Environmental Appeal Board

Citation: *Robert Couturier and Jodi Lynne Couturier v. Assistant Water Manager,* 2023 BCEAB 11

Decision No.: EAB-WSA-22-A004(a)

Decision Date: 2023-05-02

Method of Hearing: Conducted by way of written submissions concluding on January 20, 2023

Decision Type: Preliminary Issue of Jurisdiction

Panel: Subodh Chandra, Panel Chair

Appealed Under: *Water Sustainability Act,* S.B.C. 2014, c.15

Between:

Robert Couturier and Jodi Lynne Couturier

Appellants

And:

Assistant Water Manager

Respondent

Appearing on Behalf of the Parties:

For the Appellants: Una Radoja, Counsel

For the Respondent: Livia Meret, Counsel
Amanda Macdonald, Counsel

TABLE OF CONTENTS

PRELIMINARY ISSUE OF JURISDICTION

INTRODUCTION

[1] The Environmental Appeal Board (the "Board") received a Notice of Appeal filed, via email, on December 6, 2022. The Notice of Appeal was completed by Una Radoja on behalf of Robert Couturier and Jodi-Lynne Couturier (the "Appellants").

[2] The Appellants are appealing a November 7, 2022 email (the "November 7, 2022 Email") from Sandra Jensen, Assistant Water Manager, Ministry of Forests, Caribou Region (the "Respondent").

[3] The November 7, 2022 Email was issued subsequent to a June 29, 2022 Water Sustainability Act order (the "Order").

[4] The Appellants seek to set aside what they describe as the decision set out in the November 7, 2022 Email.

[5] On its own initiative, the Board requested submissions from the parties on the preliminary jurisdiction issue of whether the November 7, 2022 Email is a decision that can be appealed under the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "*WSA*").

[6] Section 105(1) of the *WSA* allows for an appeal of an order, resulting from an exercise of discretion of the comptroller, a water manager or an engineer, except as otherwise provided in the *WSA*. The *WSA* defines an "order" as including a decision or direction, whether the decision or direction is given in writing, but it does not include a request.

[7] If I find that the November 7, 2022 Email is not an appealable "order", then the matter may be summarily dismissed for lack of jurisdiction under section 31(1)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*").

[8] If I find that the November 7, 2022 Email is an appealable order, but that this order is one that was made on a previous date and was therefore not filed within the time limit provided in section 105(3) of the *WSA*, then the matter may be summarily dismissed for failure to file an appeal in time under section 31(1)(b) of the *ATA*.

[9] For the reasons stated below, I find that the November 7, 2022 Email is, in part, an appealable order.

BACKGROUND

[10] The following background information is gleaned from the submissions of both parties and is assumed to be non-contentious for the purposes of determining this preliminary jurisdiction issue.

[11] I have relied on the following information to enable me only to decide the preliminary jurisdiction issue. Both parties are entitled to challenge the veracity of any information presented here, if needed, in the appeal on the merits.

[12] The Appellants are the registered owners of a waterfront residential property (the "Property").

[13] On June 29, 2022, the Respondent issued the Order to the Appellants pursuant to section 93 of the *WSA*.

[14] The Order stated that the Appellants, amongst other things, had not obtained any authorization under the *WSA* for in-stream works installed near the Property, and had not obtained a Development Permit. The Order further required the Appellants to hire a Qualified Environmental Professional to prepare a Habitat Restoration Plan and deliver it for review and approval by the Water Manager/Assistant Water Manager by August 15, 2022.

[15] The Order was signed by the Respondent with a signatory block which stated: "Assistant Water Manager under the *Water Sustainability Act*".

[16] In addition to the Order, the Respondent sent an email on June 29, 2022, (the "June 29, 2022 Email") providing information to assist the Appellants in fulfilling the requirements of the Order. The email describes the Respondent's title as "Senior Authorizations Officer, Ministry of Forests, Cariboo Region".

[17] On July 5, 2022, the Respondent sent another email (the "July 5, 2022 Email") to the Appellants, enclosing the cover letter to the Order (which had not been included with the Order) and advising the Appellants that they would have 30 days from the date of the July 5, 2022 Email to appeal the Order, otherwise the right to appeal would be "typically 30 days from the date of the Order".

[18] The cover letter, amongst other things, described the Order as "requiring immediate action and requirement to hire a Qualified Environmental Professional to conduct a riparian and aquatic impact assessment and propose restoration measures". It also stated: "[p]lease be advised that you may be subject to further compliance actions if a restoration plan is not received by August 15, 2022".

[19] The Order was not appealed and is not the subject of the underlying appeal in this matter. It is, however, of import to the November 7, 2022 Email, and whether the communication therein is an appealable order.

[20] On August 15, 2022, Mr. Couturier emailed a document to the Respondent entitled: "Stabilization Report – Couturier" (the "Report"). The Report, dated August 14, 2022, is authored by Trilogy Crossing Corp and Poulin Environmental Ltd. I note that the Report is sometimes described as two reports. Nothing turns on that distinction for the purposes of this preliminary jurisdiction decision.

[21] On September 7, 2022, the Respondent sent a reply email to the Appellants (the "September 7, 2022 Email"), acknowledging the receipt of the Report and advising that the plan "is not accepted as it does not meet the requirements of the Order". She advised the Appellants to revise and resubmit the plan and extended the deadline to submit the plan to September 30, 2022.

[22] On September 26, 2022, by email, the Appellants sought extension up to October 31, 2022, which was granted by the Respondent by email of the same date (the "September 26, 2022 Email"). This email sets out the expectations of what the "QP report" should outline.

[23] On October 31, 2022, the Appellants emailed a letter to the Respondent (the "Letter"), also authored by Trilogy Crossing Corp and Poulin Environmental Ltd. The Appellants describe the Letter as an "updated report/further technical letter". The Respondent describes it simply as a letter.

[24] In response to the submission of the Letter, the Respondent sent the November 7, 2022 Email. In this communication, the Respondent advised the Appellants that the Letter did not meet the conditions of the Order. The November 7, 2022 Email reiterated the prior communication found in the September 7, 2022 Email that the earlier report dated August 14, 2022, did not meet "the remediation plan as ordered" in the Order.

[25] The November 7, 2022 Email continued: "[a]s a failure to fulfil the requirements of the Order, you are now in non-compliance of the Order". The Respondent further stated that the Appellants "must" bring themselves into compliance with the WSA through compliance with the Order, and reminded the Appellants that they could do so by "hiring an appropriately Qualified Environmental Professional to prepare a remediation plan that complies" with the Order.

[26] As stated above, it is this November 7, 2022 Email that is under appeal.

ISSUE

[27] The preliminary jurisdiction issue to be determined is whether the November 7, 2022 Email from the Respondent is an order that can be appealed under the *WSA*.

LEGISLATIVE FRAMEWORK

[28] The Board's authority to consider appeals under the *WSA* stems from section 105 of that act, which provides:

> **Appeals to appeal board**
>
> **105** (1) Except as otherwise provided in this Act, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the appeal board by any of the following:
>
> (a) the person who is subject to the order;
>
> […]
>
> (2) […]
>
> (3) The time limit for a person to commence an appeal is 30 days after the date on which notice of the order being appealed is delivered to the person.
>
> (4) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under this Act.
>
> […]

[29] Section 1(1) of the *WSA* defines an "order" as including "… a decision or direction, whether or not the decision or direction is given in writing, but does not include a request". The terms "decision," "direction," and "request" are not defined in the *WSA*.

[30] Division 1 of Part 8 of the *Environmental Management Act* includes section 93.1(1) which outlines the provisions of the *ATA* that apply to the Board. Notably, section 24(2) of the *ATA,* which grants an appeal tribunal the authority to extend the time to file a notice of

appeal, does not apply to the Board. Consequently, the Board has no ability to extend the time to file an appeal.

DISCUSSION AND ANALYSIS

Appellant's submissions:

[31] The Appellants submit that the Respondent was a person with authority under the *WSA* and was communicating with a person affected by her previous Order. They submit that this type of communication must either be an appealable "decision or direction," or a non-appealable request—it cannot be both.

[32] The Appellants argue that the November 7, 2022 Email contains a conclusion that the report submitted by the Appellants does not meet the requirements of the Order and that the Appellants are now in non-compliance with the Order. They submit that this is a decision and not a request.

[33] The Appellants state that the November 7, 2022 Email also contains a direction that the Appellants "must" bring themselves into compliance with the Order, and outlines the manner in which they are to do so. They submit that this is also not a request.

[34] The Appellants submit that both the "decision" that the Appellants' report did not satisfy the Order and the "direction" that the Appellants must do more were made by the Respondent pursuant to her statutory authority under the *WSA* and are an "intentional conclusion" based on her exercise of discretion.

Respondent's submissions:

[35] The Respondent notes that neither the Order nor the June 29, 2022 Email, which provided additional information as to what would comprise an acceptable Habitat Restoration Plan, were appealed by the Appellants.

[36] The Respondent submits that, although the Appellants submitted the Report, it still required review and written approval. The Appellants did not appeal the September 7, 2022 Email, which advised that the proposed Habitat Restoration Plan was not acceptable and allowed the Appellants until September 30, 2022 to submit a revised plan.

[37] The September 30, 2022 deadline was extended to October 31, 2022, upon the Appellants' request. The Respondent argues that this extension of the deadline was also not appealed by the Appellants.

[38] The Respondent submits that any decision as to the acceptability of the Habitat Restoration Plan was made by her on September 26, 2022, or before. Her November 7, 2022 Email "simply confirmed" that a revised Habitat Restoration Plan acceptable to the Water Manager/Assistant Water Manager had not been submitted by the extended deadline of October 31, 2022.

[39] The Respondent's position is that the November 7, 2022 Email was not an appealable decision as it did not involve an exercise of discretion. She submits that the email simply confirmed the following:

a) the facts associated with the Order, the September 7, 2022 Email, and the September 26, 2022 Email (none of which have been appealed);
b) that the October 26, 2022 letter did not meet the requirements of the Habitat Restoration Plan; and,
c) that the Appellants had not met the required deadline.

[40] The Respondent submits that although her previously made decision as an Assistant Water Manager would be appealable, the November 7, 2022 Email did not contain a "decision," and is not appealable.

[41] The Respondent states that the November 7, 2022 Email "did not contain a decision at all" and was "only a restatement of previous communication regarding the Order and September 26, 2022 direction to submit a revised Habitat Restoration Plan".

[42] The Respondent argues that the statement in the November 7, 2022 Email that the Letter "did not contain a restoration plan" was not a decision, but was a statement of fact, as no restoration plan was submitted.

[43] The Respondent submits that while she exercised her discretion in her capacity as Assistant Water Manager to determine that the reports submitted by the Appellants were unsatisfactory, that decision was made by September 26, 2022, at the latest. Therefore, the time to appeal that decision has lapsed.

[44] The Respondent further submits that although the legislative authority to issue orders under the *WSA* is broad, that does not mean that all correspondence from an Assistant Water Manager is an order or statutory decision.

Appellants' reply:

[45] In reply, the Appellants submit that the "final" decision about non-compliance was not made on September 26, 2022; it was communicated in the November 7, 2022 Email. They state that, as the time to submit a revised plan was extended to October 31, 2022, a

final decision about non-compliance could not have been made before that date. The Appellants argue that the extension granted by the Respondent on September 26, 2022, to allow the Appellants to comply with the Order by October 31, 2022, would be rendered meaningless if the Respondent was able to "go back in time" to rely on statements made prior to the deadline to decide whether there has been compliance with the Order. They submit that this is both unfair and non-sensical.

[46] The Appellants further argue that the Respondent cannot both grant an extension to comply with an order but also use that extension to eliminate a right of appeal because the new deadline for compliance set by the Respondent is more than 30 days from the date the extension was granted.

[47] The Appellants also submit that they had two choices after the September 26, 2022 Email extending the time to comply with the Order: a) remove all or a portion of the rip-rap and/or do further work; or b) confirm their position that removal of rip-rap was not a reasonable requirement and that they have already complied with the Order. They "chose to re-affirm their position that no rip-rap removal was required by the Order, based on the Habitat Restoration Plan already submitted and a further technical letter prepared by Mr. Poulin". The Appellants did not submit a revised Habitat Restoration Plan.

[48] Lastly, the Appellants did not specifically address the Respondent's submissions about passage of time to appeal her prior communications.

Panel's Findings:

[49] The leading caselaw about what can be considered an appealable "decision" is the BC Court of Appeal ("BCCA") ruling, *Unifor Local 2301 v. Rio Tinto Alcan Inc.,* 2017 BCCA 300 ("*Unifor BCCA*"), which confirmed the BC Supreme Court ("BCSC") ruling of *Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2015 BCSC 1592, ("*Unifor BCSC*"), which in turn was a judicial review from the EAB ruling on the same subject matter. *Unifor BCCA* and *Unifor BCSC* are, collectively, referred to as the "Unifor cases" in this decision.

[50] The Unifor cases pertain to the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"), which has a slightly different definition of "decision" than the *WSA*. To better grapple with the definition from the *WSA*, nonetheless, in assessing the Board's jurisdiction to consider an "order" under the *EMA*, the Unifor cases identified three factors to consider:

a) whether the order was made pursuant to statutory authority;

b) whether the contents of the decision under appeal contain any orders; and

c) the nature of the decision and legislation at issue, so as to not decline jurisdiction based solely on a purely formal or technical basis.

[51] Both parties referred to *The Nature Trust of British Columbia ("NTBC") v. Comptroller of Water Rights, Ministry of Forests, Lands, Natural Resource Operations and Rural Development*, 2021 BCEAB 5 (the "*NTBC* Decision"), in which the Board considered the *Unifor* factors to determine whether a communication was an appealable "order" within the *WSA*.

[52] The Board determined in the *NTBC* Decision that the meaning of "order" within the *WSA* is more expansive than the meaning of "decision" within the *EMA*.

[53] Although I am not bound by the Board's prior decision in the *NTBC* Decision, I agree with its analysis about the application of the three *Unifor* factors to determine whether an order is appealable and have used that as a framework for my analysis.

[54] The following observations, drawn from the case law and previous Board decisions, are pertinent to my decision:

a) A communication about non-compliance by a decision maker is not a decision or order as contemplated by the *WSA*. The fact that someone has not complied with an order (hence is now non-compliant) is an operation of law. If the order requires someone to do something and they choose to not do it, a subsequent communication that they are now non-compliant with the law does not lead to an appealable decision. The determination of non-compliance in such circumstances is not an exercise of discretion. The fact that someone did not do something that they were required to do, leads to an inescapable result of non-compliance by operation of law without the need for a decision or exercise of discretion.

b) A re-statement of a prior decision in a subsequent communication does not suddenly open the prior decision for an appeal if the appeal period for the prior communication has elapsed, so long as the subsequent communication does not alter, add to, or remove legal obligations from the prior decision.

c) The Unifor cases recognized that there may be instances where there would be 'staged decision', i.e., a prior decision may leave certain aspects to be decided later, leading to decisions being made in stages.

d) A communication may have various aspects to it – some of it may be appealable decision or direction (described as intentional conclusion involving an exercise of discretion), some of it may be a request (which would not be appealable per the *WSA*), some of it may be a mere statement of fact (which would not be appealable as there is no exercise of discretion involved), some of it may be just informational (such as a reminder of something previously stated which is neither a decision or direction nor a request, hence still not appealable). A single communication may contain all of these aspects and must be examined to determine which aspect applies to which portion of the communication. It is insufficient to categorize a communication as being composed solely of one

> aspect, simply because a portion, or even a majority, of that communication is of that aspect. As communications from statutory decision makers can compel action, and impose sanctions if those actions are not taken, it is important to clearly understand the purpose and the effect of all portions of these communications.

[55] With these observations in mind, I turn to consider the three factors identified in the Unifor cases, but in the context of orders from the *WSA*, and the particular circumstances of this appeal.

First *Unifor* factor: the order must have been made pursuant to a statutory authority:

[56] This factor requires an analysis of whether the decision maker had the requisite statutory authority to make the order at issue and whether they exercised their statutory authority to do so.

[57] It is undisputed by the parties that the Respondent had the necessary statutory authority to make an order pursuant to her statutory powers under the *WSA*. As previously noted, the Order was signed by the Respondent in her role as Assistant Water Manager. I find that it is of no consequence that the June 29, 2022 Email from the Respondent shows her designation as Senior Authorizations Officer.

[58] The Respondent submits that she did not exercise her statutory authority within the November 7, 2022 Email as it was only a re-statement of her prior decision(s). I disagree. While some of the November 7, 2022 Email is properly understood as a re-statement of her prior decisions, it also contained additional aspects that required an exercise of her statutory authority.

[59] The Respondent undoubtedly had to review the Letter that was submitted by the Appellants on October 31, 2022 to determine its contents; decide whether it met the requirements of the Order; and, if not, whether to allow more time for the Appellants to fulfil the requirements of the Order. All of these steps in the decision-making process are required in order for the Respondent to come to a conclusion and exercise her statutory authority to make a determination and communicate it in her November 7, 2022 Email, which she did so by stating that the Letter did not meet the conditions of the Order.

[60] Having determined that portions of the November 7, 2022 Email meet the criteria of the first *Unifor* factor, I will proceed to consider the second factor.

Second *Unifor* factor: the contents of the communication must be examined to see if there are any orders:

[61] The definition of "order" includes a decision or direction but not a request. I adopt the reasoning from the *NTBC* decision that the key element of this definition is that the words "order", "decision", and "direction" all contemplate an intentional conclusion and it must involve an exercise of a discretion.

[62] As indicated previously, not all communication by someone with requisite statutory authority will be an order. The legislation contemplates that some communications by a statutory authority will be a request. A request is specifically excluded from the definition of an order. Conversely, not all appealable communication must be in writing. The legislation specifically contemplates that an order includes a decision or direction, 'whether given in writing or not'. The Appellants have argued that the type of communication found within the various communications from the Respondent must either be an appealable "decision or direction", or a non-appealable request—it cannot be both. While I agree with the Appellants that communication cannot be both a decision or a request, this argument is, in and of itself, incomplete. There exists a further possibility that communication can be neither a decision nor a request. This possibility is one that I must consider in the analysis of the communications from the Respondent to the Appellants.

[63] There are a series of communications from the Respondent that require closer scrutiny to put matters into context. The Respondent sent pertinent communications on:

a) June 29, 2022 (the Order);

b) September 7, 2022 (advising that the plan submitted on August 14, 2022 did not meet the requirements of the June 29, 222 Order and a revised plan needed to be resubmitted);

c) November 7, 2022 (advising that the revised plan – described as a 'letter' by the Respondent and an 'updated report' by the Appellants – did not fulfill the requirements of the Order).

The Order:

[64] There is no question that the Order was in fact an appealable order. Also as noted previously, the Order:

a) noted that the Appellants had not obtained any authorization for the instream works under the *WSA*;

b) noted that the Appellants had not obtained a Development Permit;

c) ordered the Appellants to hire a Qualified Environmental Professional to prepare a Habitat Restoration Plan and deliver it for review and approval by the Water Manager/Assistant Water Manager, by August 15, 2022.

For clarity, none of the above three components of the Order are under appeal, and none can be appealed anymore. This is as a result of the expiry of the 30-day appeal period, during which no appeal of these orders was filed. As noted under the "Legislative Framework" section of this decision, above, this time period cannot be extended by the Board.

[65] In *Unifor BCSC*, the Court found that there was a staged decision due to the 2013 amended permit requiring a further decision to be made once a monitoring plan was submitted. In that case, the further decision to be made centered around how air emissions under the permit would be monitored.

[66] Here, the question of whether a plan, with known requirements, was to be submitted was not left undecided; the Order clearly stated that a plan was to be submitted. The Order does not imbed a future decision or, in its operation require that a further decision be made in order for the Order to be complete. The Order can be understood as whole and complete in and of itself and does not require any additional steps or information to be presented to be understood and acted upon. If an order is issued that requires an intervening step or relies upon an interceding event before it can be completed or complied with, it is more likely that such an order can properly be considered as a staged decision. I note, however, that each order must be considered in its own unique circumstances and my comments are constrained to the particular circumstances of this case.

[67] In this case, it is only the approval, or not, of the plan that would remain appealable once a decision about its review and approval was made, not the fact that a plan needed to be submitted at all. Any appeal of the requirement to submit a plan, containing the ordered information, would be impermissible due to the expiry of the appeal period.

The September 7, 2022 Email

[68] The Appellants submitted the Report (dated August 14, 2022) by email on August 15, 2022. The Respondent's September 7, 2022 Email to the Appellants set out the following:

a) "… providing a report that specifies that the riprap should stay in place does not meet the condition of the Order provided …".

b) "(a)t this time, your plan is not accepted as it does not meet the requirements of the Order".

c) "… to resubmit a revised plan that reduces the footprint of the riprap and includes bioengineering, I will extend your deadline to submit this plan until September 30, 2022. Failure to provide a report that meets the requirements of the Order will result in further non-compliance action".

[69] It is clear from the above communication that the Appellants were advised by the Respondent about her decision that the plan submitted by Appellants on August 15, 2022, did not meet the requirements of the Order and was not accepted, for the reasons provided in that email.

[70] The Respondent, while deciding whether to accept the plan that was submitted by the Appellants on August 15, 2022, was acting within her statutory authority and did exercise discretion that required an intentional conclusion on her part. Accordingly, the aspect of the September 7, 2022 Email which rejected the Report was an appealable order.

[71] I find that the Appellants were provided clear communication about the Respondent's decision that the plan as submitted on August 15, 2022 did not meet the requirements of the Order. The Appellants did not appeal the decision that the Report did not meet the requirements of the Order, and the appeal period for that decision closed 30 days after September 7, 2022.

[72] The Unifor cases caution against the risk of creating the need for 'prophylactic' appeals. I find that, based on the particular facts of this appeal, this is not one of those situations. There was no ambiguity about whether the Report was acceptable to the Respondent as a plan for the purposes of the Order.

[73] The Respondent clearly determined and communicated to the Appellants that the Report did not meet the conditions of the Order. Although the September 7, 2022 Email provided another option for the Appellants to resubmit a revised plan, this did not have the effect of countermanding, or even altering, the determination that the Report was not acceptable. Indeed, the opposite conclusion is true. If the Report were acceptable in its current form, there would be no need to provide additional time to resubmit the Report with alterations.

[74] I find that the decision to reject the Report is not a staged decision. This decision does not require something else to be done in the future to help determine whether the Report was acceptable or not. The Appellants were provided with this communication in a timely manner and were informed of the reasons that the Respondent considered the Report to be unacceptable.

[75] I also find, however, that the September 7, 2022 Email modified the Order in one specific way. By inviting the Appellants to resubmit a revised plan, the Respondent, in effect, communicated to the Appellants that if they were to submit a revised report, such a report would be considered by the Respondent. If this condition was satisfied by the

Appellants, the Respondent would be required to exercise her discretion to determine if the revised report was acceptable or not.

The November 7, 2022 Email

[76] For ease of reference, I reproduce paragraphs 24 and 25 of this decision here, setting out the essential contents of the November 7, 2022 Email that advised the Appellants that:

> [24] In response to the submission of the Letter, the Respondent sent the November 7, 2022 Email. In this communication, the Respondent advised the Appellants that the Letter did not meet the conditions of the Order. The November 7, 2022 Email reiterated the prior communication found in the September 7, 2022 Email that the earlier report dated August 14, 2022, did not meet "the remediation plan as ordered" in the June 29, 2022 Order.
>
> [25] The Respondent went on to state, in the November 7, 2022 Email, that "[a]s a failure to fulfil the requirements of the Order, you are now in non-compliance of the Order". She further stated that the Appellants "must" bring themselves into compliance with the WSA through compliance with the Order, and reminded the Appellants that they could do so by "hiring an appropriately Qualified Environmental Professional to prepare a remediation plan that complies" with the Order.

[77] The Respondent's argument is that the November 7, 2022 Email "simply confirmed that a revised Habitat Restoration Plan acceptable to the Water Manager/ Assistant Water Manager had not been submitted by the extended deadline of October 31, 2022".

[78] As stated above, the Appellants did not submit a revised plan, and consequently did not satisfy the precondition that would have required the Respondent to render a fresh determination on the acceptability of a revised report. Conversely, the submission of the Letter triggered the need for the Respondent to decide whether the Letter meets the requirements of the Order.

[79] I find that in order for the Respondent to decide that the Letter that was submitted by the Appellants on October 31, 2022, was acceptable or not, i.e., whether it met the requirements of the Order, the Respondent had to reach an intentional conclusion and exercise her discretion.

[80] The intentional conclusions made by the Respondent regarding the Letter were that:

a) It did not meet the conditions of the Order; and

b) It did not contain a restoration plan that was required to be submitted by October 31, 2022.

[81] I find that the Respondent exercised her discretion when she decided whether to accept the Letter submitted by the Appellants as part of the resubmission of a revised plan. She could have either accepted the Letter as meeting the conditions of the Order or not. She exercised her discretion not to accept it.

[82] Based on the exercise of discretion by the Respondent, which included the above-mentioned intentional conclusions, I find that the decision by the Respondent to either accept or reject the Letter is an appealable order contained within her November 7, 2022 Email.

[83] For greater clarity, the other aspects of the November 7, 2022 Email are not appealable for the following reasons:

- The November 7, 2022 Email reiterated the prior communication of the September 7, 2022 Email that the earlier report dated August 14, 2022, did not meet "the remediation plan as ordered" in the Order. This aspect of the November 7, 2022 Email is a re-statement of prior communication. As cautioned by the *Unifor BCCA*, an appeal of a subsequent order does not lay an existing order open to attacks at large. The appeal must be narrowly focussed on the particular impugned decision.

- The Respondent also stated in the November 7, 2022 Email, that "[a]s a failure to fulfil the requirements of the Order, you are now in non-compliance of the Order". The Appellants submit that the November 7, 2022 Email was the first time when the Respondent advised them that they were clearly in non-compliance. As indicated in the reasons above, a communication about non-compliance (i.e., having failed to comply with the Order), on its own, is not appealable as it is a mere statement about the effect of the operation of law. Having failed to resubmit a revised plan that complied with the Order, the Appellants continued to be non-compliant with the Order.

- Lastly, the Respondent further stated in the November 7, 2022 Email that the Appellants "must" bring themselves into compliance with the *WSA* through compliance with the Order, and reminded the Appellants that they could do so by "hiring an appropriately Qualified Environmental Professional to prepare a remediation plan that complies" with the Order. Again, this aspect of the communication does not involve any exercise of discretion by the Respondent. The Respondent is merely advising the Appellants that they must comply with the Order. The fact they must comply with the Order was true since the Order was issued. The Respondent merely pointed that out to the Appellants. She did

> not communicate anything new in the November 7, 2022 Email that was not already known to the Appellants. Similarly, the communication about what the Appellants can do to comply with the Order was also a restatement of previous communication. Neither of these involved an exercise of discretion or intentional conclusion that would make it an order. Hence these aspects of the November 7, 2022 are also not appealable as they are not an 'order' within the *WSA*.

Third *Unifor* factor: the Board should consider the nature of the decision and the legislation at issue, and not decline jurisdiction based on a "purely formal or technical basis":

[84] The Board, in a prior decision, *Smoluk v. British Columbia (Assistant Water Manager),* 2020 BCEAB 8 (CanLII), described the purpose of *WSA* as:

> [43] The *WSA* is a large statute with several purposes, at times in tension. It provides for the stewardship of water resources by the province, while allowing for its beneficial use by members of the public in a variety of contexts. It grants to the province the authority and means to protect water resources, including streams, stream channels, and water resources themselves. It allows for changes in rights and responsibilities in emergency circumstances and it allows the province to monitor and enforce the use of water and the protection of water resources, including streams and stream channels.

[85] The purpose of the *WSA* at issue here, is important for both parties. On one hand, it is necessary to ensure the enforcement of legislation's intent of protecting the waterways, its lifeforms and the environmental stability. On the other hand, it is also important to ensure fairness to the Appellants in the decision being made against them that affects their rights and obligations.

[86] The determination of issues arising in this decision are dependent on the specific facts of this case and their interplay with the applicable statute and caselaw. No specific issue is raised about a purely technical or formal basis to decline jurisdiction.

[87] The lack of jurisdiction for matters that are past their appeal period is by the operation of law where the Board has no discretion to extend the appeal period and the Board must decline jurisdiction.

[88] As I have decided, based on the reasons stated above, that only one aspect of the November 7, 2022 Email is appealable for the narrow issue of whether the submission of the Letter on October 31, 2022 by the Appellants meets the requirements of the Order, I am satisfied that I do not need to decline jurisdiction based on a purely formal or technical basis.

[89] In closing, I note the following is stated in s.105(1) of *WSA*:

> Except as otherwise provided in this Act, an order resulting from an exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the appeal board … [emphasis added].

[90] Neither party made any submissions about whether there is any provision in the *WSA* that exempts the November 7, 2022 Email from an appeal, if I were to decide that it was an order capable of appeal. I am aware of none and, in the absence of any submissions on the subject, am satisfied that none of the permissible exceptions within the *WSA* apply to prevent the November 7, 2022 Email from being appealable.

CONCLUSION

[91] For the above stated reasons, I have determined that only one aspect of the November 7, 2022 Email is an order resulting from an exercise of discretion that is capable of an appeal: the narrow issue of whether the submission of the Letter on October 31, 2022 by the Appellants meets the requirements of the Order.

[92] In deciding this preliminary jurisdiction issue, I have considered all of the evidence and submissions provided to the Board, whether or not specifically mentioned in this decision.

"Subodh Chandra"

Subodh Chandra, Panel Chair
Environmental Appeal Board