



Environmental Appeal Board

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DECISION NO. 2018-WAT-001(a)

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

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| BETWEEN: | Bruce Gibbons | APPELLANT |
| AND: | Assistant Water Manager | APPLICANT (RESPONDENT) |
| AND: | Christopher MacKenzie and Regula Heynck | THIRD PARTIES |
| BEFORE: | A Panel of the Environmental Appeal Board Alan Andison, Chair | |
| DATE: | Conducted by way of written submissions concluding on May 23, 2018 | |
| APPEARING: | For the Appellant: For the Respondent: For the Third Parties: Christopher MacKenzie and Regula Heynck | Matthew Nefstead, Counsel Livia Meret, Counsel Tina Parbhakar, Counsel Sean Hern, Counsel |

PRELIMINARY ISSUE OF STANDING

THE APPLICATION

[1] On March 8, 2018, Bruce Gibbons appealed a decision to issue Groundwater Conditional Water Licence 500169 (the "Licence") to the owners of Lot C, Block 29, Comox District, Plan 25306, Christopher MacKenzie and Regula Heynck (the "Owners"). The Licence was issued pursuant to section 14 of the *Water Sustainability Act* (the "Act") by David Robinson, Assistant Water Manager (the "Water Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The Licence authorizes the Owners to divert and use water from Aquifer 408 for industrial purposes; specifically, fresh water bottling.

[2] Mr. Gibbons owns a property approximately 1/4 mile down the road from the Owners' property and obtains his drinking water from a well. He asks the Board to reverse the Water Manager's decision and rescind the Licence.

[3] On March 23, 2018, the Water Manager challenged Mr. Gibbons' standing to appeal the Licence. The Water Manager submits that only certain categories of people may file an appeal under section 105(1) of the *Act*, and that Mr. Gibbons does not meet any of them. The Water Manager submits that the appeal should, therefore, be dismissed.

[4] Section 105(1) of the *Act* states as follows:

105(1) Except as otherwise provided in this Act, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the appeal board by any of the following:

- (a) the person who is subject to the order;
- (b) ... an owner whose land is or is likely to be physically affected by the order;
- (c) the owner of the works that are the subject of the order;
- (d) the holder of an authorization, a riparian owner or an applicant for an authorization who considers that his or her rights are or will be prejudiced by the order.

[Emphasis added]

[5] The Owners were added as Third Parties to the appeal. They support the Water Manager's application and submit that the appeal ought to be dismissed.

[6] Mr. Gibbons submits that he has standing to appeal the Licence under either subsection 105(1)(b) or (d) of the *Act*; i.e., as an owner whose land is or is likely to be physically affected by the order, or as a riparian owner who considers that his or her rights are or will be prejudiced by the order. ["Order" is defined in the *Act* and includes the Licence.]

[7] This preliminary application has been conducted by way of written submissions.

BACKGROUND

[8] The Owners' land consists of a two hectare, rural residential parcel. It is bounded by Sackville Road to the southeast and rural lots in all other directions. The rural lots rely upon groundwater for domestic and agricultural water purposes.

[9] Mr. Gibbon's property is located on Sackville Road to the southwest of the subject property, and is within the Agricultural Land Reserve ("ALR").

The Application for a Licence

[10] In November of 2016, the Owners filed a "New Groundwater Application" with the Ministry for the diversion of 3,650 cubic metres per year of water for industrial fresh water bottling from a pre-existing artesian well located on their land. The Owners plan to sell bottles of water at farmer's markets and to provide self-serve bottle refills to clients during water advisories. They state that their existing well draws water from Aquifer 408, which occupies a region spanning from Comox

Harbour to 10 kilometres north of Merville, BC. As it is an artesian well, no pumping is required to produce the requested water volume.

[11] In support of their application, the Owners filed a Well Construction Report that had been completed in July 2016. That report details the physical characteristics of their well, including the lithologic description of the land through which the well was drilled and the estimated yield of the well.

[12] On May 16, 2017, a well inspection was completed by Ben Robinson, an inspector with the Ministry. His inspection report provides further details about the well, as well as his notes and recommendations.

[13] As part of the application process, the Ministry sent a copy of the application out for comment to external agencies such as the Nanaimo Service Centre (Ecosystems), Vancouver Island Health Authority and the Comox Valley Regional District ("CVRD"). Initial engagement letters were also sent to certain First Nations.

[14] Under section 13 of the *Act*, the Ministry is also required to send the application to potential "objectors". Section 13 states, in part, as follows:

Objections to applications and decision maker initiatives

13(1) A decision maker must direct that an applicant for a licence, ... give notice of the application in accordance with section 117 [delivery and publication of documents and information] or the regulations to

(a) any of the following whose rights the decision maker considers are likely to be detrimentally affected if the application is granted:

(i) an authorization holder;

(ii) a change approval holder;

(iii) an applicant for an authorization or change approval;

(iv) a riparian owner, and

(b) a land owner whose land is likely to be physically affected if the application is granted.

(2) A notice under subsection (1) must include the name of the decision maker and the address to which objections to the application may be delivered.

...

(7) The decision maker must give notice of the decision maker's decision on an application to any person who delivered under subsection (3) an objection in relation to the application.

(8) For certainty, a decision maker need not give directions under subsection (1) if the decision maker is satisfied that, as a result of the decision maker's decision on an application referred to in that subsection,

(a) no authorization holder's rights, no change approval holder's rights and no riparian owner's rights will be detrimentally affected,

(b) no person's land will be physically affected, and

- (c) no person's application for an authorization or a change approval will be detrimentally affected.

[Emphasis added]

[15] In a Technical Report dated November 20, 2017, Tanya Dunlop, Senior Authorizations Technologist with the Ministry, reviewed all of the information provided in relation to the application, and recommended approval of the application. Regarding objectors, she notes as follows:

11a. NEARBY LICENSEES, AND DOWNSTREAM LICENSEES ON CONNECTED STREAMS: No notifications were given as there are no nearby licensees. As this is a confined aquifer, it is not likely hydraulically connected to any streams.

11b. JOINT WORKS: Not applicable

11c. OTHER LANDS PHYSICALLY AFFECTED BY WORKS: Not applicable

[16] Under the heading "Other Concerned Parties", she states "None identified."

[17] Based upon this assessment, Mr. Gibbons was not given notice of the application.

[18] Ms. Dunlop further notes in her summary that:

There are no existing rights on Aquifer 408 and it is not likely hydraulically connected to surface water. There is one other known application for 2 m³/day a wildlife hospital and visitor centre (File 20003836) that is just over 1 km to the west; it was granted during the adjudication of this licence application. Provincial Groundwater Observation Well #351 is within Aquifer 408 and about 12 km SE of the applicant's well. The well monitoring data from 2001 to 2017 shows that the static water level varies both annually and seasonally, but overall appears stable with the current ground water use. Given the stable status of Observation Well #351 within Aquifer 408 and the small volume of this application, concerns regarding long-term yield and impacts to other users are not anticipated.

The Decision

[19] On November 21, 2017, the Water Manager issued the Licence to the Owners. It allows the Owners to extract up to 10 cubic metres of water per day from the aquifer, up to a maximum of 3,650 cubic metres of water per year. The authorized works are a well, pipe and bottling facility. The Licence requires the Owners to install a diversion flow measuring device and to retain diversion flow meter records.

[20] As Mr. Gibbons was not considered an objector under *Act*, he was not provided with notice of the Licence when it was issued.

[21] After the Licence was issued, the Owners applied to the CVRD to rezone the property to permit "water and beverage bottling", as this use was inconsistent with the existing bylaw. During a CVRD meeting about the rezoning on March 5, 2018,

Mr. Gibbons learned of the Licence and contacted the Board. He filed an appeal on March 8, 2018.¹

[22] At the time of writing, the rezoning application before the CVRD was still pending.

The Appeal

[23] Mr. Gibbons appeals the Licence on the grounds that:

- it was approved without public input and in spite of objections of the CVRD;
- it was approved without any, or sufficient, baseline data for the aquifer;
- the well is located in an area of the ALR where there are hundreds of residents, farmers and agricultural operations depending on this aquifer for water; and
- the aquifer is in a critical watershed and the creeks and rivers also depend on the aquifer during periods of drought for fish habitat.

[24] Mr. Gibbons states that the Owners' land appurtenant to the Licence is located 1/4 mile up the road from his land. He states that he is directly impacted by the Licence because his well draws on the aquifer, and he relies on this well for drinking water.

The Water Manager's Challenge to Mr. Gibbons' Standing

[25] The Water Manager notes that an appeal to the Board is not in the nature of a public inquiry or forum; it is not the forum for the public to express concerns or to pose questions (*Avren et al v. Regional Water Manager* (Decision Nos. 2006-WAT-003(a), 004(a) and 005(b), June 29, 2007). To have a valid appeal, a person must meet one of the categories in section 105(1) of the *Act*: there is no "public interest" standing to appeal under the *Act*.

[26] The Water Manager explains that Mr. Gibbons was not provided with notice of the application, or given the opportunity to object prior to the issuance of the Licence, because the Water Manager determined that Mr. Gibbons did not have "objector" status under section 13(1) of the *Act*. The Water Manager submits that, for the same reasons that Mr. Gibbons did not qualify as an objector under section 13 of the *Act*, he does not qualify as an appellant under section 105(1) of the *Act*: he is not an applicant or authorization holder, he is not a riparian owner, and he is not a land owner whose land is, or is likely to be, physically affected by the Licence.

[27] Even though Mr. Gibbons was not offered a specific opportunity to object to the application for this Licence, the Water Manager states that impacts to

¹ The CVRD was offered Third Party status in the appeal, but declined that offer on April 25, 2018.

surrounding well users and water availability are key considerations in the adjudication of a water licence under section 14(4) of the *Act*, and were considered as part of the adjudication of this Licence.

[28] The Water Manager's evidence in support of his challenge to Mr. Gibbons' standing is set out in his affidavit sworn on May 22, 2018. He also relies upon an affidavit sworn by Sylvia Barroso, M.Sc., P.Geo., on May 22, 2018.

[29] The Owners support the Water Manager's challenge to Mr. Gibbons' standing to appeal. They submit that the most compelling evidence is that there will be no measurable effect to Mr. Gibbons' land or his well, therefore he is not affected or prejudiced by the Licence. In support, the Owners rely upon Ms. Dunlop's Technical Report, as well as a May 2, 2018 report by Dennis Lowen, Bsc.G.E., P.Eng., P.Geo, attached to Mr. Lowen's affidavit sworn on the same day.

[30] Mr. Gibbons submits that he has standing to appeal on the basis that:

- his land is or is likely to be physically affected by the Licence, and/or
- he is a riparian owner who considers that his rights are or will be prejudiced by the Licence.

[31] Mr. Gibbons further submits that the Water Manager has mischaracterized the statutory requirements, that the record does not adequately support the Water Manager's position, and that there is good reason to believe that commercial-scale groundwater extraction in this location could cause significant adverse effects on surrounding domestic wells. In support of his case, Mr. Gibbons tendered an affidavit sworn by himself on May 16, 2018.

ISSUE

[32] In this case, there are two specific subsections of the *Act* to be considered in order to determine whether Mr. Gibbons has standing to appeal. They are as follows:

1. Whether Mr. Gibbons is "an owner whose land is or is likely to be physically affected" by the Licence under section 105(1)(b) of the *Act*; and/or
2. Whether Mr. Gibbons is a "riparian owner ... who considers that their rights are or will be prejudiced" by the Licence under section 105(1)(d) of the *Act*.

[33] As a preliminary matter, the Board notes that the parties disagree on who has the burden of proof on a question of standing. Mr. Gibbons submits that the Water Manager has to establish that he (Mr. Gibbons) does not have standing to appeal on either of the claimed grounds. Conversely, the Water Manager takes the position that Mr. Gibbons, as the Appellant, must provide sufficient evidence to establish that he falls within one of the categories in section 105(1) of the *Act*.

[34] Although it is the Water Manager that has challenged Mr. Gibbons' standing, the Panel finds that the burden of proof to establish standing is on an appellant, as standing is a threshold jurisdictional question and it is the appellant who, by filing the appeal, is alleging that he or she meets that threshold. The standard of proof to be met is on a balance of probabilities.

DISCUSSION & ANALYSIS

1. Whether Mr. Gibbons is “an owner whose land is or is likely to be physically affected” by the Licence under section 105(1)(b) of the *Act*.

Mr. Gibbons’ submissions

[35] Mr. Gibbons submits that the *Act* does not require physical works to cross an appellant’s land to give rise to a right of appeal under this provision. Rather, any actual, or likely, physical effect on the land is sufficient. Mr. Gibbons submits that his land is likely to be affected by way of adverse effects on the aquifer underlying his land. He states that his domestic well is artesian and accesses Aquifer 408, as does the Owners’ well.

[36] In his affidavit, Mr. Gibbons describes how pumping water from an aquifer can impact a domestic well by describing experiences relayed to him by other local residents. He provided the text written by a local resident on the Merville Water Guardians’ website which described the resident’s experience 15 years ago with a deep well being dug (the Streamkeeper Well) just over her property line. The well was dug in order to pump water into a creek to provide adequate flow for fish. The resident states that her well had supplied her house with plenty of water for 30 years, but “within two days of this pump running my well went dry.” Mr. Gibbons states that other nearby residents have corroborated this resident’s account of the impact of this deep well on surrounding well users, and describes one such account provided to him (Mr. Gibbons) in a telephone call.

[37] Although Mr. Gibbons was unable to find any technical specifications for the Streamkeeper Well, and does not know its precise location, he is concerned that the commercial extraction proposed by the Owners could have similar implications for his well and surrounding water users.

[38] Mr. Gibbons also attached as an exhibit to his affidavit a letter report by Dr. Gilles Wendling, Ph.D., P.Eng., of GW Solutions Inc. (the “Wendling Report”). The Wendling Report was commissioned by Mr. Gibbons for the stated purpose of identifying weaknesses and potential concerns with the issuance of the Licence. Mr. Gibbons submits that the Wendling Report identifies certain inadequacies in Ms. Dunlop’s Technical Report and that, in light of these inadequacies, the direct experience of local residents with respect to the Streamkeeper Well should hold greater weight in the Board’s determination of the likelihood of physical impacts on Mr. Gibbons’ land than the information in the Technical Report.

The Water Manager’s submissions

[39] The Water Manager submits that, when an appellant asserts standing on the grounds that his or her land “is or is likely to be physically affected” by a decision, the Board has applied an objective test. This means that there must be reasonable grounds to believe that the land is likely to be physically affected by the decision under appeal: see *Wood v. British Columbia (Engineer under the Water Act)*, 39 C.E.L.R. (3d) 4 at paragraph 24 [Wood]; and *Fort Nelson First Nation v. British*

Columbia (Ministry of Environment), [2012] B.C.E.A. No. 17 at paragraph 113 ["FNFN"]. Although these cases were decided under the *Water Act*, the language for the particular subsections at issue in this case is the same.

[40] In the present case, the Water Manager submits that there is an inadequate evidentiary basis to establish that Mr. Gibbons has a well that is within Aquifer 408 and/or that his land is, or is likely to be, physically affected by the Licence. He submits that there are no reasonable grounds to support either claim.

[41] Rather, the Water Manager submits that the evidence supports a conclusion that Mr. Gibbons' land is not reasonably likely to be physically affected by the Licence. In particular, the Water Manager notes that Mr. Gibbons' residence is not adjacent to the land to which the Licence is appurtenant. Further, he has not registered a groundwater well for domestic use with the Ministry², nor has he provided the Board with information about his well that would support his claim that his land is likely to be physically affected. In contrast, the evidence provided in the Owners' Well Construction Report is that there is a thick, 23 metre confining layer of till where the well is located.

[42] In addition, Ms. Barroso, a Regional Hydrogeologist with the Ministry, concluded that no physical impact to Mr. Gibbons' land is likely as a result of the Licence. In her affidavit, Ms. Barroso explains that she was involved in the review of the Licence application, has reviewed the Ministry file materials, and has reviewed the Wendling Report. She states that her professional opinion is reflected in the conclusions of the Technical Report in relation to a supply and demand analysis for Aquifer 408, including from the Owners' well and other wells. Ms. Barroso goes on to state in her affidavit as follows:

14. As noted in the Groundwater Technical Report ..., given the large water volume and annual recharge within Aquifer 408 and the small volume requested by the Applicants [the Owners], it is my opinion that the Aquifer 408 is able to meet the demand associated with the Application without interference with the closest neighboring wells that draw on Aquifer 408. No information (spatial coordinates, depth, construction lithology) has been provided with respect to Mr. Gibbon's [sic] well in order to assess whether it is constructed within the same aquifer. Mr. Gibbon's property is approximately 350 m distance from the Well. Therefore, the relative drawdown within a well at that distance, if constructed within the same aquifer, is likely to be less than the 0.02 m drawdown previously estimated for wells on the closest adjacent properties (150 m distant). Based on the information I have reviewed, no physical impact to Mr. Gibbon's land is anticipated as a result of operation of the Well under conditions of the Licence. [Emphasis added]

² According to the Water Manager's affidavit, whereas the legislation requires certain people to apply for an authorization to divert and use groundwater from an aquifer for non-domestic purposes, domestic groundwater users do not require an authorization. However, domestic well owners are encouraged to register their well to make their water use known so that it can be protected. (paragraph 6)

[43] Based upon the Technical Report and all of the information before him, the Water Manager states in his affidavit that he is "satisfied that no physical impact to the land [Mr. Gibbons' property] ... is anticipated as a result of operation of the Well under conditions of the Licence." Further, the Water Manager submits that no concerns with the potential impacts to other surrounding, but more distant wells on the same aquifer were identified.

[44] Based upon the available information about Aquifer 408, the proximate groundwater users, and the licensed works, the Water Manager states that there are no likely physical affects to Mr. Gibbons' land from the diversion of water and proposed works authorized by the Licence, and no actual physical affects to Mr. Gibbons land.

The Owner's submissions

[45] The Owners submit that there is little persuasive evidence to support the assertion that Mr. Gibbons' land is likely to be physically affected. In fact, the Owners submit that the weight of the evidence demonstrates that there will be no measurable impact to Mr. Gibbons' land. They note that the analysis in Ms. Dunlop's Technical Report shows that the drawdown for wells located within 150 meters of their well (approximately half of the distance to Mr. Gibbons' well) would be a negligible two centimeters after 100 days.

[46] In support of their submissions, the Owners rely upon Mr. Lowen's affidavit and attached report. Mr. Lowen is a professional hydrogeologist retained by the Owners to review the available data and hydrogeology analysis and "explain what they mean for the potential relationship between the appellant [the Owners] and licence-holder's [Mr. Gibbons] well." He notes that there is an "extensive volume of existing data" used to assess the impact of the proposed well. From the data, he states:

- The Comox-Merville Aquifer #408 encompasses 147.7 km² in area extending from Comox Harbour to 10 km north of Merville.
- There are over 1261 well records available that help define the aquifer characteristics.
- One observation well has continuous water level records for the aquifer covering the last 17 years.
- Many groundwater studies have been carried out in the region and the subject aquifer, Quadra Sand layer, has been "closely studied".
- Climate, stream flow measurement, geology, soils and well pumping test data are available for this aquifer.

[47] Mr. Lowen reviewed the Technical Report and Ms. Dunlop's desktop study and analysis. He agreed with her analysis. Noting that Mr. Gibbons' well is located 350 metres away from the subject well, Mr. Lowen further states that, "[a]t this separation distance, no measurable impact would occur." (page 2)

The Panel's Findings

[48] The Panel agrees with the previous Board decisions in *Wood* and *FNFN* that the question of whether the land "is or is likely to be" physically affected is an objective test. Specifically, there must be reasonable grounds to conclude, on a balance of probabilities, that the land that the appellant is entitled to possess is, or is likely to be, physically affected by the appealed decision: *Wood*, at paragraphs 24 and 25. When making this assessment, the Panel must also ensure that a person is not denied his or her right of appeal if there is a legitimate basis for their standing.

[49] As the challenge to standing has been conducted in writing, there has not been a process for assessing credibility, qualifying experts or cross-examination. As a result, the Panel is unable to properly assess the quality or reliability of the evidence that has been presented in the affidavits. However, the inability to fully assess the quality and reliability of the evidence in this preliminary matter, does not change the requirement for there to be *some* evidence to support a claim for standing under one of the categories. While Mr. Gibbons need not provide definitive proof that his land is, or is likely to be physically affected by the Licence, he must provide sufficient evidence to establish, on a *prima facie* basis, that there is a reasonable likelihood of a physical affect to his land from the Licence that he seeks to appeal.

[50] In previous cases where the Board has found that an appellant has standing to appeal as an owner whose land is or is likely to be physically affected by a decision of the Ministry, there has been some reasonable basis to conclude that the appellant's land was or, in the future, was reasonably likely to be, *physically* affected. There was some reasonable basis to find that the land may be affected by flooding, erosion, a change in lake level, or the construction of a transmission line – the land may be affected by some observable, physical object placed upon, or some physical change to, the land (see, for example, *Wood*; *FNFN*; *Atco Lumber Ltd. v. British Columbia (Ministry of Environment, Lands and Parks)*, [1999] B.C.E.A. No. 32; and *McClusky v. British Columbia (Ministry of Water, Land and Air Protection)*, [2005] B.C.E.A. No. 16).

[51] The present case is different. It involves an existing groundwater well taking water from an aquifer under a parcel of land ¼ mile away from Mr. Gibbons' land. The question for the Board in this case is whether there are grounds to believe that this is reasonably likely to physically affect Mr. Gibbons' land. This circumstance has not been previously considered by the Board in the context of standing to appeal under the *Act*, nor has it been considered under the predecessor *Water Act*.

[52] It is clear from the words in this subsection that it is *the land* which must be affected – or likely to be affected – not a person's access to water or water supply. Impacts to a person's right to access and supply of water are covered by the other subsections in section 105(1). In this case, there are no reasonable grounds to believe that Mr. Gibbons' land is, or is likely to be, physically affected by the Licence. The information provided regarding the Streamkeeper Well does not provide any *prima facie* evidence that Mr. Gibbons' land is likely to be physically affected by the licensed works, or by the licensed diversion of 10 cubic metres of

water per day from Aquifer 408. The event involving the Streamkeeper Well occurred 15 years ago, in an unknown location.

[53] Further, Mr. Gibbons' provided no information about his well: no information about its depth, the lithography, the quantity of water taken, or how any impact to its flow may physically affect his land.

[54] Although the Wendling Report identifies weaknesses and potential concerns with the issuance of the Licence, which are disputed by the other parties, it was not written to specifically address Mr. Gibbons' standing to appeal or the physical impact of the Licence on his land. Moreover, the Panel finds that the Wendling Report does not contain any information that supports either conclusion.

[55] For all of these reasons, the Panel finds that there are no reasonable grounds to conclude, on a balance of probabilities, that Mr. Gibbons' land will, or is reasonably likely to be, physically affected by the Licence.

2. Whether Mr. Gibbons is a "riparian owner ... who considers that their rights are or will be prejudiced" by the Licence under section 105(1)(d) of the Act.

Mr. Gibbons' submissions

[56] Mr. Gibbons submits that the Water Manager has mischaracterized this section of the Act. He submits that he owns land adjacent to a number of waterways, including one known fish-bearing stream. He believes that one or more of these waterways may be hydraulically linked to Aquifer 408. Referring to the Wendling Report, Mr. Gibbons further notes that neither the Water Manager nor the Owners have conducted a pumping test to determine the connection between the Owners' well and the surrounding watercourses, including those adjacent to his land.

[57] The Wendling Report states that the volume of water that may be diverted under the Licence is "relatively small" but, because the water is to be used for an industrial activity, the application should have undergone a higher level of scrutiny. In particular, Dr. Wendling is concerned that the Ministry did not require an assessment of environmental flow needs because the aquifer is confined. Dr. Wendling states that confinement should not be the only reason for rejecting a possible connection to surface water bodies, and gives two examples of how a confined aquifer may be hydraulically connected to a nearby stream. He states that, as the Owners' well is artesian, vertical migration of groundwater through a leaky aquitard could very likely be recharging a stream or wetlands. In his view, the assumption of "absence of connection" which underlies the Licence should be supported by further study.

The Water Manager's submissions

[58] The Water Manager states that "riparian owner" is not defined in the legislation; therefore, it is appropriate to look to the common law for a definition;

i.e., a person who owns land through or past which a stream runs (*FNFN*, paras 125-126).

[59] The Water Manager also refers to the following definition of “riparian owner” in *Black’s Law Dictionary*, 6th ed.:

One who *owns land* on the bank of river, or one *who is owner of land* along, bordering upon, bounded by, fronting on, abutting or adjacent and contiguous to and in contact with river. [Water Manager’s emphasis]

[60] Further, in his affidavit, the Water Manager states that, in his experience, the Ministry does not use the term “riparian” in relation to water from under the ground (paragraph 21).

[61] Applying these definitions, the Water Manager submits that Mr. Gibbons has not provided evidence that he is a riparian owner – that he is the owner of land immediately adjacent to any stream, particularly a stream which is the source of water supply for the Licence. He further submits that the aquifer is confined. The evidence is that the area surrounding the well has an approximately 23 metre layer of hard till between the earth’s surface and where groundwater first appears. The Water Manager states that, based on the Ministry’s technical evaluation and the documents titled “Guidance for Determining the Effect of Diversion of Groundwater on Specific Streams”, he concluded that the hydraulic connection to a stream is unlikely for confined sand and gravel aquifers, such as Aquifer 408.

[62] Finally, the Water Manager submits that in the unlikely event that a stream is hydraulically connected to Aquifer 408, which he denies because the aquifer is confined, it is still unclear what stream Mr. Gibbons is referring to, where the stream abuts Mr. Gibbons’ land, or whether this stream connects with Aquifer 408.

[63] The Water Manager also relies on Ms. Barroso’s response to Dr. Wendling’s concern with hydraulic connectivity as follows:

3. ... The critique provided by [the Wendling Report] ... is based on theoretical conditions, and not substantiated by review of the actual data in this location. This aspect is described in the Groundwater Technical Report ... Impact on Connected Stream(s) and Surface Water Users (p.9). Based on the available well construction records within 1 km radius of the Well, and the lithological information provided in the construction record for the licensees’ Well, 20 out of 23 wells in this area have a confining layer, described as hard till, silt or clay with a median thickness of 22 m. The closest streams to the Well are four unnamed tributaries to Kitty Coleman Creek, located from 200 to 535 m to the northeast ..., which are considered too small to have incised through the substantive till confining layer in this area, and therefore unlikely to be hydraulically connected.
4. ... [the Wendling Report] postulates that upward vertical migration of groundwater through a leaky aquitard, and artesian flow to the surface could be a source of recharge to adjacent surface water

bodies or wetlands. As stated previously, the registered wells in this area consistently report a thick, hard grey till layer approximately 22 m thick. In some instances evidence of upward vertical migration or a discharge zone is indicated by the presence of springs. Although there may be unlicensed springs that [the Ministry] staff are unaware of, the closest licensed spring is greater than 3 km to the north-northeast from the Well. Considering the small volume of the licence, the investment in investigative field based study to evaluate the presence of springs in this area is not warranted, nor is hydraulic connection anticipated. (pages 2-3)

[64] Accordingly, the Water Manager submits that, even if Mr. Gibbons could be considered a riparian owner, there is no evidence that the Owners' exercise of their rights under the Licence will change the diversion or use of groundwater to such a degree that it would affect any riparian land that Mr. Gibbons' may own or prejudice any rights that Mr. Gibbons may have (*Columbia Power Corp. v. British Columbia (Ministry of Water, Land and Air Protection)*, [2003] B.C.E.A. No. 11 at page 13).

[65] Finally, the Water Manager submits that it is "unlikely that there is a hydraulic connection between Aquifer 408 (a confined aquifer below a significantly deep layer of till) and any surface streams in the relevant area, as discussed above, and any such connection does not automatically impact riparian rights."

The Owners' submissions

[66] The Owners submit that the Technical Report found that there would be no impact on streams and surface water levels as Aquifer 408 is unlikely to be hydraulically connected to surface water.

The Panel's Findings

[67] The Panel agrees that the usual common law definition of riparian and riparian owner applies to the *Act*. There is no reason to distinguish previous findings of the Board in this regard (e.g., *FNFN* at paragraph 126).

[68] The essence of a riparian owner at common law is that the surface of a person's land be in contact with the natural watercourse or body of water. This is supported by the etymology of the word riparian, as found by the Court in *Yanke v. Salmon Arm (City)*, [2010] B.C.J. No. 1105:

15. ... The etymological root of 'riparian' according to the Concise Oxford Dictionary is the Latin *ripa* meaning bank. So clearly riparian does not mean anything other than 'on the bank of streamside of waterways' [sic] ...

[69] Mr. Gibbons provides no evidence that he is a riparian owner. Although he could have done so, Mr. Gibbons' affidavit did not identify a specific stream or watercourse that is located on, or abuts, his land. In his submissions, he simply states that he owns land "adjacent to a number of waterways, including one known fish-bearing stream". However, unless his land is somehow in contact with the waterway, he does not meet the common law definition of riparian owner. There

may be other people in the area that are riparian owners, but Mr. Gibbons has not provided any evidence that he is one of them. Therefore, there is no need to assess whether there is, or could be any hydraulic connection between Aquifer 408 and surface waters.

[70] Moreover, the Panel can find no authority to support the proposition that “riparian” applies to groundwater. In fact, the authorities support the opposite; riparian at common law does not include groundwater. For example, in *Lynch v. St. John’s (City)*, [2016] N.J. No. 249; 2016 NLCA 35, 400 D.L.R. (4th) 62, the Court states as follows:

57. The common law distinguishes between rights applying to groundwater and riparian rights applying to watercourses “in which water flows in a fairly regular manner in channels between banks that are more or less defined”: Warren J. in *Hoyt v. Loew*, 2008 NSSC 29, at para. 44. Riparian rights entitle the owners of lands abutting a watercourse to a right of access to water and the right to prevent flooding. See *Hoyt*, at paragraphs 39 and 40. Downstream owners are entitled to receive the natural flow of the stream, and upstream owners are not entitled to unreasonably interfere with the downstream owners’ rights. Also, riparian owners are entitled to have water reach their lands substantially undiminished in quality.

58. Riparian rights do not apply, however, to water which flows through undefined and unknown channels and groundwater; ...

[71] For all of these reasons, the Panel finds that there are no reasonable grounds to conclude, on a balance of probabilities, that Mr. Gibbons is a “riparian owner” under section 105(1)(d) of the *Act*.

DECISION

[72] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

[73] Although Mr. Gibbons is clearly concerned about the impacts of the Licence on the aquifer, the Panel is unable to find that he has standing to appeal under section 105(1) of the *Act*. Consequently, the Board does not have jurisdiction over this appeal.

[74] The appeal is dismissed.

“Alan Andison”

Alan Andison, Chair
Environmental Appeal Board

June 19, 2018