



Environmental Appeal Board

Citation: *Annette D'Souza and David Allen v. Water Manager, 2025 BCEAB 15*

Decision No.: EAB-WSA-23-A011(a)

Decision Date: 2025-04-10

Method of Hearing: Conducted by way of written submissions concluding on July 31, 2024

Decision Type: Final Decision

Panel: Cynthia Lu, Panel Chair

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

Between:

Annette D'Souza and David Allen

Appellants

And:

Water Manager

Respondent

Appearing on Behalf of the Parties:

For the Appellants: Self-represented

For the Respondent: Livia Meret
Lukasz Awlasiewicz

FINAL DECISION

INTRODUCTION

[1] Annette D’Souza and David Allen (the “Appellants”) appeal an order (the “Order”) issued on July 24, 2023, by Sean Staplin, Water Manager (the “Respondent”), of the Ministry of Forests. The Order was issued under sections 93(1)(d), (e), and 93(2)(a) of the *Water Sustainability Act*, S.B.C. 2014, c.15 (the “WSA”). The Order requires the Appellants to, in relation to water from wells on their property, stop diversion and use for non-domestic purposes, including its storage, carriage, or distribution. The Order also requires the Appellants to prohibit the operation of the wells on their property for non-domestic purposes.

[2] The Environmental Appeal Board (the “Board”) is designated as the appeal board under the WSA. The Board has the authority to hear this appeal under section 105 of the WSA. Section 105(6) of the WSA states on appeal, the board may:

- (a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,
- (b) confirm, reverse or vary the order being appealed, or
- (c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

[3] The Appellants request that the Board reverse the Order. The Respondent requests that the Board confirm the Order and dismiss the appeal.

BACKGROUND CONTEXT AND REGULATORY FRAMEWORK

[4] The Appellants own and operate a farm situated on Agricultural Land Reserve lands in the Comox Valley region on Vancouver Island. The Appellants’ property is located near the Tsolum River. The Appellants use water to supply a drip irrigation system installed at their farm. The Provincial Groundwater Wells and Aquifer Mapping Database shows two mapped aquifers beneath the property, Aquifer 408 and Aquifer 411. The location of the property and mapped extent of the underlying aquifers are not disputed in this appeal.

[5] The diversion and use of water resources in British Columbia is regulated by the WSA and its associated regulations. The WSA was brought into force February 29, 2016, and was the first legislation in British Columbia to regulate the diversion and use of groundwater as a resource. A six-year transition period between February 29, 2016, and March 1, 2022, was established to assist in bringing groundwater users into the licensing scheme under the WSA.

[6] Under section 6(1) of the *WSA*, “a person must not divert water from a stream or an aquifer, or use water diverted from a stream or an aquifer by the person, unless (a) the person holds an authorization authorizing the diversion or use, or (b) the diversion or use is authorized under the regulations.” As defined in the *WSA*, an “aquifer” means:

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

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

[7] “Groundwater” is defined in the *WSA* to mean “water naturally occurring below the surface of the ground.”

[8] Under section 106(2)(b)(i) of the *WSA*, it is an offence to, without lawful authority, divert water from a stream or aquifer. Under section 106(2)(b)(v) of the *WSA*, it is an offence to, without lawful authority, construct, maintain, operate, or use works. “Works” are defined in the *WSA* to include:

- (a) anything that can be or is used for
 - (i) diverting, storing, measuring, conserving, conveying, retarding the flow of, confining or using water,
 - (ii) producing, measuring, transmitting or using electricity,
 - (iii) collecting, conveying or disposing of sewage or garbage, or
 - (iv) preventing or extinguishing fires,

The definition specifically includes wells and works related to wells. Lawful authority in this context would be obtained through the water manager’s approval of a water licence.

[9] During the pre-hearing process, the parties agreed that staff from the Ministry of Water, Land & Resource Stewardship could conduct a site visit of the Appellants’ property. On February 22, 2024, Ministry Hydrogeologist, Jessica Doyle, P.Geo., and Ministry Regional Hydrologists, Ashley Van Acken, GIT, and Dan Ciobotaru, P.Geo., conducted a site visit with the Appellants on site, to evaluate the source of water used by the Appellants for irrigation. The findings of the site visit are summarized in the Expert Report completed by Doyle, Ciobotaru, and Van Acken, dated April 9, 2024 (the “Expert Report”), submitted by the Respondent as expert evidence in this appeal. The Appellants were provided the Expert Report and refer to the report in their submissions.

ISSUES

[10] To decide this appeal, I consider the following issues:

- a. Are the Appellants diverting and/or using water from a stream or aquifer?
- b. Are the Appellants maintaining or operating “works” as defined in the WSA?
- c. Does the Board have the jurisdiction to grant the remedy sought by the Appellants?

APPELLANTS’ SUBMISSIONS

[11] The Appellants submit that the Respondent has inappropriately applied the requirements of the WSA in this case. The Appellants argue the WSA does not prohibit the use of groundwater but only prohibits the use of water from aquifers or streams without a licence. The Appellants maintain their water use does not require a water licence because they are not accessing water from a stream or aquifer.

[12] The Appellants submit their property is located on lands within the Agricultural Land Reserve. The Appellants use water to supply a drip irrigation system for their farm. The Appellants submit the water is sourced from a portion of land that is in a hollow and naturally collects water from upslope. The Appellants submit surface water is drained from this portion of land to make it arable.

[13] The Appellants submit the surface runoff water is collected in a sump tank, Well 1, which is then directed to a second sump tank, Well 2. Overflow from this second sump tank flows into a dugout pond which, when full, can overflow its banks and into a ditch that flows to the rest of the property. When required, water is pumped from Well 2 to supply the irrigation system.

[14] The Appellants submit the depths of these sump tanks are 3.9m (Well 1) and 4.87m (Well 2), respectively. The Appellants refer to the Aquifer 408 Government Fact Sheet which states the median depth of static water in the area is 10.67m and the median depth of wells is 25.69m. The Appellant argues this means that the aquifer cannot be reached at depths less than 5m; therefore, the sump tanks/wells are not connected to the aquifer.

[15] The Appellants submit that the water they use is surface runoff and is prevented from entering the aquifer due to a layer of dense soil (hardpan) between the surface of the ground and the underlying aquifer. The Appellants submit they frequently encounter the hardpan during their operations. The Appellants argue that the reason their ponds remain partially filled throughout the year is due to the presence of this hardpan layer which does not allow the surface runoff water to reach the aquifer below.

[16] The Appellants submit that neither the government’s aquifer reports nor the Expert Report in this appeal can conclusively state that their wells are using or diverting water from the aquifer. The Appellants highlight wording included in the Order, where the Respondent stated that aquifers within the Tsolum River watershed “**may** be hydraulically connected to the Tsolum River and use of water from these aquifers **could** have an impact on the environmental flow needs of the [river]” (Appellants’ emphasis). The Appellants

refer me to the language used in the Expert Report, where it states it is “likely,” but not conclusive, that water used for irrigation is sourced from the aquifer. The Appellants argue that an order impacting water use on Agricultural Land Reserve lands should be based in hard facts, not by possibilities or assumptions.

RESPONDENT’S SUBMISSIONS

[17] The Respondent submits that the Appellants’ water use and works require a water licence, which they do not hold; therefore, the Order is necessary. Further, the Respondent submits that the Board cannot authorize something prohibited by the WSA and cannot grant the remedy that the Appellants seek. Consequently, the appeal must be dismissed.

[18] The Respondent submits that Natural Resource Officers (“NROs”) from the Ministry of Forests Compliance and Enforcement Branch visited the Appellants’ property on July 19, 2023. Based on observations during the visit, the NROs reported that the Appellants were diverting groundwater from their wells for non-domestic irrigation. At the time, the Ministry did not have any records of water licences issued to or applied for by the Appellants. Consequently, the Respondent issued the Order, requiring the Appellants to stop the water diversion and use, and stop the operation of wells on their property.

[19] The Respondent submits the Appellants are accessing water from an aquifer through their wells, therefore require an authorization for their water use and for the operation of wells on their property. The Respondent submits that this is particularly evident during periods of low flow or drought when the Appellants’ wells access groundwater in the absence of overland drainage flow.

[20] The Respondent submits and relies on the Expert Report. The Expert Report was informed by a site visit to the Appellants’ property. The Expert Report states the following water features were observed on the property: a drainage ditch near the northern boundary of the property, two local drainage streams that appear as ditch features in the landscape, two unlined ponds (“Pond 1” and “Pond 2”), and two cement wells (“Well 1” and “Well 2”). The Expert Report states, “given that Well 1, Well 2 and Pond 2 have water in them year-round, and the water levels in Well 2 and Pond 2 are the same during the summer months, suggests that they are all sourced by groundwater.”¹ The Expert Report concludes:

... based on the local groundwater and lithology information from nearby well records and observations and notes taken during the site investigation, it is likely that Well 1 and Well 2 are dug into water-bearing sand and gravel layers or springs,

¹ Page 11 of the Expert Report.

fed by groundwater that is sourced from Aquifer 408 that provides water for summer irrigation of the Vineyard, via the pump installed in Well 2.²

[21] The Respondent submits that for surface runoff water to be stored in a dugout (a constructed feature used to store water), and used for non-domestic purposes, the dugout is required to have an impermeable layer to prevent groundwater from seeping into the dugout. The Respondent relies on the Expert Report in which the experts state they observed the Appellants' dugout ponds to be unlined. The Appellants do not assert that their ponds are lined.

[22] The Respondent argues that the Appellants have not submitted any expert evidence and did not provide any evidence to support their professional qualifications related to their observations or response to the Expert Report. The Respondent contends the Appellants' assertions regarding aquifer connectivity are not supported by on-site observations or detailed documents. The Respondent submits the Expert Report should be given more weight.

[23] The Respondent maintains the Appellants require an authorization for their water use and operation of wells on their property. The Respondent submits that the Appellants do not qualify for an agricultural drainage exemption under section 31 of the *Water Sustainability Regulation* because the diverted water is being used for irrigation purposes.

[24] The Respondent submits the Board does not have jurisdiction to permit unauthorized diversion and use of groundwater, or to permit the operation of Well 1 and Well 2 contrary to the requirements of the WSA. The Respondent submits the Order ought to be upheld.

DISCUSSION AND ANALYSIS

[25] In Board proceedings, as set out in the Board's Practices and Procedures Manual, the general rule is the responsibility for proving a fact is on the person who asserts it. The Board has consistently held this general rule in several previous decisions (*David Avren v. Regional Water Manager*, 2007 BCEAB 9 (CanLII); *City of Cranbrook v. Assistant Regional Waste Manager*, 2009 BCEAB 6 (CanLII); *Norman Tapp v. Director, Environmental Management Act*, 2022 BCEAB 20 (CanLII); and *Consolidated Envirowaste Industries Inc. (The Answer Garden) v. Director, Environmental Management Act*, 2025 BCEAB 8 (CanLII)).

[26] The standard of assessing evidence in administrative decisions is on a "balance of probabilities," whether a fact is more likely true than not. This standard is outlined in the Board's Practices and Procedures Manual and has been consistently held in previous decisions of the Board (*Deep Water Recovery Ltd. v. Director, Environmental Management Act*,

² Page 11 of the Expert Report.

2024 BCEAB 17 (CanLII) and *City of Cranbrook v. Assistant Regional Waste Manager*, 2009 BCEAB 6 (CanLII)).

[27] This standard has also been confirmed in the courts. In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41, the court concluded in paragraphs 44 and 49:

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide **whether it is more likely than not** that the event occurred.

...

In the result, I would reaffirm that in civil cases **there is only one standard of proof and that is proof on a balance of probabilities**. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.³

[28] In this appeal, the burden of proof falls on the Appellants to establish that, on the balance of probabilities, the water used for irrigation is not sourced from or connected to an aquifer.

Are the Appellants diverting and/or using water from a stream or aquifer?

[29] As I have outlined above, the standard for assessing evidence in administrative decisions is on the balance of probabilities. The Appellants argue water in Well 2 is not connected to the aquifer due to the depth of the well and presence of a hardpan layer. However, aside from argument and the aquifer factsheet, the Appellants' submissions lack sufficient site-specific documentation or qualified expert evidence to support their assertions. The Respondent submits that I ought to rely on the Expert Report, prepared by qualified professionals, who conclude it is likely that the Appellants' wells are connected to the underlying Aquifer 408.

[30] I find the Expert Report to be persuasive. The information it contains is site-specific, detailed, and well-explained by experts in hydrogeology. By contrast, the document relied upon by the Appellant is more general and offers conclusions on aquifer depth without a clear explanation of how conclusions on that point were reached. For these reasons, I prefer the Expert Report. Consequently, I find that the Appellants have not met their burden of proof to establish that, it is more likely than not, their wells and ponds are not connected to an aquifer. Given the available evidence, I find, on the balance of probabilities, that the water from Well 2 is connected to an aquifer. As a result, when the Appellants pump water from Well 2 to irrigate their farm, they are, more likely than not, using water from an aquifer.

³ Emphasis added.

Are the Appellants maintaining or operating “works” as defined in the WSA?

[31] The Appellants have not disputed the fact that they are maintaining, operating and/or using Well 1 and Well 2 on their property. The Appellants made no significant submissions regarding the legal status of their works, or wells. The Appellants’ main argument is related to the issue above, that the water they use is surface runoff, not water from the aquifer. The Respondent maintains the Appellants do not have the required authorization to operate the wells on their property for non-domestic purposes.

[32] Given the parties’ submissions and available evidence, I find the Appellants’ wells are “works” as defined in the WSA and the Appellants do not have the required authorization to maintain, operate, or use the works given my finding above that the wells draw water from an aquifer.

Does the Board have the jurisdiction to reverse the Order?

[33] As I have found above, on the balance of probabilities, the Appellants are diverting or using water from an aquifer for non-domestic purposes. The Appellants are also maintaining, operating, and using works. An authorization or water licence issued under the WSA is required to divert or use water from an aquifer and to maintain, operate, or use works. The Appellants do not currently hold a water licence. The Appellants applied for a water licence on August 3, 2023. A decision has not yet been made on this application.

[34] While I am not bound by previous decisions of the Board, I consider the findings in recent Board decision *Triple W Farms Ltd. v. Water Manager*, 2023 BCEAB 24 (CanLII) (“*Triple W*”), relevant to the analysis in this appeal. In paragraph 54 of *Triple W*, the Board found it “has no jurisdiction to authorize unlawful diversion, use, or storage of groundwater and [the] Board lacks the jurisdiction to be a decision maker in the first instance on the Appellant’s application for a water licence.” Similarly in this appeal, the Board cannot reverse the Order because in effect that would allow the unlawful use of water from an aquifer and the operation and use of works without an authorization. The Board does not have the jurisdiction to reverse the Order, to authorize something that is unlawful under the WSA.

DECISION

[35] In making my decision, I have carefully considered the parties' submissions and the available evidence, whether or not they are specifically referenced in the reasons above. For the reasons provided in this decision, I confirm the Order and dismiss the appeal.

"Cynthia Lu"

Cynthia Lu, Panel Chair
Environmental Appeal Board