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DECISION NO. 2019-WAT-002(a)

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

BETWEEN:	Robert Craig and Julie Craig	**APPELLANTS**
AND:	Assistant Water Manager	**RESPONDENT**
AND:	Raymond LaSalle and Debbie LaSalle	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Linda Michaluk, Panel Chair	
DATE:	September 30-October 3, 2019	
PLACE:	Cranbrook, BC	
APPEARING:	For the Appellant:	Chris Craig and Zoe Craig
	For the Respondent:	Leanne Johnston, Counsel
	For the Third Party:	Self Represented

APPEAL

[1] The Appellants, Robert Craig and Julie Craig, applied to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry") for an approval to make changes in and about a stream pursuant to section 11 of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "*WSA*"). The Appellants applied for this approval in order to build a driveway to provide access to their property.

[2] In a decision dated January 30, 2019, the Respondent, Jennifer Andrews, Assistant Water Manager, denied the application on the grounds that the driveway required infilling a portion of a wetland and would result in an unacceptable impact on riparian habitat. The Appellants appealed this decision to the Board.

[3] The Board has the authority to hear this appeal under section 105 of the *WSA*. Its powers on an appeal are set out in section 105(6), which states:

> (6) On an appeal, the appeal board may
>
> (a) send the matter back, with directions, to the comptroller, water manager or engineer 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.

[4] The Appellants ask the Board to reverse the Respondent's decision and issue an approval. In the alternative, they ask the Board to send the application back to the Respondent with directions.

[5] The Respondent asks the Board to dismiss the appeal.

[6] On April 11, 2019, the Board granted neighboring land owners, Raymond and Debbie LaSalle, Third Party status in this appeal. The LaSalles support the Respondent's position and ask the Board to dismiss the appeal.

BACKGROUND

[7] A fairly detailed background has been provided in this case as some of the issues require an understanding of the property and the history of people's involvement with it. Some of the people who have assessed the driveway are from two different government ministries and some are from different sections of the same ministry.

The Appellants' property

[8] The Appellants own a large property at the north end of Rosen Lake, in the East Kootenay area of British Columbia. The property is shaped as an inverted "U", with part of the northern tip of Rosen Lake fitting in the opening of the "U".

[9] The Appellants have owned the property for decades. A seasonal cabin was built on the property in 1959/60, and a permanent residence was constructed in the northwest portion of the property in 1999. The Appellants have no legal access to their land; they have been using an illegal access via a BC Hydro right-of-way in the property's northeastern corner.

[10] The LaSalle property is below the left leg of the Appellants' property. The southern boundary of the LaSalle property abuts Rosen Lake Road. However, a small piece of the southwestern corner of the Appellants' property also borders Rosen Lake Road. It is here that the Appellants want to obtain legal access to their property.

Water and wetlands

[11] There is an unnamed ephemeral creek that flows through a wetland in the southwestern (left) leg of the Appellants' property. The creek enters the property approximately 12 metres north of Rosen Lake Road, flowing from west to east (above the LaSalle property) and emptying into Rosen Lake.

[12] Many years ago beavers dammed the creek around the halfway mark across the property. This resulted in ponding which affected the character of the immediate area, as discussed later. In or about 2006, the LaSalles reinforced the

dam, as it was in a state of decline, to preserve the wetland and protect their basement from flooding. This wetland in the southwestern portion of the property is the area of concern in this appeal.

[13] In 2015, the Appellants applied for, and received, permission from the Ministry to remove the dam. The dam was removed in January of 2016.

Subdivision application

[14] Due to family circumstances, in or around 2015, the Appellants decided to subdivide the property into two lots and sell one of them.

[15] The Ministry of Transportation and Infrastructure ("MOTI") is the approving agency for rural subdivision applications. The Appellants filed a subdivision application with MOTI, seeking to subdivide the property into a west lot (with the house) and an east lot. As one of the pre-requisites for subdividing a property is the establishment of legal access to the lots, the Appellants proposed legal access to the west lot from Rosen Lake Road using an unconstructed right-of-way on Crown land on the southwest side of the property. Specifically, they wanted to construct a driveway that went from the southwest corner of the property, over the creek and up to the house in the northwest. A culvert would be installed to allow the creek to flow. They also decided to try to gain legal access for the east lot via the BC Hydro right-of way under section 80 of the *Land Act*.[1]

[16] MOTI conducted a site visit of the proposed Rosen Lake Road access in February 2016 and took photographs. The site visit notes describe the existence of a wetland and pond and state that the removal of the dam [not yet removed at that time] will have some impact on drainage. The notes go on to state: "[h]owever, the wetland area covers much of the unconstructed road [proposed driveway] and travels to the north."

[17] As part of its subdivision approval process, MOTI referred the application to other agencies that may have an interest in aspects of the proposal. Of relevance to this appeal, on March 15, 2016, Christine Nichol (with MOTI) referred the subdivision application to two sections of the Ministry: Doug Martin (habitat section) and Kristina Anderson (water stewardship section). Ms. Nichol asked for feedback on the location of the proposed Rosen Lake Road access, noting the presence of the creek and that the creek crossing (culvert) may impound water on the upstream side. She also noted that the upstream area will likely remain marshy because of drainage from the surrounding landscape, despite removal of the dam.

[18] On March 21, 2016, Mr. Martin and Ms. Anderson conducted a site visit for the Ministry. In an email dated April 7, 2016, they advised MOTI that they did not support the proposed driveway as it would result in a loss of wetland and riparian

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[1] Section 80 of the *Land Act* is titled "Access to private land". Of note, subsection (1) states that, if considered advisable by the minister, "the minister may authorize the Surveyor General to establish a public road allowance through Crown land to give access to privately owned land being subdivided".

habitat. They recommended that an alternate access be explored. MOTI conveyed this information to the Appellants concluding that, as the habitat and water stewardship sections did not support construction of access in this location due to its impacts, MOTI would not permit construction of the access from Rosen Lake Road. In that letter, MOTI notes that access to the property, particularly the east lot, may be overcome by obtaining an approval under section 80 of the *Land Act* from the BC Hydro right-of-way.

[19] At some point during the MOTI application process, the Appellants retained WSP Canada Inc. (the "Contractor") to obtain approval for a southwestern access.

[20] In the early fall of 2017, a different approving officer with MOTI was working with the Contractor on the proposed access. She asked Allana Oestreich, a Senior Ecosystems Biologist with the Ministry, whether an approval would be required under the *WSA*. Ms. Oestreich consulted with Kristina Anderson and attended the site. Both Ms. Oestreich and Ms. Anderson advised MOTI that the works would take place in a wetland and would require a *WSA* approval. They further suggested that the Contractor be encouraged to find alternatives to building a driveway through a wetland. This information was passed along to the Contractor who indicated that the Appellants would likely want to proceed with an approval application under section 11 of the *WSA*.

The section 11 application to the Ministry (changes in and about a stream)

[21] On April 4, 2018, Jen Ashton, on behalf of the Contractor, applied to the Ministry for an approval to "make changes in and about a stream" under section 11 of the *WSA* (the "Application"). The Application states that approval is sought for "Other: Driveway access over stream". The stream is described as "a spring that has no name only runs 5 months". The stream she refers to is the unnamed ephemeral creek flowing across the property. The proposed works are described as "creating driveway with culvert" and the footprint of the project is said to be 30 square metres. The Application does not mention the presence of a wetland or infilling for the driveway.

[22] In the Application cover letter, Ms. Ashton made the following points:

- A subdivision application is currently before MOTI and resolving the access issues (legal and physical) is a condition of approval.[2]
- Rosen Lake Road is the only legal frontage for the parcel and the Appellants want to pursue the potential driveway construction regardless of whether the subdivision application is successful.
- Since the "man-made" dam was removed in 2016, she states:

  … the artificially created swamp has drained and the creek has been returning to a new natural course. It is typically dry from November until March and flows seasonally every April until

[2] MOTI officially rejected the subdivision application in 2018.

> October. When flowing it is typically shallow and approximately 1m in width.

[23] The proposed driveway route and culvert are in the same general location as was proposed in the MOTI application, that being the wetland area in the southwestern corner of the property.

[24] Between April 2018, when the Application was filed, and January 2019, when the Application was refused, there were a number of reviews, consultations and site inspections involving various Ministry staff. In addition, there were staff changes, numerous meetings and emails, and additional information requests. As some events and communications are of particular relevance to the Appellants, they are described briefly below.

[25] When the Application was initially filed, Kristina Anderson had conduct of the file. She referred the file to Herb Tepper, an aquatic biologist with the Ministry, for his review as part of the Referral Committee Meeting. In a note from that meeting, Mr. Tepper advised that, "if the creek is fish-bearing, we cannot allow a closed bottom culvert …, that could become a barrier to upstream fish movement". At that time, the Contractor and the Appellants asserted that the creek was either not fish-bearing, or the fish in Rosen Lake were stocked and sterile and did not need to move upstream for spawning.

[26] In August of 2018, the Application was transferred from Ms. Anderson to Carol Atherton, Water Authorizations Specialist with the Ministry. Ms. Atherton investigated the Application and prepared a comprehensive Technical Summary with recommendations for the Respondent, which will be discussed later in this decision.

[27] On September 5, 2018, Ms. Atherton and another water stewardship employee, Zhong Liu, went to the site with Ms. Ashton (the Contractor), and one of the Craigs (Joe Craig). Mr. Craig was advised that habitat section (Mr. Tepper) did not have concerns provided the culvert was fish-friendly, but concerns were raised regarding archeological potential. The Ministry instructed the Appellants to proceed with an archaeological assessment. This was completed by Tipi Mountain Eco-Cultural Services Ltd. on September 18, 2018.

[28] The Ministry also instructed the Appellants to serve the LaSalles with notice of the Application. This was done on October 24, 2018. The LaSalles did not provide a written objection but called Ms. Atherton. It should be noted that the LaSalles have consistently expressed their concerns regarding disturbance to the wetland, from removal of the dam to the proposed access from Rosen Lake Road.

[29] Prior to mid-October 2018, the Ministry's consideration of the Application had focused on the culvert installation, rather than the infilling that would take place in the wetland to construct the driveway. No referrals had been made on the Application to a habitat biologist. In late October 2018, Ms. Atherton advised Ms. Ashton (the Contractor) that a site visit was planned for November 1, 2018 with a terrestrial biologist in attendance, as well as the statutory decision-maker.

[30] The November 1st site visit was attended by Ms. Atherton, Ms. Ashton, the Respondent (Ms. Andrews), and Ariana McKay, MSc, RPBio, a terrestrial biologist

with the habitat section of the Ministry. Ms. McKay was asked to do a habitat assessment as part of the referral to the habitat section of the Ministry. The notes from the site visit state that Ms. McKay:

- confirmed the value of the wetland habitat and potential for loss of connectivity of the wetland area to Rosen Lake if infill is used to build the driveway;
- identified that the entirety of the driveway would be in the riparian area and that the riparian area contributes to the overall health of the creek and supports fish and benthic invertebrates; and
- noted that Painted Turtles have been recorded in the project area and are a Species at Risk.

[31] Ms. Ashton identified a natural gas line in the vicinity of the project.

[32] During the site visit, the Ministry told Ms. Ashton that, if the Appellants wished to pursue the project, at minimum, they would need a report from a qualified environmental professional ("QEP"). They advised Ms. Ashton that the Ministry would come up with a list of requirements that the report would need to address to mitigate concerns surrounding the project.

[33] In a follow-up email from Ms. McKay to Ms. Atherton on November 16, 2018, Ms. McKay states that, whatever route the applicant proposes must maintain stream flow and habitat connectivity of the wetland ecosystem, and that "the project must not impact these factors (e.g., any infill must not impact drainage of the wetland)." In other emails, Ms. McKay states that "a bridge (the longer the better) would be more acceptable to maintain stream flow and habitat connectivity" (November 2, 2018).

[34] Between November 1st and January 30, 2019, Ms. Atherton continued to gather more information to determine whether there were any other options available to the Appellants. She had further communications with Mr. Tepper, Ms. McKay and others. In addition, the Respondent sought input from her section head, Mike Knapik, who agreed with Ms. McKay's concerns regarding stream flow and habitat connectivity, and that a clear span bridge would be an alternative to crossing the wetland. The Appellants maintain that a bridge is very expensive and they are not prepared to pursue that option.

[35] Also during this period, the Respondent emailed Mr. Knapik noting: the "public outcry" on the Application, the Appellants' frustration with the process, other habitat alterations in the area, and the need to provide a strong rationale for decision. The "public outcry" was evident from a petition circulating in the community to "save the pond" and from letters opposing the driveway.

[36] Of importance to the Appellants, in mid-December, Ms. Atherton responded to inquiries from Ms. Ashton and advised that "[w]e are looking at refusing the project as it is currently proposed (infill and culvert over wetland). We could aim to have the formal "refusal" letter ready by the end of the week if the Craigs would like to see closure on the file." She advised that the refusal is based on habitat section's concerns about negative impacts of the infill of the wetland. Regarding the possibility of a QEP report, Ms. Atherton advised that the habitat section did not

believe a QEP report with recommendations to mitigate the impacts of the project could alleviate their concerns. Ms. Atherton advised that she could keep the application open should the Craig's want to consider an alternate project design (e.g., a bridge), so they would not need to pay for a new application to the Ministry.

[37] On January 9th, Ms. Atherton responded to a request from Ms. Ashton about the policies or references upon which the decision to refuse the Application was based and offered Ms. Ashton an opportunity to ask more questions during a conference call that they had scheduled for the next day.

[38] Following up from their discussion during the conference call, Ms. Atherton asked Mr. Tepper whether the habitat section was open to mitigation/compensation measures to account for the loss of habitat of concern to the Ministry. Mr. Tepper's response was that habitat section does not support infill in the wetland even if mitigation recommendations are made by a QEP, and that a bridge or alternative access location ought to be considered. On January 17th, Ms. Atherton communicated this information to Ms. Ashton.

[39] On January 29, 2019, Ms. Atherton finalized her 11-page Technical Summary on the Application and provided it to the Respondent. Ms. Atherton recommended that the Application to build a driveway over the unnamed stream/wetland be refused, or an alternative structure be considered that does not require filling in the wetland. Much of her rationale for this recommendation was adopted by the Respondent in her decision.

[40] In the Technical Summary Ms. Atherton identified a "special consideration". She states that there were shortcomings in the adjudication of the file and that the Appellants may not have been treated fairly. She also states:

> For your [the Respondent's] information, when Habitat was initially referred the project in 2018, the referral response was focused on the placement of a culvert in a stream as per the "Changes in and About a Stream" application submitted on April 4, 2018 …. The application did not make it clear that infilling of a wetland was to take place. Once Habitat Section became fully aware that the project was more than the placement of a culvert in a stream, rather also required placing significant fill in the wetland and resultant loss of habitat, they rescinded previous comments and expressed that they do not support the project.

[41] Ms. Atherton also states that the Appellants and their consultant, Ms. Ashton, may have made erroneous assumptions that contributed to the expectation that the Application would be granted, despite the fact that the 2016 MOTI application had been refused on the basis of the Ministry's habitat concerns.

[42] It should be noted that the option of considering a "trade" of property as mitigation for the Ministry's concerns was discussed on various occasions. This has generally been described by the Appellants as "compensation" for the loss of habitat. In particular, the Appellants have suggested that their 1970/71 relinquishment of a "substantial area" of property to MOTI for a right-of-way be considered compensation or mitigation for any impact from the driveway. The

Ministry was not open to this as a compensation/mitigation measure for harm caused by construction of the driveway. In their final argument to me on the appeal, the Appellants offered to mitigate/compensate for the loss by providing private property equal to the environmental value of habitat loss due to the installation of the driveway. This option will be discussed later in the decision.

[43] On January 30, 2019, the Respondent refused the Application for the following reasons:

- Although authorized removal of a dam downstream of the proposed project area occurred in 2016, the area continues to function as a wetland.
- A wetland is defined as a stream under the *Water Sustainability Act*, and the Ministry Habitat Officer does not support the infilling of a stream (wetland).
- Alternative options exist to access this property that does not involve adding foreign matter to a stream.
- In 2016 Habitat Section and Water Stewardship were referred to an application from … [MOTI] for the creation of an access road (driveway) to the Craig property. This access road is the same project as that which has been applied for under the current Section 11 Approval Application. The Habitat Officer assigned to the MOTI referral in 2016 conducted a site visit on March 21, 2016. Based upon this site visit, the Habitat Officer [Doug Martin] recommended that alternate access to the property be explored, and he was not in support of the loss of additional wetland and riparian habitat. There have not been significant changes to the project area or project proposal since the 2016 site visit and decision. The area continues functions [sic] as a wetland that serves to connect the wetland area to Rosen Lake and Habitat Section does not support the loss of this habitat.

[44] This refusal is the subject of this appeal which was filed by the Appellants on February 20, 2019.

The Appeal Process

[45] Shortly after the appeal was filed, the Board asked the Respondent to identify anyone who may be affected by the Board's decision on the appeal. The Respondent advised that the LaSalles, as adjacent land owners, were potentially affected by the appeal. The Board offered the LaSalles the opportunity to participate in the appeal process, and ultimately awarded them full Third Party status in the appeal.

[46] On May 14, 2019, the Board, having considered correspondence from the Appellants requesting a written hearing and the Respondent's objection to that request, advised that the hearing would proceed by way of an oral hearing. The Board determined that the appeal did not involve pure questions of law; it involved complex issues of fact, and credibility may become an issue in weighing the evidence.

[47] On May 15, 2019, the Appellants applied for an order that the LaSalles be removed as parties to the appeal. The Board considered submissions from all of the parties. It decided that if the appeal was ultimately successful and the Appellants received a section 11 approval, the LaSalle's land could be affected. In addition, the Board found that the LaSalles may be able to provide information that would assist the Board to make a fully-informed decision on the appeal. On June 3, 2019, the Board confirmed its previous decision to grant the LaSalles full party status in the appeal.

The Appeal Hearing

[48] The Appellants argue that the decision should be overturned for the following reasons:

- The Appellants need legal access to their property.
- The Respondent was motivated to refuse the Application based on irrelevant or improper considerations and was not impartial.
- The Respondent's decision is based on an incorrect interpretation of the *WSA*.
- The Ministry was unduly influenced by the LaSalles.
- The Ministry failed to consider relevant information, such as compensation and mitigation options.

[49] In support of their case, the Appellants called seven witnesses, including Leah Andresen as an expert witness. They also rely on reports and letters as expert evidence. The first is submitted as an initial expert report; the remaining three are submitted as expert replies to the Respondent's expert report described below:

1. A July 5, 2019 expert report by Lotic Environmental Ltd. ("Lotic"), authored by Leah Andresen, MSc., Senior Wildlife Biologist and Biostatistician, and Mike Robinson, MSc., RPBio., Senior Aquatic Ecologist;
2. An August 16, 2019 expert reply report by Keefer Ecological Services Ltd. ("Keefer"), authored by Leah Andresen, and Tom Braumandi, RFP., Senior Vegetation Ecologist;
3. A July 19, 2019 expert reply letter from Kimberly Good, PAg.; and
4. An August 15, 2019 expert reply letter from Yaganeh Asadian, MSc., PAg., Environmental Specialist.[3]

[50] As will be discussed later in this decision, some of these reports and letters did not qualify as expert evidence.

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[3] In a letter dated September 13, 2019, the Board Chair ruled that the Appellants' reply reports/letters (#2 and #3), contained some new evidence that was not proper "expert reply". To address the new evidence, the Chair allowed the Respondent to submit an expert reply to the new evidence in those reply reports/letters.

[51] The Respondent submits that her decision was made in good faith, in accordance with the *WSA*, and that she exercised both her legal authority and statutory discretion in an appropriate and reasonable manner when deciding to deny the Application. In support of her case, the Respondent called two witnesses, including one expert witness: the Ministry's terrestrial biologist, Ms. McKay. The Respondent also relies upon an expert report by Ms. McKay dated July 2019 (the "McKay Report"), and two July 24, 2019 rebuttal reports by Ms. McKay. The first rebuttal is to portions of the Lotic reply report; the second rebuttal is to portions of the Good reply letter.

[52] Ms. LaSalle testified on behalf of the Third Parties. The LaSalles support the Respondent's position that the Application was properly refused.

[53] It should be noted that the Appellants tendered witnesses as part of their case that were also called as witnesses by the Respondent. I provided significant latitude during questioning of these witnesses to ensure that all parties were able to question the witnesses appropriately.

ISSUES

[54] In their submissions, the Appellants focused on errors in the Ministry's process and in the Respondent's decision. However, the appeal was conducted as a new hearing and there is significant new evidence before me, including new reports and expert evidence that was not before the Respondent when she made her decision. Further, the Board has the jurisdiction to make any decision that the decision-maker could have made, and that the Board considers appropriate in the circumstances. It can consider the matter afresh. Therefore, I have categorized the issues taking into consideration the Appellants' concerns with the Ministry's decision-making process, as well as my jurisdiction to consider the case afresh. The issues are:

1. Whether the Respondent's decision was fatally flawed because:
    a) the Respondent's decision is based on an incorrect interpretation of the *WSA*;
    b) the Respondent was motivated to refuse the Application based on irrelevant or improper considerations and was not impartial;
    c) the Respondent was unduly influenced by the LaSalles;
    d) the Ministry failed to consider compensation and mitigation options; and
    e) the Application process was handled in an unfair manner.
2. Should the Application be granted based on all of the evidence before the Panel?

DISCUSSION AND ANALYSIS

1. Whether the Respondent's decision was fatally flawed?

(a) The Respondent's decision is based on an incorrect interpretation of the WSA.

[55] The Respondent submits that the proposed driveway is an area of land which lies north of the foreshore of Rosen Lake, and is an area which meets the definition of wetland as set out in the *WSA*. Construction of the driveway would require a significant amount of material, typically referred to as "infill" in the wetland. In her closing argument, the Respondent states that section 46(1) of the *WSA* prohibits the introduction of material and debris of this nature into a wetland and, on this basis, the Application was denied.

[56] The Appellants submit that this area on the property has been the subject of historical disturbances and is not a natural wetland. The removal of the beaver dam, which was altered several years ago by the LaSalles, changed the nature of the area and the immediate area is now drier than when the dam was in place.

[57] They also submit that the Respondent's decision was based on an incorrect interpretation of section 46 of the *WSA*. Whereas the Respondent argues that section 46 supports refusal of the Application because it prohibits the introduction of materials into a stream, the Appellants note that the opening words in the section are "unless authorized". To the extent that the Application was refused on the basis that the project violated section 46, they submit that the decision is wrong—section 46 is only violated if foreign material is added to a stream without authority; therefore, section 46 does not preclude the Application from being granted.

The Panel's findings

[58] All water in "streams" in the province is vested in the provincial government, unless the government has granted private rights to the water by licence, approval or some other method of authorization. Section 11 of the *WSA* allows a person to apply for an approval to make "changes in and about a stream". "Changes in and about a stream" is defined in section 1 of the *WSA* to mean:

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

[59] "Stream" is defined in section 1 to mean:

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

> including, without limitation, a lake, pond, river, creek, spring, ravine, gulch, wetland or glacier, whether or not usually containing water, including ice, but does not include an aquifer. [Emphasis added]

[60] "Wetland" is defined as "a swamp, marsh, fen or prescribed feature".

[61] The evidence of all of the experts at the hearing is the southwestern portion of the property is currently a wetland. There is evidence that the dam was originally created by beavers, and later enhanced by humans. In my view, this does not remove the wetland from the definition of "stream"; it does not mean that it is not "natural". I have considered the evidence of the history of the property and the photographs submitted during the hearing, including a 1968 aerial photograph. There is no compelling evidence before me to establish that the wetland and/or the creek are not natural, as that term is meant in the *WSA*. Indeed, it was the testimony of Ms. Andresen that peat accumulation in the area demonstrated that the area was likely a fen prior to the dam construction, transitioned to a marsh during the time of the dam and that, since its removal, the area is transitioning once again to fen. This, in my view, supports the notion that the wetland is a natural feature. Further, the natural existence of this wetland is consistent with the undisputed evidence of other, larger wetlands bordering the property to the west.

[62] Even if the land has changed from fen, to marsh, and back to fen, these classifications are included within the definition of "wetland", which is, itself, included within the definition of "stream".

[63] I have also considered section 46 of the *WSA*, titled "Prohibition on introducing foreign matter into stream". I agree with the Appellants that the Respondent's argument emphasizes this section as a reason for refusal. As the Appellants observe, section 46 prohibits the introduction of material into a stream, stream channel or adjacent to a stream "unless authorized under this or another enactment". The question for the Respondent was whether to grant this authorization by issuing an approval.

[64] Based upon my review of the evidence that was before the Respondent and the Respondent's decision itself, there is no indication that reliance on section 46 was, in fact, her reason for refusing the Application. The information before the Respondent, and her decision, focusses primarily on habitat loss and impacts. There is no indication that she did not understand that she had discretion to grant the approval under section 11.

[65] I find that the Respondent did not base her decision on an incorrect interpretation of the *WSA*, as alleged.

(b) The Respondent was motivated to refuse the Application based on irrelevant or improper considerations and was not impartial.

[66] The Appellants say they have not been treated fairly by the Ministry. They submit that the Respondent refused the Application in order to "hold the line" on the earlier, 2016 decision by MOTI and the previous habitat officers, instead of re-assessing and entertaining new ideas and solutions that would support granting the

Application. Further, they believe that the Ministry selected certain personnel to review the Application who would uphold the 2016 habitat officer's decision.

[67] In support, the Appellants submit that Ministry correspondence secured through an application made under the *Freedom of Information and Protection of Privacy Act*, reveals that Mr. Tepper, the original habitat officer who reviewed the Application, was replaced by Ms. McKay. The Appellants submit that the reason for this change was that Mr. Tepper would not provide a decision recommendation on the file that was consistent with the Ministry's preferred approach, whereas Ms. McKay would. The Appellants also submit that this personnel change was unnecessary as, if the Ministry's concern related to the loss of fish habitat, Mr. Tepper was more suited to assess the impact of the project than Ms. McKay—a specialist in habitat.

[68] The Respondent asserts that the Application was addressed in a fair and appropriate manner, and that changes in personnel arose from the nature of the Application. As regards the similarity of this present decision outcome with that of the 2016 decision, the Respondent states that, while the history of past applications associated with this property was reviewed, the review served to ensure a fully-informed decision-making process and did not predispose the Respondent to making a particular decision on the present Application.

[69] Further, the reason for Ms. McKay's involvement on the file was because the scope of the Application was not limited to simply a culvert over a creek. Mr. Tepper testified that he had originally reviewed the Application form and, on noting that it involved a driveway access over a stream, gave what he referenced as his "standard response"; i.e., if the stream was fish-bearing, fish friendly passage must be provided. He further testified that his opinion on this file changed when he saw pictures of the site and realized the proposed driveway was not just crossing a stream but was within a wetland. Whereas he is a fish habitat biologist with expertise in fisheries, Ms. McKay is a habitat biologist with expertise in wetland and terrestrial systems. As such, in his view, it was more appropriate for Ms. McKay to become the "lead" on the file for the habitat section.

[70] Mr. Tepper described the site as an unusual situation where the creek and the wetland are combined. He remained tangentially involved in the Ministry's review of the Application, in that he reviewed the technical information that was prepared by Ms. McKay and agreed with her conclusions.

[71] Ms. McKay is the habitat biologist for the Kootenay Region. She testified that her role was to assess the land relevant to this Application and provide her opinion on the impact the Application would have on those lands. Ms. McKay took the following steps to assess the lands: an office (desk-top) review and a site visit; discussions with colleagues; and a review of relevant materials, including peer-reviewed journals. Based on that assessment, Ms. McKay concluded that the site was a highly functioning, healthy, intact wetland valuable to aquatic, terrestrial and avian species.

[72] Michael Knapik, RPBio, Habitat Section Head, also testified at the hearing. He was the supervisor of Mr. Tepper and Ms. McKay. In his view, the file had been

transferred appropriately to Ms. McKay, given the broader values associated with wetlands compared to fish-bearing streams.

The Panel's findings

[73] When the Application was received by the Water Stewardship Branch, it was forwarded to Mr. Tepper for review. On the basis of the Application, Mr. Tepper's assessment was that, if the culvert concerned a fish-bearing creek, a fish friendly structure would be required. Provided that occurred, Mr. Tepper had no concerns about the Application.

[74] A review of the file by Ms. Atherton led to a more detailed assessment of the project, including a site visit. When the results of the site visit were shared with Mr. Tepper, he emailed Ms. Atherton and Ms. McKay on October 10, 2018, as follows:

> After a review of the proponents change approval application, what they have applied for is: "Other: Driveway access over stream". **That is not correct.** They would need to apply for an approval to fill in the wetland, which is considered a "stream", which we would object too [sic]. Or, as discussed, they could propose a structure, such as a bridge, that goes over the entire "creek" (which by definition includes the wetland). Thank you. [Emphasis in original]

[75] As the project included wetland infill, it was broader in scope than originally believed and required additional expertise. Therefore, Ms. McKay assumed the review role on behalf of the habitat section.

[76] I find there is no credible evidence that the Ministry engaged in an inappropriate process *vis-à-vis* staff assignment on this file. It is clear that Mr. Tepper's initial assessment of the project was incorrect. Once he was made aware of the full extent of the project, he advised Ms. Atherton and a person with the relevant expertise was assigned to perform a technical review of the Application.

[77] The Appellants submit that the Respondent's refusal of their Application was based on the earlier 2016 habitat officer's views on the MOTI application. The Appellants submit this is inappropriate in light of their evidence and given that the MOTI application was for access on the MOTI right-of-way, whereas the Application is for an access on the Appellants' property. The Respondent submits that the information from the 2016 MOTI application did not prejudice the Respondent's decision and was regarded as background information to ensure a fully-informed decision on the Application.

[78] There is no compelling evidence before me to show that the Respondent used the information from 2016 as anything but background information to the Application. There was a significant amount of evidence describing the actions taken and the information considered by the Respondent, and others, in order to assess the Application.

[79] Although I appreciate how Mr. Tepper's initial comments on the Application could give rise to the Appellants' suspicions about the process, based upon a full review of the evidence, I find there is no persuasive evidence to establish that the

Respondent was motivated to refuse the Application based on irrelevant or improper considerations, or that she and was not impartial.

(c) The Respondent was unduly influenced by the LaSalles.

[80] The Appellants consider the involvement of the LaSalles in the Application process to be inappropriate. Further, they believe that the Third Parties' views negatively influenced the Respondent's decision.

[81] The Appellants submit that "lies and conjecture" by the LaSalles influenced the process which moved from being objective and in support of habitat, to one based on public opinion. The Appellants submit that the influence exerted resulted in the project being moved from a simple, streamlined "notification" to that of a full "application" under section 11.

[82] The Respondent maintains that the LaSalles' involvement was driven by legislation, and that the decision under appeal was based on the information provided by the Ministry's subject matter experts.

[83] Ms. Atherton explained the difference between a "notification" and an "application". A notification falls under section 39(1) of the *Water Sustainability Regulation*, B.C. Reg. 36/2016. It would have applied if the project had been limited to the installation of a culvert for crossing the stream. Once it became apparent that the project, in fact, required infilling of a wetland, the project required an application under section 11 of the *WSA*. Consequently, the project did not "shift" from a "notification" to an "application": the legislation required an application process for a project of this nature. Further, Ms. Atherton testified that the Application was considered in accordance with standard procedure.

[84] In her evidence, Ms. LaSalle confirmed that, in an attempt to inform others about the pending actions on the wetland, she started a petition and accepted letters from concerned local and seasonal members of the community.

The Panel's findings

[85] The Appellants submit that the LaSalles tainted the decision-making process and that the Ministry erred in involving them in the Application process. There is evidence before me regarding the proximity of the LaSalles' residence to the Appellants' property and the project area. I find that the LaSalles were properly notified about the Application under section 13 of the *WSA*. They are either riparian owners, or owners whose land is or is likely to be physically affected by the project. Once they were given notice, subsection 13(3) of the *WSA* allowed them to file an objection to the Application.[4] The subsection states:

> (3) A person who is given notice under subsection (1) may deliver to the decision maker identified in the notice within the prescribed

[4] If a hearing is held, both the applicant and the objectors are given an opportunity to be heard

> period any objection the person has to the granting of the application.

[86] In addition, I note that subsection 13(7) requires the decision-maker to provide a copy of her decision to anyone that provided an objection.

[87] I find that notification of the LaSalles and consideration of their input was required by section 13 of the *WSA* and did not taint the process.

[88] The LaSalles did not provide written comments to the Ministry but did contact Ms. Atherton by telephone. This telephone contact, and the lack of a written objection and response, may have contributed to the Appellants' suspicions about undue influence and pressure by the LaSalles.

[89] I note from the email sent by the Respondent to Mr. Knapik that she was aware that there was "public outcry" over the Application. However, I find that the overwhelming evidence, including the emails and notes of discussions within the Ministry between November and January 29, 2018, that the basis for the decision was clearly related to impacts to the habitat, not pressure or public outcry prompted by the LaSalles.

[90] Finally, I find that infilling part of a "stream" (wetland) is not included in section 39 of the *Water Sustainability Regulation* as one of the exceptions to obtaining a section 11 approval. Therefore, a section 11 application for an approval to make changes in and about a stream was required; the project did not qualify for the simpler "notification" route contemplated in section 39.[5] I understand that, based on the wording of the Application—"driveway access over stream" and "creating driveway with culvert"—the Appellants likely expected the Application would proceed under section 39; however, the actual project proposed on the property did not comply with section 39.

[91] I find that the Respondent was not unduly influenced by the LaSalles.

(d) The Ministry failed to consider compensation and mitigation options.

[92] As evidence of the Ministry's unwillingness to give fair consideration to their Application, the Appellants cite the Ministry's refusal to provide the Appellants with an opportunity to provide a QEP report to address mitigation.

[93] Evidence produced by the Appellants shows that the Ministry did not support the Appellants submitting a QEP report addressing possible mitigation measures. The Appellants submit that the Ministry did not follow standard procedure on this file regarding the inclusion of a QEP. The Appellants submit that the Ministry's hesitation to allow a QEP to provide an unbiased, expert evaluation of the project speaks to the fact that the habitat section's views and recommendations may not be shared by other professionals in the field. The Appellants further submit that the assumption by the Ministry that a QEP report would be insufficient confirms that the

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[5] Section 39 of the *Regulation* designates certain changes in and about a stream as automatically "authorized", provided all conditions in section 39 are met. Only culverts for crossing a stream fall under this section, not infilling a stream.

Ministry had already made a decision and was unwilling to consider any further facts, information, or professional opinions on the matter.

[94] The Appellants submit that while the Ministry has expressed that the Appellants were resistant to changes to the Application, it is the Appellants' position that the Ministry was resistant to any recommendations that the Appellants wanted to introduce, including the QEP report and compensation measures—both of which were discouraged by the Ministry due to their high costs. The Appellants submit that the Ministry's resistance to the QEP report on the basis of cost to the Appellants is not compatible with the Ministry's recommendation that the Appellants consider what amounts to a 69-foot clear span bridge that would likely be cost prohibitive, and result in environmental impacts. They also submit that their family has already given up parts of their property for other rights-of-way, and this should be considered as compensation.

[95] On the question of mitigation, the Respondent provided evidence to show that the Ministry does not consider mitigation appropriate when a project will result in permanent habitat loss. Consequently, having the Appellants present a QEP report on mitigation options related to the present project would have been a waste of effort and money.

[96] The Respondent testified that she considered whether a QEP report should have been requested from the Appellants. She decided that as long as the project involved infill of the wetland, mitigation was not possible and, therefore, a QEP report addressing mitigation would not be helpful. The Respondent testified that while the Appellants were dissuaded from providing a QEP report, at no time were the Appellants prohibited or precluded from providing one.

[97] Mr. Knapik testified that it would have been appropriate to involve a QEP if the QEP was to address alternate access options; however, the Appellants had a fixed view of the access location for the project. Based on the Ministry's investigation of that location, this access would have resulted in permanent loss of fish habitat and wetland values which could not be mitigated by a QEP's recommendations. As such, the Ministry considered that the involvement of a QEP would not have made a difference to the Ministry's consideration of the file and would have exposed the Appellants to needless cost and effort.

The Panel's findings

[98] The issue of compensation was touched on briefly during this hearing and was always referenced in relation to replacement for habitat loss. The Appellants submit that consideration should be given to the amount of property they have, over the years, turned over for various rights-of-way, and that this property be applied within a compensation perspective. Mr. Craig testified that the majority of the land used for rights-of-way property have involved access to their property.

[99] The Ministry noted that compensation is usually employed in larger projects and not considered for a project of this scale, used to access private property.

[100] Evidence was presented to show that, on January 9, 2018, prior to the Respondent's decision being issued, Ms. Atherton advised Ms. Ashton (the

Contractor) of the policies and references upon which the refusal decision was made and was offered an opportunity to ask additional questions. This was followed by a conference call on January 10, 2019, which resulted in an email sent from Ms. Atherton to the Contractor, summarizing the conference call as follows:

> In response to our conference call on January 10, 2019 I committed to following up with Habitat Section to determine if Habitat would be open to mitigation/compensation measures other than a bridge, as proposed by a QEP. The response I received from Habitat remains consistent; the proponent use the existing access road, build a bridge or find a different access location. Habitat does not support infill in the wetland, even if mitigation recommendations are made by a QEP.
>
> Based on the conference call that was held on the 10th, I understand that the applicants would rather we move to a refusal decision than keep the Application open to consider a bridge proposal. ….

[101] The Respondent issued the decision on January 30, 2019, refusing the Application.

[102] Section 16 of the *WSA* addresses mitigation and compensation. 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.

[103] I note that the decision-maker's authority under section 16 to require or accept mitigation or compensation to address significant adverse impacts is discretionary. She **may** require the applicant to propose mitigation measures and, if they do not properly address the adverse impacts, she **may** impose compensatory mitigation measures. The purpose of these provisions is to allow mitigation that addresses the adverse effects at issue. In addition, the compensatory mitigation that may be authorized under subsection 16(2) and (3) must be on the same stream or, in some cases, a different stream. Neither provision contemplates a previously granted right-of-way as appropriate compensation or mitigation. Therefore, I find that it is not appropriate to consider those portions of the Appellants' property previously decided for rights-of-way as compensation or mitigation to address impacts from the Application. The Appellants later suggested a new option for compensation in their closing argument. This will be addressed under issue 2.

[104] Regarding the QEP, I find that the Ministry did not prohibit the Appellants from presenting a QEP report. Rather, the habitat section was very clear that, as the infill of the wetland would result in permanent habitat loss, they were of the view that there were no possible, acceptable mitigation strategies; therefore, if mitigation strategies were going to be the subject of a QEP report, this would not be helpful to the Application to address the habitat issues. This was indirectly

communicated to the Appellants by Ms. Atherton in her email to the Contractor. The Appellants were advised that a QEP report concerning mitigation strategies associated with a bridge option would be considered, but the Appellants declined that approach and chose to pursue the project as documented in the Application.

[105] Based upon the evidence, I find that the Ministry considered whether it would be helpful for the Appellants to retain a QEP to mitigate habitat concerns on various occasions, including November of 2018 and January 2019. In November of 2018, the Ministry was to come up with a list of requirements that the QEP report would need to address to mitigate concerns surrounding the project. Ultimately, however, the Ministry determined that, except for an alternative proposal a bridge or a different access location, there was nothing that a QEP could suggest that would mitigate the habitat degradation, loss of connectivity and permanent habitat loss that would result from the proposal, and no such list was provided. In my view, it is not that the mitigation or a QEP weren't considered by the Respondent, it is that the Appellants disagree with the Respondent's decision that there are no measures that could be implemented to mitigate the significant adverse impacts of habitat and connectivity losses from the proposed project.

[106] I find that neither the Ministry, nor the Respondent, failed to consider compensation and mitigation options.

(e) The Application process was handled in an unfair manner

[107] The Appellants submit that the process used by the Ministry to assess this Application was not fair or transparent. Zoe Craig testified that, in her work as an Environmental Analyst, and as an Environmental Stewardship Coordinator for the Musqueam Indian Band, she has been involved in numerous section 10 and 11 applications under the *WSA*. She testified that there is a discrepancy between how the Ministry handles applications in the Lower Mainland compared to applications handled in the Kootenays.

[108] Based on her experience, technical reports and site evaluations should be provided to the decision-maker prior to the decision, and the decision should be based on the report. The Appellants submit that, in their case, the McKay Report setting out the reasons for refusal was prepared after the decision was released, which indicates that the Respondent was not aware of all relevant facts prior to making her decision and points to bias.

[109] Further, the Appellants submitted a list of 12 BC government personnel who were involved in the review of the proposed driveway over the years, including two from MOTI and 10 from the Ministry. The Appellants submit that the involvement of so many individuals led to a mismanagement of responsibility and accountability.

[110] In addition, the Appellants consider the alternative options proposed by the Ministry, such as a clear span bridge or accessing the property via an existing Hydro right-of-way (in the northeast), to be inappropriate. They submit that the Ministry has not performed any due diligence on the feasibility of the options. They argue that "alternative options" are not a proper consideration as they were not based on any actual assessment and, as such, are not actual solutions to their access problem.

[111] Ms. Atherton's Technical Summary acknowledges that there were fairness issues with the process. However, the Respondent's position is that a better process would not have changed the ultimate decision. The Respondent submits that the advice and opinions obtained from habitat section in 2018 were the same as the advice and opinions that the habitat section provided to MOTI and the Appellants in 2016. Moreover, Ms. Andrews testified that, prior to rendering her final decision, she and Ms. Atherton consulted with the Habitat Section Head, Michael Knapik, who agreed with Ms. McKay's view that the project area was a functioning, natural wetland complex, and that a clear span bridge might be something that could be considered as an alternative.

[112] Ms. Atherton testified at the hearing. She became involved in this Application when the file was transferred from Kristina Anderson. She testified that Ms. Anderson had identified the file as contentious; Ms. Atherton understood this was because of the concerns expressed by the neighbours.

[113] Ms. Atherton's role in the process was to assemble the information necessary to prepare the Technical Summary of the Application and provide recommendations to the statutory decision-maker. Ms. Atherton testified that the Technical Summary document is a dynamic document that was amended throughout the review process as new information was obtained. She testified that her recommendation to the decision-maker was driven by the views of the habitat section. She testified that the LaSalles' views did not have any impact on her recommendation to refuse the Application.

[114] The Respondent testified that she undertook a thorough review and analysis of the Application, including attending the site with Ms. McKay and others, consulting with staff regarding the Application, and reviewing the Technical Summary prepared by Ms. Atherton before issuing her decision. The Respondent relied upon the experience and expertise of the Ministry subject-matter experts on this file to inform her on the biology and ecological aspects of the project, as is the usual practice for these kinds of applications.

[115] In terms of where this file ranked in the spectrum of complexity, the Respondent testified that it was "tricky", in that there were "timeline issues" caused by staffing issues related to the 2018 fire and flood seasons, and the Application form incorrectly identified the project as a driveway access over a stream, rather than a wetland infill. The Respondent testified that she considered the amount of infill associated with this project to be "extensive" compared to other applications she had been involved with. In terms of process, the Respondent considered that the file proceeded in the usual manner.

[116] The Appellants asked the Respondent why Ms. McKay's Report was not written until after the decision had been made. The Respondent advised that her decision was based on the information in the Technical Summary; the McKay Report was prepared after her decision in response to this appeal.

[117] The Respondent testified that she has been involved in 50 to 100 applications under section 11 of the *WSA*. This was the first application that she had refused. She testified that it is not unusual for the scope of a project to change during the review period to address concerns, and that this often leads to an application's

approval. In this case, the Ministry offered to leave the file open so the Appellants could amend the project to include a clear span bridge, but the Appellants declined this offer. The Respondent, therefore, issued her decision refusing the Application.

The Panel's findings

[118] The Appellants' arguments related to unfairness are essentially three-pronged. The process and decision were unfair because:

1. the Respondent relied on a report created *after* her decision as support for her decision and was biased;
2. the involvement of so many government employees from two different ministries resulted in mismanagement of responsibility and accountability; and
3. consideration of alternative options is not proper or appropriate and is not a solution to their access problem.

[119] Regarding their first argument, Ms. McKay testified that she created her report after the Application was denied and specific issues were raised in this appeal. Ms. McKay also testified that, having had an opportunity to view the site in late 2018, and again in the preparation of the report, she remains firm in her opinion as to the healthy, functioning nature of this wetland. I find that the Appellants' concerns regarding the timing of the McKay Report is based on a misunderstanding of the appeal process. It is common for Ministry decision-makers to have an in-house specialist provide opinion evidence in an appeal to the Board. This, in itself, is not an indication that the decision-maker was not in full possession of the facts when she made the decision.

[120] In terms of the information that was before the Respondent when she made the decision, her testimony before me confirmed that, prior to making her decision she:

- had discussions with staff;
- personally attended the site;
- was kept apprised of progress on the file to ensure the file was "on track"; and
- reviewed the Technical Summary prepared by Ms. Atherton.

[121] A copy of the Technical Summary was presented at the hearing. It was described as a "living" document, in that it contains a number of revisions and comments, all of which pertain to the Application. The final version is dated January 29, 2019.

[122] I find that the Respondent made her decision based upon considerable information, including information regarding habitat section's concerns. I find that Ms. McKay's involvement in the case as part of the appeal process is not improper and does not taint the Respondent's decision-making process. Although the Appellants also alleged that there was bias because the McKay Report was written after the decision, an allegation of bias is a serious one and must be supported with

very clear evidence.[6] There is a legal test for establishing what is referred to as a "reasonable apprehension of bias"; i.e., "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[7] There are indications that the Respondent actively contended with questions pertaining to the Application: the comprehensiveness of the Technical Report, the Respondent's personal attendance at the site, and her involvement with the file prior to her decision. The Appellants have not provided sufficient evidence to establish any bias or reasonable apprehension of bias on the part of the Respondent.

[123] The Appellants also argue that the number of government employees involved in the project from two ministries resulted in mismanagement and unfairness. I note that the process used to consider the Application was described by various witnesses as "not pretty", "disjointed", "clunky", "messy", "confusing", "languishing", "tricky", and "frustrating"—with the latter descriptor used by all of the Parties. That is not to say, however, that the process was unfair or inappropriate. The evidence before me showed that the preliminary habitat assessment was based on incomplete information and incorrect information in the Application; specifically, that the project was mis-identified as a driveway crossing a stream and not as a wetland infill. Once the information was complete and correct, the assessment of the Application proceeded relatively quickly.

[124] Finally, the Appellants also argue that consideration of alternative options is not proper or appropriate and is not a solution to their access problem.

[125] I note that one of the considerations identified by the Respondent when she denied the Application was that there were alternative options that did not involve depositing foreign matter into a stream. It is also clear that the Ministry suggested the bridge on various occasions as a possible alternative to the impacts to habitat.

[126] Considering the context, it appears that the Ministry staff were trying to be helpful when they suggested a bridge. The brief references to the bridge option in the evidence do not suggest that a bridge would have no impacts, just that it would have fewer impacts and those impacts might be mitigated. As noted by the Respondent in her evidence, it is not unusual for a project to change in order to secure a section 11 approval; options for the proponent to look into is one of the ways such changes come about. Feasible alternatives that are not harmful to the environment (or not as harmful) are simply part of the factual matrix that goes into the investigation of an application.

[127] While the Respondent's decision identifies "Alternative options exist to access this property …" as one of the factors she considered, as stated earlier, I find that it this was not her main reason for denying the Application. If it had been her *only* reason for denying the Application, I would agree that she did not properly exercise

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[6] *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No. 2478 (CA).

[7] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at page 394.

her discretion under the statute; however, that is not the case. I find that the Ministry and Respondent's references to alternative options is not inappropriate or unfair and did not render the process unfair in this case.

[128] From my review of the evidence, I find that the process used by the Respondent to make her decision was not unfair.

Conclusion on Issue 1: Whether the Respondent's decision was fatally flawed?

[129] Section 14 of the *WSA* 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.

[130] I find that the Respondent's decision to refuse the Application was not fatally flawed as a result of any single ground alleged by the Appellants nor based on the grounds combined. The issues raised by the Appellants are not grounds for either sending the matter back for reconsideration—or for simply granting the approval. Regarding the latter, even a significant procedural issue will not justify issuing a section 11 approval unless it meets all prescribed requirements and is found to protect the stream and ecosystem. This is considered in the next issue.

2. Should the Application be granted based on all of the evidence before the Panel?

The Appellants' evidence and arguments

[131] The Appellants called Leah Andresen to give expert evidence regarding the characteristics and wildlife values of the area. Ms. Andresen was qualified as an expert on the classification of marshes versus fens, their associated wildlife values, and mitigation measures. Ms. Andresen based her evidence on visits to the site on June 20, 2019 and on August 7, 2019. Ms. Andresen co-authored the Lotic and Keefer reports.

[132] Ms. Andresen testified that the wetland was classified as a water sedge-beaked sedge fen, and that it is one of the few wetlands in the area that was not built-up or degraded. According to Ms. Andresen, soil testing in the area confirmed that the area was a fen prior to the beaver dam construction and following its removal. During the period the dam was functioning, the area was permanently inundated, exhibited marsh characteristics, and presented higher wildlife species habitat values than at present. Ms. Andresen testified that while on a larger scale the general area has been disturbed, she considers this particular portion of the area to be a relatively intact, healthy functioning wetland.

[133] Ms. Andresen also testified that there is a segment north of the proposed culvert area that, prior to the dam's removal, was only partially inundated. Since the removal of the dam, that segment is now outside the fen area, and is classified as "upland" given the vegetation components. As a result, while one of the abutments and works required for the proposed driveway project would be located

in the wetland, the second abutment could be located in an area with upland characteristics.

[134] Ms. Andresen's testimony confirmed that impacts associated with the project could include:

- damage to the function and structure of the wetland by removal of wetland vegetation and changes to the character of the streambank resulting in a reduction of wildlife habitat quality and extent;
- loss of connectivity (preventing wildlife species movements);
- changes to the underlying hydrological regime; and
- increasing the spread of invasive species.

[135] However, in Ms. Andresen's opinion, the impacts of the project can be minimized with the use of appropriate construction techniques and materials. Such techniques include:

- minimizing the area of infill by siting one of the abutments on the north side upland area;
- the use of an appropriately sized open-bottom box-culvert, pre-cast arch with abutments; and
- using multiple culverts to alleviate compaction and sedimentation in order to minimize the loss of hydrologic flow.

[136] Ms. Andresen identified potential mitigation activities to reduce the spread of invasive species, including avoiding bare soil exposure by revegetating the site to support water retention, and removing some of the non-native species and planting native species in their place. Ms. Andresen testified that it was not possible to say that all of the impacts associated with the project could be mitigated.

[137] Ms. Andresen testified that monitoring is an essential component of the mitigation efforts. Monitoring ensures that the mitigation measures are implemented in accordance with the approved infrastructure designs and allows the effectiveness of the mitigation measures to be assessed. If the mitigation efforts do not achieve the desired objective, contingency measures must be established.

[138] The Appellants submit that Ms. Andresen's evidence demonstrates that impacts from the project can be minimized and mitigated.

[139] The Appellants also submitted letter reports by Kimberly Good, PAg., and by Yaganesh Asadian, MSc., PAg. Ms. Good reviewed the Lotic report and McKay Report; she did not attend the property. Ms. Good considered the project in the context of the AMEC Earth and Environmental "Rosen Lake Foreshore Inventory and Mapping, Fish and Wildlife Habitat Management Guideline" (the "AMEC study"). She notes that the AMEC study identified the mouth of the ephemeral creek (where it flows into Rosen Lake) as a "Zone of Sensitivity"; however, the creek upstream of the mouth is not identified as "important/valued habitat or a Zone of Sensitivity". She also notes that there have already been disturbances in the upstream area, such as a retaining wall on the LaSalle property and the beaver dam. Despite these alterations, the reports say that the ecosystem is still functioning and connected. In

Ms. Good's view, if potential impacts of the project were clearly identified, then specific mitigation strategies could be established, such as a culvert to control flow into the lake while maintaining a wetland upstream of the road.

[140] Ms. Asadian's reply letter focusses on compensation and mitigation. From a review of the expert opinions and supporting information, Ms. Asadian believes that the importance, value and services of the wetland can still be maintained through compensation and mitigation measures. She states that the on-site evaluations were only done in two seasons, the data collection was only conducted in November and June, and that an environmental management plan—which includes compensation, mitigation, specified works and construction methods—could address the 12 habitat impacts/concerns identified in the reports and documents that she reviewed. She also identified additional evaluations and mapping that ought to be done. Ms. Asadian concludes by stating that she has worked on larger scale projects with greater impacts than this project that were mitigated through offsetting projects approved by appropriate government agencies. Ms. Asadian did not attend the property.

The Respondent's evidence and arguments

[141] Ms. McKay was qualified as an expert in the area of wetland classification including their overall value, and in development-related mitigation.

[142] Ms. McKay conducted three site visits after the Respondent's January 2019 decision in preparation for this appeal proceeding. Ms. McKay also undertook discussions with colleagues and reviewed relevant materials. In her opinion, the site and the associated project impacts have not changed since her earlier assessments during the Application process, and the site continues to be a highly functioning, healthy, intact wetland that provides values for aquatic, terrestrial and avian species.

[143] In terms of specific impacts associated with the project, Ms. McKay states at page 11 of the McKay Report:

> The proposed project (i.e. the culvert and infill) would cause damage to the function and structure of the wetland—wetlands are a limited resource in the East Kootenay Trench. The proposed project would cover and kill aquatic vegetation (i.e., habitat loss) that is currently contributing to ecosystem health (e.g., filtering pollutants) and providing habitat for wildlife (e.g., nesting birds). The proposed project would cause habitat fragmentation (i.e., loss of connectivity) which would negatively impact various species that use this wetland to meet life cycle requirements. The driveway and infill could introduce invasive plants, and increase the abundance and spread of invasive plants already on site.

[144] Further, Ms. McKay testified that the kind of anthropogenic disturbance associated with the project would result in the currently healthy and undisturbed area no longer being a part of the functioning ecosystem.

[145] Ms. McKay replied to the mitigation strategies proposed by Ms. Good and Ms. Andresen (Keefer report). Some of her replies also pertain to Ms. Asadian's letter. Regarding the use of a culvert, neither report provides the size or dimensions of the culvert contemplated by the authors. Whether the culvert is a closed-bottom or open-bottom, both require infilling of the wetland; neither report identifies the area within the wetland that would be infilled. Ms. McKay states that, based on the information she obtained during her site visit, the volume of infilling would impact a greater area than would the culvert itself. She states: "This infilling would result in harm and damage to the wetland including: introducing foreign matter into the aquatic ecosystem, killing aquatic and terrestrial vegetation, fragmenting habitat, interrupting soil processes and causing compaction."

[146] In response to Ms. Good's statement that the creek area on the Appellants' property is not identified as important/valued habitat or a Zone of Sensitivity, the Respondent submits that this statement is misleading. She notes that the area of the proposed project is outside of the study area of AMEC: the study focused on the lake shoreline and did not study the areas upstream of the mouth. However, consistent with Ms. McKay's evidence, the Respondent notes that the AMEC study generally comments that wetlands, in general, are a zone of sensitivity. The AMEC study also notes the importance of diverting development away from high value habitats such as wetlands.

[147] In terms of whether mitigation was possible to offset the concerns, Ms. McKay testified that mitigation is generally employed to address temporary impacts, often related to construction-related activities. In her opinion, there was no way to mitigate the impacts associated with the project, including the loss of connectivity and habitat due to the infill and road construction. Regarding Ms. Asadian's statement that the habitat impacts/concerns could be addressed by mitigation or compensation in an environmental management plan, the Respondent submits that these assertions are not helpful as she does not provide any specific or measurable recommendations.

[148] As regards Ms. Andresen's evidence concerning monitoring, Ms. McKay agrees that monitoring would be an essential component of any proposed mitigation activity; however, in her opinion, there are significant problems associated with monitoring on a project of this nature. These include, but are not limited to, having to rely on the landowner to self-monitor, or requiring the expenditure of public funds to monitor if that task is taken over by the Ministry. Ms. McKay testified that monitoring is usually associated with the construction phase of a project and exists to ensure that any problems can be addressed in a timely manner. If this project proceeded, it would require monitoring during and after construction, with the follow-up monitoring at a time and scale to ensure the healthy functioning of the ecosystem. In the event that an ecosystem is damaged, it is unlikely that the system would return to a healthy condition.

[149] In Ms. McKay's opinion, the only way to mitigate the impacts associated with providing access in this area would be through building a bridge that would span the wetland. Although a bridge would likely result in some impacts, they would be significantly less, as a bridge would not require the same infilling in the wetland, thus avoiding the resulting connectivity and habitat loss.

The LaSalles' evidence and argument

[150] The LaSalles have lived on their property since 1999. Ms. LaSalle testified that their main reason for becoming involved in the appeal was to protect the wetland. She presented a diary and a number of photographs taken over the years showing the wildlife present in the area.

[151] According to Ms. LaSalle, the beaver dam was failing so they had it reinforced to preserve the habitat and stop their basement from flooding. While Ms. LaSalle's prime concerns with the project relate to impacts on the wetland, she is also concerned with what the driveway will look like (it will pass in front of her home), and the traffic it will generate.

The Panel's Findings

[152] The evidence presented by all of the parties confirms that the area in question is a well-functioning wetland.

[153] The evidence shows that the area inundated by the modified beaver dam had been a wetland for some time. Ms. Andresen testified that, following the removal of the dam in 2016, at least part of the dewatered area was transitioning to an upland system. The Respondent's expert, Ms. McKay, testified that wetlands, by their nature, are not static. Further, as the Ministry's mapping uses a broad polygon approach and does not look to features on the smaller scale, the entire area is classified as a wetland and may not reflect smaller-scale transitions such as that described by Ms. Andresen.

[154] I find that even though part of the wetland area may be exhibiting characteristics associated with upland communities, a significant portion of the project (i.e., the culvert and a segment of the driveway) is located in the area that all parties, and the experts, agree is a wetland as defined in the *WSA*. I also note that the Application describes the footprint of the proposed works (culvert and driveway) as 30 square metres, whereas the Ministry's estimate of the footprint—which includes the estimated amount of wetland infill—is 150 square metres (30 metres x 5 metres).

[155] It is clear that site visits conducted by Ministry personnel in 2016 and 2018, as well as the site visits conducted by the Appellants' expert witness, Ms. Andresen, all confirm that infilling a portion of the wetland is likely to have negative impacts on the wetland and its functions. For the most part, Ms. Andresen's evidence is consistent with Ms. McKay's, in that the negative impacts from the Application include:

- damage to the function and structure of the wetland;
- reduction of wildlife habitat quality and extent;
- loss of connectivity;
- changes to the underlying hydrological regime; and
- increasing spread of invasive species.

[156] The difference between their opinions is that Ms. Andresen classified the wetland at the proposed crossing as fen, whereas Ms. McKay classified it as marsh which, in Ms. Andresen's evidence (Keefer report) can result in different sensitivities to road disturbance. Ms. Andresen is of the view that the hydrological impacts of placing fill material on the fen should be less pronounced than if the wetland were a marsh, and that the negative impacts can be minimized through: construction techniques and materials; revegetation and removal of non-native species; and a robust monitoring program. Further, Ms. Andresen's opinion is that since the removal of the modified beaver dam, the north side of the project area is reverting to upland and, consequently, placing fill in this area should have minimal, if any, hydrological impact. Ms. McKay's evidence on whether the north side of the area is upland or not, is that the Ministry's mapping does not delineate this level of detail and that the entire area remains classified as wetland.

[157] Based on all of the evidence before me, including the new evidence that was not before the Respondent, I find that, whether or not the wetland is marsh or fen, and whether or not a relatively small portion of the project area is reverting to upland, the Application will result in undisputed negative impacts to the wetland as set out in the bullets at paragraph 155.

[158] The Appellants' evidence (Keefer report) recommends avoiding wetland fragmentation and changes in hydrological connectivity in order to minimize impacts of the project.

[159] The reply letters tendered by Ms. Good and Ms. Asadian also recommend ways to compensate and/or mitigate the impacts. Although the Appellants tendered these letters as "expert reply", the Appellants did not provide the individual's qualifications and areas of expertise. Further, they were not called as witnesses at the hearing so no one was able to ask them questions about the information in their letters. Consequently, I was not able to, and did not, qualify Ms. Good and Ms. Asadian as experts at the hearing. Further, I am not able to properly determine the veracity of the views they expressed in their letters. Although I have considered the two letters, I am not able to give the information within them much weight due to the above limitations.

[160] Based on the evidence before the Respondent and the new evidence presented in the hearing before me, the undisputed negative impacts from the Application would be "significant" and could be irreparable (the system may not return to a healthy condition). Although at one point the Appellants suggest that natural materials, such as gravel, be used to reduce impacts, this does not address the main concerns regarding loss of connectivity and damage to the function and structure of the wetland, and the impact to habitat. The Appellants also referred to previous impacts to the wetland, such as the construction of a gas line and disturbances by the LaSalles, which they maintain impacted connectivity. However, the Appellants' own expert testified that the wetland was healthy and functioning and that the Application would have negative impacts. Moreover, even if there have been prior works in or around the wetland, this does not justify worsening the situation.

[161] While Ms. Andresen, Ms. Good and Ms. Asadian are of the view that the impacts could be "minimized", this is of little consolation when the evidence also

indicates that this is one of the few relatively "intact", healthy functioning wetlands in the area. Further, I am unable to conclude on the evidence that the mitigation measures proposed are sufficient to satisfy subsection 16(1) of the *WSA* "to address those [significant adverse impacts] effects". In this case, the issue is one of habitat loss, not simply damage. While it may be possible to mitigate or compensate for loss in some cases, I am not satisfied that this can be done in this case. According to the evidence, this is the only bit of relatively undisturbed wetland in the vicinity.

[162] The Appellants have the burden of making their case on this appeal and have not done so. They have not satisfied me, on a balance of probabilities, that the Application for a driveway should be granted.

[163] Based upon all of the evidence, including evidence that was not before the Respondent when she made her decision, I agree that the Application should be refused.

DECISION

[164] In making this decision, the Panel has carefully considered all of the submissions and the evidence provided, whether or not specifically reiterated herein.

[165] For the reasons provided above, the appeal is dismissed.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

January 20, 2020