Environmental Appeal Board

Citation:	*Isdahl et al. v. Assistant Water Manager*, 2026 BCEAB 23
Appeal No.:	EAB-WSA-22-A003
Decision Date:	2026-05-04
Method of Hearing:	Conducted by way of oral hearing concluding on May 7, 2025
Decision Type:	Final Decision
Panel:	James Carwana, Panel Chair Gary Lin, Panel Member Norman Tarnow, Panel Member
Appealed Under:	*Water Sustainability Act*, SBC 2014, c.15

Between:

Carol-Anna Isdahl and Cori-Ann Isdahl

Appellants

And:

Assistant Water Manager

Respondent

And:

Colin Sillje

Third Party

Appearing on Behalf of the Parties:

For the Appellants:	Sean Hern
	Merran Hergert
For the Respondent:	Livia Meret
	Lukasz Awlasiewicz
For the Third Party:	Self-represented

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INTRODUCTION

[1] Carol-Anna Isdahl and Cori-Ann Isdahl (together the "Appellants" or the "Isdahls") have appealed an Engineer's Order dated September 16, 2022 (the "Order"). The Order was signed by Assistant Water Manager, Jessica Doyle (the "Respondent" or "Ms. Doyle" when referring to her involvement in this matter). To avoid confusion, we will refer to the Isdahls in this decision by using first names when referring to them individually, which is consistent with how they were referred to when giving their evidence. Carol-Anna Isdahl was referred to as "Carol" in the evidence and will be referred to as "Carol" in this decision, and Cori-Ann Isdahl will be referred to as "Cori-Ann" in this decision, as she was referred to in the evidence.

[2] The Order was issued under s. 93 of the *Water Sustainability Act*, SBC 2014, c.15 (the "*WSA*") and required Appellants to:

- Immediately cease the works in and about a stream located on PID:018-689-213.
- Acquire the services of a Qualified Environmental Professional (please refer to cover letter for detailed recommendations) to assess the works which have been constructed in and about the constructed pond at PID:018-689-213 that have obstructed flows through the unnamed tributary of Veitch Creek. The Qualified Environmental Professional shall prepare and submit a remedial plan to this office which outlines any rehabilitation measures deemed necessary to restore the quantity and quality of seasonal water flows to downstream tributaries to Veitch Creek, and to prevent any further foreign matter from entering the streams. The plan must be submitted for review and acceptance by this office by November 10, 2022.

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

(a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,

(b) confirm, reverse or vary the order being appealed, or

(c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

[4] The "stream" referred to in the Order is alleged to be an unnamed tributary of Veitch Creek located in Sooke BC. The tributary was described in the Respondent's Opening statement as starting from a headwater wetland swamp on 1810 Connie Road

("1810"), travelling through a modified pond on 1800 Connie Road ("1800") to a seasonal marsh which is shared between 1800 and 1760 Connie Road ("1760"), then through a shared culvert between those properties, and subsequently flowing through 1800 via a series of modified ponds and a daylit tributary channel before entering Veitch Creek adjacent to Connie Road. The modified pond closest to the start of the alleged stream is located between the features described by the Respondent as the headwater wetland swamp and the seasonal marsh, and has been referred to as Modified Pond 3 in these proceedings. The two other modified ponds are located on 1800, with the one closest to Modified Pond 3 referred to as Modified Pond 2 and other referred to as Modified Pond 1. A visual depiction of the alleged stream from a Google map was entered as an exhibit on this appeal and is attached as Appendix 1.

[5] The Respondent contends the features of the alleged tributary of Veitch Creek constitute a "stream" and "stream channels" under the *WSA* and that the stream is subject to the *WSA*. The "constructed pond" referred to in the Order is referred to as Modified Pond 2 in these proceedings. The Respondent alleges that a culvert, in the area it has described as a "seasonal marsh", leads to Modified Pond 2 and has been blocked. The Respondent says that, but for the blockage, water would have flowed via the culvert to Modified Pond 2 and then through other features on 1800 to Veitch Creek. The cover letter mentioned in the Order refers to a site visit having been conducted by Ministry personnel during which it is alleged there was evidence of the culvert being blocked, and that the blockage altered "the natural drainage" of the stream which is alleged to run through 1800.

[6] In this appeal, the Appellants challenge both the Respondent's determination of a "stream" under the *WSA* and the Respondent's determination about a blockage of the culvert affecting the alleged "stream".

[7] The Appellants say the alleged "stream" is not a stream as defined under the *WSA*. As such, the Appellants say the Order was made without jurisdiction and should be set aside with a finding to that effect, which would leave the matter one of civil law. Alternatively, the Appellants say the Board may find that the evidence does not support a positive determination that the alleged stream is not a "stream" under the *WSA*, nor a finding that the alleged stream is a "stream" within the *WSA*. In such circumstances, the Appellants say the Board should set aside the Order on the basis that the Respondent's jurisdiction to make the Order is unsupported by the evidence, but refrain from making a declaration or finding that it is not a stream. In making their arguments, the Appellants included a visual aide which was not entered as an exhibit and will not be treated as such. However, the visual aide assists in understanding the Appellants' arguments (which will be referred to later) and the physical layout of the features involved with their arguments, and we have attached the visual aide as Appendix 2 for those purposes.

[8] Regarding the alleged blockage of the culvert, the Appellants say that, although they attempted to block a culvert, it has not been established their attempt at blockage actually worked or that the culvert they attempted to block actually flowed into Modified

Pond 2 as alleged by the Respondent. As such, the Appellants argue it has not been established that flows were obstructed as set out in the Order and the Order should therefore be set aside.

[9] The Respondent's position in this appeal is "that the decision to make the Order under appeal was correctly made", and the Respondent "requests that the appeal be dismissed" by the Board.

[10] In addition to there being many aspects of the alleged stream which are in dispute, there is also disagreement about how to refer to the area the Respondent calls the "seasonal marsh" and the Appellants call the "sheep pasture". This area straddles 1760 and 1800 and it is from this area the Respondent alleges there is a blocked culvert going to Modified Pond 2. The Appellants say that terms should not be defined so as to foreclose arguments about their nature and argue that neutral nomenclature should be used which does not prejudge a result. The Panel agrees that this aspect of the alleged stream should be identified in a neutral fashion and, given the Panel's view that this area of the alleged stream is the main area at issue between the parties, we will refer to this area as the Main Area at Issue within these reasons.

BACKGROUND

The Properties

[11] The evidence in the present case dealt with the three properties on Connie Road previously mentioned - 1760, 1800, and 1810. The Appellants are the registered owners of 1800, and the Third Party, Colin Sillje ("Mr. Sillje") is the registered owner of 1760. The evidence indicated that the owner of 1810 is Gail Harris, who did not participate in this appeal.

[12] 1760 is adjacent to, and immediately to the east of, 1800. 1810 is adjacent to, and immediately to the west of, 1800. The topography of the three properties is complex and hilly. There is a hillside behind the developed portion of the properties, and the slope of land is generally downward to the north and towards Veitch Creek. 1800 and 1810 share a driveway which includes a bridge over Veitch Creek. 1760 is part of a strata title conversion which was created in 2008 by the previous owners, Raymond and Joy Jacquot. The Jacquots have retained a residence, closer to the Connie Road roadway and Veitch Creek, on land which is part of the strata conversion.

[13] 1800 was owned by the Jacquots before the Isdahls, and was originally purchased from the Jacquots by Cori-Ann and her husband at the time in 1997. Cori-Ann has lived on 1800 since that time and the property is currently owned by Cori-Ann together with her mother, Carol.

[14] Prior to selling 1800, the Jacquots caused an easement to be granted by 1800 to permit them to use the easement as a garden area. In the easement, the Jacquots had

created a garden pond prior to the sale of 1800. This garden pond on 1800 has been called Modified Pond 2 in these proceedings. In the early years of Cori-Ann's ownership, she permitted the Jacquots to perform excavation work in the area of Modified Pond 2 with a backhoe so they could plant more water plants there. Subsequently, a dispute arose between Cori-Ann and Mr. Jacquot over other work she saw Mr. Jacquot performing in the easement area which she had not permitted and which involved the cutting down of trees. There were subsequently legal proceedings, and the easement was eventually released.

[15] In 2009, Mr. Sillje purchased 1760 and later rented the property to tenants.

The Initial Investigations relating to the Properties

[16] Water accumulation in the Main Area at Issue was not a problem until approximately 2015, after the tenants had been living at 1760 for a number of years. The Isdahls testified that they believe the tenants made changes which resulted in water accumulating in this area.

[17] In the summer of 2018, the Isdahls noticed what they described as a significant increase in the velocity and quantity of the water entering Modified Pond 2 on their property. They discovered a ditch running parallel to the property line with 1760, as well as a blue plastic pipe that had been installed into Modified Pond 2, which they understood was diverting water onto their property. The Isdahls did not agree with the water being diverted onto their property and attempted to block the pipe. The tenant on 1760 filmed the Isdahls' attempt to block the pipe and asked them not to do so because the tenant did not want the water going towards the 1760 driveway. The role, if any, played by that pipe in conveying water, as well as whether or not the pipe was effectively blocked, is at issue in these proceedings.

[18] In April 2019, Mr. Jacquot filed a Natural Resource Violation ("NRV") complaint with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry") against Cori-Ann relating to what is described as the blocking of all culverts. The Natural Resource Officer ("NRO") dealing with the matter, Denise Blid, determined that, although the complaint referred to the pond affected by the blockage as a natural pond, "the descriptor of culverts and flooding seems to be regarding the management of drainage, **not natural systems"** (emphasis added). NRO Blid further determined that there were other priorities which did not allow for the inspection of the incident at the time.

[19] In July of 2019, Mr. Jacquot filed another NRV complaint, alleging the Isdahls had filled in a drainage ditch and "plugged up the culvert." It was determined by the responding NRO that "This is not a WSA matter." The complaint form further indicates the matter was resolved with the NRO having found "this is a local gov't bylaw matter", and noting that "no action" was taken.

[20] In July of 2019, Mr. Sillje also filed a NRV complaint alleging the people at 1800 were impeding the natural flow of water from his property so that all the water was "going to be stuck up" on his property. In a conversation about the complaint after it was filed, Mr. Sillje further referred to the flow of water from his property as being "completely blocked off". In response to Mr. Sillje's complaint, NRO Clive Baudin was tasked to "verify if any recent works have been done without authority within the creek" as alleged by Mr. Sillje.

[21] NRO Baudin conducted a site visit on September 10, 2019, regarding the complaint. He noted the inspection was "to address complaints related to the Water Sustainability Act (WSA)," and that it was alleged a swamp on Mr. Sillje's property drains into the neighbouring property and the flow was diverted, causing flooding to Mr. Sillje's property.

[22] After the inspection by NRO Baudin, it was determined the alleged problems were not a concern of the Ministry. The Inspection Report notes that the drainage systems on the property were not subject to the *WSA*; the problem was due to "poor drainage planning related to the catchment basin shared by the properties adjacent to each other"; and the accumulated water showed a lack of significant flow contributing to the drainage problem.

[23] In 2020, the tenants on 1760 were observed doing trench work along the fence between 1760 and 1800 and constructing a berm. The berm was near the barn on 1760 and the property line, within the Main Area at Issue (the "Berm"). The Isdahls believed the effect of the Berm's construction was to prevent water from flowing onto 1760 and to cause water to overflow onto 1800. The Isdahls filed a complaint relating to the flooding they were experiencing from the work done on 1760 and NRO Denise Blid recommended a "joint inspection with Water Auth or Habitat Biologist."

[24] An inspection was carried out on January 12, 2021 in relation to the Isdahls' complaint. Kevin Telfer, an "Ecosystem Biologist/Habitat Officer" with the Ministry, conducted the inspection with NRO Blid and was involved in identifying the water sources and the natural drainage on the properties. In NRO Blid's Inspection Report it is noted that Mr. Telfer "identified 2 natural water sources – one small marsh northwest of 1800 Connie Road and another larger one above 1760 Connie Road, in the far southern corner." In these reasons, we will refer to the small marsh as the Spirea Swamp, although it is called the Headwater Wetland on the map in Appendix 1. The larger marsh on 1760 will be referred to as the 1760 Marsh.

[25] The 1760 Marsh identified by Mr. Telfer was found to have natural drainage which flowed down the slope of 1760 on the south side of the property (i.e. away from 1800). However, it was noted on the Inspection Report that "at the toe of the slope, a ditch has been constructed, **diverting the stream off the [1760] property onto the neighbouring property, 1800 Connie Road**" (emphasis added). NRO Blid states in her report:

> Following the gradient and formation it is clear that the natural pattern previously existed along the southern side of the property [1760] behind

> the outbuildings, running eventually down to Veitch Creek. (emphasis added)

[26] The Inspection Report relating to the Isdahls' complaint was issued by NRO Blid on January 21, 2021. It notes that this diversion of the stream's natural course from 1760 onto 1800 was contrary to the *WSA* and remediation would be required to establish the natural watercourse. In an email to the Isdahls on January 21, 2021, NRO Blid further noted that once remediation was complete, the Isdahls should not see any water entering their property from the diversion through an area they had marked with pink spray paint. She further indicated they may still experience excess water being drained from the Spirea Swamp.

[27] On January 25, 2021, an order was issued to Mr. Sillje by David Robinson, Assistant Water Manager, relating to the remediation mentioned by NRO Blid, which included dealing with culverts in the area of the diversion. This order (the "Robinson Order") required Mr. Sillje to:

- Cease diverting water onto the adjoining property at 1800 Connie Road, by removing the unauthorized culvert and infill the ditch diverting that water, thereby restoring the stream to its original channel.
- Cease the unlicensed storage of water in the manmade pond on the property located at 1760 Connie Road, by removal of the manmade berm which is causing the pond to artificially store an incremental amount of water above the amount of water that would naturally be in that pond.
- Revegetate any soils disturbed during the course of work, with a mix of grass seed and native vegetation.

Events Subsequent to the Robinson Order

[28] Unlike the Order in the present case, the Robinson Order did not require that a Qualified Environmental Professional ("QEP") undertake an assessment relating to the work required and prepare a remedial plan for approval. The reason for this difference between the two orders was not adequately explained in the evidence.

[29] Subsequently, Mr. Jacquot indicated he had performed certain work regarding compliance with the Robinson Order. In February 2021, he emailed Mr. Telfer with photographs of the work he said had been done and provided a brief written description of the work. Mr. Jacquot specifically acknowledged he had not removed the Berm, and stated the reason was that the water was not flowing naturally as of yet. There were some discussions between Mr. Jacquot and Mr. Telfer which led Mr. Telfer to indicate there was compliance with the Robinson Order, although the Berm had not been removed. In terms of what the natural pattern was and its restoration, NRO Blid indicated in a subsequent email that it looked like Mr. Jacquot had established the natural pattern which went **"**down

the side of his property, eventually leading to the Veitch Creek". However, the evidence did not establish that Ministry personnel ever inspected the area after the Robinson Order to determine what work had been done prior to deciding there had been compliance with the Robinson Order.

[30] Mr. Telfer later advised Mr. Jacquot and Mr. Sillje that Mr. Robinson was satisfied that the requirements of the Robinson Order had been met. However, on March 12, 2021, Carol spoke with Mr. Robinson to indicate that the Berm had not been removed as required by the Robinson Order. Mr. Robinson then emailed Mr. Sillje mentioning that the Berm identified in the Robinson Order had not been removed and requiring that the Berm removal be completed by March 31, 2021.

[31] On March 19, 2021, the owner of 1810, Gail Harris, filed a NRV form complaining about the Berm. Although the form indicates that Mr. Telfer was to inspect the work done, the evidence did not substantiate that such an inspection had occurred. Meanwhile, the Jacquots sent an email to Mr. Robinson on March 22, 2021, about flooding in the area of the Berm, which they said was the result of the Isdahls plugging the drainage pipe in the area. The end result of these communications was that, although Mr. Baudin had already known about and investigated the culvert blockage, Mr. Robinson believed that plugging the culvert was "new information" received by the Ministry.

[32] On March 29, 2021, Mr. Robinson wrote Mr. Sillje and the Isdahls to "state the position of the Ministry". He indicated that he had spoken with Cori-Ann about their attempt to obstruct the culvert and that, based on the new information received by the Ministry about the culvert being plugged, the remedial measures regarding the Berm were no longer required since it was no longer believed that the Berm was impounding water. He further stated there should be no further work without prior approval and concluded his letter recommending that all parties acquire the services of a QEP to assist in developing a water management plan for the area. Again, all of this occurred without Ministry personnel inspecting the area after the Robinson Order was issued.

[33] In April 2021, there were discussions and emails between the Jacquots and Cali Melnechenko, Water Authorization Section Head, with the Ministry. The Jacquots complained about the Isdahls having blocked culverts with concrete. In an email dated April 14, 2021, Ms. Melnechenko indicated her understanding that the owners of both 1760 and 1800 have constructed works in the stream without authority and it was "not the position of the ministry to directly prescribe solutions (i.e. remediation work to restore the natural watercourse, adequately sized culverts to allow for peak flows) in situations such as this." Rather, she was recommending that the Jacquots work with the Isdahls to hire a qualified professional to assess the situation and recommend a solution to address the flooding on both properties. In response to a subsequent email from the Jacquots again complaining about the blocked culverts, Ms. Melnechenko reiterated the recommendation of acquiring the services of a QEP, and indicated the Ministry would not consider making an order in respect of the Isdahl property without the QEP recommending such work.

[34] In July 2021, Ms. Melnechenko addressed the matter again. She was aware of the "sealed culvert", but would not be ordering that any work be done. She indicated that "until there is a prescription for the entire drainage that is impacting both properties, FLNRORD [the Ministry] is not prepared to order alteration/restoration works to the stream."

[35] In September 2021, there was a complaint that the Isdahls were using bales of hay to direct water off their property and onto their neighbour's property. On October 1, 2021, Ms. Melnechenko responded that the bales of hay had been placed on the upland portion of the Appellants' property and were not a concern with regard to works in and about a stream. She further stated that "**the dispute between neighbours appears to be a civil matter.**" [emphasis added]

[36] In November 2021, Ms. Melnechenko sent an email to Mr. Sillje referring to a report prepared by Corvidae Environmental for 1760 regarding historical water flow. Ms. Melnechenko indicated she had been provided with different versions of the report from both the Isdahls and the Jacquots. She stated that it appeared somebody had modified the report, she was unsure of whether either version was the original version of the report, and she could not base recommendations or decisions on a potentially fraudulent report.

The Events Surrounding the Investigation leading to the Order

[37] On August 3, 2022, Mr. Sillje sent an email to Ms. Melnechenko. He indicated that the field where there had been water "has dried up", he was planning to install a drainage system to take the water down towards the Jacquots' property, and he was assuming this was okay. The Panel notes the work indicated by Mr. Sillje was consistent with what NRO Blid had indicated was the natural pattern.

[38] Ms. Melnechenko asked Angela Cameron, whose title at the time was Senior Authorizations Specialist with the Ministry, to contact Mr. Sillje regarding his email. Ms. Cameron spoke with Mr. Sillje and subsequently on August 4, 2022, wrote an email to Ms. Melnechenko and the Ministry team dealing with potential violations of the *Act*, known as the compliance and enforcement team. Ms. Cameron refers to an original order deemed resolved and "additional works by his [Mr. Sillje's] neighbours having stopped flows from his property." She expressed the view that it sounded like "natural flows should have flowed north into 1800 Connie Road", but that his neighbour has now "plugged/altered the ditched culvert and it now backflows onto his property." She expressed this view in the context of saying she was going to bring the matter to the Compliance and Enforcement team.

[39] Ms. Cameron's August 4, 2022 email indicates that she came away from her telephone call with Mr. Sillje with the intent of taking steps to "sort this out once and for all." She further stated "if an order is put in place, it would likely be for the natural flows to be re-established to an extent that brings on-site flooding back to 'normal' conditions"'. In

other words, the “natural flows” were an important consideration to Ms. Cameron in undertaking this investigation.

[40] Ms. Cameron advised Mr. Sillje to file a NRV complaint in relation to taking the matter forward. The evidence indicates that there is a triage system when NRV complaints are filed in order to determine priorities for the Compliance and Enforcement team. However, Ms. Cameron advanced the matter from her telephone call with Mr. Sillje outside of the normal triage process and without checking whether Mr. Sillje had in fact filed a NRV complaint.

[41] In meeting with members of the Compliance and Enforcement team, Ms. Cameron learned there was a history between the neighbours in relation to the issues raised. She was shown a copy of Mr. Baudin’s Inspection Report, which notes it was sent to 1800 Connie Road. As previously mentioned, the Inspection Report indicates the findings of Mr. Baudin, including his observation that the problem was due to “poor drainage planning related to the catchment basin shared by the properties adjacent to each other”, and that the accumulated water in the area showed a lack of any significant flow contributing to the drainage problem. Ms. Cameron testified that she did not put much significance on NRO Baudin’s findings and observations because he was an NRO and not a professional biologist.

[42] Ms. Cameron determined that a site visit would be conducted. She contacted Mr. Sillje to set the date of the site visit and requested information from him to show “where the drainage issues are, as well as where the historical water used to flow to the property to your west”. She did not contact the Isdahls about the site visit or request information from them about historical water flows.

[43] On September 6, 2022, Ms. Cameron attended the properties for the site visit together with NRO Daniel Smallacombe. They met with Mr. Sillje and Ms. Cameron obtained information from Mr. Sillje about what he considered was the historical condition of the area. At that time, there were drought conditions in the area and the conclusions made by Ms. Cameron about water flows were not based on observing actual water flows. She walked around and took some photos. She noticed that the vegetation in the area of the field identified by Mr. Sillje appeared to be consistent with the area getting saturated and she dug in the ground to check the soil. Based on her observations of the vegetation and soil, she decided that the area was consistent with a seasonal marsh, although she acknowledged that the area generally looked like a hay field. From this, she determined the Main Area at Issue was a wetland and therefore a stream under the *WSA*. She further noticed a metal culvert in the area with some silt in it. She took some measurements, concluded that there was no obvious flow path for water through the culvert, and determined from those circumstances that there had been a blockage of the culvert. She did not check by running something through the culvert like water or a wire, to confirm the direction of the culvert and to confirm the fact it was blocked. She was on 1760 for approximately 30 minutes when she came to the conclusion that there was a stream in the area of the field and it had been blocked.

[44] Ms. Cameron and NRO Smallacombe then decided to visit 1800. Ms. Cameron indicated that she had not contacted the Isdahls in advance because she was unsure about whether it would be necessary to attend at 1800. Carol was not there and they surprised Cori-Ann who was at home but not expecting them. She was not properly dressed to tour the property with them and had to change. After Cori-Ann had changed, they walked around the property. Ms. Cameron walked to the boundary between 1800 and 1810 which was raised a number of feet above 1810. She noticed the Spirea Swamp on 1810 back from and below the property line. She did not see a stream channel running down from 1810 to 1800 nor did she see a stream channel around the area she identified as Modified Pond 3 on 1800. She nevertheless concluded that there was connectivity between the Spirea Swamp and the area she had identified as a seasonal marsh (the Main Area at Issue), such that water would travel from the Spirea Swamp to the 1810 property line, then over the raised ground between the 1810 and 1800, then travel through 1800 to Modified Pond 3, and then connect to the Main Area at Issue.

[45] Regarding the culvert she had seen on 1760, Ms. Cameron did not see a culvert on 1800 in the location she expected she would see one. She concluded that the culvert she had seen on 1760 must be under a rock in Modified Pond 2 on 1800, in the location she would expect the culvert to be based on her assumption that the culvert ran in a straight line from 1760.

[46] Towards the end of her visit to 1800, Ms. Cameron told Cori-Ann that an order would be issued regarding the blocking of a stream. Although Ms. Cameron testified she would not have made such a statement, for reasons we explain later, we prefer Cori-Ann's evidence that Ms. Cameron did in fact say an order would be issued.

[47] On September 7, 2022, Carol sent an email to various Ministry personnel including NRO Smallacombe and Ms. Melnechenko. Carol expressed her concern about the visit to their property and that it was important that Ministry personnel have a true and certified copy of the report from Corvidae Environmental. She further referred to the previous decision of Ms. Melnechenko in October 2021, where it was determined that the Isdahls' activities in controlling water with bales of hay were not a concern regarding works in and about a stream, and Mr. Baudin's decision that the blockage complained of was a civil matter.

[48] On September 7, 2022, NRO Smallacombe replied to Carol. He indicated he had access to the material mentioned by Carol and stated: "As described on site yesterday, instructions in the form of an order will be provided shortly which will provide you with the information required **to return the stream to its natural flow** (emphasis added)". Subsequently, NRO Smallacombe issued his Inspection Report which stated that "Angela Cameron will follow up with Cori-Ann with an Order requiring the natural flow to return" and that both he and Ms. Cameron had explained the process involved with the order during their site visit.

[49] Ms. Cameron was leaving her job shortly to change positions within the BC Government (the "Government"). September 16, 2022, was her last day on the job and she was trying to wrap up items including getting the Order out. Ms. Melnechenko was unavailable on September 15, 2022, and indicated that it was important that the order go out. She told Ms. Cameron to contact Ms. Doyle to see if Ms. Doyle would be willing to sign off on the order. Ms. Cameron contacted Ms. Doyle and they had a conversation lasting approximately 15 minutes. The evidence does not establish that Ms. Doyle provided independent direction to Ms. Cameron for the preparation of the Order and covering letter, but rather that she relied on Ms. Cameron. Ms. Cameron subsequently sent the order and covering letter to Ms. Doyle for her to sign, and approximately 10 minutes later Ms. Doyle returned the Order and covering letter as signed by her.

[50] Ms. Doyle subsequently described her role as signing the Order "for Angela." Ms. Doyle testified that when the Order was made she assumed that Ms. Cameron and Mr. Telfer had communicated with each other, and she believed that their findings were consistent. She did not know what Mr. Telfer had looked at or that Ms. Cameron had not accessed the Ministry's file before attending at the site. Although Ms. Doyle understood the Order involved a blocked culvert, she did not know that the issue of the blocked culvert had been the subject of a 2019 complaint and investigated by NRO Baudin.

[51] On September 16, 2022, Ms. Cameron arranged for the covering letter and Order to be served on the Isdahls. The covering letter references the site visit by Ms. Cameron on September 6, 2022, and in the Respondent's written argument the Respondent says: "Following the September 2022 site visit, the Respondent issued the September 16, 2022 Order to the Appellants on the evidence gathered during the site visit."

Events subsequent to the Order being Issued

[52] On September 20, 2022, Carol sent an email to various government personnel regarding the matter. She referred to the March 2021 NRV complaint that her neighbour, Ms. Harris, had filed regarding 1760 and which had not been investigated. Carol indicated that the March 2021 complaint by Ms. Harris "should be investigated to assure equity in the process" and reiterated a previous request she had made for a copy of the report by Corvidae Environmental which the Ministry was using in their decision-making.

[53] On September 22, 2022, Ms. Doyle asked Ms. Cameron if she had any communication with Carol arising from Carol's email. Ms. Cameron indicated there had been some communication, and in referring to her dealings with Carol, Ms. Cameron stated, "Lol oh man" and "she's interesting". Ms. Cameron further said she would call Carol back.

[54] After having again spoken with Carol, Ms. Cameron sent Carol an email on September 22, 2022. Among other things, Ms. Cameron asked Carol to submit another NRV complaint regarding the diversion of water onto 1800 and the Robinson Order, which

Carol had said lacked compliance. Ms. Cameron also indicated that "there are many things going on this hillside that have caused water issues", and that if someone was illegally diverting water onto Carol's property, "then we certainly can investigate that issue for you!" (emphasis in original). She further mentioned she would reach out to NRO Smallacombe, who she copied in her email, about getting the NRV information Carol was seeking in regard to the Robinson Order.

[55] On the afternoon of September 23, 2022, the Isdahls filed an NRV complaint as advised by Ms. Cameron. Later that same afternoon, NRO Smallacombe advised Ms. Cameron that the NRV had been filed. Ms. Cameron did not contact NRO Smallacombe about investigating the matter along the lines indicated in her email to Carol. Later that same afternoon, NRO Smallacombe advised the Isdahls that he would not be assigning resources to investigate their complaint. He referred to the Order which had been made and conversations with Ms. Cameron, who he called "the author of the Order". In her testimony about how this complaint by the Isdahls was handled by NRO Smallacombe, Ms. Cameron described it as "unfortunate", and on a personal level she did not think it was fair to the Isdahls.

[56] On September 24, 2022, the Isdahls replied to the email they had received from NRO Smallacombe refusing to investigate their complaint. They included Ms. Cameron and others in their reply. They requested the information which NRO Smallacombe had referred to in his decision not to investigate and addressed his reference to the Order.

[57] On the morning of September 26, 2022, Ms. Cameron replied to Carol's email to NRO Smallacombe. She thanked Carol for submitting her NRV report as they had discussed, but did not address that the treatment of Carol's NRV was different than what they had discussed. Ms. Cameron then went on to deal with enforcement of the Order. She told Carol to ensure they were seeking the advice of a QEP in order to fulfill the requirements of the Order and further stated: "I cannot provide an extension to you for the Order unless there is a reason why the Professional cannot reasonably do the work within the 8 week period of time I provided to you."

[58] Later in the morning of September 26, 2022, Carol responded to Ms. Cameron by email with copies sent to others. Later still that morning, Ms. Doyle forwarded the email train to an individual in government to keep them informed of the communication "going on in regard to a C&E [compliance and enforcement] order I signed for Angela."

[59] On the afternoon of September 26, 2022, there were emails and messages exchanged between NRO Smallacombe and Ms. Cameron. In their messages about the Isdahls, Ms. Cameron used a "headbang" emoji and NRO Smallacombe replied: "I know, these folks are relentless." Ms. Cameron further commented that the emails from the Isdahls made her emails "look short and sweet."

[60] On September 28, 2022, Carol wrote to Ms. Doyle and others regarding the Order. She referred to the previous determinations by Ministry staff indicating that the issue was a civil matter, including the inspection by NRO Baudin. She stated that the complaints by

her and Ms. Harris were not being taken seriously by Ministry staff and referenced the report by Corvidae Environmental which indicated there was a problem with 1760 having no drainage system. She asked that Ms. Doyle reconsider the Order.

[61] On September 29, 2022, Ms. Doyle responded to Carol. She mentioned that Ms. Cameron had found evidence there was an intentionally blocked culvert on 1800 preventing natural drainage of a stream, being the unnamed tributary of Veitch Creek. Ms. Doyle indicated that the Order dealt with that matter, but she did not specifically address the Ministry's previous findings, Carol's request for reconsideration, or Carol's reference to the Corvidae Environmental report.

[62] On October 3, 2022, Ms. Cameron and NRO Smallacombe again exchanged messages relating to the Isdahls. In this exchange, NRO Smallacombe stated he "can't believe these folks" and Ms. Cameron later commented with "lol."

[63] Later on October 3, 2022, Ms. Cameron responded to Carol's email of September 28, 2022 to Ms. Doyle. She included responses to Carol's previous email in writing under the items in Carol's email. In her response, Ms. Cameron indicated that the purpose of her attendance at the site on September 6, 2022 "was to confirm the blockage of a culvert, and the observation of natural stream flow." She stated that previous observations by NRO Baudin were contrary to what she had observed and that she had observed the culvert was unlawfully blocked. Ms. Cameron did not address Carol's reliance on the Corvidae Environmental report, but stated that the "District of Sooke handles drainage plans for properties and development." Ms. Cameron also did not directly address the Isdahls' request for reconsideration, and rather indicated that they should retain a QEP to assist them.

[64] In her covering email of October 3, 2022 to Carol, Ms. Cameron took further steps regarding enforcement of the Order by warning Carol: "Failure to comply with an engineers order may result in a high penalty offence pursuant to section 107(2) of the Water Sustainability Act."

[65] The Isdahls subsequently appealed the Order by a Notice of Appeal dated October 10, 2022, with attached documentation.

[66] On January 4, 2023, Ms. Cameron sent an email to Mr. Sillje. Although an order had not been made against Mr. Sillje, he had been advised to do certain work to comply with the *WSA* and, in her email, Ms. Cameron mentioned that it was important for Mr. Sillje to get advice on the work he was to do to comply with the *WSA*. Ms. Cameron further mentioned that they were in a hearing process with Carol, were gathering evidence, and having Mr. Sillje's "compliance obvious would help". In terms of using the word "obvious", Ms. Cameron testified that she intended a meaning along the lines of Mr. Sillje making his compliance clear or apparent.

[67] In preparation for this appeal, Ms. Doyle attended at the site on March 15, 2024. She had not attended at the site before that. She attended with Mr. Dan Ciobotaru, a

Registered Professional Geoscientist with the Engineers and Geoscientists of British Columbia, who is employed by the Government and was qualified as an expert at the hearing in this matter. Ms. Cameron did not attend at the site again after September 6, 2022, which is the one attendance on which the Order was based.

The Hearing of the Appeal

[68] The hearing in this matter was conducted over 11 days, commencing on December 9, 2024, and extending into 2025, with various breaks for scheduling (the "Hearing"). Final argument was heard on May 7, 2025. Prior to the Hearing, all parties filed Statements of Points with the Board, and at the commencement of the Hearing, the Appellants and the Respondent presented written Openings setting out their respective positions.

[69] During the course of the Hearing, the Appellants challenged the qualification of Ms. Cameron as an expert witness based on an alleged lack of impartiality, citing various case law on that issue. The Panel heard extensive argument regarding that challenge and, after reserving decision on the issue, the Panel rendered a bottom line decision dated February 10, 2025. The Panel upheld the Appellants' challenge to Ms. Cameron's qualification as an expert witness, determining that Ms. Cameron was not permitted to provide expert testimony before the Board in this matter. The Panel further indicated at the Hearing that full reasons for the Panel's decision on the issue would be included in the Panel's final decision on the appeal, and those reasons are set out later.

[70] At the Hearing, the Appellants called four witnesses: Carol and Cori-Ann, who gave testimony as a panel; Toby Perkins; and Scott Mitchell. Mr. Perkins was qualified as an expert in hydrology, open channel hydraulics, and fluvial geomorphology. Mr. Mitchell was qualified as an Arborist with expertise in tree identification and assessment.

[71] The Respondent called three witnesses: Ms. Doyle; Mr. Ciobotaru; and Ms. Cameron as a fact witness. Mr. Ciobotaru was qualified as an expert in the field of hydrology including watershed hydrology, the characterization, delineation and monitoring of streams and stream networks, fluvial geomorphology, hydrological modelling and hydrotechnical analysis, as well as field surveying and the use of geographic information systems mapping in the context of the evaluation of hydrological conditions.

ISSUES

[72] The issues raised in this appeal and the matters addressed in this decision are as follows:

1. Why the Panel upheld the Appellants' challenge to Ms. Cameron being qualified as an expert based on a lack of impartiality.

2. Does the evidence establish that the alleged unnamed tributary of Veitch Creek, referred to in the Order, constitutes a “stream” under the WSA?
3. Does the evidence establish there was a blockage of the culvert affecting the alleged “stream”?
4. Is the Order supported by the evidence and, if not, what should be the outcome of the appeal?

RELEVANT LEGISLATION

[73] The following sections of the *WSA* are relevant to this appeal.

[74] Section 1 of the *WSA* contains the following definitions:

> "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;
>
> "changes in and about a stream" means
>
> (a) any modification to the nature of a stream, including any modification to the land, vegetation and natural environment of a stream or the flow of water in a stream, or
>
> (b) any activity or construction within a stream channel that has or may have an impact on a stream or a stream channel;
>
> "divert" means,
>
> (a) in relation to water in a stream, cause the water to leave the stream channel, whether to cause the water to flow into another stream channel or a reservoir or otherwise, and
>
> (b) in relation to water in an aquifer, cause the water to leave the aquifer,
>
> and includes extract or impound water from a stream or an aquifer;

"stream" means

(a) a natural watercourse, including a natural glacier course, or a natural body of water, whether or not the stream channel of the stream has been modified, or

(b) a natural source of water supply,

including, without limitation, a lake, pond, river, creek, spring, ravine, gulch, wetland or glacier, whether or not usually containing water, including ice, but does not include an aquifer;

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

"wetland" means a swamp, marsh, fen or prescribed feature.

[75] Section 11 of the *WSA* deals with changes in and about a stream and states as follows:

Changes in and about a stream

11 (1) On application in accordance with section 12, the comptroller, a water manager or an engineer may issue an approval authorizing any of the following persons to make changes in and about a stream:

(a) the government of British Columbia or Canada;

(b) another person.

(2) Changes in and about a stream may only be made in accordance with

(a) the terms and conditions of a change approval,

(b) the regulations,

(c) the terms and conditions of an authorization, or

(d) an order.

[76] Section 93 of the *WSA* deals with the powers of engineers including the power to make orders:

Powers of engineers and officers

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

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

(f) in relation to changes in and about a stream, to the person who made the changes in and about a stream or a person who derives a benefit from those changes in and about a stream...

(2) In addition to the other powers given under this Act, for the purpose of enforcing the provisions of this Act, the regulations or the terms and conditions of an authorization, change approval, permit, drilling authorization or compliance agreement, or administering precedence of rights in relation to the diversion or use of water, an engineer may do one or more of the following:...

(b) inspect or take action in relation to the construction of works;...

(d) order the construction, alteration, installation, replacement, repair, maintenance, improvement, sealing, deactivation, decommissioning or removal of any works;

(e) order

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

DISCUSSION AND ANALYSIS

1. Why the Panel upheld the Appellants' challenge to Ms. Cameron being qualified as an expert based on a lack of impartiality

The Appellants' Submissions

[77] The Appellants challenge the qualification of Ms. Cameron as an expert on the basis that Ms. Cameron "does not have the requisite degree of impartiality and

independence to be qualified as an expert witness in this proceeding." (para 1 App arg) The Appellants rely on the decision of the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 (CanLII) ("*White Burgess*"), in submitting that this is one of the rare cases where the proposed expert's lack of impartiality is such that the proposed expert evidence "should be barred at the threshold admissibility stage". The Appellants say Ms. Cameron's evidence as an expert should not be received because there is a realistic concern, as explained in *White Burgess*, that she is unable to comply with her primary duty to provide independent and impartial assistance to the Panel and to not be an advocate.

[78] The Appellants argue Ms. Cameron has been deeply involved with the subject matter of this appeal, including the making of the Order, such that she is not impartial. The Appellants point to the following:

- Ms. Cameron's involvement in the investigation leading to the Order under appeal including her stated determination, after hearing from Mr. Sillje that his neighbours had stopped natural flows from his property, to sort the matter out once and for all;
- Her urging Mr. Sillje to file an NRV complaint and then processing his complaint outside of the usual triage process for such matters;
- Her conduct of the investigation in providing notice of her attendance at the site only to Mr. Sillje, and pursuing a working premise that natural flows from Mr. Sillje's property had been impeded by his neighbours, as told to her by Mr. Sillje;
- Her involvement in the decision to issue the Order under appeal, including: telling Cori-Ann that an order would be issued while on-site; drafting the Order; arranging for the Order to be signed off by Ms. Doyle; and arranging for service of the Order;
- Her involvement in the enforcement of the Order under appeal including seeking to have the Isdahls comply with the Order and advocating as to the soundness of the Order when discussing it with the Isdahls;
- Her engaging in differential treatment of the Isdahls compared to Mr. Sillje including: her providing Mr. Sillje with notice of her site visit, but not the Isdahls, as previously mentioned; her not taking action against Mr. Sillje regarding the violations of the *WSA* she observed on his property, while giving preferential treatment to his complaint against the Isdahls;
- Her engaging in inappropriate discussions about the Isdahls with other Ministry employees where disrespectful comments about the Isdahls were made such as "these folks are relentless", Carol is "interesting", and "lol" in commenting on their concerns;

- Her preparation of field notes in anticipation of writing an expert report which "are essentially the first draft of the expert report and advance a single theory of what is happening on the properties with no contrary evidence of theories considered"; and
- Her involvement in defending the appeal and instructing counsel including participating in pre-hearing conferences, advocacy decisions and instructions.

[79] The Appellants rely on the decision of the majority in *Ontario (Natural Resources and Forestry) v. South Bruce Peninsula (Town)*, 2022 ONCA 315 (CanLII) ("*South Bruce*"), where the court identified some governing principles relating to employee experts as witnesses and provided an analytical framework for assessing the impartiality and independence of an employee expert witness. In that case, the court examined how an employee expert can lose their impartiality and independence through their involvement in the investigation, involvement in the decision to prosecute, and involvement in the prosecution generally.

[80] The Appellants argue that it was Ms. Cameron's opinion which established the basis for the Order, and she cannot objectively opine on the issues before the Board without either undermining or defending her own previous opinion, "or undermining or defending all of the work she has done since to justify, defend, enforce and uphold the Order". They say that Ms. Cameron started with a working premise that the Appellants were in contravention of the *WSA* and she confirmed that view shortly after she arrived at Mr. Sillje's property. She has since advocated for the Order, was involved in defending and enforcing the Order with the Appellants, and has been involved in defending the appeal of the Order.

[81] The Appellants note that the party putting forward the proposed expert here—the Government—has sufficient resources to have retained an expert without the concerns which are evident here. In this case, they say the Government could have easily engaged another expert without Ms. Cameron's level of involvement in the matter to provide expert evidence.

[82] The Appellants assert that an examination of the proposed expert report indicates that it does not meet the requirements for an expert report. They say the proposed expert report opines on the ultimate question involving the definition of "stream" under the *WSA*, fails to consider alternate theories, and strays outside the expertise of Ms. Cameron to opine on matters of hydrology and morphology. The Appellants say all of this is particularly concerning in the present case because on previous visits to the properties, Government officials had not found there to be wetland or stream in the area identified by Ms. Cameron, and consideration of this discrepancy ought to have been undertaken.

[83] The Appellants argue that "the extent of Ms. Cameron's involvement in opining on the ultimate issue underlying the Order, her involvement in drafting and issuing the Order, in advocating for the Order, and in defending the appeal is an unprecedented level of interconnection with the subject of the appeal" (para 19).

[84] In conclusion, the Appellants say that to allow Ms. Cameron "to serve as an expert witness in these circumstances would set the bar for impartiality so low that it would effectively render the threshold test established in *White Burgess* meaningless", or put another way, "if not this case, in what circumstances would an expert ever be excluded?"

The Respondent's Submissions

[85] The Respondent says Ms. Cameron's evidence as an expert is admissible under the Board's Practice and Procedure Manual, which indicates that the Board "may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law". The Respondent argues that experts may be employed by a party "so long as they fulfill their obligations to provide an independent opinion, based on their own judgment, and an objective assessment of the relevant facts, without preference to one party or another".

[86] The Respondent cites *White Burgess* to the effect that "the exclusion of expert evidence should occur only rarely, and, in general, a mere employment relationship with a party calling the evidence will be an insufficient basis to render the expert evidence inadmissible". With respect to *South Bruce*, the Respondent notes that the majority quoted from *White Burgess* to the effect that "the threshold to demonstrate that an expert is able to provide impartial, independent and unbiased evidence is not particularly onerous". The Respondent further notes that *South Bruce* provides commentary with respect to experts involved in investigations relating to prosecutions, and that the present case does not involve a prosecution.

[87] Turning to the specific items raised by the Appellants, the Respondent says:

- This matter arose from Mr. Sillje's proposal to install a drainage system which might require a *WSA* authorization and subsequent information from Mr. Sillje about the blocking of a culvert, and a site visit was intended to provide information as to whether a stream was involved and whether a follow up under the *WSA* might be warranted;
- The "deliberate plugging of a culvert, if conveying a stream, would be an appropriate topic for an NRV form";
- It was unlikely that Ms. Cameron would have told Cori-Ann an order would be issued since she was not the statutory decision-maker;
- It was appropriate for Ms. Cameron, as part of her job, to be attempting to get voluntary compliance with the Order from the Isdahls;
- Regarding the question of differential treatment, the following needs to be considered: although Ms. Cameron contacted Mr. Sillje and not the Isdahls about her site visit, that was because she was uncertain if attendance at 1800 would be required; while Ms. Cameron did not have an order issued against Mr. Sillje, she did not discount the possibility that an order might yet be

required; and although she was involved with others in making personal comments about the Isdahls, Ms. Cameron also replied to emails from the Isdahls and attempted to address their questions;

- It was appropriate for the site visit notes written on the day of the site visit to be used in finalizing her Site Visit Report; and
- It was important for Ms. Cameron to be involved in pre-hearing conferences and subsequent calls to assist with understanding the appeal process and the required timing for various deliverables.

[88] The Respondent cites various cases including *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act)*, 2017 BCSC 107 (Can LII) ("*Shawnigan Residents*"); *Daniel Norton v. Director of Fish and Wildlife*, 2023 BCEAB 39 ("*Norton*"); and *R. v. Soni*, 2016 ABCA 231 (CanLII). The Respondent relies on such cases to argue that "the Board can accept evidence from an expert affiliated with a party as long as the Board is satisfied that the expert was willing and able to give fair, objective and nonpartisan evidence", and that "experts may be employed or retained by a party, so long as they fulfill their obligations to provide an independent opinion, based on their own judgment, and an objective assessment of the relevant facts, without preference to one party or another".

[89] The Respondent further relies on *R. v. Live Nation Canada Inc*, 2016 ONCJ 223 (CanLII) ("*Live Nation*") where proposed experts who were involved in the investigation of a matter, but were not the lead investigator, were permitted to give expert opinion evidence. A factor in *Live Nation* was that the proposed experts were engineers who were regulated by a Code of Ethics which dealt with them serving as a witness before a tribunal. With regard to the Appellants' argument about the Government's resources, the Respondent refers to an excerpt from *Live Nation* about the efficient use of otherwise scarce resources and says the Government has a duty to use taxpayer resources efficiently and practically.

Third Party Submissions

[90] The Third Party produced a document which is an NRV form and states that such a form was in fact filed in respect of his complaint prior to the site visit at 1760. The Third Party further asserts that Ms. Cameron's attendance at the site was in accordance with the NRV complaint having been filed.

Appellants' Reply

[91] Regarding the Third Party's submissions, the Appellants say that although such a form may have been filed, Ms. Cameron's evidence was that she was not aware of whether such a form had been filed when she determined to deal with the matter outside of the normal process.

[92] Regarding the Respondent's position that it was unlikely Ms. Cameron told Cori-Ann that an order would follow at the end of the site visit, the Appellants point to NRO Smallacombe's email of September 7, 2022 where he stated: "As described on site yesterday, instructions in the form of an order will be provided shortly which will provide you with the information required to return the stream to its natural flow".

[93] In terms of the Respondent's argument that various actions taken by Ms. Cameron were simply part of her job, the Appellants say that even if advocating for and seeking to enforce an order may be something done by a government employee, such actions can nevertheless affect the ability of that individual to be an independent and impartial expert in a case involving that order.

[94] Regarding the differential treatment of Mr. Sillje, the Appellants specifically note the role played by Ms. Cameron in deciding whether an order would be issued. They say that Ms. Cameron was the one who effectively made the decision about how the Appellants would be treated and how Mr. Sillje's contraventions would be treated, and whether to issue an order. As such, she was effectively the statutory decision maker in respect of such matters, which is not the role for an independent expert.

[95] The Appellants distinguish the authorities cited by the Respondent on various bases. In terms of the authorities stating that employees can be experts, the Appellants do not dispute that is the case, but argue such individuals must nevertheless be found to be able to give impartial evidence. The Appellants say that each case depends on its own particular circumstances and that the role played by Ms. Cameron was greater than in the cases cited by the Respondent. For example, the Appellants note that in *Live Nation*, the proposed experts were separate from the lead investigator, and they played no role in the laying of the charges, which is different from the present case. The Appellants say that it is the cumulative effect of Ms. Cameron's involvement in this matter that renders her unable to be impartial in the present case and should bar her from giving expert evidence.

Panel's Findings

[96] The Panel finds that the law regarding expert evidence as stated in *White Burgess* has been applied in relation to previous Board proceedings. The BC Supreme Court in *Shawnigan Residents* applied *White Burgess* in the judicial review of a Board decision, and in *Norton* the Board applied *White Burgess* when considering whether employees of the BC Ministry of Forests were precluded from giving expert evidence because of their employment relationship with the Ministry. Similarly, we find it appropriate to apply *White Burgess* in the present circumstances.

[97] We further find that both *White Burgess* and the majority decision in *South Bruce* provide a useful framework for analyzing the issue of an expert's impartiality and potential exclusion. Under that analytical framework, once the proposed expert attests to their impartiality, then the burden is on the opposing party to show there is a "realistic concern" that the expert is unable to comply with their primary duty to be impartial and not an

advocate. If the opponent demonstrates such a "realistic concern", the party proposing the expert must establish, on a balance of probabilities, the impartiality aspect of the admissibility threshold (*White Burgess*, para 48).

[98] A review of the case law reveals various principles which may be applied when determining the question of employees testifying as experts in a proceeding. These principles include the following:

i) Experts have a primary duty to provide fair, objective, and non-partisan evidence (*White Burgess*, para 46);

ii) A proposed expert is not disqualified simply because they are employed by the party proposing to call them (*Norton*, para 83);

iii) The assessment of whether a proposed employee expert witness is impartial is case specific and depends on the particular circumstances (*White Burgess*, para 49);

iv) It is the nature and extent of the interest or connection with the litigation or party thereto which is important in determining whether a proposed expert is unable to be impartial (*White Burgess*, para 49);

v) A proposed expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to weight if admitted (*White Burgess*, para 45);

vi) In general, it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet the threshold requirement (*South Bruce*, para 77);

vii) The deeper the expert's involvement in the party's case, the more likely the witness is to be disqualified as lacking the necessary degree of impartiality and independence (*South Bruce*, para 81); and

viii) Where an expert has assumed the role of an advocate for a party, whether in their proposed evidence or otherwise, the person is unlikely to be either willing or able to carry out the primary duty of impartiality to the tribunal (*White Burgess*, para 49).

[99] We begin our analysis of the present case by noting that we agree that the determination of a proposed expert's impartiality depends on the particular circumstances of the particular case, as noted in item (iii) above. We further note that it is accepted by both the Appellants and the Respondent that a proposed expert is not automatically disqualified because the individual is an employee of the party calling the individual—in this case the Respondent—and we agree with that proposition. We further find that the determination of the proposed expert's impartially depends on the nature and extent of the proposed expert's involvement with the matters at issue.

[100] In the present case, although she has attested to serving as an expert, we have found there is a realistic concern that Ms. Cameron is unable to comply with the duty of impartiality based on the particular circumstances before us. This arises from the nature and extent of the following:

a) how she dealt with the investigation;

b) her involvement in the decision to issue the Order;

c) her involvement in advocating as to the soundness of the Order and having the Order enforced;

d) her involvement in defending the appeal; and

e) her differential treatment of the Isdahls and their concerns compared to the Third Party.

[101] In response to the realistic concern arising from these matters, the Respondent has not established, on a balance of probabilities, that Ms. Cameron can provide impartial expert testimony before the Board in this case. The Panel therefore finds that Ms. Cameron is not qualified as an expert witness as proposed by the Respondent. The Panel's reasoning on this determination is set out below and addresses each of the matters set out above in items a) to e) in turn:

a) The evidence in respect of how Ms. Cameron dealt with the investigation

- After speaking to Mr. Sillje, and him telling her about his neighbours having plugged a culvert, Ms. Cameron resolved to "sort this out once and for all." She proceeded with an initial working premise that natural flows from Mr. Sillje's property had been impeded by his neighbours, which had been told to her by Mr. Sillje, and she later indicated the purpose of the site visit had been "to confirm the blockage of a culvert", and observe the natural stream flow.
- Although the evidence indicated that the normal process for investigating NRV complaints required them to go into a queue and to be triaged, Ms. Cameron advanced Mr. Sillje's matter forward without requiring it to go through the queue as normally required.
- Ms. Cameron advanced Mr. Sillje's complaint forward regardless of whether he had filed an NRV complaint and she was unaware of whether such a form had even been filed when she took the matter to other members of the Compliance and Enforcement team for action.
- Ms. Cameron learned from speaking to other members of the Compliance and Enforcement team that there was a considerable history between the neighbours relating to the properties involved, but did not speak to the Isdahls to get their perspective before attending at the properties.

- Although Ms. Cameron only had a short time left before leaving her position and had other matters to complete, she nevertheless advocated for her to pursue Mr. Sillje's matter with a site visit together with a Natural Resource Officer.
- Ms. Cameron arranged the site visit for September 6, 2022, with advance notice only to Mr. Sillje and without notice to the Isdahls. Further, prior to her visit, she emailed Mr. Sillje for information about the historic water flow, and not the Isdahls. Although the Respondent says Ms. Cameron was uncertain if an attendance at 1800 would be necessary and that observations can be carried out from the property line, we do not accept this as a valid explanation for her not contacting the Isdahls. Given that Ms. Cameron was investigating the potential blockage of a culvert on the 1800 property, and the existence of a natural stream there, these matters were more likely to be determined by her visiting the 1800 property than from observations gathered at the property line with 1760. We find Ms. Cameron should have provided notice of her visit to the Isdahls and should have obtained information from them, as well as Mr. Sillje, prior to visiting. We say this given the history between the neighbours regarding the matters at issue, and that the issue involved the Isdahls' property.
- After approximately 30 minutes on the 1760 property, Ms. Cameron came to the conclusion that there was a natural stream in the area as put forward by Mr. Sillje and that the culvert she saw was blocked, without hearing from the Isdahls, or checking things on their property.
- When Ms. Cameron attended at 1800, Carol was not present and Cori-Ann had not been expecting her. The visit was short, and we find that the purpose of the attendance at 1800 was not to conduct an independent determination, but to confirm what Ms. Cameron had already concluded – that the culvert she had seen on 1760 was blocked - and which conclusion she had made without seeing the outlet to confirm that it had indeed been blocked.

b) Ms. Cameron's involvement with the decision to issue the Order

- At the end of the site visit, Ms. Cameron told Cori-Ann that an order would be made to unblock the pipe. Although the Respondent says it was unlikely Ms. Cameron would have said an order would be made because she was not the statutory decision maker and that was not her role, we prefer Cori-Ann's evidence on this point and find that Ms. Cameron did indicate that an order would be issued. In this respect, we have found Ms. Cameron saying an order would be issued is consistent with NRO Smallacombe's statement, in an email sent to Carol the next day, that it

was indicated at the site that an order "will be provided". The email stated in part as follows:

  - "**As described on site yesterday, instructions in the form of an order will be provided shortly** which will provide you with the information required to return the stream to its natural flow" (emphasis added).

- Similarly, in his Inspection Report regarding the site visit, NRO Smallacombe stated that "Angela Cameron will follow up with Cori-Ann with an Order" and noted that they had explained the process involved with an order to Cori-Ann.
- Ms. Cameron was heavily involved in the subsequent issuance of the Order. NRO Smallacombe has described Ms. Cameron as the "author" of the Order , and Ms. Doyle has described her own role as signing the Order "for Angela". The evidence did not establish that Ms. Doyle provided independent direction to Ms. Cameron for the preparation of the Order and covering letter, but rather that she relied on Ms. Cameron. Although Ms. Doyle did not have much prior knowledge of the specifics of the situation, she spent relatively little time reviewing the matter before signing the Order and covering letter for Ms. Cameron. We have found that Ms. Cameron decided that there should be an order at the site visit, as previously noted, and later Ms. Cameron prepared the Order and had Ms. Doyle sign off on it.
- After the Order was signed for her, Ms. Cameron arranged for service of the Order.
- In a later email to Carol about a potential extension of time, Ms. Cameron described the time period set out in the Order for compliance as "the 8 week period of time **I provided to you**" (emphasis added), indicating she was effectively the decision-maker who provided the time frame in the Order.
- Ms. Cameron's dealings with Mr. Sillje demonstrated that her role in dealing with orders about these properties was effectively a decision-making role. In an email to Mr. Sillje about the contraventions on his property she stated: "I discussed with you that these contraventions **would be grounds for me issuing an Order under the WSA…"**, although she decided not to issue such an order to Mr. Sillje (emphasis added). Ms. Cameron's reference to her being the one to issue an order supports the Panel's finding that, similarly, it was effectively Ms. Cameron's decision to issue the Order to the Isdahls in the present case, and it was simply signed off by Ms. Doyle.

c) Ms. Cameron's involvement in advocating as to the soundness of the Order and enforcing the Order

- After the Order was issued, Ms. Cameron was involved in several telephone calls and emails with Carol where Ms. Cameron advocated for the Order and its enforcement against what Carol was putting forward. For example, Ms. Cameron notes she told Carol that Carol's "issues with her neighbours are not really pertinent to the Order", that the issue is a Compliance and Enforcement matter rather than a civil matter, and that it was the Isdahls' responsibility as owners of the property to comply with the Order.
- Ms. Cameron's emails further indicate that her role in enforcing the Order was significant. In a previously mentioned email to Carol about a potential extension of time, Ms. Cameron described herself as the person who would be providing any extension of time to the Isdahls in respect of the Order, and stated that she would need "a reason why the Professional [to be retained by the Isdahls] cannot reasonably do the work within the 8 week period of time I provided to you".
- In another email, Ms. Cameron escalated the enforcement pressure by telling Carol that the failure of the Isdahls to comply with the Order "may result in a high penalty offence pursuant to section 107(2) of the Water Sustainability Act".

d) Ms. Cameron's involvement in defending the appeal

- In an email to Mr. Sillje after the appeal had been filed, Ms. Cameron sought his assistance with the appeal, indicating that they were in a hearing process with Carol, gathering evidence to try to move forward, and that having Mr. Sillje's "compliance obvious" would help with the appeal. Although the Respondent has argued that this was simply an attempt to get Mr. Sillje's compliance with the items which had been discussed with him, we do not accept that explanation as it does not explain the reference in the email to being in a "hearing process with Carol", getting his "help" in that regard, or the importance of his compliance being "obvious".
- The above-mentioned email to Mr. Sillje further indicates that, in seeking help with the hearing, Ms. Cameron was part of the team gathering evidence to defend the Order and was not impartial.
- Ms. Cameron attended pre-hearing conferences relating to the appeal as part of the Respondent's team and was copied on correspondence with the Board.

- Ms. Cameron was included and involved in multiple meetings with the Respondent's defence team and was copied internally on lots of correspondence about the appeal.
- Ms. Cameron was provided with the Respondent's draft Statement of Points for review prior to filing with the Board.

e) The differential treatment of the Isdahls

- As previously noted, although Ms. Cameron had learned there was considerable history between the parties relating to this matter, she only consulted Mr. Sillje about the historical conditions of the site, and not the Isdahls, before attending at the site.
- Ms. Cameron failed to give the Isdahls advance notice of her attendance, although she made arrangements to attend with Mr. Sillje.
- In a September 22, 2022 email to Ms. Doyle about communication with Carol, Ms. Cameron responded with language which was not respectful towards Carol or Carol's concerns, and which further indicated that Ms. Cameron was not impartial towards the Isdahls. For example, Ms. Cameron used language such as "Lol oh man" in describing her dealings with Carol, and said "she's interesting".
- Ms. Cameron participated in other exchanges with NRO Smallacombe and Ms. Doyle where language which was not respectful towards the Isdahls was also used. She responded positively to NRO Smallacombe saying these folks are "relentless"; she included a "headbang" emoji in a response about them; and used "lol" as part of a response to a message from NRO Smallacombe indicating that he "can't believe these folks."

[102] All of the above matters raise a realistic level of concern for the Panel and, taken together, they demonstrate an involvement in the case which the Panel has found makes Ms. Cameron unable to be impartial in the present case. In particular, we note that in *South Bruce* the court stated: "It is the personal influence exerted by the expert to encourage the prosecution, if any, that is concerning" (para 96). In the present circumstances, we find Ms. Cameron exerted a high degree of personal influence in having the Order issued, defended, and enforced, as demonstrated in the items above.

[103] The Respondent has argued that various items identified above are matters government officials may normally undertake. In that respect, we note two things. First, while a government official may perform some of the actions, such as seeking compliance with an order, that does not mean such actions cannot be considered in determining whether the government official qualifies as an impartial expert. Second, it is the extent and nature of such actions that is considered in determining whether the individual has the necessary degree of impartiality, and in the present case we have found that the

nature and extent of Ms. Cameron's involvement with the subject matter of this appeal as described above are such that she is unable to be impartial in the current proceedings.

[104] With respect to the cases relied upon by the Respondent, we have determined that the nature and extent of Ms. Cameron's involvement in the subject matters of this appeal is greater than in those cases and those cases are distinguishable. For example, in *Live Nation*, the engineers who were proposed experts "played no role in laying the charges" that were before the court (para 6), and there was "no allegation that the Ministry of Labour investigation that the expert engineers participated in was somehow unfair or partial" (para 35). As previously noted, both of those circumstances are different in the present case, as we have found Ms. Cameron played a significant role in having the Order issued and enforced, and the Appellants have alleged the investigation was unfair. Further, with respect to the reference in *Live Nation* about the proposed experts belonging to a professional association with a Code of Ethics which deals with them serving as a witness before a tribunal, the Code of Ethics for Ms. Cameron's association was not put before us and there was insufficient evidence in the present case that the association to which Ms. Cameron belongs has any specific requirements for members giving evidence before a tribunal as was involved in *Live Nation*. In any event, the fact that an individual belongs to such an association with a Code of Ethics does not preclude a finding that, in specific circumstances, such an individual can be found to be not impartial, as we have determined in the present case.

[105] Regarding the proposed expert report, the Panel finds that the report opines on the ultimate question regarding whether the alleged stream is a "stream" as defined under the *WSA*, and proffers an interpretation of legal matters. Specifically, the proposed expert report contains a legal conclusion about whether a feature "is a 'stream' as defined by the WSA", and a legal determination that the "culvert has been blocked willfully by the landowners of 1800 Connie Road, without authorization under the Water Sustainability Act". The Panel further finds the proposed expert report strays outside Ms. Cameron's expertise as a certified biologist by opining on the "hydrology and morphology present", and fails to consider alternate theories about the features, even though other Government officials had not found there to be a wetland or stream present in the areas identified by Ms. Cameron, during their previous investigations.

[106] As previously noted, the Appellants and the Respondent agree that a proposed expert is not automatically disqualified because the individual is an employee of the party calling the individual. In that regard, we further note the cases cited by the Respondent on that point also provide that the tribunal must nevertheless be satisfied that the proposed expert is able to be impartial in the proceedings. For example, in *Norton*, the Board indicated that for opinion evidence to be accepted from an expert affiliated with a party, the Board still needs to be "satisfied that the expert is willing and able to give fair, objective, and nonpartisan evidence" (para 84), which we have found is not the situation in the present case.

[107] In conclusion, the Panel notes that although Ms. Cameron has not been accepted as an expert witness, this did not prevent the Respondent from calling her as a fact witness, and the Panel has received and considered her fact evidence in the course of deciding the issues before us.

2. Does the evidence establish that the alleged unnamed tributary of Veitch Creek, referred to in the Order, constitutes a "stream" under the *WSA*?

[108] The Respondent's written argument states: "Following the September 2022 site visit, the Respondent issued the September 16, 2022 Order to the Appellants **on the evidence gathered during the site visit**" (emphasis added). In other words, the Order rests on the observations and determinations Ms. Cameron made during her site visit. It is also the Respondent's position, based on Ms. Cameron's site visit and as set out in the Respondent's Opening, that the stream upon which the Order is based involves a hydraulically connected system of features starting

> … from a headwater wetland swamp on 1810 Connie Road [the Spirea Swamp], travelling through a modified pond on 1800 Connie Road [Modified Pond 3], to a seasonal marsh which is shared between 1800 and 1760 Connie Road [the Main Area at Issue], then through a shared culvert between those properties [the culvert at issue], and subsequently flowing through 1800 via a series of modified ponds [Modified Ponds 2 and 1] and a daylit tributary channel before entering Veitch Creek adjacent to Connie Road.

[109] From the foregoing, and the evidence received at the Hearing, we break down the component parts of the alleged "stream", which are alleged to be hydraulically connected, as follows:

- The Spirea Swamp;
- The area around Modified Pond 3;
- The Main Area at Issue;
- Modified Pond 2; and
- The Area from Modified Pond 2 to Modified Pond 1 and Beyond to Veitch Creek

[110] We will summarize the parties' submissions on the law, as well as their arguments in respect of each of these component parts of the alleged stream, prior to providing our analysis of whether the evidence establishes the features identified from Ms. Cameron's site visit, as comprising the alleged unnamed tributary of Veitch Creek referred to in the Order, constitute a "stream" under the *WSA*.

Summary of Appellants' Submissions on this issue

[111] The Appellants refer to the relevant definitions under the *WSA*, as well as the case law, in arguing that it has not been established that the unnamed tributary of Veitch Creek referred to in the Order is a stream under the *WSA*. Having said that, the Appellants also argue that this issue is to be decided more on the evidence and the facts than on the law.

The Law

[112] The Appellants begin by noting the approach to be used in interpreting the *WSA* and the definitions set out in that *Act*. They say the Board in *Vincent Smoluk v. Assistant Water Manager*, 2020 BCEAB 8 (CanLII) ("*Smoluk*"), considered the legislative intent behind the *WSA* and determined that the *WSA* is, at its heart, a statute aimed at balancing competing interests between individual rights and the government's roles in protecting water resources (*Smoluk*, at para 44). In that regard, the Appellants submit "that the definition of stream cannot be interpreted to be so expansive as to include human-made modified pond features that seasonally collect surface drainage and that are not hydrologically connected to a natural source".

[113] The Appellants say the unnamed tributary of Veitch Creek referred to in the Order is not a natural watercourse and therefore not a "stream" as defined in the *WSA*. The Appellants note the requirement in the definition of "stream" that it be "natural", and cite the Board decision in *Dario Rossi v. Assistant Water Manager*, 2020 BCEAB 10 (CanLII) ("*Rossi*") where the Board emphasized that a key element of the definition of "stream" is whether the watercourse or water supply is "natural". At paragraph 56 of *Rossi*, the panel stated as follows:

> [56] I agree with the Appellants that the definition is broad and is not based on a scientific method or formula. However, the definition does include one critical word before the words "watercourse", "body of water", or "source of water supply"; the word is "natural". This word is not defined in the *WSA*, so I interpret it according to its ordinary meaning as found in the dictionary. The most appropriate meaning of "natural" in the context of this legislation is "existing in or produced by nature; not artificial" (Merriam-Webster Dictionary, online) or, as defined in another source "existing in or caused by nature; not made or caused by humankind" [citation omitted]. Thus, the critical question to my determination of whether the watercourse is a stream is whether it is human-made or created/produced naturally. I note that the definition allows for a stream's channel to have been modified; the key question is whether, despite any subsequent alterations, there was originally a naturally created/produced watercourse in or around the place where the watercourse at the heart of this appeal now lies, operating as a watercourse before being altered to its present location and configuration.

[114] In addition to asserting that the alleged watercourse is not natural, the Appellants also assert that the alleged watercourse lacks the necessary features to make it a watercourse. The term "watercourse" is not defined in the *WSA* and the Appellants argue that, as such, the common law requirements around what constitutes a watercourse still apply. The Appellants cite *R v. Golden Eagle Ranch Inc.*, 2003 BCPC 205 (CanLII), and *Toporowski v. Farrell*, 1995 CanLII 387 (BC SC) ("*Toporowski*"), to the effect that a natural watercourse must have a source, a bed, banks, and an outlet. At para 13 of *Toporowski*, the Court stated:

> [13] The definition of a natural watercourse has long been a matter of importance in the common law with a broad and general application not limited to *Water Act* jurisdiction. The case law is reviewed in *Lee et al v. Rural Municipality of Arthur*, 1965 CanLII 595 (MB CA), 52 D.L.R. (2d) 263 (1965 Manitoba C.A.) which succinctly summarizes, at page 267:
>
> > There is no natural watercourse unless it has the characteristics of a stream, with a source, a bed, banks, and an outlet.
>
> The definition was dealt with at greater length in *Brown v. Morden*, 1958 CanLII 312 (MB QB), (1958) 12 D.L.R. (2d) 576 at 583:
>
> > Bain J. in *Wilton v. Murray* (1897), 1897 CanLII 120 (MB QB), 12 Man. R. 35 at pp. 38-9, defines a watercourse as follows: "A watercourse has been defined to consist of bed, banks and water; and, while the flow of the water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground. Here, however, there is no evidence of the water flowing in a course with defined and visible banks; and, on the facts shown by the evidence, the case seems to be one of the drainage of surface water over an extensive surface area of the water produced by the melting snow and rain down to the watercourse into which the natural watershed of this part of the country drains."
>
> In *Edwards v. Scott R.M.*, 1933 CanLII 188 (SK CA), [1934] 1 W.W.R. 33 [affd [1934], 3 D.L.R. 793, S.C.R. 332], Martin J.A. (now C.J.S.), who delivered the judgment of the Court consisting of Haultain C.J.S., Turgeon and Mackenzie JJ.A., defines a watercourse, at p. 38, as follows:
>
> > A watercourse is defined as a stream, usually flowing in a definite channel, having a bed and sides or banks and discharging itself into some other stream or body of water. It must be something more than surface water, spread over a tract of land, caused by unusual freshets or other extraordinary causes. A depression or natural draining which merely carries water in a rainy season is not a watercourse; nor is a ravine which at certain seasons facilitates the

> drainage of the country a watercourse. A watercourse must have the characteristics of a flowing stream, it must have source, outlet and channels; the water need not, however, flow continually: *Farnham on Waters and Water Rights*, vol. II, pp. 1554-1562. In *Kerr on Injunctions*, 6th ed., p. 229, the learned author states:
>
> > As distinguished from water of a casual or temporary character a water course is a flow of water usually flowing in a certain direction and by a regular channel, having a bed, banks and sides, and possessing that unity of character by which the flow on one man's land can be identified with that on the land of his neighbour.

[115] The Appellants argue that the requirement of both a source and an outlet suggests that a watercourse must have a degree of connectivity to be properly a stream under the *WSA*. They note the quote from *Toporowski* indicates that a depression or natural draining which merely carries water in a rainy season is not a watercourse. They further note that at paragraph 48 in *Smoluk*, the Board held that definition of stream in the *WSA* "refers to standing bodies of water/ice, or channels that are expected to transmit water":

> The list provided in the definition of a stream, which applies to both branches of the definition (a natural watercourse or body of water on the one hand, and a natural source of water supply on the other), refers to standing bodies of water/ice, or channels that are expected to transmit water (i.e. "gulch" and "ravine").

[116] In terms of the definition of "stream channel" in the *WSA*, the Appellants note the definition refers to the bed and banks of the stream including side channels of the stream. They cite *Gary Ware v. Assistant Water Manager*, 2020 BCEAB 9 (CanLII) ("*Ware*"), to the effect that a stream channel is a morphological feature made up of a bed and banks, containing the natural boundary of the stream. In other words, to qualify as a stream channel, the feature being examined must contain those elements.

[117] In determining what constitutes a "bank", the Appellants refer to *Ware* at paragraph 49 where the panel said that the most relevant definition of "bank" in the context of a stream is "the rising ground bordering a lake, river, or sea or forming the edge of a cut or hollow". Thus, a key characteristic of a stream bank is "rising ground" (*Ware*, at para 49).

The Component Parts of the Alleged Stream

[118] We turn now to a review of the Appellants' submissions regarding the component parts of the alleged stream, including whether the parts are hydraulically connected and "natural".

The Spirea Swamp

[119] The Appellants say the Respondent has not established that the Spirea Swamp is the Headwater of the unnamed tributary and connected to Modified Pond 3 as alleged.

The Appellants note the Spirea Swamp is set back from the property line between 1810 and 1800 so that water would first have to travel to the property line in order to connect from the Spirea Swamp. Second, there is significantly higher ground at the property line such that water which reached the property line from the Spirea Swamp would then have to mount the hilly area at the property line to cross over to 1800. Then, after getting over the hilly ground, the water would need to cross the area between the property line and Modified Pond 3. Although Ms. Cameron hypothesized this would occur in the rainy months, the Appellants point out that Ms. Cameron acknowledged on several occasions in her evidence that there was no visible channel from the property line location by the Spirea Swamp across 1800 to reach Modified Pond 3.

[120] The Appellants indicate that Ms. Doyle, like Ms. Cameron, did not observe a stream channel from the Spirea Swamp area to Modified Pond 3 when she attended at the site and thought that water may have been moving underground. Similarly, neither Mr. Perkins nor Mr. Ciobotaru observed any visible signs of connectivity between the Spirea Swamp and Modified Pond 3 on 1800. Furthermore, the Isdahls indicated they had never seen water pouring over the high ground between the properties from 1810 onto 1800. Ms. Cameron's hypothesis, therefore, is inconsistent with the observations made by the witnesses, including the lived experience of the Isdahls.

The area around Modified Pond 3

[121] As previously noted, Ms. Cameron accepted there was no stream channel in the area between the Spirea Swamp and Modified Pond 3, including no sign of a stream channel from the 1810 property line to Modified Pond 3. The Appellants note there is an outbuilding on 1800 between the 1810 property line and Modified Pond 3. This outbuilding is known as the Chocolate Shack. Near the Chocolate Shack is a man-made swale where the Appellants buried a dead horse and stag in previous years, and where water can pool in the rainy months. Again, the Appellants say there was no stream channel observed in this area by any of the witnesses, nor did the evidence establish the presence of any water flow between the man-made swale and Modified Pond 3.

[122] The Appellants refer to Ms. Cameron's evidence that the grass was somewhat green in the area between the man-made swale and Modified Pond 3. They further note that while Ms. Cameron surmised this was from overland sheet flows in the rainy season or groundwater movement, neither of these circumstances meet the definition of "stream" under the *WSA*.

[123] In terms of any connection between Modified Pond 3 and the culvert alleged to be blocked, the Appellants note there is no stream channel connecting those features through the Main Area at Issue. They indicate Ms. Cameron's theory was that a connection existed as a result of water being added to the area around Modified Pond 3 and the Main Area at Issue which created one big pool of water during the rainy months. This, in turn, raised the question of where this water was coming from.

[124] The Appellants note Ms. Cameron's theory was that the water originated from the Spirea Swamp, flowed into Modified Pond 3, and then helped to form the large pool of water in the Main Area at Issue. However, as previously stated, the Appellants say the evidence did not demonstrate any connectivity with the Spirea Swamp. The Appellants, on the other hand, say that the water originated from 1760 and would come off the slope from 1760 above Modified Pond 3 and onto 1800. They say this water flow is unconnected to the Spirea Swamp, and it was disregarded by Ms. Cameron. The Appellants further say the source of this water was a diversion from 1760 onto 1800 (which the Appellants depict as the South Slope Diversion on Appendix 2), and the failed remediation works under the Robinson Order. This water was sheet water, with no stream channel, and had been observed by the Appellants in the past flowing into the area of Modified Pond 3. This water from 1760 is also evident in the videos and photographs presented into evidence by the Appellants, while the photographs, videos, and testimony show no water visibly flowing overland from the Spirea Swamp.

[125] The Appellants say Ms. Cameron's theory of stream flow from the Spirea Swamp into Modified Pond 3 and then into the Main Area at Issue is simply inconsistent with the lived experience of the Isdahls and the evidence. Ms. Cameron's theory further fails to account for the findings of Mr. Telfer that the water in this area was being diverted off 1760 and onto 1800, which led to the Robinson Order.

[126] In terms of whether Modified Pond 3 meets the requirement of being "natural" under the *WSA*, the Appellants argue that the evidence did not establish it was a natural feature, and it appears the area constituting Modified Pond 3 was dug out as opposed to occurring naturally.

The Main Area at Issue

[127] As previously noted, the Appellants say the water arriving in this area did not originate from the Spirea Swamp and reiterate there was no stream channel into the Main Area at Issue from the direction of the Spirea Swamp through Modified Pond 3. Rather, the Appellants say the water arriving in this area comes from 1760. In addition to the water coming from the South Slope Diversion on 1760 above Modified Pond 3, the Appellants say there is additional source of water which is entering the Main Area at Issue from a further diversion on 1760. This was identified by Mr. Telfer as being closer to a pig pen on 1760. While these sources of water from 1760 were to be remedied by the Robinson Order, and although Mr. Jacquot sent photographs relating to remediation work he said was done in response to the Robinson Order, the Appellants assert that any such work failed to correct the problem. As such, water continues to accumulate in this area from these sources. As previously noted, a visual depiction indicating the Appellants' argument about these sources of water is attached as Appendix 2 to this decision, and we have included it as it may assist the reader in visualizing the Appellants' arguments.

[128] The Appellants say Ms. Cameron did not pay heed to what they were explaining about the diversions found by Mr. Telfer and, had she done so, she might have done some

further investigation and reassessed her initial hypothesis (App para 94). The Appellants argue the large accumulation of water in this area is a relatively recent phenomenon, since around 2015, and is the result of unauthorized diversions from 1760.

[129] With regard to whether the Main Area at Issue is a "natural" seasonal marsh, as alleged by the Respondent, the Appellants say the evidence did not establish how many years it would take for a wetland to become established in the state Ms. Cameron observed. In that respect, the Appellants argue the Respondent has not demonstrated whether the vegetation observed by Ms. Cameron could have been established in the years since the area began receiving water from 1760, or whether such vegetation is necessarily reflective of a historic natural body of water. In addition to Ms. Cameron not explaining how long this area would need to be saturated with water to develop such attributes in the soil or vegetation, she did not adequately examine the history of the feature. The Appellants say she simply accepted Mr. Sillje's statement about the history of that area without hearing from the Isdahls and without considering that the area was mostly dry prior to 2015.

[130] The Appellants point out that Mr. Telfer examined the Main Area at Issue and did not determine there was a seasonal marsh there or a flow of water from that area to Veitch Creek. They say Mr. Telfer determined the water accumulating in this area was primarily from the South Slope Diversion (as indicated on Appendix 2), as well as the diversion previously mentioned around the pig pen (referred to as the Pig Barn Diversion on Appendix 2). Further, they say the only historic and natural flow to Veitch Creek identified by Mr. Telfer was on the south side of 1760 away from 1800.

[131] Regarding the flow of water out of the Main Area at Issue, the Appellants note Mr. Perkins' evidence was that the presence of water in this area was influenced by human-made elements such as ditches and berms. As a result, Mr. Perkins did not believe any conclusion could be reached as to which direction the water would "naturally" have flowed out from the pooling in the Main Area at Issue and indicated that more work was necessary in terms of surveys and analysis to confirm which way the water flows and how it flows. However, the Appellants note the Respondent's hydrologist, Mr. Ciobotaru, was more definitive in opining that the natural drainage route out of the Main Area at Issue was most likely down the driveway of 1760 and not through the culvert into 1800.

[132] The Appellants say Ms. Cameron did not turn her mind to whether the natural flow of water through the Main Area at Issue would have been down the driveway of 1760 rather than through the culvert into 1800. This was because, by looking at the gradient of the land, Ms. Cameron thought that it naturally sloped towards 1800; however, the LIDAR technology indicated this was incorrect. Since Ms. Cameron's assumptions about the gradient were incorrect, the Appellants argue her theory of how the unnamed tributary naturally flowed, based on those assumptions, was also incorrect.

[133] In addition to the evidence indicating that the culvert was not part of the natural flow out of this area, the Appellants argue Ms. Cameron also based her opinion about the

flow on a number of assumptions about the culvert itself which were not established on the evidence. She assumed the culvert ran in a straight line and that it extended the whole distance, approximately 85 feet, to Modified Pond 2. She did not verify those assumptions by taking steps such as running water with dye, or a wire, or a camera through the culvert she identified on 1760 to see if it came out into Modified Pond 2, as opposed to diverting elsewhere or simply ending part-way. Thus, it was never demonstrated that water flowed out of the Main Area at Issue through the culvert, and the Appellants say Ms. Cameron's assumptions about the culvert cannot be used to establish there was a stream with a natural flow through the culvert as alleged.

[134] As for the Respondent's theory that there once existed a natural stream running from the Main Area at Issue to Modified Pond 2, into which the culvert has been placed, the Appellants point out that neither hydrologist found evidence to support such a theory, and Mr. Perkins indicated there was no geomorphic evidence of a natural streambed in this area. As previously indicated, the Appellants further note the Respondent's own expert hydrologist opined that, but for human works, the natural flow of water from this area would go down the driveway on 1760 rather than through 1800.

Modified Pond 2

[135] Regarding the natural flow of water from the Main Area at Issue to Modified Pond 2, the Appellants reiterate Mr. Perkins' opinion that it was difficult to draw a conclusion as to whether water naturally flowed in the direction of Modified Pond 2 or down the driveway of 1760. As previously noted, Mr. Ciobotaru agreed with Mr. Perkins, although he was more definitive in opining that the natural drainage route from the Main Area at Issue was most likely down the driveway of 1760 and not through 1800.

[136] The Appellants point out that in Ms. Cameron's notes she posits that the reason there is flooding in the Main Area at Issue is because the culvert was blocked. However, the Appellants point to Mr. Perkins' evidence that he observed the water level in Modified Pond 2 to be same height as the pooled water in the Main Area at Issue. This indicates the gradient of Modified Pond 2 was the same level or close to that of the Main Area at Issue such that the natural flow of water would more likely be down the driveway of 1760. In that respect, Mr. Perkins indicated a survey would need to be conducted to verify the respective water levels.

[137] The Appellants say Ms. Cameron failed to examine the area of Modified Pond 2 in the rainy months when the water levels at issue would be apparent. As a result, the Appellants say Ms. Cameron failed to recognize that the water level in Modified Pond 2 did not appear lower than in the Main Area at Issue during the rainy months. They say Ms. Cameron failed to recognize Modified Pond 2 is outlet controlled, and had she observed the water in the rainy season, she might have seen what was really happening with the culvert and determined that the flow of water from the Main Area at Issue was different than she had posited.

[138] In addition to the problems with Ms. Cameron's identification of the natural flow of water from the Main Area at Issue to Modified Pond 2, the Appellants say Modified Pond 2 is not itself a natural source of water that would qualify as a "stream" under the second part of the *WSA*. They say Ms. Cameron thought Modified Pond 2 was dug into groundwater and her evidence did not establish that Modified Pond 2 was natural. The Appellants argue that an interpretation of "stream" under the *WSA* which would include a man-made pond dug to access groundwater, that is otherwise unconnected to a natural watercourse or source of water, is too expansive and inconsistent with the legislative purpose of striking a balance between individual and collective rights as noted in *Smoluk* (at para 52).

From Modified Pond 2 to Modified Pond 1 and Beyond to Veitch Creek

[139] The Appellants argue the gradient from Modified Pond 2 to Modified Pond 1 is uphill and there is no evidence of a natural flow out of Modified Pond 2 to Modified Pond 1 in the circumstances.

[140] The Appellants say that the land rises at northwest end of Modified Pond 2 and the natural flow of water is not uphill. They rely on the evidence of the arborist, Mr. Mitchell, indicating there are a number of Douglas fir trees on the high ground in that area beyond Modified Pond 2 which are estimated to be 80-100 years old. The Appellants argue that the age of the trees is evidence that the high ground is not a human made feature within the timeframe of the development of the properties.

[141] The Appellants assert that when Cori-Ann bought 1800 with her husband, the trees were present and a deep excavated ditch ran between them carrying water from Modified Pond 2 to Modified Pond 1, but that was not natural. Subsequently, a culvert was installed in the ditch and it was backfilled.

[142] The Appellants argue it has not been established how a "historic natural" flow of the unnamed tributary of Veitch Creek could have flowed uphill to Veitch Creek through the trees prior to the ditch and subsequent culvert. They say this undermines Ms. Cameron's theory of the unnamed tributary of Veitch Creek being a stream, on which the Order is based.

Adverse Inference

[143] The Appellants argue an adverse inference should be drawn from the Respondent's failure to call Mr. Telfer as a witness. The Appellants say Mr. Telfer's evidence would have been material to explain the findings from his investigation regarding: i) the water being diverted from 1760 onto 1800; ii) the natural flow of water through 1760 down to Veitch Creek; iii) the water accumulation in the Main Area at Issue and the effect of works such as the Berm; and iv) the absence of wetland features or a stream channel in the Main Area at Issue.

[144] The Appellants say Mr. Telfer continues to be employed with the Respondent, working out of the Nanaimo office, and no explanation has been provided for not calling

him as a witness. The Appellants cite case law to the effect that an adverse inference may be drawn where there is a failure to call a material witness by a party, over whom they have exclusive control, and no legitimate explanation has been given for the failure. The Appellants say an adverse inference should be drawn in the present case to the effect that Mr. Telfer's evidence about the opinions he reached in 2021 contradict, or at least conflict with, Ms. Cameron's and undermine the evidentiary basis of the Order.

Summary of Respondent's Submissions

[145] As previously noted, in the Respondent's Opening, the Respondent indicated its position is that "there is a hydraulically connected system of stream features, including wetland features, which constitute an unnamed tributary to Veitch Creek". This hydraulically connected system starts "from the natural headwaters swamp upland on 1810 Connie Road [the Spirea Swamp], through a modified pond feature on 1800 Connie Road [Modified Pond 3], towards a natural seasonal wetland feature which straddles 1800 Connie Road and 1760 Connie Road [the Main Area at Issue]".

[146] The Respondent says water would flow from 1760 to 1800 through a culvert between the properties except for the conveyance of water via the culvert being "blocked by the Appellants by dumping concrete at the culvert inlet". The Respondent argues that "absent that blockage the culvert would have otherwise allowed water to flow from 1760 Connie Road back into 1800 Connie Road, via several marshes, referred to as modified ponds, then towards Veitch Creek."

[147] The Respondent asserts the "culvert plugged by the Appellants formed part of a natural stream/stream channel, portions of which had been subject to modifications in the past, while other parts were not modified and they were hydraulically linked features flowing towards Veitch Creek."

The Law

[148] The Respondent notes various definitions under the *WSA* including the definition of "stream". In dealing with the definition of "stream", the Respondent also cites the decision in *Rossi* where the Board held that a key element of the definition was the word "natural". The Respondent says the critical question noted in *Rossi* "was whether the watercourse was human-made or naturally created" – in other words, whether it existed before any human-caused changes and, if so, it is a stream.

[149] In terms of the definition of "stream", the Respondent notes that it includes "whether or not the stream channel of the stream has been modified". The Respondent refers to case law where it has been held that a natural watercourse, remains a "stream" even if it is modified for the purposes of development. In the present case, the Respondent says "the unnamed tributary (including related wetland features) has remained a stream under *WSA* throughout, even if certain parts were modified, whether by culverting or ditching along the stream channel."

[150] With respect to connectivity, the Respondent says the case law provides for connectivity to be established by the topographic gradient and the natural flow, such that the presence of a current from higher to lower elevation is evidence of a natural watercourse. The Respondent says this is the case even though the natural watercourse may expand into a swamp through which there are no defined banks, if through this expansion there is a current from a higher to a lower level (see *Hudson's Bay Company v. Horanin*, 1925 CanLII 274 (MB KB).

[151] The Respondent argues the definition of "stream" in the *WSA* is broader than the definition at common law, and in *Toporowski*, the court specifically noted that the definition included temporary watercourses and temporary sources of water.

[152] Regarding the question of onus, the Respondent cites various cases including *David Avren v. Regional Water Manager,* 2007 BCEAB 9 (CanLII) ("*Avren*"). In *Avren*, the Board stated at page 10:

> …The Panel takes the view that an appellant's obligation in proceedings such as these is to lead 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. The Board does not necessarily require the appellant to always demonstrate that the decision was wrong in law or fact, but if the appellant is not going to assert that there is some legal flaw in the decision or lead evidence that the Board could consider as sufficient to conclude that the Regional Water Manager should have made another decision based on the facts, then the appellant must at least lead some evidence that the process which lead to the decision was flawed in some way.

[153] The Respondent argues the Appellants' evidence "should not be preferred to the detailed on-site observations and investigations carried out by Ms. Cameron, on which the Respondent relied when making the s. 93 Order", and further argues that the hydrologists' opinions support their position. The Respondent therefore submits the Appellants have not shown why the Order was incorrect.

The Component Parts of the Alleged Stream

[154] The Respondent relies on Ms. Cameron's testimony regarding her observations and fact gathering during her September 6, 2022, site visit. The Respondent says her testimony indicates "there would be sufficient discharge from the upland spirea swamp on 1810 Connie Road to flow through the related wetland features to the properties below, which flows have formed a natural stream channel, despite modifications in certain stretches".

The Spirea Swamp

[155] The Respondent says the Spirea Swamp is connected to other features of the unnamed tributary mentioned in the Order. The Respondent relies on the observations

Ms. Cameron made while standing at the property line between 1800 and 1810 and looking towards the Spirea Swamp. The Respondent says Ms. Cameron suspected that during wet times the water levels in the Spirea Swamp would rise to the property line and up over the high ground between the properties. Although there is hilly ground at the property line over which the water would need to climb, the Respondent points out there is subsequently lower ground on 1800 than on 1810.

[156] The Respondent notes that NRO Blid, in her email of January 21, 2021 to the Isdahls, indicated that 1800 was receiving water from the smaller marsh northwest of their property—being the Spirea Swamp—in addition to the stream water diverted from 1760. Although NRO Blid indicated that the Isdahls should no longer see water entering their property from 1760 in the area with the pink spray paint after the remediation set out in the Robinson Order, she further indicated that excess water from the Spirea Swamp would still be draining onto their property.

[157] When Ms. Doyle and Mr. Ciobotaru attended the site, they noticed a ditch extending from 1810 towards the back of 1800 which conveyed water out of the Spirea Swamp in a southerly direction. The Respondent says this ditch likely affected surface flows from the Spirea Swamp. While neither Ms. Doyle nor Mr. Ciobotaru observed a stream channel from 1810 over the hill between the properties, down onto 1800, and over to Modified Pond 3, the Respondent says this is likely due to the ditch taking the water away from the Spirea Swamp in a different direction. Thus, the Respondent believes the reason the Spirea Swamp may not be supplying water to Modified Pond 3 is because of the ditch.

[158] The Respondent further says that there may be connectivity through subsurface flow bringing water from the Spirea Swamp to 1800 and Modified Pond 3. This potential was mentioned by Ms. Doyle in her testimony when she acknowledged there was no observed channel flow to Modified Pond 3 but thought that the wet ground around Modified Pond 3 may have been due to subsurface water.

The Area around Modified Pond 3

[159] As previously noted, the Respondent says the Spirea Swamp is connected to Modified Pond 3. The Respondent says there is a grassy area on 1800 below the hilly area between 1800 and 1810 which extends to Modified Pond 3. The Respondent says this grassy area becomes squishy and saturated with water in rainy months and even remained green during a period of drought.

[160] The Respondent says Modified Pond 3 was dug and is approximately five feet deep. The Respondent says that Modified Pond 3 held water at the time of Ms. Cameron's visit in September 2022 even though the region was experiencing extreme drought conditions at the time. The Respondent says that it appears Modified Pond 3 was dug into a wetland.

[161] While this area was distinct from the Main Area at Issue when Ms. Cameron attended, the Respondent asserts that during the winter months, water fills the area

between Modified Pond 3 and the Main Area at Issue, so as to extend and encompass Modified Pond 3 and make it one large pool of water.

The Main Area at Issue

[162] The Respondent argues that the Main Area at Issue is a seasonal marsh, which contains vegetation characteristic of a wetland and falls within the definition of "wetland" under the *WSA*. In that regard, the Respondent asserts the area features rushes, sedges, reed canary grass, and fowl bluegrass.

[163] The Respondent says that while there may not be a stream channel in this area, "wetlands have unique characteristics such that they do not necessarily exhibit defined 'channels' of the type observed in watercourses" and a wetland is a stream as defined under the *WSA*.

[164] The Respondent argues that pooling water could be observed in the Main Area at Issue in aerial photographs from prior to 2015 and as such it is not a relatively recent phenomenon as asserted by the Appellants. The Respondent cites Ms. Cameron's evidence on the last day of testimony where, in cross-examination, she indicated she had reviewed Google Maps imagery for several years including those between 2010 and 2016, as well as her testimony about seeing a photograph shown to her by Mr. Jacquot from May 1995 which the Respondent says depicted standing water in the area.

[165] Regarding the Appellants' argument about Mr. Telfer, the Respondent says that Mr. Telfer's views are not in conflict with Ms. Cameron's views. The Respondent points to the communication from NRO Blid, following her visit to the area together with Mr. Telfer, where she indicated that 1800 was receiving water from the Spirea Swamp on 1810 as well as from 1760 and that such water was a stream which would be protected until it enters Veitch Creek.

[166] With respect to the Appellants' theory of water flowing into the area from 1760, the Respondent says "the Appellants have not established that the water flowing into the seasonal marsh from the upstream areas on the 1760 Connie Road property is not natural." Further, the Respondent argues that while any such water flow from 1760 may contribute to the volume of water in the area, the Order is still valid as the stream flowing through the culvert has been blocked.

[167] Regarding the Robinson Order and the remediation work ordered under it, the Respondent says the Robinson Order concerned other matters and is not relevant. Further, the Respondent says the items in the Robinson Order have been dealt with, and it has not been established that any current inflows to the area have any relation to the Robinson Order or an alleged failure of the remediation works carried out under the Robinson Order. In any event, the Respondent says the Robinson Order was not appealed by the Appellants.

[168] In terms of the gradient and the flow of water out of the Main Area at Issue, the Respondent says that both Mr. Perkins and Mr. Ciobotaru believed that, before

development took place, water might have flowed from the Main Area at Issue towards Veitch Creek either through 1800 or down the slope of the driveway on 1760. However, the Respondent acknowledges "Mr. Ciobotaru reasoned it may be more likely that water preferentially flowed down the slope where the driveway was subsequently constructed" on 1760, instead of flowing onto 1800. In any event, the Respondent says that a stream naturally flowed down the slope from the Main Area at Issue to Veitch Creek before any development occurred on the properties.

[169] With respect to whether Ms. Cameron ought to have checked the outflow of the culvert she identified, such as by running water with dye through the culvert, the Respondent says it is unlikely such checks would have been successful. The Respondent says that at the time of Ms. Cameron's inspection there was no standing water in the area and therefore no ability to check the culvert by running water through it. Further, the Respondent says the culvert did not appear to be daylit and Ms. Cameron believed a boulder had been placed on top of the culvert, which would have affected such testing.

[170] Regarding the evidence of Mr. Perkins, the Respondent specifically says that Mr. Perkins' reply report should be excluded from the evidence in its entirety. The Respondent argues the reply report should be excluded because it addressed Ms. Cameron's expert report, which was not admitted into evidence. The Respondent asserts that consideration of the reply report is therefore not relevant and any consideration of the reply report by the Panel would prejudice the Respondent.

Modified Pond 2

[171] With respect to Mr. Perkins not having seen a natural streambed in area of Modified Pond 2 or the Main Area at Issue, the Respondent says Mr. Perkins carried out very limited observations in those areas. As previously indicated, the Respondent further notes the *WSA* applies if there was previously a stream channel in the area which has been modified.

[172] Regarding Mr. Perkins' statement that a survey would need to be conducted to verify respective water levels between the features, the Respondent notes that such a survey has not been carried out nor has a hydraulic analysis been done to confirm relative elevations. In that respect, more work would be required to confirm Mr. Perkins' theory of hydraulic conditions involving Modified Pond 2.

[173] In terms of whether Modified Pond 2 is natural, the Respondent acknowledges that Modified Pond 2 is an excavated pond and was "dug into the ground". However, the Respondent further says the digging of the pond was "possibly into a wetland area", and there is a belief that it was dug "to intercept groundwater and was deepened over time". The Respondent also asserts that Modified Pond 2 has become naturalized over time.

From Modified Pond 2 to Modified Pond 1 and Beyond to Veitch Creek

[174] The Respondent says Modified Pond 2 outlets into a culvert which conveys water from Modified Pond 2 to Modified Pond 1. The culvert runs below a berm which is a point

of high ground at this location, and Ms. Cameron believed the berm had likely been constructed or augmented using material excavated from Modified Pond 2. The Respondent says there was previously an open ditch where the culvert is located, and the ditch was replaced with the culvert and filled in at the request of Cori-Ann.

[175] With respect to Mr. Mitchell's estimate of the age of the trees as demonstrating the age of the high ground, the Respondent points out a number of difficulties with the accuracy of Mr. Mitchell's evidence. First, the Respondent notes Mr. Mitchell was unable to use his preferred method to calculate the age of the trees. That method would have been to use his increment borer to take samples, but it did not function well enough for an accurate reading. As a result, Mr. Mitchell was left to estimate the age of the subject trees by examining other nearby trees which had either failed or had been removed. Second, Mr. Mitchell conceded that tree growth can vary tremendously with growing conditions; however, he did not take soil samples to compare such conditions between the subject trees and those he used for comparison purposes. Third, at least two of the comparison trees were said to be in a state of "advanced decay", which impacted the accuracy in estimating the age of the trees.

[176] Dealing with Modified Pond 1 and beyond, the Respondent says Modified Pond 1 is a small, excavated pond which outlets to a natural stream channel featuring cobbles and evidence of channel formation. Part way along, that feature is then channelized into a ditch which leads to a final culvert beneath a wooden clear span bridge that subsequently conveys water into Veitch Creek.

Adverse Inference

[177] The Respondent argues no adverse inference should be drawn from Mr. Telfer's non-attendance at the Hearing. The Respondent disputes that Mr. Telfer's evidence would be material, and disputes that his evidence about his investigation leading to the Robinson Order would be in conflict with the evidence of Ms. Cameron or Ms. Doyle.

[178] The Respondent cites case law to the effect that an adverse inference should not be drawn if either party could have called the witness if they thought it was important. The Respondent notes that the Board's Practice and Procedure Manual provides a process to order that a witness attend if the person does not agree to attend pursuant to a party's request. The Respondent says that the Appellants could have sought to have Mr. Telfer attend as a witness, but such a request was never made. Accordingly, no adverse inference should be drawn.

Respondent's Additional Submissions

[179] As previously noted, the Respondent's position is that the Order is based on the evidence gathered during Ms. Cameron's site visit, from which she determined there is a hydraulically connected system from the Spirea Swamp to Veitch Creek which constitutes a stream under the *WSA*. In the Respondent's final argument, however, two additional arguments were put forward in seeking to support the Order.

[180] The first additional argument was grounded on the theory that the Main Area at Issue itself could be characterized as the start of the stream referred to in the Order, and not the Spirea Swamp. The Respondent argued that the Main Area at Issue qualified as a wetland and, as such, it met the definition of "stream" under the *WSA*. It was, therefore, sufficient to find a "stream" was blocked even if the water which was blocked, was only the water which flowed from the Main Area at Issue to Modified Pond 2. Furthermore, the water did not have to naturally flow all the way to Veitch Creek to be considered a stream under the *WSA*.

[181] This proposition was put forward by Ms. Cameron in cross-examination when faced with the evidence questioning whether there was a connection from the Spirea Swamp, and whether there was a flow out to Veitch Creek. Thus, although the Respondent's position remained that the Spirea Swamp constituted the headwater of the stream, and the unnamed tributary of Veitch Creek was as set out in the Order, Ms. Cameron indicated on cross-examination that the stream could start at the Main Area at Issue and be shorter.

[182] The second additional argument was grounded on the theory that there are two watersheds on the properties which converge at the Main Area at Issue to create a stream. The Respondent says there is an easterly watershed located primarily on 1760 which conveys water in a northerly direction and another watershed which originates on 1810 and extends in a north-easterly direction through 1800 and on to the western portions of 1760, and then back to 1800. The Respondent asserts that the two expert hydrologists agreed the topography and LIDAR data supported the generation of streams within the two watersheds, and two such watercourses were initially described to occur on the properties by Mr. Telfer.

[183] The Respondent says that after converging at the Main Area at Issue, the two watersheds convey water to Veitch Creek through the series of culverts and ponds located on 1800, which constitutes a stream. The Respondent says that while the precise point at which a stream might be observed to form on the properties is influenced by the volume of water and the topography itself, the size of the watersheds suggests that stream formation is likely to have occurred on the properties. The Respondent argues that once the watersheds converged, their respective water volumes would be combined such that stream features would be even more likely to be observed on 1800.

Third Party submissions on this issue

[184] The Third Party says the natural flow of water is through the culvert, and the blockage by the Appellants has affected the natural flow. The Third Party says that, on rural properties in mountainous terrain, there can be water flow from multiple areas, and argues it must be allowed to flow naturally.

The Appellants' Reply

[185] The Appellants state that the Respondent's theory regarding the unnamed tributary of Veitch Creek being a stream, as set out in the covering letter to the Order, has been shown to be incorrect on the facts in evidence. Those facts include:

- The lack of a stream channel between the Spirea Swamp and Modified Pond 3 and the lack of anyone observing water overflowing the Spirea Swamp overland to Modified Pond 3;
- The fact that Mr. Telfer had not identified a wetland or marsh in the Main Area at Issue, while he did identify that diversions from 1760 were causing water to flow into the area and needed to be remediated;
- The land gradient did not show a preferential pathway for water to flow out of the Main Area at Issue according to Mr. Perkins and most likely drained down the 1760 driveway according to Mr. Ciobotaru;
- There was no historical evidence of water flow through 1800 along the hypothesized pathway of the alleged unnamed tributary; and
- The evidence is that the ponds involved were excavated by the property owners and did not reflect any historic, natural presence of water predating development.

[186] The Appellants note that the Respondent acknowledges the relevant definition of a "stream" in the *WSA* requires that the feature involved be "natural", which means it must have existed before any human-caused changes. In that regard, the Appellants say the evidence does not support a finding that all the alleged features at issue existed naturally before there were any modifications.

[187] In terms of the specific features involved, the Appellants make various replies as follows.

The Spirea Swamp

[188] The Appellants note the Respondent's argument that, but for the ditch on 1810, the Spirea Swamp would be supplying significant water to Modified Pond 3 and from there to the Main Area at Issue. The Appellants say there are four reasons this argument fails:

1. There is no eyewitness evidence and no photographs nor video evidence indicating anyone has ever observed overland flow from the Spirea Swamp to Modified Pond 3, either before or after the ditch on 1810 was dug.
2. The area said to be the path of overland waters shows no signs of channelization or water flow extending from the Spirea Swamp to Modified Pond 3.

3. The area of Ms. Cameron's hypothesized overland flow is covered in dry needles and salal bushes, as evidenced by Mr. Perkins, with no evidence of an overland flow of water.

4. If the ditch was draining significant amounts of water from the Spirea Swamp, and thereby causing the overland flow of water in the direction of Modified Pond 3 to cease, then one would expect there would be significantly less water in the Main Area at Issue after the time the ditch was dug in 2020 or 2021. However, that has not been the case. The presence of the ditch, therefore, disproves the Respondent's theory as to why there is water accumulating in the Main Area at Issue and disproves the Respondent's theory about the flow path of the unnamed tributary. Rather, the Appellants say the existence of the ditch taking water from the Spirea Swamp proves the water arriving at the Main Area at Issue has been diverted from 1760, as they have argued.

[189] The Appellants further note the Respondent has not investigated the ditch to quantify its impact scientifically. In the circumstances, there is, in addition to the above, no basis for the Respondent's speculative theory that the ditch is the reason the Spirea Swamp is not overflowing onto 1800.

The Main Area at Issue

[190] The Appellants note the Respondent specifically acknowledges the relevant definition of a "stream" in the *WSA*, as relates to the area between the Main Area at Issue and Modified Pond 2, requires that the feature be "natural", which means it must have existed before any human-caused changes. In that regard, the Appellants note the evidence must support a finding that the waters at issue were a stream, with a natural watercourse and channel, before there were any modifications.

[191] With regard to Ms. Cameron's evidence about photographic evidence showing a seasonal marsh in this area, the Appellants argue there are several difficulties with such evidence. With respect to the aerial photos that Ms. Cameron said she reviewed, these difficulties include:

1. The alleged Google Earth photo images were not produced in advance of the hearing, did not appear in Ms. Cameron's site visit notes, and were not included in her evidence in chief. As such, this photo evidence is hearsay and it would be unfair to the Appellants to allow the Respondent to rely on such evidence when the Appellants have had no opportunity to review the alleged photo images, question Ms. Cameron about her interpretation of the images, and obtain expert evidence about the photo images as needed.

2. There is no reason the images could not have been produced as Google Earth images are not deleted and are readily available. If the images show what Ms. Cameron alleges, they would be highly relevant and ought to have been produced. In that regard, the Appellants say an adverse inference should be

drawn to the effect that the Google Earth images do not in fact show what Ms. Cameron alleges.

3. Ms. Cameron's evidence about aerial photo interpretation is in the nature of expert evidence and she lacks the credentials in aerial photo analysis to provide such aerial photo interpretation.

4. There was an aerial photo image from Google Earth which was exhibit 11, which no witness testified as showing water features. Similarly, an aerial photo from the District of Sooke entered as part of exhibit 8 does not appear to show any water in the Main Area at Issue.

5. Mr. Perkins testified that he reviewed aerial photos including from Google Earth and the District of Sooke. He testified that, as an expert in hydrology and fluvial geomorphology, the aerial photography was not helpful in the identification of the water bodies at issue and the water flow at issue since the features were too small, and Mr. Ciobotaru agreed.

[192] In terms of the photo Ms. Cameron took of a photo Mr. Jacquot showed her, Ms. Cameron said there was a dark spot in the Main Area at Issue which appeared to be water. Mr. Perkins agreed it could be, but could not say it was a natural feature and did not know what would have caused it. Further, Mr. Perkins testified he was unable to see any stream courses or water channels in the photo.

[193] As a result of the foregoing, the Appellants say the photos referred to by Ms. Cameron cannot assist the Respondent in establishing that a seasonal marsh or wetland existed in the Main Area at Issue prior to the injections of water diverted from 1760.

[194] Turning to the Respondent's suggestion that there was no evidence of water being diverted from 1760, the Appellants note Cori Ann specifically testified to observing the occurrence of such water flows and Mr. Telfer found such diversions were occurring when he investigated, which led to the Robinson Order.

[195] Regarding the relevance of the Robinson Order, it was premised on the findings of Mr. Telfer. The Appellants say those findings are directly inconsistent with the findings on which the Order is premised, and those inconsistencies fundamentally undermine the Order under appeal in the present case. In terms of the Isdahls not appealing the Robinson Order, it was not an order made against them so it would not be for them to appeal the Robinson Order.

[196] While the Respondent says that the diversions from 1760 into Modified Pond 3 and the Main Area at Issue are not before the Panel, the Appellants say that the Panel is entitled to consider the flows of water into these areas. The Appellants say such flows are the primary contributing factor to the accumulation of water into these areas. The Appellants say that, while the Respondent has asserted there exists an interconnected group of water features that bring water into the area and together form an unnamed tributary of Veitch Creek, it is the injection of water from 1760 that gives the appearance

of a wetland in the Main Area at Issue and the appearance of connectivity between Modified Pond 3 and the area of the culvert. The Appellants say that the Respondent's failure to appreciate what is really going on with the water on these properties is at the heart of this appeal and the Panel cannot be asked to disregard it.

[197] With respect to the Respondent's submission that Mr. Perkins' reply report should be disregarded, the Appellants say several things. First, they say the matters responded to in Mr. Perkins' reply report were in Ms. Cameron's site notes as part of Exhibit 8 and in her fact evidence, as well as in her expert report. Given the reply report speaks to such matters which are in evidence, it is relevant. Second, Mr. Perkins was cross-examined on such matters, including those mentioned in the reply report, and the report and the testimony elicited about such matters by both parties should not be excluded. Third, the Appellants say the reply report was based on hydrological concerns and the Respondent's hydrologist agreed with Mr. Perkins. Fourth, there is no prejudice to the Respondent since the Respondent had the opportunity to elicit evidence about the matters involved through the introduction of Ms. Cameron's site notes, was aware of items in the reply report well in advance of the Hearing, had the opportunity to obtain its own evidence from a hydrologist in response, and was able to cross-examine Mr. Perkins in respect of such matters.

Additional Submissions

[198] The Appellants note that the additional arguments the Respondent has put forward in an attempt to support the Order are different than what the Order was, in fact, based upon.

[199] Regarding the theory put forward by Ms. Cameron on cross-examination about the stream starting at the Main Area at Issue, the Appellants say this is a new opinion, and one that she is not qualified to give. The Appellants further say that identifying one water feature on these properties as a stream does not establish a natural historic stream between that feature and another feature. They argue there must be both connectivity between these points and the connecting flow of water must itself be a stream. In terms of connectivity, they note that not every water body is connected by way of a stream, and there is no connectivity to Modified Pond 2 as alleged. In terms of whether there is a stream, they argue that just because a wetland may be a stream under the *WSA*, does not mean that any water flow out of it is also a stream. If there is a historic pathway and sufficient volume of water to channelize, it may be a stream, but if it drains in sheet flow or goes underground, it may not be a stream. Thus, it depends on the volume of water and how it flows.

[200] Regarding the converging watersheds theory, the Appellants say that neither hydrologist identified a stream from the two watersheds mentioned in the evidence. Mr. Perkins noted the watershed area contributing to the ponding area was small, runoff volumes were modest, and there was little fluvial evidence of a natural stream channel. Similarly, Mr. Ciobotaru indicated that while it was possible that a stream might form out of the confluence of the two watersheds, you could not tell if that was the case here

because there was no morphological evidence of a stream due to the development of the properties. He further indicated a potential solution could be to look at the similar neighbouring watersheds to determine, by comparison, if one could conclude that a stream was likely present before the development of the properties disturbed the morphological evidence. The Appellants note, however, that such comparison work has not been done by the Respondent and such a theory has not been tested.

The Panel's Findings

[201] We begin by setting out various conclusions we have drawn from the evidence previously set out in the Background section of this Decision regarding both the question of the alleged stream and the question of the alleged blockage. These conclusions relate to:

i) the initial investigations carried out by the Ministry up to and including the issuance of the Robinson Order;

ii) the events subsequent to the issuance of the Robinson Order and prior to the investigation leading to the Order; and

iii) the events leading up to the Order and subsequent to the Order being issued.

Various Conclusions Drawn from the Evidence

[202] Regarding the initial investigations carried out by the Ministry up to and including the issuance of the Robinson Order, we draw the following conclusions:

- NRO Baudin had found the attempted blockage of the culvert by the Isdahls was not a *WSA* matter, and that the problem was as a result of poor drainage planning related to the catchment basin shared by the properties.
- Mr. Telfer had found there was a large marsh on 1760, being the 1760 Marsh, with a natural water flow through the south side of 1760—in other words, not through 1800.
- The water from the 1760 Marsh was being diverted onto 1800.
- Although Mr. Telfer was investigating in or around the area where Ms. Cameron would later determine there was a seasonal marsh, Mr. Telfer did not find such a feature.
- Mr. Telfer found there was a smaller marsh feature later identified as the Spirea Swamp which could affect 1800.
- Mr. Telfer found that the Berm constructed on 1760 was affecting the natural water conditions in the Main Area at Issue.
- The Main Area at Issue is identified as involving a "manmade pond" in the Robinson Order—i.e. not natural.

- The Robinson Order indicates that restoring the stream in the Main Area at Issue to its "original channel" would involve water no longer going onto 1800 – in other words, the original channel was not through 1800.

[203] Regarding the events subsequent to the issuance of the Robinson Order and prior to the investigation leading to the Order, we draw the following conclusions:

- Ministry personnel did not revisit the area subsequent to the Robinson Order to check to see what work was done and what, if anything, needed to be done in respect of the Robinson Order.
- NRO Blid indicated in an email with other Ministry staff that the natural pattern for water to flow from the 1760 Marsh was down 1760 and the property involved with the strata conversion eventually leading to Veitch Creek— not down 1800.
- In deciding the Berm on 1760 did not need to be remediated, Mr. Robinson said he was relying on "new information" received by the Ministry to the effect that the culvert had been blocked, although that was not new information and had been investigated previously by NRO Baudin.
- By the end of 2021, Ministry staff—including Mr. Robinson—were aware the Isdahls had blocked or attempted to block the culvert, and did not order it to be unblocked.
- There was a significant degree of confusion among Ministry personnel regarding this matter and about what had been previously determined, and there was inconsistent advice being given to the property owners.
- A decision had been made by Ministry personnel that both parties should obtain a report by a QEP, not just one party.

[204] Regarding the events leading up to the Order and subsequent to the Order being issued, we draw the following conclusions in addition to those conclusions mentioned in the previous section dealing with Ms. Cameron's disqualification as an expert:

- In Mr. Sillje's inquiry which led to Ms. Cameron's inspection, he had originally indicated that he had planned to take the flow of water down the property involved with the strata conversion towards the residences closer to Veitch Creek where the Jacquots currently live and not towards 1800, which was consistent with what Mr. Telfer and NRO Blid had indicated was the natural flow.
- Ms. Cameron's conclusions about the natural flow of water from the Main Area at Issue, and what should be done regarding the flow of water, were not consistent with the determinations of other Ministry personnel, including Mr. Telfer and NRO Blid.

- The Respondent did not adequately explain the reason for Ms. Cameron's different conclusions, or why they were correct as compared to the previous determinations by other Ministry personnel.

The Question of Onus

[205] Before examining the questions of whether the existence of a stream has been established and the later question of whether the culvert blockage has been established, we will address the question of onus. In *Avren*, the Board explained that it was up to an appellant "to lead 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" (at p.10). The Board in *Avren* described this as "the burden of evidence" (at p. 10). Subsequently, at paragraph 55 of *City of Cranbrook v. Assistant Regional Waste Manager*, 2009 BCEAB 6 (CanLII), the Board noted that after an appellant has proven, on a balance of probabilities, "the facts that he or she asserts are true, the onus then shifts to the other parties: *John W. Zahradnik v. Assistant Regional Water Manager* (Appeal No. 2003-WAT-009(a), February 27, 2004) [2004 BCEAB 6 (CanLII)]".

[206] We find, for the reasons which follow, that the Appellants have led such evidence to demonstrate that both the Respondent's determination of the existence of a "stream" under the *WSA* and the Respondent's determination about a blockage of the culvert affecting the alleged "stream" were wrong. The evidence led by the Respondent in response did not establish otherwise, but rather the evidence established that further investigations would need to be done to determine those questions. For example, as will be seen later, we find the evidence of the hydrologists who testified indicates that the determination about whether there is or is not a stream under the *WSA* would require further study and analysis. Similarly, before it can be determined that the culvert identified by the Respondent was blocked, further study would be needed such as running water with dye or a camera through the culvert.

Analysis of the evidence regarding whether the alleged tributary of Veitch Creek, referred to in the Order, constitutes a "stream" under the WSA?

[207] As previously noted, in analyzing the evidence on this issue, we will examine the component parts of the alleged "stream" as identified in the Respondent's Opening and the evidence presented at the Hearing. These component parts are, again:

- The Spirea Swamp;
- The area around Modified Pond 3;
- The Main Area at Issue;
- Modified Pond 2; and
- The Area from Modified Pond 2 to Modified Pond 1 and Beyond to Veitch Creek

[208] In the analysis of the "stream" question which follows, we will examine each of the features alleged to be part of the "stream" in terms of hydraulic connectivity. In doing so,

we will examine the outflow from the alleged headwater at the Spirea Swamp, as well as the inflow to and outflow from the other features. We will further examine whether the features are "natural" in terms of the definition of "stream" under the *WSA*.

[209] We turn now to a review of these features.

The Spirea Swamp

[210] The Spirea Swamp was identified by Ms. Cameron as the alleged headwater of the stream. The Panel finds the evidence before us does not demonstrate there is hydraulic connectivity between the Spirea Swamp and Modified Pond 3, contrary to what Ms. Cameron believed when having the Order issued. In support of this finding, we note and rely upon the following:

i) Ms. Cameron testified that, looking back to 1810 from the hill on the property line with 1800, she saw a low point with a slight dip in the topography she suspected was the Spirea Swamp. It was located beyond a forested area back from the property line that she could not pick up with her camera. Thus, the Spirea Swamp would need to extend significantly in the rainy season both horizontally towards the property line and vertically over the hill between the properties in order to flow onto 1800. The evidence did not satisfy the Panel this was probable or had been adequately analyzed.

ii) The evidence was insufficient to conclude that anyone had actually seen water flowing over the hill at the property line with 1810 and onto 1800. The Isdahls had never seen this occurring over the years of their lived experience on the property and neither had the other witnesses when they visited there. Mr. Perkins visited in December and Ms. Doyle visited in March and neither saw water flowing over the property line as posited by Ms. Cameron. Further, the documentary evidence presented to the Panel, such as site photos and video clips, did not support the theory that water from the Spirea Swamp has been flowing onto 1800 as relied upon by Ms. Cameron.

iii) The evidence was insufficient to conclude there was a stream channel between 1810 and the features on 1800. Mr. Perkins did not observe a stream channel between 1810 and Modified Pond 3 on 1800 when he visited in December, and he testified that such a water flow was questionable since he had observed aspects inconsistent with such a flow being present, such as the presence of needles and leaves where a flow path would otherwise occur. Ms. Doyle and Mr. Ciobotaru did not see a stream channel or any connectivity between the Spirea Swamp and Modified Pond 3 when they visited in March. While there is a reference to a stream channel from Mr. Telfer's visit, he did not testify, and even Ms. Cameron did not see a stream channel in this area. On balance, the Panel finds the evidence did not establish the existence of connectivity between 1810 and the features of the alleged stream on 1800.

[211] The Respondent has argued the reason no stream channel or any connectivity was observed was because the ditch, which has been dug on the 1810 property, has diverted the water in a different direction away from the features described by Ms. Cameron. Although this theory was not put forward by Ms. Cameron or in the Respondent's Opening statement, the Respondent raised this theory at the Hearing. In that respect, Mr. Ciobotaru testified he had seen the ditch and would expect less water in the Main Area at Issue after the ditch had been dug in 2020 or 2021, if those features were naturally connected beforehand.

[212] There are three reasons the Panel does not accept the Respondent's theory about the 1810 ditch. First, as the Appellants point out, the Respondent has not investigated the 1810 ditch to quantify its impact scientifically in relation to the position of the Spirea Swamp, and the surrounding area. Second, as previously noted, the evidence did not establish anyone having ever seen water previously flowing over the high ground between the properties before the ditch existed. Third, as the Appellants also point out, the ditch was dug in 2020 or 2021 and if the Respondent is correct, there would have been significantly less water in the Main Area at Issue since that time if the source of the water was the Spirea Swamp; however, the evidence did not establish there has been significantly less water since the 1810 ditch was dug.

[213] The Respondent's next theory is that subsurface flow is bringing the Spirea Swamp water to Modified Pond 3. That was Ms. Doyle's thought when she attended at the site, and she gave evidence to that effect. However, there are two reasons the Panel does not accept this subsurface water theory. First, Mr. Perkins' evidence, which we accept, was that whether there was any flow underground and its direction would need to be established by a hydrogeologist, and the Respondent did not investigate this with a hydrogeologist. In that respect, the volume of water involved with such a theoretical underground flow, and the effect of the ditch on the underground flow, would need to be determined scientifically. In the absence of these investigations, we find any theory based on an underground flow to be speculative and unsubstantiated. Second, a question which arises about any subsurface water, that was not adequately explored at the Hearing, is whether such subsurface water would fall within the definition of "stream" under the *WSA*, or something else (e.g. an "aquifer").

[214] Before leaving our discussion of the Spirea Swamp, we acknowledge that NRO Blid's January 21, 2021 email had indicated that 1800 was receiving water from what she called the smaller marsh northwest of 1800 – being the Spirea Swamp. This was based on her attendance at the site with Mr. Telfer; however, neither NRO Blid nor Mr. Telfer testified at the Hearing. On this matter, we prefer the evidence previously discussed and on which we based our finding that it has not been demonstrated that such a flow of water from 1810 was probable or that it had been adequately analyzed. This does not mean that there could not be a different result from further investigations; however, such a result was not established on the evidence before us. Further, even if we are wrong about the Spirea Swamp, and 1800 was receiving water from the Spirea Swamp, this does

not change our reasoning in this matter nor the determinations we have made. We find that the evidence did not establish connectivity between Modified Pond 3 and the area where water would arrive from 1810 onto 1800. It will be recalled that there is a man-made swale on 1800 by the Chocolate Shack between the property line with 1810 and Modified Pond 3 through which any water from 1810 would need to flow to Modified Pond 3. The evidence of the Isdahls, as well as the evidence of Ms. Doyle, was to the effect that there was no observed connectivity between this swale and Modified Pond 3, and we therefore find the evidence did not establish the presence of water flow or connectivity between the Spirea Swamp on 1810 and Modified Pond 3.

[215] In conclusion, we find the Appellants have led evidence to demonstrate that it was wrong to find that the Spirea Swamp was hydraulically connected to Modified Pond 3 and the evidence led by the Respondent in response did not establish otherwise. In particular, we find the Respondent's arguments about 1810 ditch and subsurface water have not been established before the Panel. However, as previously indicated, we acknowledge the potential that further investigation could result in a different determination.

[216] The evidence indicating a lack of connectivity tying the Spirea Swamp to Modified Pond 3 and the other features of the alleged stream raises the question of where water entering these areas is coming from. We will turn to that question in the next sections of this decision dealing with the area around Modified Pond 3 and the Main Area at Issue.

The area around Modified Pond 3

[217] In reviewing the area around Modified Pond 3, we will examine matters relating to the inflow into the area, the outflow from the area, and whether the feature is "natural".

[218] The area around Modified Pond 3 is on 1800 between the 1810 property line and the Main Area at Issue as seen on Appendix 2. As previously noted, the evidence did not establish there was a stream channel in this area or connectivity with the Spirea Swamp. In that regard, the panel finds the evidence did not establish the presence of water flowing to Modified Pond 3 from the Spirea Swamp on 1810, either above ground or underground.

[219] Although water arriving in this area may not be coming from the Spirea Swamp, the evidence indicates there is a significant rise in water levels in the area around Modified Pond 3 and the Main Area at Issue during the rainy season. As the Appellants note, Ms. Cameron's theory was that this water originated from the Spirea Swamp, flowed into Modified Pond 3, and then helped to form a large pool of water encompassing the Main Area at Issue. Having found the evidence does not support Ms. Cameron's theory about this water originating from the Spirea Swamp, we turn to the question of the inflow into these areas, in other words, where water in these areas is coming from.

[220] In considering this question, we agree with the Appellants that the evidence demonstrates at least one area where such water originates is from 1760. We find, based on the available evidence, that water comes off the slope from 1760 above Modified Pond

3, having been diverted onto 1800. This water affects both the area around Modified Pond 3 and the Main Area at Issue. The Panel relies on the following evidence in arriving at this finding:

- The evidence given by the Isdahls from their lived experience in seeing the water flow from 1760 onto 1800, and entering the area around Modified Pond 3 and the Main Area at Issue.
- The photos and video clips presented into evidence showing this water flowing from 1760 onto 1800.
- The evidence presented in respect of Mr. Telfer's findings to the effect that water was being diverted from 1760 to 1800, which is consistent with the other evidence. These findings are referenced in NRO Blid's correspondence that water was being diverted from 1760 through the area marked with pink spray paint, which was above Modified Pond 3. NRO Blid indicated that once remediation was complete, the Isdahls should not see any water entering their property from the stream which had been diverted from the 1760 Marsh through the area they had marked with pink spray paint.
- Ms. Doyle acknowledged that the Berm on 1760 was impounding the water mentioned by Mr. Telfer in the Main Area at Issue and preventing the water from going down the driveway on 1760.
- When shown the video of the area with the pink spray paint, Ms. Doyle agreed that the remediation ordered by Mr. Robinson for this area had failed.

[221] Although the Respondent says the remediation work ordered by Mr. Robinson was completed, the testimony of the Isdahls, which the Panel accepts, demonstrates that water was still flowing from 1760 onto 1800 in this area. This water appeared to be sheet flow, with no stream channel, and is also evident in the videos and photographs presented into evidence by the Appellants. Meanwhile, we find the photographs and videos presented into evidence do not show water visibly flowing overland from the Spirea Swamp.

[222] Having found the evidence demonstrates water to be coming from 1760 into the area around Modified Pond 3, and the evidence did not establish water arriving from the Spirea Swamp into this area, we nevertheless recognize there may be other sources of water flowing into the area. Given the complex topography of the properties and the evidence regarding the need for further investigations into various aspects of the properties, such as drainage flows, we are not prepared to rule out the potential that there may be other possible sources of water into the area than from 1760—only that such sources were not established on the evidence before the Panel.

[223] Turning to the outflow of water from the area around Modified Pond 3, we find the evidence did not establish any stream channel into and through the Main Area at Issue acting as an outflow connecting Modified Pond 3 to the culvert alleged to be blocked. The

Panel makes this finding based on the evidence of the witnesses, including Ms. Cameron, who testified they did not see a stream channel within this area. Having said that, we do not, again, rule out that there may be drainage outflows which exist that were not presented in the evidence, given the complex topography, and the lack of sufficient investigation of this area during Ms. Cameron's attendance.

[224] Before leaving our analysis of the area around Modified Pond 3, there is the question of whether Modified Pond 3 is a "stream" as defined under the *WSA*, including the requirement of being natural. As previously noted, this area receives significant water from diversion works on 1760 which are man-made, and not a natural source of water. We further find Modified Pond 3 was dug from the ground and man-made. The evidence of the witnesses did not establish the existence of naturalized aspects to Modified Pond 3 such as overgrown vegetation. Although the Respondent says that it appears Modified Pond 3 was dug out of wetland, the Panel finds Ms. Cameron's evidence did not establish that she conducted sufficient soil, vegetation, and hydrology analyses to determine the presence of a wetland in the area of Modified Pond 3, and we find the evidence was insufficient to establish that Modified Pond 3 met wetland criteria. This does not mean, however, that a more thorough analysis of the area than was done on Ms. Cameron's short visit could not yield a different result regarding this question.

The Main Area at Issue

[225] We begin our analysis of the Main Area at Issue similarly to our analysis of the area around Modified Pond 3—with the question of where the inflow of water into the Main Area at Issue is coming from. We repeat our previous finding that it has not been established the water entering this area is coming from the Spirea Swamp, nor has it been established that this area is hydraulically connected with the Spirea Swamp by way of a stream through the features alleged by the Respondent. As noted in the Panel's findings regarding the area around Modified Pond 3, we find water is entering the Main Area at Issue from 1760. We rely on the same evidence in making this finding as the evidence in relation to the area around Modified Pond 3 and set out in paragraph 220 above.

[226] Turning to the outflow of water from the Main Area at Issue, the Panel finds the evidence does not establish there is a natural outflow through 1800 or the culvert, as Ms. Cameron believed. Mr. Perkins' evidence, which we accept, was that there is uncertainty about whether water from the Main Area at Issue should flow through 1800 or 1760 Connie Road and more work in terms of surveys and analysis was necessary to determine water flows. Our finding that the evidence does not show the natural flow of water to be through 1800 is supported by Mr. Ciobotaru's evidence on this point, which we also accept. In his report, Mr. Ciobotaru indicated there was "agreement" between Mr. Perkins and the Ministry's perspective about site drainage, and stated in his report his own view that **"most likely the flow direction before the residential development was through the 1760 Connie Road property** (emphasis added)." Further, Mr. Telfer determined that prior to the diversion of water from the 1760 Marsh, the natural flow of such water was down the south side of 1760 away from 1800.

[227] The Panel agrees with the Appellants and finds Ms. Cameron's conclusion about the natural flow of water as being through the culvert was based on beliefs and assumptions which were not established as accurate in the evidence. First, Ms. Cameron believed the gradient naturally sloped towards 1800, which was not established on the evidence, including LIDAR technology. Second, Ms. Cameron assumed the culvert ran in a straight line and that it extended the whole distance of approximately 85 feet to Modified Pond 2, which was also not established on the evidence. Third, Ms. Cameron did not verify these beliefs and assumptions about the flow by taking steps such as running water with dye, or a wire, or a camera through the culvert she identified on 1760 to see if it came out into Modified Pond 2. The Panel therefore finds Ms. Cameron's beliefs and assumptions about the natural flow of water through the culvert to be unsubstantiated on the evidence before us.

[228] In response to the Appellants' arguments about checking the culvert regarding water flow, the Respondent has argued that such actions to check the culvert would have been unsuccessful. We find, however, the Respondent's arguments do not provide an adequate explanation for the failure to attempt to verify Ms. Cameron's beliefs and assumptions about the culvert. First, there was not an adequate explanation for why water with dye could not have been run through the culvert, even during the dry season, to see if the water backed up from a blockage, or ran into Modified Pond 2, or neither. Second, there was no adequate explanation for not running a wire or camera through the culvert, why Ms. Cameron did not return at a different time of the year to verify her belief about water flow through the culvert if that would have better allowed testing, or why this was not done by Ms. Doyle or Mr. Ciobotaru when they attended the properties in March. Third, while the Respondent says checking the culvert would not have been successful because Ms. Cameron believed the outlet was under a boulder, that was based on assumptions and rumours and is not a reason to avoid checking to see if the culvert was in fact under a boulder. Thus, we find it was not demonstrated that water naturally flowed out of the Main Area at Issue through the culvert into Modified Pond 2, and the Respondent's reasons for failing to verify the water flow were not established.

[229] Regarding the Respondent's theory that there once existed a natural stream running from the Main Area at Issue to Modified Pond 2, into which the culvert has been placed, we agree with the Appellants and find that this was not established on the evidence. First, Mr. Perkins stated in his initial report that "there is little geomorphic evidence of a natural stream channel" in the area. Second, this was agreed to by Mr. Ciobotaru in his report indicating agreement with Mr. Perkins and specifically that there was "very limited fluvial geomorphic evidence of a stream channel" in the area. Third, as the Appellants note and as previously mentioned, Mr. Ciobotaru specifically opined that, but for human works, the natural flow of water from this area was not through 1800 but down the driveway on 1760. The Panel accepts the evidence as noted above from the reports of Mr. Perkins and Mr. Ciobotaru.

[230] We turn now to the question of whether the evidence has established that the Main Area at Issue is a natural wetland. The Panel finds the evidence led by the Appellants sufficiently undermines Ms. Cameron's opinion that the Main Area at Issue is a natural wetland and the Respondent has not convinced us otherwise. We find this for the following reasons:

- Mr. Telfer examined the same area and did not find a natural wetland there. This discrepancy is significant, and we find the explanation given in the evidence, that Mr. Telfer may not have been as qualified as Ms. Cameron to give an opinion, to be inadequate and unsubstantiated.
- As the Appellants have argued, Ms. Cameron's evidence did not establish how many years it would take for a wetland to become established in the state observed by her. In that respect, the Respondent has not demonstrated whether the vegetation observed by Ms. Cameron could have been established in the years since the area began receiving water from the diversion on 1760, or whether such vegetation is necessarily reflective of a natural body of water.
- The Respondent did not satisfy us that sufficient soil, vegetation, and hydrology analyses were conducted by Ms. Cameron to determine the presence of a wetland given the limited time spent by Ms. Cameron at the Main Area at Issue and the evidence of the hydrologists about human works having an effect on the area.
- The Appellants have demonstrated that the Main Area at Issue receives significant water from the diversion works on 1760 which are man-made, and not a natural source of water. In that respect, the Robinson Order identified the Main Area at Issue as involving a "manmade pond"—i.e. not natural.

[231] With respect to Ms. Cameron's evidence about looking at aerial photographs to support the historical existence of a wetland in the Main Area at Issue, we agree with the arguments of the Appellants that it would be unfair to rely on such evidence in the absence of the photographs being produced prior to the Hearing. In particular, we find it would be unfair to the Appellants to allow the Respondent to rely on such evidence when the Appellants have had no opportunity to review the alleged photo images, to question Ms. Cameron about her interpretation of the images, or to obtain expert evidence about the photo images. This is particularly the case given the Respondent had Mr. Perkins' report and evidence indicating his opinion that the aerial photography he reviewed was not helpful in the identification of the water bodies at issue and the water flow at issue since the features were too small.

[232] Regarding the photograph which Mr. Jacquot showed Ms. Cameron, the Panel finds that while the photograph could be consistent with showing a water feature in the area, it could also be consistent with showing something else and the evidence was insufficient to establish a water feature based on a balance of probabilities, particularly in the absence of

testimony about it from Mr. Jacquot. Further, the Panel accepts Mr. Perkins' evidence and finds the photograph did not demonstrate that the feature was natural in any event.

[233] Turning to the Respondent's argument that diversions of water from 1760 are not relevant, we find, for the reasons previously given, the injection of water from 1760 is relevant to an understanding of the presence and flow of water within these properties. Similarly, we find the Robinson Order, and the findings of Mr. Telfer on which it was based, to be relevant in considering where the water is coming from and assessing Ms. Cameron's findings on which the Order is premised. In terms of the Isdahls not appealing the Robinson Order, we agree with the Appellants that it was not an order made against them and it was not for them to appeal the Robinson Order, nor does the lack of an appeal by either Mr. Sillje or the Appellants prevent any of them from arguing about the diversions of water from 1760.

[234] Regarding Mr. Perkins' expert reply report, we have not relied upon it or the evidence about it for the findings we have made above. However, we find we can rely on the other evidence of Mr. Perkins, including his initial report and his factual observations.

[235] In addition to the foregoing, we find we can rely on the evidence and report of Mr. Ciobotaru about the matters addressed by Mr. Perkins in his evidence and reports, including Mr. Perkins' reply report. The Panel finds this for the following reasons:

- Mr. Ciobotaru's report references Mr. Perkins' reports and Mr. Ciobotaru gave evidence on the matters which are mentioned in the Perkins' reports. Neither party made submissions about excluding such evidence of Mr. Ciobotaru, and both parties have referenced and relied on Mr. Ciobotaru's testimony and report. We find that we cannot separate the evidence about the matters mentioned in the Perkins' reports, including the reply report, from Mr. Ciobotaru's evidence regarding such matters, that such matters are relevant, and ultimately it is Mr. Ciobotaru's evidence the Panel relies upon.
- Mr. Ciobotaru states in his report that the information in Mr. Perkins' reports was "in agreement with the Ministry's perspective about the site drainage," which indicates that the expert hydrologists were not in disagreement about such matters. Ms. Cameron's expert report was not tendered as that of an expert hydrologist, and its exclusion does not affect Mr. Ciobotaru's acceptance of the hydrological information in Mr. Perkins' reports about the site drainage.

[236] Our conclusion about the Main Area at Issue is that the Appellants have satisfied the onus of demonstrating, in particular, a lack of connectivity between the features from the Spirea Swamp, through to the Main Area at Issue, and through the culvert. The evidence led by the Respondent in response did not establish otherwise, but rather established that further evidence, which was not presented, could affect that determination. In particular, the evidence of Mr. Ciobotaru and Mr. Perkins, which we accept, was that it is uncertain how water would naturally flow in the absence of human-made works affecting historical conditions. Further, we accept the evidence of the

hydrologists that more surveys and analysis would be necessary to determine how water would naturally flow from the Main Area at Issue.

Modified Pond 2

[237] In terms of the inflow of water to Modified Pond 2 from the Main Area at Issue, we repeat our previous finding that the evidence did not establish that water naturally flowed in the direction of Modified Pond 2 rather than down 1760. While Ms. Cameron's site notes indicate her belief that the normal flow of water went through the culvert into Modified Pond 2, we prefer Mr. Ciobotaru's evidence that "most likely the flow direction before the residential development was through the 1760 Connie Road property". Having said that, we further accept the evidence of Mr. Ciobotaru and Mr. Perkins that it is uncertain how water would naturally flow from the Main Area at Issue, and that more surveys and analysis would be necessary to determine how the water would naturally flow, as previously noted.

[238] On the question of whether Modified Pond 2 is "natural", the Order itself refers to this feature as a "constructed pond", and the Respondent acknowledges that it was man-made, having been "dug into the ground". While the Respondent argued that the pond was dug "possibly into a wetland area", we find the evidence was insufficient to establish this occurred. Similarly, while the Respondent argued there was a belief that Modified Pond 2 was dug "to intercept groundwater", we find the evidence was insufficient to establish this occurred. Although the Respondent also asserts Modified Pond 2 has become naturalized over time, we find the evidence was insufficient to establish the naturalization of Modified Pond 2. Taken together, the Panel finds the evidence before us was insufficient to establish that Modified Pond 2 is "natural" such that it constitutes a "stream" under the *WSA*. However, we again find that a more thorough analysis of Modified Pond 2 would be required to more definitively determine if it is natural or has become naturalized.

From Modified Pond 2 to Modified Pond 1 and Beyond to Veitch Creek

[239] When Cori-Ann and her husband purchased 1800 in 1996, there was an excavated ditch which carried water from Modified Pond 2 to Modified Pond 1. A culvert was later installed in the ditch, and it was covered over. The main question regarding this portion of the alleged stream is whether the flow of water via the ditch, and later the culvert, was natural or human-made.

[240] There is a dispute between the parties about the natural flow of water from Modified Pond 2 to Modified Pond 1, through the higher ground in the area. When Ms. Cameron attended at the site, it looked to her like the ground sloped down towards 1800 from the Main Area at Issue, and Ms. Cameron believed that the higher ground in the area from Modified Pond 2 to Modified Pond 1 was likely human-made using material excavated from Modified Pond 2. However, Ms. Cameron acknowledged on cross-examination that she was not sure what the natural flow was and had not turned her mind to the historical flow path, but rather was focused on how water was flowing now. As

previously noted, the evidence of Mr. Mitchell was that the trees on the higher ground are in the range of 80 - 100 years old, and the Appellants say this is evidence that the higher ground is not human-made and the natural gradient from Modified Pond 2 to Modified Pond 1 is uphill, such that water would not naturally flow that way.

[241] We find neither Ms. Cameron's evidence nor Mr. Mitchell's evidence sufficient to establish the natural gradient and whether the present flow of water via the culvert is natural or reflective of the historical flow path. Ms. Cameron's evidence was not based on sufficient study of the area, and she acknowledged that she was not focused on the historical flow. In terms of Mr. Mitchell's evidence, we find it is insufficient to make findings about the origin of the ditch and we agree with the Respondent about the weaknesses and difficulties in respect of Mr. Mitchell's estimate of the age of the trees as accurately demonstrating the history of the higher ground and whether or not there has been a historical flow path in the area of the ditch. Thus, based on the evidence presented, we cannot conclude there is a stream in the area from Modified Pond 2 to Modified Pond 1 as alleged by the Respondent, nor can we conclude there is not a stream in this area as alleged by the Appellants.

[242] In terms of where this leaves us, we find there may be evidence other than that presented at the Hearing which could establish whether there is or is not a stream in this area. We find that limited investigation has been carried out in this area of the alleged stream to determine the natural flow of water and connection to the other features. As previously noted, we accept the evidence of the hydrologists that it is uncertain how water would naturally flow from the Main Area at Issue and find this may impact the area from Modified Pond 2 onwards. In this regard, if, for example, water did or did not naturally flow onto 1800, it may bear on the question of whether the subsequent flow of water from Modified Pond 2 onwards is natural. The result is that, in our view, the analyses and surveys indicated by the hydrologists would be useful and more reliable in establishing the natural flow of water, and in determining whether the area from Modified Pond 2 to Modified Pond 1 and beyond is a stream under the *WSA*, with connectivity to the other features.

Adverse Inference

[243] We find that we are able to rely on the evidence previously stated in this Decision regarding Mr. Telfer's findings, without the necessity of drawing an adverse inference due to his non-attendance. In addition to the documents indicating Mr. Telfer's findings, which we accept as hearsay evidence, there is oral testimony about Mr. Telfer's findings. For example, there is the evidence of the Appellants describing water being diverted from 1760, consistent with Mr. Telfer's stated findings, as well as the evidence of Ms. Doyle. In her evidence, Ms. Doyle acknowledged she had no reason to believe that the information from the Inspection Report relating to Mr. Telfer's visit was inaccurate, and that it was likely that NRO Blid conferred with Mr. Telfer in producing the document. Among other things, Ms. Doyle acknowledged the following in relation to Mr. Telfer's investigation:

- There is a large marsh above 1760 in the far southern corner (which we have called the 1760 Marsh) and the natural flow of water from that marsh has been diverted off from 1760 and onto 1800.
- The natural pattern of the water flow from the 1760 Marsh was not down 1800, but went behind the outbuildings on 1760, down the strata property, and ran eventually down to Veitch Creek.
- The Berm on 1760 was impounding the water mentioned by Mr. Telfer and preventing the water from going down the driveway on 1760.
- Mr. Telfer had not identified a stream in the Main Area at Issue, unlike Ms. Cameron, although Ms. Doyle could not say why that was the case.

[244] Ms. Doyle acknowledged there were inconsistencies between Mr. Telfer's observations and those of Ms. Cameron, and we find that we can determine there is a conflict between their findings, as has been noted in this Decision and asserted by the Appellants, without the necessity of making an adverse inference ruling. We further note that the above observations of Mr. Telfer are accepted by us as more than stand-alone hearsay evidence, since such observations have been corroborated by both Ms. Doyle and the Appellants.

The Respondent's Additional Submissions

[245] Before turning to the Respondent's Additional Submissions, it is important to reiterate Ms. Doyle's evidence was that the Order was based on the information from Ms. Cameron. This is also, again, indicated in the Respondent's written argument where it is stated: "Following the September 2022 site visit, the Respondent issued the September 16, 2022 Order to the Appellants on the evidence gathered during the site visit" (emphasis added). We repeat our previous findings that the evidence did not support Ms. Cameron's theory about a stream as relied upon by Ms. Doyle, and did not support the Order which was made.

[246] We now turn to the theory that the Main Area at Issue itself could be characterized as the start of the stream referred to in the Order, and not the Spirea Swamp. This theory arose in Ms. Cameron's cross-examination on the last day of testimony and is based on her belief that the Main Area at Issue fits the definition of a "stream" under the *WSA* and that it flows into Modified Pond 2. We agree with the Appellants and find that this theory was only put forward late in the Hearing, when Ms. Cameron was faced with evidence casting doubt on what she had previously described as the "stream" referred to in the Order. For the reasons we previously stated, we find it has not been established that the Main Area at Issue is a "stream" under the *WSA*, or that the natural flow path is through the culvert into Modified Pond 2 rather than down the driveway of 1760. We do not accept this theory about the start of the stream to support the Order, now put forward years after Ms. Cameron visited the site, and we find that additional work would need to be done to establish such a theory about the start of a stream.

[247] The other additional theory which the Respondent has put forward to support the Order was based on converging watersheds. We agree with the Appellants and find that the evidence from the hydrologists was insufficient to establish a stream resulting from the two watersheds mentioned in the evidence. The evidence of Mr. Perkins was that the watershed area contributing to the ponding area was small, runoff volumes were modest, and there was little fluvial evidence of a natural stream channel. Similarly, Mr. Ciobotaru's view was that the evidence did not indicate a stream had formed out of the confluence of the two watersheds and there was insufficient morphological evidence of a stream due to the development of the properties. Mr. Ciobotaru further indicated more investigation could be done by looking at similar neighbouring watersheds to determine, by comparison, if one could conclude that a stream was likely present before the development of the subject properties disturbed the morphological evidence. Thus, as with many other aspects of the theories the Respondent has put forward regarding the drainage of the properties, we find that the necessary foundation for this theory has not been established on the evidence and additional work would be necessary to establish such a foundation.

Conclusion on this issue

[248] For the reasons previously stated, we find the Appellants have satisfied the onus of leading sufficient evidence to demonstrate that it was wrong for the Respondent to determine the features identified by Ms. Cameron constituted a "stream" under the *WSA*, and the evidence led by the Respondent did not establish otherwise. Various of the features identified by Ms. Cameron as comprising the stream have not been shown to be hydraulically connected or to be "natural" under the *WSA*. Thus, we find that it has not been established that the features alleged by the Respondent as comprising the unnamed tributary of Veitch Creek constitute a stream under the *WSA*. Further, we find the additional theories put forward by the Respondent do not support the finding of a stream under the *WSA* as alleged by the Respondent. The Order was based on a determination that there was a stream under the *WSA*, and we therefore find the Order is not supported on the evidence.

[249] Having said that, we do not rule out the possibility that after further investigations there could be a different conclusion under the *WSA*—in other words, we further find that we are unable to make a positive determination that there is not a stream in the areas involved, as argued by the Appellants. We find such a determination about whether there is or is not a stream under the *WSA* would require further study and analysis, as previously stated, and in particular regarding the matters identified by the hydrologists who testified.

3. Does the evidence establish there was a blockage of the culvert affecting the alleged "stream"?

Summary of Appellants' Submissions

[250] The Appellants say there are serious questions about the alleged blockage of a culvert located between the Main Area at Issue and Modified Pond 2.

[251] The Appellants acknowledge that they tried to block a blue plastic pipe which they saw on their property around Modified Pond 2. However, they further say no one has actually established whether it has been successfully blocked or where the blue plastic pipe originates from.

[252] The Appellants say the evidence does not establish that their attempt in using 2 bags of concrete to block the blue pipe worked. They are not skilled at construction and it is not clear the concrete they used would have adhered to the blue plastic pipe or remained there. According to the Appellants, there was no noticeable effect on water accumulation or drainage after their attempt at blocking the blue plastic pipe.

[253] The Appellants note that no one has tested for a blockage by running water or a line or a camera through the culvert Ms. Cameron located on 1760 in order to see if it actually flows into Modified Pond 2 or if it is blocked. Ms. Cameron had heard about a blockage from Mr. Sillje, and later saw an email about the blockage. However, the conclusion she reached that there was a blockage, leading up to the Order, was not based on her own observations of a blockage at the site.

[254] The Appellants point to Mr. Perkins' evidence that the water in Modified Pond 2 appeared to be the same height as the water in the Main Area at Issue, which would indicate that a blockage to the inlet to Modified Pond 2 was not causing such excess water accumulation. Mr. Perkins explained that Modified Pond 2 is outlet controlled, so that the water level there ought to have been lower than the Main Area at Issue if it was drawing water only from the Main Area at Issue and the culvert was blocked. As previously noted, Mr. Perkins also indicated that further work, such as a survey, would need to be carried out to verify the water levels in the two areas.

[255] Regarding the pipe itself, the Appellants note the material and colour of the culvert examined by Ms. Cameron on 1760 is different from the blue plastic pipe. The Appellants say there is no evidence of where the blue plastic pipe runs, what it is connected to, or if it has any relationship to the metal culvert seen by Ms. Cameron. Other pipes have been discovered in the vicinity of Modified Pond 2, and Ms. Cameron did not locate the culvert entering 1800 when she attended there and assumed it was under a rock.

Summary of Respondent's Submissions

[256] The Respondent says that in various communications the Appellants have admitted to blocking the culvert. For example, the Respondent points to the letter from Mr.

Robinson dated March 29, 2021, in which he states that new information had been received that "a culvert intake has been intentionally plugged with concrete", and that this had been confirmed in a phone conversation with Cori-Ann.

[257] In response to the Appellants' statement that it was a blue plastic pipe they attempted to block, the Respondent says that is simply their statement and argues such a statement should not be accepted. The Respondent further states that even if the outlet they blocked is a blue plastic pipe, that does not in any way establish that the blue pipe was not connected to the culvert observed on 1760. The Respondent says the culvert seen by Ms. Cameron displayed signs of silt within the culvert indicating that there was a blockage.

[258] In addition to the Appellants blocking the culvert, the Respondent argues the Appellants placed a large boulder in Modified Pond 2 at or about the location of the outlet of the culvert into Modified Pond 2. The Respondent says the boulder is placed where one would expect the culvert outlet to be located in Modified Pond 2 and says the Appellants have placed the boulder there to make direct observation of the culvert impossible. The Respondent further says the boulder itself appeared to have been partially covered by debris and questions whether the Appellants were responsible for this debris. The Respondent says Ms. Cameron made efforts to dig around in the debris on top of the boulder but was unable to locate the culvert outlet because of the obstruction posed by the boulder.

Third Party Submissions

[259] The Third Party says the evidence is that approximately two bags of concrete have been placed in the outflow of the culvert leading from 1760 to Modified Pond 2 on 1800. The Third Party argues that flooding was not a normal occurrence until after the culvert was blocked, and the evidence shows that the culvert was functioning properly before the obstruction.

[260] With respect to the existence of the blockage, the Third Party further says the blockage could be verified with a camera and GPS.

[261] In terms of the culvert's location, the Third Party says it is buried in the exact spot where an easement road exists to allow Connie Road residents to access their property at the back sections of their land. The Third Party argues the appeal involves matters of safety, property rights and accountability, and asks that the Panel find in favour of protecting his property and the rights of Connie Road residents by restoring the culvert and ensuring the Appellants' harmful behaviour is stopped.

Appellants' Reply

[262] In addition to the Appellants' previous submissions challenging the blockage of the culvert, the Appellants take issue with the Respondent saying that the Appellants placed a boulder on top of the culvert.

[263] The Appellants say they were cross-examined and did not testify to having placed a boulder on the culvert. Further, Carol's evidence was directly opposed to this assertion, indicating the blue plastic pipe they attempted to plug was not buried under a rock or covered by debris.

[264] The Appellants say Ms. Cameron's belief about the boulder was based on assumptions. She assumed the culvert she had seen on 1760 entered Modified Pond 2, and assumed the boulder she saw on 1800 was on top of that culvert outlet based on a rumour she heard from Mr. Sillje. She further made an assumption about where the culvert would enter Modified Pond 2, approximately 85 feet away, based on looking towards the pond from 1760, and not by having located the culvert on 1800. The Appellants say Ms. Cameron testified she did not have any evidence about the culvert location or the blockage beyond her assumptions in coming to the conclusion that the culvert was connected to the Main Area at Issue and that it had been blocked.

[265] The Appellants argue that Ms. Cameron's unsubstantiated assumptions are not an adequate basis for making findings about the culvert, including the location of the culvert or that a boulder had been placed on top of the culvert as alleged. This is particularly the case since the unchallenged evidence of Carol was otherwise regarding the location of the pipe away from the boulder.

Panel's Findings

[266] We begin by noting that, although the Respondent says the Appellants have admitted to blocking the culvert, we find it is more accurate to say that the Appellants have admitted to attempting to block a blue plastic pipe they saw in the area of Modified Pond 2, and we find that is what they attempted to do. They made such an attempt using two bags of concrete, and whether that action was effective in actually blocking the blue plastic pipe remains unknown, as does the question of whether the blue plastic pipe was actually connected to the culvert inlet seen by Ms. Cameron in the Main Area at Issue.

[267] In reviewing the evidence on the blockage question, we find the Appellants have led sufficient evidence to demonstrate it was wrong to determine that the culvert seen by Ms. Cameron on 1760 was blocked or that it connects to Modified Pond 2, and the Respondent did not establish otherwise. Rather, what the evidence established was that more work was required in order to find there was a blockage affecting the culvert and that the culvert was connected to Modified Pond 2. In coming to this conclusion, we rely upon the following evidence which we accept, which calls into question the existence and effect of an alleged blockage:

- Carol's evidence that the blue plastic pipe they attempted to block was not where Ms. Cameron had thought and it was not under a boulder. Further, the blue plastic pipe was different than the culvert seen by Ms. Cameron in terms of colour, size, and material, and a connection between the two was not established.
- NRO Baudin found the problem was as a result of poor drainage planning related to the catchment basin shared by the properties rather than the Appellants' attempt at a blockage.
- Mr. Ciobotaru testified that more analysis was needed to determine how the hydrology of the area works with the culverts in order to determine the degree to which any blockage may affect the flow of water.
- In his report, Mr. Ciobotaru stated additional investigations would be needed to determine "if the culvert between 1800 and 1760 is completely blocked or not".

[268] In addition to the above, the Panel finds the Respondent's conclusion about the culvert being blocked was based on inadequate information and assumptions. In arriving at this finding, we rely on the following evidence:

- Ms. Cameron testified that her conclusion about the culvert she saw on 1760 being connected to Modified Pond 2 was based on assumptions.
- Ms. Cameron testified that her information about the boulder being placed on top of the culvert was based on a rumour between neighbours.
- Ms. Cameron did not see any stagnant water around the culvert on 1760 which contained silt. She assumed the culvert was connected to the pipe which the Appellants had attempted to block, and assumed the silt indicated a blockage relating to Modified Pond 2, neither of which were established on the evidence.
- Ms. Cameron approached her inquiry about the blockage with an initial working premise that natural flows from 1760 had been impeded by the Appellants blocking a culvert, which Mr. Sillje had told her, and she later indicated the purpose of the site visit had been "to confirm the blockage of a culvert". However, Ms. Cameron never did locate a blockage and, in her testimony, Ms. Cameron indicated her conclusion about a blockage was based on assumptions.
- Ms. Doyle testified that she received an email from Mike Miles which was identified in the evidence, and discussed it with Ms. Cameron. Mr. Miles was identified in the evidence as a hydrologist who the Appellants had sought advice from about filing an appeal, and his email questions whether the attempt to block the culvert was successful. In the email, Mr. Miles says it is his impression "that 2 bags of ready-mix concrete are unlikely to reliably seal the culvert outlet if it has the same dimensions as those measured at the inlet." In

response, the Respondent did not adequately explain why further steps were not taken to check for the blockage.

[269] As mentioned in the previous section of this decision, we have found the Appellants have led sufficient evidence to demonstrate it was wrong for the Respondent to determine that water naturally flowed through the culvert seen by Ms. Cameron, and the evidence led by the Respondent in response did not establish otherwise. As also previously mentioned, we have found the Respondent's explanations for not checking what was happening with the culvert by running water, or a wire, or a camera through the culvert to be inadequate. In particular, we repeat our finding that the Respondent did not adequately explain why Ms. Cameron could not have checked for a blockage by running water with a dye through the culvert, even during the dry season, to see if the water backed up from a blockage, or ran into Modified Pond 2, or neither.

[270] Regarding the water build up in the Main Area at Issue, the evidence put forward demonstrated many potential explanations for that occurrence, and the Respondent did not demonstrate the reason for the build up was due to the culvert being blocked. This evidence included: NRO Baudin's determination that the problem was as a result of poor drainage planning related to the catchment basin shared by the properties; Mr. Ciobotaru's evidence regarding the site drainage that further investigations were needed to determine "culvert elevations and related hydraulics"; and the evidence of Mr. Ciobotaru and Mr. Perkins that man-made works such as the ditches and Berm have had an influence on the water accumulation in the Main Area at Issue.

Conclusion on this issue

[271] For the reasons stated, we find the Appellants have satisfied the onus of leading sufficient evidence to demonstrate it was wrong to determine that the culvert seen by Ms. Cameron on 1760 connects to Modified Pond 2, and wrong to determine that it was blocked, without further investigation. We further find the evidence led by the Respondent did not establish otherwise. Specifically, we find the evidence has not established the Appellants blocked a culvert which ran into Modified Pond 2 from the Main Area at Issue as alleged, or that the Appellants' actions in respect of the blue plastic pipe successfully blocked it. Rather, we find what has been established on the evidence is that more study and analysis is required: i) before it can be determined the culvert identified by the Respondent extends from the Main Area at Issue to Modified Pond 2 as alleged; and ii) before it can be determined the flow of water through the culvert has been blocked as alleged.

4. Is the Order supported by the evidence and, if not, what should be the outcome of the appeal?

[272] As previously noted, we have found that the Appellants have led sufficient evidence to demonstrate that both the Respondent's determination of the existence of a "stream" under the *WSA* and the Respondent's determination about a blockage of the culvert affecting the alleged "stream", upon which the Order was based, were wrong. As such, the Appellants have satisfied the onus on them.

[273] The evidence led by the Respondent in response did not establish otherwise; rather, we find the evidence established that further investigations, which were not done, and further evidence, which was not presented, could determine those questions. This included, for example, the hydrologists' evidence that more surveys and analyses are necessary to determine how the water in various features would naturally flow. Because we have found that more study and analysis is required before it can be determined whether or not there is a stream as alleged, and whether or not there is a blockage as alleged, we find we are unable to make a positive determination that there is not a stream and unable to make a positive determination that there has not been a blockage. Thus, while the Appellants have sought a positive determination that there is not a stream, we find we are unable to make such a determination based on the evidence presented and in the absence of the additional investigations.

[274] In the Appellants' written argument, they have addressed the appropriate remedy where the Panel finds the evidence is insufficient to establish the existence of a stream as alleged but considers itself unable to make a positive determination that there is not a stream. In such circumstances, the Appellants say the Panel should set aside the Order on the basis that the Respondent's jurisdiction to make the Order is unsupported on the evidence but refrain from making a declaration or finding that it is not a stream. They further say that in such an event the Respondent would be "in a position to conduct a proper investigation, if it chooses, hopefully accounting for all of the deficiencies in this appeal."

[275] In response to this submission by the Appellants, the Respondent says there is ample evidence to support the Order, including evidence that water is seasonally conveyed by hydraulic connection from the Spirea Swamp through the other features mentioned and into an unnamed tributary of Veitch Creek. The Respondent also argues that further investigation regarding a blockage would simply confirm whether any blockage was partial or complete.

[276] As previously noted, the Panel has found the Order is not supported by the evidence but considers itself unable to make a positive determination that there is not a stream. We find, as submitted by the Appellants, that the appropriate remedy in the circumstances is to set aside the Order and, accordingly, the Order is set aside. This leaves

the Respondent in the position to decide whether it wishes to conduct another investigation regarding the properties and the features discussed in this decision.

DECISION

[277] For the reasons previously set out, the appeal is allowed, and the Order is set aside.

[278] In reaching our decision, we have considered all of the submissions and relevant evidence provided by the parties, whether specifically referenced in our reasons or not.

"James Carwana"

James Carwana, Panel Chair
Environmental Appeal Board

"Gary Lin"

Gary Lin, Panel Member
Environmental Appeal Board

"Norman Tarnow"

Norman Tarnow, Panel Member
Environmental Appeal Board

APPENDIX 1

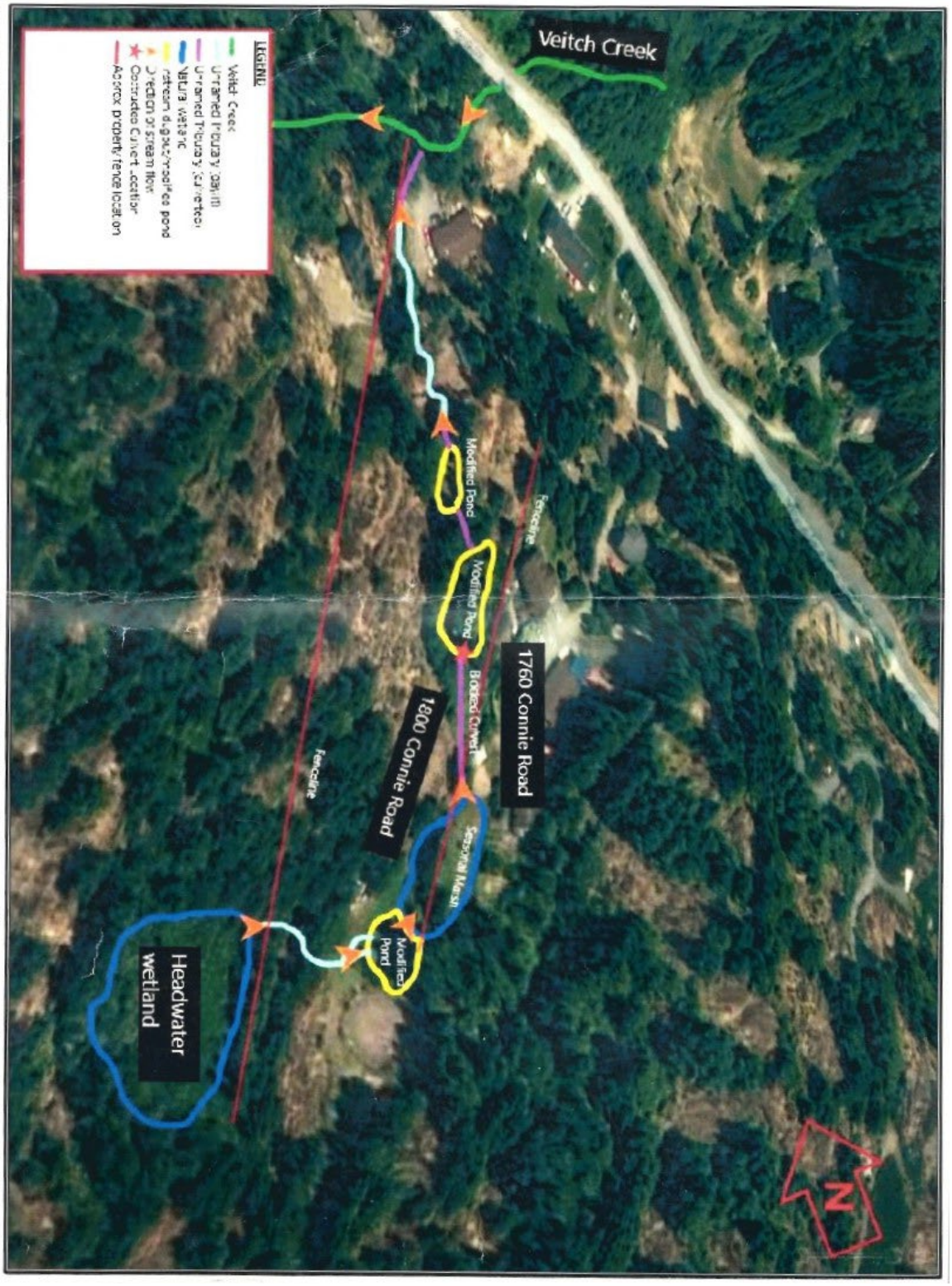
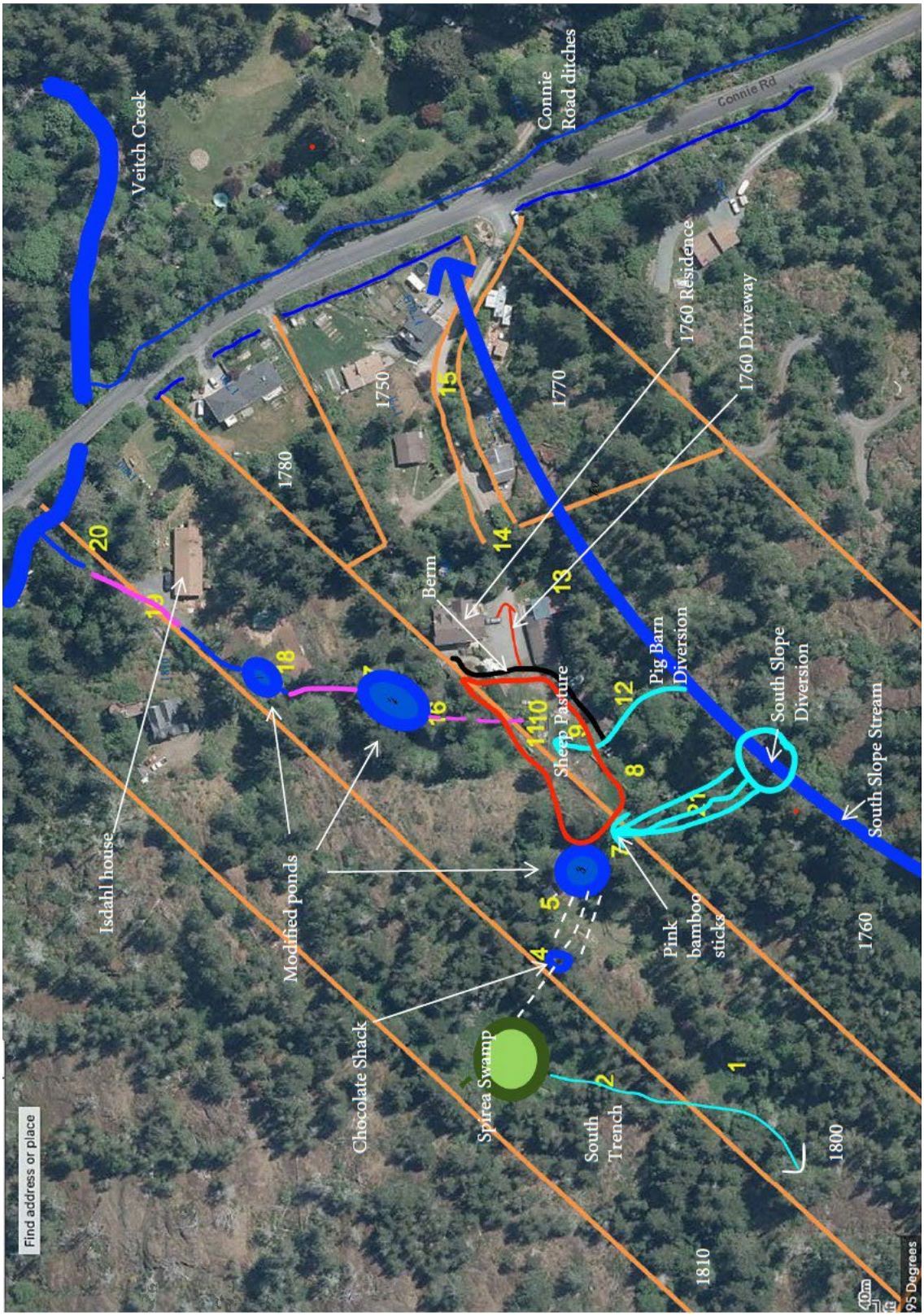


Figure 1. Map of stream features and flow present on 1800 and 1760 Connie Road (imagery: Google Earth July 2010)

APPENDIX 2


Veitch Creek
Connie Road ditches
Connie Rd
1760 Residence
1760 Driveway
1750
1770
1780
1760
1800
1810
Berm
Sheep Pasture
Pig Barn Diversion
South Slope Diversion
South Slope Stream
Isdahl house
Modified ponds
Chocolate Shack
Spirea Swamp
South Trench
Pink bamboo sticks
Find address or place
95 Degrees
10m