

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – June 3, 2011

IN THE MATTER OF sections 91, 92, 94, 95, and 99 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Nick Kohlman with respect to *Water Act* Approval No. 00250071-00-00 issued to the Town of Ponoka by the Director, Central Region, Environmental Management, Alberta Environment.

Cite as: *Kohlman v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Town of Ponoka* (3 June 2011), Appeal No. 09-022-R (A.E.A.B.).

PANEL MEMBERS:

Dr. Alan Kennedy, Panel Chair;
Justice Delmar W. Perras (ret.), Board Chair;
and Mr. Jim Barlishen, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, Board Counsel and
Settlement Officer; Ms. Denise Black, Board
Secretary; and Ms. Marian Fluker, Associate
Counsel.

SUBMISSIONS BY:

Appellant: Mr. Nick Kohlman.

Director: Mr. Todd Aasen, Director, Central Region,
Environmental Management, Alberta
Environment, represented by Mr. Andrew
Bachelder, Alberta Justice.

Approval Holder: Town of Ponoka, represented by Mr. William
Barclay, Reynolds, Mirth, Richards & Farmer
LLP.

WITNESSES:

Appellant: Mr. Nick Kohlman and Ms. Shirley Kohlman.

Director: Mr. Todd Aasen, Director, Central Region,
Environmental Management, Alberta
Environment, and Mr. Andrew Patton, Water
Administration Engineer, Alberta
Environment.

Approval Holder: Mr. Wes Williams, Tagish Engineering.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to the Town of Ponoka under the *Water Act* to construct, operate, and maintain a storm water management system in an area adjacent to the Town. The Board received three Notices of Appeal, two of which were resolved through mediation and one proceeded to a hearing on the following issues:

1. Does the Approval adequately address the potential impacts on the Appellant and his property?
2. Has access been granted for all the necessary rights of way with respect to the project? If all the necessary rights of way have not been granted, was it appropriate for Alberta Environment to issue the Approval?

After considering the written and oral submissions presented at the hearing, the Board believes that a satisfactory analysis of the storm water management requirements for the Town of Ponoka was undertaken and the potential impacts on the Appellant and his land were correctly identified. However, based on the submissions, the Board recommended that:

1. The Approval Holder should prepare a corrected Management Plan to the satisfaction of the Director. The corrected Management Plan should, among other things:
 - a) delete all references to placing a caveat on the Appellant's land;
 - b) correct all legal land descriptions;
 - c) correctly incorporate all the data presented at the Hearing; and
 - d) correct the size of the culverts that were recommended to be consistent with those used in the modeling and diagrams.
2. The Approval Holder should review all of the corrections made to the Management Plan and confirm the accuracy of its conclusions.

Based on the wording of section 37(4) of the *Water Act*, the Board found the Approval was properly issued even though not all necessary rights of way had been acquired. The *Water Act* allows Alberta Environment the discretion to determine whether all rights of way need to be in place before issuing an approval.

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I. BACKGROUND

[1] On September 28, 2009, the Director, Central Region, Environmental Management, Alberta Environment (the “Director”), issued Approval No. 00250071-00-00 (the “Approval”) to the Town of Ponoka (the “Approval Holder” or the “Town”) under the *Water Act*, R.S.A. 2000, c. W-3, to construct, operate, and maintain a storm water management system (the “Storm Water System”) located in the E½ 24-20-1-W5M, sections 6, 7 and 8-43-25-W4M, NE 35-42-26-W4M, and E ½ 1 and 12-43-26-W4M near Ponoka, Alberta.

[2] Between October 26, 2009, and November 5, 2009, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Nick Kohlman (Appeal No. 09-022) (the “Appellant”), Mr. Wade and Ms. Deborah Raugust (Appeal No. 09-023), and Mr. Alfred Breitkreuz (Appeal No. 09-024). The Board notified the Approval Holder and the Director of the appeals and requested the Director provide the Board with a copy of the records (the “Record”) relating to the appeals. The Board also asked the Approval Holder, Appellant, and Director (collectively the “Parties”) to provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[3] On November 27, 2009, the Board received a copy of the Record from the Director, and on December 3, 2009, forwarded a copy to the Appellant and Approval Holder.

[4] A mediation meeting was held on February 26, 2010, in Ponoka. The Appellant, the Director, and the Approval Holder did not reach an agreement at the mediation. However, discussions between the Raugusts, Mr. Breitkreuz, the Director, and the Approval Holder continued after the mediation meeting into the summer of 2010 when the Raugusts and Mr. Breitkreuz reached separate agreements with the Approval Holder and withdrew their appeals.¹

[5] On December 31, 2010, the Board set the Hearing for May 4, 2011, and provided the schedule to receive submissions and hear arguments on the following questions:

1. Does the Approval adequately address the potential impacts on the Appellant and his property?

¹ Mr. Breitkreuz withdrew his appeal on July 8, 2010 and Mr. and Ms. Raugust withdrew their appeal on August 26, 2010.

2. Has access been granted for all the necessary rights of way with respect to the project? If all the necessary rights of way have not been granted, was it appropriate for the Director to issue the Approval?

[6] The Parties provided their submissions on April 12, 2011, and the Hearing was held on May 4, 2011, in Ponoka, Alberta.

II. SUBMISSIONS

A. Project Overview

[7] The Storm Water System is designed to manage storm water from areas the Approval Holder intends to develop in the northwest portion of the current town site. The first development area is Hudson's Green, located in SW 8-43-25-W4M. The Storm Water System is designed to have the storm water from the new development areas flow into Lake No. 10 (the "Lake"). The southern shore of the Lake is part of the northern boundary of the Appellant's land. A natural outlet at the south end of the Lake will control the rate of flow of water into an existing natural channel and fen. The existing channel currently allows the water to flow to a discharge point into the Battle River. Upgrades to certain portions of the natural drainage course have been proposed in the Storm Water System. The existing natural drainage course passes through the Appellant's property in the NW 6-43-25-W4M. Attached, as Appendix A, is a map showing the Storm Water System.

B. Appellant

[8] The Appellant expressed concern about the use of the Lake as a collection point for the Storm Water System. He explained the Approval Holder has proposed a berm be built east of the gas well located at the north end of his property to prevent flooding of his property under the proposed Storm Water System. The Appellant stated that, without the berm and another to the west side, there could not be the storage capacity in the marsh claimed by the Approval Holder, because the elevation on the west side of the gas well is the same elevation as the Lake and the elevation of the land on the east end of the ditch by the gas well is 0.5 metres lower than the highest level of the Lake. The Appellant explained that, once the Lake overflows,

there is nothing stopping the water from flowing south through his property. The Appellant added that, without the berm, his property would be flooded by the additional water that would be added to the Lake, but if the berm was built, his neighbours' properties to the north would be flooded.

[9] The Appellant noted the Approval Holder claimed in the Storm Water Management Plan (the "Management Plan") there is 229,653 cubic metres of storage in the Lake and marsh land, and in another table in the Management Plan, the Approval Holder claimed there is 355,822 cubic metres of storage. The Appellant argued that, without the proposed berm, there is no storage above elevation 810.0 metres and therefore, neither storage volume claimed by the Approval Holder could be achieved. The Appellant stated the water level in the Lake fluctuates from year to year and during the year. He argued measuring the ice level would not determine the static level of the Lake. The Appellant noted the Approval Holder claimed there is about 60,000 cubic metres of storage in the Lake between the static level and the highest level of the Lake, but the Appellant stated the storage is not there if the Lake is already full such as in the spring or during wet periods.

[10] The Appellant indicated the Approval Holder wanted to place a caveat on his property and noted that, if a caveat were registered on his property to acquire a right of way, the value of his property would be negatively impacted.

[11] The Appellant raised the issue of the Approval Holder's plan for a walking trail on the right of way of its storm water drainage proposal. The Appellant noted the Approval Holder refused to provide written assurance the walking trail would not be put on the right of way without the landowner's permission.

[12] The Appellant questioned if there even was a proper application for the storm water drainage proposal for his property. He explained the first application filed in August 2008 did not answer the question whether the applicant was the registered landowner or, if not, whether consent was obtained from the landowners. The Appellant questioned the Director about the deficiency and was told the application was only for the NE 35-42-26-W4M. The Appellant expressed concern to the Director that if that portion of the Storm Water System was allowed to proceed, there would be pressure put on the Director, and it would enhance the

Approval Holder's chance of getting approval for the rest of the project. The Appellant stated the Director assured him that would not be the case.

[13] The Appellant explained the Approval Holder held a public hearing without an application that included the Appellant's land, and the tender notice for this work also did not include the Appellant's land.

[14] The Appellant explained that the Approval Holder filed a second application in July 2009, which showed the Approval Holder as the registered owner of NE 35-42-26-W4M. The Appellant confirmed he had not provided consent for the Approval Holder to use his land in the NW 6-43-25-W4M as an outlet for the water drainage. The Appellant questioned how the Approval had been granted for a Storm Water System that passed through his land without his consent. The Appellant argued that, since the Approval Holder did not provide an application that included consent for use of his land, the Approval should not have been granted.

[15] The Appellant also raised concerns regarding contradictions and discrepancies in the information and calculations provided by the Approval Holder in its Approval application. He indicated there was a history of mistrust between himself and the Approval Holder.

C. Approval Holder

[16] The Approval Holder explained the Approval was required to facilitate further development within the Town. The Approval Holder explained the Approval allows the construction, operation, and maintenance of a storm water management system subject to the terms and conditions in the Approval, including the requirement to undertake the activity in accordance with the Management Plan prepared by Tagish Engineering. The Approval Holder noted the key recommendation of the Management Plan was that post development runoff rates coming from the areas of new development in the Town be no greater than the pre-development flow rate of 2.5 litres/second/hectare ("L/s/ha").

[17] The Approval Holder stated there are two scenarios that could achieve equilibrium:

1. that a right of way be acquired across SW 6-43-25-W4M [*sic*] to facilitate drainage;² or
2. if the landowner refuses to grant a right of way, reduce flows by making more extensive use of on-site retention ponds.³

[18] The Approval Holder stated a right of way over the Appellant's land is not necessary, and there will be no adverse impact on the Appellant's land as a result of the Storm Water System.

[19] The Approval Holder explained the primary objective in preparing the Management Plan was to ensure post-development flows from future development areas were controlled so that existing flow rates were not exceeded. The Approval Holder explained the Storm Water System protects and uses the natural storage of 85 hectares of low-lying wetlands and 22 hectares of the Lake. It stated these areas provide peak flow attenuation within the basin.

[20] The Approval Holder explained it needs a storm water outlet for future development in three areas, and it applied to annex four additional quarters from Ponoka County.⁴

[21] The Approval Holder stated it was aware of the Appellant's concerns and, therefore, it tried to determine the existing flow rates the Appellant was receiving in order to develop a storm water management plan that controlled the flow so that it did not exceed existing flows. The Approval Holder explained there was no stream flow data or gauging station, so a regional analysis was conducted where data from adjacent Maskwa Creek and five other basins that have a stream flow gauging station were used to predict how much runoff could occur. The Approval Holder noted the regional analysis, which took into consideration land form, soil textures and types, and agro-climate, determined the natural runoff in the study basin for a 1:100 year storm to be 2.5 L/s/ha. The Approval Holder stated the rate is conservative compared to usual industry standards and resulted in the need for larger storm water detention ponds for new developments.

² The Board notes the Appellant's land is the NW 6-43-25-W4M.

³ See: Management Plan, pages 25 and 26.

⁴ The Board notes additional land was annexed to the Town of Ponoka on April 14, 2011. See: Order in Council 124/2011. This additional land did not include the Appellant's property.

[22] The Approval Holder explained two models were used to verify flow rates post-development. It noted that in order to have post-development flow rates meet pre-development rates, the Storm Water System required settling, detention and storage ponds, and implementation of the Best Management Plans and Guidelines for New Development within the area. The Approval Holder stated the release rate from all new development must match the predicted natural runoff rate of 2.5 L/s/ha.

[23] The Approval Holder stated the second model, which was more sensitive with more parameters, recommended the release rate from SW 8-43-25-W4M be modified. The Approval Holder stated it adopted a best management plan for the future development upstream of the Appellant in the SW 8-43-25-W4M. The Approval Holder argued the likelihood the development will impact the water quality is extremely low, because water from the development area must pass through storm ponds and a particulate separator that is to be installed to further settle out particulates.

[24] The Approval Holder explained it acquired the rights of way from Highway 53, south of the Appellant's property, to the Battle River in the NE 35-42-26-W4M, and an agreement was reached with the landowner of the adjacent north property. It stated an environmental easement or buffer has been established along the Lake to protect the bed and shore. The Approval Holder stated it is negotiating with the landowner of SE 7-43-25-W4M to acquire a drainage right of way along a natural watercourse between the Lake and SW 8-43-25-W4M and, if the right of way is acquired, a grassed swale would be constructed.

[25] The Approval Holder stated the Management Plan and analysis were based on no improvements on land owned by the Appellant. According to the Approval Holder, there is no need to acquire a right of way from the Appellant since no changes to stream flow intensities or natural flooding should occur post-development. The Approval Holder stated the only change the Appellant would experience would be slightly longer duration of flows during high intensity storms, but the magnitude of flow would not exceed pre-development rates.

[26] The Approval Holder did not see how there would be any measurable impacts on the Appellant's land. It confirmed it would honour the agreements made with the other landowners under the terms of the Approval. The Approval Holder explained it knew there was

a possibility the Appellant would not provide right of way access, so the Management Plan was prepared to allow development to occur upstream of the Appellant's property and still control or attenuate post-development flows and intensities to no more than what is experienced under current conditions.

[27] The Approval Holder submitted the appeal should be dismissed.

D. Director

[28] The Director explained that, on August 28, 2008, the Approval Holder submitted an application for an approval to implement a master drainage plan contained in the Management Plan. He stated additional information was requested and the Approval Holder responded to the Director's satisfaction. The Director stated a revised application was submitted on July 29, 2009, and the Approval Holder was asked to provide further information on how the Appellant's concerns regarding potential impacts to his land would be addressed. The Director stated a revised plan was submitted on September 18, 2009, and he was satisfied the Approval Holder "...had gone to significant lengths, beyond [the] expectation of Alberta Environment, to meet the concerns of the Appellant and other statement of concern filers."⁵

[29] The Director stated the most effective way to address concerns regarding storm water runoff is to apply environmentally sound management principles during the planning, design, and construction of communities. The Director explained Alberta Environment has adopted storm water management principles that achieve the developmental goals while addressing water quantity, protection of the ecosystem, and flood control.

[30] The Director confirmed a *Water Act* approval is required for any municipality or utility to construct and maintain a storm water management system. The Director stated the potential impacts from the proposed activity and issues unique to the particular situation are addressed by the terms and conditions in the approval.

[31] The Director explained the Approval Holder is required to follow the Management Plan prepared for the Town. The Director stated the Management Plan provides a

⁵ Director's submission, dated April 12, 2011, at paragraph 15.

plan for current and future storm water management needs of the Town and contains provisions to mitigate any impact on surrounding lands not owned by the Approval Holder. The Director stated he required the Approval Holder to take measures to protect surrounding landowners from flooding and erosion beyond what would naturally occur. The Director explained some of the changes included revising the Management Plan to increase the volume of the upstream storm water retention pond and reducing the post development release rate from 3 L/s/ha to 1 L/s/ha. The Director stated these changes ensure there are no significant adverse effects to downstream landowners or receiving water bodies.

[32] The Director submitted the Approval, which includes the Management Plan, adequately addresses any potential impacts on the Appellant's property and meets all the requirements of the Stormwater Management Guidelines ("Management Guidelines").⁶

[33] The Director stated he has taken the Appellant's concerns seriously and carefully evaluated each point raised by the Appellant. The Director noted he has no authority to delve into past dealings between the Approval Holder and Appellant and, therefore, the Appellant's concerns regarding the Town's "dishonesty" is irrelevant to the Approval and beyond the jurisdiction of the Board.

[34] The Director explained the applications submitted by the Approval Holder listed the NE 35-42-26-W4M as the activity location because this is the location of the outlet of the Storm Water System. The Director stated the Approval applies to those lands being developed within the approved Storm Water System boundaries. The Director explained he reviewed the Management Plan to ensure future development was addressed appropriately, and he was satisfied that, if the Management Plan is followed, there would be no significant adverse impacts to downstream landowners and the receiving water bodies due to reduced rates of runoff in newly developed areas of the Town attributable to storm water detention and retention ponds.

[35] In response to the Appellant's claim that the amount of runoff was miscalculated, the Director stated his technical experts checked the calculations, and he assured the Board the calculations in the Approval were correct. The Director suggested the difference between the

⁶ Alberta Environmental Protection, *Stormwater Management Guidelines for the Province of Alberta* (Edmonton: Environmental Services Division, 1999).

Appellant's numbers and the Management Plan calculations was a result of the Appellant incorrectly applying the runoff rate of 2.5 L/s/ha, whereas the modeling considered additional parameters such as area, slope, and routing. The Director respectfully submitted the Appellant's calculations were not accurate and do not account for routing, future storm water ponds, topography, or water features. The Director stated the assumptions used in the computer model were highly conservative and were based on worst-case scenarios such as a rainfall event occurring during spring runoff and with winter conditions (i.e. frozen ground). The Director stated the Management Plan exceeds the standards in the Management Guidelines. The Director noted the results of the modeling show no significant impacts to the Appellant's land even under a worst-case scenario.

[36] The Director was satisfied the Management Plan accounts for storm water runoff from all areas identified by the Appellant.

[37] The Director explained the Management Plan ensures all new development will treat the storm water to Alberta Environment standards, so any new developments will not cause significant contamination to the Appellant's property. The Director confirmed that each new storm water pond must be registered under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to ensure the storm water is treated to the requirements set out in the Management Guidelines and the legislation.

[38] With respect to possible flooding from downstream works, the Director explained the berm to be built on the north boundary of NE 35-42-26-W4M is 1.5 metres below the culvert under Highway 53 that drains the Appellant's land, and in a large flood event, the berm would not be overtopped and the flood waters would pass around the berm to the Battle River through an emergency spillway. The Director noted the culvert under Highway 53 would be repaired which will further reduce flooding risks. The Director was satisfied there was no significant risk of flooding of the Appellant's land as a result of this berm.

[39] The Director explained the "curve number" indicates the runoff potential for soils taking into consideration factors such as soil type, land use, and slope. The Director respectfully submitted the Appellant did not take into consideration all the necessary factors required to determine an appropriate curve number value.

[40] The Director argued that a possible future walking path, as depicted in conceptual long term Town development plans that passes near the Appellant's house, is not part of the Approval and is irrelevant to the Hearing.

[41] The Director explained he issued the Approval knowing the Approval Holder had not yet secured all necessary rights of way. He stated it was not a concern as similar situations often occur.

[42] The Director noted section 37(4) of the *Water Act* grants the Director discretion on whether the acquisition of all the necessary rights of way is required prior to granting an approval. The Director stated Alberta Environment takes a pragmatic and flexible approach to discretionary requirements, and there are situations where it is unreasonable to require an applicant to have all the necessary access agreements or permits in place prior to granting an approval. The Director stated his main concern is whether all the requirements of the *Water Act* are met. The Director noted the *Water Act* does not require all access agreements be in place; therefore, it is not within the Director's jurisdiction to deny an application for an approval on the basis that all agreements necessary are not in place, unless there are specific reasons to require these agreements be in place. The Director stated it is assumed the applicant will obtain all other approvals, permits, or licences that are necessary to carry out the project, and if the authorizations were not obtained, the approval could not be implemented. The Director stated it would be unreasonable to require an applicant to undertake the cost and effort to obtain access agreements prior to the issuance of the approval when the approval might not be granted.

[43] The Director considered the facts of this situation and determined it was not necessary for the Approval Holder to obtain written consents for all the rights of way prior to granting the Approval. The Director stated he requested informed written consent be obtained from potentially adversely affected persons or, if written consent could not be obtained, that the Approval Holder had to show how the development would cause no significant adverse impacts to non-consenting persons. The Director understood there was an outstanding right of way that would be required. The Director explained that if an agreement could not be reached, then he was prepared to accept a change to the Storm Water System and, since this would be a minor

change with no impact on adjacent landowners, an amendment to the Approval would not be required.

[44] The Director submitted the Approval along with the applicable legislation adequately address all the potential impacts on the Appellant. The Director was satisfied the Approval sets forth a needed storm water management plan for the future development of the Town. The Director submitted the appeal should be dismissed.

III. PRELIMINARY MATTERS

[45] In its written submission, the Approval Holder reserved its right to call additional witnesses if it considered it was necessary to respond to the Appellant's submission. It is the Board's usual practice to have all parties to a hearing provide their written submissions at the same time, unless one of the parties requests a staggered process. In the single submission process, all submissions are received at least one week before the hearing, thereby giving the parties ample opportunity to prepare response submissions for presentation at the hearing. In this case, the Parties had almost three weeks from the time the submissions were received until the Hearing was held. When asked at the Hearing, none of the Parties had concerns with the Board's process.

[46] Prior to the Hearing, the Board requested the Approval Holder ensure someone would be available to speak on behalf of the Town should the Board have specific questions that only the Town could answer. Someone from the Town was present at the Hearing, but the Board did not require his evidence and so this witness was not called.

[47] The Approval Holder raised concern regarding one of the attachments included in the Appellant's submission. The Approval Holder argued the document was prepared in the context of mediation and, therefore, was covered by the confidentiality agreement signed at the mediation meeting. The Approval Holder requested the Board remove the document from the Board's file and refrain from using the document in its deliberations of the Hearing issues. The Appellant explained he received the document from one of the other appellants and he was not aware the document was part of the mediation. The Board reviewed the document and determined it was captured under the mediation confidentiality agreement. The Board ordered

the document be removed from the Board's file and stated the Board would not consider the document in determining its recommendations.

IV. ANALYSIS

[48] Under section 99 of EPEA, the Board must provide the Minister with a report including recommendations on whether the Approval should be confirmed, reversed, or varied. After reviewing and considering the Record, the file, and written and oral submissions from the Parties, the Board is recommending the Approval be varied.

[49] The Board considered the following two issues at the Hearing:

1. Does the Approval adequately address the potential impacts on the Appellant and his property?
2. Has access been granted for all the necessary rights of way with respect to the project? If all the necessary rights of way have not been granted, was it appropriate for the Director to issue the Approval?

A. Approval Conditions

[50] During the Hearing, the Appellant questioned the validity of many flow rates, storage capacities, and other calculations contained in the Management Plan. Based on the data provided and the assurances provided by the Director, the Board believes that an adequate analysis of the storm water requirements for the Town was undertaken, and the potential impacts of implementing the Management Plan on the Appellant and his land were correctly identified.

[51] The Town applied for the Approval to enable further development in the Town. Taking a more regional approach to storm water management appears to be a logical step rather than relying on piecemeal planning for each new development. The Management Plan looked at two scenarios: one if all the rights of way were obtained, including one from the Appellant (the "Right of Way Scenario"); and another if the Appellant would not provide the Approval Holder access through his property (the "Retention Scenario").

[52] During questioning by the Board, the Approval Holder's witness, Mr. Wes Williams, explained how the Management Plan was prepared. He stated that, originally, he designed the system from the south end where there was an excavated channel, and his plan was

to continue with building a channel towards the Lake. It was only when he realized the damage to the wetlands would have to be financially compensated for if a channel was constructed that he decided to look at alternatives and realized the existing fen would deliver the water just as effectively as an excavated channel through the NW and SW 6-43-25-W4M. The Board is concerned it was the cost of compensation that was the determining factor that drove this decision, not the environmental harm that would have occurred if the channel had been excavated. The Approval Holder should have advised its consultant to look at alternatives that were not only feasible but that would also minimize environmental impacts.

[53] Even though the Approval Holder considered using a more intrusive storm water management technique had all rights of way been obtained, the Storm Water System currently proposed, which does not require a right of way from the Appellant, appears to minimize the environmental impact. The Approval Holder explained the output from the Hudson's Green subdivision and any future development covered by the Management Plan will be limited to 1 L/s/ha unless an agreement is reached with the Appellant to obtain a right of way. If an agreement for a right of way is reached with the Appellant, the rate of flow from the newly developed areas could be raised to 2.5 L/s/ha, but the release from the Lake would not exceed what currently occurs, which is 2.5 L/s/ha. The Board recognizes that in either of these scenarios, the flow may be for a longer period of time compared to existing conditions. However, the Appellant did not provide any evidence this would affect the use and enjoyment of his land. Since the rate of flow will be consistent with current flow rates, there should be minimal environmental impact to the Appellant's land.

1. Caveat on the Appellant's Property

[54] Throughout the evidence presented it was very clear to the Board there is a complete lack of trust between the Appellant and Approval Holder. The Management Plan did not assist in fostering trust or goodwill. The Appellant was clear he did not want the Approval Holder to have access to his property unless an agreement was reached. In the Management Plan, there was reference at page 26 that the Approval Holder would place a caveat on the Appellant's property to notify any potential buyer of its intent to pursue a right of way. The Appellant argued the caveat could affect his property value. At the Hearing, Mr. Williams

clearly stated the Approval Holder had no intention of placing the caveat on the Appellant's property, and the statement should not have been included in the Management Plan. The Board agrees such a statement should not be part of the Approval, which is the result of incorporating the Management Plan by reference. It is not relevant to the construction, operation, and maintenance of the Storm Water System and should not be seen as being endorsed by the Director. Therefore, the Board recommends the Approval be amended by deleting all references to placing a caveat on the Appellant's property from the Management Plan.

2. The Management Plan

[55] As discussed, the Management Plan identifies two scenarios for the Storm Water System:

- “1. If [right of way] was acquired across SW6-43-25W [*sic*], the 600 mm and 500 mm culverts are undersized. The HWY 53 culvert has capacity to handle the flow if the culverts were upgraded to 900 mm CSP and the CNRL oil lease and cross section at Sta. 2+249 (Figure 7/14) built up to an elevation [of] 811.0 m. This is the recommended design solution to handle the 2.5 L/s/ha natural and post development flow rates.
2. If the landowner does not provide access and a [right of way] to upgrade the culverts, then to meet a[n] equilibrium level where the post development flow and flood levels are the same the total volume of release out of [Section] 8 will have to be reduced from 2.5 L/s/ha to 1.0 L/s/ha, and this will mitigate against any possible changes to the NW6 between pre and post flow rates. The SW8 can still be designed for 2.5 L/s/ha and be released at that rate, but the total volume for all three quarters be limited to 1.0 L/s/ha or 160 L/s, which is the estimated total for [Section] 8....”⁷

[56] As both scenarios are included in the Management Plan, which incorporated by reference into the Approval, both scenarios have been approved by the Director, and the Approval Holder is entitled to implement either scenario as long as certain requirements are met. The Approval relies on the Management Plan to describe the two different scenarios and detail the conditions that need to be met in each case. The concern the Board has is that there are a number of errors in the Management Plan that make it unclear and create uncertainty as to

⁷ See: Management Plan, pages 25 and 26. The Appellant's land is the NW 6-43-25-W4M.

whether the requirements of the Approval are required. The Board will discuss these errors in more detail below.

[57] To address this concern, the Board recommends the Approval Holder correct the Management Plan to fix these errors and include the most accurate and consistent data as presented at the Hearing. As part of this process, the Approval Holder should also review its conclusions to ensure that none of the corrections changed its conclusions. The Board also recommends that once this process is complete, the Director should review the corrected Management Plan to ensure the proper additions and deletions have been made and that it continues to meet all regulatory requirements. The Director should also ensure that none of the corrections change the substance of what was originally approved. The resulting Management Plan should provide clearer direction for the Approval Holder, the Director and, importantly, for the public.

(a) Legal Land Descriptions Errors

[58] Throughout the Hearing the Approval Holder stated that acquiring a right of way through the Appellant's land (NW 6-43-25-W4M) would make a difference as to which scenario would be implemented. Unfortunately, because of errors regarding the legal land descriptions in the Management Plan, it is not clear as to which rights of way are needed for the Right of Way Scenario and what circumstances would cause the Approval Holder to change to the Retention Scenario.⁸ In the Board's view, the Management Plan, which is incorporated into the Approval by reference, should clearly state which rights of way are required for the different scenarios and what channel design would be used. In identifying the rights of way for the Right of Way Scenario, all of the legal land descriptions from the outlet of the Lake to the discharge point on the Battle River should be included, which appears to the Board to be NW and SW 6-43-25-W4M and NE 35-42-26-W4M. (See: Appendix A.)

(b) Data Errors

⁸ For example, the Appellant's land is NW 6-43-25-W5M, however it is identified at SW 6-43-25-W4M at page 25 of the Management Plan. This error was carried forward in the Approval Holder's written submission dated April 12, 2011 at page 2 and as NE 6-43-25-W5M at Tab A, page 5.

[59] During the Hearing, the Appellant mentioned his confusion as to what part of the Management Plan was applicable to the Storm Water System. As discussed, the Board agrees it is not clear what sections of the Management Plan are applicable to which scenario and which data are the most accurate and up to date, and this needs to be corrected.⁹

(c) Culverts Errors

[60] The Board also identified a number of other inconsistencies in the Management Plan relating to the sizes of culverts that are to be used under the two scenarios. In correcting the Management Plan, these inconsistencies should also be corrected.¹⁰

3. Advising the Director

[61] As the Management Plan provides for two scenarios that the Approval Holder can implement, the Director should be notified as to which scenario the Approval Holder chooses to

⁹ For example, Table 5.3 vis a vis Table 5.1 was revised in Appendix F of the Management Plan. Consideration needs to be given to how the information from Appendix F should be incorporated into the rest of the Management Plan. The Board notes that in Appendix F it states the "... final report ... will be forwarded to your office by September 15, 2009 or sooner. The report needs to include the SWMHYMO results. Table 5.1 needs to be revised and the contents of this letter incorporated into the report." It appears to the Board that this was never done.

The Board also notes on page 23 of the Management Plan that it states in Table 5.3 "... the model was modified to an interim release rate of 4.0 L/s/ha for the three quarters..." It appears to the Board that this should be 1.0 L/s/ha, to be consistent the other references in the Management Plan. However, if this was an intentionally selected flow rate then the source of this flow rate needs to be identified and possible changes to the Approval Holders conclusions need to be considered.

¹⁰ In the last paragraph on page 8 of the Management Plan it identifies "two 500 mm and two 600 mm culverts in the reach between Highway 53 and the [L]ake." Drawing 6 of Appendix D of the Management Plan shows a 600 mm culvert just upstream of Highway 53 then proceeding upstream where there are two 500 mm culverts and then two 600 mm culverts at the north end near the gas lease. Drawing 8 also shows the latter two 600 mm culverts; however, in Tables 5.3 and 5.4 (lines 18-29) there is no reference to any culverts that are 500 mm in size.

In the Management Plan at page 25, where the first scenario is discussed, it states "...the 600 mm and 500 mm culverts are undersized. ... [If] the culverts were upgraded to 900 mm ... [then] this is the recommended design solution...." On page 33 of the Management Plan under paragraph 2 of the Recommendations it again reiterates that the 600 mm and 500 mm culverts would be upgraded to 900 mm. Table 5.4 represents the recommended scenario, but in the Table only one 600 mm culvert is upgraded to 900 mm. If this is the recommended design, then it is unclear to the Board why all the culverts in this reach are not upgraded to 900 mm in the "post" implementation column in Table 5.4

Finally, in Appendix F of the Management Plan under section (g) Mitigation, it states that if a right of way was secured across NW6 then the 600 mm culvert at the Lake outlet would be upgraded to 900 mm and the 500 mm culverts would be upgraded to 1200 mm, but there is no mention of any upgrading of the remaining 600 mm culvert. Table 5.1 as revised shows only the scenario with no right of way through the Appellant's land, again with no 500 mm culverts identified. The results of a recommended scenario using culverts upgraded to 1200 mm is not included and the discrepancy with the earlier recommended upgrading to 900 mm in the main body of the plan is not discussed.

implement. The Approval Holder explained that, while it is currently implementing the Retention Scenario, if a right of way were obtained from the Appellant, then it would switch to the Right of Way Scenario included in the Management Plan allowing a storm water release rate of 2.5 L/s/ha from all lands to be developed in 8-43-25-W4M. If the Approval Holder chooses at a later date to implement the Right of Way Scenario included in the Management Plan, the Director should also be notified. This will make it clear under what terms and conditions the Approval Holder should be operating. Therefore, the Board recommends the Approval be varied to include a condition that the Approval Holder shall confirm to the Director in writing within 30 days of selecting which Storm Water System identified in the Management Plan scenario will be implemented. Should the Approval Holder opt to implement the other scenario or make a major change to the selected scenario, written notice must also be provided to the Director 30 days before implementing the alternative scenario or major change.

4. The Walking Trail

[62] The Appellant also expressed concern about the construction of a walking trail along the proposed drainage course past his house within an acquired right of way. The Approval Holder stated the walking trail was included on a drawing contained in a conceptual long term development plan prepared for the Town, but confirmed there was no plan to construct the walking trail at this time. The walking trail was not part of the Approval application and was not a factor in the Director's decision.

B. Rights of Way

[63] The Appellant argued the Director should not have issued the Approval until all of the rights of way were acquired.

[64] The Approval Holder acknowledged at the Hearing that not all of the necessary rights of way have been acquired to proceed with the full project at this time. It is still negotiating with at least one other landowner other than the Appellant. The Management Plan recognized the Appellant might not grant a right of way across his property, so an alternate storm water system scenario was included.

[65] The Director argued having all necessary rights of way before the issuance of the Approval is not required. He stated it would be unfair economically to an applicant to have to submit proof of acquisition of all required rights of way with the application because there is no guarantee the approval would be issued. Section 37(4) of the *Water Act* gives the Director discretion as to whether all of the rights of way are obtained before he makes his decision. Section 37(4) of the *Water Act* states:

“If an applicant for an approval does not own the land in fee simple or the undertaking to which the approval is to be appurtenant, *if required by the Director*, the applicant must submit the written consent of the owner of the land or of the undertaking as part of the application for the approval.” [Emphasis added.]

[66] Although it may be beneficial to have all of the rights of way in place at the time the application is submitted to the Director, it is not a requirement unless the Director specifically requests these documents be in place. By including the phrase “*if required by the Director*,” the legislators have made the requirement optional at the discretion of the Director. Therefore, although not all of the rights of way were obtained at the time of the application and issuance of the Approval, the Board finds the Approval was issued in accordance with the *Water Act*.

[67] The Approval Holder acknowledges it does not have authority to enter the Appellant’s property without consent. Without an access agreement or purchased right of way, the Approval Holder has no interest in the Appellant’s property and cannot construct any aspect of the Storm Water System on the Appellant’s property without the landowner’s permission.

V. RECOMMENDATIONS

[68] The Board recommends the Approval be varied. The Board recommends that:

1. The Approval should be amended to require the Approval Holder to prepare a corrected Management Plan to the satisfaction of the Director. The corrected Management Plan should:
 - a) delete all references to placing a caveat on the Appellant's land;
 - b) clearly describe the two scenarios that were approved;

- c) clearly describe the conditions that need to be met under each scenario;
 - d) correct all legal land descriptions and include a full description of all lands for which a right of way will be required with each scenario;
 - e) correctly incorporate all the data presented at the Hearing; and
 - f) correct the size of the culverts recommended in the Right of Way Scenario to be consistent with those used in the modeling and described in the diagrams.
2. The Approval should be amended to require the Approval Holder to review all of the corrections made to the Management Plan and confirm to the Director whether the conclusions reached in the Management Plan are still accurate.
 3. The Approval should be amended to include a condition that requires the Approval Holder to advise the Director which scenario in the Management Plan is being implemented, and to advise the Director should the Approval Holder decide to implement the other scenario in the Management Plan or make any major changes to the selected scenario.

[69] With respect to sections 100(2) and 103 of EPEA, the Board recommends that copies of this Report and Recommendations, and of any decision by the Minister, be sent to the following:

1. Mr. Nick Kohlman;
2. Mr. William Barclay, on behalf of the Town of Ponoka; and
3. Mr. Andrew Bachelder, Alberta Justice, on behalf of the Director, Central Region, Environmental Management, Alberta Environment.

[70] None of the Parties reserved their right to apply for costs and therefore, the Board will not be accepting costs applications in this matter.

Dated on June 3, 2011, at Edmonton, Alberta.

“original signed by”

Alan J. Kennedy
Panel Chair

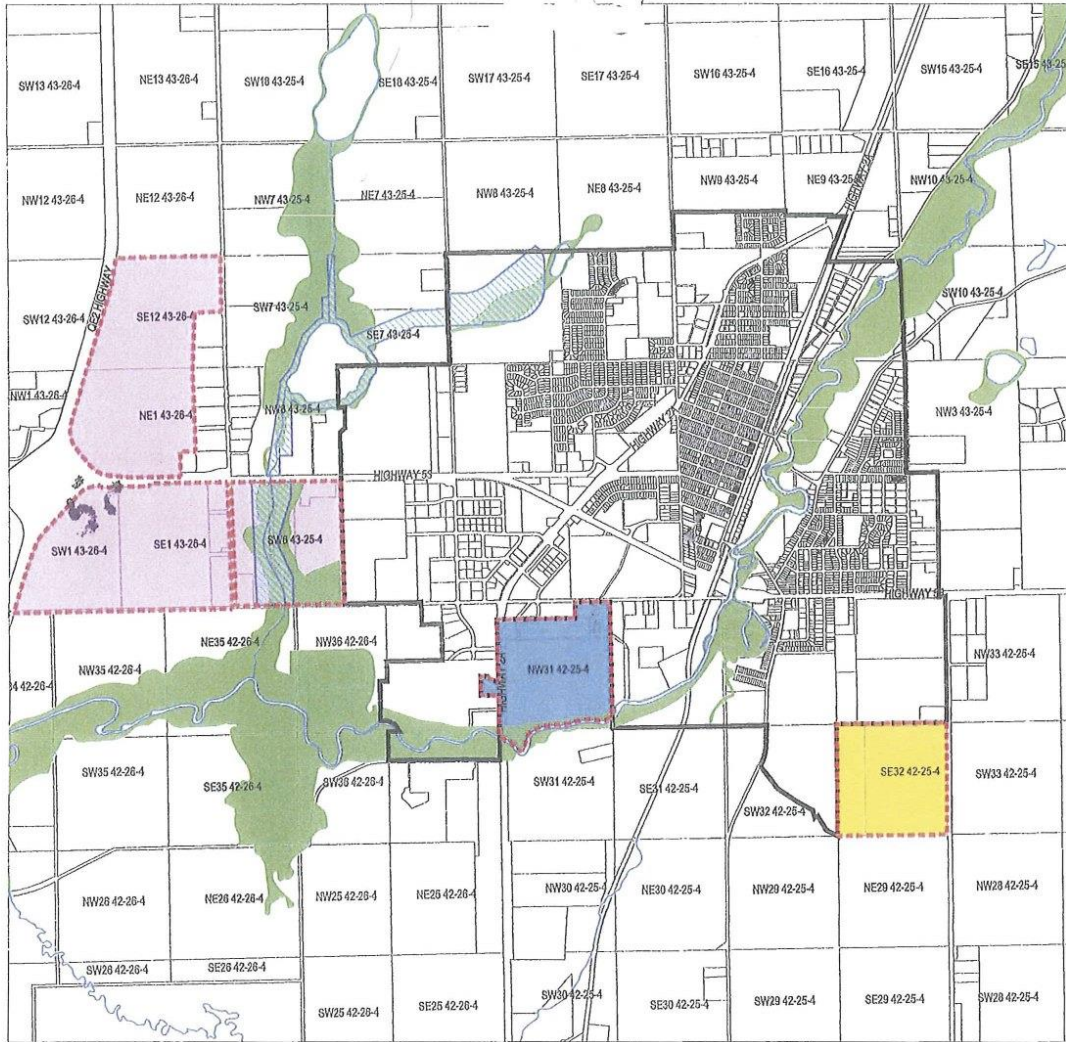
“original signed by”

D.W. Perras
Board Chair

“original signed by”

Jim Barlishen
Board Member

APPENDIX A – Appellant’s Submission Attachment 5d



Legend

- Town of Ponoka Boundary
- Proposed Growth Area
- Residential Expansion
- Commercial / Industrial Expansion
- Stampede Expansion

Figure 17
Proposed Growth Area
By Use

Town of Ponoka Growth Study

