



Environmental Appeal Board

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DECISION NO. 2012-WAT-014(a)

In the matter of an appeal under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	0805626 BC Ltd.	APPELLANT
AND:	Assistant Regional Water Manager	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board James S. Mattison, Panel Chair	
DATE:	December 11-12, 2012	
PLACE:	Quesnel, BC	
APPEARING:	For the Appellant: Roy Josephy For the Respondent: Keith Evans, Counsel	

APPEAL

[1] This is an appeal by 0805626 BC Ltd. against the June 11, 2012 decision of the Assistant Regional Water Manager (the "ARWM"), W.S. Klopp, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The ARWM refused the Appellant's application to make "Changes in and About a Stream". The application, filed on September 23, 2011, requested approval to place fill and seed grass on the Appellant's property adjacent to Dragon Lake, British Columbia.

[2] The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 92 of the *Water Act*. Section 92(8) of the *Water Act* provides that, on an appeal, the Board may:

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

[3] The Appellant asks the Board to reverse the decision of the ARWM so that it may place fill on the subject property to protect it from any future flooding.

BACKGROUND

General

[4] The property at issue in this appeal is Parcel 1, District Lot ("DL") 3967 and DL 13014, Cariboo District Plan PGP45029, Property Identifier Number 024-681-628. The land borders Dragon Lake, eight kilometres south of Quesnel, British Columbia. The property is owned by the Appellant, 0805626 BC Ltd., of which Roy Josephy is a principal. Currently, a recreational vehicle park known as Robert's Roost RV Park is operated on the property.

Use and Development of the Lands

[5] Evidence was presented that the DL 3967 was previously owned by Robert and Vivian Wurms. In the summer of 1994, the Wurms began placing fill along part of the southern boundary of DL 3967 adjacent to Dragon Lake. On September 6, 1994, the Regional Director for BC Lands of the then Ministry of Environment, Lands and Parks, wrote to Robert and Vivian Wurms telling them that a site inspection and review of survey plans had indicated a discrepancy in the actual location of the lot boundary. Notice was given to "... discontinue placing fill on the foreshore until the lot boundaries have been established and posted by your surveyor."

[6] Unless specifically granted by the Crown, the bed or shore of a body of water that lies below the "natural boundary" of that body of water is vested in the Crown. Therefore, to determine the boundaries of the Wurms property, the surveyor had to determine the natural boundary of Dragon Lake.

[7] Under the *Land Act*, the "natural boundary" of a lake is defined as follows:

"natural boundary" means the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself;

[8] In the five years after the Regional Director's letter to the Wurms, the natural boundary of Dragon Lake was determined and adjusted, and the property line was established along the southern portion of the property. The property line was also realigned to reflect the natural boundary of Dragon Lake on the east side of the property. The surveyor placed the notation "Boundary along limit of fill" on the survey plan that was registered in the Land Title Office.

[9] As a result of the survey, "new" land was recorded between the revised natural boundary of the lake and the property line for DL 3967. This new land is DL 13014, and is the area upon which the Wurms had placed most of the fill.

[10] A Crown Grant of December 14, 1999 allowed the Wurms to purchase DL 13014. As a condition of the Crown Grant, DL 13014 was consolidated with DL 3967, which was largely unfilled, to form the subject property. The Crown Grant also required that "... the Grantee shall not construct, erect or maintain any improvements on the land within 7.5 metres of the natural boundary of Dragon Lake ...".

[11] In 2007, on behalf of the Appellant, Roy Josephy, along with his business partners Mark Josephy and Phil Christie, entered into negotiations with the Wurms to purchase the Roberts Roost RV Park and associated property. Mr. Josephy testified that the boundaries of the property were explained to him as follows: the boundary to the south of the property is coincident with the high water mark of the lake but, along the east, "It appears that the lands department used a change of vegetation to determine where the new natural boundary of the property was." The natural boundary followed "... a border of cattails and small willows."

[12] Also in 2007, before completion of the sale, Robert Wurms placed fill purchased by the Appellant, in the south and southeastern edges of the property. The fill was started 7.5 metres from the lake and moved inwards away from the lake. Silt fencing was placed between the fill and the lake.

[13] In 2008, subsequent to the sale of the property to the Appellant, Mr. Josephy testified that he filled northward on the east side of the property, "... basically following the line of cattails." The distance from the lake to the fill increased to about 25 metres as they proceeded further north.

[14] Following a complaint, a Conservation Officer and a Habitat Biologist inspected the site and, in the Fall of 2008, a request to stop the filling was made to allow a habitat assessment.

[15] On the completion of this assessment, the Appellant was directed by a Habitat Officer to remove the fill. The Appellant appealed this direction to the Board. However, the Board advised that it had no jurisdiction to accept an appeal from the decision of a Habitat Officer. No further filling was done, but no fill was removed.

[16] The property was re-evaluated on May 5, 2009 by a Conservation Officer and a Habitat Biologist, this time by boat as the water level was extremely high, and part of the property was flooded.

[17] On June 29, 2009, Mr. Josephy received an email that the file had been referred to Crown Counsel for approval of charges. The Appellant and the individual partners were subsequently charged with making changes in and about a stream without lawful authority, contrary to section 93(2)(q) of the *Water Act*.

[18] The trial commenced on March 2, 2011, continued on March 3 and 4, and was eventually set for continuation for July 21, 2011. Following the closing of the Crown's case on July 21st, the Appellant and the individual partners made a "no evidence" motion. The judge granted the motion, made a finding that they were "not guilty", and dismissed the charge.

[19] Having been found not guilty of making unauthorized changes in and about a stream, Mr. Josephy testified that he was told by his lawyer that they were "good to

go" on the rest of the property. The Appellant subsequently filed a notification with the Ministry that it was intending to place more fill.

[20] In evidence are copies of email correspondence from September 20 to 23, 2011, between a Natural Resource Officer with Front Counter BC and a Habitat Officer. The Habitat Officer concluded that a notification is not sufficient, and that the Appellant should be advised to apply for approval under the *Water Act*, which it did, and which is the subject of this appeal.

The *Water Act* application and referrals

[21] On September 23, 2012, the Appellant applied for an approval under section 9 of the *Water Act* to make changes in and about a stream. Specifically, the application sought approval for "Placing fill on property and seeding grass adjacent to Dragon Lake. Silt fence to be installed until re-vegetation occurs". Approximately 2500 square metres of area was proposed to be disturbed. The "Location on Stream" for the Location of Works was described as "adjacent to central west side" of Dragon Lake. More precisely, the sketch accompanying the application shows two areas of fill: one on the eastern boundary of DL 3967 near the south end of the property and one along the southern boundary in the southeast corner. The areas are cross-hatched on the sketch and marked "Subject Area". For the purposes of this Decision, they are referred to as the "eastern application area" and the "southern application area" respectively.

[22] The application was referred to interested agencies for comment, including the Habitat Management section within the Ministry. It was directed to Becky Bings, a Habitat Biologist for the Cariboo Region. Although the application was referred to Ms. Bings in the Fall of 2011, she wanted to do a field review at high water. As a result, the decision respecting the application was postponed.

[23] Mr. Josephy testified that the next year he sent an email to the ARWM complaining about the high lake levels. He was advised that other land owners had the same concerns, and that he should take it up with the City of Quesnel as the City operates the gates that control the level of Dragon Lake.

[24] In a letter dated May 4, 2012 from the City of Quesnel to Roy Josephy, the City advised that the agreed-upon target elevation for June 21 is 1996.69 feet above sea level. Further, the City states:

The lake level is presently at 1997.25 which is abnormally high. We have had extreme rain storms over the last two weeks which have caused these exceptional high levels. Compounding the problem is the fact that beavers have been active in the channel leading to the gate and in the creek immediately downstream of the gates.

[25] Ms. Bings performed her assessment on May 8, 2012. Following her assessment, she wrote to the ARWM expressing her opinion that the application areas were submerged under water and were part of Dragon Lake. Initially she commented on the southern application area proposed for fill (outlined in red on her report). She said that Mr. Josephy:

... suggested that rather than place fill in this area, he would be willing to put in a boardwalk and a floating dock at the point (as his intention was to have

boat access off the point). I agreed that this would be a better option. I am not sure if he would need to re-apply to do this or modify his existing application.

[26] With respect to the eastern application area proposed to be filled and outlined in blue on her report, she said that:

Mr. Josephy mentioned that the lake levels had been maintained at unusually high levels this spring by the city, but it may also be that this area is frequently flooded by high lake water during springs/early summers. Unless lake levels are maintained substantially lower for a period of years (such that this area will not be flooded anymore), I would consider this area to be part of the lake and its fluctuating levels and recommend that it not be filled in.

The Decision and Appeal

[27] In a letter dated June 11, 2012, the ARWM refused the application. He states:

I have received a report from Becky Bings of our ecosystems section concerning a site visit to review your proposed changes. Her review and conclusion is that the two areas are presently part of Dragon Lake and that the two areas should not be filled in. She did comment that a walkway was mentioned by you as another possibility. This may be acceptable but would need to be applied for as a separate application and thought would need to be given to how to construct and with what materials.

In view of the foregoing by our ecosystems person, your application is refused.

[28] The Appellant appealed this decision to the Board on June 17, 2012.

The Parties' Positions on the Appeal

[29] The Appellant appeals on the grounds that that the ARWM's refusal was based on several errors, including:

1. "The subject property was sold by Ministry of Lands and Environment [sic] in 1999 and at that time was determined to be land and not lake."
2. The property is above the high water mark of the lake. "The Lake is artificially controlled by the City of Quesnel by two screw gates. ... The habitat biologist visited the site this spring after the City failed to release adequate water subjecting our property to flooding. The habitat biologist subsequently decided that the subject property was part of Dragon Lake." This is incorrect: the property is not in the Lake and is therefore not in a "stream" as defined in the *Water Act*.
3. The case has already been decided by the Court and the property was determined not to be "in and about a stream".

[30] The Appellant seeks to have the Board reverse the decision of the ARWM and grant the approval.

[31] The ARWM submits that his decision was correctly made, having regard to all of the facts and law. He argues that:

1. The subject areas are swamp and are, therefore, within the definition of "stream" contained in the *Water Act* whether or not they are part of Dragon Lake. Further, neither the Crown grant nor the property line are determinative of whether an area is a swamp or a stream within the definition of the *Water Act*.
2. The Lake is controlled by the City of Quesnel subject to a water licence. That licence prescribes a minimum but not maximum lake level. As the lake level has been controlled since 1958, there is no evidence of what the water level would be in the absence of control by the City of Quesnel, and no evidence that, absent that control, the subject areas would not be a swamp.
3. Subsequent to the Court decision, evidence was provided to the ARWM to support a finding that the subject area are a swamp, which brings it within the definition of a "stream" under the *Water Act*, and that it has high environmental values.

[32] The ARWM seeks to have the decision confirmed by the Board.

RELEVANT LEGISLATION

[33] The application made by the Appellant was for an approval under section 9 of the *Water Act* to make changes in and about a stream. Section 9 states:

Changes in and about a stream

9(1) The comptroller, a regional water manager or an engineer may grant an approval in writing authorizing on the conditions he or she considers advisable

(a) a person to make changes in and about a stream,

...

[34] "Changes in an about a stream" is defined in section 1 of the *Water Act*:

"changes in and about a stream" means

(a) any modification to the nature of a stream including the land, vegetation, natural environment or flow of water within a stream, or

(b) any activity or construction within the stream channel that has or may have an impact on a stream.

[35] Section 1 of the *Act* also defines the words "stream" and "stream channel" as follows:

“**stream**” includes a natural watercourse or source of water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp and gulch.

“**stream channel**” means the bed of a stream and the banks of a stream, whether above or below the natural boundary and whether usually containing water or not, including all side channels.

[Emphasis added]

[36] “Natural boundary” is defined in section 1 of the *Water Act* as having “the same meaning as in the *Land Act*”. As stated earlier, the *Land Act* defines it as:

“**natural boundary**” means the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself;

ISSUES

[37] The Panel has considered the following issues:

1. Whether the placement of fill on private property more than 7.5 metres inland from the natural boundary of Dragon Lake fits within the definition of “changes in and about a stream” and, therefore, requires an approval under section 9 of the *Water Act*?
2. If so, should an approval be granted in the circumstances?

DISCUSSION AND ANALYSIS

1. **Whether the placement of fill on private property more than 7.5 metres inland from the natural boundary of Dragon Lake fits within the definition of “changes in and about a stream” and, therefore, requires an approval under section 9 of in the *Water Act*.**

The Appellant's submissions

[38] The Appellant submits that, at the time the subject property was sold by the Crown in 1999, it was sold as land and, therefore, it could not have been part of the lake. The natural boundary and the limits of fill were clearly noted on the survey plan.

[39] Secondly, the Appellant submits that the lake is artificially controlled by the City of Quesnel. Further, the spring of 2012 was unusual and the operators of the dam had been unable to spill water early in the year and then had trouble with beavers later that caused a high water level. The Ministry habitat biologist visited the property while it was flooded and, subsequently, decided that both application areas were part of Dragon Lake. The Appellant suggests that there is no evidence of what the water level would have been in the absence of the control by the City.

[40] Finally, the Appellant submits that the issue has already been decided by the Courts and the property [where the fill was placed in 2008] was determined not to be "in and about a stream". The Reasons for Judgment of the Honourable Judge Walters make it clear that she could not conclude that "... any changes were made to a stream within the meaning of that term as it is defined in the *Water Act*".

[41] The Appellant submits that some of the area between the old natural boundary and the new natural boundary along the southern edge of the property had been filled to within 7.5 metres of the natural boundary line by the previous property owners. Subsequent to the purchase in 2008, the Appellants continued filling "around the corner" and heading north "well within" the line marked "limit of fill", which they took to be acceptable. This area was the subject of the court case, and which the Court found was not "in and about a stream".

[42] The Appellant's submissions in the appeal concern the next area north of the area subject to the court case. It seeks to continue placing fill from that area in a northward direction. For clarity, this is the area referred to in this Decision as the eastern application area. The Appellant's submissions focus on whether this fill will be in and about a "stream" or "stream channel" as defined in the *Water Act*. If not, then no approval is required.

[43] The Appellant relies upon the evidence of Richard Case (discussed further below), who suggests that the area of proposed fill in the eastern application area is mostly, if not entirely, within a riparian transition area and not a wetland.

[44] Although the Appellant asked the Panel to reverse the decision of the ARWM, the Appellant made no submissions with respect to the southern application area.

The Respondent's submissions

[45] The ARWM submits that, while a "natural boundary" helps to determine what is land and what is water for the purposes of the *Land Act*, the definition of "stream" in the *Water Act* includes "swamp" as well as "lake". Although the application area may not be in a lake, the ARWM submits that it is in a swamp area; therefore, the proposed fill placement would require an approval for changes "in and about a stream".

[46] The ARWM agrees that the lake is controlled by the City of Quesnel. However, the ARWM points to the evidence of expert witness Raymond Coupé, who concludes that the area has been subject to flooding since deglaciation, which suggests that the current status of the application area is not the result of the recent flooding. Mr. Coupé's qualifications are discussed below.

[47] Regarding the Court's decision, the ARWM submits that evidence presented to the Court was that the area where the fill was placed was a "wetland". The Judge chose to strictly interpret the definition of a swamp, and found that there was insufficient evidence "for a properly instructed jury to conclude" that the area in question was a swamp, when all of the evidence presented indicated that it was a wetland. The Judge narrowly construed the definition of "stream" as found in the *Water Act* and, because it does not include wetland, she allowed a motion of "no evidence" and dismissed the charges.

[48] The ARWM submits that new evidence was brought before the ARWM to show that the area contained a swamp, which is within the definition of a stream; thus, the Appellant was properly required to apply for an approval.

The Panel's Findings

[49] It is clear from the evidence that, either by accretion or by the placement of fill, the natural boundary of the south and the southeasterly part of the Appellant's property had changed prior to 1995. This "accretion" area was surveyed and the new area of land (DL 13014) was sold by the Crown, with the condition that it be attached to the upland area DL 3967 to form the Appellant's property as it is today. The surveyor's notation on Plan PGP45029 "Boundary along limit of fill" may have indicated that the new natural boundary of the lake was located along an area of previous fill that had caused the accretion to take place. The Crown clearly took the area inside of the surveyed natural boundary to be "land", and sold that land by Crown grant.

[50] There is no dispute that rivers and lakes fluctuate as a result of human and natural factors. The Panel finds that the "natural boundary" of the lake was properly determined by observing the change in vegetation that the action of the water, in most ordinary years, has marked upon the vegetation. At the time of the habitat assessment for the approval application on May 8, 2012, Dragon Lake's water level was abnormally high. However, the Panel finds that occasional flooding caused by abnormally high lake levels does not change the natural boundary of a lake. The definition itself specifies "in all ordinary years".

[51] The ARWM testified that he did not visit the application areas but he did look at a map on his computer and he looked at an air photo. He knew "ecosystems" (by which he means the Habitat Management Section staff) would be interested in this application, and he made a referral to them.

[52] The ARWM claims that new evidence was brought before him to show that the area proposed to be filled contains a swamp, which is within the definition of "stream".

[53] The ARWM testified that sometimes people within the ecosystems section want to preserve swamp land. The present application may contain swamp land, but he did not know how much. The ARWM further testified that he did not know how much swamp land you can fill before you change the lake quality. He stated, "Swamp conditions water. I wanted to preserve the state of the water in Dragon Lake".

[54] With respect to the southern application area, Ms. Bings stated that "...this area appears to be part of Dragon Lake". The Panel was given no evidence to dispute this observation.

[55] In fact, the Panel was given no evidence that would indicate that the ARWM erred in his decision with respect to the southern application area. According to Ms. Bings, Mr. Josephy suggested that, rather than placing fill in this area, he would be willing to put in a boardwalk and a floating dock at the point, a proposal that Ms. Bings agreed with.

[56] The Panel finds that the southern application area is directly connected to the Lake and, therefore, is "in and about a stream".

[57] With respect to the eastern application area, it is not clear to the Panel that the ARWM relied on the new evidence of a swamp to make his decision. In her June 9, 2012 email to the ARWM, Ms. Bings states "This area was also under water at the time." She further stated that "Mr. Josephy mentioned that the lake levels had been maintained at unusually high levels this spring by the city, but it may also be that this area is frequently flooded by high lake water during springs/early summers. Unless lake levels are maintained substantially lower for a period of years (such that this area will not be flooded anymore), I would consider this area to be part of the lake and its fluctuating levels and recommend that it not be filled in."

[58] In his decision of June 11, 2012, the ARWM writes that he has received a report from Ms. Bings "... concerning a site visit to review your proposed changes." He further writes, "Her review and conclusion is that the two areas are presently part of Dragon Lake and that the two areas should not be filled in" [Emphasis added]. The ARWM concludes, "In view of the foregoing by our ecosystem person, your application is refused."

[59] The decision also states about the report from Ms. Bings: "She did comment that a walk-way was mentioned by you as another possibility. This may be acceptable but would need to be applied for as a separate application and thought would need to be given as to how to construct and with what materials." Although not stated by the Respondent, it is clear from the email comments of Ms. Bings that this refers only to the southern application area.

[60] The Panel finds that the fill for the eastern application area was not proposed to be placed in the lake. The Appellant asked for approval to place the fill starting no nearer than 7.5 metres from the natural boundary of Dragon Lake, and continuing upland from that. While this is not "in the lake", the Panel finds that it is in close proximity to the lake, and may be in an area that the ARWM now claims is a "swamp".

[61] The word "swamp" is not defined in the *Water Act*. Therefore, the Board must look to the usual meaning of the word, and the evidence of what features or characteristics are located on the property, in order to determine whether a swamp exists.

[62] The Appellant provided the Panel with extracts from a report prepared by Richard Case, MSc., R.P. Bio., who specializes in riparian and stream ecology. Mr. Case described wetland classifications of five different classes: bogs, fens, marshes, swamps and shallow water. He further described a transition zone between the wetland and the upland as being a lush green fringe of moisture-loving vegetation found along the edges of wetlands. He explained that all wetlands share three basic features: (1) prolonged presence of surface or subsurface water, (2) hydric soils (deficient in oxygen), and (3) hydrophytic plants (water tolerant). To determine where a wetland becomes a riparian transition, these features must be investigated. [Emphasis added]

[63] In the conclusion to his report, Mr. Case says the "... evidence suggests that the area of placement of fill [*the subject of the court case*] and proposed future fill [*the eastern application area*] are mostly if not entirely within a riparian transition area and not a wetland." [Italics added]

[64] As noted earlier in this decision, Raymond Coupé was called as an expert witness for the Respondent. Mr. Coupé is a forest and range ecologist. He was accepted as an expert in the area of ecosystem classification. Mr. Coupé agreed with Mr. Case that wetlands are classified using their vegetation, soils and hydrologic regime. He testified that a swamp is a subclass of wetland, and that swamps occur on mineral substrates and have trees or tall shrubs, which distinguishes a swamp from other wetlands.

[65] Mr. Coupé visited the subject area on August 28, 2012 and gave the following overview of the area. The area that he inspected had mineral soils and some tall species. He said that the vegetation had been altered with introduced species (both intentional and invasive). He also said that the area had been mown at various times. At the time of his inspection, there was no standing water, but the soil contained moisture to the surface. He said that, in dynamic hydrologic regimes, drawdowns can be well below ground surface at this time of year. In his opinion, the area meets the criteria for classification as swamp.

[66] Mr. Coupé said that there was a distinct difference between the vegetation on the east side of the property boundary and that within the property. On the east side, it appeared that the native vegetation was largely intact. This led him to conclude that the area on the west side of the boundary (inside the east property boundary) had been cultivated mostly by mowing. This promoted the growth of reed canary grass over other species.

[67] Mr. Coupé did not determine the physical extent of the outer boundary of the swamp. He said that the source of water for the swamp was probably the lake, but it may receive water from rain events. Mr. Coupé said that such areas need periodic flooding and/or frequent saturation to retain the swamp classification.

[68] Evidence was brought before the Panel to show that, at least in the areas where the test plots were made in the eastern application area, there were indications that these areas had the characteristics of a swamp.

[69] The Panel finds that there is sufficient evidence of the characteristics of a swamp to conclude that at least some of the eastern application area is a swamp. Consequently, the Panel finds that the proposed placement of fill on the subject property fits within the definition of "changes in and about a stream" as defined in the *Water Act*, and that the Appellant requires an approval under section 9 of that *Act*.

[70] However, the reasons given by the ARWM for refusing the approval is that "... the two application areas are part of Dragon Lake and should not be filled in." The Panel finds that the eastern application area is not part of Dragon Lake. Accordingly, the Panel finds that the eastern application area should not have been refused on the basis that the area is part of Dragon Lake.

2. If the activity falls within the definition of “changes in and about a stream”, should an approval be granted in the circumstances?

[71] Becky Bings, Habitat Biologist, testified that, in 2008, she was involved in a lakeshore compliance project that included Dragon Lake. She testified that Dragon Lake shore is approximately 98% privately owned, and that the shoreline health is “... not great so we need to manage not to have more impacts to the lake.” She testified that the Ministry generally asks for buffers or leave strips between development and the shoreline.

[72] Ms. Bings testified that “It concerns me that we are adding impacts to the lake by filling in low areas of lakeshore. It concerns me. We need to stop the infill.”

[73] Ms. Bings expects that this property is flooded for one or one and a half months every year.

[74] Mr. Josephy testified that, until the recent high water episodes, he could get on the property to mow in the middle of May. However, he was unable to mow in 2011 and, in 2012, he could not mow until July.

[75] On cross-examination, Mr. Josephy was asked if he recalls any years when the application area was not submerged. He responded “Yes, in most years.”

[76] Mr. Josephy testified that the Appellant’s property has the only RV campsite on Dragon Lake; RV sites have been disappearing because of increasing land values. The Appellant’s investment in buying this land is not covered by the revenue from the existing RV sites. It wants to expand the RV area to the east side of the road with 15 to 20 new RV sites. The remaining land to the east, between the RV sites and the lake, would be “park land” that the Appellant could maintain. Mr. Josephy stated that most of the Appellant’s clients are fishermen, and he would not want to do anything to jeopardize the good fishing in the lake.

[77] Mr. Josephy admitted on cross-examination that the property was zoned R2 (meaning 6,000 square foot lots), but the Appellant currently has no intention of doing that. However, he did say that the Appellant may subdivide the property to create some residential lots in the future.

[78] Mr. Josephy testified that the land further north from the application area is higher and “... if the City of Quesnel regulates the lake like it should, then we are fine at that level.”

The Panel’s Findings

[79] Based on the May 4, 2012 letter from the City of Quesnel and the oral testimony, the Panel finds that the water level of Dragon Lake was abnormally high in the spring of 2012, particularly at the time of Ms. Bings’ inspection.

[80] Ms. Bings testified that, on fisheries streams, buffers are generally requested to protect the stream from development. Buffers are generally 15 to 30 metres wide, and the most important area of buffer is the area closest to the lake. She also testified that there are no riparian area regulations in the Cariboo area. Ms. Bings said that flooded areas near the lake can be rearing areas for fish as they

provide food and cover. She also said that these can be important bird nesting habitats and habitat for reptiles. She stated that these areas adjacent to lakes are very diverse habitats. However, when asked what her concern was with respect to the impact of filling in the application areas, she testified that Dragon Lake is very shallow and quite sensitive, and there is a fine balance in trying to keep the lake healthy.

[81] The Panel was helped by the testimony of Chris Swan, Impact Assessment Biologist for the Ministry of Environment, who was accepted as an expert on impact assessment for lakes.

[82] Ms. Swan testified that Dragon Lake is a very important fishery lake. One-third of the rainbow trout eggs for the provincial hatchery program come from there. She stated that maintaining high water quality in the lake to support the fishery is the Ministry of Environment's greatest concern.

[83] Ms. Swan testified that Dragon Lake is a shallow, warm lake with a rate of recharge of 17 years, which is very long for a shallow lake. Dragon Lake is slightly eutrophic, with phosphorous as the limiting nutrient. More phosphorous could lead to algae blooms which can prove toxic to fish. Sources of phosphorus include sewage, fertilizer and sediments. Higher lake levels mean more volume in the lake.

[84] Ms. Swan testified that the impact of filling a swamp, or areas adjacent to a lake, is the loss of the areas that would slow the runoff into the lake and help take out nutrients and sediment. She said that the water quality has not deteriorated lately, but neither has it improved.

[85] The Panel finds that it is important to protect the quality of the water in Dragon Lake. It is also clear that swamps and areas around the shoreline are important for filtering runoff and help to maintain the quality of the water.

[86] The Panel would have been assisted by additional evidence about the areal extent and location of the area that is classified as swamp.

[87] In the expert report submitted by the Respondent, Mr. Coupé concluded that the property contained a wetland that was best classified as a swamp. He recommended that a more thorough and systematic assessment of the site be conducted. He further stated: "The current assessment did not determine the full extent of wetland distribution on the property. It is recommended that a further assessment identify the distribution of wetlands on this property."

[88] It is clear that part of the property is regularly mowed, and has taken on the characteristics of a cultivated area. No evidence was given that this type of mown grass is detrimental to the water quality in the lake. No evidence was given that the areas that were previously filled have been detrimental to the quality of the water in Dragon Lake, except perhaps where areas that might filter the lake have been lost.

[89] The Panel finds that the full extent of wetland distribution on the property is not known. The ARWM stated that he neither knew how much swamp land there was, nor how much of a swamp you can fill before you alter the lake quality.

[90] The Panel finds that there are some habitat values on the land that is periodically flooded. However, the primary concern of the Ministry of Environment is to protect the quality of the water in the lake to ensure the health of the fishery.

[91] The Panel finds that the area of most importance to protect is the area immediately adjacent to the lake. For this reason, buffer zones are often required along water bodies. Buffers may also be placed around wetlands, such as swamps, to ensure high water quality.

[92] The Panel notes that there is no prohibition against making changes in and about a stream, it is only prohibited to do so without authority. With authority, in this case with an approval, changes may be made under certain conditions.

[93] The Panel has carefully considered whether it has sufficient evidence upon which to grant an approval. The Panel appreciates that the fill issue has been ongoing for the Appellant since at least 2008.

[94] Of utmost concern, is the impact that the placement of fill in the eastern application area will have on water quality for fish and fish habitat in the lake. However, it is also important to know what values may be impacted within the swamp itself.

[95] The evidence is clear that the eastern application area is subject to occasional flooding. The purpose of the proposed fill is to stop the flood water from coming further onto the Appellant's property, and to elevate the application area to allow it to be mowed and maintained as park land for use of the RV site patrons.

[96] Therefore, for an approval to be granted, more must be known about the swamp itself in terms of its boundaries and habitat value. This requires knowing:

- the location of the perimeter of the swamp area;
- the extent to which the proposed fill will affect the swamp;
- whether there are sufficient habitat values in the swamp area to protect the swamp from placement of fill; and
- whether filling some, or any, of the swamp area will be detrimental to the water quality in Dragon Lake as well as to fish and fish habitat in the lake.

[97] Also of use would be an assessment of whether the buffer areas along the areas of the Appellant's land that are already filled are working adequately to protect the lake water quality.

[98] Apparently because the Court had concluded that the previous fill was not in a "swamp", and the ARWM focused his decision on the application areas being "in the lake", no information about the swamp was provided by the Appellant in the context of this application, and it was not sought by the ARWM. However, if this information is provided to the ARWM, it may well be that an approval may be granted in this case.

[99] Unfortunately, the Panel does not have sufficient evidence before it to make these determinations.

[100] To narrow the focus, and in an attempt to bring this contentious matter to an end, the Panel will send the matter of the eastern application area back to the ARWM with directions.

DECISION

[101] In making this decision, the Panel has considered all of the evidence and submissions before it, whether or not specifically reiterated herein. The Panel also has been guided by the objectives and purposes of the *Act*.

[102] For the reasons stated above, the Panel agrees with the ARWM's refusal to issue an approval to place fill in the southern application area.

[103] However, for the reasons stated above, the Panel finds that the Appellant may be granted an approval under section 9(1)(a) of the *Water Act* for placing fill in the eastern application area, depending on the outcome of certain investigations.

[104] Therefore, the Panel sends the matter back to the ARWM to reconsider the eastern application area with the following directions:

1. Obtain from the applicant or determine the physical extent of the outer boundary of the swamp as it affects the application area.
2. Investigate whether the areas previously filled are negatively affecting the quality of the water in Dragon Lake for the purpose of determining if a buffer will be needed around the area of swamp, or whether fill can be placed to the swamp perimeter.
3. Complete or obtain adequate habitat studies within the eastern application area to determine whether any of the areas within the application area can be filled without destroying important habitat or impairing water quality.
4. Determine where fill may be placed to protect the subject property from flooding without impairing the quality of the water in Dragon Lake or important swamp habitat values as identified in #3, above.
5. Consider whether an approval may be issued authorizing the placing of such fill as determined in #4, above.

[105] The ARWM's decision is reversed in part, and the matter is sent back to the ARWM to reconsider the application for the eastern application area with the above-noted directions.

[106] The appeal is allowed in part.

"James S. Mattison"

James S. Mattison, Panel Chair
Environmental Appeal Board

April 16, 2013