



Environmental Appeal Board

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DECISION NO. EAB-WSA-20-A008(a)

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

BETWEEN:	Geoffrey Fox	APPELLANT
AND:	Assistant Water Manager	RESPONDENT
AND:	Brad McArthur	PARTICIPANT
BEFORE:	A Panel of the Environmental Appeal Board Daphne Stancil, Panel Chair	
DATE:	Conducted by way of written submissions concluding on June 30, 2021	
APPEARING:	For the Appellant: Self-represented For the Respondent: Micah Weintraub, Counsel For the Participant: Self-represented	

APPEAL

[1] Geoffrey Fox appeals an order (the "Order") made on September 25, 2020, under section 93 of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "WSA"). An Assistant Water Manager, Pat Lapcevic, (the "Respondent") who works at the West Coast Office of the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry") issued the Order.

[2] The Order alleges that the Appellant and Christine Fox made unauthorized changes in and about a stream located on property they own, contrary to the WSA. The Order directs the Appellant and Ms. Fox to take certain action to remediate the unauthorized changes to the stream.

[3] With respect to appeals, section 105(6) of the WSA provides that the Environmental Appeal Board (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.

[4] The Appellant asks the Board to reverse the Order. The Appellant submits that the changes in and about the stream were allowed under certain legislation, and that no further remedial steps are necessary with respect to any changes made

to the stream. Further, the Appellant asks the Board to consider the undue financial burden of complying with the Order.

BACKGROUND

Overview of the Regulatory Scheme

[5] Section 11(2) of the *WSA* provides that changes in and about a stream may only be made in accordance with the terms and conditions of a change approval, the regulations, the terms and conditions of an authorization, or an order. It is an offence under section 106(2)(b)(ii) of the *WSA* to make changes in and about a stream without lawful authority.

[6] The phrase "changes in and about a stream" is defined in section 1 of the *WSA* as:

- (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;

[7] A change approval may be issued under section 11(1) of the *WSA*. In some circumstances, the *Water Sustainability Regulation*, B.C. Reg. 36/2016 (the "*Regulation*") authorizes a person to make a change in and about a stream. A person does not need to obtain an approval under section 11(1) of the *WSA* to make a change that is authorized under section 39 of the *Regulation*. Section 38(1) provides that a person proposing to make a change authorized under section 39 (other than certain changes that do not apply to the present appeal) must notify a habitat officer of the particulars of the proposal at least 45 days before beginning the authorized change, and obtain from a habitat officer a statement of terms and conditions on which the authorized change can proceed. Section 38(4) states that if a person who has given notice under section 38(1) is not contacted by a habitat officer within 45 days after the notice is received by a habitat officer, the person may proceed with the authorized change.

[8] The *WSA* and the *Regulation* also establish the rules for the diversion and use of water from a stream or an aquifer. Section 6(1) of the *WSA* states that, subject to a few exceptions, a person must not divert water from a stream or an aquifer unless the person holds an authorization for the diversion or use, or unless the diversion or use is authorized under the regulations. Section 33(2) of the *Regulation* states that a person is exempt from the requirement in section 6(1) of the *WSA* to hold an authorization to divert water from an aquifer using agricultural drainage works, if certain requirements are met. Section 33(1) states that, in section 33, "agricultural drainage works" means ditches or subsurface drain pipes or other conduits used to drain surface runoff or to divert water from an aquifer to lower the water table to improve the productivity of agricultural land.

Events Leading to the Order

[9] The Appellant and Ms. Fox are the registered owners of property that is legally described as Lot 1, District Lot 4, Cameron District of Plan VIP7646 (the "Property"). The Property is about 9.15 acres in size and is within the Agriculture Land Reserve (the "ALR"). The Property is located on the north side of Highway 4, on the west side of its intersection with Hilliers Rd. The community of Whiskey Creek is about two kilometres further west along Highway 4 on the south side.

[10] The Appellant and Ms. Fox viewed the Property in August 2019, purchased the Property in the fall, and took possession of it in December 2019. They plan to develop a vineyard and winery on the Property. The Property was treed throughout at the time of purchase.

[11] An upstream portion of Foch Creek (the "Creek") runs through the Property. The Creek, which is about 2.7 kilometres long, runs in a west/north-west direction through a rural area, and along and under several transportation corridors, before turning south-west to empty into the confluence of Crocker and Whiskey Creeks. Fish, including trout, may be found in the lower reaches of the Creek where it enters those creeks. The Creek's flow is seasonal. The portion of the Creek on the Property fills with water during periods of rain, and it dries up as rain diminishes during the spring and summer.

[12] The Appellant began to clear the Property in December 2019 by harvesting trees and removing bushes and brush. This continued into January 2020; throughout this time, the Appellant experienced heavy rainfall at the Property. He used heavy equipment to clear the land. The Appellant noted the presence of water on the Property, and he used an excavator to make a channel to collect the water and direct the water flow across the Property.

[13] On January 7 and 8, 2020, a Ministry Natural Resource Officer (the "NRO") attended the Property after receiving a complaint regarding the condition of the Creek from a resident whose property is downstream from the Property. The complaint linked the condition of the Creek and the Appellant's land clearing activities. The NRO viewed the Creek upstream and downstream of the Property, visited the Property, gathered information, discussed water flow across the Property with the Appellant, advised the Appellant of the presence of the Creek, and advised the Appellant not to further disturb the gully on the Property where water collected. The NRO prepared an inspection report based on the visits.

[14] Assistant Water Manager John Baldwin ("AWM Baldwin"), a Ministry employee at that time, reviewed the NRO's inspection report. On January 16, 2020, AWM Baldwin wrote to the Appellant¹ and provided copies of the inspection report and a map prepared by the Regional District of Nanaimo. The map shows the Creek running for a distance of approximately 300 metres across the Property, from the southeast corner to the north, paralleling the eastern border of the Property for several metres, and then turning to the west and exiting the Property about one third of the distance along its western boundary. AWM Baldwin advised the

¹ The address for the Appellant on the correspondence is a mailing address in Qualicum Beach.

Appellant that the *WSA* applies to land within the ALR. AWM Baldwin stated that the Appellant required an authorization under the *WSA* for the clearing and draining work undertaken on the Property because it included work in the Creek, resulting in changes in and about a stream. AWM Baldwin advised that making changes in and about a stream without authorization was an offence and that the Appellant may be required to stabilize the Creek after making any changes. AWM Baldwin referred the Appellant to section 11 of the *WSA* and advised the Appellant to acquire an authorization under this provision before undertaking any further work in or about the Creek. AWM Baldwin suggested that the Appellant flag the Creek and avoid it when doing any further work on the Property.

[15] On January 20, 2020, the NRO issued a violation ticket to the Appellant based on the inspection report dated January 8, 2020.²

[16] A Ministry Habitat Officer ("HO") and AWM Baldwin attended the Property on February 6, 2020, and advised the Appellant to prepare and submit a plan of property development and stream protection.

[17] In response, on February 12, 2020, the Appellant emailed the HO from his business email address providing an update of his activities with respect to the Creek including the placement of logs along the banks of the Creek bed and the ordering of materials for a silt fence. He attached a line drawing titled "Fox'n Rhino Vineyards Site Plan", briefly described proposed plantings, and disclosed information regarding the installation of a clear span bridge.

[18] On February 13, 2020, AWM Baldwin replied by email addressed to the Appellant, but made an error in the Appellant's business email address by omitting one key stroke from the address. The email included feedback regarding the inadequacy of the plan the Appellant submitted on February 12, 2020 as a basis for an approval for making changes in and about a stream which would be required for works in and about a stream. The email also advised that the Appellant should provide a plan to manage sediment released from the Property into the Creek and that revegetation of the stream bank would be necessary. It also provided direct internet links to resources available from the Ministry of Agriculture, Food and Fisheries regarding environmental farm planning and making changes in and about a stream. The email encouraged the Appellant to contact the Provincial Agricultural Land Commission regarding the plan.

[19] On February 18, 2020, the HO viewed the Property from a location on Hilliers Rd., and noted that the Appellant had not done further work in the Creek or adopted mitigation measures since February 6, 2020.

[20] On April 23, 2020, AWM Baldwin attended the Property and took numerous photographs.

[21] On May 30, 2020, the HO viewed the Property and the Creek again, and observed no changes in the Creek. On June 8, 2020, the HO revisited the Creek

² According to the NRO's June 15, 2021 affidavit, the court proceedings related to this violation ticket and those issued on August 26 and September 9, 2020 are "on hold" until the appeal process concludes.

where it leaves the Property, and commented in his field notes that the water in the Creek was "clear".

[22] In July 2020, the Appellant continued to develop a defined channel for the Creek by installing a culvert where the Creek enters the Property under Highway 4, in the southeastern corner of the Property, and installing the footings for a clear span bridge for vehicle use about mid-way along the length of the Creek on the Property. The Appellant continued work on the Property into August 2020, using heavy equipment for contouring the Property and channelizing the Creek.

[23] On August 26, 2020, the NRO drove by the Property and stopped to advise the Appellant to keep heavy equipment out of the Creek. Later that day, the NRO noted new equipment tracks in the area he identified as the Creek channel. The NRO prepared an inspection report and issued a violation ticket to the Appellant.

[24] The next day, August 27, 2020, the Ministry delivered a stop work order dated August 26, 2020, which directed the Appellant to cease work in and about the Creek on the Property, and the NRO advised the Appellant of the basis for the stop work order.

[25] The HO attended the Property on September 4, 2020, and observed the presence of equipment and recent disturbance in and about the Creek. The NRO attended the Property the same day and issued two violation tickets to the Appellant. The NRO completed service of the tickets on September 9, 2020.

[26] In mid-September 2020, the Appellant planted a cover crop (winter rye) on the Property adjacent to the Creek and distributed cut hay along the banks of the Creek channel.

The Order

[27] On September 25, 2020, the Respondent issued the Order and delivered it to the Appellant the same day. The Order directs the Appellant and Ms. Fox, as the owners of the Property, to:

1. Retain a qualified environmental professional to develop a plan for immediate implementation, that addresses the risk of sedimentation from the unauthorized changes in and about Foch Creek to downstream values. This work is to be completed **no later than October 16, 2020** and **must** be overseen by an environmental monitor.
2. Have the qualified environmental professional produce a plan to address the long-term remediation of Foch Creek in order to stabilize its banks and reduce erosion. Submission of this plan is to be received to this office **no later than November 30, 2020** for review and approval by this office (habitat officer).
3. Upon approval of the long-term remediation plan, conduct the required work within Foch Creek and submit a final report within 14 days of completion, documenting the remediation work completed on-site.

[Emphasis in original]

[28] On October 9, 2020, the Appellant wrote to the Respondent and asserted that the Property owners were entitled under "ALC regulations" to drain the

property and were exempt under the "WSA Regulations" from having to hold an authorization for such work. He then cited sections 33 and 38 of the *Regulation*.

[29] The Respondent replied on October 15, 2020, advising that the Order remained in effect, outlining expectations for the Appellant's compliance with the Order, and referring the Appellant to a Regional Dam Safety Officer ("RDSO") for assistance.

[30] The Appellant responded on October 16, 2020, advising the Respondent of his intention to appeal the Order.

Appeal of the Order

[31] On October 19, 2020, the Appellant appealed the Order.

[32] In his Notice of Appeal, the Appellant asserts that because the Property is in the ALR, the Property owners did not require an approval or authorization under the WSA for works undertaken to drain the Property for agricultural use. The Appellant maintains that the changes on the Property were authorized under section 33 of the *Regulation*, and he required no further approvals. In addition, he says a habitat officer did not, after receiving notice of the proposed plan for changes, contact the Property owners within the 45-day period specified by section 38 of the *Regulation*, and therefore, the owners were entitled to proceed with the changes.

[33] Furthermore, the Appellant says there is no need to carry out the Order because he has already taken steps to protect the stream from sedimentation, and greater harm to water quality is posed by discarded asphalt in the Creek and the pollutants from roadways that drain into it. He maintains that carrying out the requirements of the Order will be an unnecessary waste of time and resources.

[34] The Respondent submits that the ALR designation of the Property does not exempt the Property owners from the requirement to acquire a regulatory or other authorization before making changes in and about a stream, in this case the Creek. The Respondent says section 33 of the *Regulation* does not apply in this case because it applies only to water diverted from "an aquifer". If section 33 of the *Regulation* did apply, it does not exempt a person from the requirement to hold an authorization to divert water from a stream. The Respondent also submits that the Property owners have not met the requirements for authorization under section 39 of the *Regulation*. Further, the Respondent submits that the directions in the Order are consistent with the standards required by the WSA when making changes in and about a stream, and allow for site specificity. The Respondent asks the Board to confirm the Order in substance, and to set new dates for the directions in the Order.

Events Since the Appeal of the Order

[35] On November 9, 2020, the Appellant requested that the Board order a stay of the Order, pending the Board's final decision on the merits of the appeal.

[36] On November 23, 2020, the Respondent consented to a stay of the Order, pending the outcome of the appeal. Accordingly, in a letter dated December 23, 2020, the Board issued a stay of the Order.

[37] On November 26, 2020, Brad McArthur (the "Participant") wrote to the Board outlining his concerns about the Appellant's clearing and Creek channeling activities, and their impacts to his property and the Creek. He owns property downstream of the Property, and he asked to be a participant in these proceedings. On December 24, 2020, the Board granted him participant status. The Board offered him an opportunity to provide a written submission on the appeal.

[38] The Panel heard this appeal based on written submissions. After the Appellant submitted his final reply, the Respondent filed an objection in relation to portions of the Appellant's final reply. The Respondent said the Appellant inappropriately raised new issues in the final reply. The Respondent asked the Board to refuse to: consider new evidence provided in the reply; consider any new arguments in the reply; and, direct the Ministry to take remedial action in connection with the Creek.

[39] After the Appellant responded to the Respondent's objection, the Board advised the parties that this Panel would address the Respondent's objections in the final decision.

ISSUES

[40] The general question raised by this appeal is whether the Order should be reversed as requested by the Appellant. To decide that question, I have considered the following issues, raised by the parties in their submissions:

1. Does the Appellant's reply submission include new evidence, arguments, and requests for remedies that I should not consider when deciding the merits of the appeal?
2. Does the designation of the Property as ALR land and/or the application of section 33 of the *Regulation* enable the Appellant to undertake channelling and other work in the Creek where it flows through the Property without a Ministry approval or authorization?
3. Does section 39 of the *Regulation* apply, eliminating the need for the Appellant to apply for and obtain an approval under section 11 of the *WSA* to make changes to the Creek where it flows through the Property?
4. If the Appellant was not authorized to make changes in and about the Creek where it flows through the Property, is the Order appropriate in the circumstances?

OVERVIEW OF THE PARTIES' SUBMISSIONS AND EVIDENCE

Appellant's submissions and evidence

[41] The Appellant states he was unaware of the Creek on the Property until he began clearing it to develop a vineyard and winery in late December 2019. He discovered water at the base of the trees and bush covering the Property. He commented in his May 26, 2021 submission to the Board (the "May Submission"):

Once the property was cleared it was apparent that when there was water in the Creek, it was not contained in a defined channel, but traversed from east to west through a wide low-lying swath of land.

[42] The Appellant describes the work he undertook in connection with the Creek as follows:

When the Creek became totally dry in July, 2020, works were undertaken to create a defined Creek channel similar to those that exist on farm fields both upstream and downstream from the property. These works included a culvert crossing where the Creek entered the property, and a small bridge located near the center. This bridge was supported on concrete lock blocks buried above the top of the Creek banks. A water line was also run to the well that had been dug on the south side of the Creek³. All this work was carried out by a highly qualified machine operator with years of experience, including constructing fish hatcheries and working in active stream channels.

[43] The Appellant advises that no further work in the Creek channel took place after August 27, 2020, although he acknowledges that he installed a double silt fence in the Creek in September 2020, installed a second silt fence at the downstream end of the Creek channel in December 2020 and seeded insectary plants on the banks of the Creek in April 2021.

[44] The Appellant's May Submission expands on the grounds for appeal provided in the Notice of Appeal. I have summarized his submissions as follows:

1. The Appellant did not require an authorization under section 6 of the *WSA* for water use because the Property is in the ALR and a person does not require a water use authorization for agricultural drainage works because they are exempt from the *WSA*. The work the Appellant undertook was to provide drainage for the agricultural use of the land, and no authorization is necessary for that work.
2. The Appellant did not require an authorization or change approval for making "changes in and about a stream" under section 11 of the *WSA*, when undertaking clearing and channelizing work on the Property. He was exempt from the requirements to apply for and receive an authorization due to the application of section 11(2)(b) of the *WSA* and the provisions of the *Regulation*. The Appellant says he met the requirements of the *Regulation* and has achieved a regulatory authorization.
3. Further to 2., above, the Appellant was entitled to rely on an expectation that the work he undertook did not require an authorization or change approval from the Ministry because the proposal met the requirements in section 39 of the *Regulation* for changes in and about a stream. The Appellant determined the proposal was adequate because he submitted notice of the proposal to

³ The Appellant clarified in his reply submission that this line did not run through the Creek; it runs "under the Creek and up to the building on the north side of the property". In any case, the Order does not address the line or well, and I find a consideration of these works to be beyond the scope of this appeal.

the HO on February 12, 2020, and the HO did not contact him within 45 days of receiving the notice.

4. The Appellant has completed remediation work which stabilized the Creek banks and protects downstream values, and no further remediation work is necessary. Requiring further remediation as the Order stipulates would create undue hardship, impose an onerous financial burden, and impose a higher standard on the Appellant as compared with other property owners upstream and downstream of the Property.
5. The HO ignored information that the Appellant provided about expectations for future siltation events in the Creek based on site specific parameters such as ground slope, the level of turbidity of the Creek coming into and leaving the Property, and potential sources of contamination to the Creek. In this regard, the Appellant says the Ministry should have considered site specific circumstances but did not, in making the Order.
6. The cost to retain a professional as required by the Order creates undue hardship and imposes an onerous financial burden.

[45] In support of his submissions, the Appellant provided in evidence a brief description of the Creek, a line drawing of the Creek and drainage area, photographs of the Creek and works undertaken on the Property, and photographs of the Creek taken upstream and downstream of the Property.

[46] The photographs taken of a property to the east and upstream of the Property show the Creek running from a culvert through a channel across fields and along a fence. The bank of the Creek along the fence line is vegetated with tall grasses, and the other bank on the open field side in relation to the fence is vegetated with shorter grasses.

[47] The Appellant provided no photographs of the Creek from the properties immediately west and downstream of the Property which he states are forested. A photograph taken at a point further west from these properties, on a property just west of Burbank Rd., shows the Creek in a channel crossing that property. The banks of the Creek are densely vegetated with a combination of grasses, bush and deciduous trees. Grasses are growing in the Creek channel. Moving further west, photographs from the next property, the Participant's property, show the Creek ponded before passing under a driveway. The Creek banks are densely vegetated with grasses, bush, and deciduous and coniferous trees. The Creek exits a culvert from under a driveway to flow in a westward direction. Rocks and boulders are evident in the Creek channel near the culvert's exit, and grasses and small bushy plants are growing on the banks.

[48] Moving further west, the photographs are from a property where the Creek crosses under Highway 4 to follow the south side of the highway as far as Clarke Rd. The Creek is in a deep gully; its banks on the highway side are vegetated with grasses and bush, and on the other side the bank is vegetated primarily with large coniferous trees. Continuing westward, a photograph shows the Creek exiting a culvert under Clarke Rd. Finally, a photograph shows the Creek crossing a property west of Clarke Rd. That property is fenced, and the Creek follows one of the fence lines to cross a field. The banks are vegetated with grasses, sedges, bush and deciduous trees. At this location, vegetation is infilling the Creek channel.

[49] The Appellant estimates that the Creek is 2.7 kilometres long, and the hand drawn map he included of the drainage shows that the Creek is modified in several places where it passes through culverts under at least six transportation corridors.

[50] The Appellant provided no expert evidence; he relies on several statutory authorities.

Respondent's submissions and evidence

[51] The Respondent's submissions pose the following questions:

1. Is the Creek a stream as defined in the *WSA*?
2. Was the Appellant entitled to drain his property on the basis it is in the ALR?
3. Was the Appellant authorized to make changes to the Creek under the *Regulation*?
4. Is the condition of the Creek upstream and downstream from the Appellant's property a relevant consideration?
5. What is the appropriate remedy?

[52] The Respondent's submissions address those questions and rely on: evidence extracted from Ministry records including cancelled water licences held on Crocker Creek (located downstream from the Creek); a map dated 1997 prepared by the Regional District of Nanaimo of the Creek's drainage, identifying fish habitat; affidavit evidence of NRO Peter Goode, HO Grant Bracher, and RDSO David Skarbo, all prepared using and including visual records (photographs and/or videos); evidence of the Appellant; statutory authorities; and, decisions made in other cases.

[53] The Respondent did not seek to qualify as experts any of the witnesses who provided affidavits. In his affidavit, Mr. Bracher states that his evidence is based on "his personal observations of the site conditions and his general experience as an Ecosystem Biologist for the Ministry".

[54] In summary, in answering the questions listed above, the Respondent submits that:

1. the Creek located on the Appellant's Property is a "stream" as defined by the *WSA*;
2. the designation of the Property as ALR does not alter the applicability of the *WSA* to the work that the Appellant undertook in and about a stream, including realigning and channelizing the Creek;
3. the Appellant required an authorization or approval for "changes in and about a stream" under the *WSA* before undertaking the work, and the Appellant did not have such an authorization;
4. the condition of the Creek upstream and downstream of the Property was a factor to consider in making the Order; and
5. to prevent further sedimentation and achieve remediation of the Creek, taking into account downstream uses of the Creek, the Order should be confirmed.

Participant's submissions

[55] The Participant provided written submissions dated June 10, 2021. He is concerned about the silt that entered the Creek during the winter of 2019-2020 and built up in the Creek where it flows through his property. He believes the source of the sedimentation was the Property, and the Appellant caused the increase in sedimentation when clearing the Property and working in the Creek. He says the water in the Creek was "the colour of hot chocolate" for five months, and the Creek was still brown as of June 2021. The Participant is concerned that the Creek will rise above the level of a bridge located on his property due to silt accumulation. He also suggests that the increased silt in the Creek may have had an adverse effect on any fish present in Crocker Creek. The Participant says he will have to hire an excavator to remove the large amount of sediment that has accumulated in the Creek on his property. The Participant seeks compensation from the Appellant for the cost to remove the accumulated silt.

Appellant's reply

[56] I address the Appellant's reply submissions and the Respondent's objections below, under Issue 1.

DISCUSSION AND ANALYSIS**1. Does the Appellant's reply submission include new evidence, arguments, and requests for remedies that I should not consider when deciding the merits of the appeal?****Summary of the Parties' submissions**

[57] The Respondent objects to portions of the Appellant's reply submissions on the basis that they go beyond proper reply. The Respondent submits that the Board's *Practice and Procedures Manual* (the "Manual") is clear (at pp. 27, 49-50) that no new evidence is to be included in reply submissions. The Respondent says the Appellant's reply includes six exhibits of new evidence which the Panel should refuse to consider. In addition, the Respondent says the Appellant's reply largely repeats his submissions in chief. The Appellant's reply also makes new arguments that do not reply to the Respondent's submissions. The Respondent submits that the Panel should refuse to consider the Appellant's reply to the extent that it repeats his earlier submissions or raises new evidence and argument which could have been raised earlier.

[58] Finally, the Respondent asks the Panel to refuse to consider the Appellant's request that the Board direct the Respondent to take remedial action in the Creek.

[59] The Appellant maintains that each paragraph and argument in his reply addresses allegations and arguments contained in the Respondent's submissions and evidence. The Appellant says he intended to ensure that the Board has current information about the condition of the Creek, as information in the Respondent's submissions is six to fifteen months out of date and does not reflect the current condition and results of the Appellant's remediation work.

Panel's findings

[60] The Board's Manual and Rules provide all parties with notice of the Board's expectations regarding its hearing process. They are intended to ensure that the Board treats all parties fairly, while establishing when and how the Board receives critical and relevant evidence and argument from the parties as a basis to decide an appeal. The Manual and Rules explain that each party should submit all of their evidence and argument with their submissions. This is explained in Rule 20 and on pages 27 to 29 of the Manual, with respect to appeals that are heard in writing. Page 27 of the Manual also states that no new evidence is to be included in an appellant's reply submission. To avoid surprise and to ensure the respondent has the ability to consider the appellant's evidence, the appellant should not provide new evidence (in this case, evidence not provided in the Appellant's May Submission) or new arguments in the reply. The opportunity to submit a reply is intended to give the appellant an opportunity to answer the submissions of the respondent, because the appellant will not be aware of the respondent's submissions until the respondent makes them. The Board expects parties to comply with these requirements, but the Board may make exceptions in the interests of procedural fairness. However, exceptions are rare, because the Rules and the Manual are intended to ensure procedural fairness.

[61] In this case, in making his reply, the Appellant adopted a style of answering most paragraphs of the Respondent's submission, which included an interpretation of evidence or argument that the Appellant did not agree with. After reviewing the reply, I find that the Appellant repeated many of the same assertions and arguments he made in his Notice of Appeal and May Submission, including his interpretation of some of the visual records. While much of the reply is a duplication of arguments made in the May Submission, I do not find it necessary to exclude the repetitive parts of the reply; they simply do not further the Appellant's arguments.

[62] The Appellant attaches five new (not provided in the May Submission) photographs of the Creek (Exhibits 1 to 5) to his reply. The Appellant took these photographs about six months after the photographs submitted by the Respondent, primarily to show the state of the vegetation along the Creek in June 2021. The Appellant questions the HO's affidavit of June 15, 2021 regarding the adverse environmental effects of the channelized Creek. The HO makes conclusions in his affidavit based on his knowledge and experience and the visual records, the most recent being from January 2021. The Appellant finds fault with this, because he seeded insectary plants along the banks of the Creek in April 2021, and he asserts that the HO could not have considered the most recent vegetative growth on the banks of the Creek in drawing the conclusions in his June 2021 affidavit. The Appellant does not provide a description of the type or density of plants seeded in April 2021 other than indicating they are insectary.

[63] In considering the Respondent's argument that the photographs should be excluded from evidence, I take into account the following: the Respondent did not see the new photographs in the reply submission before making the June 16, 2021 submission and could not provide direct comment on them; the Respondent was aware that the Appellant planned to seed insectary plants along the Creek; the Appellant did not provide written evidence describing the type or density of insectary plants he planted or explain in evidence how and when the specific plants would successfully stabilize the Creek; and, more time has elapsed since the dates

when the Appellant took the photographs in June 2021. While the June 2021 photographs are more recent than the ones from December 2020 and January 2021, I find that the photographs alone could not address whether the plants can achieve the objectives of bank stabilization necessary for remediation. The photographs would have to be supported by a description of the type and density of plants seeded and a rationale as to how and when the plants would grow to successfully stabilize the Creek, to be useful as evidence. There is no such accompanying information either in the May Submission or the reply. In these circumstances, I find it unnecessary to make an exception to the Board's practices. I find that the five photographs (Exhibits 1 to 5) in the Appellant's reply should not be included as evidence, and I have not considered them in deciding the appeal. I address the matter of Creek bank stability more fully when considering Issue 4, below, including uncertainties regarding existing vegetation.

[64] Regarding Exhibit 2, the second of the five new photographs, I note that it is labelled "successful silt fence from June 27, 2021". According to the Appellant, this second fence was installed in December 2020, is wider than the one installed in September 2020, and it has successfully prevented silt from being carried downstream. As stated above, I have decided to exclude this photograph from the evidence. However, even if I had not excluded it, I find that the photograph does not support the Appellant's assertion. The photograph shows an accumulation of silt right up to the top of one part of a silt fence. The other section of silt fence further downstream appears to be perpendicular to the Creek, but does not cross the Creek, in which case silt flowing over the first silt fence would continue to enter the Creek.

[65] The Appellant's reply also included, as Exhibit 6, a copy of a Ministry of Agriculture, Food and Fisheries Fact Sheet, dated March 2005 and titled "Agricultural Watercourse Classification", which is part of that ministry's drainage guide for farmers. This document is publicly available on the internet. It also would have been accessible to the Appellant via the internet links in AWM Baldwin's email to the Appellant on February 13, 2020, if the Appellant had received the email. Although the Appellant did not receive this email, I find that the document is likely not new information to the Respondent, given that the document is public information and the evidence shows that Ministry staff were aware of the document. The Appellant relies on this document for the proposition that he is allowed to drain his ALR property without approval under the WSA. This is not a new argument; it is a repetition of the submissions made in the Notice of Appeal and enhanced by the May Submission.

[66] Similarly in reply, the Appellant makes an additional reference to "Agriculture Land Reserve Regulations" and specifically the *Agricultural Land Reserve Use Regulation* (the "ALR Use Regulation"). The Respondent makes submissions regarding the *ALR Use Regulation* which indicate that, in responding to the Appellant's initial appeal submissions, the Respondent considered the applicability of that regulation in relation to the Appellant's circumstances. Based on this, I find that the Appellant's argument pertaining to the *ALR Use Regulation* in the reply is not a new argument and I need not exclude it from this appeal. I consider the Appellant's arguments pertaining to the Property being in the ALR and the application of the WSA as part of the analysis of Issue 2, below, and address the

relevance of the Ministry of Agriculture, Food and Fisheries Fact Sheet and of the *ALR Use Regulation* in that analysis.

[67] Regarding the remedies requested in the Appellant's reply, I find that in addition to repeating the same requests for relief as in the Notice of Appeal, he requests that the Board direct the Respondent to remove substances (asphalt debris) from a highway culvert.

[68] The Board's authority on appeal is set out in section 105(6) of the *WSA*. The remedies available to the Board under section 105(6) arise from the Order under appeal which indicates the alleged contravention. In this case, the Respondent alleges that the Appellant has "without authorization, made changes in and about the stream of Foch Creek", which is an offence under section 106(2)(b) of the *WSA*, and the Respondent has ordered remediation of the Creek where it flows through the Property. On appeal the Board may: send the Order back to the decision maker for reconsideration; confirm, reverse or vary the Order; or, make a new order that the decision maker might have made. The *WSA* does not enable the Board to make new orders that are unrelated to the appealed Order. In deciding this appeal, it would be inappropriate for the Board to make an entirely different order directing someone other than the Appellant (in this case, the Respondent) to conduct work such as removing a foreign substance from a stream (under section 47 of the *WSA*), that is unrelated to the changes in the Creek that allegedly led to the Order. Therefore, I will give no further consideration to this requested remedy. On this basis, I do not need to consider whether the requested remedy could be raised in reply submissions.

[69] The Appellant also requests that the Panel dismiss the request of the Participant "that Mr. Fox pay for all costs associated with me hiring an excavator to dig out the silt from my portion of the creek." Setting aside the question as to whether or not the Participant is able to prove that the Appellant's activities on the Property are the sole or a major source of the sediment that has built up in the Creek at the Participant's property, I am unable to provide the remedy the Participant seeks. This is for the same reason as noted above regarding the Appellant's request that I order the Respondent to make an order under section 47 of the *WSA*. My authority to make an order in this decision is established by section 105(6) of the *WSA* as it relates to the Appellant's alleged contravention of the *WSA*. It does not include the authority to make an entirely new order directing the Participant to undertake works⁴ in and about a stream to remove accumulated sediment and to order the Appellant to compensate the Participant for the costs associated with the performance of those works.

2. Does the designation of the Property as ALR land and/or the application of section 33 of the *Regulation* enable the Appellant to undertake channelling and other work in the Creek where it flows through the Property without Ministry approval or authorization?

Summary of the Parties' submissions

⁴ The *WSA* defines "works" as including changes in and about a stream.

[70] The Appellant submits that the Property is in the ALR, and under the "ALC regulations" and section 33 of the *Regulation*, he was exempt from the requirement to hold an authorization when he created a ditch for water to flow through the Property and to drain the adjacent land so it could be put to agricultural use. He claims that section 6(1)(b) of the *WSA* and section 33 of the *Regulation* provide an exemption from the requirement for an approval in respect of agriculture drainage works. In addition, in his reply submission, he says he was entitled to drain the Property under section 6(2)(c) of the "Agricultural Land Reserve Regulations"⁵.

[71] The Respondent argues that the Creek is a stream, and not an aquifer, and the exemption referenced in section 33 of the *Regulation* is specific to a water diversion from an aquifer; therefore, it does not apply to the circumstances of this appeal. The Respondent notes that section 1 of the *WSA* defines "stream" as meaning:

- (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;

[underlining added in Respondent's submissions]

[72] Based on this definition, the Respondent says the fact that the Creek may be dry for periods of the year does not change its essential character as a stream, nor does the fact that it has been modified by the Appellant and others over time. The Respondent submits that the Appellant does not appear to contest that the Creek is a stream as defined in the *WSA*. For example, the Appellant's submissions state that "Foch Creek is a minor seasonal stream that is typically dry during the months of late June to early September."

[73] The Respondent maintains that the Appellant is not, by virtue of the Property being in the ALR, relieved from complying with the *WSA*, the *Regulation*, or the Order. The Respondent notes that section 2 of the ALR Use Regulation states:

- 2** For the purpose of section 2(1) of the Act, a person who engages in a use of agricultural land that is permitted under this regulation is not relieved from complying with
 - (a) any other enactment that may apply, or
 - (b) a decision of a responsible authority that may apply.

Panel's findings

[74] I begin by considering how the *WSA* applies to the Property and the works the Appellant undertook on the Property in relation to the Creek. A "stream" is

⁵ This appears to be a reference to *Agricultural Land Reserve Use Regulation*, B.C. Reg. 30/2019.

defined in the *WSA* as a natural watercourse or a natural body of water, whether or not the stream channel has been modified, including streams that do not always contain water.

[75] The Respondent provides evidence of the state of the Creek before the Appellant completed the works on the Property. The evidence includes videos and photographs collected by the NRO on January 8, 2020. The visual records show that water entered the southeast corner of the Property from the east through a culvert passing under Highway 4 at the junction with Hilliers Rd., flowed northwest to form a broad shallow channel with some ponding and then flowed in a westerly direction across the Property. Video evidence shows water flowing in a channel covered by brush, trees, and other vegetation. Where cut trees have been removed, the Property surface has been disturbed, is often rutted, and is bare and muddy where not covered with water. The Appellant says he did not notice a stream on the Property until heavy rain occurred while he was clearing the land. He submits that, once the Property was cleared in January 2020, "it was apparent that when there was water in the Creek, it was not contained in a defined channel, but traversed from east to west through a wide low-lying swath of land." Following a site visit by AWM Baldwin and the HO in early February 2020, the Appellant sent an email to the HO on February 12, 2020, which states in part:

Further to our site meeting last week in regards to Foch Creek that flows through our property, **I have been able to identify the defined channel** and place logs at a few strategic points to prevent silt from the adjacent flooded areas from migrating into the water, which is running clear now. The flooding is too extensive at this point to place any hay **along the banks** as suggested.

[Emphasis added]

[76] This indicates that the Appellant was, at least by February 2020, aware of the location of the defined stream channel of the Creek, including its banks. Section 1 of the *WSA* defines "stream channel" to mean the bed and banks of the stream, both above and below the natural boundary, and whether or not the channel has been modified. The Appellant does not dispute that he made changes to the Creek by modifying the area on which it flowed, to create what he calls a "narrow ditch" that "follows the low lying contours of the land, exactly where the water would naturally run." The Appellant's submissions describe how he modified the stream channel on the Property by enclosing part of the water flow into a second culvert where the Creek enters the Property and using machinery to make the remaining open channel narrower.

[77] I find that it is unnecessary to determine the precise location of the Creek's channel where it originally flowed through the Property, because it is clear from the Appellant's submissions and evidence that, before he modified the stream channel, he noticed and commented on flowing and pooling water on the Property. Later, the Appellant acknowledged the presence of a stream with a defined channel including banks. I find that the activities the Appellant undertook on the Property in the Creek fall within the definition of "changes in and about a stream", as they involved modifications to the land, vegetation and natural environment of the Creek, the flow of water in the Creek, and are an activity or construction within the channel of

the Creek that had or may have an impact on the Creek or its channel. I find that since the Appellant has made changes in and about a stream, the *WSA* applies.

[78] Next, I will address the Appellant's submissions regarding the Property being in the ALR and the applicability of section 6 of the *ALR Use Regulation*, which is a regulation under the *Agricultural Land Commission Act* (the "*ALCA*"), and not the *WSA*. In determining the significance of the Property's ALR designation in relation to the *WSA*, it is helpful to begin with section 2 of the *ALCA*, which states:

- (1) This Act and the regulations are not subject to any other enactment, whenever enacted, except the *Interpretation Act*, the *Environment and Land Use Act* and the *Environmental Management Act* and **as provided in this Act.**

[Emphasis added]

[79] Section 3 of the *ALCA* states:

A minister or an agent of the government must not exercise a power granted under another enactment **except in accordance with this Act and the regulations.**

[Emphasis added]

[80] Section 2(a) of the *ALR Use Regulation* explains how other enactments apply to land within the ALR:

For the purpose of section 2 (1) of the Act, a person who engages in a use of agricultural land that is permitted under this regulation is not relieved from complying with

- (a) any other enactment that may apply, ...

[81] Although the *WSA* is not one of the statutes listed in section 2(1) of the *ALCA*, and section 3 of the *ALCA* states that decision-makers under other Acts, such as the *WSA*, must exercise their powers in accordance with the *ALCA* and its regulations, section 2(a) of the *ALR Use Regulation* makes it clear that agricultural land uses permitted under that regulation must comply with any other applicable enactment, such as the *WSA*. Section 1 of the *ALCA* defines "agricultural land" as land that is included in the ALR. The *ALCA* and the *ALR Use Regulation* apply to "land" that is within the ALR, whereas the *WSA* applies to streams.

[82] The *WSA* defines "stream" to mean "a natural watercourse, ... or a natural body of water, whether or not the stream channel of the stream has been modified... including a creek, ravine, gulch, wetland... whether or not usually containing water". I have found that the portion of the Creek that flows through the Property meets the definition of a "stream". From a consideration of the definition of "stream" and sections 11(2) and 106(2)(b)(ii) of the *WSA*, it is clear that a person cannot make changes to a stream, including its channel, without authorization. This means a person cannot change the channel of a stream in order to drain agricultural land, unless the person is authorized in one of the ways listed in section 11(2) of the *WSA*.

[83] The inclusion of the word "use" in the title of the *ALR Use Regulation*, is a helpful early indication of its purpose. This regulation explains how ALR land may

be used for farm use and uses that support farm uses. It acknowledges that to enable farming, certain types of installations, referred to in section 6 of that regulation as "land development works", may be required on the land. In section 6 of the *ALR Use Regulation*, "land development works" are defined by section 6(2) to include levelling and berming agricultural land, and constructing works ancillary to clearing, draining, irrigating, levelling or berming agricultural land.

[84] It appears that the Appellant had the authority under the *ALR Use Regulation* to clear, drain, and level the Property. The land development works the Appellant undertook on the lands adjacent to the Creek appear to fall within the *ALR Use Regulation* as an approved use of the ALR. Section 6 of the *ALR Use Regulation* makes plain that the activities described by sub-section (2), above, cannot be prevented on agricultural land. However, as the Respondent points out, section 2 of the *ALR Use Regulation* states that a person using agricultural land as permitted under that regulation is not relieved from having to comply with any other enactment that may apply. The banks and bed of the Creek are encumbered with water and, under the *WSA*, they are part of a stream. Section 1 of the *WSA* states:

"stream channel" in relation to a stream, means the bed of the stream and the banks of the stream, both above and below the natural boundary and whether or not the channel has been modified, and includes side channels of the stream

[85] While the Appellant's works are land development works within section 6 of the *ALR Use Regulation*, due to the operation of section 2 of the *ALR Use Regulation*, section 6 does not eliminate the application of the *WSA* to the works that I have determined are changes the Appellant made in and about the Creek. The Appellant required authorization under section 11(2) of the *WSA* to make changes in and about a stream, which in this case is the Creek.

[86] Based on the above analysis and findings, I conclude that section 6 of the *ALR Use Regulation* did not authorize the Appellant to make changes in and about the Creek where it flowed through or over the Property, nor does it preclude the need for an approval or authorization under section 11(2) the *WSA*. The Order does not require the Appellant to restore the Creek to the state it was in before he undertook works. Those works, such as removing trees and bush from the land, piling debris on the land, and contouring the land adjacent to the Creek, fall within the definition of land development works as provided by the *ALR Use Regulation* section 6, paragraphs (a) and (c). The Order does not threaten these works, but addresses risks of erosion and sedimentation to the Creek that may result from works in and about the Creek.

[87] The Appellant also referred to the Ministry of Agriculture, Food and Fisheries Fact Sheet, dated March 2005 and titled "Agricultural Watercourse Classification" to support his argument that the ALR designation precludes the application of the *WSA*. The focus of this document, in part, is to explain to farmers when undertaking drainage projects how to do so to avoid infractions under federal fisheries legislation. The document also states:

The BC Water Act also applies to streams. The legislation does not differentiate between natural or channelized streams with respect to

licencing, legislative or regulatory requirements for conducting maintenance works in and around a stream.

[88] The *WSA* has replaced the *Water Act*, but this does not alter the statement in that document, except that "Water Sustainability Act" would now replace "Water Act". The document points out that the *WSA* applies to streams, whether natural or channelized. I find that this document does not assist the Appellant with the argument that ALR land is exempt from the application of the *WSA*. Rather, this document supports the Respondent's argument.

[89] Next, I will address the Appellant's arguments regarding the applicability of section 33 of the *Regulation*. Section 33(2) exempts a person from the requirement under section 6(1) of the *WSA* to hold an authorization for the "diversion of water from an aquifer" using agricultural drainage works, if certain requirements are met.

[90] As the Respondent argued, I find that an exemption under section 33(2) of the *Regulation* is not applicable to the circumstances of this appeal. Section 33(2) of the *Regulation* provides an exemption in relation to the diversion of water "from an aquifer". Section 1 of the *WSA* defines "aquifer" to mean:

- (a) a geological formation,
- (b) a group of geological formations, or
- (c) a part of one or more geological formations

that is groundwater bearing and capable of storing, transmitting and yielding groundwater;

[91] The definition of "aquifer" focuses on geological formations that hold "groundwater", which is defined in section 1 of the *WSA* as "water naturally occurring below the surface of the ground". Based on these definitions and the definition of "stream" in the *WSA*, I find that an aquifer holds and transmits water naturally occurring below the surface of the ground, whereas a stream is a natural watercourse or source of water supply on or above the ground surface. Importantly, the definition of "stream" states that it "does not include an aquifer". I conclude that the definitions of "stream" and "aquifer" in the *WSA* are exclusive of one another.

[92] The Order states that it addresses unauthorized "changes in and about a stream". It does not address an unauthorized "diversion of water from an aquifer". I find that there is no evidence that the Appellant diverted water from an "aquifer" when he conducted work in and about the Creek on the Property. Indeed, the Appellant's submissions state that "there is no evidence that Foch Creek is supplied by an aquifer, and in fact is only supplied by surface run off during wet seasons." Given that the exemption in section 33(2) of the *Regulation* applies only to the diversion of water from an aquifer, I find that section 33(2) does not apply in this case.

[93] In summary, for the reasons provided above, I conclude that neither the Property's status as agricultural land within the ALR, nor the exemption in section 33(2) of the *Regulation*, assist the Appellant in this case. Neither have the effect of authorizing the Appellant to make changes in and about the Creek where it flowed on or through the Property.

3. Does section 39 of the *Regulation* apply, eliminating the need for the Appellant to apply for and obtain an approval under section 11 of the WSA to make changes to the Creek where it flows through the Property?

Summary of the Parties' submissions

[94] The Appellant submits that the work he completed in and about the Creek was authorized by section 39 of the *Regulation*, and he undertook the work in a manner that fulfills the requirements of the *Regulation*. He says he expected that the work was authorized by the *Regulation* because the Ministry did not respond within 45 days to the plan that he submitted for making changes in and about a stream, as required by section 38 of the *Regulation*.

[95] The Appellant sent an email to the HO on February 12, 2020, attaching a line drawing showing the proposed placement for the vineyards and associated facilities. In the email, he explained the work he had done to date in and around the Creek, and the further work he proposed to do. After receiving no response from the Ministry within 45 days of that email, the Appellant assumed that he was free to carry out the works as proposed, pursuant to sections 38(1) and (4) of the *Regulation*.

[96] The Respondent submits that the Appellant needed to obtain an approval under section 11(1) of the WSA to make changes in and about a stream before he drained land in and about the Creek and modified its channel.

[97] The Respondent submits that section 39 of the *Regulation* specifies the type of activities or work that the regulatory authorization can extend to. It also establishes standards and specifications for activities undertaken or works installed in or about a creek, and the applicant must demonstrate these will be met. Section 39(1) of the *Regulation* sets out a lengthy and detailed list of "authorized changes" which may be made through a streamlined notification process in section 38.

[98] The Respondent notes that the work the Appellant undertook includes installing a culvert and a free span bridge, but much of the work adjusted the stream channel by narrowing and deepening it, and by realigning the portion of the Creek that flows north-west from the south-east corner so that it is closer to the eastern boundary of the Property. The Respondent acknowledges that installing a culvert can be an authorized change if the conditions of section 39(1)(a) of the *Regulation* are met; installing a clear span bridge can be an authorized change if the conditions of section 39(1)(b) of the *Regulation* are met. However, the Respondent maintains that the realignment and channelization of a stream is not an authorized change under section 39(1) and therefore, may only be made in accordance with a change approval issued under section 11 of the WSA: *MacKay v. Brookside Campsite Inc.*, 2020 BCSC 375 [*MacKay*], at paras. 37 and 40.

[99] Further, the Respondent says that even if some of the changes made by the Appellant could have been authorized changes under the *Regulation*, the Appellant did not follow the prescribed notification procedure under the *Regulation*, which is described in *MacKay*. The Respondent notes that sections 4 (applications for change approvals) and 38 (notice to a habitat officer) of the *Regulation* establish procedural requirements that must be met. The Respondent submits that the Appellant failed

to meet those requirements. A person must also be aware that a habitat officer may establish terms and conditions for protection of the aquatic ecosystem (section 44) before regulatory authorization is achieved. The Respondent submits that the Appellant must provide evidence that he met all the requirements of the *Regulation* in connection with the changes made in and about the Creek, and he has not or is unable to do so. Instead, the Appellant asserts that he “assumed” he was free to carry out the works as proposed because he did not receive a response to his February 12, 2020 email within 45 days.

Panel’s findings

[100] In arguing that the work the Appellant undertook in the Creek was authorized under section 39 of the *Regulation*, he does not dispute that the work amounted to changes in and about a stream. The work included removing vegetation from the pre-existing stream channel, excavating a deeper channel resulting in a narrowing of the channel (channelizing), installing a culvert in the channel, and building and installing a clear span bridge on concrete footings. On a plain language reading of the definition of “changes in and about a stream” set out above, and a review of the work that the Appellant planned and undertook, I find that the work clearly falls within the *WSA* definition of “changes in and about a stream”.

[101] Section 39(1) of the *Regulation* provides a list of changes in and about a stream that are authorized without the need to obtain an approval under section 11(1) of the *WSA*. Section 39 covers many types of activities and works, but in describing those activities and works, the language is precise. It describes in detail the works and activities that can receive a regulatory authorization. I agree with the Respondent that installing a culvert is a change authorized by the *Regulation* if the 15 conditions listed in section 39(1)(a) are met. Similarly, installing a clear span bridge is an authorized change if the five conditions listed in section 39(1)(b) are met. I will address whether those conditions were met in this case, but first I will address whether the Appellant’s modification of the stream channel of the Creek was authorized under section 39(1).

[102] I find that the Appellant’s modification of the channel of the Creek does not fall within any of the authorized changes listed under section 39(1) of the *Regulation*. Sections 39(1)(g) and (h) authorize “the restoration or maintenance of a stream channel” by “the government” and by “a municipality or regional district”. Even if the work undertaken by the Appellant could be described as “the restoration or maintenance of a stream channel”, sections 39(1)(g) and (h) do not apply in this case because the Appellant did not propose to undertake the works to realign and narrow the Creek channel on behalf of the government or a municipality or regional district.

[103] I find that the changes the Appellant made to the Creek, by realigning part of its channel and making the channel narrower and deeper, could only be authorized by obtaining an approval under section 11(1) of the *WSA*. This finding is consistent with *Mackay*, in which the BC Supreme Court found at paras. 40 and 82, that a channel realignment to partially straighten the bends in a stream, by adding a berm on one side and moving the opposing bank, could only be authorized by obtaining an approval under section 11 of the *WSA*.

[104] The fact that the Appellant did not receive a response to his proposal within 45 days, as set out in section 38 of the *Regulation*, is irrelevant. He could never be, and was not, authorized by the *Regulation* to make the changes in and about the channel of the Creek. Under these circumstances, the presence or absence of a response within 45 days of sending his plan to the Ministry has no meaning to achieving a regulatory authorization.

[105] Next, I address the installation of the culvert and the bridge, which may be authorized under the *Regulation* if certain requirements are met. Although section 39(1)(a) authorizes the installation and maintenance of culverts that meet the 15 specifications listed for culverts, I find it unnecessary to consider whether the culvert the Appellant installed on the Property meets those specifications. The Appellant did not include the installation and maintenance of a culvert in his February 12, 2020 proposal. The Appellant did not notify the HO of his intention to install a culvert, as was required by section 38(1) of the *Regulation* to achieve regulatory authorization.

[106] To explain more fully, section 4 of the *Regulation* lists the information that an applicant must provide when seeking regulatory approval. In particular, the applicant must provide notice to a HO containing "a description of the activities and works to be constructed in relation to the proposed changes in and about the stream and that may affect the stream" (section 4(g)). The Appellant's February 12, 2020 email states that he had placed logs to block highly sedimented runoff from reaching the Creek, installed a silt fence, changed the alignment of the Creek channel, planted sedges in the channel bottom, intended to plant insectary plants on the banks of the channel, and when the stream is dry, planned to install a clear span bridge constructed of timbers and steel beams placed on concrete blocks. The drawing attached to the email does not include a scale, and the components do not appear to be drawn at the same scale. The drawing does not include cardinal directions, but it shows the alignment of Hilliers Rd. along one side of the property and Alberni Highway 4 along the bottom border of the Property from which one could infer directions. It shows the alignment of the Creek following Hilliers Rd., before changing course to cross the Property, a band on either side of the Creek for insectary plants, the location of vineyards and winery, the location of a small pasture, a band across the bottom border of the property for wind machines and what appears to be an unmarked service alley or road through the centre of the Property, crossing the stream channel. Neither the Appellant's February 12, 2020 email nor the attached line drawing refer to the installation of a culvert. On this basis alone, I find that the Appellant did not meet the requirements of the *Regulation* for obtaining authorization to install the culvert in the Creek.

[107] The construction of a "clear span bridge" could receive regulatory authorization under section 39(1)(b) if all the following conditions are met:

- (i) the equipment used for site preparation, or for construction, maintenance or removal of the bridge is situated in a dry stream channel or operated from the top of the bank;
- (ii) the bridge and its approach roads do not produce a back water effect or increase the head of the stream;

- (iii) the hydraulic capacity of the bridge is equivalent to the hydraulic capacity of the stream channel, or is capable of passing the 1 in 200 year maximum daily flow;
- (iv) the height of the underside of the bridge is adequate to provide free passage of flood debris and ice flows;
- (v) the bridge is made of materials that meet the applicable standards of the Canadian Standards Association”.

[108] The Appellant’s February 12, 2020 email indicates he planned to construct the bridge when the Creek was dry, which may have been enough to satisfy condition (i) above. However, the Appellant’s email and plan provided no further information that could be used to assess if the bridge could meet the conditions in paragraphs (ii) to (v) above. On this basis, I find that the Appellant did not meet the requirements for regulatory authorization to install the clear span bridge.

[109] In summary, I have determined that the *Regulation* did not provide a basis for an approval of the changes to the channel and bed of the Creek the Appellant made. I also find that the information in the Appellant’s February 12, 2020 email and line drawing was incomplete and it did not meet the requirements that were necessary for it to serve as notice for the works the Appellant undertook in and about the Creek. It was incapable of “proposing to make an authorized change” (section 38(1)) because it failed to include the culvert, and did not provide sufficient detail regarding the clear span bridge and its installation.

[110] Under these circumstances, I find that a failure by a HO to contact the Appellant within 45 days does not mean the Appellant was entitled, under section 38(4) of the *Regulation*, to proceed with the work. Section 38(4) only applies if a person has given notice of the change as required under section 38(1). The Appellant failed to do so in the case of the culvert and clear span bridge, and he was unable to do so in the case of the Creek channelling and realignment because the *Regulation* does not apply to those changes in this case.

[111] The Respondent’s evidence makes clear that the Ministry did prepare and send a response on February 13, 2020 to the Appellant’s February 12, 2020 plan. The Ministry’s response indicated that the plan was inadequate and would not provide a basis for regulatory authorization, but the Ministry did not send it to the correct email address. The Ministry did not mail it to the residential address used for the January 16, 2020 correspondence, in addition to sending the response to an email address. I find that the Appellant did not receive the February 13, 2020 response. However, for the reasons provided above, I find that this is irrelevant and insufficient to support a claim for regulatory authorization.

[112] I do not find it necessary to consider the adequacy of any process regarding notice that may have been incumbent on the Appellant under the *Regulation* (section 4) or the implications of the *Regulation* (section 44) regarding terms and conditions of authorizations to protect the aquatic ecosystem.

[113] Based on all the findings above, I conclude that section 39 of the *Regulation* did not apply to the work undertaken by the Appellant in relation to the Creek. Therefore, the Appellant needed to obtain an approval under section 11(1) of the

WSA before he made changes in and about the Creek where it flows through the Property. There is no question that the Appellant did not do so.

4. If the Appellant was not authorized to make changes in and about the Creek where it flows through the Property, is the Order appropriate in the circumstances?

Parties' general submissions

[114] The Appellant submits that the directions of the Order set a higher standard for the works he has undertaken as compared with his neighbours. He provides photographs of the Creek upstream and downstream of his Property which show the Creek on other properties, in a defined channel often along a property line or fence line. The Appellant appears to be inferring that even if the Creek did not, at one time, follow a defined channel on those properties, changes have been made by other property owners to channelize it along at least half its length.

[115] The Appellant's photographs also show the Creek channel modified by the installation of culverts at several locations as the Creek flows below transportation corridors including local streets and Highway 4. All the photographs provided by the Appellant of the Creek banks upstream and downstream from the Property show that the banks are densely vegetated. Some type of grass, and possibly sedges, are evident on banks in the upstream portion. In the downstream portion of the Creek, combinations of grasses, sedges, bushes, and coniferous and/or deciduous trees are evident. The Appellant acknowledges that the two properties immediately downstream from his are forested at this time. He provides no evidence of the form of the Creek running through those properties.

[116] The Appellant also asserts that the cost of implementing the Order is too onerous, and in any event, the Order is unnecessary. Furthermore, he maintains that imposing rules of "standard practice" can be too rigid and does not enable a consideration of site-specific circumstances.

[117] The Respondent submits that the Appellant has not discharged the onus of showing the requirements of the Order, especially the costs, are onerous. The Appellant has not provided evidence regarding the costs of compliance or the resources he has invested to date.

[118] The Respondent also submits that the Ministry is directing the Appellant to retain a qualified environmental professional to develop the plans required by Directions 1 and 2 in the Order, because this will enable the consideration of site-specific circumstances. Based on the Board's decision in *Story v. Assistant Water Manager* (Decision No. 2017-WAT-011(a), October 29, 2019 [*Story*], at para. 94), the Respondent submits that when making directions such as these, the Appellant's situation should not be "considered in isolation from the surrounding environment including the established, current biological state ... as affected by past and existing human activities."

[119] In addition, the parties provided more specific submissions that address each of the directions in the Order. I provide a summary of those submissions below, where I address the merits of each direction in the Order.

Panel's findings

[120] First, I will address whether there is a statutory basis for the Order. The Order states that it was issued under section 93(2)(e)(i) of the *WSA*. Section 93(1) of the *WSA* provides the context for section 93(2). Section 93(1)(e) is relevant to this appeal, and it states:

93 (1) An order under this section may be directed to any person who has a right, permission or obligation under this Act, including, without limitation,

...

(e) in the case of works for which an authorization, change approval, permit or drilling authorization is required but has not been obtained, to the person who has constructed or is using the works,

[121] Based on the work the Appellant undertook in and about the Creek, and my findings under Issues 2 and 3, it is clear he had an obligation under the *WSA* to obtain a change approval for the works in the Creek, but he did not obtain one. Therefore, section 93(1)(e) provided the Respondent with the authority to issue an order under section 93 of the *WSA*.

[122] Section 93(2) authorizes orders to be issued for the purpose of enforcing the *WSA* and its regulations. It is an offence under section 106(2)(b)(ii) of the *WSA* to make changes in and about a stream without lawful authority. I have already found that the Appellant needed to obtain an approval under section 11(1) of the *WSA*, to make changes in and about the Creek, but he did not have one. Therefore, I find that the Respondent had the discretion to issue an order under section 93(2) of the *WSA*. The Order was issued under section 93(2)(e)(i), which states:

(2) In addition to the other powers given under this Act, for the purpose of enforcing the provisions of this Act, the regulations or the terms and conditions of an authorization, ... an engineer may do one or more of the following:

...

(e) order

(i) a person who makes changes in and about a stream or any person who derives a benefit from the changes in and about a stream to restore or remediate those changes, ...

[123] Based on a plain language reading of section 93(2)(e)(i), I find that the Respondent had the statutory authority to direct the Appellant, who contravened section 106(2)(b)(ii) of the *WSA* by making unauthorized changes in and about the Creek, to restore or remediate the changes he made in and about the Creek.

[124] Having determined that there is a statutory basis for the Order, I next evaluate the directions contained in the Order in relation to the unauthorized changes that led to the Order.

[125] The following briefly summarizes the work undertaken by the Appellant pertinent to the directions in the Order:

1. The Appellant cleared the Property of trees and bush in the winter season of 2019-20. This left the soil on the Property in a bare, unprotected state. In February 2020, the Appellant placed logs at intervals along the banks of the Creek in an attempt to prevent sediment from entering the Creek.
2. In the summer of 2020, the Appellant used machinery to realign part of the Creek channel on the Property and make the channel narrower and deeper. He installed a culvert where the Creek enters the Property, and a small bridge to cross the Creek in the middle of the Property. He also recontoured some parts of the Property to reduce the slope toward the Creek, and other parts of the Property to slope away from the Creek.
3. In September 2020, the Appellant planted some winter rye on the Property to stabilize some of the surface soil, distributed some hay along the banks, and installed a double silt fence in the Creek. The Appellant installed a second silt fence where the Creek exited the Property in December 2020.
4. In April 2021, the Appellant seeded insectary plants along the banks of the Creek.

[126] I now turn to the directions in the Order, which are set out in the Background of this decision and summarized below.

Direction 1 – address the risk of sedimentation

[127] Direction 1 in the Order requires the Appellant to retain a qualified environmental professional to develop a plan to immediately address the risk of sedimentation to downstream values caused by the changes in and about the Creek, and to have this work overseen by an environmental monitor.

[128] The Appellant provided a photograph from April 2020 showing sediment accumulation behind and around a silt fence. He states that he replaced that silt fence with a double fence in September 2020 and added a second fence in December 2020. He planted winter rye and dispersed hay along some parts of the Creek shoulders in September 2020.

[129] The Respondent's evidence includes photographs of the Property and the Creek that were taken by the RDSO, on December 3, 2020. Several of those photographs show evidence of sediment entering the Creek from the Property. In his affidavit, the RDSO states that one of the photographs shows the silt fencing the Appellant installed "just before stream exits his property", and "it is straining from the sediment transport that is up against it and shows some signs of travelling around it." The photograph shows dark coloured water flowing over the top of the silt fence where it had slumped in the middle. This fence is positioned in the Creek near the western Property line. The photographs show there is no other barrier to stop silt from entering the Creek before it leaves the Property. The Appellant says he installed a second fence after the date of these photographs. The logs the Appellant placed in February 2020 at intervals along the Creek bank to prevent sediments entering the Creek were not evident in the Respondent's December photographs.

[130] Photographs of the Property from January 2021 provided by the Respondent show some new grassy-type plant growth close to the ground. Bare soil is evident amongst the growth. The Appellant seeded insectary plants in April 2021.

[131] In addition to this evidence, I have also considered the June 15, 2021 affidavit evidence from Mr. Bracher, the HO, who is an Ecosystem Biologist with the Ministry. His evidence is based on six inspections of the Property that he conducted from February 2020 through December 2020, an August 2019 satellite image of the Property, and the Respondent's photographic evidence. He states that until riparian vegetation is firmly established along the Creek, bank erosion and sedimentation will continue to be a problem. The smooth silt and clay lining the stream bottom will continue to be a source of sediment over the long-term during high flows, because there are no structures in the Creek to slow water velocity. He states that the vegetation that originally lined the banks of the Creek would have kept the banks in place which would assist with preventing soil erosion and the transport of sediment into the Creek. The prevention of sedimentation helps maintain water quality for aquatic life and downstream water users. The HO explains that the portion of the Creek that ran through the Property would not likely have supported fin fish, but would have contributed water, invertebrates, detritus and nutrients to downstream fish bearing waters. Although the HO was not tendered as an expert witness, and as such he cannot provide opinion evidence, I find his observations of the Creek, including riparian vegetation and sources of sedimentation to the Creek, to be credible and reliable.

[132] The RDSO, based on the Regional District of Nanaimo's fish habitat map of the drainage dated 1997, states in his affidavit that lower Foch Creek and Crocker Creek downstream of the Property, are fish bearing. The Respondent indicates that water quality is an important factor to support fish habitat. The Appellant questions if fish can be found in these waters today and submits that contaminants such as extracts from asphalt, which have entered the Creek, have eliminated the Creek as fish habitat.

[133] The Appellant points out that in addition to sediment from Property entering the Creek, there are other potential sources that could cause sediments to reach the Creek at the Participant's property. The Appellant submits that the traffic corridors, Burbank Rd., and Highway 4, which are downstream of the Property, as well as surface runoff in general, are sources of sediment.

[134] The Appellant did not provide specific evidence regarding the sediment contributed to the Creek from these sources, in total or individually. The Appellant's line drawing shows there are four transportation corridors upstream of the Property, and two downstream between the Property and the Participant's property. The visual records before me show bare patches of soil on both sides of the Creek channel and fairly sparse new plants along the Creek banks. They also show a breach in a silt fence, over which dark coloured water escapes. Although the Respondent's photographic evidence is from December 2020 and January 2021, the Participant's evidence confirms that a significant amount of sediment accumulated under a bridge on his property from December 2019 to August 2020. The Ministry first attended the Property in January 2020 because, at that time, the Participant reported an increased sediment load in the Creek where it crosses his property. The evidence of the Respondent is that the water in the Creek leaving the Property was

clear in June 2021. Taking into account the evidence before me, I find it is insufficient as a basis for me to determine how much sediment from the Appellant's Property contributed to the total load of sediment to the Creek. However, I find that there is sufficient evidence to conclude that the banks and bed of the Creek on the Property were substantial sources of sediment to the Creek.

[135] The evidence of sediment leaking around and over the silt fence closest to the western boundary of the Property confirms that the Appellant's attempts at sediment control have not been effective and that despite the silt fence, some sediment entered the Creek to travel downstream. I agree with the Respondent that further action is needed to prevent sediment from the Property entering the Creek.

[136] As the Board stated in *Vincent Smoluk v. Assistant Water Manager* (Decision No. 2019-WSA-001(a), May 20, 2020), at para. 43, one of the purposes of the WSA is "to protect water resources, including streams". I find that Direction 1 is consistent with the WSA's objective of protecting water resources including streams. The purpose of Direction 1 is to prevent or stop adverse impacts to the stream associated with sedimentation. I find this consistent with the purposes of the WSA as stated, when evidence demonstrates a risk of harm to water quality and possible downstream fish habitat, associated with ongoing sedimentation in the Creek.

[137] For these reasons, I confirm the substance of Direction 1 in the Order aimed at preventing sediments from entering the Creek from the Property, but I recognize that the date for completion of the work has passed and a new one must be set. The specifics of the further remediation are to be determined in a plan after identifying the risks to sedimentation and based on the current circumstances of the Creek at the Property.

Direction 2 – stabilize Creek banks and reduce erosion

[138] Direction 2 requires the Appellant to have a qualified environmental professional produce a plan for the long-term remediation of the Creek in order to stabilize its banks and reduce erosion, and submit the plan for review and approval by a Ministry HO.

[139] I find that the evidence, including the photographs provided by the Appellant, shows that the banks of the Creek up and downstream from the Property are stabilized by dense vegetation. In contrast, the December 2020 and January 2021 photographs show that the vegetation along the Creek banks on the Property is sparse, and bare patches of soil remain next to the Creek. The Appellant seeded insectary plants in April 2021. He did not provide evidence of the plant variety(ies) or planting density, and did not provide an explanation of why the plants he chose or their density would achieve bank stabilization.

[140] Aside from the photographs of the Creek bed at the base of the newly installed culvert, which show the presence of rocks and boulders, the Creek bed as shown in the Respondent's photographs appears consistent in composition. The HO's affidavit indicates the Creek bed is essentially fine sediment, as opposed to rock or woody debris or a mixture of these. He states that larger sized materials in a creek bed can slow the velocity of the overlying water, which in turn reduces

scour and erosion of the bed and banks of stream. He also indicates that creek channels with a diverse habitat composition support a broader range of aquatic life.

[141] Although the Appellant says the Respondent's evidence does not take into account the current state of the Creek, I find that Direction 2 addresses that concern. Direction 2 orders the Appellant to retain a qualified environmental professional to review the current state of the Creek bank vegetation and develop and implement a plan to lead to bank stability and to stop erosion. While the Order anticipates the need for further remediation for creek bank stability and to prevent erosion, the Order itself does not determine what measures should be taken. It simply acknowledges that the remediation measures undertaken by the Appellant at that time were insufficient to achieve the goals of creek bank and bed stability and to prevent erosion. It enables the Appellant to retain a person, on his behalf, to evaluate the Creek and develop a plan satisfactory to the Ministry to establish those measures.

[142] As indicated above, the Respondent submits that the decision in *Story* establishes that the current situation in the Creek should not be "considered in isolation from the surrounding environment including the established, current biological state ... as affected by past and existing human activities." I agree. The condition of the Creek upstream and downstream of the Property reflects the consequences of changes in and about the Creek that occurred in the past. The Appellant is subject to the current regulatory scheme which allows the consideration of current ecological state of the Creek, and he is not being held to a different or higher standard than any other person would be under the current regulatory scheme. I find that the development and implementation of plans as required by Directions 1 and 2 will enable a consideration of the current environmental condition of the Creek before establishing further remediation measures. Also, I find that Direction 2 is consistent with purposes of the *WSA*, which include protecting water resources, and is appropriate in the circumstances. For these reasons, I confirm the substance of Direction 2, but I recognize that as is the case for Direction 1, the dates in Direction 2 must be changed due to the passage of time.

Direction 3 – Prepare a final report after implementation

[143] Direction 3 requires the Appellant to prepare a final report after the plans required by Directions 1 and 2 have been fully implemented. The parties did not make specific submissions regarding this direction, and I see no need to vary this requirement. In my view, reporting on the results of plan implementation is simply good management practice, and is necessary to show that remediation work is completed as planned.

Complying with the Order

[144] I have rejected the Appellant's submissions that there is no need for further mitigation, but the question remains as to the measures that should be adopted. The Appellant submits that retaining a qualified environmental professional to undertake the planning and implementation of the directions is too onerous due to costs. The Appellant is responsible for providing evidence to support the arguments he makes, and he has provided no evidence of the cost of complying with the

Order. On this basis alone, I could reject this argument. However, I find that there are additional reasons that justify the cost of implementing the Order, including the requirement to hire a qualified environmental professional.

[145] I note that the Order does not require the Appellant to undo the channelizing on the Property, restore the Creek to the state and alignment it was in before he undertook the changes, or make adjustments to the culvert. The Order requires the Appellant to address the risk of sedimentation to downstream values from the unauthorized changes to the Creek, stabilize the Creek banks, and reduce erosion. Under section 93(2)(e)(i) of the *WSA*, the Respondent could have chosen to order the Appellant to “restore” the Creek. However, the Respondent chose to make a less drastic and more practical order that requires the Appellant to remediate and mitigate the unauthorized changes he made to the Creek. I find that the Order is not, in terms of its requirements, and likely in terms of the associated costs, as onerous for the Appellant to carry out as it could have been if the Respondent had ordered the Appellant to restore the Creek channel to its original vegetative state, course and shape. The Order respects the balance between the designation of land as ALR and the need for compliance with the *WSA*. The implementation of the Order will not interfere with the Appellant’s ability to use the Property for farm purposes.

[146] Furthermore, I find that development of the plans by a qualified environmental professional enables the consideration of site-specific circumstances, based on the state of the Creek at this time, to determine the needs for further mitigation and remediation. An assessment by a qualified environmental professional will bring an end to the uncertainty surrounding how to successfully remediate the Creek. The professional can also provide a fresh assessment and develop plans to achieve the outcomes as directed and considered in this decision. That person can also serve as a contact with the Ministry to obtain any necessary approvals for the remediation work.

[147] Expertise is required to identify specific plants at the site, to determine how they will grow and if they will be enough to provide bank stability. A qualified environmental professional will be able to determine if, or what, further plantings are necessary. The February 13, 2020 email from AWM Baldwin, while not delivered to the Appellant, discloses the Ministry’s objective of using ecologically suitable plants with deep roots to revegetate riparian zones. A qualified environmental professional can determine the appropriate plantings to achieve the objectives of the remediation plans. I find this approach to be consistent with the purposes of the *WSA* in balancing interests.

[148] I have determined that Directions 1 and 2 are substantively appropriate in the circumstances, but that new dates must be established and set for development and implementation of the plans identified in Directions 1 and 2. I also conclude that the Respondent should set new dates and issue a varied Order to that extent. Under these circumstances, the Respondent should visit the site to determine the current condition of the Creek before setting new dates for Directions 1 and 2.

[149] On this basis, I confirm the Order with the exception of the dates currently set by Directions 1 and 2. I remit the Order back to the Respondent with directions to set new dates after conducting a site visit to inspect the Creek on the Property.

Summary

[150] The directions in the Order enable a qualified environmental professional to take into account the current ecological state of the Creek, upstream and downstream of the Property, and to develop plans to remediate the Creek, while meeting the broader legislative purposes of the WSA of balancing interests and protecting the environment. Based on my analysis of the directions, I have determined that they are substantively appropriate in the circumstances. The original dates established in the directions of the Order for completion of remedial work have passed. New dates are required, and I direct the Respondent to establish these after conducting a site visit to inspect the Creek on the Property.

DECISION

[151] In making this decision, I considered all of the relevant and admissible evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[152] For the reasons set out above, I confirm the Order with the exception of the dates for completing the requirements in Directions 1 and 2. I direct the Respondent to set new dates for completing the requirements in Directions 1 and 2, after conducting a site visit to inspect the Creek on the Property.

[153] The appeal is dismissed.

“Daphne Stancil”

Daphne Stancil, Panel Chair
Environmental Appeal Board

January 11, 2022