



# Environmental Appeal Board

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## DECISION NO. EAB-WSA-20-A004(a)

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

**BETWEEN:** William Di Pasquale **APPELLANT**

**AND:** Assistant Water Manager **RESPONDENT**

**BEFORE:** A Panel of the Environmental Appeal Board  
Darrell LeHouillier, Panel Chair

**DATE:** Conducted by way of written submissions  
concluding on September 11, 2020

**APPEARING:** For the Appellant: Sandra Ryan  
For the Respondent: Livia Meret, Counsel  
Ben Naylor, Counsel

## APPEAL

[1] William Di Pasquale (the "Appellant") appeals Conditional Water Licence no. 502112 (the "Licence"), issued by Jeff Nitychoruk, Assistant Water Manager (the "Water Manager"), Okanagan Shuswap Natural Resource District. The Water Manager works for the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry").

[2] The Licence authorizes the Appellant to divert groundwater from an aquifer (Aquifer 482) for irrigation, subject to certain terms and conditions. The Appellant objects to two Licence conditions that require him to install a flow meter or other measuring device, and to retain flow meter/measurement records for inspection. The Appellant submits that the Water Manager's statutory powers should not be interpreted as allowing him to impose those conditions, and the Appellant asks that those conditions be removed from the Licence.

[3] The Environmental Appeal Board (the "Board") has the authority to hear the appeal under section 105 of the *Water Sustainability Act* (the "Act"). Section 105(6) of the *Act* provides that, on appeal, the 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.<sup>1</sup>

[4] This appeal was heard based on written submissions.

## BACKGROUND

[5] The Appellant owns land in Beaverdell, British Columbia. He uses part of that land to grow crops. In 2003, a groundwater well was built on the property, to irrigate crops. The *Act* and the *Water Sustainability Regulation*, B.C. Reg. 36/2016, require users of groundwater wells that existed before February 29, 2016, and that are not used for domestic purposes, to apply for a water licence by March 1, 2022. The Appellant applied for a licence authorizing the diversion and use of 70,120 cubic metres of groundwater per year from the well.

[6] In March 12, 2020, a Water Stewardship Officer with the Ministry completed a Water Licence Technical Report on the Appellant's water licence application (the "Technical Report"), for the Water Manager's consideration. Among other things, the Technical Report states that the Appellant's well "appears to be drawing water from Aquifer 482 which is likely hydraulically connected to the West Kettle River" and is also likely hydraulically connected to Beaverdale Creek and Patch Creek. In addition, the Technical Report states that Aquifer 482 has a "low level of development relative to its productivity but has a high vulnerability to surface contaminants." The Technical Report notes that although the Appellant requested 70,120 cubic metres of groundwater per year for irrigation, the BC Agriculture Water Tool recommends an allocation of 67,640 cubic metres per year to support 8.618 hectares of irrigated forage. The Technical Report recommends that a licence be granted for that lower volume of water.

[7] Section 14(1)(f) of the *Act* states that the Water Manager may issue a water licence "subject to prescribed terms and conditions and on the terms and conditions the decision maker considers advisable".

[8] On March 16, 2020, the Water Manager issued the Licence authorizing diversion of 67,640 cubic metres of groundwater per year from Aquifer 482 at a rate not exceeding 150 gallons per minute (9,464 litres per second), from June 1 to September 30, to irrigate 8.618 hectares of the Appellant's land. The Licence states that the authorized works are a hydrant, sprinklers, an irrigation system, pipe, a pump, and a pumphouse, which have been constructed and are in use. The Licence has a precedence date of March 17, 2003, based on the date when the Appellant began using the well.

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<sup>1</sup> Under section 1 of the *Act*, "order" includes a decision.

[9] The Appellant objects to the following Licence conditions:

- k) The licensee shall install a flow meter or other measuring device to the satisfaction of an Engineer under the *Water Sustainability Act*.
- l) The licensee shall retain flow meter/measurement records for inspection upon request by an Engineer under the *Water Sustainability Act*.

[10] On June 8, 2020, the Water Manager sent an email to Sandra Ryan, the Appellant's representative in this appeal, in response to an inquiry about Licence conditions k) and l). That email states, in part, as follows:

The clauses [k) and l)] referring to metering, measuring, and recording came about in a regional policy document in 2016. The policy stated all new licences must have that language unless there was justifiable reasons not to. You are not the first person to voice your concerns; however, please consider the following:

- Though a flow meter or water meter is encouraged, it is not required. What we really need is large water users to be able to measure and keep records on their annual water consumption. There are multiple ways this can be done. They include keeping track of pivot use; being able to quantify based on nozzle size, quantity, and pressure; or keeping track of pump settings, to name a few.
- The intent is to get people aware of the water they use. Traditionally, folks have not measured or kept any type of records and this can present problems in verifying they are adhering to their licences, if required. Also, water users are expected to be more conservative with the resource if they are aware of how much water they use.
- The clauses say nothing about a need to submit the records. We do not wish to see them unless we ask for them.

[11] On June 15, 2020, the Board received the Appellant's Notice of Appeal. In it, the Appellant acknowledges that section 14(1)(f) of the *Act* grants the Water Manager the discretion to grant water licences on the terms and conditions he considers "advisable". The Appellant argues, however, that this discretion should not include the power to impose Licence conditions k) and l) because this would usurp the regulation-making authority of the Lieutenant Governor General in Council. Sections 131(2)(a), (b) and (c) of the *Act* empower the Lieutenant Governor General in Council to make regulations requiring licensees to install or use works for measuring, monitoring and testing the quantity of water diverted, and to calculate the quantity of water diverted or used, but no such regulations exist. The Appellant asks that the Board engage in "statutory interpretation" on the application of the word "advisable" in section 14(1)(f) of the *Act*, and order the removal of conditions k) and l) from the Licence.

[12] The Water Manager submits that the terms and conditions in the Licence should be confirmed, and the appeal should be dismissed. The Water Manager maintains that he has broad discretion under section 14(1)(f) of the *Act* to impose conditions in water licences, and conditions k) and l) are consistent with the Ministry's policy for this region and are appropriate in the circumstances. The Water

Manager further submits that the Appellant is not restricted to installing a flow meter; rather, he may use an “other measuring device” to measure how much water he is using. In support of his submissions, the Water Manager filed an affidavit with several exhibits.

## ISSUE

[13] Can the Water Manager, under section 14(1)(f) of the *Act*, require the Appellant to install a flow meter or other measuring device to the satisfaction of an Engineer under the *Act*, and to retain flow meter/measurement records for inspection upon request by an Engineer under the *Act*, and if so, should the Water Manager have done so in this case?

## DISCUSSION AND ANALYSIS

### *Summary of the Appellant's submissions*

[14] The Appellant submits that it is sensible to narrowly interpret the word “advisable” in section 14(1)(f) of the *Act* and curtail the Water Manager’s discretionary power. The Appellant refers to the statutory interpretation approach stated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 [*Rizzo*], at para. 21 (quoting E. Driedger, *Construction of Statutes* (2nd ed 1983), at 87):

...the words of an act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[15] The Appellant maintains that the *Act* provides a licensing scheme to regulate the non-domestic use of surface and ground water in British Columbia. The Appellants says the object of the *Act* is to protect water for current and future generations of British Columbians, and the *Act*’s purpose is to sustain: 1) water quantity; 2) water quality; and, 3) aquatic ecosystems.

[16] The Appellant submits that when looking at the scheme and the object of the *Act*, “there is really nothing that indicates the Water Manager’s inclusion of requiring a licensee to install a flow meter as a term and condition of a licence is problematic”, but disharmony arises when examining the consequential analysis and the intent of the Legislature.

[17] Regarding the Legislature’s intention, the Appellant says that many of the *Act*’s details were intended to be expounded in future regulations. For example, under sections 131(1)(a), (b) and (c) of the *Act*, the Lieutenant Governor in Council may make regulations on measuring and reporting water use by: requiring flow meters/measuring devices; or alternatively, using a mathematical formula. Specified persons may be exempt from both of those methods. The Province has publicly stated that it intends to make measuring and reporting regulations, in which case that will become a prescribed topic which decision-makers must follow. The Appellant submits that until those regulations are made, decision-makers should not guess what direction(s) the Province will take.

[18] The Appellant further submits that if the Legislature intended for decision-makers to have discretionary authority over the issue of flow meters, then the *Act*

would have been drafted differently. Section 14(1)(f) of the *Act* might have been drafted to state that a water manager may issue a licence “subject to prescribed terms and conditions, if any, and on terms and conditions the decision maker considers advisable in addition to the terms and conditions required under the regulations” [underlining in Appellant’s submissions]. Alternatively, the Legislature could have had a separate section in the *Act* dealing specifically with the decision-maker’s authority on measuring and reporting. The exclusion of such language in section 14(1)(f), and the absence of another enabling section, clearly implies that the Legislature never intended to allow decision-makers to take such action.

[19] In addition, the Appellant maintains that the consequences of not adopting such an approach to interpretation are:

- massive inconsistency regarding whether a flow meter is required, based on a comparison of licences from different areas of the Province, licences issued by different decision-makers, and even among licences issued by the same decision-maker;
- inequity for licensees, as some small volume users must install flow meters whereas some large volume users do not have to install flow meters;
- the terms and conditions of licences will be contrary to proposed regulations which may allow low volume users to divert water for livestock without a licence, and future regulations on water use measurement and reporting;
- imposing an expensive obligation on agricultural users who cannot afford it, at a time when food security is a concern (the Appellant estimates that a brass meter, accessory pieces and a qualified installer would cost \$5,000, and a plastic meter would be about \$500 to \$1,000 less but would be impractical in mountain conditions and extreme winter weather);
- inappropriately inserting an enforcement mechanism into a licence<sup>2</sup>, which circumvents procedural fairness and potentially imposes a heavy-handed sanction (i.e., the cost of installing a flow meter) on licensees who have not contravened any law;
- inappropriately giving an antiquated policy document the force of law; and
- causing decision-makers to make ridiculous and incoherent statements on the topic of water use measuring and reporting, because they lack the necessary guidance.

#### *Summary of the Water Manager’s submissions*

[20] The Water Manager submits that the *Act* has several purposes, as the Board held in *Vincent Smoluk v. British Columbia (Assistant Water Manager), Re*, 2020 CarswellBC 1290 [*Smoluk*]. The power to issue licences under section 14(1)(f)(i) embodies the *Act*’s purpose of monitoring and enforcing the rules applicable to

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<sup>2</sup> Under section 93(2)(f) of the *Act*, an Engineer may, for certain enforcement purposes, order the construction, installation and maintenance of a measuring or testing device in addition to any construction, installation or maintenance of measuring or testing devices required under the regulations. Under section 114(9) of the *Act*, a water manager may exercise any power or perform any duty given under the *Act* to an engineer or an officer.

water diversion and use (sections 22, 86 to 88, and 93 of *Act*), as well as allowing the beneficial use of water in accordance with authorizations and the legislation. In order to advance those purposes, section 14(1)(f)(i) must be understood as allocating broad discretion to decision-makers so they can react to changing situations and differing circumstances.

[21] The Water Manager argues that other provisions in the *Act* support the view that the Legislature intended to confer broad discretion to decision-makers under section 14(1)(f). For example, under section 114(9) of the *Act*, a water manager may exercise any power or perform any duty given to an engineer or an officer under the *Act*, including:

- a. order the construction, installation and maintenance of a measuring or testing device (section 93(2)(f));
- b. order the operation of, and provision of data from, a measuring or testing device (section 93(2)(g)); and
- c. order a person who is not subject to the regulations in relation to the measuring, testing or reporting to comply with specified regulations or to otherwise measure, test and report in relation to water usage or works (section 93(2)(h)).

[22] The Water Manager submits that those sections of the *Act* clearly confer broad discretion to make orders relating to measuring devices. This supports the proposition that the Legislature intended to allow designated officials to monitor and enforce rules for water diversion and use. Statutory decision-makers must have sufficient discretion to ensure the protection of water quality, quantity, usage, and preservation, and to respond to the individual facts of each licence application.

[23] The Water Manager says that although the discretion in section 14(1)(f) can be constrained by regulations, the decision-maker's power remains intact in the absence of such regulations. Without such regulations, the decision-maker's discretion is only limited by the purposes and language of the *Act*. The word "and" in section 14(1)(f) allows a decision-maker to issue a licence with any prescribed terms and conditions, as well as the terms and conditions that the decision-maker considers advisable. Further, proposed regulations that are not in force cannot restrict the discretion conferred on decision-makers under the *Act*. A narrower interpretation of section 14(1)(f) would lead to the absurd result that the absence of regulations prescribing licence requirements would prevent decision-makers from advancing the *Act's* purpose of monitoring and protecting water resources.

[24] In support of those submissions, the Water Manager cites *Cominco Ltd v. Northwest Territories (Water Board)*, [1991] 3 F.C. 177 [*Cominco*]. In that case, the Federal Court – Appeal Division interpreted similar language regarding the issuance of water licences under section 12(1) of the *Northern Inland Waters Act*, RSC 1985, c. N-25. That Act empowered the Governor in Council to make water quality regulations, but no such regulations existed. The Court held at para. 9:

Under subsection 12(1) of the Act, "a board may attach to any licence issued by it any conditions that it considers appropriate". In my opinion, the only limitation that is imposed on that general power by the words used in the rest of the subsection is that, if and when water quality standards are

prescribed pursuant to paragraph 29(e), the conditions that the [statutory decision-maker] imposes in relation to the types and quantity of waste that may be deposited in water must be based on those standards. If, as in this case, no such standards have been prescribed, the power of the [statutory decision-maker] to impose appropriate conditions remains intact. To adopt another interpretation of subsection 12(1) would lead to the absurd result that the failure of the Governor in Council to make regulations prescribing water quality standards would prevent the [statutory decision-maker] from attaining their objects as described in section 10 of the Act.

[25] Regarding the word “advisable” in section 14(1)(f) of the *Act*, the Water Manager submits that the Board previously interpreted that word in the context of the power to issue permits under section 14 of the *Environmental Management Act*. For example, in *Rolf Bettner v. Director, Environmental Management Act*, (Decision No. 2005-EMA-007(a), March 20, 2006) [*Bettner*], the Board held at page 18 that the word “advisable” indicated a broad and subjective discretion to impose requirements for the protection of the environment:

... Section 14 states that a director “may issue a permit authorizing the introduction of waste into the environment subject to requirements for protecting the environment that the director considers advisable...” [underlining added]. That language gives directors broad discretion in deciding whether to issue a permit .... Thus, a director may issue a permit subject to the requirements for protecting the environment that he or she concludes, based on all of the relevant information as well as his or her professional knowledge and experience, are advisable. ...

[26] The Water Manager submits that section 14(1)(f) of the *Act* should similarly be interpreted as granting decision-makers wide discretion to utilize their subjective knowledge and expertise when determining “advisable” terms and conditions.

[27] The Water Manager’s affidavit refers to the Thompson Okanagan Water Measuring Policy (the “Policy”), and a copy of it is attached to his affidavit. The Water Manager attests that the Policy was created as guidance, to advance water management in a chronically water short region and to help address future impacts to water availability. The Water Manager notes that that the Appellant’s land is located immediately adjacent to the West Kettle River, Beaverdell Creek and Patch Creek, and that Aquifer 482 (to which his well is connected) is likely hydraulically connected with these streams. The Water Manager states that the West Kettle River and its tributaries have a history of chronic late summer low water flows, when concerns arise over meeting environmental flow needs requirements in these streams and their aquatic ecosystems. A Water Allocation Restriction has been in place with respect to this water system since 1993. Water Allocation Restrictions are alerts to Ministry staff about current or potential water allocation concerns related to particular water sources.

[28] In his affidavit, the Water Manager also notes that the Appellant’s licence application requested 70,120 cubic metres of water per year, and the Appellant cited the BC Agriculture Water Calculator as having helped him arrive at that number. However, Ministry staff calculated a lower volume based on that calculator, as stated in the Technical Report. The Water Manager submits that the Appellant’s

estimate suggests that he may not know how much water he uses to irrigate his land, the very issue that water use monitoring is designed to prevent or mitigate. A requirement to measure and record actual water consumption supports efforts to ensure that the Appellant is licensed appropriately as a “transitioning groundwater user”, and to protect water resources for all British Columbians into the future.

[29] In addition, the Water Manager says the phrase “or other measuring device” in condition k) of the Licence is intended to provide alternatives to a flow meter, should it prove to be too burdensome to the licensee. There are multiple means, including some which may already exist as part of a licensee’s works, for a licensee to measure their water use. Some methods rely on the specific characteristics of an irrigation system, mathematical calculations, or a combination of both. It is impractical to list them all in the Licence condition. The broad wording of condition k) takes this into account, and grants discretion to the Engineer to determine the efficacy of any proposed method.

#### *Summary of the Appellant’s reply submissions*

[30] In reply, the Appellant submits that Water Manager’s submissions focus more on the purposive and/or schematic analysis of statutory interpretation, than a consequential analysis. The Water Manager’s submissions ignore the inconsistency in the terms and conditions of licences around the Province, and the consequential absurdity this creates. The Appellant asks why licensees in the same circumstances are being treated differently regarding flow meters and other measuring devices?

[31] In addition, the Appellant submits that a “deeper look” at the scheme and purposes of the *Act* should demonstrate that although they don’t necessarily preclude a decision-maker from ordering a licensee to install a flow meter (or other measuring device), they do not especially support such an order either. Also, the Water Manager has failed to consider alternate means of accomplishing a purpose.

[32] The Appellant notes that while some areas of the Province experience droughts, according to the Technical Report, the demand on Aquifer 482 is relatively low compared to its productivity. Further, the Policy is an undated, unauthorized, unendorsed policy document, and it is unclear whether it was ever intended to apply to the Kootenay Region, in which Aquifer 482 is found, according to a government factsheet<sup>3</sup> the Appellant submitted to the Board.

[33] Although the Water Manager suggests that “other measuring device” may include using a method of mathematical calculation, the Appellant submits that a measuring device is a physical object, not a method. Also, condition k) states that the Appellant “shall install” a flow meter or other measuring device, which means the object must be installed, but a mathematical calculation cannot be installed. The Appellant acknowledges that other measuring devices could include objects such as an orifice plate, a flume, or a weir, but some of these are more appropriate for measuring surface water than groundwater.

[34] The Appellant agrees that the *Act* has many purposes which include measuring, monitoring and reporting water use, and protecting water for the citizens of British Columbia. Further, the Appellant submits that those purposes are

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<sup>3</sup> <https://apps.nrs.gov.bc.ca/gwells/aquifers/482>



not necessarily in tension with the idea of requiring flow meters (or other measuring devices); in fact, they favour the use of flow meters (or other measuring devices). However, the disputed conditions of the water licence raise a tension with another purpose of the *Act*: supporting agriculture. For example, the Appellant notes that under section 22 of the *Act*, when water restrictions are in place there is a precedence or ranking of water use rights. At the top of this list is drinking water for individuals and water for home gardens and pets (through domestic use and municipal waterworks), followed immediately by irrigation for agriculture. The Appellant maintains that this purpose is about ensuring that agricultural producers have the right to use water, and protecting food security for British Columbians.

[35] The Appellant submits that even if enforcement or monitoring could be considered a purpose of the *Act*, the question becomes: can this purpose be accomplished in way that does not involve the installation of costly flow meters (or other measuring devices) and thereby harms agriculture? In the Appellant's view, the best way would be to ask to see a licensee's energy bills for their irrigation system.

[36] In addition, the Appellant submits that the ultimate discretionary power of a decision-maker in the *Act* is part of the 30-year licence review in section 23(7)(c). On reviewing a licence under section 23, subsection (7)(c) states that the decision-maker may amend the terms and conditions of the licence to require the licensee, for the more efficient use or conservation of water, to "construct, alter, install, replace, repair, maintain, improve, seal, deactivate, decommission or remove any works". The Appellant submits that if such a review is not carried out carefully or there is not funding for producers in agriculture to support such measures, it could cripple agriculture. The Appellant notes that section 23(7)(c) has nearly identical language to section 93(2)(d) (i.e., the power of an engineer and a water manager to order the construction, alteration, installation, replacement, repair, maintenance, improvement, sealing, deactivation, decommissioning or removal of any works). The Appellant asks: if the legislature intended for the decision-maker to have this power over agriculture at any time, why give them this specific power in the 30-year review provision? Such an interpretation would render the 30-year review superfluous.

[37] The Appellant submits that *Cominco* can be distinguished based on differences in the applicable legislation. The Appellant says that *Cominco* involved legislation authorizing discharges into streams, and did not involve legislative intents that were in tension, whereas the present appeal involves tension between the *Act's* purposes of supporting agricultural use of water versus those associated with requiring licensees to install flow meters.

[38] Regarding licences from around the Province, the Appellant reiterates that whether they contain the clause ordering a water meter (or other measuring device) is unrelated to what district they are in (with the exception of Vernon), the quantity of water needed, the water use, the aquifer, or drought conditions. The inconsistencies in the licences embody the concept of irrational distinction.

[39] Regarding the Water Manager's submission that the Appellant's request for 70,120 cubic metres of water suggests that he is unaware of how much water he is using, the Appellant states that he used the BC Agriculture Water Calculator on

February 18, 2019. However, when the Ministry calculated the Appellant's water needs, they used an updated version of the calculator that is less generous in the water quantity estimates. The Appellant maintains that he should not be faulted for a change in the calculator's software.

*The Panel's findings*

[40] In *Smoluk*, at para. 42, the Board stated as follows regarding proper interpretation of the *Act*:

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

[41] I agree with and adopt that approach. It is consistent with the approach adopted in *Rizzo*, and in the Parties' submissions in the present appeal.

[42] In paras. 43 to 44 of *Smoluk*, the Board stated as follows regarding the *Act's* purposes:

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

... This appeal seeks to clarify the appropriate balance between individual rights and the government's roles in protecting water resources. The precise wording of the legislation, and its context, takes particular significance in these circumstances; however, there is no singular overarching intent that supports a particular outcome. The *WSA* is, at its heart, a statute aimed at balancing competing interests.

[43] Turning to the specific section of the *Act* that lies at the heart of this appeal, section 14(1)(f)(i) of the *Act* states that the Water Manager "may, in accordance with this Act and the regulations... issue to the applicant, subject to prescribed terms and conditions and on the terms and conditions the decision maker considers advisable" one or more water licences. I find that the word "may" indicates that the Water Manager has discretion when deciding whether to issue water licences. The parties agree that the Water Manager must exercise this discretion in accordance with the language in section 14(1)(f), and the scheme and purposes of the *Act*.

[44] One of the *Act's* purposes is to regulate the diversion and use of water through a scheme of authorizations, including water licences. With respect to groundwater specifically, section 5(2) of the *Act* vests to the government the property in, and the right to the use, percolation and flow of, groundwater, except insofar as private rights have been established under authorizations (except for

domestic users of groundwater, who are not required to have a licence, subject to the regulations). Groundwater is a finite resource that is regulated in order to ensure it is used in a sustainable manner, taking into account the precedence of uses and environmental considerations established in the *Act*. In fact, certain environmental considerations generally take precedence over licensed water use.

[45] For example, section 22(7) of the *Act* ranks the different types of water uses according to their precedence, and section 22(9) states that the critical environmental flow threshold for the stream has precedence over the rights under any authorization issued in relation to the stream or a hydraulically connected aquifer. While irrigation use is ranked only below domestic use and waterworks use in section 22(7) of the *Act*, section 22(9) clearly indicates that irrigation use of water from a stream, or an aquifer that is hydraulically connected to that stream, is subordinate to maintaining the critical environmental flow threshold for the stream. Similarly, under section 15(1) of the *Act*, a decision-maker must consider the environmental flow needs of a stream when deciding whether to issue a licence in relation to the stream or an aquifer that the decision-maker considers is reasonably likely to be hydraulically connected to that stream.

[46] Consistent with the *Act*'s objectives of regulating groundwater use and protecting the environmental flow needs of streams that are hydraulically connected to aquifers that are also licensed water sources, groundwater licensees should be accountable for how much groundwater they divert and use. One way to do that is to require licensees to measure and report how much groundwater they are diverting and using, as a condition of their licence. I find that requiring licensees to measure how much water they are diverting and using, and to keep records of their water use, is generally consistent with the *Act*'s regulatory and environmental objectives as well as the *Act*'s scheme of authorizations. Also, requiring irrigation licensees to measure and report how much water they are using is not, in itself, contrary to supporting their use of water to irrigate crops; rather, it helps to ensure that finite water resources are being used in a manner that is sustainable for the long-term benefit of all water users while also protecting environmental flow needs.

[47] Reading section 14(1)(f) in the context of the *Act*, and considering the *Act*'s purposes and scheme for authorizing water diversion and use, I find that the discretion to issue a licence subject to the terms and conditions that the Water Manager "considers advisable" should be interpreted broadly. This discretion needs to be broad so that decision-makers have flexibility to meet the *Act*'s regulatory and environmental objectives, and to craft licence terms and conditions that are responsive to the varied circumstances of water resources and users in different parts of the Province. I find that the Board's interpretation of the word "advisable" in *Bettner*, regarding the permitting scheme in section 14 of the *Environmental Management Act*, applies similarly to that word in section 14(1)(f) of the *Act*: the word "advisable" indicates a broad and subjective discretion to impose licence terms and conditions that further the *Act*'s purposes and objectives, including protecting environmental flow needs over and above the needs of water licensees, based on all of the relevant information as well as the decision-makers professional knowledge and experience.

[48] I further find that the discretion in section 14(1)(f) is not presently limited by either the current absence of, or the future potential for, regulations requiring water users to install specified works or use specified formulae for measuring the quantity of water diverted and used. The Appellant is correct that sections 131(1)(a) and (b) of the *Act* state that the Lieutenant Governor in Council “may” make regulations requiring water users to “install or use specified works for the purposes of measuring, monitoring and testing” the quality or quantity of water diverted, and “to calculate the quantity of water diverted or used in accordance with a prescribed formula”. However, I find that the word “may” indicates that this regulation-making power is discretionary; in other words, such regulations may or may not be made. No such regulations are presently in force. Only if, and when, such regulations come into force can they limit a decision-maker’s discretion to impose the terms and conditions in a water licence.

[49] I have also considered the Legislature’s intent in using the word “and”, underlined below, in section 14(1)(f):

the decision maker may, in accordance with this Act and the regulations, ... issue to the applicant, subject to prescribed terms and conditions and on the terms and conditions the decision maker considers advisable... one or more conditional licences or final licences, or ...

[50] I find that the word “and” is used to mean “as well as” or “in addition to”. The phrase “subject to prescribed terms and conditions” does not limit the Water Manager’s discretion unless there are regulations in effect that apply and expressly limit that discretion. For example, section 19 of the *Water Sustainability Regulation* prescribes a term and condition of a licence issued in respect of a sensitive stream. Thus, the prescribed term and condition must be included in such a licence. However, the absence of regulations prescribing other types of terms or conditions cannot logically limit or restrict a Water Manager’s discretion to impose terms and conditions that they consider advisable, as long as the terms and conditions imposed by the Water Manager are consistent with the *Act*’s purposes and objectives.

[51] This interpretation is supported by the principles stated in *Cominco*. Although the Appellant attempts to distinguish *Cominco* based on differences in the legislation, I find that the legislation in both that case and the present case involves a scheme of authorizations to regulate human activities that can impact water resources. I find that the legislation is similar enough that general principles stated in *Cominco* apply equally to the present case. If and when regulations are made requiring licensees to install specified works or use specified formulae for measuring the quantity of water diverted and used, the conditions that decision-makers impose in water licences must be based on those requirements. If, as in this case, no such requirements have been prescribed, a decision-maker’s power to impose appropriate licence terms and conditions remains intact. To adopt another interpretation would lead to the absurd result that the Lieutenant Governor in Council’s delay or decision not to make such regulations would prevent decision-makers from attaining some of the objects of the *Act*. These circumstances would be particularly absurd, given that the *Act* only allows such regulations to be made; it does not require them.

[52] The fact that requirements with respect to flow meters or other measuring devices can be imposed under compliance and enforcement processes or in 30-year licence reviews under the *Act* does not mean that such requirements cannot also be imposed when a licence is issued. There could be fact-specific reasons to do so when a licence is issued. For example, in the case of a groundwater licence for irrigation use, there could be concerns about: maintaining environmental flow needs in streams that are likely hydraulically connected to the aquifer that is the water source; seasonal droughts affecting domestic water users on streams that are likely hydraulically connected to the aquifer (as domestic water users have priority over irrigation users under the *Act*); or, the amount of water diversion from the aquifer relative to its productivity. Also, aside from concerns about groundwater supply and environmental flow needs, requiring licensees to measure and record how much water they divert and use enables both the licensee and the Ministry to ensure that only the licensed amount of water is being used. As I have already stated above, groundwater is a finite resource, and it is consistent with the *Act's* purposes that licensed water users, including those using water to irrigate crops, should be accountable for how much of groundwater they are diverting and using.

[53] The next question is whether Licence conditions k) and l) are appropriate in the circumstances of this case. Is a requirement to install a flow meter or other measuring device, and keep records of water use, advisable for the protection of Aquifer 482 and any streams that it is likely hydraulically connected to?

[54] Although the Water Manager relied on the Policy as guidance that supports the imposition of Licence conditions k) and l), the evidence indicates that Aquifer 482 is in the Grand Forks Water District within the Kootenay Region. Aquifer 482 is not in the Thompson Okanagan District, for which the Policy appears to have been intended. Thus, the Policy appears to have little relevance to the Licence. However, there may be other reasons that support including conditions k) and l) in the Licence.

[55] According to the Technical Report, the demand on Aquifer 482 is presently relatively low compared to its productivity. Thus, the amount of water being diverted from Aquifer 482 by groundwater users, relative to the amount of water that is typically available in the Aquifer, does not seem to be a concern presently. However, there is evidence that Aquifer 482 is likely hydraulically connected to the West Kettle River, Beaverdell Creek and Patch Creek, which have a history of chronic low water flows in the late summer, when there may be concerns about sustaining the environmental flow needs in those streams. Although low stream flows may not have occurred where the West Kettle River flows past the Appellant's property, this is still a relevant consideration since Aquifer 482 is likely hydraulically connected to this River and its tributaries. This means that groundwater from Aquifer 482 likely supports or is supported by stream flow in this River and its tributaries. In either case, whether due to diminished recharge of the surface water or increased recharge from those sources, this will have a negative impact on the flow within the River and its tributaries during low flow periods. This is a relevant consideration given the importance that the *Act* places on protecting environmental flow needs.

[56] I also find that the one-time expense associated with installing a flow meter or other measuring device has not been shown to have the severe detrimental effects on agricultural production and food security contended by the Appellant. Further, as I have stated above, requiring irrigation licensees to measure and report how much water they are using is not, in itself, contrary to supporting their use of water to irrigate crops. In fact, it helps to ensure that finite water resources are being used sustainably for the long-term benefit of all water users while also protecting environmental flow needs.

[57] That said, both parties seem to take the position that a flow meter is unnecessary, and that other measuring devices (that may involve associated mathematical calculations) may be sufficient.

[58] In *District of Lake Country v. Assistant Regional Water Manager* (Decision Nos. 2012-WAT-017(a) to 030(a), November 13, 2013), the Board considered several water licences that included a condition requiring the licensees “to install a flow metering device to record the volume of water diverted under this licence”, and provide a written record of total annual water use for each year. On appeal, some of the licensees argued that installing a flow meter could be impractical because of cost, the possible requirement of electricity, and need for winterizing the meter, and that there were other options besides a flow meter. At para. 134, the Board held that the installation of a flow meter “may not be practical, and that there may be more practical ways to measure and record water usage, such as recording each time the licensee fills his/her calibrated water storage tank.” The Board decided to vary the licence condition, to give licensees more flexibility in how they measured their water use. Thus, the Board varied that the licence condition so that it stated the licensees were required “to measure and record the volume of water diverted under this licence” and provide a written record of annual water use.

[59] I agree with and adopt the Board’s approach in that case. I find that this approach strikes an appropriate balance between the *Act’s* objectives and purposes that are served by requiring licensees to measure and record how much water they are diverting and using, while allowing licensees flexibility to determine a practical and cost-effective method for doing so, subject to the approval of an Engineer.

[60] Accordingly, I order that Licence conditions k) and l) are varied to state as follows:

- k) The licensee shall use a measuring device and/or method of calculation to measure and record the volume of water diverted under this licence, to the satisfaction of an Engineer under the *Water Sustainability Act*.
- l) The licensee shall retain records of the water volume diverted under this licence for inspection upon request by an Engineer under the *Water Sustainability Act*.

## DECISION

[61] In making this decision, I have considered all the evidence and submissions before me, whether or not specifically referred to herein.

[62] For the reasons provided above, Licence conditions k) and l) are varied as ordered above.

[63] The appeal is granted, in part.

“Darrell LeHouillier”

Darrell LeHouillier, Panel Chair  
Environmental Appeal Board

October 16, 2020