



# Environmental Appeal Board

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## **APPEAL NO. 95/13 WATER**

In the matter of an appeal under section 38 of the *Water Act*, R.S.B.C. 1979, c. 429

<b>BETWEEN:</b>	Bill Wyett and Wendy Harbidge	<b>APPELLANT</b>
<b>AND:</b>	Deputy Comptroller of Water Rights	<b>RESPONDENT</b>
<b>AND:</b>	Bill Rawn et al	<b>LICENSEES</b>
<b>BEFORE:</b>	Harry Higgins, Panel Chair Elizabeth Keay, Member Jack Lapin, Member	

**DATE:** Written submissions concluded October 27, 1995.

This is a decision of the Environmental Appeal Board in the matter of a *Water Act* appeal from an April 12, 1995, decision of the Deputy Comptroller of Water Rights.

The appeal was brought by Bill Wyett and Wendy Harbidge against the decision of the Deputy Comptroller of Water Rights to overturn the Regional Water Manager's denial of an application for Water Licence 3001332 on Corning Creek.

## **BACKGROUND**

On August 30, 1988, Robert Rawn, agent for eleven property owners, applied for domestic water licences which would permit the use of up to 500 gallons of water per day from Corning Creek for each property owner.

Senior water licence holders downstream objected to this application. They maintained permitting the withdrawal of up to 5,500 gallons per day upstream would prevent them from receiving their licenced water requirements.

By letter on November 16, 1990, the Regional Water Manager refused the licence application on the grounds that Corning Creek had insufficient water to meet licence requirements without injurious impact on the downstream licensees.

A meeting was held on July 11, 1993, at which the Rawn group offered to construct a 'fair weather', above ground conduit from their proposed intake to the lowest diversion point on Corning Creek. Some stakeholders withdrew their objections to the licence application on the basis of this offer. Others believed it would not be effective during periods of water shortage.

On December 11, 1994, Roger Rawn submitted a Notice of Appeal to the Deputy Comptroller of Water Rights. A hearing was conducted in writing with submissions

and rebuttals reviewed by all parties. Bill Rawn took over as representative of the applicants at this time.

The Deputy Comptroller of Water Rights allowed the appeal in his decision of April 12, 1995, concluding that there was sufficient water to grant the additional licences based on updated stream flow records and new water availability criteria for assessing water use. He ruled that the licence would not be dependent on the fair weather conduit proposal, although it had merit. He indicated that he would defer this matter to the discretion of the Regional Water Manager.

Bill Wyett and Wendy Harbidge filed an appeal to the Environmental Appeal Board on May 8, 1995. At the request of the Appellants, the appeal process was changed to a written hearing with all submissions and rebuttals being seen by all parties as well as the Board.

### **GROUND OFS OF APPEAL**

The Appellants contend:

1. Unless the Licensees' licence is cancelled they will experience increased shortages of water from Corning Creek.
2. The reduced flow in Corning Creek will adversely affect spawning salmon at the mouth of the creek.

The order sought by the Appellant is that the Licence issued to the Licensees be cancelled.

### **ISSUES AND EVIDENCE**

#### **ISSUE 1 - Water Shortage.**

The Appellant submits that the Deputy Comptroller of Water Rights was in error in granting the licence to draw up 5,500 gallons of water per day to meet the domestic needs of the eleven property holders in this group.

The Appellant in two separate letters dated May 8, 1995, and dated August 23, 1995, raised the following concerns in support of their appeal against the licence.

**If the water licence issued to the Licensees is exercised, there will be increased shortages of water for the downstream licensees.**

The Appellant strongly supported the 1990 decision of the Regional Water Manager to deny the Licensees a licence. They agreed that, based on their experience in previous years, there was already insufficient water to meet the needs of the downstream licensees.

The Licensees protested and appealed the Regional Water Manager's decision to the Deputy Comptroller of Water Rights on December 11, 1990.

The Deputy Comptroller of Water Rights denied that the exercise of the Licensees' licence would have an adverse affect on downstream users. He upheld the Licensees' appeal and issued a licence to the group in April, 1995. He came to this decision using new information assembled since the earlier decision of the Regional Manager.

The new information included four years of additional stream flow records as well as a stream flow survey undertaken by the Ministry staff under the supervision of Bill Obedkoff. This survey was to identify streambed losses due to seepage and/or evaporation. There were, as well, new Water Allocation Guidelines with criteria for establishing water flow estimates.

To reach his decision the Respondent used the records of stream flow from data from the Water Survey of Canada gauging station. This is situated below the Appellants' Point of Diversion on Corning Creek. (Because the station is downstream of both the Licensees' and Appellants' diversions the data is conservative.) These records show that the lowest daily stream flow ever recorded on Corning Creek during the winter months was 6 times greater than the total of all licences and that the lowest summer record was 1.2 times greater. The Respondent concluded that there has never been a single day since records began in 1980 that the flow at the gauging station was less than the sum of all licences.

Using the gauging station records from 1980 to 1993, a computer analysis was run to estimate rate of flow for drought periods, average low flows of 7, 15, and 30 days and difference probabilities of recurrence (2 to 50 years). The new Water Allocation Guidelines criteria are based on the natural 7-day flow for a return period of 1 to 5 years. Using this analysis the Respondent concludes that even under moderate and extreme drought conditions the water supply exceeds the total demand in both summer and winter.

Section 12(1) of the *Water Act* states:

- 12 (1) ...the respective rights exercisable under 2 licences authorizing the diversion of water from the same stream have precedence in law according to the respective dates from which the licences take precedence as set out in them.

This means that the Appellants as senior licensees have, in times of drought, the right to divert and use water before the Licensee group. This also means that the Appellants as junior licensees to both the Lee Creek Water Users group and the Simpson Irrigation licence will in times of drought be required to restrict their water usage. The Water Allocation Guidelines state, "Water allocations must not impact negatively on existing uses, existing water licensees and necessary stream flow requirements." The Panel is satisfied that the updated flow calculations are in keeping with the Guidelines. The Panel also finds that the calculations demonstrate that the flow of water in Corning Creek has exceeded the potential maximum demand of all licensees at all times since records started in 1980.

**A lack of hydrological data was mentioned yet the licence denial by the Regional Manager was overturned**

The Water Allocation Section Head for the Southern Interior, Ron B. Smith, signed an Engineer's Report on November 15, 1990, which was used by the Regional Manager to make his decision to deny the licence. When the decision was overturned, Mr. Smith pointed out that the Obedkoff Report on seepage should be used with caution as it does not provide hard data for the winter months. Smith stated that, "the lack of hydrological data remains outstanding".

The Appellants agree with Smith and are concerned that this point is being ignored.

The Respondent contends that there is a misunderstanding of Smith's comments regarding the Obedkoff report. He points out that the report was a study, not of water flow but of seepage losses from Corning Creek, most of which are above the gauging station. Therefore, despite the seepage loss statistics, the estimates of water supply and run off are less than the actual volume of water available at the Appellant's diversion point.

The Panel is in agreement with the Respondent regarding the significance of the Obedkoff Report and that the "lack of hydrological data" did not apply to total water supply.

**The Appellants would be faced with unfair additional expenses if the Licensees exercised their water rights**

The Appellants stated that they believed that upgrading their water systems as recommended by the Respondent would constitute unfair additional expenses to the senior licensees. Further, they believe the suggested improvements would solve the shortage problem was moot. Mr. Wyett held that even Mr. Simpson, (the irrigation licence holder), with his large storage capacity, experienced shortages.

The Respondent recommended that if the Appellants provided adequate balancing storage and redesigned their intake according to the plan he provided, their periodic water shortages could be alleviated.

Mr. Cairns, from the Water Resources Branch Appeals Unit, indicated that it is the water users' responsibility to provide balancing storage capacity with their water systems to accommodate the difference between peak consumption rates and the rate of diversion protected under licence.

The Water Availability Guidelines, [page 4(11)] states, "In British Columbia, water from surface streams is often required when it is not normally available. The storage of water is often a viable alternative and is regularly required in water licences to support diversion and use of water and to maintain instream flows."

While the Panel is sympathetic to expenses involved to upgrade the Appellants' system, it is satisfied that this matter is not connected to the exercise of the Licensees' licence.

**Licensees' pre-licence use of water was illegal**

The Appellants are concerned that the Licensees diverted water from Corning Creek before they had a licence to do so.

The *Water Act*, section 42(2) states, "It is not an offence for a person to divert unrecorded water for domestic purposes". Unrecorded water is defined as water not held under licence or under special or private act.

Although the legality of the Licensees' actions regarding water diversion prior to their receiving a licence are not relevant to this Appeal, it should be noted that they were within their rights to draw unrecorded water from Corning Creek.

The Panel finds that the Licensees were within their rights to divert water from Corning Creek with or without a licence. The Respondent has demonstrated that the water permitted under Water Licence 3001332 was previously unrecorded water and therefore available for domestic use under the terms of the *Water Act*.

**Mr. Cairns' office was biased in presenting material to the Deputy Comptroller of Water Rights**

The Appellants charged that Mr. Cairns A/Head, Appeals Unit, Water Rights Branch, Ministry of Environment, Lands and Parks showed bias in favor of the Licensees and ignored expressed concerns about water shortages.

Mr. Cairns provided a copy of his "Investigation Report" to all licensees on Corning Creek, although this was not a requirement. Furthermore, all submissions and rebuttals were carefully considered and recommendations for improving the Appellants' water system were provided at no charge.

The Panel, after an extensive review of all relevant information provided, can see no evidence of either bias or failure to consider any of the expressed concerns about water shortages.

**The Licensees had prior knowledge of water problems and knew of alternative sources**

The Appellants contend that the Licensees were aware of water shortages before they purchased and developed their land. They also knew that alternative sources of water were available to them.

The Panel finds that whether or not the Licensees were aware of water shortages before they purchased the land is not relevant to the Licence or to this Appeal. The Licensees were entitled to apply for the least expensive and highest quality water available regardless of alternative sources.

The Respondent had to make his decision based on whether or not there was sufficient water available to meet the needs of all licensees within the terms of the *Water Act* and the Water Availability Guidelines. Alternative sources would only become a significant issue if it could be proven that insufficient water existed.

**ISSUE 2 - Salmonid Problems**

In a letter dated April 21, 1994, Ms. Harbidge suggests that the reduced flow of water in Corning Creek would adversely affect spawning sockeye salmon at the mouth of the creek. This predates the Appellants' final submissions in May and August of 1995, which express concerns that the reduced water seepage near the mouth would negatively impact spawning fish.

The Respondent indicated that there is no evidence that the diversion authorized under his decision will have an impact on fish habitat. In his final argument he appears to concede that there are salmon spawning at the mouth of Corning Creek by stating, "The Decision will not cause an adverse affect on the salmonid fishery, particularly the spawning activities of sockeye salmon on the shore of Shuswap Lake near Corning Creek." He also states, "There is no evidence submitted by the Appellant to demonstrate that water which seeps from the channel of Corning Creek supports spawning activities of sockeye salmon on the shore of Shuswap Lake near the mouth of Corning Creek."

The Panel finds no evidence to support the Appellants' case that damage will be done to spawning salmon by the exercise of the Licensees' licence.

Likewise, the Panel finds no evidence to support the Respondent's contention that the protection of water and ecological health, included in the Water Availability Guidelines, were an important consideration in his decision to grant the licence.

As there is insufficient evidence from either party on this issue, the Panel cannot give it sufficient weight to either deny or support the Appeal. However, the Panel is concerned that at least on paper there is no substantive evidence that the ecological health of Corning Creek and its delta played a significant role in the Respondent's final decision. The Panel's concerns will be more fully explored under Comments and Recommendations.

**DECISION**

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the written submissions and documentary evidence placed before it.

The Panel is satisfied that there is sufficient water in Corning Creek to fulfill the demands of all licensees at most times. In times of shortage the Appellants as senior licensees to the Third Party Licensees are protected under law.

It is therefore the unanimous decision of the Panel to uphold the issuance of Water Licence No. 3001332 and dismiss the Appeal.

**The Decision To Grant A Water Licence**

In his letter to Mr. Cairns on April 21, 1994, Mr. Wyett made the following comment, "Can mankind consider all the water in a watershed as solely his to use? Should there not be a certain amount of water reserved to maintain the ecology of

the stream community? Should not water continue to flow after a share is removed by man? There should be some assurances somehow that there will be no fish out of water."

The Panel believes these concerns are pertinent to this appeal and others in the future.

The Water Allocation Guidelines indicate that:

- (a) (page 2, #2) "The integrity of the water environment and aquatic ecosystems must be protected."
- (b) (page 8, #4) "The assessment of demand required estimates of minimum flows required for other potential uses identified by other agencies or jurisdictions (such as Federal or Provincial Fisheries agencies, Environmental Protection Program, Parks, First Nations, etc.)"

The Panel finds no substantive evidence that the Respondent has engaged in any form of environmental assessment or consultation with Federal or Provincial Fisheries agencies before granting the water licence.

### **Recommendation**

That before any additional water, beyond that currently licenced, is authorized from Corning Creek, the Water Allocation Guidelines referred to above should be followed. Furthermore, other concerned agencies such as Federal and Provincial Fisheries agencies should be consulted and their replies recorded in the licence rationale.

Harry Higgins, Panel Chair  
Environmental Appeal Board

February 12, 1996