
ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – November 24, 2017

IN THE MATTER OF sections 91, 92, 95, 97 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 appeals filed by Jeff Brookman and Allison Tulick with respect to the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks to issue *Water Act* Approval No. 00388473-00-00 to KGL Constructors (A Partnership).

Cite as: *Brookman and Tulick v. Director, South Saskatchewan Region, Alberta Environment and Parks, re: KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Board Chair;
Mr. Eric McAvity, Q.C., Board Member; and
Ms. Anjum Mullick, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; Ms. Valerie Myrmo,
Registrar of Appeals; Ms. Marian Fluker,
Associate Counsel; and Ms. Vickie Martin,
Student-at-Law.

SUBMISSIONS BY:

Appellants: Mr. Jeff Brookman and Ms. Allison Tulick,
represented by Mr. Tyler Shandro and Mr.
Richard Harrison, Wilson Laycraft.

Approval Holders: KGL Constructors, A Partnership, represented
by Mr. Ron Kruhlak and Mr. Stuart Chambers,
McLennan Ross LLP.

Director: Mr. Kevin Wilkinson, Director, South
Saskatchewan Region, Alberta Environment
and Parks, represented by Ms. Lisa Semenchuk
and Ms. Jodie Hierlmeier, Alberta Justice and
Solicitor General.

WITNESSES:

Appellants: Mr. Jeff Brookman; Ms. Allison Tulick; Mr.
Barry Lester; and Mr. Michael Kostashuk.

Approval Holders: Mr. Nathan Grob, Director Construction,
Graham Construction; Mr. Andrew Allan,
Environmental Manager, Kiewit; Ms. Ann
Francis, Environmental and Permitting
Manager, Kiewit; Mr. Carl Rogers, Principal
Project Manager - Roads and Highways,
Parsons; Mr. Garry Lamb, Urban Construction
Manager, Calgary, Alberta Transportation
(retired); and Mr. Jonathan Thompson, Senior
Wetland and Wildlife Scientist, Golder
Associates.

Director: Mr. Kevin Wilkinson, Director, South Saskatchewan Region, Alberta Environment and Parks; Ms. Alana-Rose Lynes, Water Technologist, Alberta Environment and Parks; and Mr. Matthew Wilson, Provincial Wetland Specialist, Alberta Environment and Parks.

Intervenors: Mr. Rizwan Hussain, Alberta Transportation, represented by Mr. Mark Enright, Alberta Justice and Solicitor General; Ms. Sarah Nevill; Weasel Head Society, represented by Ms. Sarah Nevill; Nature Calgary, represented by Mr. John McFaul; Mr. Charles Hansen; Mr. Barry Lester; Mr. Leon Nellissen; Ms. Maureen Bell; Ms. Janice Fraser; and Mr. Manoj Sharma.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Approval under the *Water Act* to KGL Constructors, A Partnership (the Approval Holder) to permanently disturb (in-filling) 24 wetlands for a total of 22.07 hectares of wetland loss and to change the location of water for the purpose of dewatering wetlands. The work allowed under the Approval is part of the Southwest Calgary Ring Road project.

Mr. Jeff Brookman and Ms. Allison Tulick (the Appellants) filed appeals with the Environmental Appeals Board (the Board) of AEP's decision to issue the Approval.

The Board received and reviewed written submissions, assessed oral evidence and arguments presented at the hearing, and reviewed AEP's record on the following issues:

1. What is the standard of review the Board should apply in the circumstances of this case?
2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:
 - a. the terms and conditions in the Approval;
 - b. the impact of disturbing the wetlands included in the Approval; and
 - c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.
3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?

The Board determined the appropriate standard of review to apply in the circumstance of this case is correctness, with no deference to the Director. The correctness standard means that if the Board does not agree with the Director's decision, the Board in making its report and recommendation to the Minister of Environment and Parks can recommend that she substitute her decision for that of the Director. In this way, the appeal process allows a better decision to be made.

The Board recommended the Approval be varied to include monitoring conditions to address concerns regarding impacts on water quality and water quantity flowing into Wetland 06.

The Board also recommended the Approval be varied to require the Approval Holder complete an assessment of the wetlands impacted by the project using the criteria specified in the 2013 Alberta Wetland Policy.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's report and recommendations in respect of appeals filed with respect to Approval No. 00388473-00-00 (the "Approval") issued to KGL Constructors, A Partnership (the "Approval Holder" or "KGL"). Alberta Environment and Parks ("AEP") issued the Approval to the Approval Holder under the *Water Act*, R.S.A. 2000, c. W-3 (the "*Water Act*"). The Approval allows for the permanent disturbance (in-filling) of 24 wetlands for a total of 22.07 hectares of wetland loss and to change the location of water for the purpose of dewatering wetlands. Eleven wetlands will be partially infilled, and 13 wetlands will be completely infilled as part of the construction of the Southwest Calgary Ring Road ("SWCRR"). The project involves the construction of a roadway through the Transportation Utility Corridor ("TUC") located on the west side of the City of Calgary. The project proponent is Alberta Transportation, but the Approval was issued to KGL, the contractor hired to complete the construction work.

[2] Mr. Jeff Brookman and Ms. Allison Tulick (collectively, the "Appellants") appealed the decision to issue the Approval.

[3] The Environmental Appeals Board (the "Board") held a hearing to hear submissions and evidence on the following issues:

1. What is the standard of review the Board should apply in the circumstances of this case?
2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:
 - a. the terms and conditions in the Approval;
 - b. the impact of disturbing the wetlands included in the Approval; and
 - c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.
3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?

[4] The Board determined the appropriate standard of review in the circumstances of this case is correctness, with no deference given to the Director.

[5] After reviewing the oral evidence and arguments, written submissions, and the AEP record, the Board is recommending the Approval be varied.

II. BACKGROUND

[6] On August 11, 2017, the Director, South Saskatchewan Region, Alberta Environment and Parks (the “Director”), issued the Approval to the Approval Holder. The Approval was issued with respect to the SWCRR on lands legally described as NW 04-24-02-W5M, SE 03-24-02-W5M, W½ 25-23-02-W5M, E½ 26-23-02-W5M, NW 24-23-02-W5M, SE 24-23-02-W5M, W½ 18-23-01-W5M, E½ 13-23-02-W5M, W½ 31-22-01-W5M, SE 31-22-01-W5M, E ½ 30-22-01-W5M, SW 29-22-01-W5M, NW 20-22-01-W5M, S½ 28-22-01-W5M, W½ 21-22-01-W5M, SW 27-22-01-W5M, and N½ 22-22-01-W5M (the “Site”) in the City of Calgary. The Approval allows the Approval Holder to permanently fill-in all or portions of 24 wetlands and change the location of water for the purpose of dewatering the wetlands.

[7] On August 11, 2017, the Board received a Notice of Appeal from Mr. Jeffery Brookman appealing the Approval and asking for a stay of the Approval.

[8] On August 12, 2017, the Board acknowledged Mr. Brookman’s Notice of Appeal and notified the Approval Holder and Director of the appeal. The Board also issued a temporary stay of the Approval in its entirety to allow the Board to establish a written submission process to consider the stay application more fully and to consider the validity of Mr. Brookman’s appeal. The Board set a schedule to receive written submissions on the stay request and the directly affected status of Mr. Brookman.

[9] On August 12, 2017, Mr. Brookman requested the schedule be amended to allow him extra time to file his written submission regarding the stay application and the directly affected motion. The Board granted Mr. Brookman an additional 4 and ½ hours.

[10] On August 13, 2017, Mr. Brookman asked for an additional extension to file his written submissions because he did not consider it reasonable for the Approval Holder to be given the opportunity to provide comments on extending the submission deadline.

[11] On August 13, 2017, the Board responded to Mr. Brookman to clarify the Board was not seeking permission from either the Approval Holder or the Director to grant the extension but was simply asking for their comments. The Board further extended the timeline for Mr. Brookman to provide his written submissions. The timeline for the other parties was also extended.

[12] On August 14, 2017, the Approval Holder provided its comments regarding the extension, stating it objected to the extension given the critical timing of the project and potential cost consequences of a stay.

[13] On August 15, 2017, the Board received a Notice of Appeal from Ms. Allison Tulick appealing the Approval and requesting a stay.¹ The Board set a schedule to receive written submissions on the stay application and whether Mr. Tulick was directly affected.

[14] Written submissions were received regarding the stay requests and directly affected issue between August 16, 2017 and August 18, 2017.

[15] On August 16, 2017, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively, the “Parties”) asking them to include comments in their written submissions on whether the stay, if it was maintained, should apply to all the wetlands or whether it could apply to only wetlands W06, W07, W08, and W09.²

[16] On August 18, 2017, the Board notified the Parties that Mr. Brookman and Ms. Tulick were found to be directly affected and their appeals would be heard. The Board notified

¹ The Board also received Notices of Appeal from Mr. Barry Lester, Ms. Maureen Bell, Mr. Kevin Bon Bernard, Mr. Leon Nellissen, Mr. Peter Sziraky, Mr. Marek Bartlomowicz, Ms. Sherie Angevine, Ms. Jacquie Hansen-Sydenham as President of the Discovery Ridge Community Association, Mr. Tim Dixon, and Mr. Brent Javra. The Board found these appellants were not directly affected and their appeals were dismissed. Ms. Diane Stinson also filed a Notice of Appeal and was found to be directly affected. However, she withdrew her appeal on August 28, 2017.

² In this report, the wetlands will be referred to by “W” and a corresponding number, and the watercourse will be referred to as “WC01.”

the Parties that the stay would remain in place but would be limited to wetlands W06, W07, W08, W09, and watercourse WC01.

[17] On August 23, 2017, Mr. Brookman asked for a site visit to be scheduled and a mediation meeting to be held. On August 25, 2017, the Board asked the Parties to respond to Mr. Brookman's request.

[18] On August 28, 2017, the Board proposed two issues for the hearing and asked the Parties to provide their comments.³

[19] On August 28, 2017, Mr. Brookman requested an extension to provide comments on the proposed hearing schedule to meet with legal counsel. The Board granted the extension and extended the deadline to receive comments on the hearing issues.

[20] On August 28, 2017, the Board received comments from the Parties regarding the site visit. The Appellants and the Director also provided comments regarding the prospect of holding a mediation meeting. On August 29, 2017, the Approval Holder provided its comments regarding the possibility of holding a mediation meeting.

[21] On August 30 and 31, 2017, the Board received comments from the Parties regarding the proposed issues for the hearing.

³ The Board suggested the following issues:

- “1. Was the decision to issue the Approval reasonable having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:
 - a. the terms and conditions in the Approval;
 - b. the role of wetlands in attenuating flooding;
 - c. the impact of disturbing the wetlands specified in the Approval in the overall context of all of the wetlands impacted by the development of the Southwest Calgary Ring Road; and
 - d. the impact of disturbing the wetlands specified in the Approval on the environmental resources outside the Transportation Utility Corridor.
2. In making the decision to issue the Approval was the Director required to apply the Provincial Wetland Policy (avoid, mitigate, or compensate, in that order), and if so, did the Director properly apply this policy? This issue includes, but is not limited to, consideration of the relationship between the Provincial Wetland Policy and the agreements entered into and the legislation passed to establish the Transportation Utility Corridor.”

[22] On August 31, 2017, the Board advised the Parties that neither the Approval Holder nor the Director were interested in participating in mediation.

[23] The Board published the Notice of Hearing in the Calgary Herald on September 5, 2017. The Board also provided a copy of the Notice of Hearing to the City of Calgary to place on its public bulletin board or website. The Notice of Hearing was also placed on the Board website, and a News Release was distributed to the media throughout the Province by the Public Affairs Bureau. The Notice of Hearing notified the public of the hearing and requested that any person, other than the Parties, wanting to make representations before the Board, should contact the Board by September 11, 2017.

[24] On September 1, 2017, the Board received a copy of the documents the Director relied on when making his decision (the "Record"). A copy of the Record was provided to the Parties on September 5, 2017.

[25] On September 5, 2017, the Approval Holder and Director provided comments on the proposed revised issues for the hearing.

[26] On September 5, 2017, the Approval Holder indicated the Approval does not authorize work to be conducted on WC01 and, therefore, it should not be included in the stay. The Board requested the Parties provide comments on the Approval Holder's request to reconsider the stay on this basis.

[27] The Board received comments on the reconsideration of the stay from the Director on September 6, 2017, and from the Appellants on September 7, 2017.

[28] On September 9, 2017, the Board notified the Parties that it was adjourning Mr. Brookman's application for a site visit but stated he could remake his application after the issues were set and the Board received the submissions from the Parties. The Board also provided the Parties an additional opportunity to provide comments on the issues as they had since received the Record.

[29] On September 11, 2017, the Board notified the Parties the stay was varied to exclude WC01.

[30] On September 14, 2017, the Parties provided additional comments on the proposed issues for the hearing.

[31] In response to the Notice of Hearing, the Board received intervenor applications from: Ms. Janice Fraser; Mr. Leon Nellissen; Rocky View County; Ms. Maureen Bell; Calgary Nature represented by Mr. John McFaul; Alberta Transportation represented by Mr. Mark Enright, Alberta Justice and Solicitor General; Weaselhead/Glenmore Park Preservation Society represented by Ms. Sarah Nevill; Ms. Sarah Nevill; Mr. Manoj Sharma; Mr. Barry Lester; Mr. Dave Mayhood;⁴ Mr. Charles Hansen; and Ms. Sherie Angevine⁵ (collectively, the “Intervenors”). On September 18 and 20, 2017, the Board received comments from the Parties regarding the intervenor applications.

[32] On September 19, 2017, the Approval Holder requested the Board reconsider its stay with respect to W07, W08, and W09 and remove these wetlands from the stay. The Board set a schedule to receive comments from the Parties regarding the Approval Holder’s request.

[33] On September 19, 2017, the Appellants applied for interim costs. The Board advised the Parties of the schedule to receive comments on the costs application.

[34] On September 20, 2017, the Board notified the Parties that, based on the Parties’ availability, the hearing would be held between October 23 and 25, 2017. The Board determined the issues for the hearing to be the following:

1. What is the standard of review the Board should apply in the circumstances of this case?

In consideration of this issue, the Board has used the word “appropriate” in the remaining issues. The meaning of appropriate will be based on the standard of review determined by the Board.

2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:
 - a. the terms and conditions in the Approval;
 - b. the impact of disturbing the wetlands included in the Approval; and

⁴ Mr. Mayhood withdrew his intervenor application on September 26, 2017.

⁵ Ms. Angevine withdrew as an intervenor on October 22, 2017.

- c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.
3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?

This issue includes, but is not limited to, consideration of the relationship between the relevant provincial wetland policies and the agreement entered into between the Crown and the Tsuut'ina, and the relationship between the relevant provincial wetland policies and the legislation passed to establish the Transportation Utility Corridor. For example, does the agreement or the legislation affect the applicability or interpretation of the policies?

[35] On September 25, 2017, the Appellants asked the Board to reconsider its decision excluding WC01 from the stay and asked the Board to add WC01 and the remaining 20 wetlands covered by the Approval to the stay. The Board set a schedule to receive comments from the Parties regarding the reconsideration request.

[36] On September 25, 2017, the Board acknowledged the additional comments provided by the Parties regarding the intervenor applications.

[37] On September 25, 2017, the Appellants submitted their interim costs application.

[38] On September 26, 2017, the Appellants and the Approval Holder provided submissions regarding the requests to reconsider the stay.

[39] On September 28, 2017, the Board notified the Parties that the Appellants' interim costs application was denied.

[40] On September 28, 2017, the Board notified the Parties and Intervenors that all the Intervenors would be given the opportunity to provide written submissions and provide a brief oral statement at the beginning of the hearing.

[41] On September 29, 2017, the Board received response submissions from the Parties regarding the stay requests.

[42] On October 2, 2017, the Board notified the Parties, that the Appellants' and the Approval Holder's applications for reconsideration of the stay were denied. The stay remained in place with respect to W06, W07, W08, and W09.

[43] The initial hearing submissions were received from the Parties and Intervenors between October 1 and October 4, 2017.⁶

[44] On October 6, 2017, the Approval Holder recommended the Board attend a site visit.

[45] On October 11, 2017, response submissions were received from the Parties.

[46] On October 13, 2017, the Appellants notified the Board of their intent to have two expert witnesses present at the hearing. The Director raised concerns regarding the Appellants' decision to bring two experts to the hearing so late in the process and requested the witnesses not be permitted to participate in the hearing. The Approval Holder supported the Director's motion stating there was no indication of the role or testimony of the witnesses.

[47] The Board had indicated in its letter dated October 5, 2017, to the Parties that the names of witnesses the Parties intended to bring to the hearing were to be provided as part of the written submissions, which were to be filed on October 11, 2017. The Appellants did not provide the names of their witnesses with their submissions.

[48] The Board notified the Parties on October 20, 2017, that it would hear the evidence of the Appellants' witnesses, and if the Approval Holder or Director had any concerns, they could raise their concerns after the evidence of the Appellants was complete. The Board stated that if it determined the evidence of the Appellants' experts was inadmissible, it can disregard the evidence.⁷

[49] The Board's site visit was held on October 22, 2017. The Appellants were also afforded a separate site visit on October 22, 2017.

⁶ The submission from Mr. Nellissen was received on October 11, 2017, after the Board granted an extension to file his submission on compassionate grounds.

⁷ At the hearing, neither the Approval Holder nor the Director raised concerns regarding the evidence presented by the Appellants' experts. Therefore, the Board weighed this evidence presented in the same manner as evidence provided by the other witnesses at the hearing.

[50] The hearing was held on October 23 to 25, 2017, in Calgary. The issues heard by the Board were:

1. What is the standard of review the Board should apply in the circumstances of this case?

In consideration of this issue, the Board has used the word “appropriate” in the remaining issues. The meaning of appropriate will be based on the standard of review determined by the Board.

2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:
 - a. the terms and conditions in the Approval;
 - b. the impact of disturbing the wetlands included in the Approval; and
 - c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.

3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?

This issue includes, but is not limited to, consideration of the relationship between the relevant provincial wetland policies and the agreement entered into between the Crown and the Tsuut’ina, and the relationship between the relevant provincial wetland policies and the legislation passed to establish the Transportation Utility Corridor. For example, does the agreement or the legislation affect the applicability or interpretation of the policies?

III. INTERVENOR SUBMISSIONS and RESPONSE SUBMISSION

A. Alberta Transportation

[51] Alberta Transportation is the owner of the SWCRR project. It submitted the “SWCRR alignment between 90 Avenue SW and Glenmore Trail was carefully selected to ensure the SWCRR would be contained within an area already disturbed by federal Department of National Defense operations south of the Elbow River.”⁸

⁸ Alberta Transportation Submission, dated October 4, 2017, at page 1.

[52] Alberta Transportation explained the Elbow River crossing is located mainly within a narrow corridor of the former Tsuut'ina First Nation lands that were significantly disturbed by past military activities. As a result, the SWCRR corridor was routed in the area and away from less disturbed lands nearby. Alberta Transportation noted this is aligned with section 4(1) of the *Calgary Restricted Development Area Regulations*, Alta. Reg. 212/76.

[53] Alberta Transportation explained an environmental assessment was prepared to meet the requirements of the *Canadian Environmental Assessment Act, 2012* (Canada) which included an extensive consultation program with federal and provincial regulators to understand regulator concerns and identify mitigation measures to address the concerns.

[54] Alberta Transportation explained the current SWCRR alignment avoids existing residential neighbourhoods within the City of Calgary, while maintaining acceptable engineering standards for the road alignment and profile, and the roadway corridor within the TUC was narrowed to minimize the impact on the Elbow River constructed wetland.

[55] Alberta Transportation stated it had "... agreed to pay The City of Calgary for the design and construction of a new constructed wetland within The City of Calgary's Clearwater Park (NW 24-2-5) at an estimated cost of \$4 million."⁹

[56] Alberta Transportation said it avoided wetlands in the TUC wherever possible, but due to available space in the TUC, the ability to build around wetlands was limited.

[57] Alberta Transportation added that feedback was received from public consultation and incorporated into optimizing the design around W06. It was noted that, in the planning stages, 29 percent of W06 was to be disturbed, but this was reduced to five percent through design optimization. Alberta Transportation explained options were evaluated for the Clay Marsh (W11). Alberta Transportation determined that moving the road alignment to the east would have resulted in removing 180 houses, and the Tsuut'ina Nation did not want to exchange more land to the west because of the cultural significance of the area and the existing buildings.

⁹ Alberta Transportation Submission, dated October 4, 2017, at page 2.

[58] Alberta Transportation explained all wetlands disturbed by the SWCRR will be compensated at a ratio determined by AEP to achieve no-net-loss of regional wetland functionality.

[59] Alberta Transportation said a Stormwater Drainage Master Plan was prepared during the planning stage and two new stormwater ponds will be constructed in the Elbow River valley. Alberta Transportation explained stormwater from the SWCRR that drains into the Elbow River would be directed into stormwater quality enhancement facilities before being released into the Elbow River.

[60] Alberta Transportation confirmed there would be fewer hectares of wetlands affected on the SWCRR project than on similar projects, such as the Southeast Calgary Ring Road.

[61] Alberta Transportation explained its agreement with the Tsuut'ina Nation dictated the Province would build and open the SWCRR no later than May 2022.

[62] Alberta Transportation said it offered to replace wetlands on other Tsuut'ina Nation lands that were not transferred to the Province, but the Tsuut'ina Nation declined the offer.

[63] Alberta Transportation noted any delays in obtaining provincial environmental approvals for the SWCRR project would not be considered force majeure events under the Tsuut'ina Nation final agreement. According to the agreement with the Tsuut'ina Nation, force majeure events would allow for an extension of the May 2022 deadline for opening the SWCRR.

B. Mr. Charles Hansen

[64] Mr. Charles Hansen stated the SWCRR construction is within the City of Calgary (the "City") and, therefore, must adhere to the municipal regulations.

[65] Mr. Hansen said the *Municipal Government Act*, R.S.A. 2000, c. M-26, gives the City the power to determine health and safety guidelines for projects, including works within the provincially designated mapped floodway flood plain.

[66] Mr. Hansen said the South West Calgary Ring Road Wetlands Impact Assessment completed by Golder Associates (the “Golder Report”) had errors and did not identify all the proposed engineering work under the Approval.

[67] Mr. Hansen stated the intent of the *Water Act* is to conserve all existing water bodies for sustainable water management.

[68] Mr. Hansen said *Calgary Land Use Bylaw 58* states that no structures should be constructed in or under a floodway unless they are being constructed by the City for erosion control. Mr. Hansen submitted the SWCRR cut and fill bridge does not comply with the *Calgary Land Use Bylaw*.

[69] Mr. Hansen questioned whether a cut and fill bridge complied with the intent of the Flood Hazard Map on the Elbow River Valley. Mr. Hansen submitted there are other bridge designs that would not cause upstream waters to rise or be as disruptive to the environment.

C. Mr. Leon Nellissen

[70] Mr. Leon Nellissen is a resident of the community of Springbank located approximately 20 kilometres northwest of the SWCRR project. He submitted KGL illegally diverted the Elbow River by way of channeling without having applied for or been given approval under the federal *Fisheries Act*, R.S.C. 1985, c. F-14.

[71] Mr. Nellissen stated there was inadequate disclosure about the project by Alberta Transportation and the Approval Holder, and no haul road was ever discussed in the open houses.

[72] Mr. Nellissen submitted the memorandum of June 14, 2017, from Alberta Transportation Minister Brian Mason to Alberta Transportation Deputy Minister Barry Day advising that future network planning should not encourage the development of outer ring roads and should not be worked into present plans through revisions.

[73] Mr. Nellissen said there are alternatives to the SWCRR, including narrowing the roadway.

D. Mr. Manoj Sharma

[74] Mr. Manoj Sharma is a resident of the community called The Slopes, located at the north end of the SWCRR. He explained the consultation materials showed only six to eight lanes for the proposed highway, but the road is being built to accommodate 16 to 18 lanes. Mr. Sharma said reducing the size of the project could be done without incurring delays, and possibly save costs.

[75] Mr. Sharma said the project construction will result in filling in wetlands that would be very useful in absorbing flood water in the event of future floods.

[76] Mr. Sharma referred to a letter from Mr. Michael Kostashuk to Alberta Transportation Deputy Minister and the Calgary Mayor, dated October 5, 2017, which expressed concern regarding the SWCRR. The letter noted the agreement between the Tsuut'ina Nation and the Government contemplates a delay in the project timelines without triggering the reversion clause. The letter also noted Alberta Transportation had not sufficiently considered stakeholder concerns, and the consultation was insufficient. Finally, the letter stated Alberta Transportation had shirked its responsibility and had ignored relevant economic considerations.

[77] Mr. Sharma submitted another letter from Mr. Michael Kostashuk to the Honourable Dave Rodney, dated October 20, 2014, which expressed concern about the SWCRR. The letter noted Alberta Transportation had not embraced economic and environmental procedures in the evaluation of the current design or undertaken serious evaluation of other, less invasive, options for the infrastructure. The letter asked the Province to have more inclusive representation at the open houses and coordinate more with the City.

E. Ms. Sarah Nevill

[78] Ms. Sarah Nevill is a resident of the community of Spruce Cliff, located approximately 15 kilometres north of the SWCRR project. She submitted the education programs delivered through the Weaselhead/Glenmore Park Preservation Society require safe access to open water in the wetlands.

[79] Ms. Nevill submitted infilling W06, W07, W08, W09, and WC01 will reduce the flow or degrade the quality of water that flows into them.

F. Nature Calgary

[80] Nature Calgary explained it has been involved in the study of conservation of Calgary's natural areas, including the Weaselhead Natural Area, for 60 years.

[81] Nature Calgary stated the Weaselhead Natural Area is one of three special protected areas in Calgary's system of natural environment parks, largely due to its high level of biodiversity. Nature Calgary said the Weaselhead had been part of numerous species and bird counts and is used by club members and schools for their own nature studies and walks.

[82] Nature Calgary submitted the biodiversity of W06 was not adequately described in the AMEC Environmental Impact Assessment (the "AMEC Report") and was not given adequate consideration by the Approval Holder.

[83] Nature Calgary said the partial or complete infilling of W07, W08, W09, and WC01 will have a negative impact on the long-term survival of W06.

[84] Nature Calgary stated that if assurances the SWCRR will not harm W06 are not provided, then 2.68 hectares of W06 should be compensated for, and not just the 0.15 hectares as indicated in the AMEC Report.

[85] Nature Calgary said the Northern Leopard Frog, a species identified as at risk, and the Sora (a small water bird), a species identified as sensitive, have been reported in W06; however, these species were not reported in the AMEC Report. Nature Calgary believed the boreal and wood frogs in the area should have been given indicator species status.

[86] Nature Calgary noted the AMEC Report did not undertake a survey for aquatic invertebrates even though there are 41 species of *Dytiscidae* beetles in W06.

[87] Nature Calgary argued the loss of the 24 wetlands cannot be compared to the wetlands in the Diamond-Didsbury area, as was done in the AMEC Report.

[88] Nature Calgary stated the Approval Holder did not make efforts to reduce the impact of its project on the wetlands, as required by the Alberta Wetland Policy.

G. Mr. Barry Lester

[89] Mr. Barry Lester is a resident of the community of Discovery Ridge, located near the northern end of the SWCRR. He submitted the project was not accurately represented by

Alberta Transportation or by the Approval Holder in the Approval application. Mr. Lester said the project was being represented as a six and eight-lane divided freeway when, in fact, it is being built to permit 16 to 18 lanes and is made up of the SWCRR and a possible future outer ring road.

[90] Mr. Lester said the transportation needs of southwest Calgary can be satisfied with fewer disturbances to the environment and adjacent communities and can cost less.

[91] Mr. Lester stated Alberta Transportation ignored pleas from stakeholders to consider modifying the design. Mr. Lester said it is relatively simple to make the roadway smaller by eliminating the central lanes and, as such, the project could be completed within the four remaining years of the agreement with the Tsuut'ina Nation. Mr. Lester stated that, while there would be costs associated with the redesign, there also would be significant costs savings by reducing the size of the roadway.

H. Weaselhead/Glenmore Park Preservation Society

[92] The Weaselhead/Glenmore Park Preservation Society (the "Weaselhead Society") explained it is a registered charity that is a member of the *Alberta Stewardship Network*¹⁰ and, as such, a key partner in delivering the Water for Life Strategy.¹¹ The Weaselhead Society provides outdoor education programs for approximately 5000 children and 800 adults annually, in addition to participating in various community events and education delivery programs.

[93] The Weaselhead Society said wetlands W06, W07, W08, and W09 provide surface water drainage into the Beaver Pond, which in turn drains into the Weaselhead Natural Environment Park.

[94] The Weaselhead Society submitted reduction of overland flow or changes in water quality would impact its ability to deliver educational programs.

[95] The Weaselhead Society stated the "reduction of overland flow or degradation in the quality of surface water entering these wetlands (two of the main wetlands in the Weaselhead

¹⁰ See: <http://www.landstewardship.org/ASN/>.

¹¹ See: <http://aep.alberta.ca/water/programs-and-services/water-for-life/strategy/downloadable-information-about-the-water-for-life-strategy.aspx>.

out of a total of 5) would impact the contribution their aquatic ecosystems make to maintaining water quality and quantity in the adjacent Glenmore Reservoir."¹² As a result of this concern, it was stated the Weaselhead/Glenmore Park Preservation Society retained a third party to conduct baseline, during construction, and post-construction water quality and quantity monitoring of W06.

[96] The Weaselhead Society said a change to the ecology of the Beaver Pond and the Weaselhead Natural Environment Park because of filling in the wetlands goes against the mission of the Society. The Weaselhead Society indicated it does not provide educational tours of other wetlands in the Weaselhead Flats, and W06 was the only area accessible by wheelchair.

I. Ms. Janice Fraser

[97] Ms. Janice Fraser is a resident of the community of Oakridge, located immediately east of the SWCRR. She submitted these appeals were not within the jurisdiction of the Board but are an indigenous rights matter and requires the proponents provide a federal environmental assessment.

[98] Ms. Fraser said the appeals do not relate to objections against the SWCRR as a whole but are about protecting the aquatic environment.

[99] Ms. Fraser stated the Board should reverse the Approval, place an “interim permanent” stay for the 24 wetlands, and call for restitution for damages done pending the appeals, including restoring the wetlands. Ms. Fraser submitted the Board should request the Approval Holder disclose all original planned work times, work orders, work schedules, and assessments.

[100] Ms. Fraser stated there should be an assessment done based on contamination of drinking water, destruction of flora and fauna, and additional flood risk in the flood zone. Ms. Fraser said wildlife species depend on the 24 natural wetlands for their survival.

[101] Ms. Fraser submitted there was undisclosed compensation and negotiations for the SWCRR.

¹² See: Weaselhead/Glenmore Park Preservation Society submission, dated September 11, 2017, at page 3.

[102] Ms. Fraser believed her Section 7 Charter¹³ rights were violated because the government did not disclose the truth about the SWCRR and the social, environmental, and financial risks it caused.

[103] Ms. Fraser stated the application for the Approval did not include submissions for avoidance or mitigation solutions.

[104] Ms. Fraser said there is no water management plan, storm trunk, storm reservoir, storm infrastructure, or replacement of the water “sponges” as a result of the SWCRR project, thereby impacting the security of her person and property. Ms. Fraser stated there was significant risk of flooding that could threaten to breach the Glenmore Reservoir Dam because of the loss of wetlands.

[105] Ms. Fraser stated filling in the wetlands creates risk of loss of life, drowning, injury, electrocution, or psychological trauma. Ms. Fraser said filling in the wetlands puts her drinking water at risk, and hydrocarbons and heavy metals from road runoff will contaminate her property.

[106] Ms. Fraser argued the Director’s decision was preconceived and did not consider the requirement for a water management plan, or avoidance and mitigation solutions. Ms. Fraser said the wetland damage was not avoided or minimized in any way, and funds given to Ducks Unlimited Canada would go to replacing wetlands in other areas of the province, not in the neighbourhood of the SWCRR project.

[107] Ms. Fraser said up to 1.5 million US gallons per acre of water contained in the wetlands were not part of the calculations for the engineering designs and, as a result, all of Calgary is at risk of greater flooding.

[108] Ms. Fraser stated the Approval Holder was building the earth dam causeway without approval under the *Water Act* by claiming it is building a bridge, not a causeway.

[109] Ms. Fraser submitted the Approval Holder continued the destruction of the wetlands despite the stays and injunction, and the Director refused to enforce compliance.

¹³ See: *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, s. 7.

[110] Ms. Fraser explained the Glenmore Reservoir purifies drinking water for 250,000 people in Calgary.

[111] Ms. Fraser said she is now required to get a backup valve before she can obtain overland insurance which was not required in the past. Ms. Fraser believed her home will be devalued due to increased flood risk.

[112] Ms. Fraser stated it was reckless and negligent for the Director, the Approval Holder, and the City to proceed with the project while refusing to listen to the concerns of the Appellants and other stakeholders.

[113] Ms. Fraser submitted an article by James Wilt, dated September 19, 2017, entitled “What Canada Needs to Do Now (But Isn’t) to Prevent the Worst Impacts of Climate Change,” which set out concerns about lack of preparedness for flooding in Canadian cities, including Calgary.

[114] Ms. Fraser stated a multi-year electrical utilities project housed in Enmax Substation 35 is at risk of flooding from the destruction of the wetlands resulting in extended lengths of time without power, creating further risk to humans during a natural catastrophe.

[115] Ms. Fraser explained in the event of a flood, adjacent communities would not be able to evacuate the area, thereby creating risk of loss of life, drowning, injury, harm, and severe property damage.

J. Ms. Maureen Bell

[116] Ms. Maureen Bell previously lived downstream of the Glenmore Reservoir Dam. She submitted the Board should conduct a *de novo* hearing as the Director did not correctly consider all the matters and facts before granting an approval.

[117] Ms. Bell stated the approval process needed to consider the relationship between the agreement with the Tsuut’ina First Nation, the size of the larger project, and the timing of the larger project so alternatives could be discussed.

[118] Ms. Bell stated the Director should have considered the existing, potential, and cumulative effects of the changes to the wetlands, as set out in the *Approved Water Management*

Plan for the South Saskatchewan River Basin (Alberta) Table 2. Ms. Bell said a potential hockey arena and amusement park built near the SWCRR will contribute to increased runoff and possibly destroy more wetlands. Ms. Bell suggested the standard for development in the area should be set now, rather than later to properly understand all the impacts in the area.

[119] Ms. Bell stated the Elbow River is already stressed, and there is no planned relief for increased risk of flooding or drought due to changes to the river and filling in of the wetlands.

[120] Ms. Bell said the concerns of the properties below the Glenmore Reservoir were not represented in the approval process or appeals, although they will be impacted by both flood and drought.

[121] Ms. Bell submitted brown and rainbow trout will be impacted if the river flow is too low, as will the public health risks, aesthetics, quality of recreation, and general enjoyment by the citizens.

K. Response Submissions

[122] The Approval Holder submitted none of the Intervenors provided any relevant information or evidence in connection with the issues set by the Board that was material or different from the information provided by the Appellants. The Approval Holder said the Intervenors generally had concerns outside the scope of the Approval, the hearing process, or the jurisdiction of the Board.

IV. STANDARD OF REVIEW

[123] The Parties raised the issue of determining the appropriate standard of review early in the appeal process. The Director argued the Board should apply the reasonableness standard it has “consistently” used in setting issues for a hearing, such that there is a presumption of deference to the Director. The Director cited the Supreme Court of Canada decision in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (“*Capilano*”) as authority for this view.¹⁴ The Board notes the Director later abandoned his reliance on the *Capilano* decision.

¹⁴ Letter from the Director, date September 5, 2017.

[124] The Appellants responded by arguing the *Capilano* case relates to the standard of review to be applied by the Court to the decision of a tribunal, and not the standard of review to be applied by a tribunal in reviewing the decision of the statutory decision-maker such as the Director.¹⁵

[125] On September 12, 2017, the Appellants made a preliminary motion to determine the standard of review to be applied by the Board. The Appellants argued the role of the Board is analogous to the appeal of a Master's decision in the Court of Queen's Bench.¹⁶

[126] In their letter of September 14, 2017, the Appellants raised a related argument regarding the role of the Director in the Board's proceedings. The Appellants argued the Director should have a limited role in the proceedings before the Board. The Appellants cited the case of *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684 at pages 708 to 711 ("*Northwestern Utilities*"). They argued the Director's participation should be limited to explaining the record "... in the nature of an *amicus curiae* but not a party." The Appellants objected to the adversarial role the Director was taking and stated the Director should leave the appeals to be argued between the Appellants and the Approval Holder. The Board notes, in contrast, two of the Intervenors argued the Board should limit the participation of the Approval Holder in the proceedings. These Intervenors objected to the Approval Holder being a full party in the appeals, arguing the appeals are of the Director's decision, and the Approval Holder should leave it to the Director to defend his decision.¹⁷

[127] The Board decided, rather than determining the standard of review as a preliminary matter, it would include it as one of the issues for the hearing. Therefore, in the Board's letter of September 20, 2017, the Board included the following issue for the hearing: "What is the standard [of] review the Board should apply in the circumstances of this case?" The Board stated it would use "... the word 'appropriate' in the remaining issues..." and the

¹⁵ Letter from the Appellants, dated September 5, 2017.

¹⁶ The Appellants cited the following cases as authority: *Brian W. Conway Professional Corporation v. River Rock Lodge Corporation*, 2015 ABQB 359 at paragraphs 25 and 26; *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166 at paragraph 30; and *Gudzinski Estate v. Allianz Global Risks US Insurance Co.*, 2012 ABCA 5 at paragraph 21.

¹⁷ The concern was first raised by Mr. Sharma in his email dated October 6, 2017, and supported by Ms. Fraser in her email also dated October 6, 2017.

“...meaning of appropriate will be based on the standard of review determined by the Board.” The Board added that in “...addressing this issue, the parties are requested to consider the *de novo* jurisdiction of the Board as provided for in section 95(2)(d) of EPEA.”¹⁸

A. Submissions

1. Appellants

[128] In their written submissions for the hearing, the Appellants argued the *Capilano* decision does not stand for the proposition that the decision of the Director must be reviewed by the Board on a reasonableness standard.

[129] The Appellants said the decision made by the City of Edmonton about the assessed value of the shopping mall property was reviewed by the Edmonton Assessment Review Board on a *de novo* basis, not on a reasonableness standard. The Appellants stated the issue considered by the Supreme Court of Canada related to the standard of review applied by the Court to the decision of the Edmonton Assessment Review Board. The Appellants argued the Supreme Court of Canada’s decision does not support the proposition that the standard of review of the Director’s decision by the Board should be reasonableness.

¹⁸ “EPEA” is the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and is the Act that establishes and empowers the Board. Section 95(2)(d) of EPEA provides:

“(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following: ...

(d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made”

The Board’s *de novo* jurisdiction was confirmed by the Court of Appeal in *Chem-Security (Alberta) Ltd. v. Lesser Slave Lake Indian Regional Council*, 1997 ABCA 241 at paragraphs 11 and 12:

“Section [95(2)] of the Act contemplates that, prior to the hearing of an appeal, the Board may determine which matters set out in a notice of [appeal] will be included in the hearing of the appeal. In making that determination the Board is entitled to consider ‘whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made.’

It follows that the hearing before the Board is a *de novo* hearing. The Board is empowered to consider evidence that was not before the Director. For example, if significant changes in p.c.b. emissions had occurred since the Director pronounced, the Board might consider that.” (Footnotes not included.)

[130] The Appellants stated the Board's decisions are assessed on a standard of reasonableness because of its expertise and familiarity with its home legislation. The Appellants argued if the Board gave deference to the Director's decision, there would be no reason for the Board's decisions to be reviewed by the courts on a reasonableness standard. The Appellants said it would defeat the purpose of the Board accepting new evidence at hearings.

[131] The Appellants stated *Capilano* provides direction on the standard of review for decisions appealed from a tribunal such as the Board, not the standard of review for decisions appealed to a tribunal such as the Board. The Appellants argued giving deference to the Director's decision undermines the purpose of the Board and its processes.

[132] The Appellants submitted a *de novo*, or at least a correctness standard, should apply, however during closing arguments at the hearing, the Appellants acknowledged the competing standards of review are reasonableness and correctness, and that *de novo* is not a standard of review.

2. Director

[133] The Director argued that, based on the Alberta Court of Appeal decision of *Lum v. Alberta Dental Association and College (Review Panel)*, 2015 ABQB 12, affirmed 2016 ABCA 154 ("*Lum*"), the Board must apply the same standard of review to the Director's decision as a Court would apply in a judicial review.

[134] The Director argued the presumption of applying the reasonableness standard can only be reviewed if the decision is:

1. a constitutional issue;
2. the question is of general law that is both of central importance to the legal system as a whole and outside the decision-maker's specialized area of expertise;
3. the drawing of jurisdictional lines between two or more competing specialized tribunals; and
4. a true question of jurisdiction or *vires*.

[135] The Director stated a reasonableness standard would apply when the question raises issues of fact, discretion, or policy, or involves intertwined legal and factual issues.

[136] The Director stated the standard of review requires focusing on the nature of the issue and not the powers of the reviewing body. The Director said the fact the Board has a *de novo* hearing power is irrelevant to the standard of review to be applied.

[137] The Director said the Court in *Lum* found the reasonableness standard applied to the review by an appeal body of the decision of the initial decision-maker, and deference was owed to the initial decision-maker even when the appeal body had the power to make any decision the initial decision-maker could have made.

[138] The Director stated the Director's decision to issue the Approval involved: (1) interpreting his own statute (the *Water Act*); (2) raising issues of fact, discretion, and policy; and (3) intertwined legal and factual issues.

[139] The Director said the issuance of an approval always involves balancing several competing factors and considerations, so there is no one correct answer.

[140] The Director argued issuing the Approval did not raise any of the types of questions the Supreme Court of Canada indicated would attract a correctness standard since there were no constitutional issues, no questions of general law, no drawing of jurisdictional lines, and no question of true jurisdiction.

[141] The Director stated a decision is considered reasonable if it falls within a range of possible, acceptable outcomes which are defensible in fact and law.

[142] The Director argued the Board must apply a reasonableness standard in reviewing the Director's decision to issue the Approval, and the Director's decision must be given deference.

3. Approval Holder

[143] The Approval Holder adopted the position and submissions of the Director. The Approval Holder noted the Director is required to balance various interests in determining whether to issue the Approval such that a review on a standard of correctness would not be appropriate.

[144] The Approval Holder submitted the Director's decision was correct even if correctness was the standard that was applied.

B. Response Submissions

1. Director

[145] The Director argued none of the cases referred to by the Appellants on the standard of review were applicable since the cases referred to standards of review applied by superior courts to decisions of Masters.

[146] The Director stated the *Lum* case is directly on point as it relates to an internal review of an initial decision-maker by an appellate body, and the Court determined the standard of review for an internal review was reasonableness.

[147] The Director said the *Capilano* case does not consider an internal review of an initial decision-maker by an appellate body, and the *Lum* case was more relevant. The Director stated *Capilano* sets out the presumption of reasonableness when interpreting home legislation unless one can fit into four exceptions to which correctness applies. The Director noted the Alberta Court of Queen's Bench in *Lum* relied on the principles from *Capilano* in determining the standard of review of reasonableness for the internal review.

[148] The Director noted that a "*de novo*" standard of review is not a standard of review recognized in administrative law, but it is an approach the Board has taken on previous appeals. The Director stated that just because the Board may consider additional evidence and interpret statutes, it does not, in and of itself, determine the standard of review.

2. Approval Holder

[149] The Approval Holder reiterated it supported the Director's position on the standard of review and said that regardless of which standard of review was applied, the Director's actions met both standards.

[150] The Approval Holder submitted that, under a *de novo* approach, there is no review because it is an entirely new process that does not have to pay any regard to the previous

decision. The Approval Holder said this is not the same as a *de novo* hearing in which evidence not on the record may be considered by the appellate decision-maker.

[151] The Approval Holder submitted there is no basis in statute or jurisprudence to indicate a proceeding before the Board is *de novo* as advocated by the Appellants, such that the Board considers the matters before it without regard to the Director's decision. The Approval Holder said the Board reviews the Director's decision but can consider new evidence where appropriate. The Approval Holder stated there are two possible standards of review as determined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*"), correctness or reasonableness.

[152] The Approval Holder stated that, where the Director must weigh competing interests and assess a variety of technical data provided to him as part of the application, it is not possible to say the Director was "incorrect." The Approval Holder stated the Director considered all the relevant factors and, therefore, his decision was not only reasonable, but it was also correct.

C. Analysis

[153] This is the first time the Board has received full arguments on the standard of review to be applied by the Board in the hearing of an appeal. As noted by the Director, in the past, when determining the issues for the hearing the Board has generally accepted the Director's proposition that the Director's decision should be reviewed on the reasonableness standard.¹⁹ For example, in many cases, the Board has set the issues to include whether the decision made by the Director (e.g. an approval) was reasonable. However, now that the Board has received

¹⁹ While, in the past, the Board has accepted the Director's submission the Board's review should include a reasonableness component, the Board has not accepted the Director is owed deference. As stated in *McCain Foods (Canada) v. Director, Prairie Region, Alberta Environment*, (20 July 2000) Appeal No. 99-138 (A.E.A.B.) at paragraph 14:

"The Board has previously stated in other decisions that it will recommend that the Minister confirm the Director's approval decisions if those decisions best serve the public interest viewed in light of the purposes of the Act and other provisions. In other words, the Board will generally not defer at all to the Director's bases for the decisions at issue. The Board also stated that some degree of deference is inevitable as a practical matter where the Board uses the Director's own decision-making record as the starting point for its *de novo* review." (Footnotes not included.)

full arguments, it has concluded the appropriate standard for review to apply in the circumstances of this case is correctness, with no deference given to the Director.²⁰

[154] In making this decision, the Board needs to clarify what it means by the correctness standard of review. As will be discussed below, in cases such as this (the appeal of a *Water Act* approval) the Board's role is to make a recommendation to the Minister of Environment and Parks ("Minister"). Therefore, in applying the correctness standard the Board determines if it agrees with the Director or not, and if it does not, it will recommend to the Minister that she should substitute her decision for that of the Director.²¹ In fact, not only can the Minister substitute her decision for that of the Director, the Minister can "make any further order that the Minister considers necessary for the purpose of carrying out the decision."²² The purpose of this approach is to result in a better decision, which tries to address the valid concerns of the person filing the appeal.

[155] As discussed by the Court of Queen's Bench in *Lum*, there are three different standards of review that can involve a decision of the Board. The first is the standard of review to be applied by the Board to the decision of the Director, which is the subject of appeal before the Board in this instance. The second is the standard of review to be applied by the Court of Queen's Bench to the decision of the Board. The third is the standard of review to be applied by the Court of Appeal to the decision of the Court of Queen's Bench. The rules regarding each of the standards of review are different and it is important not to confuse them. Unfortunately, the arguments advanced by the Director confuse the standard of review applicable to the Board reviewing the decision of the Director with the other two types of standards of review. The

²⁰ In making this decision, the Board has made this determination for an appeal of a *Water Act* Approval with the issues set in these appeals, being (1) whether the decision to issue the approval was correct having regard to the environmental impacts of the project, and (2) whether the Director has correctly applied the appropriate policies in making the decision. It is possible that for different types of decisions made by the Director (i.e. administrative penalties) and for different issues, correctness may not be the appropriate standard. A consideration of the standard of review should be done on a case by case basis.

²¹ The Minister is empowered to make such a decision by section 100(1) of EPEA, which provided:
"On receiving the report of the Board, the Minister may, by order,
(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, ... and
(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."

various tests identified by the Director relate mainly to the standard of review that is applicable to the Court of Queen's Bench reviewing the Board, and not the Board reviewing the Director. The functions of the Board reviewing the Director and the Court of Queen's Bench reviewing the Board are different, and do not by default attract the same standard of review.

1. First Standard of Review – Review by the Tribunal

[156] In *Newton*,²³ which is cited in *Lum*, the Court of Appeal discussed the three types of standards of review. With respect to the role of the appellate tribunal (i.e. the Board) reviewing the statutory decision-maker of first instance (i.e. the Director), the Court of Appeal stated: “The central issue in this appeal is the respective roles of the presiding officers [(the statutory decision-maker of first instance)] and the [Law Enforcement Review] Board [(“LERB”)] in the police disciplinary process in Alberta.”²⁴ According to the Court, this included consideration of “...what level of deference should the Board show to the presiding officer?”²⁵ This is the standard of review that is relevant in this case.

2. Second Standard of Review – Review by the Court of Queen's Bench

[157] The Court in *Newton* also stated: “The standard of review analysis respecting the relationship between superior courts [(Queen's Bench)] and administrative tribunals [(the Board in this case or in the LERB in the *Newton* case)] is found in *Dunsmuir v. New Brunswick*, ... 2008 SCC 9...”²⁶ According to the Court,

“*Dunsmuir* summarized the standard used at [paragraph] 51:

... questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

Truly jurisdictional questions are usually reviewed for correctness. Errors of law within the expertise or mandate of the tribunal are often reviewed for

²² EPEA section 100(1)(c).

²³ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 (“*Newton*”).

²⁴ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paragraph 27.

²⁵ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paragraph 27.

²⁶ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paragraph 32.

reasonableness. Questions of law of more general interest to the legal system are often reviewed for correctness.”²⁷

[158] The Court continued:

“The standard of review applied by the superior court to decisions of administrative tribunals recognizes the purely supervisory role of the superior courts. Judicial review has a constitutional foundation related to the rule of law. ‘The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes’: *Dunsmuir* at [paragraph] 28. Because the role of the superior court is supervisory, it is not their place to substitute their judgement for that of the tribunal.”²⁸

This is the standard of review that is discussed in *Capilano*, and in other cases cited by the Director: *Canadian Forest Products Ltd. v. Alberta (Environment and Parks)*, 2016 ABQB 628 and *Bow River Irrigation District v. Wilkinson*, 2017 ABQB 616. In all three of these cases the standard of review being addressed is not the standard of review the Board needs to apply to a review of the Director’s decision.

3. Third Standard of Review – Review by the Court of Appeal

[159] Finally, in *Newton*, the Court of Appeal stated, “The standard of review analysis respecting appellate superior courts [(the Court of Appeal)] and trial courts [(Court of Queen’s Bench)] was definitively stated in *Housen v. Nicholaisen*, ... 2002 SCC 33 [(‘*Housen*’)].”²⁹ According to the Court, “...an appellant superior court reviews the decisions of the trial courts on questions of law for correctness. Errors of fact, mixed errors of fact and law, and inferences to be drawn from the facts are generally reviewed for palpable and overriding error.”³⁰ This is the type of standard of review that was discussed in the cases dealing with the appeal of decisions of the Masters of the Court of Queen’s Bench identified by the Appellants.

4. Director’s Arguments

[160] In the Board’s view, the Director has misconstrued *Newton* and *Lum*. As stated, the Director argued the reasonableness standard can only apply if the decision is: a constitutional

²⁷ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399 at paragraph 32.

²⁸ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399 at paragraph 33.

²⁹ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399 at paragraph 30.

³⁰ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399 at paragraph 30.

issue, the question is of general law, the drawing of jurisdictional lines between tribunals, or is a true question of jurisdiction. This is part of the test for the standard of review addressed in *Dunsmuir* and applies to the Court of Queen's Bench reviewing a tribunal. It is not part of the test for a tribunal reviewing the decision-maker of first instance as described in *Newton* and *Lum*.

[161] Further, the Director stated a reasonableness standard would apply when the question being addressed raises issues of fact, discretion, or policy, or involves intertwined legal and factual issues. Again, this is part of the test for the standard of review described in *Dunsmuir* and applies to the Court of Queen's Bench reviewing a tribunal, not the test for a tribunal reviewing the decision-maker of first instance as described in *Newton* and *Lum*.

[162] The Director stated determining the standard of review requires focusing on the nature of the issue to be decided and not the powers of the reviewing body. The Director also submitted the fact the Board has *de novo* hearing power is irrelevant to the standard of review to be applied. All three of these positions are incorrect. As discussed below, both *Newton* and *Lum* make it clear the nature of the issue, the powers of the reviewing body, and whether the reviewing body has *de novo* hearing powers are all relevant to determining the appropriate standard of review for an appellate tribunal reviewing a decision-maker of first instance.

[163] The Director was correct in saying the Court in *Lum* found the reasonableness standard applied to the review by the LERB of the decision of the presiding officer, and deference was owed to the presiding officer even when the LERB had the power to make any decision the initial decision-maker could have made. However, the Director fails to note this was the outcome of applying the test for the appropriate standard of review in that case. The Director is incorrect in suggesting this is a finding to be applied in all cases, and the Director does not make any arguments comparing the circumstances in the *Lum* and *Newton* cases to the case that is before the Board.

[164] As stated, the Director argued none of the cases referred to by the Appellants on the standard of review are applicable since the cases referred to standards of review applied by superior courts to the decisions of Masters. The Board agrees. The same is true for the *Capilano* case first referred to by the Director. The only case referred to by any of the Parties that is relevant to determining the applicable standard of review for a tribunal when reviewing a

decision-maker of first instance is *Lum*, and regrettably none of the Parties provided argument as to how the test prescribed in *Lum*, and initially in *Newton*, should be applied by the Board in this case.

[165] Finally, the Director noted that a *de novo* standard of review is not a standard of review recognized in administrative law, contrary to the position initially argued by the Appellants. Again, the Board agrees. There are only two standards of review, reasonableness and correctness; there is no *de novo* standard of review. However, as detailed in both *Lum* and *Newton*, the fact the Board holds a *de novo* hearing – which is acknowledged by all the Parties – is one of the relevant factors in determining the appropriate standard of review to be applied by the Board in determining what standard of review to apply when reviewing the Director’s decision.

5. The *Newton* Test – The Standard of Review for Appellate Tribunals

[166] According to the Court in *Newton*,

“The determination of the standard of review to be applied by an appellate administrative tribunal ... to the decision of an administrative [decision-maker] of first instance ... requires a consideration of many of the same factors that are discussed in *Housen* and *Dunsmuir/Pushpanathan*, adapted to the particular context”³¹

Specifically, the factors that should be considered are:

1. the nature of the statutory scheme;
2. the roles of the appellate body and decision-maker of first instance under the enabling legislation;
3. the nature of the issues being decided;
4. a comparison of the expertise and “advantageous position” of the appellate body and the decision-maker of first instance, including whether new evidence can be considered in the hearing of the appeal (is the hearing *de novo*); and
5. the need to be economical with the appeal process (the number, length, and cost of appeals), including the need to respect the role of the decision-

³¹ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399 at paragraph 42. See: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 SCC 778 (“*Pushpanathan*”).

maker of first instance (preserving the economy and integrity of the first decision-making process).³²

A consideration of these questions will determine the appropriate standard of review for an appellate tribunal to apply to a decision-maker of first instance. The standard of review will be either reasonableness or correctness. While this test is derived from *Housen*, *Dunsmuir*, and *Pushpanathan*, the *Newton* test is not the same as the test stated in these cases, and any cases that solely rely on the tests in these cases are of limited assistance in determining the proper standard of review for an appellate tribunal reviewing a decision-maker of first instance.

6. Application of the Newton Test

[167] In applying the Newton Test, the Board will provide an overview of the appeal process to provide context and support its consideration of the factors that make up the test.

a. Overview

[168] The *Water Act* is one of the key environmental laws in Alberta.³³ The *Water Act* regulates the allocation of water (via licences) and any activities that take place in and around waterbodies (via approvals). This legislation is essential to protect the water resources in Alberta, which are necessary for human life, the environment, and economic development.³⁴ In the case before the Board, the *Water Act* regulates the disturbance of wetlands to allow the construction of a major roadway. Decisions under the *Water Act* are important to ensure the protection of the environment, especially in Southern Alberta where there are limited water supplies (in some areas of this region all surface water has already been allocated) and where wetlands have a significant environmental value because there are comparatively few. Wetlands support a wide variety of flora and fauna and play an essential role in attenuating the impacts of both drought and flooding. The *Water Act* is an ameliorative statutory scheme, which requires a broad and liberal interpretation. (See: *114957 Canada Ltée (Spraytech, Société d'arrosage) v.*

³² See: *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, and *Lum v. Alberta Dental Association and College*, 2015 ABQB 12. With respect to *Newton*, it is important to note the LERB did not consider all of these factors in determining its jurisdiction. In *Newton*, the LERB's consideration was limited to the mere presence of the appeal right and the ability to accept *de novo* evidence.

³³ See: EPEA, which is the legislation that establishes the Board.

Hudson (Town), 2001 SCC 40.³⁵ See also: *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52.³⁶)

[169] In making decisions under the *Water Act*, the Director and the Board are guided by the purpose provision, which is found in section 2. Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta’s economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;

³⁴ See: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (A.E.A.B.), for discussion about the importance of water resources in Alberta.

³⁵ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at paragraph 1:

“The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. ... This Court has recognized that ‘[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a fundamental value in Canadian society’: *Ontario v. Canadian Pacific Ltd.*, [1995 SCC 112 (SCC) at paragraph 55].”

³⁶ *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 at paragraph 9:

“The [*Environmental Protection Act*] is Ontario’s principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation (Legislation Act, 2006, S.O. 2006, c. 21, Sch. F, s. 64; *Ontario v. Canadian Pacific Ltd.*, [1995 SCC 112 (SCC) at paragraph 84]). Moreover, as this Court recognized in *Canadian Pacific*, environmental protection is a complex subject matter — the environment itself and the wide range of activities which might harm it are not easily conducive to precise codification ([paragraph] 43). As a result, environmental legislation embraces an expansive approach to ensure that it can adequately respond ‘to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation’ ([paragraph] 43). Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep ([paragraph] 84).”

- (f) the important role of comprehensive and responsive action in administering this Act.”

These purposes require the Director and the Board to balance competing societal interests when making decisions under the legislation including, most notably, environmental protection and economic development.

[170] The decision-making process for a *Water Act* approval starts when the project proponent planning to undertake an activity (i.e. the construction of a roadway) that impacts a waterbody, such as any of the wetlands in this case, makes an application to the Director.³⁷ (Depending on the degree and nature of the environmental impacts other regulatory tools may be used, such as a Code of Practice. However, when the degree and nature of the impacts are sufficient that an individualized decision is required, then an approval is used.) Upon receiving the application, the Director undertakes an administrative review and may require the proponent to provide additional information.³⁸

[171] When all necessary information has been provided, the application is declared administratively complete, and the proponent is required to publish notice of the application.³⁹ In the case before the Board, notice was published in the classified section of the Calgary Herald and posted on a Government of Alberta Website. In response to this notice, persons who believe they will be negatively impacted are entitled to file Statements of Concern with the Director.⁴⁰ The Director will only accept Statements of Concern for a limited time, which is seven days when the application is for a *Water Act* approval.⁴¹ The Director reviews these Statements of Concern and is required to consider the concerns of any person that he believes is directly affected. (In this case, the Director rejected all of the Statements of Concern.) The Director rejects late filed Statements of Concern. The Director then undertakes his technical review and decides whether to issue the approval.⁴²

³⁷ See: *Water Act* section 37(1).

³⁸ See: *Water Act* section 37(2).

³⁹ See: *Water Act* section 108.

⁴⁰ See: *Water Act* section 109(1).

⁴¹ See: *Water Act* section 109(2).

⁴² See: *Water Act* section 38.

[172] In the past, the Director has had his technical staff undertake an independent technical review of the information provided by the proponents. For example, in the past, the Director's staff may have done their own calculations to determine if the information filed by the proponent is valid. However, due to resource restraints, the Board has heard evidence from the Director that his staff now only ensure the information provided by the proponent is complete, and the Director relies on the conclusions drawn by the proponent's experts to make his decision. (At the request of the Director, the Board modified its hearing process. In the past, the Director used to go before the project proponent. Now, to reflect the Director is relying on the proponent's experts, the project proponent goes before the Director.)

[173] If the Director issues the approval, he notifies the proponent and any of the persons who filed Statements of Concern that he determined to be directly affected.⁴³ He does not notify anyone whose Statement of Concern he rejected for not being directly affected or that was filed late. Once the approval has been issued, the appeal period starts to run. In the case of an approval under the *Water Act*, the appeal period is seven days from the day a person receives notice of the Director's decision to issue the approval.⁴⁴

[174] The Board's appeal process starts with the filing of a Notice of Appeal. The Notice of Appeal must be filed with the Board within the appeal period to be valid, although there are some limited circumstances where the Board will extend the appeal period. Further, while the filing of a Statement of Concern with the Director is a prerequisite to being able to file an appeal with the Board, the Director accepting a person as being directly affected is not. The Board makes its own decision whether a person is directly affected, and in this case, the Board found three of the persons who filed notices of appeal were directly affected. The requirement for a Statement of Concern to be filed, the requirement to file a Notice of Appeal in time, and the requirement to be directly affected all serve "gatekeeper" functions to ensure that only those people who are genuinely concerned about a project can appeal.⁴⁵

⁴³ See: *Water Act* section 111.

⁴⁴ See: *Water Act* section 116.

⁴⁵ See: EPEA section 95.

[175] Once a matter is determined to be properly before the Board, and assuming the Board is not successful in mediating the dispute between the project proponent and the appellants, the Board proceeds to a hearing. Before doing so, however, the Board usually determines the issues to be heard at the hearing of an appeal.⁴⁶ The Board has a broad discretion to determine the issues to be heard, but for an issue to be validly before the Board, it must have been included in the Notice of Appeal (i.e. the Notice of Appeal acts as a pleading to limit the possible issues to be heard), it must relate to the decision under appeal (in the circumstance of this case, a *Water Act* approval), and it must be within the Board's jurisdiction (the Board must be able to make recommendations to the Minister respecting the issue). The Board has the authority to direct that matters other than the issues set will not be raised at the hearing.⁴⁷

[176] The Board's jurisdiction to hear certain issues, or in some cases accept certain appeals, is also limited where there has been another public hearing process. EPEA, the legislation that established the Board, requires the Board to consider whether the person filing the appeal appeared before or had the opportunity to appear before the Alberta Energy Regulator, the Natural Resources Conservation Board, the Alberta Utilities Commission, or a *Canadian Environmental Assessment Act* Hearing Panel. Where one of these other boards adequately considered an issue, the Board is required not to include that issue in the hearing of an appeal.⁴⁸ Further, where one of these other boards adequately considered all the issues included in the Notice of Appeal, the Board is required to dismiss the appeal in its entirety.⁴⁹ Again, these provisions provide "gatekeeper" functions to eliminate any duplication of proceedings.

[177] Once the Board has set the issues to be considered at the hearing of an appeal, the Board proceeds to a hearing. At the hearing, while the Director's record plays a key role in the proceeding, the parties are entitled to provide *de novo* evidence – new evidence that was not before the Director at the time he made his decision.⁵⁰ It is very common for all the parties to file new technical reports and call experts. In preparation for the hearing, the Director may

⁴⁶ See: EPEA section 95(2).

⁴⁷ See: EPEA section 95(4).

⁴⁸ See: EPEA section 95(2).

⁴⁹ See: EPEA section 95(5).

⁵⁰ See: EPEA section 95(2).

undertake additional technical work, including site visits and further reviews of technical information. The importance of accepting new evidence was discussed by the Board in the *Maga* case.⁵¹ In *Maga* the Board stated:

“Several judicial decisions have informed the Board that our hearing is *de novo*, and the Director and Approval Holder conceded this. Thus, the Board should look at additional evidence that the Director did not have when he made his decision to issue the Approval. Further, when the Board provides recommendations to the Minister, the Minister has the power to confirm, reverse or vary the decision of the Director, and therefore, it is prudent upon the Board to hear all relevant information to enable it to present a thorough and balanced report to the Minister.”⁵² (Footnotes not included.)

During the hearing, the evidence is tested much more rigorously than during the Director’s technical review. The evidence is subject to cross-examination by the parties adverse in interest to the Director and subject to questioning by the Board.

[178] One of the key aspects of the hearing is the expertise of the Board members. Unlike many Boards, the members of the Environmental Appeals Board are recruited for their expertise. The Courts have recognized the expertise of the Board in a number of decisions.⁵³

⁵¹ *Document Production: Maga et al. v. Director, Northern Region, Regional Services, Alberta Environment re: Inland Cement Limited* (13 February 2002), Appeal Nos. 02-023,024, 026, 029, 037, 047, and 074-ID3 (A.E.A.B.) (“*Maga*”).

⁵² *Document Production: Maga et al. v. Director, Northern Region, Regional Services, Alberta Environment re: Inland Cement Limited* (13 February 2002), Appeal Nos. 02-023,024, 026, 029, 037, 047, and 074-ID3 (A.E.A.B.) at paragraph 60.

⁵³ See: *Sarg Oils Ltd. v. Environmental Appeal Board*, 2007 ABCA 215 at paragraph 13:

“The Board is an expert appellate tribunal, established to decide polycentric fact and policy intensive issues about the protection of the environment. While its decisions are in form only recommendations to the Minister, they can have a significant effect on the rights of those before it. The Board recognized this, by affording the respondents a full viva voce hearing with the right to cross-examine and call witnesses.”

See: *Imperial Oil Limited and Devon Estates Limited v. HMQ and the City of Calgary*, 2003 ABQB 388 at paragraph 37:

“In relation to the second factor, the nature of the expertise has to be considered, with reference to the specific problem. Here, it is fair to look at the statutory scheme and recognize that a specialized board is empowered to have a hearing, and make recommendations to the Minister. One then can look at the expertise of the Board, as the appellate body, as well as the general expertise of the Minister. The Board has a scientific expertise in reviewing decisions of the Director. The expertise of the Minister in this scheme is to bring his knowledge of the political pressures to bear on the final decision. Balancing the wide and often conflicting interests as are set out in the purpose of the Act is a decision for which a Minister has qualifications and expertise by virtue of his or her position.”

See also: *McColl-Frontenac Inc. v. Alberta (Minister of Environment)*, 2003 ABQB 303 at paragraphs 24

Currently the membership of the Board includes expertise in environmental law, wildlife biology, toxicology, genetics, animal sciences, geology, energy regulation, resource development, environmental stewardship, land use planning, regulatory compliance, environmental management, physics, meteorology, water policy, regulatory policy, regulatory prosecutions, environmental engineering, contaminated sites management and remediation, civil engineering, water management, and dispute resolution.⁵⁴ When the Board was created, the intent was to create an independent board of experts who were capable of reviewing the decisions made by AEP.⁵⁵

[179] After the hearing, in most cases, the Board prepares a Report and Recommendations for the Minister.⁵⁶ The Board will recommend to the Minister whether the decision being appealed should be confirmed (upheld, allowing the project to proceed under the original terms and conditions), reversed (cancelled, requiring the proponent to start over with a new application), or varied (allowing the project to proceed but under different terms and conditions). Upon receiving the Report and Recommendations, the Minister is empowered to confirm, reverse, or vary the decision appealed, make any decision the person whose decision

and 25:

“The expertise of the EAB was considered by Lefsrud J. in [*Fenske v. Alberta (Minister of Environment)*], 2000 ABQB 664 at paragraph 22] noting that the EAB had more expertise than the Minister. The Court of Appeal did not disagree. In *Legal Oil & Gas Ltd. v. Alberta (Minister of Environment)*, [2000 ABQB 388] Clackson J. addressed the issue of the EAB's expertise to interpret the Act, noting that:

- (1) the legislative scheme has established the EAB as an expert advisor to the Minister,
- (2) the issues to be dealt with under the Act require scientific expertise,
- (3) the purpose of s. 102 was to identify and rectify pollution problems, not to ascribe fault,
- (4) applications under s. 102 may involve many competing interests that must be balanced, and
- (5) there are policy considerations to be taken into account when making a decision under s. 102.

Here, in making its report to the Minister, the EAB considered the factual background, analysed and interpreted particular sections of the Act, including ss. 102 and 114 (now s. 129), considered legislative policy, considered the problems associated with applying that policy, and considered the historical antecedents of the legislation. The Board has not only scientific expertise, but also cumulative expertise in interpreting and applying the Act. All these factors suggest that the EAB is a board with significant expertise entitled to deference.”

⁵⁴ <http://www.eab.gov.ab.ca/members.htm>.

⁵⁵ <http://www.eab.gov.ab.ca/history.htm>.

⁵⁶ See: EPEA section 99.

was appealed could make, and make any further order the Minister considers necessary for carrying out the decision.⁵⁷ Ultimately, the Board's function is to provide the best possible advice to the Minister and assist in making a better decision than the Director could make.

[180] Once the Minister has made her decision, the Board considers applications for costs.⁵⁸ While the Board has a broad jurisdiction to award costs,⁵⁹ the Board does not apply the "loser-pays" principle used by the Courts, nor does it apply the "automatic local intervenor funding" model used by the Alberta Energy Regulator, the Natural Resources Conservation Board, or the Alberta Energy Regulator. Rather, the Board starts with the proposition that each party pays its own way, and then the Board uses costs as a "reward" for assisting the Board. This approach also serves a "gatekeeper" function. Appellants, when deciding whether to file an appeal, must weigh their potential costs of participating in the hearing, as they cannot expect their costs will be paid. However, at the same time, it is not likely that costs will be awarded against them.

b. Nature of the Statutory Scheme

[181] The statutory scheme the Board administers is an ameliorative scheme, designed to protect the water resources of the Province, which are essential for human life, environmental protection, and economic development. The determinations the Board must make require the complex balancing of competing interests, including environmental protection and economic development. The Board is called upon to deal with complex technical evidence and consider that evidence in the context of policies that are designed to address a wide variety of concerns. The determinations the Board is called upon to make, as these appeals have demonstrated, can galvanize a community, with local residents opposing the development of a significant provincial infrastructure project to protect the environment. In these appeals, the decision whether to allow the infilling of the wetlands will have long-term consequences for the environment in the area.

⁵⁷ See: EPEA section 100.

⁵⁸ See: EPEA section 96.

⁵⁹ See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293.

[182] While the matters before the respective tribunals in *Newton* and *Lum* ultimately are aimed at protecting the public, the decision of these tribunals deal with professional discipline and are focused mainly on one individual. In *Newton*, the process is described as:

“It has done so recognizing the challenges of striking the proper balance between the rights of the members of the public and police officers engaged in a dispute arising from interactions between them, the rights and responsibilities of the chiefs of police maintain discipline within their respective services, the importance of treating all participants fairly and equitably, the impact of disciplinary proceedings on officer morale (both individual and collective), and the public interest in ensuring that the disciplinary process promotes transparency, accountability and confidence.”

This description is consistent with the supervisory role that is described in *Dunsmuir*, where the function is to ensure “... the legality, the reasonableness and the fairness of the administrative process and its outcomes.”⁶⁰ This is markedly different from the Board’s role, which is to advise the Minister and end up with a better decision than the decision that was made by the Director.

[183] The determination of the Board can have an immediate impact on many people and significant economic development. The potential effect of the Board’s process is so significant the statutory scheme provides for a “political override.” Instead of making a final decision, the Board makes a recommendation to the Minister. As the Court has described, this structure allows the Minister to “...bring his knowledge of the political pressures to bear on the final decision. Balancing the wide and often conflicting interests as are set out in the purpose of the Act is a decision for which a Minister has qualifications and expertise by virtue of his or her position.”⁶¹

[184] Based on these considerations, the Board is of the view the appropriate standard of review for it to apply to the Director’s decision is correctness, with no deference.

c. Role of the Appellate Body (the Board) and the Decision-Maker (the Director)

[185] The Board and the Director play different roles in the approval process. There is anecdotal evidence that has been presented to the Board in numerous hearings that AEP makes

⁶⁰ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 28.

⁶¹ *Imperial Oil Limited and Devon Estates Limited v. HMQ and the City of Calgary*, 2003 ABQB 388 at paragraph 37.

thousands of appealable decisions each year. However, on average, less than 100 appeals are filed with the Board each year. The vast majority of decisions made by the Director and his colleagues – as there are numerous Directors within AEP – are made with limited or no opposition. The legislation is designed in such a manner that any objections are brought to the Director’s attention early in the process, and through the work of the Director, his staff, and the project proponent, the Board understands the vast majority of these concerns are addressed.

[186] The Board steps in only where opposition to a project is strong enough to motivate a person to get involved in the approval process by filing a Statement of Concern, and then, after the Director makes his decision, the person is still sufficiently opposed to the Director’s decision that they choose to engage the appeal process by filing a Notice of Appeal. The Board’s role is to conduct a review of the Director’s decision, but that review is not focused on the procedure the Director followed. Rather, the Board’s focus is on whether the Director’s decision is sound considering the concerns raised by the person who filed the appeal. A core aspect of this review is to consider new evidence that was not before the Director. As stated, it is common for new technical reports to be prepared focusing on the issues that were set by the Board, and all the evidence that is brought before the Board is subject to cross-examination and questioning by the Board.

[187] This process is different from what occurred in both *Newton* and *Lum*. In both those cases, much of the focus was on ensuring the process and interpretation of the legislation in the proceeding below was reasonable. Another significant factor is the type of decision-maker in *Newton* and *Lum*, compared to the Board. In *Newton*, the LERB’s role is of civilian oversight. In *Lum*, the Registrar was found to have greater expertise in applying the licencing rules than that of the review tribunal. In comparison, the Board is composed of experts with a high level of expertise and significantly better evidence before them than before the Director when he made his decision.

[188] Based on these considerations, the Board is of the view the appropriate standard of review for it to apply to the Director’s decision is correctness, with no deference.

d. Nature of the Issues

[189] The nature of the issues before the Board in this case is a complex mix of facts and law, in the form of policy, combined with a polycentric consideration of competing purposes under the *Water Act*. Specifically, the main questions in these appeals are:

2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval?
3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?

[190] On its face, the second issue set by the Board, the appropriateness of issuing the Approval, requires a detailed understanding of the nature of the project and the effects of filling in these wetlands. The effects of filling in these wetlands can have local environmental impacts, particularly because of the interconnected nature of the wetlands. However, the effects must also be considered in a more regional context. This technical information must be considered in the context of the purpose provisions of the *Water Act* and the various competing interests that must be taken into account.

[191] The consideration of this technical information becomes more complex because it must be considered having regard to the Alberta Wetland Policy, and in this case whether the Interim Wetlands Policy or the 2013 Alberta Wetland Policy was applicable, and how did the Implementation Guidelines affect this choice. To answer these questions, the Board had to look at both policies in detail, understand the different implications of each policy, and consider this impact on the environment. Again, answering these questions required the Board to balance various competing societal interests to give the best possible advice to the Minister.

[192] In considering this factor, it is also important to note the extensive new information before the Board, and the more fulsome arguments that were available to the Board in making these decisions. Therefore, the Board is of the view that consideration of this factor points to the appropriate standard of review for the Board to apply to the Director's decision is correctness, with no deference.

e. Expertise, Advantageous Position, and New Evidence

[193] As detailed in the overview of the Board's appeal process, the Board has a significant level of expertise, not only in the technical and scientific matters that it must consider, but in how to deal with this evidence in the context of what the court has described as polycentric societal interests. Respectfully, because of the design of the legislation and the process the Board follows, the Board has a significant advantage compared to the Director. All the evidence that comes before the Board can be fully tested through cross-examination by the other parties and by questioning of the experts on the Board panel. There is the opportunity to provide significant new evidence that was not available to the Director when he made his decision. As stated, new scientific and technical reports are often developed in response to the specific issues set by the Board. The witnesses that appear before the Board are usually the authors of the original technical and scientific reports that the Director relied upon, or the authors of new scientific and technical reports that are filed with the Board. This provides for a significantly more fulsome discussion about the matters before the Board than the Director had before him when he made his decision whether to issue the approval.

[194] There is also a significantly greater opportunity to discuss the competing interests that will be impacted by the decision that will ultimately be made. There is the opportunity to consider socio-economic arguments that are not normally considered by the Director. There is also the opportunity to examine the relevant policies in detail and hear legal arguments from the various parties before the Board as to how the decision should be made.

[195] Again, these considerations lead the Board to the conclusion that the appropriate standard of review for the Board to apply to the Director's decision is correctness, with no deference to the Director.

f. An Economical Appeal Process and Respect for the Decision-Maker

[196] The *Water Act* and EPEA have specific provisions to ensure an economical appeal process and proper respect for the decision-maker of first instance. Most notably, the legislation requires, in most cases, a person who is concerned about a project to engage directly with the Director before having the ability to appeal to the Board. The legislation requires a person who has concerns about a project to file a Statement of Concern. This gives the Director, and the

project proponent, the opportunity to consider those concerns before he makes his decision and prevents a person from filing an appeal without going through this process.

[197] The legislation places limits on who is entitled to be considered by both the Director and the Board through the use of the directly affected test. The Legislature, in enacting the *Water Act*, could have permitted “any person” to file a Statement of Concern. Instead, the Legislature created a more limited class of “directly affected” persons, to ensure that only those with a genuine interest could engage the process. The legislation also places strict timelines on the ability to file Statements of Concern and file an appeal. These timelines ensure both respect for the Director’s process and an economical appeal process.

[198] The Board’s application of the costs process also supports respect for the Director’s process and an economical appeal process. As the Board starts with the proposition that all parties must pay their own way, a balance is achieved between an appellant expecting to bear the costs their own appeal, compared to the harsh consequences of the “loser-pays” model of the courts.

[199] In the Board’s view, these mechanisms support an economic appeal process and provide an appropriate level of respect for the Director’s decision, such that the appropriate standard of review the Board should be applying is correctness, without deference to the Director.

g. Northwestern Utilities

[200] While not directly relevant to the standard of review applicable to the Director’s decision, the Appellants raised a related argument regarding the role of the Director. As stated, the Appellants are of the view the role of the Director in the hearing process should be limited in manner like that of a tribunal being reviewed on judicial review. As has been discussed, the role of the Board in reviewing the Director’s decision is not the same as the Court undertaking a judicial review, nor is it the same as the Court of Appeal undertaking a statutory appeal of the Public Utilities Board as occurred in the *Northwestern Utilities* case. Ultimately, the Board’s role is to provide the best possible advice to the Minister to make her decision. In the Board’s view, the active participation of the Director, where there is new evidence before the Board, is the best way to support this. Specifically, the Board also relies on the provision of the

Environmental Appeal Board Regulation, Alta. Reg. 114/1993, section 1(d). This section provides:

“In this regulation ... (f) “party” means

- (i) the person who files a Notice of Appeal that results in an appeal,
- (ii) the person whose decision is the subject of the Notice of Appeal,
- (ii.1) where the subject of the Notice of Appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the Water Act, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and
- (iii) any other person the Board decides should be a party to the appeal.”

The regulation makes the Director a party to the appeal and makes no distinction between the role of the Director, the appellant, and the project proponent.

[201] This is expressly different from the legislation governing the Public Utilities Board in *Northwestern Utilities*. The Supreme Court of Canada stated:

“Section 65 no doubt confers upon the Board the right to participate in appeals from its decisions, but in the absence of a clear expression for the Legislature, the right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not a party. That this is so is made evident by [section] 63(2) of the *Public Utilities Board Act*

Under [section] 63(2) a distinction is drawn between ‘parties’ who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. The Board has a limited status before the Court, and may not be considered a party, in the full sense of that term, to an appeal from its own decision.”⁶²

Given this difference in legislation and the purpose of the Board’s process, the Board does not accept the arguments of the Appellants. The Director is a full party to the Board’s proceedings.

h. Conclusion

[202] In the Board’s view, the proper standard of review to apply to the Director’s decision in the circumstances of this case is correctness, with no deference to the Director. Ultimately, the role of the Board is to provide the Minister with the best possible advice to

⁶² *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684 at page 708.

support exercising her broad jurisdiction under EPEA. The Minister uses the Board's advice to make a better decision than the Director, which can consider a much broader range of considerations than the Director.

V. TERMS AND CONDITION OF THE APPROVAL

A. Submissions

1. Appellants

[203] The Appellants noted the documents included with the Approval relate to the minimization of siltation and harm to other wetlands, but they did not include anything related to the infilling of 24 wetlands.

[204] The Appellants noted the Approval requires the Approval Holder to conduct mitigation as stipulated in the identified reports or as authorized in writing by the Director, and then it requires the Approval Holder to pay compensation in the amount of \$1,275,000.00 to Ducks Unlimited Canada. The Appellants stated the Approval does not mention wetland replacement or that wetland replacement must be within the same region and watershed. The Appellants said the compensation is based on the outdated minimum 3:1 replacement ratio from the Provincial Wetland Restoration/Compensation Guide (2007) (the "Guide"). The Appellants referred to the Alberta Wetland Policy, 2013 (the "2013 Policy") that came into effect on June 1, 2015.

[205] The Appellants noted that, under the 2013 Policy, wetland replacement falls within either restorative replacement or non-restorative replacement, and the relative value of a wetland from an ecological and anthropogenic perspective is considered. The Appellants stated the 2013 Policy assigns a replacement ratio for replacing higher valued wetlands, ranging up to eight hectares of replacement wetland for every one hectare of wetland lost.

[206] The Appellants argued the amount paid to Ducks Unlimited Canada failed to take into account the 2013 Policy and discounted the value of the wetlands. The Appellants noted some of the wetlands impacted by the work authorized in the Approval are adjacent to sensitive areas, such as the Weaselhead area which is a Special Protection Natural Environment Park.

[207] The Appellants stated the Approval Holder and Director did not take flood mitigation into account. The Appellants said the wetlands are hydrologically connected to the water table and the aquifer that is part of the Elbow River system. They explained the Elbow River is the source of approximately 50 percent of Calgary's drinking water supply. The Appellants stated the wetlands filter out pollutants, and there was no study completed to address the impact filling in these wetlands would have on Calgary's drinking water supply.

[208] The Appellants noted the 2013 Policy became effective in the White Area of Alberta on June 1, 2015,⁶³ replacing the Interim Policy, under the following conditions as stated in the Alberta Wetland Mitigation Directive (the "Directive"):

"Wetland Impact Assessments that were completed in the White Area under the interim policy will be accepted and reviewed if the assessment:

- was completed during the growing season of 2014 and is submitted to the regulatory body before December 22, 2017
- was completed during the growing season of 2015, up until May 31, and is submitted to the regulatory body prior to June 1, 2018."

[209] The Appellants stated the introduction to the Golder Report, completed for the Approval Holder in 2016, indicated the Interim Policy was used because the wetland assessments were started by AMEC prior to June 1, 2015.

[210] The Appellants stated the Directive requires that wetland field assessments be completed prior to May 31, 2015, but the Golder Report refers to work completed in 2016 by CH2M Hill and field work completed by Golder Associates in October 2016, both being done after May 31, 2015. The Appellants noted the work completed for the AMEC Report was completed between July 2005 and May 2006, and supplemental environmental studies were completed in 2014 to confirm and update the original data, including field surveys conducted in the 2014 growing season to confirm wetland boundaries and classification.

⁶³ "The White area [of the province] (settled positions) consists of the populated central, southern and Peace River areas of the Province.... In the White Area, public land is part of the agricultural landscape. [It is] managed for various uses including agriculture, recreation, soil and water conservation, and fish and wildlife habitat. Some parts of the province have large tracts of public land while other parts have very few scattered parcels. Most of the public land in the White Area is under disposition or is otherwise committed." History of Public Lands in Alberta, Government of Alberta, April 2017 of page 2.

[211] The Appellants noted the differences between the AMEC Report and the Golder Report, specifically that W07, W08, W09, and W10, were not included in the AMEC Report wetland inventory. The Appellants argued Golder's claim it could use the Interim Policy because the wetland assessments were initiated prior to June 1, 2015, was not based on scientific evidence as the AMEC Report missed a number of the wetlands included in the Golder Report, and the field work for the Golder Report was done in 2016.

[212] The Appellants said an email between the Approval Holder and AEP stated Alberta Transportation was able to get an agreement with AEP that any wetland disturbance would be treated under the Interim Policy if Alberta Transportation submitted its Approval application in 2016. The Appellants noted the application was submitted on December 23, 2016. The Appellants stated Alberta Transportation did not have the authority to cut secret deals, and the Director had to abide with the 2013 Policy. The Appellants argued that, because the mapping and field work done by Golder took place in 2016, the 2013 Policy, not the Interim Policy, should have been used. The Appellants submitted the Director erred by applying the wrong policy, and the terms and conditions of the Approval were therefore invalid. The Appellants said the Director should have notified the Approval Holder that its application was incomplete and required an assessment of the options to avoid or minimize the impact to the 24 wetlands as well as a cost-benefit analysis.

[213] The Appellants referred to documents in the Director's Record that indicated the hydrological relationship and connectivity between WC01 and W06 were well understood. There were also questions whether WC01 was a wetland because of the presence of certain vegetation. The Appellants stated the flow from W09 to W06 had not been maintained because WC01 had been filled-in east of W09, and the intake culvert opening for the WC01 bypass was not in place. The Appellants explained water flow from W09 to W06 could not be maintained when it rained, and this contributed to the loss of water in the east side of W06.

[214] The Appellants claimed the infilling of certain wetlands or watercourses could have an adverse impact on other wetlands adjacent to the project and should have been considered during the Approval process. The Appellants noted W06 is in a special protection

Natural Environment Park (the “Weaselhead”) and has the highest level of protection afforded by the City of Calgary Parks Department.

[215] The Appellants stated the relationship between W07 and W08 and W06 had not been discussed by AEP. The Appellants explained W07 and W08 were the major source of water for the west side of W06, and filling-in the wetlands, even if a culvert was installed, could reduce the flow of water to W06. The Appellants said the Approval Holder did not provide any documentation regarding the consequences of filling-in W07 and W08 and the possible adverse effect to W06.

[216] The Appellants explained W11 (“Clay Marsh”) is an 11.68-hectare Type V wetland, indicating it has a high value. The Appellants believed filling in W11 could result in 165 million litres of floodwater traveling overland to nearby communities. The Appellants questioned whether the Approval Holder completed an analysis on what impacts there would be when the wetlands are filled-in and grasslands are replaced with asphalt.

[217] The Appellants stated W06 and W11 host a variety of bird species, but the bird species population near W06 decreased over the summer of 2017. The Appellants noted studies indicate roads and road embankments result in a decline of wildlife species, but this adverse environmental impact was not discussed in the Record.

[218] The Appellants also raised concerns with the impact on the wetlands and the need for the construction of a roadway that is capable of being built into a 16-lane highway.

[219] The Appellants stated the Director did not use a forward-looking and integrated approach when he made his decision as required under the AEP Business Plan 2017-2020. The Appellants noted the Director used out-of-date policies and did not use the “avoid, minimize, relocate” policy. The Appellants questioned whether the Director considered the cumulative social, economic, and environmental impacts of filling-in the wetlands since there was no triple bottom line assessment completed that included all of these variables.

[220] The Appellants stated the Director had an obligation to use a higher standard of review of the application, should have sent the application back to the Approval Holder for being

incomplete, and should have advised the Approval Holder to submit options to avoid or minimize the environmental impacts to the wetlands.

[221] The Appellants argued Alberta Transportation needs to adapt to changes in policy, and roads do not have a priority over the environment. The Appellants said roads can be adjusted to avoid or minimize any adverse impacts.

[222] The Appellants noted the 2013 Policy requires consideration of the regional context. They referred to the Bow Basin Watershed Management Plan, which the Elbow River is a part of, and noted the plan states:

“Develop wetland conservation and management policies and/or bylaws based on no further loss of wetland areas and develop strategies and tools for measuring and implementing no net loss within municipal boundaries.”⁶⁴ (Emphasis added by Appellants).

[223] The Appellants said studies confirmed wetlands conservation can reduce flood damage, but the financial benefit of flood mitigation of the wetlands was not considered by the Director.

[224] The Appellants stated the filling-in of the wetlands, when there are options to avoid doing so, goes against the provincial and City of Calgary’s flood mitigation strategies. The Appellants argued the regional picture was not considered, and the Director erred in issuing the Approval.

2. Approval Holder

[225] The Approval Holder stated the appeals should be dismissed and the partial interim stay lifted.

[226] The Approval Holder submitted the terms and conditions in the Approval were appropriate. The Approval Holder said the Director was an experienced decision-maker who reviewed the issues raised by the Appellants and provided a comprehensive response to the Appellants directly. The Approval Holder noted the Director determined the Appellants lacked standing and their complaints had no merit.

⁶⁴ Appellants’ Submission, Appendix “A”, at page 12.

[227] The Approval Holder stated the Appellants' concerns were outside the scope of the Approval. The Approval Holder noted the Approval allows for the disturbance of 24 wetlands necessary to complete the southwest portion of the Calgary ring road. The Approval Holder said it followed the legislative and regulatory process and was taking steps to meet its contractual obligations. The Approval Holder stated the Appellants were not satisfied with the legislative and regulatory process, such as the Appellants believing the entire SWCRR should have been subject to a single regulatory approval process. The Approval Holder stated the filing of separate *Water Act* approval applications in connection with a single project is common and is compliant with existing legislative processes.

[228] The Approval Holder stated the Appellants' concerns were wide-ranging and broadly encompassed their opposition to the proposed Elbow River crossing associated with the project and their speculative fears of the impact from a failure of the crossing. The Approval Holder submitted it is an improper use of the Board's process to seek to stall a significant public works project, which has been subject to extensive public and regulatory scrutiny.

[229] The Approval Holder explained the Approval is not for the construction of the ring road or the building of a bridge. The Approval Holder said the Approval relates to the disturbance of 24 wetlands and, in the context of such a significant public works project, allows for the disturbance of a relatively small number of wetlands.

[230] The Approval Holder explained the project must be constructed within a narrowly defined corridor, which is the allocated road right-of-way within the designated TUC. The Approval Holder explained other utility infrastructure will be constructed in the TUC, so KGL was not free to re-design a major portion of the project due to logistical, practical, and contractual restrictions on where the road must be built. The Approval Holder said it cannot simply invoke a change order that would result in a major disruption to the project.

[231] The Approval Holder stated the Appellants cannot connect their statements about the value of wetlands generally with any specific evidence of enhanced risk to them, the residents of Calgary, or the environment. The Approval Holder said the Appellants did not demonstrate any connection between these specific wetlands and the scenarios they fear. The

Approval Holder submitted it is not enough to say wetlands are generally good, so wetlands cannot be disturbed.

[232] The Approval Holder stated the Director reviewed all the evidence before him and made the correct decision to issue the Approval. The Approval Holder submitted the benefits of this major public works initiative more than justify the disturbance or partial disturbance of a small number of wetlands.

[233] The Approval Holder said the project had been carefully planned, designed, and scrutinized by qualified experts throughout the planning stages, during pre-Approval investigations, and during the design phase.

[234] The Approval Holder stated there is no reason to derail the project at an enormous cost to KGL and the taxpayers of Alberta, while depriving the residents of Alberta of an important public works, which their elected representatives deemed necessary and appropriate.

[235] The Approval Holder explained the SWCRR is a project of Alberta Transportation and is part of the Calgary ring road system that will divert vehicles from urban roads and reduce inner city congestion.

[236] The Approval Holder stated that, to construct the SWCRR, an agreement was reached with the Tsuut'ina Nation (the "Land Transfer Agreement") which involved the transfer of federal lands under the *Indian Act*, R.S.C. 1985, c. I-5. The Approval Holder explained the AMEC Report was prepared pursuant to the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52. The Approval Holder noted the AMEC Report addressed wetlands and anticipated impacts from the project.

[237] The Approval Holder stated the AMEC Report noted the following regarding the site of the project:

1. wildlife habitat in the area was marginalized due to surrounding developments and agricultural land use; and
2. the SWCRR corridor was routed within areas of former Tsuut'ina Nation lands that were formerly used by the military. The Weaselhead continues to be fouled by unexploded ordinance, which is a hazard expressly made known to recreational users and which required KGL to perform clearance

activities before starting work at the site. The routing on these lands was preferred over other, less disturbed, lands.

[238] The Approval Holder explained the TUC was created explicitly to set aside lands for infrastructure facilities such as the SWCRR. The Approval Holder stated the *Government Organization Act*, R.S.A. 2000, c. G-10, gives the Lieutenant Governor in Council authority to create the TUC through regulations. The Approval Holder said the *Government Organization Act* recognized the creation of a TUC contemplated limiting the use of the designated areas and the potential for adversely affecting, disturbing, or destroying natural systems.⁶⁵ The Approval Holder noted the TUC is established as a “Restricted Development Area” in the *Calgary Restricted Development Area Regulations*, Alta. Reg. 212/1976.

[239] The Approval Holder explained Alberta Infrastructure issued the Transportation/Utility Corridor (TUC) Policy that identified primary and secondary users. The Approval Holder noted that primary users, such as the SWCRR, can displace secondary users, such as the Appellants’ recreational activities and, therefore, the activities authorized under the Approval have priority over the Appellants’ recreational activities.

[240] The Approval Holder explained the SWCRR will be built within the portion of the TUC allocated for the road right-of-way. The Approval Holder said the wetlands that are subject to the Approval are within the road right-of-way within the TUC. The Approval Holder stated the Appellants had no legal access to the relevant TUC lands, including the wetlands. The Approval Holder noted that, prior to lands being acquired by Alberta Transportation, the lands were federal lands occupied by the Tsuut’ina Nation. The Approval Holder stated the Appellants

⁶⁵ See: Schedule 5 of section 4(1)(e)(i) the *Government Organization Act* provides:

“The Lieutenant Governor in Council may by regulation establish any part or parts of Alberta as a ‘Restricted Development Area’ or a ‘Water Conservation Area’ (in this section called ‘the Area’) on the report of the Minister that the establishment of the Area is necessary in the public interest to co-ordinate and regulate the development and use of the Area for the purpose of ...

- (e) confining to land within the Area
 - (i) any operation, activity, use, development or occupation of land
 - (A) that adversely affects or is likely to adversely affect the quality or quantity of any natural resource, or
 - (B) that destroys, disturbs, pollutes, alters or makes use of a natural resource, or is likely to do so....”

only have standing regarding the specific issue where KGL's direct activity on the TUC with respect to certain wetlands may impact the Appellants' use of lands outside of the TUC.

[241] The Approval Holder explained that, under the Land Transfer Agreement, 428 hectares of former reserve lands were transferred to the Province for inclusion in the TUC in exchange for a cash payment and the addition of provincial lands to the reserve. The Approval Holder said ongoing postponement of work during the 2017 construction season due to the appeals creates increased costs because of pushing the schedule for successive activities into 2018 and 2019 which runs the risk the completion of the project will be delayed, resulting in the possibility of the land reverting to the Tsuut'ina Nation and all infrastructure on site becoming part of the Tsuut'ina Nation lands. The Approval Holder stated reversion would cost the taxpayers of Alberta hundreds of millions of dollars and derail the completion of the SWCRR.

[242] The Approval Holder explained a wetland impact assessment was completed by Golder Associates in December 2016, the Golder Report, which included a review of historical air photos, vegetation and wildlife characteristics, hydrological functions, and a wetland impact evaluation.

[243] The Approval Holder explained W06 lies within the City of Calgary on the east edge of the TUC. W07 and W08 lie west of W06, across the road right-of-way and at a slightly higher elevation. The Approval Holder explained W07 and W08 are fed by a natural groundwater spring near the western edge of the TUC, and the water from this spring connects to W06 via W07 and W08. The Approval Holder said it would maintain this connectivity with a permanent culvert. The Approval Holder explained W09 lies across the western portion of the road right-of-way and lands west of that. When W09 is wet, which occurs intermittently, it can supply water to WC01 which crosses the road right-of-way before turning towards W06.

[244] The Approval Holder stated it maintained connectivity of water flow during construction, and its design contemplates doing so upon completion of the development. The Approval Holder noted the following regarding the wetlands:

1. W07 and W08 are connected to the west side of W06 by a spring, and the west side of W06 remains wet;

2. W09 intermittently discharges water to the east side of W06 through WC01, under sufficiently wet conditions. W09 and WC01 were generally dry in 2017, and the east side of W06 is also currently dry. Steps have been taken to protect the flow of water through WC01 by enclosing it in a concrete pipe across the project site;
3. a temporary culvert was installed to the east of the road right-of-way to create connectivity for WC01 eastwards into the Weaselhead Natural Area; and
4. inspections done by AEP on at least three occasions in response to public complaints did not result in any contraventions or further action being taken.

[245] The Approval Holder recognized the impact that would occur to the wetlands and the potential effect on wetlands outside the TUC. The Approval Holder said it had meetings with the Weaselhead/Glenmore Park Preservation Society, and Alberta Transportation was aware of the need to maintain water quality and address impacts to the wetlands.

[246] The Approval Holder stated the project was designed to ensure the water could continue to flow and that any water from the roadway would not be allowed to flow into the watercourse which provides water to W06. The Approval Holder said highway flows would be diverted to collection ponds.

[247] The Approval Holder noted the AMEC Report included a review and assessment of impacts to the wetlands.

[248] The Approval Holder noted the Director determined the project fell under the Interim Policy, which was implemented under the provisions of the Provincial Wetlands Restoration/Compensation Guide (the "Guide"). The Approval Holder stated the goal of the Interim Policy was to sustain the social, economic, and environmental benefits of Alberta's wetlands. The Approval Holder added the Interim Policy strived to avoid or minimize impacts to wetlands and to compensate for loss of wetland areas that could not be avoided.

[249] The Approval Holder stated that, under the Interim Policy, wetland impacts were preferentially avoided, minimized, or, as a last resort, compensated for. The Approval Holder noted that where wetlands to be impacted extend onto federal lands, the proponent must consult with Environment Canada under the Federal Policy on Wetland Conservation (Government of

Canada 1991). If the wetlands to be impacted are in the City of Calgary, the proponent should consult with the City to ensure adherence to the Calgary Wetland Conservation Plan (City of Calgary Parks 2004).

[250] The Approval Holder said it complied with all requirements and guidelines of the Interim Policy, the Federal Policy, the Calgary Plan, and any other laws, rules, guidelines, or publications regarding appropriate wetland and water management in Alberta. The Approval Holder stated all applicable guidelines and policies have been incorporated into the project planning, application and approvals processes, and construction.

[251] The Approval Holder noted documents in the Director's Record indicate the Director was aware of the requirements of the Interim Policy and considered them as part of the review of the Approval application including:

1. an email from a member of the Director's staff involved in the review of the application stating the Interim Policy applied; and
2. an AEP wetland specialist reviewed the application and had a number of follow-up questions, which were ultimately answered to his satisfaction.

[252] The Approval Holder said the Director ensured the questions and concerns of the Statement of Concern filers were thoroughly reviewed and addressed.

[253] The Approval Holder submitted the Director's decision to allow complete or partial disturbance of 24 wetlands comprising a relatively small area given the size and scope of the project was not only reasonable, but correct. The Approval Holder stated the TUC did not allow for any practical alternatives as to routing of the roadway. The Approval Holder argued the Appellants did not present any practical, economically viable alternative, and there is no such alternative available.

[254] The Approval Holder stated that, given the scale and limited flexibility and nature of the project, compensation was the most logical mitigation option to offset direct impacts to the wetlands. The Approval Holder said impact to the wetlands could not be avoided given the relatively narrow corridor, but experts had expressly considered the issue. The Approval Holder explained assessments were completed to determine the steps required for avoidance or mitigation, reaching the conclusion that compensation and restoration was the most viable,

economic, and environmentally safe option. The Approval Holder stated the Director was not only reasonable, but correct, to rely on the information provided and grant the Approval.

[255] The Approval Holder explained that Alberta Transportation complied with and fulfilled the mitigation mandate of the Interim Policy by:

1. ensuring construction limits, construction access routes, temporary workspaces, and environmentally sensitive areas were delineated prior to disturbance;
2. protecting wetlands with a riparian buffer zone;
3. overland drainage measures were planned in order to maintain surface water flow volumes for retained wetlands;
4. timing constraints for vegetation clearing and habitat destruction activities to avoid breeding season for migratory and non-migratory birds; and
5. best management practices are followed during construction to ensure erosion and sedimentation control and minimize potential impacts to wildlife, fish, and fish habitat.

[256] The Approval Holder explained Ducks Unlimited Canada is the provincially designated agent for management of all wetlands compensation in Alberta. The Approval Holder said Ducks Unlimited Canada prepared a wetland compensation proposal for the wetlands to achieve a no-net-loss of wetland function regionally and in accordance with the *Water Act* and *Federal Policy on Wetland Conservation in Canada*. The Approval Holder stated it was required to provide compensation at a 3:1 ratio for any disturbed wetland.

[257] The Approval Holder stated the City of Calgary approved of the mitigation actions and proposed impacts to the 10 wetlands adjacent to City owned lands. The Approval Holder noted the City of Calgary owns almost all of W06, and it was satisfied with the proposed impacts to it.

[258] The Approval Holder stated that impacts to the wetlands had been avoided or mitigated where possible, but given the project, compensation has been the primary mechanism of compliance.

[259] The Approval Holder stated that public consultation efforts by Alberta Transportation and KGL in connection with the project had been extensive.

[260] The Approval Holder stated the terms and conditions in the Approval provide appropriate and reasonable restrictions and safeguards. The Approval Holder noted the Approval appends and incorporates numerous reports and plans that contain data regarding the wetlands and provides for mitigation which is then expressly incorporated into the Approval.

[261] The Approval Holder stated that, given the minimal disturbance to the periphery of W06, there was no evidence the impact of disturbing W07, W08, and W09 was not given appropriate and reasonable weight. The Approval Holder noted the planned disturbance of W06 is five percent.

[262] The Approval Holder submitted the size and scale of the project must be weighed in the context of the disturbance of the 24 wetlands. The Approval Holder did not dispute the valuable role wetlands play in the environment. However, the Approval Holder said, there was no evidence the relative impact of the infill or partial infill of the wetlands outweighs the public benefit offered by the SWCRR.

[263] The Approval Holder stated there was no credible evidence to substantiate the wetlands at issue would make any practical difference in a major flood event.

3. Director

[264] The Director explained the areas where the activities are to occur are wholly within a TUC set aside for the purpose of building the SWCRR. Most of the lands were formerly held by the Government of Canada for the benefit of the Tsuut'ina Nation and transferred to the Government of Alberta for the express purpose of building the SWCRR. A small piece of land was previously owned by the City of Calgary.

[265] The Director explained a review of the Record and discussions with staff indicated the Director at the time of the issuance of the Approval, considered all the available information, including the AMEC Report and Golder Report, and properly applied all applicable policies prior to issuing the Approval. The Director said the Approval contains terms and conditions to mitigate and compensate for the impact to the wetlands. The Director stated the Approval balances the impact to the wetlands with mitigation and compensation measures.

[266] The Director explained the lands at issue are included in the *Calgary Restricted Development Area Regulation* which sets out lands to be included in the TUC and places those lands under the administration of the Minister of Infrastructure. The lands were then designated as part of a provincial highway under a Department of Transportation Ministerial Order, placing them under the administration of the Minister of Transportation.

[267] The Director explained the lands transferred from the Tsuut'ina Nation were for the express purpose of being added to the TUC for the construction of the SWCRR, and if the SWCRR is not completed in the time required under the agreement between the Tsuut'ina Nation and the Government of Alberta, the lands would revert to the Government of Canada for the benefit of the Tsuut'ina Nation.

[268] The Director provided a brief overview of the application process and his review of the application:

1. the Approval Holder submitted an application and supporting documents on January 4, 2017, for an approval for the proposed infilling of 24 wetlands located within the TUC to allow for construction of the SWCRR;
2. the initial fieldwork supporting the application was conducted in 2014;
3. the proposed wetland disturbances included the partial infilling of 11 wetlands and the complete infilling of 13 wetlands, including six Class II wetlands, 10 Class III wetlands, two class IV wetlands, and six Class V wetlands, for a total of 22.07 hectares;
4. the application and supporting documents, including the Wetlands Impact Assessment, prepared by Golder Associates, dated December 2016 was reviewed;
5. other supporting documents provided and reviewed by the Director included:
 - i. Environmental Assessment for the Southwest Calgary Ring Road, updated December 2014, prepared by AMEC Environment & Infrastructure;
 - ii. Southwest Calgary Ring Road – Environmental Construction Operations (ECO) Plan, dated December 21, 2016, prepared by KGL;
 - iii. relevant sections of the technical requirements of the Design-Build-Finance-Operate Agreement for the Southwest Calgary Ring Road, dated August 24, 2016;

- iv. Environmental Evaluation for the West Calgary Ring Road, dated February 2015, prepared by AMEC Environment & Infrastructure;
 - v. Twinning of Highway 8: Highway 22 to Calgary Western City Limits Environmental Evaluation, dated February 2014, prepared by Spencer Environmental Management Services Ltd.; and
 - vi. Southwest Calgary Ring Road Remaining Wetland Protection Plan, dated March 31, 2017, prepared by KGL;
6. comments and recommendations from AEP specialists were provided, including Lands Management/Public Lands Specialist, wildlife specialist, and wetlands specialist;
 7. input from the City of Calgary was received and reviewed;
 8. a review of the context of all the *Water Act* applications submitted for the SWCRR as well as other *Water Act* applications in the area;
 9. consideration of the applicable matters and factors of the Approved Water Management Plan for the South Saskatchewan River Basin (Alberta), specifically the existing potential and cumulative effects on the aquatic environment and existing and cumulative hydraulic, hydrological, and hydrogeological effects;
 10. other applicable policies and guidance documents including:
 - i. Wetland Management in the Settled Area of Alberta: An Interim Policy, dated May 1993;
 - ii. Administrative Guide for Approvals to Protect Surface Water Bodies under the *Water Act*, dated December 2001;
 - iii. Provincial Wetland Restoration/Compensation Guide: Revised Edition, dated February 2007; and
 - iv. Stepping Back from the Water: A Beneficial Management Practices Guide for New Development Near Water Bodies in Alberta's Settled Region, 2012; and
 11. the review of the application began March 1, 2017.

[269] The Director said a meeting was held on March 22, 2017, to discuss the inapplicability of the *Public Lands Act*, R.S.A. 2000, c. P-40, regime for this application as the lands are owned by Alberta Infrastructure.

[270] The Director explained that, in March 2017, the Approval Holder was asked to provide further information including supporting documentation of non-wetlands identified within the project footprint, assurance of flood mitigation for the whole project, a completed

Wetland Protection Plan, and the CH2M wetland assessments. The Director said the information requested was provided by the Approval Holder.

[271] The Director noted that, on April 20, 2017, the Notice of Application was published by the Approval Holder in accordance with the legislation.

[272] The Director explained the AEP wetland specialist requested the Approval Holder provide additional information including a list of dominant vegetation species and incidental wildlife species, and mitigation measures for wetland avoidance and minimization of wetland impacts, specifically whether all avoided wetlands would have a 30 metre buffer and how disturbance to partially impacted wetlands would be minimized, and function restored post-construction. The Approval Holder provided the requested information. The AEP wetland specialist asked for additional information regarding shoreline slopes and soil salvage, and the Approval Holder provided the information and a map to identify wetland impacts within lands previously owned by the City of Calgary. The AEP wetland specialist asked the Approval Holder to submit further information regarding features identified as “man-made” and “non-wetland” in the reports prepared by CH2M and the Golder Report, and when this information was provided, the AEP wetland specialist had no additional concerns relating to the 24 wetlands proposed to be disturbed in the application.

[273] The Director noted the City of Calgary had no objections to the proposed activities.

[274] The Director stated the Approval Holder was required to pay Ducks Unlimited Canada \$1,275,090.00 plus GST in accordance with the 2007 Provincial Wetland Restoration/Compensation Guide.

[275] The Director stated the Approval allows the Approval Holder to permanently disturb 24 wetlands for a total of 22.07 hectares of wetland loss and change the location of water for the purpose of dewatering wetlands. The Director noted the Approval incorporates specific mitigation measures included in the Southwest Calgary Ring Road ECO Plan (“ECO Plan”).

[276] The Director stated that, prior to the issuance of the Approval, consideration of the following matters were taken into account: (1) the application and all of the supporting

documentation provided by the Approval Holder; (2) comments and recommendations from relevant AEP specialists; (3) input from the City of Calgary; (4) the *Approved Water Management Plan for the South Saskatchewan River Basin*; (5) other applicable policies and guidelines; and (6) other proposed *Water Act* activities under review within the area.

[277] The Director stated there would be no significant adverse effect on:

1. the aquatic environment as there will be a net gain of future wetland habitat in the region given the compensation ratio applied; and
2. existing potential and cumulative hydraulic, hydrological, and hydrogeological effects because an Erosion and Sediment Control Plan will manage water during construction as short-term mitigation and stormwater ponds that meet the 1:100-year events will be constructed for long term mitigation.

[278] The Director noted recommendations from the AEP wetland and wildlife specialists were incorporated into the Approval. He stated the mitigation measures included in the AMEC Report were also incorporated into the Approval.

[279] The Director stated the context of the SWCRR, including its impacts and constraints of the TUC, were considered when the Approval was issued.

[280] The Director noted the Approval was limited to the partial infilling of 11 wetlands and the total infilling of 13 wetlands. The Director stated the Approval Holder took reasonable steps to avoid as many wetlands as possible in relation to the larger project as well as the smaller area connected with the Approval. The Director stated the terms and conditions of the Approval mitigate impacts to the remaining wetlands.

[281] The Director explained he balanced the impact to the wetlands with the mitigation and compensation measures and found the impact caused by the removal of the wetlands would have no significant adverse effect on the aquatic environment, and the removal of the wetlands was not anticipated to result in significant changes to the existing, potential, and cumulative hydraulic, hydrological, and hydrogeological effects.

[282] The Director stated the decision to issue the Approval was in the range of possible, acceptable outcomes, supported by law and fact, and should not be interfered with.

B. Response Submissions

1. Appellants

[283] The Appellants noted the AMEC environmental assessment started in the fall of 2005 and continued through to the spring of 2006, with additional field work completed in 2011, 2012, and 2014. The Appellants also noted Golder Associates collected supplemental field data in October 2016 regarding wetlands not included in previous reports.

[284] The Appellants noted AMEC missed wetlands W07, W08, W09, W10, and W12 as well as wetlands further south, including W01, W02, and W04. The Appellants stated that, even though AMEC started the fieldwork in 2005 and completed the work in 2014, the fieldwork did not relate to the 24 wetlands in the application for the Approval. The Appellants argued the completion of the fieldwork in 2014 cannot justify the use of the Interim Policy as many of the wetlands identified in the Golder Report were not included in the AMEC Report. The Appellants stated that, since fieldwork related to the 24 wetlands included in the Approval was completed in 2016, the Approval should have been based on the 2013 Policy.

[285] The Appellants did not agree with the Approval Holder's comments that the Appellants were motivated by concerns outside of the appeals. The Appellants stated their appeals related to the 24 wetlands and their enjoyment of activities in the adjoining Special Protection Natural Environment Park that had been adversely impacted by the infilling of WC01. The Appellants stated there was no connectivity for water flow down WC01 from the west side of the project area to the east side considering no intake exists. The Appellants believed this contributed to harming W06.

[286] The Appellants believed WC01 was filled-in without an approval. The Appellants disagreed construction of the causeway being built across the Elbow River need only follow the Code of Practice for Watercourse Crossings. The Appellants believed a *Water Act* approval was required.

[287] The Appellants said Alberta Transportation can request adjustments to the scope of work. The Appellants questioned whether the Approval Holder had provided the Tsuut'ina

Nation notice of the court injunction as required under the Land Transfer Agreement to extend the opening day under the *force majeure* provisions of the agreement.

[288] The Appellants stated the practical constraints of the TUC are not that significant given an eight-lane highway requires 40 to 50 metres and the TUC is 285 metres wide and is 600 metres wide at the interchanges. The Appellants noted the AMEC Report provided three options to avoid W11, but AMEC did not complete an environmental, social, and economic analysis of the options. The Appellants questioned where the options analysis for the 24 wetlands was included in the application.

[289] The Appellants said the Approval Holder denies there are serious and significant concerns related to the filling-in of 24 wetlands.

[290] The Appellants stated the policy goal of the 2013 Policy is to conserve, restore, protect, and manage Alberta's wetlands to sustain the benefits they provide to the environment, society, and the economy. The Appellants said the highest value wetlands are to be protected for the long term.

[291] The Appellants stated the Approval Holder does not understand the 2013 Policy, the value created by wetlands, and the intent to preserve high value wetlands. The Appellants explained W06 is a class IV semi-permanent wetland, W11 is a class V permanent wetland, W15, W17, and W18 are also class IV wetlands, and W25, W26, W27, and W31 are also class V wetlands. The Appellants questioned why the Director did not require an assessment of these high value wetlands taking into consideration the environmental, social, and economic metrics to avoid or minimize impacts to these wetlands.

[292] The Appellants stated that, based on documents in the Director's Record, the Director agreed there was hydrological connectivity between the wetlands, but details were not provided. The Appellants said they demonstrated hydrological connectivity between W08, W07, and W06 as well as connectivity between WC01, W09, and W06. The Appellants noted documents in the Director's Record explain WC01 feeds to W06 and W09 is connected to WC01.

[293] The Appellants did not believe the Approval Holder's application provided sufficient discussion on the hydrological connection between the wetlands and aquifers nor the role of wetlands acting as natural sponges during rainfall and flood events. The Appellants noted the Director's tracking sheet did not check off the "hydrology" referral box, suggesting no one cared about the hydrology at the site.

[294] The Appellants stated that, if the Interim Policy was used, the City of Calgary becomes a restoration agent and can collect funds on behalf of AEP. The Appellants explained the compensation rate would be tied to the value of the land, which typically ranges from \$350,000 to \$400,000 per hectare. The Appellants calculated that, at a ratio of 3:1, the 22.37 hectares of wetlands impacted would result in a payment of \$23.5 million to \$26.8 million. The Appellants stated the payment of \$1.275 million to Ducks Unlimited Canada underestimates the value of the wetlands and does not motivate the proponent to evaluate other less environmentally adverse options to avoid the wetlands.

[295] The Appellants stated that, if the Approval Holder complied with the Minister of Transportation's June 14, 2017 directive regarding the outer ring road,⁶⁶ different options would be available to avoid the wetlands. The Appellants said there is plenty of room in the TUC for a six to eight-lane highway to avoid the wetlands.

[296] The Appellants said the Approval Holder tried to marginalize the wildlife habitat in the area due to surrounding development and agricultural use of the lands. The Appellants said the Approval Holder attempted to denigrate the Tsuut'ina Nation lands because of past military exercises. The Appellants disagreed with the Approval Holder's assessment of the area. The Appellants noted the City of Calgary's "Our BiodiverCity Report" noted the area may be the most species-rich natural area in Calgary.

⁶⁶ The Minister of Transportation's June 14, 2017 directive regarding Edmonton and Calgary Outer Ring Roads states, in part:

"Given the rapid changes we expect to see, it is important that we rethink how we plan our network. As demographics and technology change and evolve, we need to ensure we are not planning to encourage urban sprawl. Outer ring roads do not align with that vision and I would like to confirm future network planning will not include outer ring roads."

[297] The Appellants argued the Director should have taken into consideration the Special Protection Natural Environment Park adjacent to the TUC given Schedule 5, section 4(1) of the *Government Organization Act*. The Appellants stated the *Government Organization Act* requires that no harm occurs in lands adjacent to the TUC. The Appellants questioned why rules, policies, and procedures were ignored or relaxed given that Government projects should abide by a higher standard.

[298] The Appellants pointed out the contradiction between the requirement for “no harm to adjacent areas,” provided for in Schedule 5, section 4(1)(a) and (b) of the *Government Organization Act*, and the limitation on recreational activities in the TUC that the Approval Holder identified in Alberta Infrastructure’s Transportation/Utility Corridor (TUC) Policy.

[299] The Appellants stated the Approval Holder inferred the appeals were jeopardizing the Land Transfer Agreement, but there is a provision in the agreement that allows for a time extension in situations such as a court injunction. The Appellants said the Approval Holder should be required to resubmit its application with the required options analysis and cost-benefit analysis.

[300] The Appellants did not agree with the Approval Holder that this delay was costing them money since the Approval Holder is ahead of schedule with the project.

[301] The Appellants stated the Approval Holder was in violation of the *Water Act* because its activities have the potential to alter the flow of water down WC01, and the alteration of the flow contributed to the decline of the east side of W06. The Appellants said the Approval Holder did not maintain connectivity of water flow across the project site since the intake portion of the connection between WC01 and W09 and W06 had not been completed.

[302] The Appellants expressed concerns regarding the way public consultation of the project was done by the Approval Holder. The Appellants explained Alberta Transportation told the public what it was going to do and did not incorporate any feedback.

[303] The Appellants understood the Approval Holder considered roads have a priority over the environment, but this was incorrect since roads and other linear projects must adjust to environmental laws, policies, procedures, and regulations.

[304] The Appellants disagreed with the Approval Holder's statement that there was no credible evidence to substantiate that filling-in the wetlands will increase overland flooding. The Appellants referenced reports, found through internet searches, that indicated research found flood damage was lower if wetlands were left in their natural state.

[305] The Appellants stated the Director erred in using the Interim Policy and the Guide, and it appeared the Director enabled short cuts that resulted in harm to the environment, such as the east side of W06.

[306] The Appellants explained the stay of W06, W07, W08, and W09 was registered as an order of the Court of Queen's Bench. The Appellants questioned why the Approval Holder or Alberta Transportation did not provide written notice to the Tsuut'ina Nation of the stay being registered with the Court since notice had to be given within 60 days of the stay to extend the opening day deadline. The Appellants said the stay is not having an adverse impact on the ability to complete the project within the Land Transfer Agreement timeline.

[307] The Appellants noted the AMEC Report wetland location map did not resemble the wetland location maps in the Golder Report. They said W07, W08, W09, and W10 were missing.

[308] The Appellants noted the Environmental Construction Operations Plan states a 30 metre buffer will apply for all avoidable wetlands where practical and a 15 metre buffer for the balance. The Appellants questioned how the 30 metre buffer was determined.

[309] The Appellants said they found no evidence of the Approval Holder discussing options for avoiding or minimizing impacts to the 24 wetlands. The Appellants stated the City of Calgary's acceptance of the proposed activities was inconsistent with the City's wetland policy.

[310] The Appellants said there was no indication the Director conducted activities related to avoidance of wetlands as outlined in the 2013 Policy. They stated copies of alternate project designs should have been included with the application as well as an evaluation of options that considered the cost-benefit analysis based on environmental, social, and economic aspects of the different designs. The Appellants argued that if the cost-benefit analysis does not exist, the application was incomplete, and the Director erred in his decision to issue the

Approval. The Appellants said the Director should have notified the Approval Holder of the deficiencies.

[311] The Appellants noted the AMEC Report stated that all wetlands and associated peripheral functional uplands disturbed by the project would be compensated for, but the compensation provided to Ducks Unlimited Canada did not include anything for the uplands. The Appellants stated the letter to Ducks Unlimited Canada requires the new wetlands to be in the same region/watershed as Calgary.

[312] The Appellants stated the mitigation measures in the AMEC Report did not deal with mitigating adverse impacts to the 24 wetlands, but instead are forward-looking to ensure no harm occurs to adjoining habitat and wetlands.

[313] Ms. Tulick stated it is the responsibility of Albertans to support and promote the conservation and management of water, and the fundamental principle of conservation is to avoid and mitigate wetland destruction. Ms. Tulick expressed concerns regarding: (1) the incomplete application and mapping of the wetlands; (2) the need for sound cannons to scare off wildlife during nesting season because of incorrect timeframes; (3) the removal of trees outside the TUC; and (4) the refusal for the Approval Holder to accept responsibility, admit mistakes, and work directly with the community.

[314] Ms. Tulick said the area is known as a non-development region. She stated bypassing policy and procedure to rely on compensation for wetland loss at a low rate of \$19,000.00 per acre is a poor decision. Ms. Tulick stated the threats of climate extremes are apparent and biodiversity is at risk. She stated it is important to protect our water resources, and roadways can be moved or constructed over areas and since wetlands cannot be moved, they need protection.

[315] Ms. Tulick stressed the importance of the 24 wetlands for flood mitigation, filtration for drinking water for the Glenmore Reservoir, and a wildlife corridor. She stated it is a sensitive natural wetland, and the area is important to the quality of life for present and future Albertans.

[316] Ms. Tulick was surprised the social evaluation of the project was not included in the application and noted it should have been required.

[317] Ms. Tulick explained the Weaselhead area and the Glenmore Park and associated wetlands are enjoyed and appreciated by thousands of visitors for a number of various events that occur annually.

[318] Ms. Tulick said wildlife is being impacted by the project, and wildlife displacement indicates a problem exists since construction of the SWCRR began. She noted the rare flora that exists in the area also needs to be recognized and protected.

[319] Ms. Tulick stated the hydrological connection between the wetlands is undeniable but was not thoroughly considered. She said there was no indication the Approval Holder attempted to avoid the critical wetlands throughout the Approval process.

[320] At the hearing, Mr. Michael Kostachuk presented evidence regarding the potential impacts on groundwater resulting from contaminated runoff from the road surface entering WC01 and flowing into W06. He stated WC01 needed to be addressed as a source of potential contamination since it was open and exposed to potential runoff. Mr. Kostachuk noted the Alberta Environment and Parks Guide to Groundwater Authorization requires an approval be obtained where groundwater can influence surface water and vice versa.

2. Approval Holder

[321] The Approval Holder pointed out factual errors in the Appellants' submission including:

1. The Appellants stated the flow from W09 to W06 had not been maintained because WC01 had been filled, but the Approval Holder explained WC01 had been protected by being enclosed in a concrete pipe.
2. The Appellants said the intake culvert opening for WC01 bypass was not in place. The Approval Holder explained the work was not completed because it could not complete work impacting W09 under the stay conditions. According to the Appellant, procedures were in place to pump water from W09 to the pipe enclosing WC01 if conditions were wet enough for W09 to discharge water. Work in WC01 does not require a *Water Act* approval.

3. The Appellants claimed water from W07 and W08 was the prime source of water for the west side of W06. The Approval Holder explained it maintained and will continue to maintain flows from the natural spring near W07 and W08 through to the west side of W06. The Approval Holder noted the west side of W06 is wet and healthy.
4. The Appellants argued the loss of the wetlands would have a significant adverse impact in a major flood event. The Approval Holder explained that, if the Appellants' suggestion that one acre of wetlands has the ability to store up to 1.5 million US gallons of floodwater is correct, and there are 22.07 hectares of impacted wetlands subject to the Approval, the mitigative effect of the impacted wetlands in a major flood event would be inconsequential.

[322] The Approval Holder noted that 20 stormwater ponds are included in the design of the project, with a total capacity of 150 million gallons. The Approval Holder explained that, using the Appellants' estimate, the loss of water storage from the 22.07 hectares of wetlands was 85 million gallons.

[323] The Approval Holder indicated the stormwater ponds would include littoral zones and vegetation to help mimic natural wetlands. The Approval Holder stated the constructed wetlands could not be built in the TUC to replace the infilled wetlands as had been done in the Northeast Stoney Trail project. The Approval Holder explained the difference in the two projects was that the Northeast Stoney Trail project had greater availability of land than the SWCRR project.

[324] The Approval Holder indicated the stormwater release guidelines included in the stormwater management plan exceeds the City of Calgary stormwater release guidelines. The Approval Holder said the water quality monitoring, control, and release rates were agreed upon by the City of Calgary and AEP. The Approval Holder indicated a risk management plan was developed based on a risk assessment determining the likelihood and consequence of a hazardous materials spill, and the results indicated the likelihood of a hazardous materials spill into the Elbow River was low.

C. Analysis

[325] The Board appreciates the participation of the Intervenors at the hearing. They provided additional insight into the various uses of the wetlands by those in neighbouring communities as well as outside of the area.

[326] Of particular interest to the Board was the work being done by the Weaselhead Society, including hosting school groups to educate them on the value and biodiversity of the wetlands. The Board also notes the Weaselhead Society has retained a third party to collect water quality and quantity data at the Beaver Pond (W06) to assess impacts prior to, during, and after construction of the road. This will benefit the Weaselhead Society, the Approval Holder, and AEP in assessing impacts and potential additional mitigative measures that should be taken to minimize impacts to W06 or future projects.

[327] The Appellants raised concerns regarding the Director's decision to find the Appellants not directly affected when they filed their Statements of Concern. One of the purposes of filing a Statement of Concern is to reserve the right to file a Notice of Appeal with the Board if the person filing the Statement of Concern is not satisfied with the approval when the Director issues it. The Director also takes into consideration the concerns presented in a Statement of Concern when deciding to issue an approval and what conditions should be included. In this case, the Board previously decided the Appellants were directly affected by the Director's decision to issue the Approval, regardless of the Director's decision to find the Statements of Concern filers were not directly affected. The Appellants have the opportunity to have their issues heard by the Board.

[328] The Appellants appealed the issuance of the Approval primarily given their concerns with the loss of wetlands near the area where they live. The Appellants and some of the Intervenors used the wetland area for recreational and educational purposes, and they also raised concerns regarding the impact the loss of the wetlands could have on flooding abatement and impacts on water quality entering the regional drinking water source.

[329] When the Director receives an application for a proposed project, it is his responsibility to review the application and supporting documents to assess the environmental impacts that may occur. It is not the Director's role to assess the need for the project or the size of the project. The purpose of the *Water Act*, as stated in section 2, includes the need to balance

environmental protection and economic development.⁶⁷ The Appellants confirmed they were not opposed to the SWCRR, just opposed to the infilling of the 24 wetlands covered by the Approval.

[330] The Appellants argued the project scope resulted in a construction footprint large enough to accommodate a 16-lane highway, yet the actual construction referred to in the Approval application was for an 8-lane road. Alberta Transportation testified the larger footprint is necessary to accommodate possible future expansion and needed to be within the TUC as the agreement with the Tsuut'ina Nation did not provide for acquisition of a second parcel of land. If it is determined that additional lanes or other modes of transportation such as light rail transport or bus rapid transit may be required in the future, the easement and initial construction would be in place and further land access agreements with the Tsuut'ina Nation would not be required.

[331] The Director, and ultimately the Board, cannot advise a project proponent to rescale a project based on whether there is need for a specific project. When an application is filed, the Director reviews the application, with assistance from the relevant staff members, to determine if the project will cause an adverse impact to the environment and, if so, whether those impacts can be effectively mitigated. The Director is not in a position to assess need or size of a proposed project. Therefore, whether the road should have been built to accommodate eight lanes or 16 lanes was not a consideration, except for any additional environmental impacts the larger project would create.

⁶⁷ Section 2 of the *Water Act* states:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;

[332] The largest wetland that will be infilled under the Approval, W11, (the Clay Marsh), would be impacted significantly whether an 8-lane or 16-lane road is constructed. There was no viable way to avoid impacting W11. The Board notes W11 was entirely on the Tsuut'ina Nation lands, so there was no public access to that wetland prior to the start of construction. The Board remains cognizant of the Appellants' concerns of potential impacts of filling in W11 on other wetlands in the area given the interconnectedness of the wetlands.

[333] At the hearing, the Appellants asked the Board to reverse the Approval. In the alternative, the Appellants recommended the Approval be varied by adding conditions requiring the Approval Holder to:

- a. avoid W06, W07, W08, and W11;
- b. install the intake culvert that transects the project area at the 90th Avenue interchange;
- c. not allow the mixing of groundwater and stormwater;
- d. remove beaver dams and other impediments to WC01 which may stop the flow from reaching W06; and
- e. monitor W06, W07, W08, and W11 for the next five years and correcting any deficiencies which prevent the flow of water from continuing.

[334] There is no doubt the construction of the SWCRR will impact the wetlands in the area. Some of the wetlands will be partially infilled while others will be completely infilled. Wetland 06 was a major concern to the Appellants and Intervenors. Wetland 06 has as its water source W07, W08, and W09.

[335] The Approval Holder and Director explained the limitations presented to the Approval Holder given the size of the TUC. There was little latitude for altering the design of the project and limited ability to avoid some of the wetlands. It was explained the anticipated impact to W06 was reduced from an initial 29 percent in the planning design phase to five percent in the detailed design phase. This indicates the Approval Holder made some attempts to minimize impacts to the wetlands where possible.

(f) the important role of comprehensive and responsive action in administering this Act.”

[336] The Appellants were concerned the road construction will have a detrimental impact on W06. Although the Approval requires the Approval Holder to maintain drainage flows to as close as natural as can be achieved, the effectiveness of the mitigation measures will determine if the results anticipated will be achieved. The project is a long-term project as the road will be in place for many years. The water quality and quantity in W06 should be measured to assess whether mitigation measures are effective and to allow any potential negative impacts to be detected and managed early. The Board is recommending the Approval be varied to include a condition requiring the Approval Holder to prepare a monitoring plan to assess water quality and quantity of W06. The monitoring plan should include collecting samples in the spring and fall to capture both high and low water levels. The Approval Holder should collect samples at the inflow of water into W06 from the TUC. Samples should be analyzed for total dissolved solids, salts, dissolved metals, and other parameters that would be required under the stormwater sampling program. The monitoring plan is to be approved by the Director, and once approved, shall be implemented immediately and will remain in force for a minimum of five years after the SWCRR is open to traffic. The results of the monitoring program should be provided to the Director and made publicly available within one month from the time the data are collected. The data should also be included in an annual report to be provided to the Director. To ensure the Appellants, Intervenors, and other members of the public have access to the data collected, the annual report and monitoring results should be published on a public website. The website may be AEP's Environmental Site Assessment Registry or some other publicly accessible website.

[337] As the Board is recommending the monitoring be continued for five years after the SWCRR is open to the public, the Board is recommending the Approval be extended until August 10, 2027. The Board understands the project is a partnership between government and private entities. Maintenance of the road and associated structures must continue after the project is completed. As a result, monitoring conditions in the Approval will transfer to the party responsible for continuing maintenance.

[338] The intent of the monitoring will be to ensure the hydrologic connection to Wetland 06 is maintained and water quality is not negatively impacted.

[339] Although the stormwater plan was not part of the Approval currently before the Board, the Board believes it would be prudent for the Approval Holder to post this plan, when approved by the Director, on a publicly accessible website. The Board understands the stormwater plan will minimize the potential for runoff from the SWCRR to commingle with groundwater or surface runoff in the area.

[340] At the hearing, the Approval Holder stated it was working under Version 4 of its ECO Plan, specifically reducing the buffer area around the remaining wetlands. The Board appreciates the ECO Plan is a dynamic document that will evolve as the project proceeds. However, the Approval specifically incorporated by reference Version 1 of the ECO Plan which stipulates a 15 to 30 metre buffer zone around remaining wetlands. The Board, and it appeared the Director, were surprised to hear the Approval Holder decided to change the buffer zone to five metres.

[341] The Approval requires a 15 to 30 metre area of protection around the remaining wetlands. The Approval Holder believed it was possible to conduct the work while maintaining that distance but is now suggesting a smaller buffer zone would be sufficient, making for easier construction around the wetlands. The Approval was issued with conditions to ensure impacts to the wetlands would be minimized. If the Approval Holder wants the buffer area to be changed, it must submit an amendment application to the Director and, if the Director approves, the Approval can be amended. The Approval Holder would then be required to follow the conditions in the amended Approval.

VI. WETLAND POLICIES

A. Submissions

1. Appellants

[342] The Appellants stated that, even though the Director may not have been able to use the 2013 Policy, the Board should base its decision on the 2013 Policy. The Appellants noted the AMEC Report and Golder Report did not show the same wetlands in the same geographic locations, and the work for the Golder Report was done in 2016. The Appellants argued using the Interim Policy was not allowed according to the implementation plan for the wetland policy issued in 2016 and updated in 2017.

[343] The Appellants noted the 2013 Policy requires a proponent avoid or minimize impacts before looking at replacement options. The Appellants stated there was no indication in the Director's Record that avoidance or minimization was dealt with by the Approval Holder as part of the application process. The Appellants said the 2013 Policy came into effect for the White Area of the province on June 1, 2015, so the Director should not have used the Interim Policy. The Appellants argued the Government must live to a higher standard than the private sector.

[344] The Appellants stated their review of the Director's Record demonstrates the Director did not follow the approval pathway of avoidance, minimization, and then compensate, but instead went directly to compensate. The Appellants argued this was a violation of policy and, therefore, the Director's decision to issue the Approval should be reversed.

[345] The Appellants stated the application did not include any analyses of the options to avoid the wetlands or minimize impacts to the wetlands. The Appellants noted the Golder Report considered compensation as the most logical wetland mitigation option given the narrow project area and large project footprint. The Appellants stated this indicates Golder Associates, on behalf of the Approval Holder, did not evaluate options to avoid or minimize impacts to the wetlands, and the Director did not request the information.

[346] The Appellants stated that, without the 100 to 150-metre-wide median in the middle of the highway, there were options available to avoid or minimize the impact to the

wetlands. The Appellants said an option would be to relocate the highway to the west of W11 where there is room for an 8-lane highway, shoulders, and median. The Appellants suggested the minimization option would include a slightly elevated causeway over W11.

[347] The Appellants said it is not known whether it is appropriate to leave a 100 to 150 metre median, but if this constraint was removed, options for avoidance and minimization become available. The Appellants acknowledged there is an economic cost associated with spanning the wetland with a pier and beam causeway, but the application did not include an options assessment with a cost-benefit analysis that included an evaluation of the economic, environmental, and social costs.

[348] The Appellants, referring to Mr. Barry Lester's evidence, stated redesigning the SWCRR from 16 lanes to eight would not cause the Approval Holder to miss the completion deadlines. The Appellants said that, if saving the wetlands can reduce financial hardships due to flooding, then the design of the SWCRR should be modified since this positive economic benefit was not considered in the application. Based on Mr. Lester's evidence, the Appellants believed reducing the scope of the project would also reduce project costs.

[349] The Appellants noted the TUC and the restricted development area were based on the interpretation of the *Government Organization Act*, Schedule 5, section 4(1).⁶⁸ The

⁶⁸ Schedule 5, section 4(1) of the *Government Organization Act* provides:

“The Lieutenant Governor in Council may by regulation establish any part or parts of Alberta as a ‘Restricted Development Area’ or a ‘Water Conservation Area’ (in this section called ‘the Area’) on the report of the Minister that the establishment of the Area is necessary in the public interest to co-ordinate and regulate the development and use of the Area for the purpose of

- (a) preventing, alleviating, controlling or stopping the destruction, damage or pollution of any natural resources in or adjacent to the Area,
- (b) protecting a watershed in or adjacent to the Area,
- (c) retaining the environment of the Area in a natural state or in a state suitable for recreation or the propagation of plant or animal life,
- (d) preventing the deterioration of the quality of the environment of the Area by reason of the development or use of land in the Area incompatible with the preservation of that environment,
- (e) confining to land within the Area
 - (i) any operation, activity, use, development or occupation of land
 - (A) that adversely affects or is likely to adversely affect the quality or quantity of any natural resource, or

Appellants stated that, pursuant to section 4(1)(a) and (b), the Director and Approval Holder were required to protect any natural resources, including the watershed, in or adjacent to the area. The Appellants noted section 4(1)(f) of Schedule 5 of the *Government Organization Act* requires separation of the activity to ensure development does not adversely affect the quality or quantity of any natural resource or destroys, disturbs, or pollutes any natural resource.

[350] The Appellants argued the Approval Holder's activities already caused a noticeable adverse impact to the Special Protection Natural Environment Park that is adjacent to the TUC, indicating non-compliance with the intent of the *Government Organization Act*.

[351] The Appellants noted the Land Transfer Agreement between the Tsuut'ina Nation and the Province indicates the project must be completed within seven years of the transfer date, which would be May 22, 2022, but the date can be extended by agreement under a *force majeure* clause.⁶⁹

[352] The Appellants stated a reduction in the size of the project would enable avoidance of many of the wetlands that would be filled under the Approval. The Appellants believed reducing the scope of the project would enable the Approval Holder to avoid or minimize the wetlands and would do no harm to the Approval Holder.

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- (B) that destroys, disturbs, pollutes, alters or makes use of a natural resource, or is likely to do so,
 - or
 - (ii) any emission, discharge, noise or other environmental pollutant, or its source, whether from any commercial, industrial or other operation, activity, use, development or occupation of land, or
 - (f) separating
 - (i) any operation, activity, use, development or occupation of land
 - (A) that adversely affects or is likely to adversely affect the quality or quantity of any natural resource, or
 - (B) that destroys, disturbs, pollutes, alters or makes use of a natural resource, or is likely to do so,
 - or
 - (ii) any emission, discharge, noise or other environmental pollutant, or its source, whether from any commercial, industrial or other operation, activity, use, development or occupation of lands
- from any operation, activity, use, development or occupation of adjacent land.”

⁶⁹ See: Oxford English Dictionary, s.v. “*force majeure*” is defined as: “Unforeseeable circumstances that prevent someone from fulfilling a contract.”

2. Approval Holder

[353] The Approval Holder stated the Director applied the relevant provincial wetland policies reasonably and correctly.

[354] The Approval Holder submitted the Interim Policy and Guide were the applicable policy documents. The Approval Holder stated that even though there are differences between the Interim Policy and the 2013 Policy, the key issue for these appeals is the wetland mitigation hierarchy (avoid, minimize, compensate), which is in both policies.

[355] The Approval Holder stated it was required to, and did, follow the wetland mitigation hierarchy. The Approval Holder said the circumstances of the SWCRR being required to be built within the narrow TUC did not change that fact and explains the choice of compensation as being the primary method of mitigation. The Approval Holder explained the wetlands were not avoidable in many cases due to the narrow band of the TUC.

[356] The Approval Holder stated the construction of the SWCRR within the TUC is consistent with the expected use of those lands. The Approval Holder argued it would be unreasonable for the Director to not allow the SWCRR be constructed in the TUC in favour of recreational users on adjacent lands. The Approval Holder said the correct approach would be for the Director to issue the Approval with the appropriate terms and conditions.

[357] The Approval Holder submitted it was appropriate for the Director to consider the nature and function of the TUC, and the legislation enacting the TUC, to inform the Director's assessment of the mitigation hierarchy. The Approval Holder said that:

“...where it is not practical or realistic to avoid, and where the land in question is specifically allocated for the very purpose KGL intends, then the interpretation and application of the Interim Policy and Guide can properly be such that compensation is the ultimately favored option, notwithstanding the general preference for avoidance.”⁷⁰

[358] The Approval Holder stated the interpretive effect would apply in the same way if the 2013 Policy applied, given it uses the same mitigation hierarchy.

⁷⁰ Approval Holder's submission, dated October 4, 2017, at paragraph 76.

[359] The Approval Holder said it could be argued the regulatory structure establishing the TUC should supersede the policy structure supporting the wetland mitigation hierarchy, and then there would be no obligation on an applicant to meet the policy requirements. The Approval Holder stated in this case, it recognized the Interim Policy and Guide and concluded that avoidance was not technically feasible in this case.

[360] The Approval Holder submitted the fact the Director was properly able to consider the Land Transfer Agreement contemplates the construction of the SWCRR within specified time limits and, accordingly, impacts to wetlands that could only realistically be addressed by compensation were acceptable. The Approval Holder submitted it is not possible to say the Director's decision to issue the Approval was incorrect given the TUC and the Land Transfer Agreement.

[361] The Approval Holder stated the Appellants' attempt to effectively halt the project is a misuse of the Board's process.

[362] The Approval Holder stated the Director's decision was not only reasonable, but correct. The Approval Holder noted the Appellants did not offer evidence to the contrary, but instead tried to impugn the scientific-based, rational decision with suggestions that an outdated policy was used or the loss of these small wetlands would somehow increase the impact of a major flood event.

[363] The Approval Holder stated the Approval is based on sound scientific and technical work by qualified experts. The Approval Holder said the project was the subject of extensive consultation and public notice.

[364] The Approval Holder requested the Approval be confirmed and the partial stay be lifted.

3. Director

[365] The Director stated the relevant provincial wetland policies were appropriately and reasonably applied. The Director noted the provincial wetland policies apply even though the activity was being carried out in the TUC, but the size of the TUC relative to the scale of the project had practical implications on avoiding and minimizing impacts to the wetlands.

[366] The Director stated the provincial wetland policies that apply in this case were the Interim Policy, the Guide, and “Stepping Back from the Water: A Beneficial Management Practices Guide for New Development Near Water Bodies in Alberta’s Settled Region.”

[367] The Director stated the Interim Policy applied because the initial field work was done in 2014 and the application was submitted in 2016. The Director noted this met the requirements in the Alberta Wetland Mitigation Directive.

[368] The Director noted the Interim Policy and 2007 Compensation Guide were based on the mitigation hierarchy of avoidance, minimization, and compensation, which is the same mitigation hierarchy as in the 2013 Policy.

[369] The Director explained the main difference between the 2007 Compensation Guide and the 2013 Policy is how compensation is calculated. The Director said that, under the 2007 Compensation Guide, compensation was calculated on a 3:1 ratio, regardless of the relative value of the wetland. This resulted in the Approval Holder paying Ducks Unlimited Canada \$1,275,090.00 plus GST.

[370] The Director stated the 2013 Policy takes a relative wetland value into account and identifies a replacement ratio ranging from 8:1 to 1:1.

[371] The Director stated the mitigation hierarchy of avoidance, minimization, and compensation was applied given the practical constraints caused by the TUC. The Director said the Approval Holder demonstrated the mitigation hierarchy in accordance with the relevant provincial wetland policies. The Director stated he considered the information provided by the Approval Holder and applied the applicable policies appropriately and reasonably.

[372] The Director explained the locations of avoided wetland areas were identified in the Golder Report, which stated nine wetlands would be impacted less than 50 percent (totaling 2.65 hectares) and eight wetlands were to be avoided completely.

[373] The Director explained there were multiple discussions between AEP and KGL regarding the potential avoidance of W06. The Director noted that only five percent of W06 will be disturbed.

[374] The Director stated that, given the linear nature of the SWCRR and the narrowness of the TUC, complete wetland avoidance was not feasible. The Director said that 11 of the 24 wetlands under the Approval will be partially disturbed. The Director noted the ECO Plan and the Remaining Wetland Protection Plan prescribe mitigation measures such as buffer zones to protect existing wetland features.

[375] The Director stated the AEP wetland specialist was satisfied the wetland policy requirements of avoidance and minimization had been met. The Director explained there were no practical alternatives to removing or impacting some wetlands due to the width of the TUC and the size and nature of the SWCRR.

[376] The Director stated that any permanent loss of wetland area that could not be avoided was accounted for in the payment to Ducks Unlimited Canada, resulting in the creation of 67.11 hectares of wetland habitat to replace the 22.07 hectares of removed wetlands.

[377] The Director stated he considered and properly applied relevant wetland policies in exercising his discretion to issue the Approval.

[378] The Director requested the Approval be upheld as issued.

B. Response Submissions

1. Appellants

[379] The Appellants believed that since the field work for the Golder Report was completed after June 1, 2015, the 2013 Policy should apply. They submitted that, since the AMEC Report did not include all 24 wetlands, it should not have been used to support the Approval application. The Appellants stated that, since only the Golder Report included all 24 wetlands, that report should have been used to determine which policy should apply. The Appellants noted that since the fieldwork was completed in 2016, the 2013 Policy should have been used, and the Approval Holder should be required to submit options to avoid and minimize wetlands and carry out a cost-benefit analysis based on the environmental, social, and economic aspects of the project. The Appellants noted there was no indication the Approval Holder conducted a proper options assessment or cost-benefit analysis.

[380] The Appellants argued that, if there really was no difference between the Interim Policy and 2013 Policy as suggested by the Approval Holder, then the Approval Holder could have submitted the application using the 2013 Policy.

[381] The Appellants noted the Record did not include any document related to assessment of options to avoid or minimize and, therefore, the Director erred in issuing the Approval.

[382] The Appellants noted the compensation value for high value wetlands is a ratio of 8:1, but this was not used to determine the compensation to Ducks Unlimited Canada.

[383] The Appellants argued the Director issued an Approval based on an out-of-date policy and guide. The Appellants stated that none of the wetlands missing from the AMEC Report should have been considered for the Approval if the Director allowed the Interim Policy to be used.

[384] The Appellants stated the practical constraints of the TUC are not that significant considering the TUC is 285 metres wide, and an eight-lane highway requires a width of 40 to 50 metres. The Appellants noted the AMEC Report considered three options to avoid W11, but the environmental, social, and economic analysis was not completed.

[385] The Appellants said that, even though Alberta Transportation and the Approval Holder stated they are building a six to eight-lane ring road, documents show the road is actually being built for 16 to 18 lanes. The Appellants stated the overbuild results in the situation where the Approval Holder says wetlands cannot be avoided. The Appellants believed building a six to eight-lane highway presents options to avoid the wetlands.

[386] The Appellants stated developers and industry must not be allowed to go directly to “compensation.” The Appellants asked the Board to reverse the Approval, thereby forcing the Approval Holder to do the work they tried to avoid.

[387] The Appellants stated the compensation payment to Ducks Unlimited Canada did not include uplands and was not based on relative value of the wetlands. The Appellants said the payment does not conserve, restore, protect, or manage Alberta’s wetlands to sustain the benefits they provide to the environment, society, and economy.

2. Approval Holder

[388] The Approval Holder said the Appellants analyzed the implementation timeline of the 2013 Policy, but there was little discussion on the actual contents of the 2013 Policy. The Approval Holder stated there was no relevant distinction between the 2013 Policy and the Interim Policy. The Approval Holder argued the Appellants failed to demonstrate how the use of the 2013 Policy could have made a difference in the avoidance of the wetlands. The Approval Holder noted that both the 2013 Policy and Interim Policy use the same mitigation hierarchy that prefers avoidance where possible. The Approval Holder there was no basis to suggest there would have been a different outcome if the 2013 Policy was used.

[389] The Approval Holder said the constraints of operating within the road right-of-way within the TUC largely dictated where the road must go. The Approval Holder noted the most contentious wetland, W06, was only subject to a five percent disturbance, which was reduced from the original 29 percent disturbance in the preliminary design phase. The Approval Holder said the Appellants' suggestion that it would be simple to avoid W06 or any of the other wetlands was unsubstantiated conjecture.

[390] The Approval Holder stated that, given the constraints of construction in the TUC and the Land Transfer Agreement with the Tsuut'ina Nation, "...the Director's decision was not only correct, but it may well have been the only decision possible save for not allowing the ring road to be built at all."⁷¹ The Approval Holder said the SWCRR is an important piece of infrastructure that will benefit all Albertans, particularly residents of the City of Calgary, and prohibiting its construction would not be a reasonable or correct outcome.

[391] The Approval Holder stated the compensation under the 2013 Policy could be more or less than the current amount levied, depending on a wetland compensation assessment. The Approval Holder explained one of the primary distinctions between the Interim Policy and the 2013 Policy is the more site specific and variable compensation ratio under the 2013 Policy. The Approval Holder noted the compensation ratio may be less than the current 3:1, but the best

⁷¹ Approval Holder's submission, dated October 11, 2017, at paragraph 18.

outcome for the Appellants would be for the wetlands to be assessed at a higher ratio. The Approval Holder stated it would not be reasonable or logical to deny the Approval outright.

[392] The Approval Holder noted the Appellants argued the 2013 Policy should have applied because the Golder Report identified more wetlands than the AMEC Report. The Approval Holder said the increase in the wetlands subject to compensation in the Golder Report was a benefit to the overall wetlands compensation as it increased the number of hectares to be included in the 3:1 ratio calculation. The Approval Holder stated the difference between the AMEC Report and Golder Report demonstrated the nature of the wetlands in question, and there is a technical debate whether some even qualify as wetlands. The Approval Holder explained AMEC provided and completed the foundational initial fieldwork from 2014, and while supplemental work may have been done later, the initial fieldwork was sufficient for the application of the Interim Policy.

[393] The Approval Holder stated the Appellants' arguments on the improper use of the "wrong" policy were meaningless and of no assistance. The Approval Holder said there would be no substantial difference and no basis to reverse the Approval.

[394] The Approval Holder also disputed several comments made by the Appellants, including:

1. The Appellants believed the Board must consider current legislation, policies, and guidelines in force at the time of its decision, even if it differed from what existed when the Director made his decision. The Approval Holder noted the Director was aware that more than one wetland policy could possibly apply when the decision to issue the Approval was made;
2. The Approval Holder did not agree with the Appellants' assertion that a redesign of the road to avoid W11 was feasible. The Approval Holder stated a project of the size, scope, and complexity of the SWCRR cannot be substantially redesigned. The Approval Holder said it would require a realignment of the TUC, and a realignment as suggested by the Appellants would adversely impact the Tsuut'ina Nation by decreasing the amount of contiguous reserve land on the west side of the highway while increasing disconnected reserve land on the east side;
3. The Approval Holder noted the technical aspects of roadway design and engineering are not within the Director's purview; and

4. The Approval Holder noted the Appellants' argument that registration of a court order in relation to the stay constituted a *force majeure* provision under the Land Transfer Agreement. The Approval Holder stated this was an incorrect interpretation of the agreement. The Approval Holder noted Alberta Transportation confirmed the delay in obtaining Provincial environmental approvals was not a *force majeure* event under the Land Transfer Agreement allowing for an extension of the deadline to complete the SWCRR.

[395] The Approval Holder indicated it was not typical to conduct a cost-benefit analysis of wetlands under either the Interim Policy or the 2013 Policy. The Approval Holder noted the wetland assessment is largely an ecological evaluation and does not include a strong economic or social impact focus. The Approval Holder said the social impacts that are typically considered in a wetland assessment include indigenous value, recreational use, and use for educational programs.

[396] The Approval Holder indicated that when compensation is the selected alternative, replacement does not usually occur in the areas that are "high risk," such as urban or highly disturbed areas. The Approval Holder explained this is the reason compensation typically occurs within the watershed or basin of the wetland being compensated.

[397] The Approval Holder submitted the Appellants failed to discharge their onus to prove the Director's decision to issue the Approval was inappropriate, regardless of the standard of review used. The Approval Holder stated the Appellants did not provide any evidence, only unsubstantiated allegations. The Approval Holder said the Appellants failed to connect their broad and generic assertions regarding the value of the wetlands to the specific impact of the infilling or partial infilling of the limited wetland area. The Approval Holder stated the Director considered all the relevant information, and he reasonably and correctly balanced the project benefits with the impact to the wetlands.

[398] The Approval Holder stated that, except for the unaffected portion of W06 within the municipal parkland, the Appellants never had the legal right to access or utilize the wetlands that are subject to the Approval and, regardless of the outcome of the appeals, never will have access.

[399] The Approval Holder asked that the Approval be confirmed and the partial interim stay be lifted.

3. Director

[400] The Director indicated a review of the Approval application would have been similar using either the Interim Policy or the 2013 Policy since both policies follow the core principles of avoid, minimize, or compensate. The Director noted that, as part of the avoidance criteria, options analysis is completed for only “A” value wetlands where reasonable, as was the case for W11.

[401] The Director stated the decision to issue the Approval would not have been different had the Approval application been assessed against the 2013 Policy. He explained the only difference in the Approval itself would have been Section 7, related to compensation.

[402] The Director said one of the differences between the Interim Policy and the 2013 Policy was the latter considers wetland management and compensation from a regional context which would consider higher level objectives in the watershed basins. The Director noted that regional plans do not currently exist and, therefore, cannot be considered.

[403] The Director indicated there was no documentation of the agreement reached between the Director and Alberta Transportation regarding the use of the Interim Policy. The Director added that, throughout the Approval application process, there had been no further discussion regarding the potential use of the 2013 Policy.

C. Analysis

[404] One of the issues before the Board was whether the proper water policy was applied in assessing the application for the Approval. The Appellants argued the 2013 Policy should have been used, given the prerequisites as listed in the Directive, the wetlands identified in the AMEC Report, and the wetlands identified in the Golder Report. The Director and Approval Holder argued the Interim Policy was the correct policy to be used in these circumstances, and the Director correctly applied that policy in his assessment.

[405] To determine which was the appropriate policy in these circumstances, the Board looked at when the work was completed, the timing of the filing of the application, what was applied for in the application, and the prerequisites included in the Directive.

[406] The Interim Policy was released in 1993. The 2013 Policy was released in September 2013 but, as explained by the Director, the guidelines to explain how the 2013 Policy was to be applied were not issued until June 1, 2015. This left a two-year period in which there was some uncertainty as to which policy applied because there were no implementation guidelines on which a proponent could rely to meet the requirements of the 2013 Policy. In a legal context, this is similar to an Act being passed that refers to forthcoming regulations which provide details on how a section of the Act is to be interpreted and followed. Without the applicable regulations, the specific section of the Act would be unenforceable.

[407] The data collection for the AMEC Report was completed in 2014. This report included an assessment of 14 wetlands in the area of the proposed project and noted some would be impacted significantly, some would be impacted to some degree, and others would not be impacted at all. Included in the application were the AMEC Report and the Golder Report.

[408] The Directive described a phased-in approach for the 2013 Policy, and explained the Interim Policy applied if the following prerequisites were met:

“Wetland Impact Assessments that were completed in the White Area under the interim policy will be accepted and reviewed if the assessment:

- was completed during the growing season of 2014 and is submitted to the regulatory body before December 22, 2017
- was completed during the growing season of 2015, up until May 31, and is submitted to the regulatory body prior to June 1, 2018.”

[409] If these prerequisites are not met, then the 2013 Policy would apply.

[410] The Director stated there was an agreement reached between AEP and Alberta Transportation to have the project assessed using the Interim Policy. The Board notes there is no written agreement included in the Record to explain the reasons behind the decision to use the Interim Policy in these circumstances, which was confirmed during the hearing. The 2013 Policy was available at the time the Director made his decision to allow the application to

proceed under the Interim Policy, however, the Directive was unavailable. The Director suggested using the Interim Policy provided certainty in the tender process for the project given the company winning the tender would be responsible for obtaining the necessary approvals for the project. The Board understands there needs to be certainty in the process, but it was also the proponent's responsibility to ensure policies and regulations are followed throughout the process, from the application stage through to the completion stage. If the regulatory requirements change or policies change, the proponent is required to comply with the applicable regulations and policies.

[411] The AMEC Report, dated December 2014, included an assessment of only 14 wetlands, not the 24 wetlands identified in the Approval. The assessment work for the 14 wetlands was completed in 2014, and if the Approval was issued for only these 14 wetlands, the Director was correct in using the Interim Policy. However, the issue arises when the additional 10 wetlands are included in the Approval. These additional wetlands were not assessed by Golder until 2016, past the cutoff period under the Directive to meet the prerequisites to fall under the Interim Policy. The Approval Holder did not meet the prerequisites and, therefore, the 2013 Policy should have been used in assessing the application.

[412] Both the Interim Policy and 2013 Policy incorporate a hierarchical approach to dealing with wetlands, with avoidance being the preferred approach, followed by minimization, and compensation, which is to be used only when avoidance and minimization cannot be effectively accomplished. The major difference between the policies is the way compensation is calculated, plus the 2013 Policy requires the project proponent to consider social or regional assessments and to provide an analysis of alternatives to avoid or minimize impacts to "A" value wetlands, where reasonable.

[413] The Board notes AMEC assessed W11 to determine if there were alternatives that were viable to avoid this wetland or to minimize the impact. This type of analysis is what would be required under the 2013 Policy for "A" value wetlands where reasonable. Those wetlands with minimal value would not have to be assessed for alternatives, but an explanation would have to be provided to explain why no alternative analysis was required.

[414] The Board finds the Director should have instructed the Approval Holder to assess the 24 wetlands impacted by the Approval using the 2013 Policy. As a result, the Board recommends the Approval be amended requiring the Approval Holder to re-classify the wetlands and assess each of the 24 wetlands identified in the Approval using the criteria in the 2013 Policy. This includes completing an options analysis of the “A” value wetlands, where reasonable, taking into account the potential environmental, social, and regional impacts. Compensation for the impacted wetlands should be calculated using the 2013 Policy.

[415] According to the Director, compensation calculations under the 2013 Policy are averaging in the range of 2.5 to 2.6, meaning each hectare of impacted wetland requires 2.5 to 2.6 hectares for compensation, which is actually less than the 3 to 1 ratio used under the Interim Policy and which was paid under the Approval. Since the Board is recommending the wetlands be reviewed under the 2013 Policy, it is only reasonable compensation calculations also be done using the 2013 Policy guidelines.

[416] Therefore, the Board recommends the Approval be varied, requiring the Approval Holder to assess the wetlands impacted using the criteria found in the 2013 Policy.

VII. CONCLUSION

[417] The issues before the Board were:

1. What is the standard of review the Board should apply in the circumstances of this case?

In consideration of this issue, the Board has used the word “appropriate” in the remaining issues. The meaning of appropriate will be based on the standard of review determined by the Board.

2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:
 - a. the terms and conditions in the Approval;
 - b. the impact of disturbing the wetlands included in the Approval; and
 - c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.

3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?

This issue includes, but is not limited to, consideration of the relationship between the relevant provincial wetland policies and the agreement entered into between the Crown and the Tsuut'ina, and the relationship between the relevant provincial wetland policies and the legislation passed to establish the Transportation Utility Corridor. For example, does the agreement or the legislation affect the applicability or interpretation of the policies?

[418] The Board determined the appropriate standard of review in the circumstance of this case is correctness, with no deference given to the Director. The correctness standard means that if the Board does not agree with the Director's decision, the Board is making a recommendation to the Minister of Environment and Parks to substitute her decision for that of the Director. In this way, the Board's process allows a better decision to be made. The standard of review needs to be determined on a case by case basis.

[419] Under section 99(1) of EPEA, the Board must provide the Minister with its recommendations regarding the issues in these appeals.⁷²

[420] The onus is on the Appellants to provide sufficient, reliable, and relevant evidence for the Board to recommend to the Minister to reverse or vary the Approval. The Board is not convinced the Approval should be reversed. The Board finds the evidence supports a recommendation the Approval be varied.

[421] The Board is recommending the Approval be varied to include monitoring conditions to address concerns regarding impacts on water quality and quantity flowing into W06.

⁷² Section 99(1) of EPEA states:

“In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the *Water Act*, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it.”

[422] The Board is recommending the Approval be varied to require the Approval Holder complete an assessment of the wetlands impacted by the project using the criteria specified in the 2013 Policy.

[423] The stay will remain in effect for W06, 07, 08, and 09 until the Minister makes her decision.

VIII. RECOMMENDATIONS

[424] The Board recommends the Minister vary *Water Act* Approval No. 00388473-00-00 as follows:

1. Delete the Expiry Date and replace it with the following:
“EXPIRY DATE: August 10, 2027”.
2. Add the following immediately after condition 3.1:
“3.1.1 The Approval Holder shall undertake the activity in accordance with R001 and R002 including any revisions or amendments approved by the Director in writing.”
3. Add the following immediately after condition 6.1:
“6.2 The Approval Holder shall provide the Director with a monitoring plan for Wetland 06 that includes, as a minimum, the following:
 - (a) monitoring of the water flow into Wetland 06 in the spring and fall of each year;
 - (b) the water quality parameters of Wetland 06 that will be measured every spring and fall of each year the plan is in effect, including total dissolved solids, salts, dissolved metals, and other parameters consistent with the stormwater sampling program;
 - (c) the results of the monitoring shall be provided to the Director and made publicly available within one month from the data being collected;
 - (d) the results of the monitoring and an analysis of the monitoring shall be provided to the Director in an annual report by March 31 of the year following the data being collected; and
 - (e) the monitoring plan will come into effect as soon as the Director approves the plan and will remain in effect for a period of five years after the road is officially opened to the public.

6.3 The Approval Holder shall assess the 24 wetlands subject to this Approval using the criteria under the Alberta Wetland Policy 2013.”

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

1. Mr. Tyler Shandro, on behalf of Mr. Jeff Brookman and Ms. Allison Tulick;
2. Mr. Ron Kruhlak and Mr. Stuart Chambers, McLennan Ross LLP, on behalf of KGL Constructors, A Partnership;
3. Ms. Lisa Semenchuk and Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General, on behalf of the Director, South Saskatchewan Region, Alberta Environment and Parks; and
4. Ms. Janice Fraser, Mr. Leon Nellissen, Rocky View County, Ms. Maureen Bell, Nature Calgary represented by Mr. John McFaul, Alberta Transportation represented by Mark Enright, Alberta Justice and Solicitor General, Weaselhead/Glenmore Park Preservation Society represented by Ms. Sarah Nevill, Ms. Sarah Nevill, Mr. Manoj Sharma, Mr. Barry Lester, and Mr. Charles Hansen.

[53] The Board notes the Approval Holder and Appellants reserved their right to ask for costs. A process for the costs application will be established after the Minister makes her decision in these appeals.

Dated on November 24, 2017, at Edmonton, Alberta.

- original signed -

Alex MacWilliam
Board Chair

- original signed -

Eric McAvity, Q.C.
Board Member

- original signed -

Anjum Mullick

Board Member



ALBERTA
ENVIRONMENT AND PARKS
Office of the Minister
Minister Responsible for the Climate Change Office
MLA, Lethbridge-West

Ministerial Order
06/2018

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12;

and

Water Act
R.S.A. 2000, c. W-3.

Order Respecting Environmental Appeals Board
Appeal Nos. 17-047 and 17-050

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 17-047 and 17-050.

Dated at the City of Edmonton, Province of Alberta, this 29th day of January, 2018.

-original signed by-
Shannon Phillips
Minister

Order Respecting Environmental Appeals Board
Appeal Nos. 17-047 and 17-050

With respect to the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks (the “Director”), to issue Approval No. 00388473-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to KGL Constructors, A Partnership (the “Approval Holder”), I, Shannon Phillips, Minister of Environment and Parks, order that the decision of the Director to issue the Approval is varied as follows:

1. Delete the Expiry Date and replace it with the following:

“EXPIRY DATE: August 10, 2027”.

2. Add the following immediately after condition 3.1:

“3.1.1 The Approval Holder shall undertake the activity in accordance with 00388473-R001 and 00388473-R002, including any revisions or amendments approved by the Director in writing.”

3. Add the following immediately after condition 6.1:

“6.2 The Approval Holder shall provide the Director with a monitoring plan for Wetland 06 (identified in 00388473-P003) that includes, as a minimum, the following:

- (a) monitoring of the water flow into Wetland 06 in the spring and fall of each year that the plan is in effect;
- (b) monitoring of the water quality for Wetland 06 in the spring and fall of each year that the plan is in effect, including total dissolved solids, salts, dissolved metals, and other parameters consistent with a stormwater sampling program;
- (c) the monitoring data shall be provided to the Director within one month from the date the data were collected;
- (d) the results of the monitoring and an analysis of the monitoring shall be provided to the Director in an annual report by March 31 of the year following the calendar year in which the data were collected; and

- (e) the monitoring plan shall come into effect as soon as the Director approves the plan and shall remain in effect for a period of five years after the road is officially opened to the public.
- 6.3 The Approval Holder shall prepare the monitoring plan detailed in condition 6.2 to the satisfaction of the Director.
- 6.4 The Approval Holder shall implement the monitoring plan detailed in condition 6.2 immediately upon the plan being approved by the Director in writing.
- 6.5 The Approval Holder shall make the monitoring data collected pursuant to the monitoring plan publicly available within one month from the day the data were collected by:
 - (a) posting the data to a website maintained by the Approval Holder or the Approval Holder's designate; and
 - (b) providing the data to the Weaselhead/Glenmore Park Preservation Society.
- 6.6 The Approval Holder shall make the annual report prepared pursuant to the monitoring plan publicly available by March 31 of the year following the calendar year in which the data were collected by:
 - (a) posting the annual report to a website maintained by the Approval Holder or the Approval Holder's designate; and
 - (b) providing the annual report to the Weaselhead/Glenmore Park Preservation Society.
- 6.7 (a) The Approval Holder shall assess the 24 wetlands subject to this Approval using the criteria under the 2013 Alberta Wetland Policy, and this assessment shall include, at a minimum, the following:
 - (1) a consideration of any further options that may be available for avoidance or mitigation;
 - (2) a recalculation of the required compensation; and

(3) specific proposals for avoidance and mitigation, if possible, of Wetland 07 (identified in 00388473-P003) and Wetland 08 (identified in 00388473-P003).

(b) The Approval Holder shall complete this assessment on or before June 30, 2018, or such earlier date as prescribed by the Director in writing, and the assessment shall be to the satisfaction of the Director.

(c) Upon completion of this assessment, the Approval Holder shall provide the assessment to the Director, and based on this assessment, the Approval Holder shall carry out the additional work or actions as prescribed by the Director in writing.

(d) The Approval Holder shall make the assessment prepared pursuant to condition 6.7(a) publicly available by June 30, 2018, or such earlier date as prescribed by the Director in writing, by:

(1) posting the assessment to a website maintained by the Approval Holder or the Approval Holder's designate; and

(2) providing the assessment to the Weaselhead/Glenmore Park Preservation Society.

(e) The Approval Holder shall make the written direction of the Director provided under condition 6.7(c) publicly available within 7 days of receiving the written direction by:

(1) posting the written direction to a website maintained by the Approval Holder or the Approval Holder's designate; and

(2) providing the written direction to the Weaselhead/ Glenmore Park Preservation Society.”

4. Add the following immediately after condition 8.1:

“WETLANDS 06, 07, and 08

- 9.1 Notwithstanding any other provision in this Approval, the Approval Holder shall not disturb Wetland 06.
- 9.2 The Approval Holder shall implement protection measures to ensure its construction activities do not disturb Wetland 06 that are to the satisfaction of the Director.
- 9.3 No further disturbance of Wetland 07 (identified in 00388473-P003) and Wetland 08 (identified in 00388473-P003) is permitted without the written direction of the Director in accordance with section 6.7(c).”

Reasons of the Minister of Alberta Environment and Parks

**Under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12
and the *Water Act*, R.S.A. 2000, c. W-3**

Environmental Appeals Board Appeals No. 17-047 and 17-050

January 29, 2018

INTRODUCTION

- [1] These are the reasons for my decision in Ministerial Order 06/2018. My decision deals with Appeal Nos. 17-047 and 17-050, filed with the Environmental Appeals Board (the “Board”) by Mr. Jeff Brookman and Ms. Allison Tulick (collectively the “Appellants”). The Appellants appealed Approval No. 00388473-00-00 (the “Approval”) issued under the *Water Act*, R.S.A. 2000, c. W-3, by Alberta Environment and Parks (“AEP”). The Approval was issued to KGL Constructors, A Partnership (“KGL”) and is one of the various environmental authorizations required for the construction of the Southwest Calgary Ring Road project.
- [2] The Southwest Calgary Ring Road completes the highway within the Transportation and Utility Corridor (the “TUC”) established around the City of Calgary. The highway (Highway 201 – Stony Trail) has been planned for Calgary since the early 1970s. The completed highway is an essential piece of provincial infrastructure to support Calgary’s economic development and allows for the efficient movement of goods and people within the Province. The Southwest Calgary Ring Road project was subject to two federally mandated Environmental Impact Assessments. The first was completed in 2009, with Transport Canada, the Federal Transportation Agency, the Department of Fisheries and Oceans, and Environment Canada signing off on the Environmental Screening Report on December 22, 2009. The second was completed in December 2014 to support the federal review and approval of the lands transfer from the Tsuut’ina First Nation to the Province.¹ The Federal Government signed off on the second Environmental Impact Assessment on May 1, 2015, with the passage of an Order of the Governor General in

1 Environmental Assessment for the Southwest Calgary Ring Road (Updated December 2014), prepared by

Council, Privy Council No. 2015-0556, which authorized the transfer of the lands. The lands acquired by the Province from the Tsuut'ina First Nation are essential for the project to proceed.

- [3] Specifically, the Approval being appealed allows KGL to fill in 24 wetlands, in whole or in part, as part of the construction of the Southwest Calgary Ring Road. These wetlands are located within the TUC on the western boundary of the City of Calgary, mainly on the lands acquired by the Province from the Tsuut'ina First Nation. These lands provide a relatively narrow corridor in which to build the Southwest Calgary Ring Road project, leaving little room for flexibility in the location of the roadway. While KGL is the Approval Holder and is responsible for building the Southwest Calgary Ring Road, the actual project proponent is Alberta Transportation.
- [4] As there has been some confusion about the nature of these appeals, I wish to make it clear these appeals are only about the wetlands included in this Approval. These appeals are not about whether the Southwest Calgary Ring Road project should proceed. Further, these appeals are not about the design of the bridge that will be crossing the Elbow River. The Appellants have raised a concern about the effect the bridge could have on potential flooding upstream of the bridge. My understanding is that at least two studies have been done, by Alberta Transportation and the City of Calgary, which concluded that the bridge as currently designed does not increase the risk of flooding upstream of the bridge. Finally, these appeals are not about other authorizations that have been or may be issued by AEP for the Southwest Calgary Ring Road. Despite comments from the Appellants and concerns raised by members of the public, these other matters were not before the Board and, therefore, are not before me in making this decision.
- [5] While I am not required to give reasons,² I believe it would be helpful for everyone involved in this matter to understand the reasons for my decision. This is, in part, because my decision makes additional amendments to the Approval, over and above those recommended by the Board.

AMEC Environment and Infrastructure, December 2014, being Tab 27 of AEP's Record filed in these appeals.

² See: *Fenske v. Alberta (Minister of Environment)*, 2002 ABCA 135 at paragraph 24 to 27.

[6] Following receipt of the appeals, the Board held a public hearing and prepared a report, which includes the Board's recommendations (the "Report").³ The Report was provided to me on November 24, 2017. The Board's entire appeal file has also been available for me to review. The Report and the Board's file form the basis of my decision and these reasons. I am authorized to make this decision under section 100(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") which provides:

- "On receiving the report of the Board, the Minister may, by order,
- (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, ... and
 - (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."

These provisions give me broad powers to decide how to address the appeals filed with the Board. The Court of Queen's Bench in *McColl-Frontenac Inc. v. Alberta (Minister of Environment)*, 2003 ABQB 303 at paragraph 19, quoted the Supreme Court of Canada in described the powers of the Minister, stating:

"... [T]he exercise of ministerial discretion and decision-making generally involves polycentric considerations, that is they 'require the simultaneous consideration of numerous interests and the promulgation of solutions which concurrently balance benefits and costs for many different parties,' *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, ..." 1998 SCR 778 at paragraph 36.

DISCUSSION

[7] Taking into account the numerous competing interests in this matter, I am exercising my powers under section 100(1) of EPEA to vary the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Approval No. 00388473-00-00.

³ *Brookman and Tulick v. Director, South Saskatchewan Region, Alberta Environment and Parks, re: KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.).

Water Monitoring

[8] I am accepting the Board's recommendation to require water quality and quantity monitoring for Wetland 06, which is locally known as the Beaver Pond. This includes accepting the recommendation to extend the term of the Approval to 10 years to accommodate this monitoring. I am also ordering that more detailed conditions be included in the Approval to ensure both the monitoring data and the annual reports are widely available to the public. Given the importance and use of the Beaver Pond by the public, I agree with the Board that monitoring Wetland 06 will ensure that it is properly protected. I also believe it is important to ensure the Appellants, the other participants in the hearing, and members of the public have easy access to this information to ensure the features included in the design of the roadway protect Wetland 06 as intended. If it becomes apparent the features included in the design of the roadway are not protecting Wetland 06 as intended, then AEP can take steps under their legislation to ensure that any deficiencies are corrected.

Reports

[9] I understand from the Board's Report, KGL has updated the Southwest Calgary Ring Road Eco Plan (referred to in the Approval as 00388473-R001) and the Remaining Wetland Protection Plan (referred to in the Approval as 00388473-R002) without informing AEP. These plans form part of the Approval as they are incorporated by reference. I agree with the Board that it is not appropriate to make changes to these plans without first obtaining the approval of AEP. There must be clarity in what terms and conditions are in place in an approval, and any change to a document incorporated by reference into an approval must be approved by AEP before the approval holder is permitted to act on the change. Therefore, I am accepting the Board's recommendation. I am ordering that the Approval Holder may undertake the activities authorized by the Approval in accordance with the Southwest Calgary Ring Road Eco Plan and the Remaining Wetland Protection Plan, but any revisions or amendments to these plans must be approved by AEP in writing before KGL is permitted to act under these plans.

2013 Alberta Wetland Policy

- [10] I agree with the Board’s conclusion that the proper wetland policy that should have been applied in making the decision to issue this Approval is the 2013 Alberta Wetland Policy. In my view, it is clear that KGL did not meet the transitional provisions that were included in the Alberta Wetland Mitigation Directive that was issued in June 2015 (the “Directive”). I agree with the finding of the Board that the wetland assessment conducted by KGL was not completed until 2016, which was past the deadline included in the Directive to allow the 1993 Interim Policy apply.
- [11] In its Report, the Board describes that AEP and Alberta Transportation made an agreement that the Southwest Calgary Ring Road project would be assessed under the 1993 Interim Policy. While I understand AEP and Alberta Transportation reached this agreement to provide certainty in the tendering process for the construction of the Southwest Calgary Ring Road, I am of the view this agreement significantly underestimates the importance of wetlands to the environment, particularly in areas adjacent to urban development.
- [12] With the greatest of respect to the AEP staff involved in reaching this agreement, notwithstanding the absence of the Directive, the agreement should have been that the higher standards found in the 2013 Alberta Wetland Policy should apply. This would have created the same certainty as the agreement to use the 1993 Interim Policy, while properly respecting the significant role that wetlands have in our environment. I want to be clear in communicating that AEP needs to work harder to ensure the avoid, mitigate, compensate hierarchy included in the 2013 Alberta Wetland Policy is strictly applied, with compensation being the last alternative even where the project involves significant provincial infrastructure. In particular, due to the linear impact of roads, future road designs need to reflect a strict application of the avoid, mitigate, compensate hierarchy.
- [13] I have given serious consideration to the consequences that should result from the application of the wrong wetland policy. I understand the difficult position the Board finds itself in because, like AEP, it is not the Board’s place to tell a project proponent to significantly redesign its project – even if the project proponent is Alberta Transportation.

I also understand the Appellants' argument that, to respect the 2013 Alberta Wetland Policy, the Approval should be cancelled and KGL should be sent back to the "drawing board" to redesign this portion of the project such that it has less impact on the wetlands covered by the Approval. I am also aware that, in part, the Appellants' request to have this Approval cancelled is connected to their desire to have the bridge that crosses the Elbow River redesigned. However, as I stated, neither the Board nor I have the jurisdiction to deal with the design of the bridge, and while it is apparent the Appellants would like to create a connection between these appeals and their concerns with the bridge, I wish to be clear that no such connection exists. The bridge is a separate matter, dealt with through a separate regulatory process and, as I have stated, there are at least two studies that conclude that the concerns with the bridge are unfounded.

[14] Taking into account all of the competing interests, including the concerns of the Appellants regarding the loss of these wetlands, as well as the importance of the Southwest Calgary Ring Road as a piece of significant provincial infrastructure, I accept the recommendation of the Board that KGL should be required to reassess all of the wetlands that are the subject of the Approval in accordance with the 2013 Alberta Wetland Policy. Subject to my comments below regarding Wetlands 06, 07, and 08, once this assessment is complete, AEP can determine if any additional steps can be taken to further avoid or mitigate the impact on the wetlands under this Approval or if any other work is required. The compensation that is required to offset the impact to the wetlands under the Approval should be determined in accordance with the 2013 Alberta Wetland Policy. I make this decision fully aware that much, if not virtually all, of the work under the Approval has likely been done and there are likely limited options for additional avoidance or mitigation, but I agree with the Board that both KGL and AEP should undertake the work necessary to find as many opportunities as possible.

[15] In making this decision, I am also cognizant of the limited choices that were available to Alberta Transportation and KGL in the design of the roadway. The choices in designing the road were limited by the comparatively narrow corridor the Province acquired from the Tsuut'ina First Nation and some of the terms and conditions included in the

agreement between the Province and the Tsuut'ina First Nation. Further, the design of the roadway appears to have been driven in large part by the practice of previous governments to over-design roadways. This concern is reflected in the Memorandum dated June 14, 2017, from the Honourable Brian Mason, Minister of Transportation to his Deputy Minister dealing with “outer ring roads,” filed by the Appellants as part of the Notices of Appeal and discussed in the hearing of these appeals. Regrettably, this memorandum came out after the design for the roadway was completed.

- [16] I strongly agree with Minister Mason’s direction that the Province should not be developing an outer ring road for Calgary. An outer ring road would only lead to more urban sprawl and additional pressures on the environment, including on our wetlands. I agree with the Appellants that requiring KGL and Alberta Transportation to go back to the “drawing board,” to redesign the roadway to 8 lanes and restore the wetlands that may have been unnecessarily disturbed, would send a strong message about the importance of protecting our wetlands. However, I do not believe that is the proper choice given the current stage the road construction has reached. At this point, I believe that redesigning and rebuilding this portion of the Southwest Calgary Ring Road would cause more harm to the environment, needlessly cause more disturbance to the people living in the area, and potentially delay a significant piece of provincial infrastructure. I do not see the benefit of risking these impacts in exchange for a number of engineered wetlands adjacent to an 8 lane roadway. It is unlikely these engineered wetlands, and their location adjacent to the roadway, will have the same value as the original wetlands to the Appellants and other people living in this area.

Wetlands 07 and 08

- [17] During the appeal process, the Board granted the Appellants a stay preventing KGL from doing any work under the Approval on Wetlands 06, 07, 08, and 09. I understand after the hearing concluded the Appellants and KGL reached an agreement to release the stay on Wetland 09. When I issue my decision, the stay on Wetlands 06, 07, and 08 is automatically released. Wetland 06 is dealt with below, so I must provide instructions as to what to do with Wetlands 07 and 08.

[18] I have considered the location, nature, and size of Wetlands 07 and 08, and have concluded the disturbance of Wetlands 07 and 08 should be allowed to proceed in accordance with the Approval to allow for the construction of the Southwest Calgary Ring Road. Regrettably, given the location of Wetlands 07 and 08, I do not believe it is likely these wetlands could reasonably be avoided given the design of the roadway. However, I am ordering that Wetlands 07 and 08 be reassessed, along with all of the other wetlands included in the Approval, in accordance with the 2013 Alberta Wetland Policy. As part of this reassessment, I am specifically requiring that all possible options for avoidance and mitigation of Wetlands 07 and 08 be considered. To ensure that as many options as possible remain open, I am prohibiting any further work under the Approval from being undertaken on Wetlands 07 and 08 until AEP reviews the options and provides written directions to KGL. Once AEP has provided these written directions to KGL, KGL may undertake the work on Wetlands 07 and 08 authorized by the Approval, but in accordance with AEP's written directions.

Wetland 06

[19] Notwithstanding my observations above, I believe that more can be done to protect Wetland 06, which I consider the most significant wetland in the area. Further, Wetland 06 appears to be particularly significant to the Appellants, the other participants at the hearing, and the members of the public. Therefore, I am ordering that amendments be included in the Approval to prohibit any disturbance of Wetland 06 and to require KGL to implement measures to ensure Wetland 06 is protected from the construction of the roadway. As was discussed in the Board's Report, the Weaselhead/Glenmore Park Preservation Society uses the Beaver Pond as a core component of its public education program. It is my understanding that during their education, students in the City of Calgary Public Education system visit the Beaver Pond twice as part of their science curriculum. I want to ensure that as much protection as possible is provided to this invaluable learning opportunity.

Conclusion

- [20] I understand the desire of the Appellants to have KGL and Alberta Transportation redesign and rebuild this project to a higher standard. However, given the current state of construction, I do not believe it would be prudent to consider a redesign of the project. If we were to attempt to redesign and rebuild the project now, it would result in significant costs increases, and in the process, I am concerned we would cause more environmental impacts, cause more disturbance to the people living in the area, and potentially delay a significant provincial infrastructure project. I wish the outcome could be different, but after careful consideration of all the facts and competing interests, I have concluded it would not be in the best interests of Albertans to undertake a redesign at this stage.
- [21] Further, given the time between the federal signoff of the initial Environmental Impact Assessment in 2009 and the implementation of the 2013 Alberta Wetland Policy, I am disappointed that the previous government's inclination to over-design roadways has resulted in environmental impacts and that this project is now too far along to undo these impacts. I am also concerned that there was confusion about how the implementation of the 2013 Alberta Wetlands Policy is to be interpreted. In my view, the Directive implementing the policy is clear that to fall under the old policy all field work must have been completed before the end of the 2015 growing season. However, in the case of this Approval, the application was processed under the old policy despite the field work not being completed until 2016. Through my order, I welcome the opportunity to clarify that it is my expectation the AEP applies the highest possible standards for the protection of wetlands in all projects.
- [22] Lastly, I want to thank the Appellants for bringing these appeals forward. These appeals have highlighted the importance of strictly applying the avoid, mitigate, and compensate hierarchy, particular for wetlands in urban areas. The appeals have made it clear that we need to do a better job in designing and approving roadways, particularly where they have been over-designed and have disproportionate impacts on wetlands. While I understand the Appellants would have wanted to see more significant changes for this project, I am hopeful they can be satisfied that they have set the stage for better projects from this point forward.

Shannon Phillips
Minister of Environment and Parks