



Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923
Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1
Email: eabinfo@gov.bc.ca
Website: www.eab.gov.bc.ca

DECISION NOS. 2013-WAT-013(b), 015(c), 016(b), 017(c), 018(c) and 019(c)
In the matter of six appeals under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	Ellen Weir Greg Whynacht D'Arcy Lubin Ian R. Poyntz Catherine Willows Woodrow Michael Dix (on behalf of himself and the Cowichan Lake Recreational Committee Inc.)	APPELLANTS
AND:	Deputy Comptroller of Water Rights	RESPONDENT
AND:	Catalyst Paper Corporation	THIRD PARTY
AND:	Cowichan Watershed Society	PARTICIPANT
AND:	See Schedule A	LIMITED PARTICIPANTS
BEFORE:	A Panel of the Environmental Appeal Board: Robert Wickett, QC, Panel Chair Daphne Stancil, Member Douglas VanDine, Member	
DATE:	April 14-17, 2014 and June 3-5, 2014	
PLACE:	Langford and Victoria, BC	
APPEARING:	For the Appellants: Ellen Weir Greg Whynacht D'Arcy Lubin Ian R. Poyntz Catherine Willows Woodrow Michael Dix For the Respondent: For the Third Party: For the Participant: For the Limited Participants:	David Weir Greg Whynacht Brooke Hodson D'Arcy Lubin Ian R. Poyntz Catherine Willows Woodrow Brooke Hodson Michael Dix A.K. Fraser, Counsel Ben Naylor, Counsel Janice Walton, Counsel Krista Robertson, Counsel Only Brooke Hodson attended the hearing

APPEALS

[1] Ellen Weir, Greg Whynacht, D'Arcy Lubin, Ian R. Poyntz, Catherine Willows Woodrow, and Michael Dix (on behalf of himself and the Cowichan Lake Recreational Committee Inc.), appeal the May 30, 2013 Order of Approval (the "Order") of Brian Symonds, P.Eng., Deputy Comptroller of Water Rights (the "Deputy Comptroller"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry").

[2] The Order was issued pursuant to section 88(1)(h) of the *Water Act* (the "Act"), which empowers the Deputy Comptroller to "regulate, in person or through an officer or a water bailiff, and make orders with respect to the diversion, rate of diversion, time of diversion, storage, time of storage, carriage, distribution and use of water."

[3] The Order relates to the operation of a dam, a weir and gates located where Cowichan Lake drains into Cowichan River. The Order changes the operation of the existing "rule curve" governing the storage of water in, and the release of water from, Cowichan Lake into the Cowichan River under conditional water licences ("CWLs") 23085 and 29542, held by Catalyst Paper Corporation ("Catalyst").

[4] The Environmental Appeal Board has the authority to hear these appeals under section 92 of the *Act*. Section 92(8) of the *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.

[5] The Appellants request that the Board reverse the Order, or refer the matter back to the Deputy Comptroller for reconsideration.

[6] As the six appeals raise similar issues, they were heard together.

BACKGROUND

The CWLs

[7] Cowichan Lake is a large fresh water lake located on southern Vancouver Island, British Columbia. The lake is located in the Cowichan River watershed, and is the source of the Cowichan River. It is located in the Cowichan Valley Regional District (the "CVRD").

[8] Catalyst is the current holder of CWLs 23085 and 29542, which were issued in 1956 and 1965, respectively, to British Columbia Forest Products Limited. These CWLs authorize Catalyst to store a total of 49,700 acre feet per annum of water (61,304 cubic decametres per annum) in Cowichan Lake. Together, these licences are referred to in this decision as the "Storage Licences".

[9] The Storage Licences authorize the construction, maintenance and operation of storage works near the outlet of Cowichan Lake. The works consist of a boat lock, a weir, a dam, four control gates and a fish ladder that are used to regulate the lake's level and the water flow from the lake, into Cowichan River, for a portion of the year. The boat lock is located on the north shore of the lake and the weir is in the middle. The weir connects to an island. From the south side of the island to the south shore of Cowichan Lake are four control gates and the fish ladder.

[10] According to the Deputy Comptroller, British Columbia Forest Products Limited applied for the licences to ensure an adequate water supply for its Crofton Pulp Mill, located down the river. The works were constructed in 1956, and upgraded in 1965. The mill is now owned and operated by Catalyst.

[11] The Storage Licences support a diversion licence, CWL 22864, which was issued in 1956 to British Columbia Forest Products Limited, and is now held by Catalyst (the "Diversion Licence"). The Diversion Licence authorizes the diversion and use of a maximum of 100 cubic feet per second ("cfs") (2.83 cubic metres per second ("cms")) of water from Cowichan River for industrial purposes at the Crofton Pulp Mill.

[12] According to the Order, when British Columbia Forest Products Limited applied for the first storage licence in support of the Diversion Licence, it suggested a minimum controlled discharge from the weir of 250 cfs during the low flow months of the year, of which 100 cfs was to be diverted to the mill under the Diversion Licence. The remaining 150 cfs would be for other water users and to benefit fish propagation and migration.

[13] Clause (k) of both Storage Licences states:

The licensee herein shall maintain at its own expense a minimum flow of 250 cubic feet per second [7.08 cms] below the control weir.

[14] In addition, clause (l) of both Storage Licences states:

That if it is deemed in the public interest that other or additional works are required for flood control or other regulation of Cowichan Lake or Cowichan River, the works authorized under this licence may be altered or removed as directed by the Comptroller [of Water Rights] without cost to the licensee provided that any proposed works do not interfere with the amount of water to be diverted under this licence.

[15] Clause (m) of Storage Licence CWL 29542 states:

The licensee herein shall release water at such times and in such quantities as may be directed by the Comptroller of Water Rights, for the public benefit.

[Emphasis added]

Operation of the Weir and Gates

[16] The crest of the weir on Cowichan Lake is 162.37 metres, Geodetic Survey of Canada datum ("GSC")¹.

[17] The minimum lake elevation required to discharge the minimum flow of 250 cfs through the fully opened control gates is 161.40 metres GSC.

[18] The Storage Licences allow storage in the lake for the "whole year". However, according to the Ministry², water is not typically stored between November and April (the winter high inflow period) due to concerns that the operation of the weir might aggravate flooding of private properties located on the shore of Lake Cowichan. Also, there is sufficient water in the river during the winter months to meet the pulp mill's needs, without adversely impacting instream requirements. Therefore, over the winter, the control gates on the weir are fully open, so the winter lake level is a function of the inflow to the lake and the natural outlet river channel dimensions/restriction downstream of the weir. It is during the summer months that water storage and release to the river is more carefully controlled by the Ministry in order to achieve the minimum flow volume of 250 cfs. This control is achieved by opening and closing the gates, and depends on the levels of the lake and the volume of inflow.

[19] Over the years, the Comptroller (or regional water manager) provided the licensee with direction regarding how the storage works are to be operated, sometimes referred to as the operating regime. The current operating regime for Cowichan Lake storage is governed by a "rule curve" which has been in place since 1990 (the "1990 Operating Rule Curve").

The 1990 Operating Rule Curve

[20] The 1990 Operating Rule Curve requires the licensee to:

... maintain a full supply level of 162.37 meters G.S.C. datum [the crest of the weir] until approximately 9 July 1990, and target for elevation 162.22 [metres] at 1 August and 162.02 [metres] at 1 September ...

A minimum flow of 7 m³/sec [cms] must be maintained at all times regardless of lake levels.

[21] Catalyst describes the 1990 Operating Rule Curve as follows:

The Rule Curve mandates periods when Catalyst may not store water, and when it is required to operate the gates to achieve FSL [full storage level]³, or a specified target height below it. In this respect, it effectively mandates when the spill gates must be kept open, and when gates must be operated to achieve the prescribed Lake levels. The period between when Catalyst is required to close the gates and when the gates must be fully opened again, is referred to as the Control Period. It extends from

¹ All elevations in this decision use GSC datum, unless otherwise stated.

² "Cowichan Lake Weir Report on Proposed Amendment to Operational Rule Curve", July 2013 by John Baldwin.

³ The terms "fully supply level" and "full storage level" were used interchangeably. This decision uses "full storage level".

April 1 to November 5 of each year. Within the Control Period there is a mandated gradual “draw down” of the water levels (the “Draw Down Period”).

The Rule Curve also mandates minimum flows to be maintained during the Control Period.

[22] The 1990 Operating Rule Curve resulted from a “Cowichan Lake Operation Meeting” between representatives of the licensee, Fisheries and Oceans Canada (“DFO”) and the provincial Ministry of Environment, the minutes of which state:

The basic strategy for 1990 will be to maintain the full supply level until July 9, 1990, and then target for lake levels at or above the following values:

Jul 9 lake level 162.37 m GSC [the crest of the weir]

Aug 1 lake level 162.22 m GSC

Sep 1 lake level 162.02 m GSC

Sep 25 lake level 161.87 m GSC

The minimum flow from the start of control is to be 7 m³/s [cms].

Proposed Changes to the 1990 Operating Rule Curve

[23] The main impetus to changing the 1990 Operating Rule Curve was the Cowichan Basin Water Management Plan.

[24] In 2007, the Cowichan Basin Water Management Plan was prepared by Westland Resource Group Inc. for a partnership between six entities: the CVRD, the BC Ministry of Environment, the DFO, Catalyst, Cowichan Tribes and the Pacific Salmon Commission. The Water Management Plan was developed to “move beyond crisis decision making, prepare responses to the effects of climate change, and plan proactively for current and future water needs in the Basin.” In terms of the problems to be addressed, the plan states:

Seasonal fluctuations and unpredictable amounts of annual precipitation create water management challenges in the Basin. The Basin can experience flood in the winter and spring and droughts in summer and fall, when water demand is at its peak. In recent years, low summer water levels in the Cowichan River system have put fish populations at risk and threatened closure of the Catalyst Paper mill. These problems are likely to get worse in the future as climate change alters the hydrologic cycle of the Basin, bringing increasing winter rainstorms, less snow and earlier melt, and warmer summers. (page 3)

[25] The Water Management Plan recommended, among other things, changes to the 1990 Operating Rule Curve.

[26] In 2012, the CVRD asked the Ministry to establish a new Operating Rule Curve to govern water storage in Cowichan Lake and water release into Cowichan River, in order to increase operational flexibility, meet human needs and minimize impacts of low water levels.

[27] In early 2013, two proposed new Operating Rule Curves were considered by the Ministry, and a process of public notification and consultation ensued.

The Order

[28] On May 30, 2013, the Deputy Comptroller issued the Order adopting one of the two proposed new Operating Rule Curves. The other proposed new Operating Rule Curve, which included an additional 0.2 metres of water storage in Cowichan Lake, was rejected by the Deputy Comptroller because it required a water licence application for additional storage, and no such application was received.

[29] The changes to the 1990 Operating Rule Curve adopted by the Deputy Comptroller, and set out in the Order, stipulate the following:

1. In any given year the control of outflow through the Cowichan Lake storage works shall commence following the winter high water season and when the lake, on its falling stage, is approaching the full storage level of 162.37 metres, GSC. Control of outflow shall not commence prior to April 1st, unless otherwise approved in writing by the Comptroller of Water Rights or the Regional Water Manager.
2. After control of outflow commences and until control of outflow ceases, the licensee shall maintain a minimum outflow from Cowichan Lake of 250 cfs (7.08 cms) as specified in the storage licences, except when the release of a lesser outflow is otherwise approved in writing by the Comptroller of Water Rights or the Regional Water Manager.
3. After control of outflow commences the licensee shall operate the storage works to maintain the level of Cowichan Lake at or below the elevations specified below:
 - Prior to July 31st 162.37 metres
 - August 31st 162.06 metres
 - September 30th 161.76 metres
 - October 31st 161.45 metres
 - November 5th 161.40 metres
4. While under outflow control there may be periods of abnormally high inflow to Cowichan Lake during which the lake's elevation may temporarily rise above the lake elevations specified in section 3 of this Order. As far as practicable during these periods the licensee shall operate the storage works to prevent the rise exceeding the specified elevations by more than 0.10 metres and, thereafter, shall take the necessary and reasonable steps to return Cowichan Lake to the specified elevations in the shortest practicable time possible.

The Parties' and Participants' Positions on the Appeals

The Appellants

[30] All six Appellants own lakeshore property on Cowichan Lake, and all six seek to have the Order overturned.

[31] The Panel notes that the Appellants delivered written Notices of Appeal wherein they listed grounds of appeal that were not pursued in the hearing of the appeals. The Panel has, therefore, distilled the grounds of appeal as described below.

[32] Ms. Weir's relevant grounds of appeal are as follows:

- the Order is not authorized by the Storage Licences;
- the Order changes the intent of the Storage Licences sufficiently to require a water licence application for additional storage; and
- the Order does not consider potential damage to, or compensation for loss of, riparian areas.

[33] Based on their similar Notices of Appeal, the Panel has distilled Mr. Whynacht's and Mr. Lubin's relevant grounds of appeal as follows:

- the Order will result in continued shoreline erosion of property;
- the Order affects property rights and acts to expropriate lands; and
- the Order limits use of the properties.

[34] The Panel has distilled Mr. Poyntz's relevant grounds of appeal as follows:

- the Order affects property rights;
- the Order limits use of the property;
- the Order does not consider compensation; and
- the Order does not consider potential increased lake levels due to land use adjacent to the lake.

[35] The Panel has distilled Ms. Willows Woodrow's relevant grounds of appeal as follows:

- the Order affects property rights;
- the Order limits use of the property;
- the Order will result in more shoreline erosion; and
- alternatives to the Order were not considered.

[36] The Panel has distilled Mr. Dix's relevant grounds of appeal as follows:

- prior to the Order, there was not sufficient or appropriate public consultation;
- the Order increases the water storage volume;
- the Order changes the intent of the Storage Licences sufficiently to require a water licence application for additional storage; and

- the Order does not consider the rights of the lakeshore property owners.

Summary of Appellant's Concerns

[37] Having considered the foregoing, and having then considered the Appellants' evidence and submissions, the Panel concludes that the Appellants raise similar and complementary concerns. In essence, the Appellants' grounds for appeal fall under three broad headings:

1. The Deputy Comptroller lacked the jurisdiction to make the Order.
2. The process leading to the Order was unfair.
3. The Order is wrong on the merits.

[38] Specifically, the Appellants maintain that the Deputy Comptroller lacked the jurisdiction to make the Order because the Order increases the water storage volume in clause 4, contrary to the Storage Licences. In addition, the process was unfair because the Appellants were not given a fair opportunity to be heard; i.e., their particular concerns were neither heard nor taken into account by the Deputy Comptroller when he made the Order.

[39] Finally, the Order is wrong on its merits because it allows more water to be stored than is authorized by the Storage Licences (above full storage level of 162.37 metres), and allows more water to be stored in the lake for a longer period of time than was provided in the 1990 Operating Rule Curve (full storage for an additional three weeks from July 9th until July 31st). These allowances materially affect the Appellants' property rights and will result in the loss of use of the properties and loss of real property (e.g., by flooding and/or erosion). They submit that the Order results in expropriation without compensation.

[40] The Appellants further submit that this additional storage will occur when the lake levels are likely to be at their highest following spring run-off, which is also when they are most likely to use their properties to enjoy summer recreational activities.

[41] As stated above, the Appellants ask the Board to overturn the Order. If the Order is not overturned, they ask the Board to send the Order back to the Deputy Comptroller with directions to reconsider whether the Operating Rule Curve should:

- i) remain as stated in the Order,
- ii) return to the 1990 Operating Rule Curve, or
- iii) be amended in some fashion to take into account the Appellants' concerns.

The Respondent

[42] The Deputy Comptroller submits that there was adequate consultation with those affected. He submits that any impact on the lakeshore owners is minimal, because the Order simply allows a three-week delay in the commencement of the drawdown of the lake, whereas the benefit of meeting the minimum outflow obligations specified in the Storage Licences, and the benefit to Cowichan River, in particular the fishery, is "significant". In his prehearing submissions, the Deputy Comptroller stated that: "For

whatever reason the summer flow out of Cowichan Lake has declined, and the operation of the modified rule curve will to some extent mitigate the effects of that reduction.”

[43] He submits that the Order should be confirmed.

The Third Party

[44] Catalyst submits that it did not apply for the Order, nor has it made any application for amendments to its water licences. Nevertheless, it supports the Order because it understands that it is beneficial for fish, and that it will not materially impact local landowners.

The Participant

[45] In a letter dated August 15, 2013, the Cowichan Watershed Society (“CWS”), formerly the Cowichan Water Board, applied to participate in the appeals.⁴ The CWS is an advisory board to the CVRD and the BC Conservation Foundation. It applied to participate in the appeals on the ground that its “mandate is to provide leadership for sustainable water management to protect and enhance environmental quality and the quality of life in the Cowichan watershed and adjoining areas.” It also explains in its application:

The [CWS’s] objective is to uphold the Order, and ensure that the [Environmental Appeal] Board is properly informed on the need and rationale for the application of the ‘rule band’ protocol as an interim measure to ensure that the ecological, cultural, environmental, social and economic values attributable to a healthy Cowichan River are maintained.

[46] In a decision dated October 24, 2013, the Board granted CWS’s application (see *Weir et al. v. Deputy Comptroller of Water Rights* (Decision Nos. 2013-WAT-013(a), 015(b), 016(a), 017(b), 018(b) and 019(b))).

[47] The CWS submits that the Order changes the 1990 Operating Rule Curve in ways that are necessary to maintain ecological, social and economic values in the Cowichan River, and that the Order will not cause adverse effects on the lakeshore properties. It submits that the Order was made in accordance with the *Act* and is fair and reasonable in the circumstances. If there are any adverse effects on the lakeshore properties, the CWS submits that they will be “minimal”.

[48] The CWS submits that the Order should be confirmed.

The Limited Participants

[49] On July 25, 2013, the Board sent out a “Notice to Persons Potentially Affected by Appeals” to over 800 people that were identified by the Deputy Comptroller as being

⁴ For consistency, this decision refers to this entity as the CWS, not the Cowichan Water Board.

potentially affected by the Board's decision on the appeals. The Board invited the recipients of the Notice to advise, in writing, whether they wished to participate in some manner in the appeals, and to advise on the extent that they may be impacted or affected by the subject matter of the appeals. Once the Board obtained this information, it advised that it would decide what level of participation would be granted to the person.

[50] In October of 2013, the Board granted Limited Participant status to the CVRD, 32 individuals, and one individual representing both himself and Friends of the Cowichan, for a total of 34. The Board offered these Limited Participants the following:

- The Board would provide their individual letters explaining how the Order may impact them to the hearing Panel.
- The Board would notify the participants of the date and time of the hearing.
- Some of the Limited Participants were offered an opportunity to either make a short oral presentation at the hearing or make a further written submission. The participant had to advise the Board of his or her choice upon receipt of the Notice of Hearing. Others were offered an opportunity to make a written submission only.

[51] The Panel has considered all of the Limited Participants' original letters in accordance with the Board's directions above, even if not specifically referenced in this decision. Of the 34 Limited Participants, 26 were opposed to the Order, four were in support of the Order, and four took no position with respect to the Order.

[52] Four Limited Participants advised that they would participate in the oral hearing: Brooke Hodson (oral submission), Joe Saysell and Friends of the Cowichan (oral submission), Dianne Martin (written submission), and Eric and Alva Avison (written submission). Of these Limited Participants, only Mr. Hodson appeared before the Panel at the hearing. Mr. Hodson opposes the Order. Mr. Saysell did not appear, but sent a late written submission that the Panel did not accept. Ms. Martin and Mr. and Ms. Avison did not deliver a written submission.

RELEVANT LEGISLATION

[53] The following definitions are relevant to these appeals:

[54] Section 1 of the *Act* defines "natural boundary" as follows:

"natural boundary" has the same meaning as in the *Land Act*

[55] The *Land Act*, R.S.B.C. 1996, c. 245, defines "natural boundary" as "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."

[56] In addition, the following sections of the *Act* are relevant to these appeals:

Vesting water in government

- 2(1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

Objections to applications

- 11(1) A licensee, riparian owner or applicant for a licence who considers that his or her rights would be prejudiced by the granting of an application for a licence may, within the prescribed time, file an objection to the granting of the application.
- (2) The comptroller or the regional water manager has authority to decide whether or not the objection warrants a hearing, and he or she must notify the objector of his or her decision.
- (3) If the comptroller or the regional water manager decides to hold a hearing, the applicant and objectors are entitled to be notified, to be heard and to be notified of his or her decision following the hearing.

...

Powers of comptroller and regional water manager

- 85(1) In addition to the other powers given under this Act, the comptroller may at any time do any act or thing that a regional water manager, engineer or officer is empowered to do under this Act.
- (2) In addition to the other powers given under this Act, a regional water manager may at any time do any act or thing that an engineer or officer is empowered to do under this Act.

...

Powers of engineers and officers

- 88(1) In addition to all other powers given under this Act, an engineer may do one or more of the following:

...

- (h) regulate, in person or through an officer or a water bailiff, and make orders with respect to the diversion, rate of diversion, time of diversion, storage, time of storage, carriage, distribution and use of water;

...

ISSUES

[57] The following issues arise from the appeals:

1. Did the Deputy Comptroller have the jurisdiction to make the Order?

2. Did the Deputy Comptroller engage in a procedurally fair process prior to making the Order?
3. Is the Order reasonable in the circumstances?

DISCUSSION AND ANALYSIS

1. Did the Deputy Comptroller have the jurisdiction to make the Order?

[58] The Appellant, Mr. Dix, submits that clause 4 of the Order authorizes additional storage within Cowichan Lake, contrary to the Storage Licences. Clause 4 is repeated for convenience as follows:

4. While under outflow control there may be periods of abnormally high inflow to Cowichan Lake during which the lake's elevation may temporarily rise above the lake elevations specified in section 3 of this Order. As far as practicable during these periods the licensee shall operate the storage works to prevent the rise exceeding the specified elevations by more than 0.10 metres and, thereafter, shall take the necessary and reasonable steps to return Cowichan Lake to the specified elevations in the shortest practicable time possible.

[59] Mr. Dix submits that the Deputy Comptroller acted without jurisdiction in crafting clause 4 of the Order because the effect of clause 4 is to authorize water storage in Cowichan Lake in excess of the full storage level authorized by the Storage Licences (i.e., the crest of the weir, or 162.37 metres).

[60] Mr. Dix submits that, because no application was made to the Deputy Comptroller to increase the storage level of the lake, it is beyond the Deputy Comptroller's jurisdiction to, in effect, increase the maximum storage level in the lake by 0.10 metres without first requiring an application to be made, and giving all interested parties a full opportunity to respond to such an application. Mr. Dix submits that the Deputy Comptroller had no jurisdiction to issue an Order that contradicts the Storage Licences.

[61] The Deputy Comptroller, Catalyst and the CWS submit that clause 4 of the Order only changes the operating process within which the storage limits set out in the Storage Licences are managed. They further submit that clause 4 of the Order does not authorize an additional 0.10 metres of storage water in Cowichan Lake; rather, it only permits the licensee to act reasonably in operating the gates of the weir to prevent undue damage to downstream values in the event of abnormally high water inflow into the lake, or a flood event on the lake. Therefore, no application to amend the licences was required.

[62] They further submit that the licensee must be given some flexibility to operate the gates of the weir in these circumstances, keeping in mind that the operator's ultimate obligation is to ensure that Cowichan Lake is returned to its full storage level as reflected in the Storage Licences.

Panel's Findings

[63] The Panel agrees with the Deputy Comptroller, Catalyst and the CWS. Clause 4 of the Order does not authorize additional storage. It is clear that clause 4 is intended to address a practical concern that, due to high water inflow or a flood event beyond the control of the licensee, the water level of Cowichan Lake may rise above the elevations set out in clause 3 of the Order. In such circumstances, the licensee is obliged (within the 0.10 metres range and in the time frame stipulated) to release water into the Cowichan River and return the lake to the levels mandated by clause 3 of the Order. Clause 4 addresses the process by which the licensee is to achieve the levels mandated by clause 3 of the Order: it does not authorize the licensee to increase the storage level of water in the lake.

[64] The Panel concludes that clause 4 of the Order does not require an amendment application, or constitute an amendment to the Storage Licences, because it does not authorize the additional storage of water. Therefore, the Panel finds that the Deputy Comptroller did not exceed his jurisdiction by inserting clause 4 into the Order.

[65] This ground of appeal is dismissed.

2. Did the Deputy Comptroller engage in a procedurally fair process prior to making the Order?

[66] The Appellants submit that they did not receive a fair opportunity to be heard by the Deputy Comptroller before he issued the Order. They assert that the process was unfair and that the Deputy Comptroller should have convened a hearing pursuant to section 11 of the *Act* to consider all relevant evidence and submissions.

Should the Panel consider this procedural fairness issue given the nature of the appeal hearing?

[67] The Panel heard all of the witnesses and received all of the parties' submissions on the merits of the Order. This was not an appeal "on the record" before the Deputy Comptroller: the Panel heard evidence that was not before the Deputy Comptroller when he issued the Order. In addition, the Panel has the power to make a new decision on the basis of all the evidence. As a result, it is arguable that any defects in the Deputy Comptroller's decision-making procedure would (or could) be "cured" by the hearing before the Panel.

[68] In this case, however, one of the remedies sought by the Appellants is a request that the Panel send the Order back to the Deputy Comptroller to reconsider whether the Operating Rule Curve should:

- i) remain as stated in the Order,
- ii) return to the 1990 Operating Rule Curve, or
- iii) be amended in some fashion to take into account the Appellants' concerns.

[69] In these circumstances, the Appellants submit that the hearing before the Panel might not "cure" any defects in the original decision-making process, if any. They submit that the lack of a fair opportunity to be heard before the Deputy Comptroller

constitutes a sufficient ground to refer the matter back to the Deputy Comptroller to reconsider the Order, with directions.

[70] The Deputy Comptroller's evidence and arguments at the hearing focussed on his decision-making process, not on the merits of the Order. In his view, he was not there to defend the Order as being correct; rather, his evidence would show that the process was fair, and that the terms of the Order are within the range of decisions that were reasonably available to him.

[71] Having regard to all of the above, the Panel will consider the Appellants' concerns about the process as a stand-alone ground of appeal.

Events Leading to the Order

[72] Prior to considering the evidence and submissions of the Appellants on this issue, it is necessary to describe the framework within which the process began.

[73] One Storage Licence and the Diversion Licence have been in existence since 1956; the other Storage Licence since 1965. Since that time, there has been an increase in the resident population in the Cowichan Lake area and downstream along the Cowichan River. The types, and numbers, of water users have increased, and changes in climatic conditions have contributed to lower inflows of water into Cowichan Lake. As a consequence, there are competing demands for use of the water. For example, Catalyst is authorized by the Diversion Licence to divert water from the Cowichan River for use in its pulp mill. Catalyst is also obliged by the Storage Licences to ensure at least 7.08 cms of water flow into the Cowichan River. In times of low water inflow into Cowichan Lake, Catalyst may find it difficult, or impossible, to maintain the 7.08 cms of flow into the river. In these circumstances, downstream water users may be affected. The downstream water users include: First Nations who rely on the fisheries of the watershed, other persons who rely on the substantial local commercial and sport fishery and tourism along the Cowichan River, and the Town of Crofton.

[74] The increases in population, the number and diversity of water users, and climate change, have resulted in heightened public interest in maintaining an appropriate level of storage in Cowichan Lake, and ensuring appropriate water flow in the Cowichan River throughout the year.

[75] In the recent past, the CWS has received submissions and proposals from a variety of interest groups concerned that, in the late summer and early fall (before the fall rains begin), the water flow from Cowichan Lake into the Cowichan River has decreased, resulting in negative downstream effects. As a consequence, the CWS concluded that steps had to be taken to increase the water flow in the Cowichan River during this period of the year.

[76] The BC Conservation Foundation commissioned Kerr Wood Leidal ("KWL"), consulting engineers, to study the situation and to propose a remedy. During a meeting in November 2012, KWL presented its findings and a proposal to the CVRD. It then set out its findings and proposal in a technical memorandum dated December 17, 2012 (the "Technical Memo"). In that memo, KWL proposed that the 1990 Operating Rule Curve be changed to increase the full storage level by 0.20 metres.

[77] In a special meeting of the CVRD on November 30, 2012, the CVRD passed a resolution that it would support “a decision of the Province of British Columbia, or an application to the Province of British Columbia” to implement the plan prepared by KWL; specifically, it supports changing the 1990 Operating Rule Curve by increasing the full storage level of Cowichan Lake by 0.20 metres.

[78] Subsequent meetings between representatives of the Deputy Comptroller, Catalyst, the DFO, the CVRD, and KWL were held to ensure that all parties had a complete understanding of the KWL proposal.

[79] The Deputy Comptroller determined that there could be no increase in the full storage level of Cowichan Lake without an amendment to the Storage Licences. However, to amend the licences, he required an application for the additional storage.

[80] In December 2012, Catalyst advised the Deputy Comptroller that it did not intend to apply for an amendment to the Storage Licences, nor would it apply to change the 1990 Operating Rule Curve. Catalyst indicated, however, that it would support a change to the 1990 Operating Rule Curve.

[81] Thereafter, in January 2013, KWL developed a second proposal to change the 1990 Operating Rule Curve. The second proposal eliminated any increase in the full storage level, but proposed a delay of the date on which Catalyst could begin drawdown from the full storage level of Cowichan Lake from July 9 to July 31.

[82] On receipt of KWL’s second proposal, documented in a letter to the CWS dated February 8, 2013, and with some assistance from the CVRD, the Deputy Comptroller undertook the following activities in February and March 2013 to publicize and explain the proposed changes to the 1990 Operating Rule Curve, and to solicit input. The Deputy Comptroller:

- Created a Ministry website describing both of KWL’s proposals. The website contained a mechanism for individuals to provide comments. This website also provided a link to a CVRD website of various LiDAR⁵ images that illustrated various Cowichan Lake elevations on properties around the lake.
- Advertised both proposed changes, including a process for the public to provide comments, in two newspapers (the Times Colonist and the Cowichan Valley Citizen).
- Sent letters to all of the Cowichan Lake lakeshore property owners describing both proposals and seeking their input.
- Referred both proposals for comment to six First Nations with land claims in the Lake Cowichan area.
- Referred both proposals for comment to BC Parks, the Provincial Fish, Wildlife and Habitat Branch, and the DFO.
- Advertised and held a public meeting in Lake Cowichan on March 9, 2013 to provide background information and present both proposals. The Deputy

⁵ LiDAR is Light Detection and Ranging, an airborne remote measuring technique.

Comptroller added the presentations made at the meeting to the website sometime after the March meeting.

- The March 9, 2013 public meeting included a verbal question and answer session, and allowed written questions to be submitted at the end of the meeting. The Deputy Comptroller considered these questions as indications of the level of acceptance, or rejection, of the proposals.

[83] Following the March 9th public meeting, the Deputy Comptroller received 14 letters of objection to the proposed changes to the 1990 Operating Rule Curve from lakeshore property owners. All of the letters identified a concern with the effect of the proposed increase in lake levels on their properties. From the property owners' perspectives, increasing the full storage level, and/or maintaining the lake at the licenced full storage level for a longer period of time, increased the risk of flooding and erosion of their properties.

[84] Upon receipt of the letters of objection, the Deputy Comptroller directed one of his senior staff, John Baldwin, Watershed Stewardship Officer, to visit 10 of the lakeshore properties to speak to the property owners, take photographs of the properties from the lake and from the land, consider what might be done to mitigate their concerns, and report back to him.

[85] Mr. Baldwin visited the properties and took photographs in late April and early May 2013 and provided the Deputy Comptroller with his hand-written notes of the discussions that he had with the property owners, and his annotated date-stamped photographs of the lakeshore properties.

[86] Following the process described above, the Deputy Comptroller concluded that KWL's proposal to change the 1990 Operating Rule Curve by delaying drawdown from the licenced full storage level on the Cowichan Lake from July 9 to July 31 each year, would not materially affect the rights of the lakeshore property owners, and that it was in the public interest to do so.

[87] The Deputy Comptroller issued the Order. He then notified each of the lakeshore property owners by registered letter dated June 4, 2013, including the Appellants. The letter indicated that the Order was based on the existing Storage Licences, that no hearing would be held under the *Act*, and that the property owners had a right to appeal the Order to the Board.

[88] The Appellants acknowledge that these steps were taken by the Deputy Comptroller, but they raise a number of specific concerns with respect to the fairness of the process.

The Appellants' Evidence and Submissions

[89] The Appellants submit that the public meeting of March 9, 2013 was poorly conducted for a variety of reasons: there was very little opportunity for those who had concerns to ask questions, to make comments, and/or to raise objections. This impacted their ability to better understand both proposals and their potential effects.

[90] Several Appellants testified that supporters of either, or both, proposals to change the 1990 Operating Rule Curve were given substantially more time to voice their opinions than those who were expressing contrary opinions. For example, Mr.

Whynacht testified that the CVRD employees were given substantial time to ask multiple questions and make comments, while those opposed were limited in the number of, or the time for, questions or comments. Other Appellants gave similar evidence.

[91] Several Appellants testified that they were uncertain about which of the two proposals the Deputy Comptroller was favouring and, therefore, what effects, if any, they could expect on their lakeshore properties.

[92] The Appellants' state that they came away from the March 9, 2013 meeting believing that the meeting was "fixed", and that their concerns and opinions were not going to be considered by the Deputy Comptroller when he made his decision. In particular, the Appellants note that the Deputy Comptroller arranged for the following individuals to present information and hear public input at the March 9, 2013 meeting, in addition to himself:

- Rob Belanger, representative of Catalyst;
- Ron Ptolemy, representative of the Ministry;
- Kim Hyatt, representative of the DFO;
- Craig Sutherland, representative of KWL;
- Rob Hutchins, representative of the CVRD; and
- Rob Grant, representative of the CVRD.

[93] The Appellants submit that all of these individuals were predisposed to approve and support the proposals, and that none of them were there to advocate for the interests of the Cowichan Lake lakeshore property owners.

[94] The Appellants submit that the Deputy Comptroller ought to have convened a formal hearing under the *Act* to receive a fair and balanced presentation of the issues.

[95] As indicated above, several of the Appellants were visited at their properties by Mr. Baldwin at the Deputy Comptroller's direction. Those Appellants who were visited by Mr. Baldwin were satisfied that he treated them in a fair manner, and that he took note of their concerns about the effect of proposed changes to the 1990 Operating Rule Curve on the use and enjoyment of their properties. They submit, however, that these concerns were not reflected in the Order. In the Appellants' view, the Deputy Comptroller simply ignored their concerns in favour of the concerns of others.

[96] Several of the Appellants maintain that the Order has the effect of expropriating their properties by causing Cowichan Lake to remain at an artificially high storage level. Although not expressed directly by the Appellants, the Panel took these submissions to mean that, in such circumstances, the Deputy Comptroller ought to have offered a full and fair hearing before he made his decision.

The Respondent's Evidence and Submissions

[97] As indicated above, the Deputy Comptroller did not seek to defend the merits of the Order; rather, his evidence and submissions focussed on the decision-making

process. He submits that he provided a fair and balanced public consultation process to the Appellants.

[98] The Deputy Comptroller further submits that his decision was within the realm of reasonable decisions available to him. In making this submission, the Deputy Comptroller did not dispute that the Panel was entitled to hear evidence and render a fresh decision on the issue.

[99] The Deputy Comptroller submits that the degree of procedural fairness depends on the nature of the issue to be decided. In this instance, because there was no statutory process for the Deputy Comptroller to follow, he submits that he was obliged to provide procedural fairness as defined by the common law.

[100] The Deputy Comptroller considered that the three-week delay in the drawdown from the full storage level of Cowichan Lake (from July 9 to July 31) would have very little effect on the Appellants' lakeshore properties. Further, in his view, the Order would only affect the Appellants' properties during years when Cowichan Lake was at full storage level on July 9 and could, by operation of the weir, be retained at that level until July 31, a situation that would not occur every year.

[101] The Deputy Comptroller concluded the only effect on the Appellants' properties would be that, for three additional weeks of the year, the lake could be retained at the full storage level permitted by the Storage Licences, a level that has been in place for more than 40 years.

[102] The Deputy Comptroller does not believe that the Order results in an expropriation of lakefront property. He submits that, irrespective of the legal descriptions of the properties, the water level on Cowichan Lake would not exceed the full storage level permitted by the Storage Licences. In the circumstances, he submits that the Order could not possibly result in an expropriation of property.

[103] The Deputy Comptroller further submits that there was no legal requirement to conduct a hearing in respect of the proposed Order. Further, it would have been unreasonable to conduct a multi-day hearing in respect of the proposed Order when, in his view, the proposed Order would have so little effect on the Appellants' properties, and on the Appellants themselves.

The Panel's Findings

[104] In *Elsie Mychaluk v. Deputy Comptroller of Water Rights* (Appeal No. 2001-WAT-006, July 19, 2002) (unreported), the Board considered how to determine the amount of procedural fairness that may be owed to a person in a particular situation. The Board states as follows at pages 16-17:

What "natural justice" and "procedural fairness" mean substantively depend on the particular context? The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (hereinafter *Baker*) recently provided an "overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers": D. J. Mullen, *Administrative Law* (2001).

Madame Justice L'Heureux-Dubé, writing for the majority in *Baker*, affirmed that a duty of fairness is triggered if the decision is administrative and affects the rights, privileges or interests of an individual. The content of the duty of fairness owed by a person exercising statutory authority varies, however, depending on the context of the particular decision and its statutory, institutional and social context. At paragraphs 21-27 of the decision, she discusses five non-exhaustive factors that are relevant in determining the content of the duty of fairness in a particular case:

- (1) the nature of the decision being made and process followed in making it;
- (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- (3) the importance of the decision to the individual or individuals affected;
- (4) the legitimate expectations of the person challenging the decision; and
- (5) the choices of procedure by the agency itself.

[105] Regarding the factor identified in (3) in the previous paragraph, the Court states in paragraph 25 of *Baker*:

The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

[106] At paragraph 33 of the judgment, the Court in *Baker* addresses oral hearings. It states:

... it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.

[107] *Baker* was an immigration case. An order had been made to deport Ms. Baker. She applied to stay in Canada on humanitarian and compassionate considerations, one of which was that her children had been born in Canada. Her application was denied on the basis of written submissions. Regarding procedural fairness, the Court found at paragraph 101:

Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements

of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

[108] The Panel has considered the factors from *Baker* and concludes that the public consultation process to change the 1990 Operating Rule Curve, as ordered, attracted a degree of procedural fairness at the lower end of the spectrum, as it did in *Baker*. The Panel reaches this conclusion because, as it will be discussed in more detail in the next section, the proposed change can be implemented within the existing Storage Licences, licences which established the full storage levels in 1956 and 1965. The Order does not increase the full storage level of Cowichan Lake and, even if it did, it is not a foregone conclusion that an oral hearing would be required. It would depend on the nature of the increase and various other factors.

[109] The Panel acknowledges the possibility that the retention of water at the full storage level in Cowichan Lake for a period of three weeks longer than authorized by the 1990 Operating Rule Curve may affect the Appellants' use and enjoyment of their lakeshore properties. This additional period of storage occurs in July, which is a prime time when the Appellants might be expected to enjoy the recreational values of their lakeshore properties.

[110] Regarding the Appellants' submissions on the expropriation of their properties, the Panel concludes that the Order could not possibly result in an expropriation. As will be discussed in more detail in the next section, the Appellants' property rights end at the "natural boundary" of the lake, which is close to the high water mark of the lake. Below the natural boundary, the property belongs to others. The Panel agrees with the Deputy Comptroller that the Order could not have the effect of changing the natural boundary of Cowichan Lake so as to affect the property rights of the Appellants.

[111] Having said this, the Panel concludes that the potential impacts of the Order on recreational values and, possibly, erosion, are of sufficient importance that the Deputy Comptroller owed the Appellants notice of the proposed Order, and an opportunity to express their views on the proposed Order and how it may impact them and/or their properties.

[112] The Panel concludes that the Deputy Comptroller provided the Appellants with a fair and appropriate opportunity to do so. The Deputy Comptroller took reasonable steps to publicize the proposed changes to the 1990 Operating Rule Curve, and to give the Appellants an opportunity to express their concerns and opinions. The Ministry's website provided a detailed description of the proposed changes and set out the process for filing written comments or objections. In addition, it advertised both proposed changes and the process for public comment in two newspapers, and it sent a letter to each waterfront owner. It also held a public meeting on March 9, 2013.

[113] The Appellants submit that the public meeting was unsatisfactory because some of the Appellants were not able to ask questions or express their concerns or opinions; others were limited in their ability to pose questions and their questions were not

answered. The Panel concludes that the process was not unfair. Based upon the evidence before the Panel, the Deputy Comptroller presented background material and both proposals at the public meeting and held a verbal question and answer session. Even if some people were not able to ask their questions during the meeting, the Deputy Comptroller allowed written questions/comments to be submitted at the end of the meeting for his consideration. The Deputy Comptroller testified that he considered the comments made during the meeting, and those made through the written questions/comments provided to him at the end of the meeting.

[114] In addition, the Deputy Comptroller directed Mr. Baldwin to visit many of the Appellants' properties in order to identify their concerns, and obtain information about the lake level at full storage in relation to the Appellants' lakeshore properties. Mr. Baldwin's hand-written notes of the discussions that he had with the property owners, and annotated photographs of their lakeshore properties, were provided to the Deputy Comptroller for his consideration.

[115] The Panel concludes that the Appellants were given notice of the proposed changes and were afforded a reasonable and sufficient opportunity to be heard on the matter in light of the interests at stake, and the potential effect of the decision on their interests. Based upon the factors in *Baker*, an oral hearing was not required to meet the legal test of procedural fairness. The fact that the Deputy Comptroller decided to issue the Order does not mean that the process was unfair.

[116] In summary, the Panel concludes that the Deputy Comptroller engaged in a procedurally fair process prior to making the Order.

[117] This ground of appeal is dismissed.

3 Is the Order reasonable in the circumstances?

[118] The Appellants submit that the Order is unreasonable and should not have been issued. They argue that the Deputy Comptroller's decision to issue the Order is flawed because:

- a) there are no "legitimate" downstream benefits sufficient to justify the Order;
- b) the Order will result in increased flooding on the Appellants' lakeshore properties; and
- c) the Order will result in increased erosion on the Appellants' lakeshore properties.

[119] The Appellants submit that the latter two issues constitute an unlawful expropriation of their lands. They further submit that, if the Deputy Comptroller had appropriately considered the evidence, he would not have issued the Order.

a) There are no "legitimate" downstream benefits sufficient to justify the Order.

The Appellants' Evidence and Submissions

[120] Ms. Weir, Mr. Lubin and Mr. Poyntz did not make any submissions directly related to downstream benefits resulting from the Order.

[121] Mr. Whynacht, Ms. Willows Woodrow and Mr. Dix identified the downstream beneficiaries of the Order as being:

- fish and fish habitat along the Cowichan River,
- Catalyst for industrial purposes at the Crofton Pulp Mill,
- the Town of Crofton for water supply and sewage effluent dilution, and
- other water licensees and water well users along the Cowichan River.

[122] Mr. Whynacht and Ms. Willows Woodrow submit that at least one of these beneficiaries and users is illegitimate, and should have been discounted by the Deputy Comptroller. In support, Mr. Whynacht called Brooke Hodson as a witness.

[123] Mr. Hodson is a past Regional Director for the CVRD and a Limited Participant in the appeals. He understands that a portion of the water authorized by Catalyst's Diversion Licence is being used for the Town of Crofton's sewage effluent dilution system. In his view, this is an illegitimate use of water from the river and should not have been considered as a factor in support of changes to the 1990 Operating Rule Curve.

[124] Mr. Dix also takes issue with the water being used by the Town of Crofton for dilution of sewage effluent. He submits that this is an abuse of Catalyst's Diversion Licence. Mr. Dix submits that the change to the 1990 Operating Rule Curve facilitates additional water into the river for an illegitimate purpose.

The Respondent's Evidence and Submissions

[125] The Deputy Comptroller called John Baldwin as a witness. Mr. Baldwin is a Watershed Stewardship Officer with the Ministry, and is currently responsible for public safety with respect to dams and dikes. His jurisdiction includes Cowichan Lake and Cowichan River. Mr. Baldwin assisted the Deputy Comptroller by attending meetings, conducting research, and assisting with the public consultation associated with the proposed Order.

[126] In July 2013, Mr. Baldwin prepared a formal Ministry report titled "Cowichan Lake Weir Report on Proposed Amendment to Operational Rule Curve" that summarized the background and process that lead to the Order. Mr. Baldwin testified that, in his opinion, the downstream beneficiaries of the Order are fish and fish habitat along the Cowichan River, Catalyst for industrial purposes at the Crofton Pulp Mill, and the Town of Crofton for municipal use.

[127] Mr. Baldwin referred to the Storage Licences and, in particular, section (k) of both licences. Section (k) requires Catalyst to "maintain at its own expense a minimum water flow of 250 cubic feet per second [7.08 cms] below the control weir ...".

[128] Mr. Baldwin testified that, if the water flow in the Cowichan River downstream of the weir is less than 7.08 cms, fish and fish habitat will be negatively affected.

[129] Mr. Baldwin also referred to the Diversion Licence. In particular, he referred to sections (e) and (j). Section (e) permits Catalyst to divert a maximum of 100 cubic

feet per second [2.83 cms]. Section (j) prohibits Catalyst from reducing the flow below 100 cubic feet per second unless it first receives permission. Section (j) states:

The diversion of water permitted under this licence shall not reduce the remaining flow in the Cowichan River below the point of diversion to a quantity less than 100 cubic feet of water per second [2.83 cms] without the permission of the Comptroller of Water Rights, first being obtained.

[130] Mr. Baldwin referred to section 34(1) of the *Act* in response to the Appellants' argument that the Town of Crofton's use of the water is "illegitimate". This section gives the comptroller of water rights or a regional water manager the authority to allow Catalyst to divert some of the water from its Diversion Licence to the Town of Crofton. It states:

Power to authorize extension of rights under a licence

34(1) If the comptroller or regional water manager considers that no other supply is available at reasonable cost, the comptroller or regional water manager may authorize a licensee to use or supply water for use for other purposes or on other land than specified in the licence and may set the terms on which the water is to be used or supplied.

[131] Pursuant to this section previous Deputy Comptrollers of Water Rights authorized the licensee to supply water from the Diversion Licence to the District of North Cowichan for waterworks purpose in accordance with the terms of a 1999 Agreement between the licensee and the District. The most recent section 34 authorization was granted in 2000 on the basis that "no other supply of water is available to the District at reasonable cost".

[132] The Deputy Comptroller also gave evidence. He testified that the requirement for Catalyst to maintain a water flow of 7.08 cms in the Cowichan River downstream of the weir is primarily for the benefit of fish and fish habitat in the river. His objective is to maintain these downstream benefits, and the method to achieve this is through the Catalyst licences.

[133] The Deputy Comptroller testified that the DFO supported the Order because it gives Catalyst more flexibility in the control of the Cowichan Lake levels, and Cowichan River flows, to achieve a minimum water flow of 7.08 cms downstream of the weir throughout the year.

[134] The Deputy Comptroller testified that, without the changes to the 1990 Operating Rule Curve reflected in the Order, there will be negative effects on the Cowichan River, and authorized downstream users will be negatively impacted.

[135] The Deputy Comptroller noted that the Storage Licences contain references to the public interest in clause (l). Moreover, in CWL 29542, clause (m) states:

The licensee herein shall release water at such times and in such quantities as may be directed by the Comptroller of Water Rights, for the public benefit.

[136] The Deputy Comptroller stated that, in addition to the provincial government, the CWS and the CVRD represent the public interest, and they fully support the proposed changes to the 1990 Operating Rule Curve. He noted that "the public

interest" is not only limited to the interests of the Appellants. It also covers the interests of others, including those persons and groups dependent on maintaining a minimum water flow of 7.08 cms in the Cowichan River throughout the year.

[137] In cross-examination, the Deputy Comptroller said that he did not consider the water flow in Cowichan River downstream of the Catalyst point of diversion, and that he did not know whether there are other points of diversion downstream of Catalyst's point of diversion.

The Third Party's Evidence and Submissions

[138] Catalyst did not make any submissions related to downstream benefits resulting from the Order.

The Participant's Evidence and Submissions

[139] The CWS called Craig Sutherland, P.Eng., as an expert witness in water resources engineering. The Panel qualified Mr. Sutherland as an expert in the hydrology of Cowichan Lake and Cowichan River; specifically, the operation of the Cowichan Lake weir and effects on the hydrology of Cowichan Lake and the Cowichan River. Mr. Sutherland is employed by KWL, consulting engineers. Mr. Sutherland was the prime author of KWL's December 17, 2012 Technical Memo, prepared for the BC Conservation Foundation. Mr. Sutherland provided hydrological expertise which the Deputy Comptroller considered when he made his decision to issue the Order.

[140] In the Technical Memo, Mr. Sutherland noted that, historically, spring/summer inflows into Cowichan Lake have decreased:

The trend in seasonal inflows to Cowichan Lake appears to be decreasing over the last several decades. A review of historical inflow records indicates that average spring/summer inflows (April to September) have reduced by about 17% since 1953 (KWL, 2011). Moreover, average summer (June to September) inflows have declined by 35% during the period 1955 to 2008 (Chapman 2011) [sic]. As a result, operation of the Catalyst Paper Corporation's (Catalyst Paper) weir at the outlet of Cowichan Lake has required that summer flows released to the Cowichan River be frequently reduced below the water licence condition of 7 m³/s [cms] in order to maintain lake storage in support of the Crofton pulp mill operation, and to meet fisheries conservation requirements.

[141] Mr. Sutherland testified that, with continuing climate change, this trend is likely to continue. He also testified that balancing Cowichan Lake levels and Cowichan River discharge can be challenging during the summer period.

[142] In regard to the Order, Mr. Sutherland testified that the Order improves the reliability of maintaining the Cowichan River water flow at 7.08 cms, without having to raise the height of the weir. From hydrological modeling, he estimates that, with the 1990 Operating Rule Curve, the target water flow of 7.08 cms in the Cowichan River was achieved approximately 40% of the time. Once the Order comes into effect, the target water flow will be achieved 60% of the time. He further testified that modelling predicts that, with the reduced inflows into Cowichan Lake, the lake will remain at full

storage level on July 30 only about 10% of the time. For the remaining 90% of the time, despite the Order, the level of the lake will be less than the full storage level.

[143] The CWS also called Brian Tutty, RP.Bio., to give expert evidence. Mr. Tutty is a retired Fisheries and Oceans Canada scientist that has been associated with fisheries stewardship of the Cowichan River since 2003. Mr. Tutty was qualified by the Panel as an expert in fisheries biology, with a specialty in fish habitat with respect to fisheries management in the Cowichan Watershed Basin.

[144] Mr. Tutty testified that the Cowichan River is, with respect to fish and fisheries stewardship, a "world class river". He testified that it is very important to the maintenance of fish and fish habitat that a minimum water flow of 7.08 cms be maintained in the Cowichan River in the summer and early fall months when conditions are dry. He also testified that there must be two pulses⁶ of water released in the fall, with water flows of 16 cms for 30 hours, to encourage fish to return to the Cowichan River to spawn.

[145] Mr. Tutty testified that lower water flows in the Cowichan River are associated with higher water temperatures, a condition that is less desirable for fish. He also noted that adequate water flow in the Cowichan River, between the BC Highway 1 bridge (in Duncan) and the Cowichan River estuary, is very important to encourage fish to return to the river from the ocean to spawn.

[146] Mr. Tutty believes that approximately one-half of the water flow of the Cowichan River between the BC Highway 1 bridge and the Cowichan River estuary is infiltrating into groundwater aquifers.

[147] Finally, Mr. Tutty testified that the external environmental pressures on fish and fish habitat in the Cowichan River have increased since European settlement, and that sport fishers, commercial fishers, the tourism industry and First Nations all rely on healthy fish populations in the Cowichan River. These fish populations need to be supported by an adequate flow of water in the river.

The Panel's Findings

[148] The Panel accepts that a minimum water flow in the Cowichan River of 7.08 cms, as required by the Storage Licences, is essential to the maintenance of downstream values; specifically, it is essential to the maintenance of a healthy fish population in the Cowichan River, and a healthy fish habitat along the river.

[149] The Panel also accepts that Catalyst requires, and is authorized to divert, water for industrial purposes at the Crofton Pulp Mill under the Diversion Licence. In addition, there are other water licensees and water well users along the Cowichan River, all of whom benefit from appropriate water flows in the Cowichan River.

[150] The Panel finds that the downstream benefits to supporting Catalyst's Diversion Licence, the benefits to fish and fish habitat, as well as the benefits to other water licensees and water well users along the Cowichan River, are legitimate values to be considered by the Panel when evaluating the reasonableness of the Order. In addition,

⁶ Pulses are water releases from Cowichan Lake with higher than normal water flows.

although the Appellants believe that the Town of Crofton ought not to be using water for sewage dilution, this use appears to be covered by a previous authorization under the *Act*. The diversion of water to the Town of Crofton appears to fall under the terms/conditions of an Agreement between the licensee and the District of North Cowichan, and the section 34 authorization issued by a previous Deputy Comptroller of Water Rights. That authorization is not the subject of these appeals nor within the jurisdiction of the Panel in the context of these appeals. Moreover, the decision under appeal is the Order, not the Diversion Licence or any other authorizations regarding the diversion and use of water by the Town of Crofton.

[151] The Panel concludes that the downstream benefits resulting from the Order are legitimate, real and substantial. The Panel also finds that these benefits fall within clause (m) of the licence (for the "public benefit"), even though the Panel acknowledges that the Appellants do not believe that the Order will benefit them. The Panel will consider whether the impacts to the Appellants are sufficient to weigh against these other benefits in the sub-issues below.

b) The Order will result in increased flooding on the Appellants' lakeshore properties, and that such additional flooding will constitute an unlawful expropriation of their land.

The Appellants' Evidence and Submissions

[152] Ms. Weir testified that the Order will result in additional flooding of her lakeshore property and that she will, in effect, lose some of her property. Referring to a 1959 land title survey of her property, Ms. Weir believes that the Order will result in higher water levels and a loss of property.

[153] Mr. Lubin testified that he owns two lakeshore properties, the first of which he purchased in 1963. He testified that flood events occur from time to time on Cowichan Lake, and that he is concerned that the Order will result in future flooding of his properties.

[154] Mr. Whynacht purchased his waterfront property in 1991. He believes that his property line extends to the low water level of Cowichan Lake, and that he is temporarily losing 10 metres of land due to flooding during high water events. He considers this to be a loss of his real property.

[155] Mr. Whynacht acknowledged that there are no controls to prevent a natural late winter or early spring flood. However, he believes that the Order increases the risk of flooding for an illegitimate purpose, that being the supply of water to the Town of Crofton.

[156] In cross-examination, Mr. Whynacht was shown a CVRD map of his property (an orthophoto⁷ with ground elevations established by LiDAR data). He agreed that the high water mark elevation of 164.0 metres on Cowichan Lake, as shown on the CVRD map, is above the full storage level of elevation 162.37 metres. However, his witness, Mr. Hodson, testified that the high water mark elevation of 164.0 metres, adopted by

⁷ An orthophoto is a geometrically corrected air photo

the CVRD in the early 2000s, is somewhat arbitrary. Mr. Hodson believes that this elevation was selected primarily for administrative convenience, and that the CVRD considers all land between the 164.0 metre elevation, and the actual water level, to be a riparian area.

[157] Ms. Willows Woodrow purchased her waterfront property in 1988. She testified that Cowichan Lake has always covered a portion of her property and, therefore, she has never had the benefit of all of her property. However, she opposes the Order because it will keep water on her property for a longer period of time during the year.

[158] Ms. Willows Woodrow submits that her property boundaries, including the natural boundary, are shown on a 1991 land title survey as below the lake level for most of the year.

[159] Ms. Willows Woodrow disagrees with the property boundary shown on the CVRD map, which differs from the 1991 land title survey referred to above. She believes that her property boundary extends to the low water level of Cowichan Lake.

[160] In cross-examination, Ms. Willow Woodrow acknowledged that, during the winter months, the water level of Cowichan Lake is typically above the full storage level due to natural circumstances.

[161] Mr. Poyntz purchased his waterfront property (Goat Island) in 2007. He testified that much of his property was flooded in late November 2009. He submits that the Order puts his property at further risk of more flooding because Catalyst controls the lake level into early November, even though heavy rains can begin in October.

[162] Like the other Appellants, Mr. Poyntz believes that the high water mark elevation of 164.0 metres, shown on the CVRD map of his property, is not accurate. Mr. Poyntz testified that the correct legal boundary of his property, an island, is shown on a 1983 land title survey as the "Present Natural Boundary". This natural boundary is lower than the 164.0 metre elevation shown on the CVRD map.

[163] In cross-examination, Mr. Poyntz testified that he did not know that clause 3 of the Order requires the water in Cowichan Lake to be at zero storage level (elevation 161.4 metres) on November 5.

[164] Mr. Dix purchased his waterfront property (Billy Goat Island) in 2007. He is also a principal of Cowichan Lake Recreational Committee Inc. that also owns another lakeshore property on Cowichan Lake.

[165] Mr. Dix testified that the Order increases the duration of water storage on private land. This results in more flooding and elevated groundwater tables, that, among other things, can compromise septic systems and kill vegetation.

[166] Mr. Dix introduced a 1906 land title survey of Billy Goat Island into evidence. The natural boundary shown on that survey shows Billy Goat Island as a single island. He believes that, after construction of the weir in the 1950s, Billy Goat Island was partially submerged by water so that it was, and still is, divided into two smaller islands.

[167] Mr. Dix called Allen Cox, a BC land surveyor, to give expert evidence. The Panel qualified Mr. Cox as an expert witness in land surveying.

[168] In 2012, Mr. Cox prepared a topographical survey plan of the eastern portion of Billy Goat Island based on a provincial benchmark, not based on the GSC datum. That topographical survey plan was entered in evidence.

[169] Mr. Cox stated that natural boundaries can often be different from “natural boundaries” shown on land title surveys, especially on shorelines of lakes with gentle slopes, as is the case of Billy Goat Island.

[170] Mr. Cox knows that there is a “17 to 20 cm” difference between the elevations of provincial benchmarks and those that are referenced to the GSC datum, with the GSC datum being higher.

[171] In cross-examination, Mr. Cox testified that natural boundaries are not related to an elevation, but are subjectively located by a surveyor based on vegetation and soil types. He testified that natural boundaries tend to be closer to the high water marks than to the low water marks of a lake. He testified that construction of the Cowichan Lake weir in the 1950s would have changed the natural boundary around Billy Goat Island.

[172] Mr. Cox also testified that the present natural boundary that he located on the eastern portion of Billy Goat Island in 2012, is higher than the natural boundary on the associated 1906 land title survey. He testified that the present natural boundary is, in most places, higher than the 162.5 metre elevation shown on his 2012 topographical survey plan, which is referenced to a provincial benchmark (or approximately 165.3 metres relative to the GSC datum).

The Respondent’s Evidence and Submissions

[173] Mr. Baldwin testified that, in late April and early May 2013, he visited, on foot and/or by boat, many private lakeshore properties that border Cowichan Lake, including those of the Appellants, except those of Mr. Lubin.

[174] At the time of his visits, the Cowichan Lake water levels were between 162.31 and 162.41 metres, while the full storage level is 162.37 metres, and there were few waves on the lake.

[175] Mr. Baldwin’s date-stamped ground photographs of the shorelines of the properties, taken during the site visits, were entered in evidence.

[176] Mr. Baldwin testified that he had no concerns about flooding or potential flooding based upon his site visits. He referred to each of the Appellant’s properties (except those of Mr. Lubin), and illustrated to the Panel that the lake level at the full storage level, as evidenced by flotsam, rock staining, vegetation growth or beach composition, was below the natural boundary of each property.

[177] The Deputy Comptroller testified that he understands that some lakeshore owners are concerned that the Order will result in additional flooding of their properties. However, those concerns are based upon an erroneous understanding of their property boundaries, in particular, how the “natural boundary” of their lands is determined. The Deputy Comptroller also testified that the natural boundary is defined in the *Land Act* and is identified by soil substrate and vegetation, and that it is typically located at the top of the beach.

[178] Prior to issuing the Order, the Deputy Comptroller testified that he reviewed all of the information before him. With respect to potential flooding of lakeshore properties, he relied, in part, on the CVRD maps and the ground photographs taken by Mr. Baldwin in late April and early May.

[179] According to the Deputy Comptroller, the only substantial changes the Order makes to the 1990 Operating Rule Curve is to potentially delay the beginning of the drawdown of Cowichan Lake's full storage level from July 9 to July 31, and to potentially keep the lake levels slightly elevated for a portion of the control period.

[180] The Deputy Comptroller presented the calculations of the potential increased Cowichan Lake water levels resulting from the Order. He testified that the potential increase in water levels resulting from the Order are:

- 14.4 centimetres on July 9,
- 14.0 centimetres on July 31,
- 3.4 centimetres on August 1,
- 3.0 centimetres on September 1, and
- 1.0 centimetre on September 30, October 31 and November 4.

[181] The Deputy Comptroller testified that, based on his review of records of the Cowichan Lake levels beginning in 1962, as compiled by KWL, the lake has been at the full storage level on July 30 only 10% of time.

[182] The Deputy Comptroller testified that, because there is unlikely to be a large rainfall event at the end of July, the possibility of flooding resulting from the new lake levels at the end of July is low.

[183] Based upon his review of all of the information, the Deputy Comptroller concluded that the Order would not result in additional risk of flooding of Cowichan Lake.

[184] He further testified that any change to the level of the lake caused by the Order is within the range of historical Cowichan Lake levels as he understands them to be.

The Third Party's Evidence and Submissions

[185] Catalyst submits that there is no basis to conclude that the timing of the relatively minor changes to the Cowichan Lake level under the Order will result in damage to the Appellants' lakeshore properties.

The Participant's Evidence and Submissions

[186] The CWS called Brian Grant as an expert witness. The Panel qualified Mr. Grant as an expert in Geographic Information Systems ("GIS"). Mr. Grant works with the CVRD, and oversaw the drafting of the CVRD maps that were referenced by the parties during the hearing.

[187] Mr. Grant testified that, in early 2013 (before the Order was issued), his department drafted maps for approximately 650 lakeshore properties bordering Cowichan Lake.

[188] Mr. Grant testified that the CVRD maps are based on air photos that have been ortho-rectified to a known geographic horizontal datum, and are considered accurate to 10 centimetres. He testified that the LiDAR-derived elevations shown on the CVRD maps were acquired by Terra Remote Sensing Inc. in 2008, are referenced to the GSC datum, and are considered accurate to 5.5 centimetres [0.055 metres].

[189] Mr. Grant stated that the property boundaries shown on the CVRD maps, including the natural boundaries, were derived, for the most part, from associated land title survey boundaries (where available). Exceptions include the 1909 land title survey for Plan of Subdivision of Lot 32 (the Sa-Seen-Os area) on which a natural boundary is not provided, and for which the low water mark was used as the natural boundary.

[190] Mr. Grant noted that a CVRD map was not drafted for Mr. Poyntz's property prior to the Order, and that he subsequently has found some inaccuracies with respect to the property boundaries of a small number of the CVRD maps, including the CVRD map of Ms. Willows Woodrow's property.

[191] Mr. Sutherland also testified on this issue for the CWS. He stated that, during the period of the year when Catalyst does not control the Cowichan Lake levels (November 5 to March 31), the lake levels are primarily the result of lake levels on November 4, plus inflows into the lake from rain and "rain on snow" weather events.

[192] Mr. Sutherland testified that, during the period of the year when Catalyst does control the Cowichan Lake levels (April 1 to November 4), the spillway gates have a theoretical influence on the lake level of up to 0.30 metres above the full storage level. Above that height, the spillway gates have little influence.

[193] Mr. Sutherland also testified that:

- the operation of the weir has no effect on the highest water levels on Cowichan Lake, but it can have some effect on the lowest level on the lake;
- the last day of control provided in the Order and in the 1990 Operating Rule Curve (November 4), is based on hydrological rationale; and
- based on records of past Cowichan Lake levels beginning in 1962, the lake has been at the full supply level on July 30 only 10% of time.

[194] In cross-examination, Mr. Sutherland testified that, in clause 4 of the Order, the phrase "As far as practicable during these periods the licensee shall operate the storage works to prevent the rise exceeding the specified elevations by more than 0.10 metres" is appropriate from a hydrological point of view. He indicated that such operational flexibility is required to allow the operator time to be able to adjust the gates to respond to inflows or predicted inflows.

[195] The CWS submits that there can be no flooding or potential flooding resulting from the Order because the full storage level, for the most part, does not reach the natural boundary of the lakeshore properties. The CWS's reasoning is that the high

water mark of Cowichan Lake, which defines the natural boundary, is above the full storage level of the lake.

Limited Participant's Evidence and Submissions

[196] Mr. Hodson's evidence is referenced as part of Mr. Whynacht's case above.

The Panel's Findings

[197] All of the Appellants are concerned about increased duration of flooding on their properties as a result of the Order. Most of these concerns result from the Appellants' belief that their property boundaries are either the "natural boundary", as shown on their land title survey, or the low water level of Cowichan Lake.

[198] As stated in the *Land Act*, a natural boundary is:

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.

[199] Based upon this definition, the Panel finds that a natural boundary of a property is not a fixed boundary and can, and often does, move with time due to gradual erosion or accretion as a result of natural causes. In other words, a present natural boundary may not be the same as the natural boundary shown on a land title survey.

[200] Persons who own lakeshore or rivershore property must live with the vicissitudes of nature. Natural processes can subtract land from the legal boundary in British Columbia by erosion, or add land to the legal boundary of property by accretion. This long standing common law principle is explained in Blackstone's Commentaries, Book 2, pages 261-262 as follows:

... and as to the lands gained from the sea, either by alluvion, by the washing up of sea and earth, so as in time to make terra firma; or by dereliction as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees it shall go to the owner of the land adjoining In the same manner, if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy. (quoted with approval by Dickson J, in dissent in *Re Chuckry and the Queen in Right of the Province of Manitoba*, [1972] 27 D.L.R. (3d) 164 at 172. Dickson J in dissent adopted by SCC on appeal; *Chuckry v The Queen*, [1973] 35 D.L.R. (3d) 607.)

[201] The same reasoning applies to lakes.

[202] The Panel notes that the high water mark around Cowichan Lake is above the full storage level of 162.37 metres. The Panel concludes that the high water mark, or natural boundary, of Cowichan Lake is the result of natural causes. The Panel finds that, applying the legal definition of "natural boundary" in the *Land Act* (as required by

the Act), the present natural boundary of the lake on the Appellants' properties is higher than 162.37 metres.

[203] The Panel also notes that the Order provides that the November 4 date, after which Catalyst no longer controls the lake level, has remained consistent with the 1990 Operating Rule Curve.

[204] For these reasons, the Panel concludes that the terms of the Order will not result in any increase in the duration or extent of flooding on the Appellants' properties, above the natural boundary. The Panel agrees with the Deputy Comptroller's conclusions with respect to flooding, or potential flooding, of the lakeshore properties. Accordingly, there is no unlawful expropriation due to flooding.

c) The Order will result in increased erosion on the Appellants' lakeshore properties and that such erosion will constitute an unlawful expropriation of their land.

The Appellants' Evidence and Submissions

[205] Ms. Weir and Mr. Poyntz did not make any submission related to increased erosion resulting from the Order.

[206] Mr. Lubin submits that construction and operation of the weir and related storage works on Cowichan Lake has resulted in some erosion of his lakeshore properties.

[207] In cross-examination, Mr. Lubin advised that his house has settled 8 inches [20 centimetres] because of erosion, in general. However, he did not specify whether the erosion and/or settlement is due to the operation of the storage works under the Order, previous operating rule curves, or due to erosion unrelated to the operation of the storage works.

[208] Mr. Whynacht testified that his lakeshore property has eroded due to high Cowichan Lake levels, combined with high winds and heavy boat traffic. He testified that the continued pounding of the foreshore by wind and waves destroys vegetation and removes soil.

[209] In cross-examination, Mr. Whynacht stated that erosion around Cowichan Lake might also be associated with retaining walls and groins⁸ that property owners have constructed to reduce erosion.

[210] Ms. Willows Woodrow testified that her lakeshore property is subject to some erosion. She testified that the retaining walls on her property were constructed before she purchased it.

[211] According to Mr. Dix, erosion is occurring on his Billy Goat Island property. He has observed toppling trees, riparian damage and soil loss on the beach of Billy Goat Island. He believes that wave action, associated with wind and heavy boat traffic, are partially the cause of this erosion. He also believes that the weir contributes to this erosion by holding back water in Cowichan Lake.

⁸ A groin is a rigid structure built out from an ocean shore, a lake shore or a river bank that impedes water flow and reduces the movement of sediment along the shore or bank.

Limited Participant's Evidence and Submissions

[212] Mr. Hodson did not make any submissions on whether the Order will increase erosion.

The Respondent's Evidence and Submissions

[213] As discussed above, Mr. Baldwin visited, on foot and/or by boat, a number of the lakeshore properties bordering Cowichan Lake, some of which are the Appellants' properties. These site visits took place in late April and early May 2013, when the Cowichan Lake level was at, or close to, full storage level (between 162.31 metres and 162.41 metres, while the full storage level is 162.37 metres).

[214] Mr. Baldwin's date-stamped ground photographs of the shorelines of the properties, taken during those site visits, were entered into evidence.

[215] Mr. Baldwin testified that, of the ten properties that he visited and photographed, he saw no concerns with respect to erosion on eight of the properties, and minor concerns with the other two. On one of the two properties, he had a concern with under-designed rock armouring. On the other, he saw evidence of some erosion that he deduced occurred many years ago. Neither of these two properties belonged to the Appellants.

[216] Mr. Baldwin testified that, prior to the Order, and based on his 2013 site visits, he had no concerns with shoreline erosion, except for the one property where he noted erosion from many years ago.

[217] The Deputy Comptroller testified that he was aware that some lakeshore property owners had concerns with the possibility of erosion of their properties. Prior to issuing the Order, the Deputy Comptroller reviewed all of the information provided to him. With respect to erosion of lakeshore properties, he relied, in part, on the ground photographs taken by Mr. Baldwin in late April and early May.

[218] From the information before him, the Deputy Comptroller understood that most of the erosion around Cowichan Lake would occur during the winter months. This is when the lake can be well above the full storage level, and when winter storms, accompanied by strong winds, typically occur.

[219] The Deputy Comptroller reiterated that, as the only substantial change that the Order makes is to potentially delay the beginning of the drawdown of Cowichan Lake's full storage level from July 9 to July 31, the Order is not likely to change any ongoing or potential erosion.

[220] The Deputy Comptroller testified that, in his opinion, there is no indication that there will be any additional erosion to the properties as a result of the changes made by the Order.

The Third Party's Evidence and Submissions

[221] Catalyst submits that there is no basis to conclude that the relatively minor changes to the lake levels will cause any erosion or other damage to the Appellant's properties, or any other properties along the lakeshore.

[222] In support, Catalyst referred to a February 2011 draft report titled "Cowichan Lake Erosion Study", prepared for the BC Conservation Foundation by Erica Ellis, P.Geo., and Eric Morris, P.Eng., of KWL. This report contains the results of KWL's investigation of the nature and causes of Cowichan Lake shoreline erosion, and its determination on whether a hypothetical seasonal lake level 30 centimetres above the full storage level [162.37 metres] would increase erosion.

[223] Catalyst referred to points 4 and 5 of the draft report, as follows:

4. Several sites which are representative of shoreline and wave exposure conditions were selected for detailed examination. Low severity erosion was observed at all the sites around the lake including locally eroded shoreline profiles and dunes, exposed seawall footings and exposed tree roots.
5. Several potential erosion mechanisms were identified. The most important erosion mechanism is thought to be disruption of sediment transport due to seawall and groyne [groin] construction, followed by removal of shoreline vegetation, vessel wake waves, changes in water level regime due to Cowichan Lake Weir installation and historical log booming practices.

The Participant's Evidence and Submissions

[224] Mr. Sutherland referred to KWL's December 2012 Technical Memo, prepared for the BC Conservation Foundation. As its prime author, he wrote recommendation #2:

It is recommended that:

...

2. A detailed review of potential impacts as a result of increased early summer lake levels be completed, including lakeshore erosion, impacts to riparian habitat and impacts to lake shore private properties;

...

The Panel's Findings

[225] There is no evidence before the Panel to show that any of the erosion observed by the Appellants on their lakeshore properties is related to any of the previous operating rule curves. Further, given the times of year when the Order is in effect, there is no compelling evidence that it will contribute to erosion of the Appellants' properties above the natural boundary of their properties.

[226] The Panel also notes that, in general, erosion around Cowichan Lake is of relatively low severity, and is influenced by a number of different factors when the lake is at different levels.

[227] For these reasons, the Panel concludes that there is no persuasive evidence that the Order will have any effect on the natural processes of erosion that occur on the Appellants' lakeshore properties, above the natural boundary. Therefore, there is no merit to the argument that the Order will result in an expropriation without compensation.

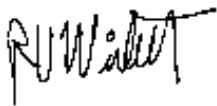
Summary and Conclusions

[228] The Panel concludes that the Deputy Comptroller had the jurisdiction to make the Order, that he offered the Appellants a fair opportunity to be heard, he undertook a fair process prior to issuing the Order, and that the decision is reasonable in the circumstances. The Panel finds that the Deputy Comptroller assimilated the information that he received during the decision-making process and made a decision, in good faith, balancing the water values and benefits of the change to the 1990 Operating Rule Curve downstream, with the potential effects to riparian owners, licensees and applicants for a licence on Cowichan Lake, as well as his understanding and appreciation of the public benefit, as referenced in clause (m), and the public interest, as referenced in clause (l) of CWL 29542. The Panel finds that this decision is reasonable in the circumstances.

DECISION

[229] In making this decision, the Panel has considered all of the evidence in common to the six appeals, as well as the evidence that applies only to the Third Party, as well as the submissions in respect of each appeal, whether or not specifically reiterated herein.

[230] For the reasons set out above, the appeals are dismissed.



Robert Wickett, QC, Panel Chair
Environmental Appeal Board



Daphne Stancil, Member



Douglas VanDine, Member

May 21, 2015

SCHEDULE "A"

LIST OF LIMITED PARTICIPANTS

Greg Allen	Derek Arnoldi
Floyd Augustine	Eric and Velma Avison
Noni Baanstra	Linda J.A. Bjur
Philip Bowers	Christopher M. Burke
Jean Cozens	Catherine Cummings
Catherine Denny & John David Anderson	Ernest Dods
Michael Farup	Craig Gibson
Brooke A. Hodson	Michael Iddon
Heidi Kern	Simon Knott
David Maddison	Michael and Lynette Marti
Dianne Martin	Maxine McKeown
Phyllis and Norris Nygaard	Stu and Iris Reid
Barbara Robertson	Joe Saysell and on behalf of Friends of the Cowichan
Edward James Snidal	Jerry and Florenda Stenberg
Bud Towle	Sue Voisin
David and Jennifer Wall	Steve and Carole Yarmie
Craig and Tanya Young	Cowichan Valley Regional District