



Environmental Appeal Board

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DECISION NO. 2017-WAT-011(a)

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

BETWEEN:	John Story and Jozica Kolarich	APPELLANTS
AND:	Assistant Water Manager	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Susan E. Ross, Panel Chair	
DATE:	September 24, 25 and 26, 2019	
PLACE:	Victoria, BC	
APPEARING:	For the Appellants: John Story and Jozica Kolarich For the Respondent: Pamela Manhas, Counsel Meghan Butler, Counsel	

APPEAL

[1] The Appellants appeal approval no. 1003804 (the "Decision") made under section 11 of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "WSA"), that authorized them to remove walls and abutments at the shore of their residential property on Glen Lake, but denied permission to place sand on the foreshore for the creation of a small beach.

[2] In June 2017, the Appellants applied to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry") for a change approval under the WSA, authorizing them to remove existing waterfront u-shaped rock and concrete walls on the foreshore of their property, and replace them with a combination of sand beach and native vegetation (the "Application").

[3] On August 18, 2017, Mary Bauto, an Assistant Water Manager with the Ministry, issued the Decision. She acted as a delegate of a Regional Water Manager, who is designated as a water manager under the WSA. Ms. Bauto is the Respondent in this appeal.

[4] On September 15, 2017, the Appellants filed their Notice of Appeal to the Environmental Appeal Board (the "Board"). Under section 105(6), 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.

[5] The Appellants request that the Board order the approval of their Application to place sand on the lakefront of their property.

BACKGROUND

[6] Glen Lake is a small lake surrounded by urban development within the City of Langford on southern Vancouver Island. The Appellants have lived in the area for many years. Six or seven years ago, they purchased their property at 991 Loch Glen Place with plans to tear down the older house on the property and build a new one. They decided they wanted to put in a beach for their grandchildren, and they sought authorization to do so under the *WSA*.

The *WSA* Regulatory Scheme

[7] Glen Lake falls within the definition of "stream" in section 1(1) of the *WSA*.

[8] Section 11(2) of the *WSA* provides that changes in or 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.

[9] Section 12(1)(b)(ii) and (iii) require an applicant to pay prescribed fees and provide specifications, reports of assessment and other information that the decision maker requires. Section 12(2) authorizes the decision maker to require a specified assessment to be prepared by a person who has specified qualifications. Section 12(3)(b) authorizes the decision maker to verify information provided under subsections (1) or (2).

[10] Section 14 authorizes the decision maker to refuse, amend or grant all or part of an application. The decision maker can also grant an application subject to terms and conditions prescribed by regulation or determined by the decision maker.

[11] Section 16(1) provides that if the decision maker considers that activities proposed in an application are likely to have a significant adverse impact on the water quality, water quantity or aquatic ecosystem of a stream or other uses of water from the stream, the decision maker may require the applicant to submit a proposal for mitigation measures. If the decision maker considers that proposed mitigation measures either cannot, or cannot fully, address the adverse impacts, section 16(2) authorizes the decision maker to impose compensatory mitigation measures on a different part of the stream to which the application relates.

The Application

[12] The Application was submitted to the Ministry on June 9, 2017 through an environmental biologist, Julie Budgen at Corvidae Environmental Consulting Inc., who prepared an environmental protection plan (the “Corvidae Report”) in support.

[13] The Application was reviewed by Mary Toews, an Ecosystem Biologist working as a Water Officer at the Ministry, before it was referred to the Respondent. Ms. Toews consulted with Dr. Grant Bracher, an Ecosystems Biologist with the Ministry, who recommended against allowing sand to be placed on the shoreline below the high-water mark. Ms. Toews exchanged numerous communications with Ms. Budgen and the Appellants regarding the Application and concerns about the placement of sand. She also had a limited communication with an external consultant. Ultimately, Ms. Toews prepared a Technical Report on the Application for the Respondent’s consideration that included a summary of concerns, referrals/consultations, and recommendations. The Technical Report recommended approving the removal of the concrete structures on the foreshore, but not approving the deposition of sand over the riparian/littoral area (i.e., below the high-water mark).

[14] The Corvidae Report and Ms. Toews’ review of the Application are discussed in more detail later in this decision.

[15] In June 2017, Ms. Budgen also referred the Appellants’ proposal to Fisheries and Oceans Canada (“DFO”), which administers the federal *Fisheries Act*. In a July 5, 2017 letter, DFO advised that the proposal did not require authorization under the *Fisheries Act* because serious harm to fish could be avoided by following standard measures.

The Decision

[16] On August 18, 2017, the Respondent issued her Decision. The Decision described the proposed and permitted changes as follows:

Removing the existing concrete retaining walls and abutments on the property that extend into high water mark of the lake, and planting native vegetation in place of concrete wall. Note that this approval does **not** grant the placement of sand within the littoral and riparian area of the lake, however does permit invasive plant removal within this area and any native species plantings the applicant wishes to include.

[emphasis in original]

[17] The Decision contained a list of conditions and specifications. It did not attach or refer to the Technical Report, or otherwise give reasons for denying the placement of sand.

[18] Ms. Bauto's cover letter for the Decision noted that:

...this Approval, under Section 11 of the *Water Sustainability Act*, does not include fish habitat concerns and issues under the *Federal Fisheries Act*. A separate authorization process may be required under the *Federal Fisheries Act*.

GROUNDINGS OF APPEAL/ISSUES IN THE APPEAL

[19] The Appellants appealed the Decision denying the part of their Application for the placement of sand below the high-water mark of their property on Glen Lake.

[20] I have summarized the Appellants' grounds of appeal, drawn from their Notice of Appeal and Statement of Points, as follows:

1. The Decision gave no reason for denying the placement of sand.
2. The Ministry's Regional Policy, section 4.1.7.1, which does not favour infilling lakes to accommodate development, applies only to large scale and commercial developments, not the Appellants' proposed works.
3. It was discriminatory and prejudicial to deny the Application to place sand for a beach when municipal beaches and at least one private beach have been allowed on Glen Lake. Concern about approval of the Application attracting similar applications from other private lakefront owners was not a reason to deny the Application.
4. The application process was flawed in that it did not require the Respondent to follow the Corvidae Report and permitted the Respondent to deny the placement of sand without conducting a site visit or hiring its own independent specialist.
5. The Respondent displayed bias against private lakefront property owners.
6. The lake bottom already has sand in it, and the Appellants' lakefront is sand beneath an intermittent layer of gravelly rock.
7. The introduction of clean, washed sand is preferable to soil for planting.
8. It is unfair to expect the Appellants to green the lakefront by undertaking the cost of removing the concrete structures without giving them something in return.
9. The Application has been costly and cumbersome, and the Decision came so far into the 2017 window for work on the Appellants' property that it was too late to do the lakefront work before construction of the new house had to proceed.
10. The representation of the Respondent by government lawyers was burdensome to the Appellants and caused delay in the hearing of their appeal.
11. The DFO's approval of the Appellants' proposed placement of sand is inconsistent with the Respondent's Decision to deny it.

[21] In this decision, I have addressed each of ground of appeal as a separate issue.

PROCEDURAL ISSUES

[22] The appeal was the subject of considerable case and scheduling management between the filing of the Notice of Appeal on September 15, 2017, and the start of the hearing on September 24, 2019. This included case management around the filing of expert evidence which became critical to the evidentiary record on the appeal.

[23] On April 30, 2018, the Respondent filed Notices of Expert Evidence for the two expert witnesses she called at the hearing, as required by the Board's Rule 25. Those expert witnesses were Scott Silvestri (fish biology) and Deborah Epps (water quality), both of whom had knowledge specific to Glen Lake.

[24] On June 27, 2018, the Board Chair directed the Appellants to confirm their reliance on the Corvidae Report as an expert report. The Appellants replied on July 11, 2018 by sending "the CV of our expert Julie Budgen." Then on August 8, 2019, they filed the Corvidae Report as their expert report. The next day, the Respondent re-filed their Notices of Expert Evidence and advised that she was not taking issue with the Appellants' late notice or reliance on the Corvidae Report. However, the Respondent requested an opportunity to rebut the Corvidae Report and filed Notices of Rebuttal Evidence from her experts dated August 28, 2019.

[25] The Board's Rule 25(10) requires that if a party wants to cross-examine an expert on their report, the party must give reasonable advance notice that it will require that expert to attend the hearing for cross-examination. On September 5, 2019, the Respondent gave notice that if the Appellants intended to rely on the Corvidae Report, then the Respondent would require Ms. Budgen to attend the hearing for cross-examination. The Respondent stated that this request was first made in a pre-hearing conference on June 27, 2018, and if Ms. Budgen was not made available for cross-examination, the Respondent would object to the admission of the Corvidae Report as expert evidence. The Appellants replied on September 12, 2019, that they would "stand by our position originally stated in the conference call June 27, 2018 with the previous chair that we have no intention of calling Julie Budgen of Corvidae Environmental Consulting Inc. and had already submitted her CV per the chair's request on July 19, 2018."

[26] The evidence that was presented at the appeal hearing included the Appellants' Application, records of the review of the Application by Ms. Toews, and its referral to Ms. Bauto for decision. Both Appellants testified. The Respondent called Ms. Toews, Ms. Bauto, and the two expert witnesses, Mr. Silvestri and Ms. Epps. The Appellants and Respondent filed written Statements of Points and made opening and closing oral submissions. The evidentiary record also included photos of the Appellants' property and the lake, and certain post-Decision communications between the parties that are relevant to the Appellants' grounds of appeal.

[27] Despite notice of the Respondent's expert evidence and ample opportunity to call expert evidence themselves, the Appellants confirmed that they were not doing

so because they did not believe they should have to. Because Ms. Budgen was not produced for cross-examination, I did not admit the Corvidae Report as expert evidence. However, I did admit the Corvidae Report into evidence as part of the Application. The Corvidae Report was the foundation of the Application, and both parties referred to it extensively.

[28] Mr. Silvestri's and Ms. Epp's evidence included their responses to fish biology and water quality aspects of the Corvidae Report. The Corvidae Report also asserted that the Appellants' proposed works would provide habitat for the red-listed (endangered) western painted turtle, but Mr. Silvestri and Ms. Epp did not give evidence about the western painted turtle and both confirmed that they did not have expertise on that subject.

[29] The Respondent sought to introduce evidence about the western painted turtle through the testimony of Ms. Toews. This was done by reference to inquiries she made for her review of the Application. The Respondent also sought to refute the statements about the western painted turtle in the Corvidae Report by introducing through Ms. Toews an August 12, 2015 report called the "Western Painted Turtle Management Plan" prepared for the City of Langford by authors associated with Royal Roads University and WPT Ecological Consulting (the "Turtle Report"). However, Ms. Toews was not tendered as an expert witness, or in fact an expert, respecting the western painted turtle. During the Appellants' cross-examination of Ms. Toews, it also became clear that the parties contested how to interpret the Turtle Report.

[30] I concluded that the Respondent was seeking to introduce the Turtle Report as expert evidence without notice and without an expert witness qualified to speak to it. Furthermore, it was inappropriate for the Respondent to attempt to adduce the Turtle Report through Ms. Toews' lay testimony, while objecting to the admission of the Corvidae Report as expert evidence because the Appellants had not made Ms. Budgen available as a witness.

[31] The Turtle Report was marked as an exhibit but has not formed part of my deliberations on the merits of the appeal. The evidence about the western painted turtle that I considered are Ms. Budgen's assertions in the Corvidae Report and communications with Ms. Toews about the western painted turtle, which were admitted as part of the Application but not as expert evidence, and records of Ms. Toews's pre-Decision inquiries about the western painted turtle, which were admitted as part of her review of the Application leading to the Decision but not as expert evidence.

SUMMARY OF EVIDENCE

The Appellants

[32] Because the Appellants testified serially as to a shared narrative, I have described the substance of their evidence collectively.

[33] In 2017, the Appellants were tearing down the older house on their property so that they could replace it with a new house. Government permits and approvals of various kinds were required, including for any changes affecting the lake. Having

observed two public sand beaches on the lake as well as one at the shore of a neighbour near the previous property they owned in the area, the Appellants decided that they wanted to put in a beach for their grandchildren.

[34] The Appellants are not ecologists, but they care about Glen Lake's habitat and have been involved in a community volunteer program to remove invasive plant species from the lake. They believed, but did not in fact know, that approvals had been issued for the public beaches and the private beach of their former neighbour. They believed the government wanted to provide incentives for private property owners to "green" their lakefront, and they wanted to comply with permitting requirements.

[35] The Appellants initially had no plans to remove the u-shaped concrete and rock structures on their lakefront. They decided to do so after Ms. Budgen informed them that this would benefit the habitat. In their minds, removing the concrete structures was a costly, valuable and good thing to do in return for a small beach for their grandchildren.

[36] The lakefront changes needed to be completed before the construction of the new house started in the fall, after which necessary machinery would no longer be able to access the lakefront. The timing of lakefront work was also confined to a June 15 to September 15 window imposed for the protection of fish habitat.

[37] On June 9, 2017, Ms. Budgen submitted the Application and the supporting Corvidae Report, which proposed to:

Soften and green the shoreline on [the Appellants'] property by removing rock and concrete walls that are present on the foreshore of Glen Lake and partially submerged below the lake's High-Water-Mark (HWM). The retaining wall and concrete pad will be replaced with a combination of beach sand and native vegetation. (p. 1)

[38] The Corvidae Report concluded that the end result of the proposed project would:

...enhance the ecological value of the property. There will be no harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in Glen Lake and the surrounding Riparian Development Area. (p. 5)

[39] The Corvidae Report noted that an endangered species, the painted turtle, has been observed in Glen Lake. It stated that threats to wildlife including the painted turtle would be monitored during the works, and the removal of concrete and placement of the sand would create "ideal nesting habitat for painted turtles to lay they [*sic*] eggs in." (p. 7)

[40] The Corvidae Report also noted that the soil on the property "is generally silty sandy loam." It stated that "[b]each sand placed on the foreshore extending into the lake's littoral zone will be from a pure clean source that is free of fine silt and clay particles, as well as free of plant matter and organisms", and that after removal of the concrete and placement of the beach sand "all exposed soil surfaces, other than the beach sand, will be planted with native vegetation." (p. 9)

[41] Appendix A (p. 4) of the Corvidae Report stated that “[n]utrient loading was an issue in the past, but is not now (likely as result from change over from septic to sewer systems in the area).”

[42] Ms. Toews was assigned to review the Application. A series of communications followed between her, Ms. Budgen and the Appellants. Those communications are detailed in the next section of this decision. Ms. Budgen was, at all times during the application process, acting as authorized agent of the Appellants. Ultimately, Ms. Toews advised that she would recommend approval of the removal of the wall structures, but not the placement of sand within the littoral and riparian area¹ of the lake. In other words, she would be recommending against approval of the introduction of a sand beach below the high-water mark.

[43] The Appellants advised, both through Ms. Budgen and directly, that they wanted the Application to go ahead anyway with the intention that, if the sand beach was not approved, they would not proceed with removal of the concrete structures or other shoreline improvements either. By this time, the Appellants knew they could not get a refund of their application fee, and they realized the time window was closing for lakefront work that season. They resolved to proceed with the Application in the belief that an approval would be valid for two years, over which time they could apply to amend it.

[44] On August 18, 2017, the Respondent issued the Decision. The Appellants were dismayed that the Decision did not include reasons for denying approval of the placement of sand, when they were aware of at least one private landowner (their former neighbour) who they believed had been granted approval to put in a sand beach on Glen Lake. They were also upset by how long it had taken to process the Application.

[45] On August 25, 2017, the Appellants wrote a letter of complaint to their MLA, John Horgan, which they copied to Ms. Toews. On September 15, 2017, Ms. Toews replied with a three-page letter explaining the reasoning behind the Decision.

[46] On September 15, 2017, the Appellants appealed the Decision, and their Notice of Appeal tracks much of the content in their letter of complaint to Mr. Horgan.

[47] In addition to documents respecting the review of their Application, the Appellants provided copies of certain post-Decision documentation relating to their complaint to Mr. Horgan. They also referred, or were referred, to various photos of their property, its lakefront and the substratum at the water’s edge.

[48] By the time the appeal was heard, the Appellants had built their new house, and were living in it. They have removed the top layer of concrete on the lakeshore walls by hand and planted five rhododendrons. The concrete groynes embedded in the shoreline remain in place.

¹ The littoral area is the shore zone where light penetrates to the bottom. The riparian area is the transitional zone connecting the land and water.

Ms. Toews

[49] Ms. Toews explained that applications under section 11 of the *WSA* are assigned to a Water Officer who does a preliminary review to determine if notices or consultations are required. This is followed by a more detailed review for statutory and policy compliance. She described the process as one of regulatory review. Applicants are expected to provide complete materials including a site map and professional report (in this case, the Corvidae Report). Site visits are not necessarily done, and there were none in this case. Each application is reviewed on its own merit, but biological impact is cumulative in nature, and therefore, is not considered stand-alone to each application. The Water Officer then prepares a technical report solely for the Water Manager who decides the application.

[50] For the Appellants' Application, Ms. Toews liaised with Dr. Grant Bracher, an Ecosystems Biologist with the Ministry, who recommended against approving the placement of sand. In response to a query from Ms. Toews on July 11, 2017 about whether an alternative to sand could be used, such as spawning gravel, Dr. Bracher replied that:

We would need a fish biologist's assessment of the current fish habitat. Glen Lake is regularly stocked with sterile rainbow trout for a put and take fishery; native trout recruitment is minimal. There are many non-native fish in the lake – smallmouth bass and sunfish. Nothing should be done to enhance habitat for non-native fish species.

If we allow one homeowner to create a sandy swimming beach other homeowners will see this and want the same.

I am sticking with my recommendation that this part of the approval not be allowed.

[51] On July 31, 2017, Ms. Toews informed Ms. Budgen that she would be recommending most of the works but needed more information on the proposed sand placement. She said that the addition of new substrate to the "lake littoral area" was not normally approved, as it would damage existing habitat and introduce unnatural substrate into the lake. She said she understood that the only fish species in the lake were rainbow and cutthroat trout, so spawning habitat on the lakeshore was not a concern; however, she invited Ms. Budgen to provide more information on how sand placement could impact other habitat uses and species.

[52] On August 1, 2017, Ms. Budgen replied that:

... For the sand placement it would be over the existing native vegetation which is regularly mowed. ... The sand placement could impact other habitat uses and other species by creating a potential turtle nesting area, as they prefer sand for nesting. The invertebrate species will be minimally impacted by covering the mowed area with sand. However, due to the area being mowed to the water there is little suitable habitat for invertebrates, with the exception of the yellow flag irises and rush areas. We propose the yellow flag iris is removed because it is an invasive species, and replaced with hydrophilic native vegetation. The rush and iris are along the edges and that

will continue to be vegetated (re-vegetated with native vegetation). These areas will not be beach...

[53] Ms. Toews passed this reply on to Dr. Bracher with the following comments:

I suppose best case would really be to replace the grass with native plantings as well and not mow it. Sand placement would provide one features [*sic*] of painted turtle habitat, as Julie mentioned, but wouldn't likely be used due to people being there and not a large area or deep enough for nesting. So not sure how helpful that would be. Maybe could add a basking log or two.

[54] Dr. Bracher replied:

It has been my experience that the only time we OK the placement of sand is for public beaches; if we OK it for a private residence other homeowners will want the same and it will be hard to say no. The suggestion that it will create painted turtle habitat is rather weak.

Planting native riparian vegetation is certainly the preferred option from an ecological point of view.

[55] On August 2, 2017, Ms. Toews proposed to Ms. Budgen that if the Appellants did not want to plant riparian vegetation along the entire stretch of the shore, leaving it "as is" with grass would be preferable to sand placement, and ideally they would not mow the vegetation to the shore. That same day, Ms. Budgen reported this information to the Appellants, noting that Ms. Toews was referring to the area below the high-water mark, and the Appellants could do what they want above it.

[56] On August 1, 2017, Ms. Toews had also sent a query to Christian Engelstoft, an external consultant familiar with the western painted turtle, stating:

I have someone wanting to complete sand placement along a SW facing lake littoral area for painted turtle habitat, at a known painted turtle site (Glen Lake). Will simply placing sand and basking logs create habitat, or if it's over a small area and has too much people activity, is it more likely to be a population sink or negative impact? The existing area is mowed grass.

[57] On August 3, 2017, Mr. Engelstoft replied that "pure sand is generally not a good substrate, a loamy soil would be better. If it is here in our region, you [*sic*] contact can contact us directly and we can work with him/her."

[58] Ms. Toews had not heard back further from Ms. Budgen and did not provide her with Mr. Engelstoft's communications.

[59] Ms. Toews prepared a two-page Technical Report dated August 4, 2017. The Technical Report is organized under the following headings: Concerns; Referrals and Consultations; and Comments and Recommendations. I have summarized its relevant contents below:

Concerns

- This section of the Technical Report indicated that removing the concrete structures and planting native vegetation would enhance the fish habitat. Specifically:

Rainbow trout and cutthroat trout occur in Glen Lake, and may use the littoral area of the lake for overwintering, rearing and feeding areas. Riparian vegetation and aquatic vegetation provide cover and a source of invertebrates for forage, therefore there will be a net increase in fish habitat quality by replacing the concrete walls with riparian plantings.

- There were no concerns about aquatic plant species at risk. The Technical Report noted that the western painted turtle is known to occupy Glen Lake, but there was no known use of the Appellants' property by those turtles, and a survey would be conducted before completion of the proposed works.
- There were concerns about the placement of sand, which the Technical Report indicated would not generally be approved under section 4.1.7.1 of the Ministry's Regional Water Policy which reads: "Due to the documented adverse impacts on aquatic fish and habitat, the infilling of lakes or swamps within the natural boundary of these water bodies to accommodate development are not favoured for approval". The Technical Report said the reasons for this are that sand placement is not a natural substrate for the lake, allowing one landowner to place sand would set a precedent, and sand would not increase habitat for any species.
- The Technical Report indicated that the existing condition of grass, though not itself ideal, was preferable to sand because grass provides habitat for invertebrates which provide food for fish. Furthermore, the proposed sand placement would likely be of insufficient depth and too disturbed to provide nesting habitat for the western painted turtle.
- The Technical Report disclosed that when informed that sand placement may not be approved and asked to provide alternatives, the Appellants had advised that did not want to complete the works if sand placement was not permitted. It also disclosed that the Appellants had been informed that WSA approval was not required outside of the riparian area and they were free (with appropriate municipal permits) to place sand upland of that area so long as it was protected.

Referrals and Consultations

- This section of the Technical Report indicated that Grant Bracher recommended approving the removal of the concrete structures and the planting of native vegetation, but not the proposed sand placement because it would negatively impact fish habitat in the riparian and littoral zones.

Comments and Recommendations

- This section of the Technical Report recommended reasons for partially granting the application, as follows:

Reasons for decision:

The removal of the concrete wall and native species planting are an improvement to the shoreline from both an aesthetic and environmental perspective and these can be completed with appropriate sediment control and mitigation measures. However, I recommend that the portion

of the works requesting sand deposition over the riparian/littoral area of the lake should not be approved, as this would damage existing [sic] habitat and provide a precedent for other landowners to follow suite [sic]. I have not received a rationale from the proponent on why sand placement should be approved, such as any mitigation measures suggested for lost habitat or alternatives to sand placement.

[60] In her testimony, Ms. Toews explained that she understood “accommodate development” in section 4.1.7.1 of the Regional Policy to mean human use that includes the Appellants’ proposed works, and not only commercial or large-scale developments. Ms. Toews explained that the placement of sand is sometimes allowed within the cumulative effects framework on the rationale that one public beach is preferable to many private beaches as regards cumulative impact. She also explained that although the Technical Report noted the depth of sand placement to be likely insufficient for turtle nesting, this was not a key concern in her mind, but rather one of multiple concerns about the placement of sand.

[61] On August 9, 2017, Ms. Toews sent an email to Ms. Budgen and the Appellants explicitly explaining that she would not be recommending approval of sand placement because of the Ministry’s Regional Policy and inviting them to raise alternative changes for the grass area within the u-shaped concrete walls.

[62] Ms. Budgen replied the same day, requesting that the Application proceed without alteration. She explained that the Appellants:

...are willing to create a better (green/soft) shoreline by removing the concrete and planting native species. They are not willing to compromise on the beach. From the perspective of the neighbours and them, as landowners on the lake, they are being good stewards by creating a green shore with native species (and removing invasive species). If they are not being approved to put sand down in the small area between where the concrete is to be removed, then they will not remove the concrete or do any improvements to the shoreline. As per my discussions with them, all are eyes on them to see how this goes. With the difficult process, different government applications and the lack of support for creating a greener shoreline, their neighbours are being deterred to go through the process at all. I am speaking frankly and voicing what I have heard from several local landowners in the area.

There have been no amendments to the application. They would like the sand placement to be included as per this specific case. If the sand placement is not approved then they will not be going ahead with any of the process.

[63] On August 10, 2017, Ms. Toews sent Ms. Budgen and the Appellants another even more detailed invitation for more information to support the placement of sand:

Unfortunately, besides aesthetics, I am still not clear on the benefits of placing sand along the littoral area and under the high water mark of the lake. I agree that the current situation of low-lying vegetation, grass and invasive species is not ideal and I am open to considering any option you can

describe that has a reasonable rationale for approval. However, in order to approve those works the decision maker would need some more details on how the proposed sand placement would not be impacting existing lakeshore habitat and fish habitat, if it does impact habitat how this could be compensated, or if it improves habitat the details as to how it does this. For example, improving habitat for trout in the lake could include large woody debris placement and riparian plantings, and painted turtle habitat would need to be created in a more holistic way to ensure it does not become a 'sink' habitat through disturbance during breeding season. **If there is a case to be made to place sand that does not result on net loss of aquatic/riparian habitat, please do express this and I'll bring all of the information to the decision maker.** Under the *Water Sustainability Act*, only the aquatic and riparian habitat is considered, there is no issue with placement of sand outside of the riparian area.

[emphasis in original]

[64] At the hearing, Ms. Toews explained that 'sink' habitat means habitat that a species may use but is not a net benefit to its population; for example, because of unsuccessful nesting or predation.

[65] Ms. Toews met with and briefed the Respondent on the Application before the Respondent made her Decision. Ms. Toews did not have detailed recollection of the briefing but knew that it included the Technical Report.

[66] The Technical Report was not provided to the Appellants until January 2018, long after they had received the Decision, complained to their MLA, and filed their appeal.

[67] Before the hearing of the appeal, Ms. Toews did a site visit and made enquiries about the existence and status of other beaches on Glen Lake. She described this as part of her role to monitor applications, and report information on compliance and enforcement. Those investigations yielded the following information:

- Glen Lake has two public use beaches. In 2015, approval was given for topping up of sand on the Glen Lake Park Beach located at the north end of the lake. In 2013, notice was received of a proposed upland beach for Glen Cove Park at the south end of the lake. Because an upland beach is above the high-water mark, it did not require an approval under the *WSA*.
- Ms. Toews observed two other beaches on what appeared to be private properties, but there are no applications for approval on file for private landowners to place sand on Glen Lake.

Ms. Bauto

[68] Ms. Bauto testified that Ms. Toews brought her the Application and the Technical Report recommending that it only be partially granted, a situation Ms. Toews had not encountered before. Ms. Bauto asked Ms. Toews to again pose her concerns about sand placement to Ms. Budgen. Ms. Toews returned with emails she had exchanged with Ms. Budgen. Ms. Bauto and Ms. Toews discussed the matter further and Ms. Bauto made her Decision.

[69] Ms. Bauto testified that she considered the briefings she received from Ms. Toews were sufficient, the reasons for her Decision were communicated in the emails exchanged between Ms. Toews and Ms. Budgen, and she would make the same decision on the basis of the additional information being provided on the appeal.

Expert Witness – Mr. Silvestri

[70] Mr. Silvestri is a Fisheries Officer with the Ministry. He is trained as a fish biologist. He was qualified to give expert evidence on the species of fish present in Glen Lake, and how fish species and habitat may be affected by the deposition of beach sand along the lake's littoral zone. He also testified respecting certain statements in the Corvidae Report about the impact of the Appellants' proposed works on aquatic life and habitat, and persisting nutrient loading problems in Glen Lake.

[71] I am satisfied of Mr. Silvestri's expertise in the areas on which he testified, and that he did so in an objective and non-partisan manner.

[72] At the risk of over-simplification, I have summarized the substance of Mr. Silvestri's evidence as follows:

- There are four native and three non-native freshwater fish species in Glen Lake. Some forage in the lake and move to Colwood Creek to spawn in the spring. Others spawn in the lake. Glen Lake also has a 'put and take' fishery that is stocked multiple times a year with non-reproductively viable rainbow trout.
- Glen Lake is a eutrophic lake, meaning it has high nutrient productivity. Although nutrient productivity can be influenced by soil and geologic forces, high productivity is most often associated with human land uses. Eliminating external nutrient loading factors can help improve a eutrophic lake, but not the persistence of internal nutrients that have already found their way into the lake (i.e., internal loading).
- Increased nutrients can lead to decreased oxygen levels and warmer temperatures, which can affect aquatic life including fish. Fish habitat is restricted to depths where temperatures are cooler and oxygen is saturated. Low oxygen also prevents insects from using lower depths for their life cycle.
- In 1985, an aerator was installed at the bottom of Glen lake. Its function has been to maintain an oxygen rich environment at the bottom of the lake. The delivery of oxygen facilitates fish survival when high water temperatures

result in oxygen depletion. It also prevents the release of phosphorous that causes algae growth and continued high nutrient productivity.

- The aerator is regularly monitored and maintained and does a reasonable job of combatting a low oxygen state in Glen Lake. If it was shut off, fish habitat conditions would deteriorate and algae blooms would increase. The aerator has been upgraded and is operating at the limit of its capacity. It cannot sustain more biologic demand.
- The substratum on Glen Lake varies from location to location. Near the boat launch, there are aquatic weeds and mud. The substratum at the Appellants' property is a mix of sand and courser gravel, small cobbles and even boulders typical of the shores away from the ends of the lake. The Appellants' shore area appears to be a dynamic one where sand and silts will move by wind and water action, as opposed to a naturally high deposition area.
- Fish species adapt to using the native substrate and most prefer a mix of habitat type. Placing sand at the Appellants' shore would significantly change the ability of fish to use the area for spawning, rearing, and finding cover in spaces between the natural substrate. Sand smothers the production of insects which are food for fish. It also has a smothering effect on aquatic plants which consume and bind up nutrients in an already nutrient-rich area. Sand is mobile and can shift, with negative effects on other areas such as the bottom of the lake where the aerator cannot counter further nutrients in the lake.
- For these reasons, the placement of sand on the Appellants' shore will harmfully disrupt the natural habitat, contrary to the statement in the Corvidae Report (p. 5) that there will be "no harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in Glen Lake and the surrounding Riparian Development Area."
- Sand cleanliness (p. 9 of the Corvidae Report) is not an answer to fish habitat concerns as it would address the introduction of external chemicals by the sand itself, but not the impact of the placement of the sand on the fish habitat.
- The statement in Appendix A (p. 4) of the Corvidae Report that nutrient loading was an issue of the past in Glen Lake but is not now (likely as result from change over from septic to sewer systems in the area), is not accurate. Internal nutrient loading has been a persistent issue in the lake. Internal nutrients are a major nutrient source which the aerator, operating at capacity, is not removing. The aerator is just preventing the creation of anoxic conditions in the lake bottom.

Expert Witness – Ms. Epp

[73] Ms. Epps is the Section Head, Water Quality, at the Ministry of Environment and Climate Change Strategy. She was qualified to give expert evidence on water quality, and the effect on the water quality and protection of aquatic life of the deposition of beach sand along the littoral zone of Glen Lake. She also testified

respecting certain statements in the Corvidae Report within the areas of her expertise.

[74] I am satisfied of Ms. Epp's expertise in the areas on which she testified, and that she did so in an objective and non-partisan manner.

[75] At the risk of over-simplification again, I have summarized the substance of Ms. Epp's evidence as follows:

- Glen Lake is a mesotrophic lake with a tendency to become eutrophic in the summer as the weather warms. Trophic status depends on nutrient status, which basically turns on phosphorous level.
- Nutrient enrichment has been a longstanding issue for Glen Lake water quality. Water quality data between 2010 and 2015 show significantly high phosphorous levels that are above those recommended for aquatic life or recreational use.
- Too many nutrients cause excessive algal and aquatic vegetation growth. Over time nutrients have settled at the bottom of Glen Lake and become an internal source of nutrients, referred to as internal loading, in addition to ongoing land sources. During the summer, the lake heats up and oxygen levels at the bottom drop, while the nutrients locked in sediments at the lake bottom are released back into the water column, exacerbating the already high nutrient levels.
- The aerator may be why there has not been visible blue-green algae blooms in the Glen Lake. There have been algae blooms, however, just not visible ones. The aerator, operating at its 1980s capacity, is holding the problem at bay. Any additional nutrient sources will likely overload it at some point.
- Failing septic systems contributed to Glen Lake nutrient levels in the past. Most houses are now hooked up to a sewer system, but unused septic fields could yet be aging and leaking nutrients into the water table and ultimately the lake. Septic decommissioning may be clean in some cases but not others.
- Depositional areas will be uniform with sand and usually protected from wave and weather action. Flushing areas usually have mixed substrates because what sand is there is mobile and gets flushed out. There is sand on Glen Lake's shore, but it is a heterogeneous combination of substrate. In the areas where sand has been brought in, it is uniform and not the mixed substrate natural to the lake.
- When sand gets flushed out, it finds somewhere else to settle—the lake bottom, on shore or on vegetation. The settling of sand on the lake bottom will have a smothering effect on aquatic vegetation and micro-organisms. The shore of the Appellants' property is a composite of sand and cobbles in a flushing, not depositional, zone. If sand is placed in a non-depositional zone, it will flush away because it is not meant to be there, and then there will be a desire to bring in replacement sand. Clean sand (p. 9 of the Corvidae Report) will still move, whether or not it is free of silt and clay.

- Nutrient loading is not an issue of the past for Glen Lake (Appendix A, p. 4, of the Corvidae Report). Multiple sources of nutrients, external and internal, continue to be an ongoing concern for water quality in the lake. Each time something more is added, the nutrient level increases in a system that is already barely holding on with elevated phosphorous levels. The result can be thought of as death by a thousand cuts.
- Non-point sources for nutrients include land disturbances such as shoreline modifications. The Ministry of Environment's Glen Lake 1981-2009 Water Quality Monitoring Program report includes the following Tips to Keep Glen Lake Healthy:
 - Minimize the disturbance of shoreline areas by maintaining natural vegetation cover
 - Do not import fine fill

DISCUSSION AND ANALYSIS

[76] In this section, I have summarized the parties' key arguments regarding each of the Appellants' grounds of appeal, and I have analyzed the merits of each of those grounds.

1. The Decision gave no reason for denying the placement of sand.

[77] The Respondent maintains that she relied on the Technical Report to reach her Decision and, although the Technical Report was not provided to the Appellants until January 2018, the Appellants were aware of the underlying reasons for the Decision from the pre-Decision communications with Ms. Toews, as well as her post-Decision letter dated September 15, 2017.

[78] Having considered Ms. Bauto's and Ms. Toews's evidence, the Technical Report and regulatory review of the Application, I find that the Technical Report was the basis of Ms. Bauto's Decision. However, that message was not conveyed in the Decision, which contains no reasons, or by the Technical Report itself, which was not provided to the Appellants until months later. When the Technical Report was provided to the Appellants, it conveyed that Ms. Toews was recommending reasons for decision, not whether Ms. Bauto adopted those reasons. Similarly, the Appellants knew what Ms. Toews' recommendations would be from her communications about the Application, but it was Ms. Bauto, not Ms. Toews, who was the decision maker and she gave no reasons for her Decision. This was confusing and could have been avoided if the Technical Report was transparently adopted by Ms. Bauto and provided to the Appellants in a timely manner.

[79] It may be a positive feature of the regulatory review process that feedback from Ministry staff to proponents helps resolve issues so that few applications go forward without a recommendation for approval in terms and on conditions that address any concerns raised during the review process. The Appellants' Application was not such a case. They ought to have had reasons for the Decision when weighing whether to file their Notice of Appeal, which had to be filed within 30 days

after they received the Decision. One of the cardinal purposes of providing reasons for a decision is to facilitate the exercise of rights of appeal.

[80] Ms. Toews's explanatory letter of September 15, 2017 was issued post-Decision in reply to the Appellants' complaint to their MLA and, once again, it is a communication from Ms. Toews, not the decision maker, Ms. Bauto. The Appellants may have been destined to complain to their MLA in any event, but the absence of reasons for the Decision contributed confusion and suspicion to the situation.

[81] I conclude that this ground of appeal has merit. However, it does not provide a basis for allowing the appeal, because section 105(2) of the *WSA* authorizes the Board to conduct an appeal by way of a new hearing and this appeal was conducted as such. The parties had the opportunity to present new evidence and arguments that were not before the Respondent when she made her Decision. I considered the matter afresh based on all of the arguments and admissible evidence, and I have provided detailed reasons for my decision. This has rectified the absence of reasons for the Decision.

2. The Ministry's Regional Policy, section 4.1.7.1, against approving the infill of lakes to accommodate development applies only to large scale and commercial developments, not the Appellants' proposed works.

[82] The Respondent relies upon section 4.1.7.1 of the Vancouver Island Region Water Stewardship Division Policy, established by the Regional Water Manager on March 6, 2006, which reads:

Regional Policy

4.1.7.1 Due to the documented adverse impacts on aquatic fish and habitat, the infilling of lakes or swamps within the natural boundary of these water bodies to accommodate **development** are not favoured for approval.

[emphasis added]

[83] The Appellants argue that "development" in section 4.1.7.1 means large scale commercial developments and has no application to their proposed works as private landowners on a residential property.

[84] I reject this argument because the language in section 4.1.7.1 does not restrict the meaning of "development" to large scale or commercial developments or indicate that section 4.1.7.1 does not apply to all applications for change approval. Also, considering the evidence of Mr. Silvestri and Ms. Epp, there is no reason to believe that infill activity by private landowners does not have the documented "adverse impacts on aquatic fish and habitat" that are the focus of section 4.1.7.1. Indeed, quite the opposite. I find that section 4.1.7.1 should be interpreted purposively to apply all change approvals. In any event, section 4.1.7.1 is a Ministry policy, and policies simply provide guidance to decision makers. Policies are not legally binding.

[85] Another facet of this ground of appeal is the Appellants' argument that they should not have been put through the application process under section 11 of the *WSA* if the Ministry has a policy against beaches for private landowners.

[86] I find that the statement in section 4.1.7.1 of the policy that the infilling of lakes to accommodate development is “not favoured for approval” this does not create an absolute rule against infilling. Ms. Toews was forthright about concerns regarding the placement of sand from the outset of her regulatory review, and the need for more in the Application to mitigate or compensate for its adverse impact. The communications between Ms. Toews, Ms. Budgen, and the Appellants show that Ms. Budgen was alive to those concerns and to the fact that the Appellants’ practice of mowing the vegetation down to the water was harmful to the lake habitat. Ms. Budgen attempted to leverage the placement of sand as a beneficial habitat for the endangered western painted turtle. The Appellants were aware of all this as well as Ms. Toews’s continued concern that adequate justification had not been provided for the placement of sand.

[87] The Appellants chose to proceed with their Application on that basis, and to argue their appeal without calling Ms. Budgen or another expert. They had an opportunity to bring compelling evidence, if it exists, that their proposed placement of sand in a small beach intended for human use would create beneficial habitat for western painted turtles that, in conjunction with the positive impact of removing the concrete structures, outweighs the negative impacts of the placement of sand attested to by Mr. Silvestri and Ms. Epp.

[88] That the Appellants did not provide sufficient evidence does not make the Ministry’s policy not to favour the approval of infill, due to adverse impacts on aquatic fish and habitat, an absolute or unfair policy.

[89] The Appellants raised a related point that Ms. Toews should have alerted them that the adequacy of the depth of sand to support turtle habitat was an issue. It is true that this issue is raised in the Technical Report, which the Appellants did not have. However, it is but one of the concerns about the placement of sand, and the Appellants did not reply to specific issues that Ms. Toews did raise with them, such as the beach becoming a ‘sink’ habitat through disturbance during breeding season.

[90] I find that the Appellants were aware of, and could have addressed, all of these issues with further and compelling support in their Application and with expert evidence at the appeal hearing, but they did not. The Appellants are responsible for providing sufficient evidence to support their arguments on this ground of appeal. I find that their evidence was insufficient to establish that either the Ministry policy does not apply to their Application, is itself unfair or improper, or was applied unfairly or improperly by the Respondent in making the Decision.

3. It was discriminatory and prejudicial to deny the Appellants’ application to place sand for a beach when municipal beaches and at least one private beach have been allowed on Glen Lake. Concern about approval of the Appellants’ application attracting similar applications from other private lakefront owners was not a reason to deny the Appellants’ application.

[91] The Appellants argue that their Application should be considered on its merits, and not based on what may happen with future applications from others. As they describe it, they should not be “penalized by being the first” because of concern about setting a precedent.

[92] I find that this ground of appeal misunderstands the statutory process for the Application, as well as the evidence about the adverse biological impacts of the Appellants' proposal.

[93] I accept that when the Appellants decided they wanted to establish a small beach for their grandchildren, they assumed that the existing beaches they could see were properly permitted, including the one at the shore of their former neighbour's property. This contributed to their expectation that it would not be difficult to obtain approval for their beach. It also contributed to their feeling that it is unfair that other private landowners who deposited sand without approval have beaches while they, who sought approval, do not.

[94] The Appellants are entitled to have their Application considered in relation to its specific facts and their property. They are not entitled to have it considered in isolation from the surrounding environment including the established, current biological state of Glen Lake as affected by past and existing human activities.

[95] The adverse effects of proposed works on the lake's environment are a valid consideration for applications under section 11 of the WSA. It is not improper for the Ministry to develop policy that seeks to limit adverse impacts from the placement of sand in water bodies in a manner which rationally distinguishes between public and private use beaches and recognizes biological impacts.

[96] There is compelling evidence, including expert evidence, that the Appellants' proposed placement of sand on the foreshore of Glen Lake would have adverse environmental impacts on the lake. There is no evidence that the Ministry has approved the placement of sand for beaches on other private properties on Glen Lake. The existence of unapproved private beaches does not oblige the Respondent to approve the placement of sand by the Appellants even if, or just because, they have applied and are the first to do so. Landowners who deposit sand below the high-water mark without authorization under the WSA may be subject to compliance and enforcement action by the Ministry. There is no evidence that the Appellants have been treated unfairly or differently than any other landowner who may make a similar application in similar circumstances.

4. The application process was flawed in that it did not require the Respondent to follow the Corvidae Report and permitted the Respondent to deny the placement of sand without conducting a site visit or hiring its own independent specialist.

[97] Section 11 of the WSA required the Appellants to apply for change approval in order to do their proposed shoreline work. Section 12 of the WSA authorized the Respondent to require the Appellants to pay a prescribed fee, to provide a required application form accompanied by supporting documentation prepared by a Registered Professional Biologist, like the Corvidae Report prepared by a Registered Professional Biologist, Ms. Budgen. The WSA also authorized the Respondent to require the Appellants to provide further information or reports. The Respondent had the authority to specify what professional assessment work was needed with the Application and the discretion to accept or reject what was provided.

[98] Ms. Toews described the regulatory review process as driven by the obligation of the applicant to provide a completed application, site map, and a professional report justifying the proposed works. In my view, sections 11 and 12 of the *WSA* provide for the type of administrative process that she described, and this ground of appeal is without merit in the face of those provisions. The Respondent was not required to follow the Corvidae Report, do a site visit or hire its own external specialist.

[99] The Appellants argue there has been a “miscarriage of justice” because the Respondent treated the Corvidae Report with “total disregard” and dismissed it “without even doing a site visit.” I find that this is not an accurate characterization of the facts, specifically Ms. Toews’s concerted communication of concerns about the sufficiency of the Application as regards the placement of sand.

5. The Respondent displayed bias against private lakefront property owners.

[100] This ground of appeal has two sources: (1) statements by Ministry and Ministry of Environment staff opposing private beaches over public beaches, and opposing the Application because it would invite similar applications to place sand for making other private beaches; and (2) remarks by Ministry staff concerning drafts of Ms. Toews’s post-Decision letter of September 15, 2017.

[101] As to the first alleged source of bias, I have already ruled that the considerations the Appellants object to are legitimate ones for Ministry policy making about adverse impacts on aquatic fish and habitat from the infilling of water bodies for development. They are not an indication of improper bias against private lakefront property owners.

[102] As to the second alleged source of bias, I do not find the evidence around composition of Ms. Toews’s September 15, 2017 letter to be an indication of bias. The end result was an informative explanatory letter, albeit not saying what the Appellants wanted to hear. Emails produced in the hearing revealed that Ms. Toews sought input from colleagues. One of them used flippant language, referring to “weasel words” and an “escape clause” in the drafting. However, it is important to remember that those remarks were not made by Mary Bauto, the person who made the Decision, and the September 15, 2017 letter itself was written post-Decision by Ms. Toews, not Ms. Bauto. I see no significance for this appeal in what Ms. Toews may have pondered or been exposed to in her colleagues’ comments as she prepared her September 15, 2017 letter. It is also trite to observe that thoughtful correspondence can require consultation and multiple drafts, and great authors often write ill-conceived preliminary drafts.

[103] There is no evidence that Ms. Toews had improper bias in her regulatory review of the Application. There is no evidence that Ms. Bauto, the decision maker, did either. In any case, I considered this matter afresh and independently of both parties, based on all of the arguments and admissible evidence.

6. The lake bottom already has sand in it and the lake in front of the Appellants' property is sand beneath an intermittent layer of gravelly rock.

[104] The gist of this ground of appeal is that there is sand amongst the mixed substrate in the lake adjacent to the Appellants' property. Sand is therefore natural to the lake, and there is no harm in adding more to establish a small beach at their shore. In support of this ground of appeal, the Appellants provided photographic evidence of a person standing up to their ankles in the water at their shore.

[105] I find that this ground of appeal is without merit. The Appellants acknowledged that they do not have ecological or other scientific expertise. Mr. Silvestri and Ms. Epp do have that expertise. They gave consistent, compelling evidence, which I accept, that homogenous sand is not a natural substrate in Glen Lake and the proposed introduction of sand would harmfully disrupt the lake habitat, which already has problematically high nutrient levels.

7. The introduction of clean, washed sand is preferable to soil for planting.

[106] I find that this ground of appeal is without merit. There is no evidence that clean, washed sand is a benefit for planting. There is unequivocal evidence from Mr. Silvestri and Ms. Epp, which I accept, that the use of clean sand does not compensate for the negative impact on fish, aquatic habitat and water quality of the placement of the sand itself.

8. It is unfair to expect the Appellants to green the waterfront by undertaking the cost of removing the concrete structures without giving them something in return.

[107] This ground of appeal also misunderstands the statutory process for considering the merits of the Application, as well as the evidence about the biological impacts of the Appellants' proposed placement of sand.

[108] The Appellants sought to use removal of the concrete structures, an acknowledged environmental benefit, as leverage for approval of the placement of sand. The WSA does not allow such a 'trade off'. In fact, section 11 requires an application for a change approval even when a proposed change will be entirely beneficial to a stream's environment and the applicant will get no less beneficial, or even non-beneficial, change in return.

[109] Under section 16 of the WSA, if the Respondent considers that a proposed change approval is likely to have a significant adverse impact on the water quality, water quantity or aquatic ecosystem of a stream, she has a mandate to require the applicant to address mitigation measures. Those mitigation measures may be in respect of the proposed works directly or in respect of a different part of the stream in compensation for the adverse impact of the proposed works.

[110] The Appellants wanted to create a small beach. They learned that removal of the concrete structures would benefit the habitat and therefore made a two-part Application to remove the u-shaped concrete structures and replace them with native vegetation and to place sand for a beach in the middle. In their minds, removal of the concrete structures as well as the possible creation of turtle habitat was sufficient benefit to justify the placement of sand.

[111] The Respondent was not required to accept the Appellants' equation and, indeed, was required to exercise independent judgment about the merits of the Application. Ms. Toews's communications to Ms. Budgen and the Appellants about adverse impacts and mitigation measures were within the discretion in section 16, and to her credit. The Technical Report concluded that the replacement of the concrete structures with native plantings would be a net benefit, but the placement of sand would damage the riparian habitat and the Appellants had not suggested any mitigation measures "for lost habitat or alternatives to sand placement." I find that the Appellant has still not addressed those issues. Removal of the concrete structures and their replacement with native plantings will not have a direct or compensatory mitigating effect on the significant adverse impacts of depositing sand below the high-water mark established by the expert evidence of Mr. Silvestri and Ms. Epp.

[112] As regards the possibility that the placement of sand for the proposed beach might create habitat for the endangered western painted turtle, the only evidence in favour are minimal bald assertions in the Corvidae Report. The Appellants did not call Ms. Budgen for cross-examination, or an expert on the western painted turtle. I find that the evidence is insufficient to establish the suitability of the proposed beach as western painted turtle habitat.

9. The Appellants' application has been costly and cumbersome, and the Respondent's decision came so late in the 2017 window for work on the Appellants' property that it was too late to remove the concrete structures before construction of the new house had to proceed.

[113] The substance of this ground of appeal has been mostly addressed and dismissed in the discussion under grounds 2, 3 and 8.

[114] I would only add that the Application was submitted on June 9, 2017, six days before the start of the June 15 to September 15 fish window. The WSA required an affected First Nation to be given notice of the Application, and it had until August 4 to file an objection (none was filed). The WSA also required notification of DFO, which was done on June 17, 2017, and DFO replied on July 5, 2017. By July 31, 2017, Ms. Toews had reviewed the Application and contacted Ms. Budgen about what was and would continue to be her concern, and the central issue on this appeal: the placement of sand which would damage existing habitat and introduce an unnatural substrate into the lake. Communications between them continued, and Ms. Bauto's Decision was made on August 18, 2017, approximately one month before the fish window ended on September 15.

[115] All in all, I find that the processing time for the Application was appropriate in the circumstances.

10. The representation of the Respondent by government lawyers was burdensome to the Appellants and caused delay in the hearing of their appeal.

[116] I find that this ground does not relate to the substance of the appeal, and in any case lacks merit.

[117] All parties to appeals to the Board are entitled to be represented by counsel, including parties that are government officials.

[118] This appeal was delayed in getting to hearing. Pre-hearing case management records indicate there was a change of counsel for the Respondent in early 2018. However, obstacles to scheduling hearing dates came from both sides. Neither the Appellants' ability to present their case, nor the merits or demerits of the appeal, have been affected by delay in it being heard.

11. The Federal Department of Fisheries' approval of the Appellants' proposed placement of sand is inconsistent with the Respondent's decision to deny it.

[119] On July 5, 2017, DFO sent an email to the Appellants stating, in part, that:

Based on the information provided, your proposal has been identified as a project where a *Fisheries Act* authorization is not required given that serious harm to fish can be avoided by following standard measures. Proposals in this category are not considered to need an authorization from the [Fisheries Protection] Program under the *Fisheries Act* in order to proceed.

[120] The email went on to refer the Appellants to online guidance tools for compliance with the *Fisheries Act*. The Appellants argue that DFO took no issue with their proposed placement of sand and elected not to participate in their appeal for that reason, a stance inconsistent with the Decision.

[121] The Respondent submits that DFO did not "approve" the Appellants' proposed placement of sand. Rather, it referred the Appellants to online compliance tools for standard measures to **avoid** placing fill below the high-water mark, and merely elected not to participate in an appeal of a decision by another agency.

[122] I conclude that the Appellants have not provided evidence that DFO approved of their proposal to place sand on the foreshore. It is by no means clear from the July 5, 2017 email that DFO either supports the Appellant's Application or disagrees with the Respondent's Decision and expert evidence on this appeal.

Conclusion

[123] In final submissions, the Appellants expressed regret that they had not realized they could establish an upland beach (above the high-water mark) without approval under the *WSA*. I find that Ms. Toews did, in fact, explicitly point that out in her regulatory review communications with Ms. Budgen and the Appellants, and she confirmed it in the Technical Report which the Appellants have had since January 2018. Furthermore, Ms. Budgen herself conveyed that point to the Appellants in her August 2, 2017 message to them forwarding Ms. Toews' concerns about the placement of sand; Ms. Budgen stated: "Outside the littoral zone (high water mark) you can do anything you want, it is in the littoral zone that she [Ms. Toews] is talking about."

[124] In summary, to succeed on their appeal, the Appellants had to prove, through legal grounds or factual evidence established on a balance of probabilities, that the Decision was in error and should be set aside and their Application should

be granted for the placement of sand. In my analysis of their grounds of appeal, I concluded that they did not do so.

[125] The evidence of the Respondent's experts regarding the adverse impacts on aquatic habitat and water quality from the placement of sand as proposed in the Application was consistent, compelling, and not persuasively contested by evidence from the Appellants.

DECISION

[126] In making this decision, the Panel has fully considered all of the evidence and submissions made, whether or not specifically referred to in this decision.

[127] Based upon the findings above, I order pursuant to section 105(6) of the *WSA* that the Appellants' appeal is dismissed, and the Respondent's Decision is confirmed.

"Susan E. Ross"

Susan E. Ross, Panel Chair
Environmental Appeal Board

October 29, 2019