants submit that "none of the consequences of failing to comply with the [the] order will occur until wintertime." The Regional Manager also submits that the Applicants do not deny that the filling of UT5 and the works on Lagace Creek were done without lawful authority.

The Panel's findings

[52] The Panel has carefully reviewed the parties' submissions and the Applicants' Notice of Appeal. The Panel finds that much of Mr. Gill's affidavit contains statements that amount to challenging the factual basis for, and merits of, the Order. For example, Mr. Gill attests that UT5 was a pond that was dug by a previous owner of the property, and that activities by his neighbours have contributed to flooding on the Applicants' property. Regarding "compliance" with the Order, Mr. Gill's affidavit addresses each clause in the Order. With the exception of clause 1, which the Applicants agree to comply with, he either challenges that factual basis or need for each clause, or says that the clause does not apply.

[53] Regarding "compliance" with clauses 2, 3, and 4 of the Order, respectively, Mr. Gill attests that: there is no erosion or sediment flowing into the creek and there is no risk of that happening until late winter or early spring of 2017; what the Ministry wants to be done is beyond the Applicants' ability to pay for; and the property is not a wetland. Regarding clauses 5 and 6 of the Order, Mr. Gill attests that there is no water being used for irrigation on the property, there is no diversion of water from a stream or aquifer for irrigation, and the only irrigation in the past occurred for two days in the summer of 2015. The Panel finds that these attestations go to the merits of the Order, and the merits of the appeal. In deciding

this preliminary stay application, the Panel will make no conclusive findings regarding the merits of the Order or the merits of the appeal.

[54] Regarding clause 7 of the Order, Mr. Gill attests that the debris was deposited by trespassers and has been removed. The Panel finds that, if that is so, the Applicants appear to have complied with clause 7. As such, clause 7 does not appear to be part of the Applicants' stay application.

[55] Regarding "compliance" with clauses 8 and 9 of the Order, Mr. Gill states that the Applicants are waiting for the hearing of the appeal to determine whether they must comply with clauses 2, 3, 4 and 5 of the Order. However, the Panel finds that these attestations show that the Applicants are acting as though a stay was already in place when Mr. Gill swore the affidavit (i.e., July 20, 2016), which is not the case. An appeal does not automatically act as a stay, and the Panel finds that the Applicants appear to have been in non-compliance with the applicable clauses of the Order since the expiry of the June 7 and 17, 2016 deadlines in clauses 8 and 9, respectively.

[56] Based on the foregoing, the Panel finds that the appeal raises serious issues to be tried. For example, the Applicants claim that UT5 is not a "natural water stream" and was constructed by a previous owner of the property to create a pond. This raises a question of fact and law regarding whether UT5 is a "stream" within the meaning of the *Act*. In addition, it is apparent from Mr. Gill's affidavit that, except for clauses 1 and 7 of the Order, which the Applicants appear to have complied with, the Applicants challenge the factual basis and/or necessity of the Order.

[57] For these reasons, the Panel finds that the appeal is not frivolous or vexatious, nor does it only involve pure questions of law. Consequently, the Panel will proceed to consider the next part of the three-part test.

Irreparable Harm

[58] At this stage of the *RJR MacDonald* test, the Applicants must demonstrate that their interests will suffer irreparable harm if a stay is not granted. As stated in *RJR MacDonald*, at page 405:

'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision ...; where one party will suffer permanent market loss or irrevocable damage to its business reputation ...; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined

[59] The Applicants submit that they will suffer irreparable harm if a stay is denied and they must comply with the Order before the appeal is decided. The Applicants submit that complying with the Order will cause them to suffer unrecoverable economic losses. Specifically, they submit that they will have to go

to the expense of hiring qualified professionals to prepare plans that may not have to be implemented if the appeal is successful. The Applicants submit that the remedial work will cost an estimated \$100,000. In addition, the applicants submit that complying with the Order would interrupt their blueberry harvesting, which would cause them losses.

[60] Mr. Gill attests that, when his affidavit was sworn (i.e., July 20, 2016), the Applicants were harvesting blueberries and did not have time to instruct and communicate with qualified professionals and the Ministry. Mr. Gill attests that doing so would result in “substantial income loss” to the Applicants.

[61] The Regional Manager submits that the Applicants have failed to substantiate their claim that they will suffer irreparable harm unless a stay is granted. The Regional Manager submits that there is no evidence that the Applicants’ blueberry harvest would be jeopardized by complying with the Order, as harvesting can continue if ESC measures are implemented on the property and if qualified professionals attend the property to conduct site assessments. Moreover, the Regional Manager argues that the harm alleged by the Applicants is not irreparable in nature, and there is no evidence that they would be put out of business or suffer permanent market loss if a stay is denied.

[62] Regarding the Applicants’ assertion that compliance with the Order will cost an estimated \$100,000, the Regional Manager submits that the Applicants have tendered no evidence to support this assertion or prove that the Applicants are unable to pay that amount. Furthermore, in his affidavit, the Regional Manager attests that Ministry staff spoke with a Senior Project Biologist with SRS on August 9, 2016, who advised that it would cost between \$5,000 and \$6,000 for SRS to: conduct an environmental assessment and impact assessment of UT5; prepare a restoration plan for UT5; prepare an ESC plan for UT5; and, conduct environmental monitoring of UT5. The Regional Manager acknowledges that this estimate does not include the cost of preparing plans for the unauthorized works at Lagace Creek, but he submits that it suggests that the Applicants’ estimate of \$100,000 is unrealistic.

[63] In addition, the Regional Manager argues that any quantifiable monetary losses can be cured, because they could be compensable through litigation. The Regional Manager submits that if the Applicants are successful on the merits of the appeal, they will have recourse against the Ministry for quantifiable losses incurred as a result of interim compliance with the Order.

[64] In reply, the Applicants provided a letter from a professional engineer, who they retained to conduct a geotechnical assessment of the lock block wall. The Applicants did not explain whether, or how, this letter addresses the question of irreparable harm to the Applicants’ interests. Consequently, the letter is discussed later in this decision, regarding the question of the balance of convenience.

The Panel’s findings

[65] At this stage of the test, the question is whether the Applicants have demonstrated that their interests are likely to suffer irreparable harm if a stay is denied. As stated above, “irreparable” harm is harm that either cannot be

quantified in monetary terms or cannot be cured, and includes instances where one party will be put out of business or will suffer irrevocable damage to its business reputation.

[66] In this case, if a stay is denied, the Order will remain in effect pending the conclusion of the appeal, and the Ministry will be able to enforce the Order. The Panel has already noted that the June 2016 deadlines in clauses 8 and 9 have passed, and the Applicants appear to be in non-compliance with the relevant clauses of the Order. The Panel has also noted that the Applicants appear to have complied with clauses 1 and 7 of the Order.

[67] The Panel finds that the Applicants have provided no details regarding how they estimated the \$100,000 cost of complying with the Order. For example, the Applicants provided no documents such as cost quotes from a qualified environmental professional or a qualified engineer regarding the cost of complying with the Order. In addition, the Panel notes that Mr. Gill's affidavit contains no attestations or supporting documents regarding the estimated \$100,000 cost of complying with the Order; rather, the estimate of \$100,000 is an assertion made in the submissions of the Applicants' legal counsel. The Panel finds that the Applicants could reasonably have obtained quotes from an engineer and a qualified environmental professional, especially given that the Applicants have previously retained SRS to prepare plans and reports in response to the Ministry orders issued in 2012 and 2014, and the Applicants retained an engineer to provide a letter regarding the lock block wall in support of their stay application. There is simply no evidence, or even detailed information, from the Applicants explaining how they calculated the \$100,000 cost of complying with the Order.

[68] While the Panel accepts that the Applicants will incur some costs to retain qualified professionals to prepare the required plans if they comply with the Order, the Panel finds that there is no evidence that the Applicants are unable to afford those costs, and there is certainly no evidence that such costs are likely to put the Applicants out of business. In addition, it appears that such costs, which are clearly quantifiable, may be compensable through litigation if the Applicants are successful on the merits of the appeal.

[69] Moreover, based on Mr. Gill's affidavit, the Panel finds that the Applicants appear to have misunderstood the requirements of the Order. In his affidavit, Mr. Gill states that "from what we understand of the changes the Assistant Regional Water Manager is insisting upon, a substantial portion of our land will not be capable of being farmed as it will be wetlands." He further states that compliance with the Order "would result in the loss of our farm or a substantial portion of it." However, the Panel finds that the only on-site actions required under the Order are: to "immediately update" the ESC measures on the property, with those measures being implemented or supervised by a qualified environmental professional (clause 3); and, to remove all debris from the riparian and instream of Bouchier Creek and any other water course on the property (clause 7), which the Applicants say they have already done. The Order does not require the Applicants to implement the plans required in clauses 3 and 4; rather, it requires the Applicants to hire professionals to submit the required plans to the Ministry by specific dates. The Panel finds that there is no evidence that compliance with clause 3, or any other

clause in the Order, will likely result in a substantial portion of the property becoming "wetlands" or otherwise becoming unusable for farming.

[70] Moreover, the Panel finds that there is no evidence that the Applicants' blueberry harvest is likely to be jeopardized or interrupted by compliance with the Order. The Panel finds that, even if harvesting is still underway (and the Panel notes that harvesting may no longer be underway, given that Mr. Gill's affidavit was sworn over two months ago), there is no evidence that harvesting cannot continue if ESC measures are implemented near watercourses on the property and/or if qualified professionals conduct site assessments on the property.

[71] In these circumstances, the Panel concludes that the Applicants' estimate of the cost of complying with the Order is speculative, and there is no evidence that the Applicants are unable to complete their harvesting activities (if harvesting is still ongoing at this time) unless a stay is granted. There is no evidence that the Applicants are likely to be put out of business or suffer permanent market loss if a stay is denied. In summary, the Panel finds that the Applicants have provided insufficient evidence to establish that they will likely suffer irreparable harm to their financial interests or their interests as landowners and operators of a blueberry farm, if a stay is denied.

[72] The Panel concludes that the Applicants have provided insufficient information or evidence to establish that their interests are likely to suffer irreparable harm, between now and the time that the appeals are decided, unless a stay is granted.

Balance of Convenience

[73] This branch of the test requires the Panel to determine which party will suffer the greatest harm from the granting or the denial of the stay applications.

[74] The Applicants argue that the balance of convenience favours granting a stay. The Applicants submit that complying with the Order will cause them to incur large expenses and suffer substantial losses, whereas "none of the consequences of failing to comply with the order will occur until wintertime." In his affidavit, Mr. Gill attests that "... the state that the streams are presently in will not change between now and late winter or early spring." He also states that "... waiting to later in the year after harvest and before spring runoff will provide adequate time to address the concerns set out in the [Order]."

[75] The Regional Manager submits that the balance of convenience favours denying a stay. He submits that the Applicants have failed to establish that they will suffer irreparable harm if a stay is denied, and they have admitted the risks posed by leaving the unauthorized works unaddressed during the high flows associated with winter rains and spring runoff.

[76] In addition, the Regional Manager submits that when he issued the Order pursuant to section 93 of the *Act*, he was exercising his powers to protect watercourses, aquatic species, and aquatic habitat, and to protect against public safety issues related to potential flooding of neighbouring properties. The Regional Manager submits that the ESC measures (in clause 2 of the Order) would mitigate

risks posed to the public interest, and concerns that the lock block wall could deflect water towards neighbouring properties which may cause flooding and erosion (clause 3 of the Order). Obtaining a plan prepared by a qualified professional will allow time for work to occur, should it be necessary for the Regional Manager to make such an order. The Regional Manager further submits that, if the Applicants do not comply with clause 4 of the Order (prepare a restoration plan for UT5) before the appeal is heard, the result could be irreparable harm to aquatic life and habitat, because the unauthorized road and blocked culvert may cause further isolation of UT5 and further habitat loss in the coming months. He submits that the ability to obtain a restoration plan is jeopardized by the passage of time due to potential changes in the landscape.

[77] Moreover, the Regional Manager argues that it is untenable that these risks should go unabated when they were caused by the Applicants' actions taken without lawful authority, especially when the process for obtaining lawful authority would have involved addressing these risks.

[78] The Applicants' reply submission includes a September 9, 2016 letter from Calum Buchan, P. Eng., of WSP Canada Inc., who was retained by the Applicants to conduct a geotechnical assessment of the lock block wall. Mr. Buchan's letter states, in part:

A sliding and overturning analysis of the retaining wall indicates that it has a factor of safety against failure exceeding 2.0, indicating suitable longer-term stability under static and seismic loading. The vertical retaining wall is judged to be stable in bearing and is generally globally stable in its current condition. However, scour erosion could occur during high flow periods, resulting in retaining wall undermining. The outward leaning south end of the wall has reduced stability.

It is recommended that the Owner place additional cobbles and boulders ranging from 100 mm to 200 mm in nominal diameter in front of the wall to reduce the erosion potential. Consideration should also be given to pulling back and replacing the outward leaning south end of the retaining wall such that it no longer possesses an outward lean. ...

[79] The Applicants submit that, based on the content of the letter, and given that a hearing is scheduled for early March of 2017, it is appropriate to grant a stay.

[80] In sur-reply, the Regional Manager submits that Mr. Buchan's letter contains concerns about the potential for scour erosion to undermine the lock block wall, and about the stability of the south end of the wall. The Regional Manager argues that the letter recommends steps for the Applicants to take to reduce the potential for erosion, including placing boulders and pulling back and replacing the outward leaning south end of the wall. The Regional Manager submits that this supports his view that there is a significant possibility of erosion and potential issues with stability of the wall in its current state.

[81] In any event, the Regional Manager submits that Mr. Buchan's letter falls short of making findings on the total potential impacts or risks associated with the lock block wall and the fill behind it. For example, the letter does not review the

potential impacts of the lock block wall on neighbouring land, historical flooding issues, the stream's hydrology, or aquatic and riparian species. In that regard, the Regional Manager reiterates that there is a significant likelihood of high stream flows prior to the March 2017 appeal hearing. Moreover, the letter does not review or address the clauses in the Order that deal with other matters.

The Panel's findings

[82] The Applicants have advised that they are voluntarily complying with clause 1 of the Order (stop work), and it appears that the Applicants have complied with clause 7 of the Order by removing debris from the riparian and instream of Bouchier Creek. Therefore, those clauses of the Order are not considerations in the stay application.

[83] The Panel finds that compliance with the remainder of the Order prior to the appeal hearing will result in some inconvenience and added costs to the Applicants. For example, they will be obliged to prepare the required plans and implement updated ESC measures. However, the Panel has already found that the Applicants failed to establish that complying with the Order will result in irreparable harm to their interests. Specifically, there is no evidence that complying with the Order will force the Applicants out of business, result in substantial financial costs that they cannot afford, significantly interrupt their blueberry harvesting (if it is still in progress), or result in a substantial portion of their farm being converted to wetland. Moreover, the costs that the Applicants would incur from complying with the Order are quantifiable, and may be compensable through litigation.

[84] The Panel has considered that the Applicants constructed the lock block wall in an attempt to mitigate the risk of flooding on their property from Lagace Creek overflowing its banks. The Panel notes, however, that compliance with the Order does not mean that the Applicants must remove the lock block wall. Rather, the Order requires the Applicants to hire a qualified professional to prepare a plan for the wall's removal, because the wall was built without authorization and was not built based on plans or oversight by an engineer. In the event that the appeal is successful and the Applicants are allowed to leave the lock block wall in place (presumably with improvements such as those recommended in Mr. Buchan's letter), the cost of preparing the plan may be recoverable by the Applicants.

[85] Conversely, the Panel finds that granting a stay would result in the Order's requirements not being fulfilled before the appeal is decided, sometime after the hearing scheduled for March 20 to 29, 2017, in the event that the appeal is unsuccessful. Consequently, during the upcoming winter and early spring, no updated ESC measures would be implemented on the property, no plan would be prepared for the rehabilitation of UT5, and no plan would be prepared for the removal of the lock block wall and restoration of the stream bank along Lagace Creek.

[86] Failure to update ESC measures on the property before the winter may result in increased turbidity in waterbodies on the property during the high flows that occur in the winter and spring. This is particularly a concern for Bouchier Creek, which is identified as a fish-bearing stream. In addition, a delay until after March 2017 in preparing a restoration plan for UT5 would result in greater harm to the

environment, because rehabilitation becomes more difficult as time passes. Finally, a delay until after March 2017 in preparing a plan to remove the lock block wall and restore the stream bank would mean there is no plan to address the wall's removal, in the event that the wall adversely impacts the stream channel, causes worse flooding of neighbouring properties, or becomes unstable due to high flows and/or erosion during the winter and spring.

[87] The Panel has also considered the fact that the Order was issued under section 93 of the *Act*, which gives engineers (including the Regional Manager) broad powers to make orders regarding changes in and about a stream, the diversion and use of water, and any "works" (as defined in the *Act*), whether authorized or not. On its face, the appealed decision was properly issued by a statutory decision-maker exercising remedial powers to address unauthorized works and changes in and about a stream. In *RJR-MacDonald*, the Court stated as follows regarding the role of the public interest in weighing the balance of convenience:

... When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. ...

[88] Given this statement in *RJR-MacDonald*, and given the remedial purposes for which orders may be issued under section 93 of the *Act*, there is a presumption that the Order is in the public interest, and is aimed at protecting riparian and aquatic species and their habitat, as well as addressing risks associated with flooding, erosion, and channel instability in an area that has a documented history of such events occurring during winter storms and spring freshet.

[89] In conclusion, after weighing the potential harm to the Applicants' interests if a stay is denied, versus the potential harm to the Regional Manager's interests and the public interests if a stay is granted, the Panel finds that the balance of convenience favours denying the application for a stay. The Panel finds that if a stay is granted, the risks to the environment, public safety, and the public interest, outweigh the inconvenience and cost to the Applicants if a stay is denied, particularly given the documented risks of flooding, erosion, and channel instability in this area.

DECISION

[90] The Panel has considered all of the submissions and arguments made, whether or not they have been specifically referenced herein.

[91] For the reasons stated above, the application for a stay is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

October 13, 2016