Environmental Appeal Board
Fourth Floor, 747 Fort Street, Victoria BC V8W 3E9
Tel: (250) 387-3464 Fax: (250) 356-9923
www.bceab.ca Email: info@bceab.ca

DECISION NOS. EAB-WSA-21-A007(a) and EAB-WSA-21-A011 [Group Appeal File: EAB-WSA-21-G001]

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

BETWEEN:	Archibald J. McCallum & Rose M. Sinclair	**APPELLANTS**
AND:	Assistant Water Manager	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board James Carwana, Panel Chair	
DATE:	Conducted by way of written submissions closing on March 7, 2022	
APPEARING:	For the Appellants:	Self-represented
	For the Respondent:	Amanda Macdonald, Counsel Livia Meret, Counsel

APPEALS

[1] Archibald J. McCallum and Rose M. Sinclair (the "Appellants") have appealed a decision (the "Decision") made on April 21, 2021, by Jeremy Roscoe, an Assistant Water Manager (the "Respondent"). The Respondent works in the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry").

[2] The Decision dealt with two applications by the Appellants under the *Water Sustainability Act* ("*WSA*"). One application was to amend the Appellants' conditional water licence 107968 (the "Current Licence"), which authorizes the Appellants to use water for domestic purposes from Clore Brook, located in the Skeena Region of BC. The application indicated that the Appellants sought to change the works associated with their Current Licence.

[3] The other application was for the Appellants to obtain a new water licence on Clore Brook. They sought authorization to divert and store water for conservation and irrigation purposes.

[4] The Decision states that the Respondent refused the applications on the grounds of "insufficient information having been provided to complete a satisfactory

review". The Decision also stated that the Appellants' current water use was contrary to the terms and conditions of their Current Licence, and they should align their water use with the terms of their Current Licence.

[5] 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.

[6] In their Notices of Appeal, the Appellants submit that they have been using water from Clore Brook for more than 50 years, and they request the continued use of that water.

[7] The Respondent submits that his Decision to deny the applications was reasonable and the appeals should be dismissed.

BACKGROUND

The Current Licence

[8] The Current Licence authorizes the Appellants to divert and use 500 gallons of water per day from Clore Brook for domestic purposes, as defined in section 2 of the *WSA*. The Current Licence is appurtenant to land that the Appellants own, on which they have a home. It has a precedence date of July 11, 1968, and was issued on April 18, 1994, in substitution for an earlier licence.

[9] The works authorized by the Current Licence consist of a diversion structure and pipeline located approximately as shown on a plan attached to the Current Licence. The authorized location for the water intake on the plan is within a highway right of way ("ROW 52-195").

Events leading to the Decision

[10] In September 2016, the Ministry received a complaint in relation to the Appellants' Current Licence. The complaint was from another licence holder on Clore Brook who alleged that the Appellants had made modifications to their water diversion structure. Those modifications were reportedly impairing the ability of other licence holders to access water from Clore Brook.

[11] The complaint was investigated by Ministry Natural Resource Officers ("NROs") through an initial site visit on October 14, 2016, and a subsequent site visit on December 8, 2016.

[12] The Respondent reviewed the Ministry's file on the Appellants' Current Licence as well as the information from the NROs. This led to concerns by the Respondent that: i) the Appellants' use of water may not be in compliance with the terms and conditions of their Current Licence; and ii) the works constructed by the

Appellants in relation to their water use may not be in compliance with their Current Licence.

[13] In a letter dated December 19, 2016, the Respondent informed the Appellants about the complaint and requested the following information from them so that he could better assess their compliance:

- how they were currently using the water;
- a detailed description of their water diversion structure, including photos, specifications, and a summary of any recent modifications;
- the daily diversion volume and method of measurement; and
- the surface area of the impoundment area upstream of the diversion structure.

[14] The Appellants provided information in response, which was reviewed by the Respondent. The Respondent concluded that the Appellants' use of water and their diversion structure did not align with the rights provided under their Current Licence. For example, the Appellants indicated that that they were using water for a fishpond; however, their Current Licence does not allow water to be used for conservation or storage purposes, which would be required for a fishpond.

[15] Regarding the Appellants' diversion structure, the information from the Appellants indicated that they intended to use a diversion point which had previously been used approximately 25 metres from ROW 52-195. That diversion point had been used under a previous licence, but was not authorized under the Current Licence.

[16] On January 18, 2017, the Respondent wrote to the Appellants identifying various concerns based on the information the Appellants had provided. This included the fact that the Appellants' Current Licence did not provide for water conservation or storage in relation to having a fishpond, and the fact that moving their intake to the previous location would require an amendment to their Current Licence. The Respondent requested further information including the Appellants' intentions in respect of reconnecting with their previous diversion point and their intentions to store water, which could include an application for an additional water licence.

[17] The Appellants provided further information to the Respondent, indicating they were seeking water storage relating to a fishpond and water for irrigation. They referred to using their current water works and their previous "stump" water works[1] located upstream. In connection with these matters, the Appellants referenced a previous licence, #35645[2], that was appurtenant to land that included

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[1] In subsequent correspondence, the Appellants describe this as 5-gallon plastic bucket with a 2-inch hole feeding a water line located in the roots on the downstream side of an old cedar stump.

[2] According to the Respondent's submissions, conditional water licence 35645 was appurtenant to lands including the Appellants' property. When that land was subdivided, conditional water licence 35645 was replaced with two licences, one of which was

the Appellants' property. That licence ("CWL 35645") was issued to Joseph Schultzik, permitted the use of 1,500 gallons per day from Clore Brook, and had a water intake at or near the historic "stump" location.

[18] On March 2, 2017, after further discussions between the Respondent and the Appellants, the Respondent wrote to the Appellants and explained his understanding of the Appellants' proposed course of action and his recommendations. The relevant portions of the Respondent's email state as follows:

> As per our recent telephone conversation and the information that you had previously provided, my current understanding of your proposed course of action is as follows:
>
> - You intend to re-locate your intake ~25 metres upstream of its current location to the "stump" location which was used previously
> - You would like to apply for an additional licence authorizing the diversion and storage of water for conservation and irrigation purposes (fishpond and watering on property)
>
> Given the above, I recommend that you proceed as follows:
>
> - Submit an application to amend your current domestic water licence (File No 0370798) to reflect the change of works associated with the relocation of your intake
> - Provide a detailed description and location of the proposed works, the specifications of the intake structure **and most importantly, landowner permission in writing if any of the works traverse private property**
> - Provide a detailed plan outlining the decommissioning and removal of your existing intake structure
> - Submit an application for a new water licence for storage purposes
> - Provide a detailed description of the works associated with your existing fishpond (dimensions, daily diversion rate etc.)
>
> [emphasis added]

[19] The Appellants subsequently made both an application to amend their Current Licence, and an application for a new licence, as recommended by the Respondent.

[20] The Appellants' application to amend their Current Licence sought to re-activate the previous intake, which they identified as being located approximately 27 meters upstream from the current location.

[21] The Appellants' application for a new licence sought authorization to store 500 to 1,000 gallons of water per day, using the same historic point of intake as

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conditional water licence 65187. That licence was later superceded by final licence 72699. The Current Licence was issued in substitution to final licence 72699.

identified in the amendment application. This was in addition to the 500 gallons per day allocated to the Appellants under their Current Licence.

[22] On June 5, 2018, a Ministry representative met with the Appellants. Prior to the meeting, the Respondent emailed the Ministry representative about obtaining further information from the Appellants. He indicated that it was difficult to understand the Appellants' intentions from the information provided in their applications and there was some confusion. Regarding the Appellants' request for a conservation licence, the Respondent indicated that they appeared to be seeking a different storage component than for the existing fishpond on their property, which they use for fire suppression and irrigation. In that regard, he further indicated that he was "not too worried" about the purpose related to the fishpond, and would like to get that use authorized.

[23] After the June 5, 2018 meeting, the Ministry representative who had met with the Appellants informed the Respondent by email that there was still confusion, and the Appellants disagreed with the Respondent's stipulation that they needed written permission from the other landowner to access the historic stump intake.

[24] The Respondent reviewed the applications and the material provided by the Appellants. On July 25, 2018, he wrote to the Appellants about his concerns regarding the applications.

[25] Regarding the application to amend the Current Licence, the Respondent determined that it was lacking in several ways, which he set out in his July 25, 2018 letter. First, the Respondent found that the amendment application did "not include a sufficiently detailed description and location of the proposed point of diversion". Second, the Respondent noted that the proposed location for the water intake was outside of ROW 52-195, would be located on private property, and therefore the Appellants would "require the landowner's permission to access and occupy their property". He further stated that a water licence did not provide the licensee with access to land and he again noted that the Appellants would need to get the landowner's permission to access and occupy their property, either in a written agreement or by establishing an easement.

[26] Regarding the application for a new licence, the Respondent determined that insufficient information was provided. Information relating to the proposed works provided a range of water volumes and lacked specific information on the additional water volume associated with the fishpond, to which the application related.

[27] The Respondent further noted that the Appellants' Current Licence did not include a storage component, the current intake clearly impounded and stored water within the channel of Clore Brook, and there was no detailed information regarding how their current point of diversion would be decommissioned or updated.

[28] In the Respondent's letter of July 25, 2018, he also mentioned the "ongoing neighbourly dispute" between the Appellants and their neighbours, the Webber family. The Respondent stated: "It is clear that this dispute is beyond the scope and authority of the *Water Sustainability Act* to resolve. As such, the Province must focus on the elements which the Act has jurisdiction over".

[29] Finally, the Respondent's letter of July 25, 2018 also requested written clarification from the Appellants in respect of his concerns, by August 8, 2018.

[30] On August 28, 2018, the Respondent again wrote to the Appellants reminding them of his request for further information.

[31] In a September 6, 2018 email, the Appellants provided further information to the Respondent. Regarding the location for the diversion on their amendment application, the Appellants stated that the Water Management Branch had measured the area of their original water intake outside of ROW 52-195 years ago and was aware of the location of the point of diversion. In terms of their right to use that point of diversion, the Appellants relied on a Supreme Court of BC decision which they said gave them grandfathered rights to their original water works and an implied easement to all pathways, waterways, and accrued fixtures on Clore Brook. They indicated that this right derived from a lease granted to them by Arthur Clore prior to the current owners (the Webbers) owning the property near the diversion.

[32] The Appellants responded regarding their use for the additional water by indicating that they did not have a garden in 2018 and they were having to feed their pond from another source due to issues with the water from upstream on Clore Brook.

[33] The Respondent replied to the Appellants on September 12, 2018. Regarding the location for the diversion on the amendment application, the Respondent indicated that the Appellants' information confirmed that the requested location was outside of ROW 52-195 and within the adjacent private property. He requested a copy of the BC Supreme Court judgment referred to by the Appellants, and he noted that the lease document which had been submitted did not appear to provide a right to traverse or occupy land outside of the parcel identified in the lease. The Respondent further disputed the Appellants' claim to an implied easement over the Webbers' property, and he stated his opinion that such a claim was inconsistent with the fact that they had previously moved their intake from the historic source when the Webbers had sent a notice in the 1990s requiring the Appellants to remove their water works from that location. There was no claim of an implied easement by the Appellants at that time, and the Respondent reminded the Appellants that "the right to withdraw and use water provided by a Water Licence does not provide the holder with the authority to access or occupy private property".

[34] Regarding the Appellants' new application for additional water use and storage, the Respondent noted that the information they had recently provided was inconsistent with information previously provided. He further indicated that he required an accurate estimate regarding the water volume sought. Thus far, the Appellants had provided a range of volumes, from 400 gallons to 1,500 gallons per day. In addition, the Respondent indicated he required "a detailed description of the works to be authorized by the licence (pond and distribution line in this case) as well as a diagram illustrating the relative size and location of the works in relation to the appurtenant land".

[35] The Appellants responded on September 18, 2018. Regarding their amendment application to reactivate their original point of diversion, the Appellants claimed a legal right to have their water source on the Webbers' property, and a right-of-way over the Webbers' land to access their water source. The Appellants stated they had been using such a water source before the precedence date on their Current Licence. They also referred to legal texts, and cited concepts such as adverse possession, prescriptive easement, and right-of-way by necessity. They indicated that they would send the Reasons for Judgment from their 1977 B.C. Supreme Court case regarding their rights under a lease, and that they were seeking re-activation of their water works to achieve their original water pressure.

[36] Regarding their application for additional water use and storage, the Appellants indicated they would provide further material, and they would like to have both their Current Licence and an additional licence for fire protection and domestic use, each for not more than 500 gallons per day.

[37] The Respondent replied to the Appellants on October 1, 2018, and discussed various legal aspects of the amendment application and the Appellants' claims about their rights to re-establish their original point of diversion. The Respondent made a number of points, which I have summarized below:

- The water in question is surface water. The fact that the Appellants may have been using such water prior to having a licence does not confer rights to such use, since "the use of surface water for domestic purposes has been allowed in sufferance in British Columbia".
- The rights to water use are established by priority date on the licence for such use. The date in this case was the date of application for the original licence on Clore Brook, not whenever use at sufferance may have been occurring. The application for the original licence in this case was received July 11, 1968.
- The BC Supreme Court Reasons for Judgment and the lease provided by the Appellants did not provide express access to, or an easement across, adjacent properties. The issue of access/easement would be in dispute until the property owners negotiate an agreement or put the issue before the courts.
- The Appellants' recent activities associated with re-establishing the historic point of diversion outside of their Current Licence were not authorized.

[38] Regarding the Appellants' new application for additional water use, the Respondent indicated that he had recommended applying for an additional licence so the Appellants could bring the pond on their property into compliance. This would allow for storage in addition to the 500 gallons per day authorized by their Current Licence. Without any issues about the point of diversion, the Respondent indicated he would still need to take other licence holders' concerns into account, and he did "not foresee issuing such a licence given the current water shortage concerns on Clore Brook".

[39] The Respondent further noted that the Appellants did not need a licence to use water for firefighting. He asked again about their intended use for the additional water requested in the application for a new licence.

[40] The Appellants subsequently left a voice mail message for the Respondent. The voicemail indicated their uses for the water included raising poultry, irrigating 40 to 50 fruit trees, reactivating their fish pond, and possibly having a bed and breakfast on the property in the future.

[41] The Respondent responded to the voice mail on October 11, 2018, by email. He noted that the water uses described in the Appellants' voicemail were not reflected in their applications. He advised the Appellants that in order to proceed with their applications, he needed "to know precisely what your intentions are in terms of water use", and that a specific purpose and accurate quantity must be specified on any licence issued.

[42] The Appellants sent an email to the Respondent on October 15, 2018. They indicated that they would use 500 gallons per day of water from the historic stump location for domestic purposes, "including house, pond, hedge and lawn irrigation as well as fire protection". In addition, they requested 500 gallons per day from the current source for an orchard, and they referred to also having ¼ acre of berries and a green house. They explained that their family "is of Native descent", and it is part of their culture to be as self-sufficient as possible. They further indicated that in the future, their beneficiaries may decide to raise poultry or own a bed and breakfast. Regarding the amount of water in Clore Brook, the Appellants stated that the Webbers have an abundance of water, and the water is flowing the same as it always has for the last 52 years.

[43] The Respondent attests that during the time he was reviewing the applications, the Ministry received complaints about the Appellants making unauthorized changes in Clore Brook. NROs conducted compliance investigations which resulted in violation tickets being issued to the Appellant McCallum. The violation tickets were contested in the Provincial Court of BC on November 27, 2019, and Mr. McCallum was found guilty of making unauthorized changes in and about a stream.

[44] A transcript of the court proceedings is included in the materials before me. In dealing with the matter, Judicial Justice E.K. Langford made comments about the Appellants' previous water licence having been cancelled and replaced by the Current Licence, the regulation of water matters, and the role of those administering the *WSA.*

[45] No further correspondence about the applications is included in the appeal record prior to the Respondent's Decision on April 21, 2021. In the Decision, the Respondent noted that the Appellants submitted the applications in response to recommendations by his office, and referred to various pieces of previous correspondence between the parties.

[46] The Respondent made particular reference to the September 6, 2018 email from the Appellants which did not adequately address the outstanding concerns which had been identified, and "highlighted the ongoing dispute" with the Webber family. He noted that a review of the applications was paused during investigations

of the Appellants' compliance with the terms of their Current Licence and the resulting enforcement actions. He further referenced the judgment of Judicial Justice Langford and an email received afterwards relating to the ongoing dispute with the Webber family.

[47] In the Decision, the Respondent made specific reference to the dispute with the Webbers and stated: "As indicated previously, the dispute between you and the Webbers is unfortunate and beyond the jurisdiction and authority of the *Water Sustainability Act* to resolve".

[48] The Respondent refused the applications "on the grounds of insufficient information having been provided to complete a satisfactory review" of the applications.

[49] The Decision went on to remind the Appellants that their "current water use is contrary to the terms and conditions" of their Current Licence, and urged them to align the water use on their property with the terms of their Current Licence.

[50] After the Appellants received the Decision, they left voicemail messages seeking clarification of the Decision. The Respondent replied by letter dated May 13, 2021. In that letter, the Respondent referred to the following points in connection with the refusals of the applications, which I have paraphrased below:

- The authorization to relocate the water intake "to the historic location known as the 'stump' **was contingent on you receiving written permission to access the stump by the owners of the private property that the stump is located on. This permission had not been provided when the refusal letter was issued".**
- Clarification of the Appellants' intended water use and configuration of the associated water works had not been provided despite a number of requests.

  [emphasis added]

[51] The Respondent's May 13, 2021 letter also referenced complaint investigations that led to violation tickets being issued while his office was attempting to clarify matters relating to the applications, and the Provincial Court's finding that the Appellant McCallum was guilty of making unauthorized changes in and about a stream.

Procedural Background of the Appeals

[52] On May 17, 2021, the Board received the Appellants' Notice of Appeal against the Decision. The Board received subsequent correspondence from the Appellants and a further Notice of Appeal dated July 5, 2021.

[53] On July 14, 2021, the Respondent identified Cindi Webber as being a person who may be affected by the appeal proceedings, and Cindi Webber was given notice of the proceedings.

[54] On August 24, 2021, the Board held a conference call with the parties. On August 25, 2021, the Board sent a letter to the parties regarding the conference call. The Board's letter indicates that "counsel for the Respondent noted that the applications were rejected based on insufficient information and encouraged the

Appellants to review the correspondence" from the Respondent setting out the additional information that was requested to see if this information could be provided. The Board noted that the parties had agreed that the appeals could proceed by way of written submissions, and the Board set out a submission schedule.

[55] The Appellants received an extension of time to submit their written comments and supporting documentation to the Board. On November 22, 2021, the Appellants provided a number of documents to the Board. These documents mainly related to assertions made by the Appellants in the document attached to their May 17, 2021 Notice of Appeal.

[56] The Respondent filed his Statement of Points, an affidavit, and a Book of Authorities on December 14, 2021. Numerous documents from the Ministry file relating to this matter are attached to the Respondent's affidavit as exhibits.

[57] On December 24, 2021, the Appellants wrote to the Board indicating they would like to apply for another extension of time. On December 29, 2021, the Board responded and on January 2, 2022, the Appellants sent an email requesting an extension of time for submitting documents as well as their written reply submissions, stating that they were in the process of hiring a lawyer to represent them.

[58] On January 5, 2022, the Board received the Respondent's submission in response to the Appellants' request for an extension.

[59] On January 6, 2022, the Board wrote to the parties regarding the Appellants' request for an extension of time in relation to their reply submissions. The Board made various orders in respect of the extension request including setting January 20, 2022 as the date for which the Appellants were required to notify the Board and the Respondent of their legal counsel; setting the date for the Appellants to file their final reply submissions as February 28, 2022; and, setting out the requirements for any further extensions of such deadlines.

[60] The Appellants did not provide information regarding their legal counsel by the required date, and the Board wrote to them on January 24, 2022. The Board confirmed that no correspondence had been received regarding their legal counsel, and reminded the Appellants that the other deadlines in the January 6, 2022 letter remained in place.

[61] On March 1, 2022, the Board sent an email to the Appellants indicating that a final reply had not been received by the deadline, asking if they intended to provide a final reply and, if so, reminding them what was required in terms of a further extension.

[62] On March 1, 2022, the Appellants sent an email to the Board. The Appellants explained that they had been trying to obtain legal counsel and had recently sent their documents to a lawyer who they were hoping would represent them. They requested a further extension for filing written submissions.

[63] On March 2, 2022, the Board granted the Appellants a further extension to March 7, 2022, to file provide any final reply submissions.

[64] On March 8, 2022, the Board wrote to confirm that no final reply submissions were received and that the record was closed.

ISSUES

[65] The issues raised on this appeal are as follows:

1. In deciding the appeals, is the Board limited to considering whether the Respondent's decision was reasonable?
2. Did the Appellants fail to meet the burden of proof?
3. If not, what should be the outcome of the appeals?

RELEVANT LEGISLATION

[66] The following sections of the *WSA* as well as the *Water Sustainability Regulation*, B.C. Reg. 11/2021 (the "*Regulation*"), are relevant to this appeal.

[67] Section 2 of the *WSA* defines various water use purposes including the following:

> "conservation purpose" means the diversion, retention or use of water for the purpose of conserving fish or wildlife and includes the construction of works for that purpose;
>
> "domestic purpose" means the use of water for household purposes by the occupants of, subject to the regulations, one or more private dwellings, other than multi-family apartment buildings, including, without limitation, hotels and strata titled or cooperative buildings, located on a single parcel, including, without limitation, the following uses:
>
> (a) drinking water, food preparation and sanitation;
>
> (b) fire prevention;
>
> (c) providing water to animals or poultry kept
>
> (i) for household use, or
>
> (ii) as pets;
>
> (d) irrigation of a garden not exceeding 1 000 m^2 that is adjoining and occupied with a dwelling;
>
> "irrigation purpose" means the use of water on cultivated land or hay meadows to nourish crops or on pasture to nourish forage;
>
> …

[68] Part 2 of the *WSA* deals with the licensing, diversion and use of water. Section 5 states, in part:

> (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations.

…

(3) No right to divert or use water may be acquired by prescription.

[69] Under section 12 of the *WSA*, an applicant may apply for a licence in respect of the diversion and use of water. Section 12(1) and (2) of the *WSA* state as follows:

(1) An applicant may apply to a decision maker by

(a) complying with any requirements prescribed in respect of the application, and

(b) within the period, if any, prescribed by regulation,

(i) complying with the decision maker's directions under section 13 (1) or (9), if any,

(ii) paying the prescribed fees,

(iii) providing in the form and manner specified by the decision maker any plans, specifications, reports of assessments and other information the decision maker requests, which information may include, but is not limited to, public personal information that is relevant to the application, respecting

(A) the applicant,

(B) existing water users, riparian owners, other applicants and other authorization holders, whose rights are likely to be detrimentally affected if the application is granted, and

(C) land owners whose land is likely to be physically affected if the application is granted, and

(iv) providing in the form and manner specified by the decision maker the consents that are necessary for the decision maker to verify personal information relating to the applicant that is provided under subparagraph (iii).

…

[70] Under section 26(1)(d) of the *WSA*, an applicant may apply for an amendment to a licence to authorize additional or other works than those previously authorized.

[71] Section 3(1) of the *Regulation* sets out what must be included in an application for a licence. The information required includes: the purposes for which the water is to be used; the quantity of water proposed to be diverted or stored for each water use purpose; the measurements of the area of land to be irrigated if the water use purposes include irrigation; identification of points of diversion and storage; a detailed description of the proposed works; a location description of the land on which the applicant proposes to construct works; and a detailed drawing showing the location of the proposed works.

[72] Section 6 of the *Regulation* provides that an amendment application must include:

(i) a description of the works that will be decommissioned, if any, and of the proposed works,

(ii) if the proposed works will be located on land other than the land described in the original application, a location description of the land,

(iii) a location description of any land that is likely to be physically affected by the proposed works,

(iv) the name of the owner of any land described in subparagraph (ii) or (iii) that is not owned by the applicant,

… and

(vi) a drawing as described in section 3 (1) (p) showing the relevant boundaries and the location of the proposed works.

[73] Section 14 of the *WSA* provides for the powers of a decision maker respecting applications:

14 (1) Whether or not notice is given, or objections are delivered, under section 13 in relation to an application, the decision maker may, in accordance with this Act and the regulations,

(a) refuse the application,

(b) amend the application in any respect,

(c) grant all or part of the application,

(d) order the applicant to provide in the form and manner specified by the decision maker plans, specifications, reports of assessments or other information, …

…

(f) issue to the applicant, subject to prescribed terms and conditions and on the terms and conditions the decision maker considers advisable,

…

(i) one or more conditional licences or final licences, or

….

(6) Without limiting subsection (1), the decision maker may refuse an application, or reject an application without considering it, if

(a) the applicant fails to comply with

(i) section 12 (1) *[application and decision maker initiative procedures]*,

(ii) a direction under section 13 (1) or (9),

(iii) an order under subsection (1) (d) or (e) of this section, or

(iv) an order or a direction referred to in this paragraph within the required period,

> …, or
>
> (c) the application is incomplete.

DISCUSSION AND ANALYSIS

1. In deciding the appeals, is the Board limited to considering whether the Respondent's decision was reasonable?

Summary of the Parties' positions

[74] The Respondent says that the Appellants have provided no evidence to show why the Decision was unreasonable. The Respondent submits that the Decision was reasonable in all the circumstances, and the appeals should be dismissed.

[75] This raises the question of the Board's role in deciding an appeal under the *WSA*, and whether the Board is limited to a review of whether the Respondent's decision was reasonable.

[76] The Appellants did not directly address this question.

Panel's Findings

[77] It is well established that, in deciding an appeal under the *WSA*, the Board is not limited to considering whether the Respondent's decision was reasonable. For example, in *Karen Nonis v. Assistant Water Manager*, (Decision No. 2017-WAT-010(a), April 19, 2018) [*Nonis*], the Board dealt with an appeal from a decision of an Assistant Water Manager denying the appellant a licence to draw water from Lake Okanagan. In *Nonis*, the Assistant Water Manager argued that "the decision to refuse the application was reasonable, and was based on all of the information provided within the context of the application", and maintained "that the onus lies on the Appellant to demonstrate why his decision was unreasonable" (at paras. 38 and 39).

[78] In paras. 44 to 46 of *Nonis*, the Board found that it was not limited to considering the reasonableness of the Assistant Water Manager's decision. The Board stated:

> Although the present matter before the Panel is referred to in the legislation as an "appeal", the Board's role in hearing and deciding an appeal is not limited to reviewing the record of information that was considered by the Assistant Water Manager and deciding whether his decision was "reasonable". The Board typically considers both the record of information that was considered by the person who made the appealed decision, and any new information provided by the parties that is relevant to the appeal. In that regard, section 105(5) of the *Water Sustainability Act* empowers the Board to "conduct an appeal by way of a new hearing." This is sometimes called a hearing "*de novo*". This means that the Board may consider evidence that was not available to the Assistant Water Manager, as the Panel has done in this case.
>
> In addition, section 105(6) of the *Water Sustainability Act* provides the Board with broad remedial powers, including the power to "make any order that the

> person whose order is being appealed could have made and that the board considers appropriate in the circumstances." Thus, the Board may exercise the same powers as the Assistant Regional Manager in deciding whether to grant the licence application.
>
> For all of these reasons**, the issue before the Panel is not simply whether the Assistant Water Manager's decision was "reasonable"; rather, it is whether a water licence should be granted to allow the Appellant to continue drawing water from the lake for irrigation purposes, based on the legislation and relevant evidence that is before the Panel.**
>
> [emphasis added]

[79] The Board came to the same conclusion more recently in *Judith Goplen v. Assistant Water Manager*, (Decision No. EAB-WAS-21-A005(a), June 7, 2022) [*Goplen*], where the Board considered the decision of an Assistant Water Manager denying a water licence application to divert water from Kalamalka Lake. In *Goplen*, the Board's reasoning was similar to that in *Nonis* in finding that, contrary to the Assistant Water Manager's submissions, the Board was not limited to considering the reasonableness of his decision.

[80] In addition, the courts have confirmed this approach. For example, in *British Columbia (Water Sustainability Act) v. Harrison Hydro Project Inc.*, 2021 BCSC 195 (confirmed in *British Columbia (Comptroller of Water Rights, Water Sustainability Act) v. Harrison Hydro Project Inc.*, 2022 BCCA 4), at paras. 35 and 36, the B.C. Supreme Court stated as follows regarding the role of the Board:

> Section 105 of the *WSA* creates a general right of appeal to the Board from "an order resulting from an exercise of discretion" of the Comptroller. Despite this terminology, the Board is not confined to hearing an appeal in the traditional legal sense. Section 105(5) of the *WSA* provides that "the appeal board may conduct an appeal by way of a new hearing."
>
> In a *de novo* hearing the Board owes no deference to the Comptroller. In this case, as noted in the Board's decision, the parties agreed that the hearing was a hearing *de novo* and that the Board was entitled to consider the parties' submissions and the evidence afresh. …

[81] I agree with the reasoning of the BC Supreme Court, above, and the Board's reasoning in *Nonis* and *Goplen*, and find that my role in deciding the present appeals is not limited to considering whether the Respondent's Decision was reasonable.

2. Did the Appellants fail to meet the burden of proof?

Summary of the Respondent's position

[82] The Respondent says the appeals should be dismissed because the Appellants have failed to meet the burden of proof in terms of showing why the Decision was unreasonable. The Respondent submits that the Appellants failed to

provide arguments in support of the grounds of appeal or explain why the Decision should be different and what remedy they are seeking.

[83] The Respondent refers the Board's decisions in *Telegraph Cove Resorts Ltd. v. British Columbia (Ministry of Environment)*, [2019] B.C.E.A. No. 15 (QL) [*Telegraph Cove*], *Wilfred Boardman* (Decision No. 2013-WIL-021(a)), September 9, 2014, and *Avren et al. v. Regional Water Manager* (Decision Nos. 2006-WAT-003(a), 2006-WAT-004(a), 2006-WAT-005(b)), June 29, 2007 [*Avren*], and argues that an appellant must provide "some evidence that either the order made was wrong in law or fact, or that the process leading to the order was flawed in some way" (*Avren*, at p. 10).

[84] The Respondent says that it is not enough for an appellant to simply file a notice of appeal against a decision because the appellant does not like it (see: *Telegraph Cove*, at para. 35), and that the Appellants have failed to file any submissions to show why the Decision is wrong and should be changed.

Summary of the Appellants' position

[85] The Appellants' position is set out in the written submissions included with their Notices of Appeal, the documents they provided on the appeals relating to their applications, and in the Ministry documents filed on the appeals.

[86] The Appellants have identified the remedy they are seeking as continued use of the water from Clore Brook. The material before me indicates that they are relying on licences for water use from Clore Brook which were granted in the past, their use of water from Clore Brook in the past, the present, and into the future, and documents relating to their property and water use.

Panel's Findings

[87] In *Avren*, the Board explained that it is not enough for an appellant to simply "come to this Board with the mere complaint that the appellant does not like the decision that was made" (at p. 11). I agree with that view expressed in *Avren*. I find that an appellant must provide some evidence or argument as to why a different decision ought to have been made or why the process leading to the appealed decision was flawed.

[88] In determining whether that is the case here, I find that it is appropriate to consider the totality of the material provided on the appeals. In the present case, that material includes the information provided with the Appellants' Notices of Appeal, the documents they filed, and the information from the Ministry's file regarding the applications which has been placed into evidence by the Respondent.

[89] I note that the Appellants filed a lengthy document with their May 17, 2021 Notice of Appeal taking issue with the Respondent requiring them to obtain permission from the Webbers regarding use of the historic stump intake. The Appellants assert a legal right through an implied easement and rely on a BC Supreme Court decision issued in 1977 which refers to them having a hook up to a natural water supply. In support of their argument, the Appellants included the BC Supreme Court judgment and related documents in their submissions.

[90] The Appellants have also provided a letter dated August 23, 2001, from Wayne Webber to the Appellants, as well as related documents from July 2000 relating to horses from the Webber land affecting the water quality in Clore Brook. The August 23, 2001 letter appears to indicate that the Appellants were operating water works outside of ROW 52-195, and there may have been an arrangement under it would be permissible to do so in relation to Wayne Webber's property. Mr. Webber's August 23, 2001 letter states:

> After a ground inspection in mid August with Fraser McKenzie, a pollution control officer of the Ministry of Water, Lands and Air Protection, I have agreed to the following.
>
> I will supply the intake pipe for you to extend your intake up the existing creek to a point above the horse pasture and fence in the dyke area, so that no horses can get near the water dam.
>
> You can build a trail along the side hill from the existing road to the dam area for inspection and maintenance without going across my property.
>
> I will supply the intake pipe and lay it from your existing dam to the new dam site above pasture and fence the new dam area at my expense. You can build your own dam.
>
> If this is not acceptable, please remove your existing dam from my property and relocate it on the government right-of-way downstream from the existing dam.

[91] Regarding the Appellants' request for water storage and additional water usage, they indicate in their Notices of Appeal that they use the water on their property for domestic purposes, emergency fire protection, and agriculture. The material from the Ministry file includes documents with information about the Appellants' fishpond, and higher water usage of 1,500 gallons per day having been permitted in the past under CWL 35645 held by Joseph Schultzik, from which the Appellants' Current Licence subsequently arose.

[92] At this stage of the analysis, where the consideration is whether to dismiss the appeals without deciding the merits, the question is simply whether the Appellants have put forward sufficient evidence and argument such that it is apparent why they say the Decision is wrong and or the process leading to the decision was flawed. In the present circumstances, I find that they have done so. The material provides some information concerning the Appellants' potential uses for additional water, some information about the amount of additional water sought, and indicates that the configuration of the stump intake sought is the same as previously approved under an earlier licence. The fact that Clore Brook had a previously licenced capacity of 1,500 gallons per day, of which 500 were unused, indicates additional water could potentially be available for use, and the August 23, 2001 letter referred to above indicates there may be an arrangement dating back a number of years to permit the Appellants to use the historic stump location. In the result, I find that I should proceed to consider the merits of the appeals.

3. What should be the outcome of the appeals?

Summary of the Respondent's position

[93] The Respondent says the Appellants did not provide the information required to assess their applications, and his Decision to refuse the applications on the grounds of insufficient information should be upheld.

[94] The Respondent submits that section 3 of the *Regulation* requires certain information to be provided with an application for a licence. That information includes the water use purposes, identification of points of diversion and storage, and a detailed description of proposed works. Similarly, under section 6 of the *Regulation*, an application to amend a licence must include specific information including a description of works that will be decommissioned, the location of the land if the proposed works are to be located on land other than the land in the original application, the location of land likely to be physically affected by the proposed works and the names of the landowners of such land, and a drawing showing the relevant boundaries and locations of the proposed works. The Respondent says he corresponded with the Appellants on a number of occasions and "made multiple attempts to clarify and solicit the information that was required to review the Applications on their merits", but the Appellants did not provide the necessary information.

[95] Regarding the Appellants' application for a new licence relating to water storage, the Respondent says the Appellants did not provide detailed information about the reservoir or impoundment. With respect to the Appellants' application to use additional volumes of water, the Respondent says the Appellants did not provide precise information of the volumes involved with the usages sought, and the information which was provided was inconsistent (including, for example, describing uses which were not reflected in the applications, such as a poultry farm, and a bed and breakfast).

[96] Regarding the Appellants' application to amend the Current Licence to change their point of diversion and use the historic "stump" location, which is identified in both applications, the Respondent makes several submissions. First, the Respondent says the Appellants "have not provided detailed drawings or descriptions showing the exact location" of the proposed works.

[97] Second, the Respondent says the Appellants did not provide written permission from the Webbers for the Appellants to use their land, as required by the Respondent, and mentions their failure "to provide evidence of permission from the Webbers to relocate the point of diversion onto the Webber Property" as a basis for refusing their applications in his affidavit. The Respondent argues it was reasonable for him to request that the Appellants provide proof of permission from the Webbers regarding use of their property, given the history of complaints from the Webbers about the Appellants on the Webber property, and the fact that the Appellants would need to cross the Webber property to access their proposed point of diversion and some of the proposed works may be located on the Webber property.

[98] The Respondent acknowledges that section 3 of the *Regulation* does not require the Appellants to provide proof of permission from the Webbers to cross the Webbers' property. However, the Respondent says that the Webbers would be

affected landowners who would be potential objectors to the Appellants' application, and the Respondent could consider potential objections and require other "information" in relation to such landowners under section 12(1)(b)(iii) of the *WSA*. The Respondent cites the decision in *Halstead v. British Columbia* (Decision No. 2017-WAT-007(a)) [*Halstead*] in support of his argument that the decision maker can request further information under section12(1)(b)(iii). In *Halstead*, the Ministry requested hydrogeological information relating to an application to divert groundwater from an aquifer.

[99] In the alternative, the Respondent argues that access to the Webber property "is a private matter between the Appellants and Ms. Webber, and outside of the Board's jurisdiction to determine". Similarly, the Respondent argues that neither the Respondent nor the Board would be involved in any expropriation proceedings taken by the Appellants under sections 32 to 35 of the *WSA* and sections 22 to 30 of the *Regulation* for any land reasonably required for their works.

Summary of Appellants' Position

[100] Regarding their application for a new licence that would allow water storage and irrigation, the Appellants submit that they have used water in the same manner for over 50 years, including for a fishpond and for an orchard that requires irrigation. The Appellants state that they use the water on their entire property for domestic purposes, fire protection and agricultural purposes.

[101] Regarding the Appellants' application to use additional volumes of water, their January 9, 2017 email says they use approximately 400 gallons for their fishpond, which also irrigates their rows of fruit trees, a greenhouse and a garden. They ask the Respondent to consider allowing them enough water for the summer watering of 1.5 acres of garden, a greenhouse, and raspberries etc., 2 acres of lawn, 700 feet of hedge, 500 feet of boulevard which sometimes needs water, and for fire protection.

[102] In support of their application, the Appellants rely on a previous water licence which permitted a higher volume to be diverted from Clore Brook. That licence was CWL #35645, which permitted the use of 1,500 gallons per day for domestic purposes. It was issued on May 15, 1970, to Joseph Schultzik. On October 21, 1986, the Deputy Comptroller of Water Rights made a proposal under the (then applicable) *Water Act* which involved cancelling part of the water rights under that licence for non-use. Although not specified, it appears that the rights to 500 of the original 1,500 gallons per day were cancelled, since the Deputy Comptroller went on to apportion the rights under CWL #35645 between Mr. McCallum and Edwin Wayne Webber, at 500 gallons per day each for domestic purpose. A replacement licence, conditional water licence #65187, was granted to Mr. McCallum on April 8, 1987, for 500 gallons per day for a domestic purpose.

[103] In addition to submitting that Clore Brook had previous unused capacity of up to a further 500 gallons per day, the Appellants say that, based on their examinations of the water flow, the water in Clore Brook is flowing the same as it always has for the last 52 years and that the Webbers have an abundance of water.

[104] As previously noted, the Appellants provided several documents regarding their proposal to use the historic "stump" location as their point of diversion for the Current Licence. The Appellants say they have an implied easement over the Webber property arising from the B.C. Supreme Court judgment issued in 1977. The documents from the Ministry file include a July 27, 2018 letter from a lawyer retained by Mr. McCallum, to Mr. Webber. The lawyer's letter argues the water licence creates a type of easement because the licence is appurtenant to Mr. McCallum's home. The lawyer's letter also mentions the potential of an application under section 32 of the *WSA* to expropriate a necessary part of the Webbers' property to protect the water the Appellants are authorized to divert from Clore Brook.

Panels' Findings

[105] I begin by noting that I agree with the Respondent that there is insufficient information to grant the applications. I find this is the case even after I take into account the new information that the Appellants provided during the appeal process.

[106] Regarding the application to amend the Current Licence, the Appellants need to specify the reason for the application (in other words why they wish to re-activate the stump location), provide a clearer description of the proposed works, and a clearer drawing of matters such as the land boundaries, the location of the stream, and the water flow, all of which are set out in the *Regulation*. Although the Appellants stated in their application that no other lands would be affected by their works, it is clear that other lands will be affected, and the Appellants need to provide the information required by the *Regulation* in that regard. In other words, the Appellants will need to provide all of the information required by section 6 of the *Regulation.*

[107] In terms of the application for a new licence authorizing water storage, the Appellants have not provided the required level of detail regarding the description of the works to be authorized by the licence, including the size of the reservoir or pond and its precise location. Regarding the request to use additional water volume, I cannot determine exactly how much water is needed for the uses sought. The information provided is confusing, with a request at one point for an additional 400 to 1,500 gallons per day, and later for an additional 500 gallons per day, without clarity around the specific uses for such additional water and the specific amount of water relating to a particular use. For example, the Appellants mention irrigating an orchard, but also raising poultry and reactivating their fishpond, without specifying the amount of water needed for each of such uses.

[108] Sections 3(1)(f) and (g) of the *Regulation* specify that an application for a licence must include the water use purposes and the quantity of water proposed to be diverted or stored for each water use. If the Appellants are looking to use water at the current time for irrigation and their fishpond (without the other potential future uses mentioned such as a bed and breakfast), as appears may be the case, that must be clearly stated. Also, if the water is to be used for irrigation, section 3(1)(k) of the *Regulation* requires the application to include the measurements of the land to be irrigated. If the application for a new licence authorizing water

storage and additional use is only being sought if the Appellants can use the historic stump diversion, then the Appellants need to provide all the information relating to those works as identified above relating to the amendment application. This information is required by section 3(1) of the *Regulation*, and as such, these are prescribed requirements that the Appellants must meet under section 12(1)(a) of the *WSA*. Section 14(6)(c) of the *WSA* clearly states that "the decision maker may refuse an application, or reject an application without considering it, if … the application is incomplete."

[109] Regarding the Respondent's argument that based on section 12(1)(b)(iii) of the *WSA*, he could require the Appellants to provide proof of the Webbers' permission to cross their land, as a prerequisite to considering their application to amend the Current Licence, I find that access to or use of private land needed for water works may be obtained either by an agreement or by expropriation. Although the Respondent may request information about how an applicant plans to obtain access to affected land, and an applicant may choose to obtain permission from the landowner as means of gaining access, section 32 of the *WSA* provides a licensee with a right to expropriate any land reasonably required for the construction, maintenance, improvement or operation of works authorized or necessarily required under the licence. Thus, the legislation contemplates that licenses may be issued even if a private landowner and the licensee fail to agree on access to or use of the private land for water works. In my view, it would be contrary to the scheme of the *WSA* to read the term "information" in section 12(1)(b)(iii) in a manner which would deprive an applicant of the expropriation option by allowing a decision maker to make written permission from a potential objector a prerequisite to processing the application.

[110] In addition, I note that some sections of the *Regulation* expressly require written consent from certain persons as a prerequisite for certain things. For example, sections 13(2) and (3) of the *Regulation* require an application under section 12 of the *WSA* to include the written consent of other people for certain things, but consent to enter onto or use another person's private land is not one of those things. Similarly, sections 40 and 48 of the *Regulation* expressly require a person to obtain the landowner's consent before entering onto private land to make changes in and about a stream or to divert or use water when drilling a well. Similar language could have been added to the *Regulation* to require an applicant for a licence or a licence amendment to obtain the landowner's written consent to enter onto or use their private land for licensed water works, but the *Regulation* contains no such language.

[111] In my view, these provisions in the legislation indicate that the Respondent may ask the Appellants for information about what arrangements they are making to access their historic point of diversion at the "stump" location, but he could not insist on obtaining proof of permission from the Webbers as a prerequisite to processing the Appellants' application to amend the Current Licence.

[112] In terms of the Respondent's alternative argument that the access issue between the Appellants and the Webbers is a private matter, I find that this argument does not support the Respondent having the jurisdiction to require the Appellants obtain permission from the Webbers. Indeed, by making it a

requirement to obtain such permission, the Respondent appears to be inserting himself into what he terms "a private matter" to force a resolution of the dispute between the Appellants and the Webbers. In that regard, I note that the Appellants' May 17, 2021 Notice of Appeal indicates that they intend to go back to the Supreme Court to obtain a ruling relating to such matters, and the July 27, 2018 letter from their lawyer further references taking proceedings in the BC Supreme Court.

[113] I turn now to the question of what the outcome should be regarding the appeals and what should happen with the applications. Given my previous determination that there is insufficient information to grant the applications, I deny the Appellants' request to grant them. Nevertheless, I find that the Respondent's repeated requirement that the Appellants obtain permission from the Webbers as a prerequisite to dealing with the applications affected the processing of the applications, and the Appellants ought to have an opportunity to apply again for a new licence and for an amendment to their Current Licence. Thus, I find the denial of the applications is to be without prejudice to the Appellants making such applications again in the future.

[114] In the event the Appellants make such applications again, the Respondent can consider whether he should amend the applications pursuant to section 14(1)(b) of the *WSA* upon further review with the Appellants regarding what they are seeking. The Respondent may also consider whether he could be more precise regarding the information requested from them to assess the applications on their merits, and whether such applications may be applicable to the current location rather than the "stump" point of diversion if the Appellants indicate that is an outcome they are seeking. Regarding the stump location, the Respondent can consider the additional information required regarding the configuration of the works given the passage of time since the previously approved works and the requirements of the *Regulation*. Further, without making it a prerequisite to dealing with the applications, the Respondent could consider what, if any, effect the August 23, 2001 letter from Wayne Webber might have regarding the issue of whether there was some agreement allowing the Appellants to have their water works at the historic stump location, or whether the access issue will need to be sorted out by the courts, through the expropriation route or other proceedings.

[115] The result of all of the above is that the Appellants can continue to use water as permitted by their Current Licence. It will be up to the Appellants to decide whether to reapply for the new licence and the amendment to their Current Licence as previously mentioned.

[116] In meantime, as the Respondent has indicated, the Current Licence does not authorize either use of the stump location as a point of diversion, or uses of water for purposes other than domestic use.

DECISION

[117] In reaching my decision, I considered all of the submissions and relevant evidence provided by the parties, whether specifically referenced in my reasons or not.

[118] For the reasons set out above, the appeals are dismissed, but the Appellants may choose to refile the applications.

"James Carwana"

James Carwana,
Panel Chair, Environmental Appeal Board

October 13, 2022