
ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – December 18, 2019

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

-and-

IN THE MATTER OF appeals filed by Tollestrup Construction (2005) Inc. and Honey Holdings Ltd., with respect to the decision of the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, to issue Enforcement Order No. WA-EO-2017/05-SSR under the *Water Act* to Tollestrup Construction (2005) Inc. and Honey Holdings Ltd.

Cite as: *Tollestrup Construction (2005) Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (18 December 2019), Appeal Nos. 17-052-053-R (A.E.A.B.), 2019 ABEAB 37.

HEARING BEFORE:

Mr. Alex MacWilliam, Board Chair;
Ms. Anjum Mullick, Board Member; and
Mr. Timothy Goos, Board Member.

Board Staff: Mr. Gilbert Van Nes, General Counsel and Settlement Officer, Mr. Andrew Bachelder, Associate Legal Counsel, Ms. Denise Black, Board Secretary, and Ms. Candice Mah, Administrative Assistant.

PARTIES:

Appellants: Tollestrup Construction (2005) Inc. and Honey Holdings Ltd., represented by Mr. Barry Weintraub, Rueters LLP.

Director: Mr. Stephen Mathyk, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

WITNESSES:

Appellants: Mr. Marc Sabourin, Vice President, Engineering Practice, Western Canada, Tetra Tech EBA, Ms. Martie Murphy, CEO and President, Tollestrup Construction, (2005) Inc. and Honey Holdings Ltd., and Mr. Richard Allison, Hydrologist.

Director: Mr. Stephen Mathyk, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, Coreen Bates, Compliance Assurance Lead, South Saskatchewan Region, Alberta Environment and Parks, and Mr. Larry Boychuk.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an enforcement order to Tollestrup Construction (2005) Inc. and Honey Holdings Ltd. (the Appellants) regarding a berm located along the banks of the Oldman River within the City of Lethbridge. The berm was constructed and operated without an approval issued under the *Water Act*. The enforcement order required the Appellants to decommission the berm.

The Appellants filed appeals of the enforcement order with the Environmental Appeals Board (the Board).

The Appellants and AEP jointly requested the Board not proceed with the appeal process while they attempted to negotiate a resolution of the matter. Accordingly, the Board held the appeals in abeyance and received regular updates from the parties on the status of the negotiations.

The Appellants applied for an approval for the berm under the *Water Act*. AEP rejected the approval application as the Appellants had not obtained the consent of the City of Lethbridge, the owner of lands upon which the berm encroached upon. AEP requested the Board proceed with the appeal process.

The Board held a public hearing on the following issues:

1. Was *Water Act* Enforcement Order No. WA-EO-2017/05-SSR properly issued? This issue considers both the Director's legal jurisdiction and the factual basis for issuing the Order.
2. Are the terms and conditions of *Water Act* Enforcement Order No. WA-EO-2017/05-SSR appropriate?

After reviewing the evidence and considering the arguments submitted by the Appellants and AEP at the hearing, the Board determined the enforcement order should be varied to increase the length of time provided for the Appellants to decommission the berm. The Board held that increased time will enable the Appellants to more effectively address the objectives of the enforcement order and provide sufficient time to arrange for the removal of two transmission towers located on the berm.

Therefore, the Board recommended the Minister vary the enforcement order accordingly.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's (the "Board") Report and Recommendations to the Minister, Environment and Parks (the "Minister") regarding appeals of Enforcement Order No. WA-EO-2017/05-SSR (the "Enforcement Order") issued to Tollestrup Construction (2005) Inc. and Honey Holdings Ltd. (collectively, the "Appellants"). Alberta Environment and Parks ("AEP") issued the Enforcement Order to the Appellants under the *Water Act*, R.S.A. 2000, c. W-3, concerning a berm constructed by the Appellants as flood protection (the "Berm") for its construction, and sand and gravel operation. The Berm is located along the banks of the Oldman River and is on lands legally described as SE-11-009-22-W4M, SW-12-009-22-W4M, NW-01-009-22-W4M, and NE-01-009-22-W4M (the "Lands"), within the City of Lethbridge (the "City"). The Berm encroaches on City lands, and a right-of-way first thought to be public lands belonging to the Province, but later determined to belong to the City (the "Right-of-way").

[2] In the Enforcement Order, it was alleged the Appellants contravened section 36(1) of the *Water Act*¹ by constructing and operating the Berm without the required approval. The Enforcement Order required the Appellants to submit a decommissioning plan (the "Decommissioning Plan") for the Berm and to complete the work of removing the Berm no later than May 15, 2018.

[3] The Appellants filed Notices of Appeal with the Board appealing AEP's decision to issue the Enforcement Order.

[4] The Board held a public hearing in Edmonton on November 19, 2019, to hear submissions and evidence on the following issues:

1. Was *Water Act* Enforcement Order No. WA-EO-2017/05-SSR properly issued? This issue considers both the Director's legal jurisdiction and the factual basis for issuing the Order.

¹ Section 36(1) of the *Water Act* provides:

"Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act."

2. Are the terms and conditions of *Water Act* Enforcement Order No. WA-EO-2017/05-SSR appropriate?

[5] After reviewing the oral evidence and arguments, written submissions, and the AEP record, the Board recommends the Minister vary the terms and conditions of the Enforcement Order to provide reasonable timelines for decommissioning the Berm.

II. BACKGROUND

[6] Honey Holdings Ltd. is the registered owner of the Lands. Tollestrup Construction (2005) Inc. owns and operates a construction and sand and gravel business on the Lands.

[7] The Lands are located within the Oldman River Valley along the eastern bank of the Oldman River and immediately south of the City's Wastewater Treatment Plant. The majority of the Lands are within the area designated by AEP as the Flood Hazard Area of the Oldman River.

[8] In 1975, the Oldman River flooded the Lands and caused significant damage to the Appellants' business. Shortly after the flood, the Appellants began construction of the Berm to protect the Lands from future flood events. The Berm was built on the western side of the Lands on top of a pre-existing natural berm.

[9] Work on the Berm proceeded gradually over several years but accelerated after several flood events. In June 1995, a flood destroyed part of the Berm, the Appellants' office and business records, and stockpiling areas for sand and gravel. The flood also inundated the City's Wastewater Treatment Plant.

[10] Starting in 1996, the Appellants increased the height of the Berm and extended it to the northwest and then to the northeast, where it connected with a berm built by the City, which was adjacent to the Wastewater Treatment Plant.

[11] Damage to the Lands from a 2005 flood of the Oldman River was limited due to the Berm, although there was some damage to the Appellants' office and the Lands adjacent to the Wastewater Treatment Plant.

[12] On June 24, 2005, AEP received a complaint from a member of the public regarding the dumping of concrete blocks along the banks of the Oldman River adjacent to the Berm.

[13] On July 4, 2005, AEP met with the Appellants regarding the Berm and the allegations of the dumping of concrete blocks. The Appellants informed AEP that the concrete blocks were an emergency measure to protect the riverbank during the 1995 flood. The Appellants said they would apply for an approval to remove the blocks and protect the river bank from erosion.

[14] On March 28, 2006, AEP sent an email to the Appellants advising an approval may be needed for the Berm.

[15] The Appellants continued work on the Berm, substantially completing it in 2009.

[16] In 2010, AltaLink Management Ltd. (“AltaLink”), constructed two transmission line towers on the Berm as part of its South West Development high voltage transmission line crossing of the Oldman River.²

[17] On March 2, 2010, AEP conducted a site inspection on the Lands and noted further construction of the Berm and “sluffing”³ in the northwest portion of the Berm facing the Oldman River.

[18] On March 5, 2010, AEP provided the Appellants with a Notice of Investigation, which stated that AEP was investigating the Appellants for conducting an activity in a waterbody without an approval under the *Water Act*, referring to the Berm.

[19] On March 16, 2010, AEP advised the Appellants the Berm required an approval under the *Water Act* and informed them of the requirements for an approval application.

[20] On June 20, 2013, the Director emailed the Appellants and outlined the options to bring the Berm into compliance, which included removal of the Berm or obtaining an approval for it.

² See Appendix A of this Report and Recommendations.

³ Sluffing refers to an avalanche, mudslide, or slumping of material or debris.

[21] On May 3 and 27, 2016, AEP conducted site inspections of the Berm with the Appellants and discussed the Berm's non-compliance with the *Water Act*.

[22] On June 17, 2016, AEP sent an email to the Appellants advising the site inspections revealed the Appellants had taken the following actions, which were non-compliant with the *Water Act*:

- (a) unauthorized diversion and use of the water;
- (b) unauthorized construction of the Berm and the recent occurrence of backfilling; and
- (c) the unauthorized acceptance and treatment of waste.

[23] On June 20, 2016, AEP met with the Appellants and discussed the non-compliance issues observed during the inspections and next steps and options for the Appellants to bring the Berm into compliance with the *Water Act*.

[24] On June 30, 2016, the Director sent a letter to the Appellants that required the Appellants to provide a written plan by July 25, 2016, which would include a proposal to apply for authorization under the *Water Act* for either the removal or approval of the Berm. The proposal was to include the following:

- (a) a hydrologic assessment of the Berm by a qualified engineer, confirming the impacts of the Berm on the river and floodplain hydrology, and potential impact to adjacent landowners and infrastructure;
- (b) a structural engineering assessment of the Berm by a qualified engineer, confirming the structural stability of the Berm in relation to a one in one hundred year flood event, the effectiveness of the Berm as flood protection, and any future modifications required.

[25] On July 22, 2016, the Appellants responded to the Director, stating they would proceed with the application for a *Water Act* approval and provide an engineering report on the Berm by the spring of 2017.

[26] On August 10, 2016, the Director informed the Appellants that the proposed actions described in the Appellants' July 22, 2016 response did not meet the requirements set out previously by AEP.

[27] On August 22, 2016, the Appellants replied to the Director, stating they believed they were making reasonable efforts to comply and had retained a consultant to assist in the approval process.

[28] On September 1, 2016, AEP and the Appellants met to discuss the Berm and other issues. AEP advised the Appellants to provide the application for the Berm approval within four months.

[29] On September 14, 2016, AEP met with a staff member from the City and discussed the Berm's encroachment onto City lands and the Right-of-way. The staff member stated the Berm did not have a development permit from the City and expressed concerns regarding the impact of the Berm on the Highway 3 bridge, City infrastructure, an adjacent campground, and other downstream users.

[30] On September 23, 2016, the Director advised the Appellants the Berm was partially located on the Right-of-way, which was considered vacant public land belonging to the Province.

[31] On October 21, 2016, AEP met with the Appellants and the Appellants' consultants, Tetra Tech – EBA (“Tetra Tech”). Tetra Tech informed the Director they could have a plan for the Berm by January 1, 2017.

[32] On November 22, 2016, Tetra Tech provided AEP with a report for the Berm entitled “Tollestrup Site Flood Protection Berm Water Level Impact” (the “Hydraulic Assessment”).

[33] In January 2017, Tetra Tech provided AEP with a report for the Berm entitled Geotechnical Assessment Tollestrup Earthen Berm (the “Berm Stability Assessment”).

[34] On January 11, 2017, AEP staff from the River Engineering and Technical Services Section reviewed the Hydraulic Assessment and identified concerns regarding differences in the model used by Tetra Tech and the model used by AEP to determine conditions in a flood event.

[35] On February 7, 2017, AEP's geotechnical engineer reviewed the Berm Stability Assessment and expressed concerns regarding the Berm's incomplete slope protection and the

design analysis in the assessment.

[36] On March 2, 2017, the City informed the Appellants the Berm was not compliant with City Bylaws and the Alberta Building Code. The City requested the Appellants provide a plan by March 10, 2017 detailing when and how the Berm would be compliant.

[37] On March 23, 2017, the Director received a memo regarding the Berm from a water approvals engineer with AEP. In the memo, the water approvals engineer compared the required documents and information for an approval application to the documents received from the Appellants to that point. The water approvals engineer wrote that for an approval application for the Berm to be considered complete, the Appellants would be required to provide consent from the City and AEP for the encroachment of the Berm onto their lands, and consent from parties directly affected by the Berm. The water approvals engineer also stated the Berm did not meet acceptable engineering standards.

[38] On August 10, 2017, the Director met with the Appellants to provide them with an opportunity to discuss AEP's concerns regarding the Berm. The Appellants were given an unsigned copy of the Enforcement Order for review. During the meeting, the Director signed and issued the Enforcement Order to the Appellants.

[39] On August 16, 2017, the Appellants filed two Notices of Appeal with the Board, appealing the Enforcement Order. The Appellants also requested a stay of the Enforcement Order.

[40] On August 21, 2017, the Director advised he opposed the stay application. The Board requested and received submissions from the Appellants and the Director (collectively, the "Parties"). On September 28, 2017, the Appellants advised the Board the Parties had agreed to the following:

- (a) a joint request to the Board to hold the appeals in abeyance;
- (b) the Enforcement Order would not be enforced against the Appellants while the appeals are in abeyance;
- (c) if the Director is not satisfied that the Appellants are making good-faith satisfactory efforts to bring the berm into compliance, then he will give reasonable notice to the Appellants terminating the agreement to hold the

appeals and the Enforcement Order in abeyance and will set new due dates for the steps required by the Enforcement Order, without the necessity of going back to the Board to seek to set aside a stay order;

- (d) if the Director terminates the agreement, the Appellants would be at liberty to apply to the Board for a stay; and
- (e) the Enforcement Order timelines will be amended to reflect the agreement.

[41] On October 4, 2017, the Board agreed to hold the appeals in abeyance while the Parties worked towards a resolution. The Board also requested regular status updates. The Parties provided monthly status updates to the Board and then moved to bi-monthly updates.

[42] On October 16, 2018, the Appellants informed the Board they had submitted an approval application for the Berm to the Director.

[43] On December 14, 2018, the Director advised the Board the technical review of the Appellants' approval application was on hold pending receipt of an amended approval application that included portions of the berm on City and public lands.

[44] On March 6, 2019, the Director advised he was willing to delay enforcing the Enforcement Order until April 1, 2019.

[45] On March 28, 2019, the Appellants advised they had submitted the amended approval application to AEP. The Appellants stated they were waiting for the City to provide further information on transferring the lands the Berm encroached on to the Appellants. The Appellants stated the City had advised them the transfer could take several months.

[46] On May 31, 2019, the Director advised the Board that AEP had rejected the Appellants' amended approval application and wished to proceed with the next steps in the appeal process.

[47] On July 10, 2019, the Appellants were advised by Alberta Transportation that the public lands the Right-of-way was untitled and could be claimed by the City of Lethbridge.

[48] On June 21, 2019, the Appellants made preliminary motions for an adjournment of the appeals and a stay of the Enforcement Order. The Board requested and received written

submissions regarding the preliminary motions from the Parties.

[49] On July 30, 2019, the Board received the Director's file from the Director. The Board provided the Director's file to the Appellants on August 14, 2019.

[50] On August 27, 2019, the Board denied the Appellants' application to adjourn the appeals and granted the Appellants' application for a stay of the Enforcement Order, pending the outcome of the appeals.

[51] On September 5, 2019, the Board advised the Parties a hearing on the appeals would take place on November 19, 2019, on the following issues:

1. Was *Water Act* Enforcement Order No. WA-EO-2017/05-SSR properly issued? This issue considers both the Director's legal jurisdiction and the factual basis for issuing the Order.
2. Are the terms and conditions of *Water Act* Enforcement Order No. WA-EO-2017/05-SSR appropriate?

III. SUBMISSIONS

A. Appellants

[52] The Appellants submitted the Director's order to remove the Berm is not appropriate as the Berm protects the Appellants, immediate neighbours, and the southern Alberta community from flood events. The Appellants noted their experts had found the Berm to be structurally sound and to have no material adverse impacts on neighbouring properties.

[53] The Appellants stated they have operated on the Lands since 1939. The Appellants said the western portion of the Lands are on a flood plain that has had several significant flood events over the past 80 years and features a pre-existing natural berm of approximately three to four metres in height along the bank of the Oldman River.

[54] The Appellants submitted that the Berm provides flood protection to the properties and employees of the Appellants' business, the City's Wastewater Treatment Plant, the AltaLink power transmission lines, the southern Alberta community, and the natural environment. The

Appellants stated the Director has no jurisdiction to order the removal of a flood protection berm unless there is no real danger of flooding, or it is demonstrated to adversely affect others or the natural environment.

[55] The Appellants said the construction of the Berm was not illegal as they have common law rights to protect their lands from the dangers of flooding where that danger is real and provided the measures taken to protect their lands do not damage the lands of any neighbours. The Appellants stated Alberta courts have consistently recognized such common law rights, and have held that diversions of water to prevent flooding, which do not result in harm to others, are excluded from the scope of the *Water Act*.

[56] The Appellants referred to the 1979 Alberta Supreme Court decision in *Tottrup v. Alberta* (“*Tottrup*”). In *Tottrup*, the respondent built a dyke to protect his land from flooding. The respondent did not have an approval from the Director to construct the dyke. The Appellants submitted the Court in *Tottrup* established a common-law exception to the *Water Act*.

[57] The Appellants noted the Court stated in *Tottrup*:

“[w]hen ‘flood control’ is made subject to a grant of license requiring such extensive procedures, it cannot be intended to apply, nor should it be construed to include, an act of preservation of private property from periodic flooding which causes no harm to others nor breaches specific prohibitions or the overall purposes of the [*Water Resources*] Act.”⁴

[58] The Appellants submitted that although the *Water Act* requires an approval for the construction of a berm, that requirement must be read consistently with recognized common law rights, as the Court did in *Tottrup*.

[59] The Appellants also referred to the Alberta Court of Queen’s Bench decision in *R. v. Fisher*, where the Court stated:

“[T]he [*Water Resources*] Act is very broad in its language and could apply to any diversion of water. The *Tottrup* decision stands for the proposition that a more flexible approach is required in order to protect the common law right possessed by a landowner to preserve their property from flooding. ...

⁴ *Tottrup v. Alberta (Environment, Minister)*, 1979 AltaSCAD 189, at paragraph 19.

The Trial Judge interpreted Tottrup as only being available when no diversion of water occurred. In my view, this is too narrow an interpretation of the availability of the defence. It should have been considered.

To come within this more flexible approach, two specific findings of fact are required. First, that there has been flooding, and second, that the diversion of the floodwaters does not result in harm to others.”⁵

[60] The Appellants submitted the Director had no jurisdiction to order the removal of a flood protection berm unless there is no real danger of flooding, or it is proven to adversely affect the natural environment or others.

[61] The Appellants stated the Enforcement Order was improperly issued because the Director failed to consider the information available to him regarding the structural integrity of the Berm, the absence of adverse impacts of the flood protection berm, and the lack of sufficient factual basis for his opinions.

[62] The Appellants submitted that instead of considering factually correct evidence, the Director based his opinions on conjecture, speculation and inaccurate information.

[63] The Appellants said the Director’s conclusion that the Appellants must decommission and remove the Berm contradicted his earlier opinion that the Appellants could achieve compliance through the issuance of an approval for the Berm.

[64] The Appellants noted qualified professional engineers have said the Berm is structurally sound and has successfully protected the Lands from several flood events with no material adverse impact on neighbouring properties, or on the bed and shore, hydrology, and aquatic environment of the Oldman River.

[65] The Appellants stated they retained Tetra Tech to study and advise on the Berm. Tetra Tech provided the Berm Stability Assessment, which concluded:

- (a) the Berm has protected the Tollestrup property during flood events and should continue to do so;
- (b) the Berm functions well in protecting the site from excessive seepage during flood events;

⁵ *R. v. Fisher*, 2000 ABQB 431, at paragraphs 8, 9 and 10.

- (c) the Berm is sufficiently wide, and internal erosion and piping is not a concern, although it is recommended that monitoring occur; and
- (d) the flattening of slopes along the Berm and monitoring is recommended to address slope stability and surface erosion in some sections of the Berm.

[66] The Appellants noted Tetra Tech's Hydraulic Assessment modelled the impacts of the Berm and the Waste Water Treatment Plant's berm on the Bridgeview RV Park (the "RV Park"), located on the opposite bank from the Lands. The Appellants said the Hydraulic Assessment found:

- (a) the combined impact of the Berm and the Waste Water Treatment Plant berm do not increase the frequency of flooding of the RV Park;
- (b) the RV Park is consistently flooded in flood events of less than a 1:10 (one in ten-years) flood and larger regardless of the impacts of the Berm and Waste Water Treatment Plant berm;
- (c) modelled results for a one in ten-year flood indicated the Berm would cause a water level increase of 0.11 meters (4.3 inches) and a small increase in the amount of site inundation at the RV Park site;
- (d) the water level at the RV Park during a flood event increases with flood severity, but the incremental extent of inundation diminishes; and
- (e) for a 1:50 (one in fifty-year) and larger floods, the RV Park site is almost entirely flooded in all scenarios, and the incremental impact of the Berm becomes increasingly negligible.

[67] At the hearing, the Appellants' expert witness, Mr. Marc Sabourin, Vice President for Engineering with Tetra Tech, testified that there are no material impacts on the RV Park from the Berm. Mr. Sabourin said that even without the Berm, flooding of the RV Park would still occur during a flood event.

[68] The Appellants stated they reached an agreement with the City to dedicate an easement over the top of the Berm providing residents of southern Alberta with a recreational path that will join Indian Battle Park to the south with existing recreational paths to the north, enabling enjoyment of the natural environment, safe from the threat of flooding.

[69] The Appellants noted AltaLink, with the approval of the Alberta Utilities Commission, located two electric transmission towers on the Berm in 2010 and 2011. The

Appellants stated decommissioning the Berm would require the transmission towers to be removed and rebuilt on a flood plain, placing southern Albertans' power supply at risk in the event of flooding. The Appellants said it would cost millions of dollars to relocate the towers and take years to complete.

[70] The Appellants submitted it would be in the public interest for the Director and the Appellants to continue the approval process, which would include a detailed technical review, public consultation and modifications to improve the Berm.

[71] The Appellants stated that after they had provided the Tetra Tech studies to AEP in November 2016 and January 2017, they were waiting for a response and comments so they could address any concerns in an amended application for approval of the Berm. The Appellants submitted that instead of a response or comments, the Director prematurely issued the Enforcement Order.

[72] The Appellants noted the Enforcement Order confirmed the Director's receipt of the Tetra Tech reports and acknowledged there is no immediate risk of a catastrophic failure of the Berm. At the hearing, Mr. Sabourin testified the Berm was structurally adequate to withstand a 1:200 flood event.

[73] The Appellants stated AEP advised them on March 20, 2019, that if the issues of encroachment of the Berm on City lands and the Right-of-way were not resolved by April 20, 2019, AEP would reject the approval application for the Berm, but the Appellants could apply again once all the required information in support of a complete application was obtained.

[74] The Appellants said AEP rejected the approval application on May 13, 2019. The Appellants submitted the encroachment of the Berm on City lands and the Right-of-way was the only impediment to the acceptance of the approval application.

[75] The Appellants said they and the City were aware the northern portion of the Berm encroached on City lands. The Appellants said the City and the Appellants have agreed on how to address the encroachment on City lands, and the Appellants expect to resolve the issue imminently, possibly as soon as early 2020.

[76] The Appellants stated they and the Director initially believed that the Right-of-way belonged to the Province. The Appellants said that when they discussed the matter further with the Public Lands section of AEP and Alberta Transportation, they learned the Right-of-way is untitled and can be claimed by the City. The Appellants submitted the Province advised the City on July 10, 2019, that under section 16(2) of the *Municipal Government Act*, R.S.A. 2000, c. M-26,⁶ the City owns all right-of-ways within its boundaries.

[77] The Appellants stated the City agreed to request the Province formally transfer title to the Right-of-way to the City, following which the City will sell the Right-of-way to the Appellants.

[78] The Appellants stated a letter dated October 15, 2018, from Mr. Doug Hawkins, Director of Infrastructure Services for the City of Lethbridge, demonstrated the City supported their application for an approval for the Berm. The Appellants said they included the letter from Mr. Hawkins in the approval application sent to AEP.

[79] The Appellants said they requested AEP reconsider its rejection of the approval application; however, AEP refused to reconsider its decision as it did not accept the City has provided formal consent.

[80] The Appellants submitted complying with the Enforcement Order would likely bankrupt them and result in the loss of 130 jobs, unless the implementation of the Enforcement Order was permitted to be carried out gradually over many years.

[81] The Appellants said the Director acknowledged there is no risk of failure of the Berm. The Appellants submitted the Director had not provided evidence the Berm has any material adverse effect on neighbouring properties. The Appellants stated the Enforcement Order was not based on expert review, and there was no scientific basis for the Director's opinions, which formed the basis of his decision.

⁶ Section 16(2) of the *Municipal Government Act* provides:

“The title to all roads in a city is vested in the city unless another Act or agreement provides otherwise.”

[82] The Appellants submitted the Director made false assumptions regarding the height of the Berm. At the hearing, the Appellants stated the gathering of evidence to support the Enforcement Order was “sloppily” done. As an example, the Appellants said AEP used faulty measurement methods to estimate of the height of the Berm and erroneously included the height of the natural berm in the height of the Appellants’ Berm. The Appellants noted the Director wrongly claimed the Berm ranged from approximately 10 to 30 meters in height. The Appellants stated they built the Berm on a pre-existing natural berm, which rises three to four metres above the river. The Appellants said Tetra Tech determined the Berm rises a further four to five metres above the river. The Appellants submitted the Berm varies in height from three metres to nine metres.

[83] The Appellants stated the Enforcement Order is unclear as to how much of the Berm is required to be removed. The Appellants said the Director should have completed a delineation study defining the Berm, and the Director should have taken into account pre-Berm elevations before issuing the Enforcement Order.

[84] The Appellants submitted there is no prejudice to anyone in allowing the process for the approval application to continue.

[85] The Appellants requested the Board’s recommendations to the Minister include:

- (a) an order setting aside the Enforcement Order in its entirety;
- (b) an order requiring the Appellants to continue their efforts to obtain approval under the *Water Act* for the Berm, with ongoing monitoring by the Director and the Board and time limits if necessary; and
- (c) an order declaring the Appellants’ approval application dated March 1, 2019, is complete and directing AEP to consider the application, including a detailed technical review, public consultation and other steps.

[86] If the Board does not recommend setting aside the Enforcement Order, the Appellants request the Board issue the following:

- (a) an order extending the time for preparing a decommissioning plan to a date that is five years from the date of the conclusion of these appeals; and
- (b) an order extending the time for implementation of the decommissioning plan to a date that is five years after the cessation of all industrial activities

at the Lands or ten years from the date of the conclusion of these appeals, whichever is later.

B. Director

[87] The Director submitted he had jurisdiction under section 135(1) of the *Water Act*⁷ to issue the Enforcement Order to the Appellants.

[88] The Director stated the Appellants admitted the Berm was constructed for flood protection and, therefore, meets the definition of “works” under section 1(1)(mmm) of the *Water Act*.⁸

[89] The Director submitted the Appellants’ actions in deliberately placing the Berm adjacent to the Oldman River, in an area they knew would be impacted by flooding, to displace floodwaters away from their lands, met the definition of “activity” under section 1(1)(b) of the *Water Act*.⁹

⁷ Section 135(1) of the *Water Act* states:

“The Director may issue an enforcement order to any person if, in the Director’s opinion, that person has contravened this Act, whether or not that person has been charged or convicted in respect of the contravention.”

⁸ Section 1(1)(mmm) of the *Water Act* defines “works” as:

“... any structure, device or contrivance made by persons, or part of it, including a dam and canal, and

- (i) land associated with it, and
- (ii) mitigative measures associated with it,

and includes anything that is defined as a works in the regulations for the purposes of this Act.”

⁹ Section 1(1)(b) of the *Water Act* defines “activity” as follows:

- “(i) placing, constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material, or carrying out any undertaking, including but not limited to groundwater exploration, in or on any land, water or water body, that

[90] The Director noted the Berm is located on land owned by the Appellants, and by third parties.

[91] The Director stated the evidence establishes the Berm is situated where water from the Oldman River flows intermittently or during a flood, meeting the definition of a water body, as defined by section 1(1)(ggg) of the *Water Act*.¹⁰

[92] The Director referenced section 36(1) of the *Water Act*, which reads: “Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.”

[93] The Director also referred to section 142(1)(h) of the *Water Act*, which states: “A person who... commences or continues an activity except under an approval or as otherwise

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- (A) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage,
 - (B) changes, may change or may become capable of changing the location of water or the direction of flow of water, including water in a water body, by drainage or otherwise,
 - (C) causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body, or
 - (D) causes, may cause or may become capable of causing an effect on the aquatic environment;
 - (ii) altering the flow, direction of flow or level of water or changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose;
 - (iii) drilling or reclaiming a water well or borehole;
 - (iv) anything defined as an activity in the regulations for the purposes of this Act

but does not include an activity described in sub clause (i) or (ii) that is conducted by a licensee in a works that is owned by the licensee, unless specified in the regulations...”

¹⁰ Section 1(1)(ggg) of the *Water Act* defines “water body” as:

“any location where water flows or is present, whether or not the flow or the presence of water is continuous, intermittent or occurs only during a flood, and includes but is not limited to wetlands and aquifers but does not include except for clause (nn) and section 99 “water body” that is part of an irrigation works if the irrigation works is subject to a licence and the irrigation works is owned by the licensee, unless the regulations specify that the location is included in the definition of water body...”

authorized by this Act... is guilty of an offence.”

[94] The Director stated the Appellants have admitted to constructing the Berm. The Director said a review of AEP’s internal records and the documentary evidence gathered by AEP established the Appellants constructed the Berm without a historical or current approval under the *Water Act*.

[95] The Director submitted a person must obtain an approval from AEP before beginning or continuing activities prescribed under the *Water Act*, and as the Appellants did not obtain an approval before constructing the Berm, they are in contravention of the *Water Act*.

[96] The Director stated the Berm is an obstruction in the floodway that alters the water flow and restricts water into a smaller channel width.

[97] The Director noted section 1(1)(c) of the *Water Act* defines “adverse effect” to mean “impairment of or damage to...” The Director submitted, based on his education, project experience, the Appellants’ reports, and AEP inspection results, he formed the opinion the Berm may cause adverse effects to:

- (a) the bed and shore of the Oldman River by increasing river velocities and bed scour, lowering the riverbed, increasing sediment transport, and destabilizing riverbanks;
- (b) the hydrology of the Oldman river by constricting flow velocities and increasing water levels;
- (c) the aquatic environment of the Oldman River by increasing river velocities and sediment transport, impacting fish and fish habitat and other aquatic organisms; and
- (d) other landowners by increasing river velocities, bank erosion, and water levels which could flood areas otherwise unaffected by river flows.

[98] The Director submitted after he considered the facts, he formed the opinion based on the balance of probabilities that the Appellants contravened the *Water Act* and, therefore, he decided to issue the Enforcement Order.

[99] The Director stated section 136(1) of the *Water Act*¹¹ provided him with the

¹¹ Section 136(1) of the *Water Act* provides:

“In an enforcement order, the Director may order any or all of the following:

- (a) the suspension or cancellation of an approval, licence or registration or the cancellation of a preliminary certificate where one or more of the grounds set out in section 43, 55, 71 or 78 have been met;
- (b) if an approval, preliminary certificate or licence has been issued or registration effected, the stopping or shutting down of any activity, diversion of water or operation of a works or thing either permanently or for a specified period of time if one or more of the grounds set out in section 43, 55, 71 or 78 have been met;
- (c) if no approval, preliminary certificate or licence has been issued and no registration has been effected, the stopping or shutting down of any activity, diversion of water, or operation of a works or thing either permanently or for a specified period of time;
- (d) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking until the Director is satisfied that the construction, operation, maintenance, repair, control, replacement or removal or the carrying out of the undertaking will be done in accordance with this Act;
- (e) **the submission to the Director, for the Director’s approval, of a proposal or plan to be undertaken by the person in order to remedy the contravention;**
- (f) **the removal or otherwise rendering ineffective of**
 - (i) **a works placed or constructed without approval,**
 - (ii) **a works that is no longer required or for which an approval or licence has been cancelled or is no longer in effect, or**
 - (iii) **an obstruction to the flow of water caused in any manner;**
- (g) the repair of a works in order to protect human health, property or public safety;
- (h) the minimization or remedying of an adverse effect on
 - (i) the aquatic environment,
 - (ii) the environment, caused by a problem water well or drilling, or
 - (iii) human health, property or public safety;
- (i) the operation of a works in a specified manner or in order to achieve a specified result;
- (j) the restoration or reclamation of the area affected to a condition satisfactory to the Director;
- (k) how the order is to be carried out;
- (l) the reporting on any matter that the order requires to be carried out;
- (m) the maintenance of records on any relevant matter;
- (n) the reporting periodically to the Director;
- (o) **the specification of the time within which any measure required by the order is to be commenced and the time within which the order or any portion of the order is to be complied with;**

authority to include the terms and conditions in the Enforcement Order, and the terms and conditions are reasonable.

[100] The Director stated it was reasonable to require the Appellants, under the terms of the Enforcement Order, to submit the Decommissioning Plan to remedy the contravention and remove the berm, and that sections 136(1)(e) and (f) of the *Water Act*¹² provided the authority for those terms.

[101] The Director submitted section 136(1)(h) of the *Water Act*¹³ authorized him to order that the Decommissioning Plan be carried out in a manner that would prevent adverse effects to the bed and shore, hydrology, and aquatic environment of the Oldman River, and other landowners.

[102] The Director stated section 136(1)(j) of the *Water Act*¹⁴ authorized him to include

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- (p) with respect to a problem water well, the reclamation of the water well or the taking of any remedial action with respect to the water well;
 - (q) the modification, suspension or stopping of any actions related to the drilling of a water well;
 - (r) the taking of any other measure that the Director considers necessary to facilitate compliance with the order or this Act.” [Emphasis added by the Director.]

¹² Section 136(1)(e) and (f) of the *Water Act* provides:

“In an enforcement order, the Director may order any or all of the following:

- (e) the submission to the Director, for the Director’s approval, of a proposal or plan to be undertaken by the person in order to remedy the contravention;
- (f) the removal or otherwise rendering ineffective of
 - (iv) a works placed or constructed without approval,
 - (v) a works that is no longer required or for which an approval or licence has been cancelled or is no longer in effect, or
 - (vi) an obstruction to the flow of water caused in any manner....”

¹³ Section 136(1) of the *Water Act* states:

“In an enforcement order, the Director may order any or all of the following...

- (h) the minimization or remedying of an adverse effect on
 - (i) the aquatic environment,
 - (ii) the environment, caused by a problem water well or drilling, or
 - (iii) human health, property or public safety;

¹⁴ Section 136(1) of the *Water Act* provides:

“In an enforcement order, the Director may order any or all of the following...

- (j) the restoration or reclamation of the area affected to a condition satisfactory to

terms in the Enforcement Order related to restoration and reclamation of the area affected by the Berm. At the hearing, the Director said if the Berm were to be removed, it would have to be done in a methodical and well thought out manner.

[103] The Director noted the Director's file (Tab 5.2) contained a letter dated March 11, 2010, from AltaLink regarding the placement of transmission towers on the Berm. The letter states:

“AltaLink is aware that Alberta Environment has not yet provided approval to the property owner for the berm and may require modification to or removal of the berm at a future date. In order to alleviate Alberta Environment's concerns that the installation of the new transmission structures on the berm may limit Alberta Environment's options with respect to the berm, AltaLink is hereby providing its assurance that it will cooperate fully with Alberta Environment to permit any necessary changes to the berm. If necessary, AltaLink will rebuild its structures in the event that this is required to permit the necessary modification or removal of the berm.”¹⁵

[104] The Director submitted it was reasonable to require the Appellants to conduct river modelling for the Berm's removal so AEP's flood hazard mapping section and the Director could assess the area affected by the Berm and determine the end-state condition of that area.

[105] The Director stated it was reasonable to order the Appellants to submit a Verification Report with a 60-day timeline, detailing the work completed to comply with the Enforcement Order. The Verification Report would enable the Director to evaluate the work and prescribe additional work or assessments to meet the Enforcement Order objectives.

[106] The Director said it was the sole responsibility of the Appellants to comply with the *Water Act*. The Director noted that since he issued the Enforcement Order on August 10, 2017, the Appellants have not complied with the requirements of the Enforcement Order nor obtained a *Water Act* approval for the Berm.

[107] The Director testified at the hearing that issuing the Enforcement Order was not a question of impatience on his part. The Director stated the approval application had been rejected,

¹⁵ Director's file at Tab 5.2.

and the next step was to resolve the situation through the Board's appeal process.

[108] The Director submitted the *Tottrup v. Alberta*¹⁶ and the *R. v. Fisher*¹⁷ cases are distinguishable from these appeals for the following reasons:

- (a) *Tottrup* was decided under the *Water Resources Act*,¹⁸ which was replaced by the *Water Act*. In these appeals, the facts the Director relied on to issue the Enforcement Order took place after the *Water Act* came into force on January 1, 1999;
- (b) in *Tottrup*, the location of the dyke that diverted water was far from the water body. In these appeals, the Berm is on the river;
- (c) in *Tottrup*, the dyke was built with the consent of the landowners. In these appeals, there is no evidence of consent from the landowners;
- (d) there was no harm from the dyke in *Tottrup*. In these appeals there is harm to other landowners;
- (e) in *Fisher*, the Court said that for the existence of a common-law right to divert water to protect land against flooding, there must be (1) a flood or risk of flood at the time of diversion and (2) there must be no harm resulting from the diversion. In these appeals, the Appellants' evidence is that there was not an imminent flood danger during much of the construction of the Berm, and the Berm will result in a diversion of water that will harm other landowners;
- (f) the *Water Act* does not provide for a common-law right to protect property from a flood event emergency;
- (g) the *Water Act* extinguished any common law right that may have existed under the *Water Resources Act*; and
- (h) the definition of "activity" in the *Water Act*¹⁹ includes actions taken for flood control. Any activity for flood control that does not have an approval or

¹⁶ *Tottrup v. Alberta (Environment, Minister)*, 1979 AltaSCAD 189.

¹⁷ *R. v. Fisher*, 2000 ABQB 431.

¹⁸ *Tottrup* was decided under the *Water Resources Act*, R.S.A. 1970, c. 388, and *Fisher* was decided under the *Water Resources Act*, R.S.A. 1980, c. W-5.

¹⁹ Section 1(1)(b)(ii) of the *Water Act* states:

"In this Act...

(b) "activity" means...

- (ii) altering the flow, direction of flow or level of water or changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose..."

other authorization under the *Water Act* is a contravention of section 36(1) and an offence under the *Water Act*.²⁰

[109] At the hearing, Mr. Larry Boychuk was called as a witness by the Director. Mr. Boychuk's late mother owned farm land across the river from the Appellants' Lands and Mr. Boychuk presented photographs of those lands. Mr. Boychuk submitted the photos showed a deterioration of the land over several years, which Mr. Boychuk said was the result of the Berm deflecting the river to the opposite bank where the river erodes the land. Mr. Boychuk stated that during a flood, the river rises, but is limited from spreading out due to the Berm. Mr. Boychuk submitted the Berm is inhibiting the river's natural flow. He said that the risk of a major flood occurring is minor due to the Oldman River Dam, which regulates water levels on the river.

[110] The Director submitted the Board did not have the authority to issue the orders requested by the Appellants.

[111] The Director requested the Board:

- (a) find the Enforcement Order was properly issued, and its terms and conditions are appropriate and remain in force; and
- (b) recommend to the Minister the appeals be dismissed.

C. Appellants' Rebuttal

[112] The Appellants submitted that section 98(2) of the *Environmental Protection and Enhancement Act* ("EPEA") provides the Board with authority to issue the orders requested by the Appellants. Section 98(2) provides:

"In its decision, the Board may

- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
- (b) make any further order the Board considers necessary for the purposes

²⁰ Section 36(1) of the *Water Act* provides:
"Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act."
Section 146(1) of the *Water Act* states:

of carrying out the decision.”

[113] The Appellants stated section 22(1) and (3) of the *Water Act* are the only sections that extinguish a common law riparian right. Section 22 states:

- “(1) Notwithstanding the common law, a riparian owner, riparian occupant or person who owns or occupies land under which groundwater exists has the right to divert water only in accordance with section 21 and may not divert water for any other purpose unless authorized by this Act or under an approval, licence or registration....
- (3) Nothing in this Act is to be construed so as to repeal, remove or reduce any rights held at common law by a riparian owner or occupant of land or by a person who owns or occupies land under which groundwater exists, other than the right to the continued flow or diversion of water.”

The Appellants submitted the Berm is not a “continued flow or diversion of water.” The Appellants stated the *Water Act* distinguishes between “diversions” of water and activities undertaken for the purpose of flood control, and the *Water Act* only extinguished common-law rights to divert water.

[114] The Appellants noted section 1(1)(m) of the *Water Act* defines “diversion of water” as:

- “(i) the impoundment, storage, consumption, taking or removal of water for any purpose, except the taking or removal for the sole purpose of removing an ice jam, drainage, flood control, erosion control or channel realignment, and
- (ii) any other thing defined as a diversion in the regulations for the purposes of this Act.”

[115] The Appellants submitted the term “diversion of water” is distinct from the term “activity,” which the Appellants stated refers to the alteration of a water body’s flow and includes flood control. The Appellants said section 1(1)(b) defines “activity” as follows:

“placing, constructing, operating, maintaining, removing or disturbing works... [or] ground... that... alters... the flow or level of water... changes... the location of water or the direction of flow of water... causes... the siltation of water or the erosion of any bed or shore of a water body, or causes... an effect on the aquatic environment.”

[116] The Appellants stated section 22(1) of the *Water Act*²¹ addresses the diversion of water, and did not extinguish the right to build a berm to prevent flooding (as long as it does not harm others). The Appellants submitted the common-law right to prevent flooding is maintained in section 22(3) of the *Water Act*.²²

[117] The Appellants stated to destroy a common-law right the legislation must be clear and explicit. The Appellants' quote the Court in *Tottrup* as follows:

“The Act has a larger horizon. It recognizes some rights of riparian owners to the use of waters for domestic purposes, and the like; but its wider purposes may be found in the activities and uses which may be licenced under s. 11... As to flood control, it is plain to me that what is contemplated here are measures which will affect the property, rights, or interests of others than the applicant, including the public interest in conservation, recreation and so on... When "flood control" is made subject to a grant of licence requiring such extensive procedures, it cannot be intended to apply, nor should it be construed to include, an act of preservation of private property from periodic flooding which causes no harm to others nor breaches specific prohibitions nor the overall purposes of the Act. It is flood control in a wider context that is to be construed....”²³

[118] The Appellants submitted that while the *Water Act* includes actions for flood control in the definition of an “activity”, that does not mean the legislature intended to extinguish riparian owners' rights to protect themselves from flooding, as long as there is no harm caused to others.

[119] The Appellants said the Court in *Tottrup* determined the *Water Resources Act* did not apply to the respondent's dykes erected for flood control, even though the Court found the

²¹ Section 22(1) of the *Water Act* provides:

“Notwithstanding the common law, a riparian owner, riparian occupant or person who owns or occupies land under which groundwater exists has the right to divert water only in accordance with section 21 and may not divert water for any other purpose unless authorized by this Act or under an approval, licence or registration.”

²² Section 22(3) of the *Water Act* states:

“Nothing in this Act is to be construed so as to repeal, remove or reduce any rights held at common law by a riparian owner or occupant of land or by a person who owns or occupies land under which groundwater exists, other than the right to the continued flow or diversion of water.”

²³ *Tottrup v. Alberta (Environment, Minister)*, 1979 AltaSCAD 189, at paragraph 19.

Water Resources Act's definition of "works" included the dykes. The Appellants stated the Court interpreted "diversions" and "works" in accordance with the purpose of the *Water Resources Act*, which the Court said prohibited diversions or works "which will affect the property, rights, or interests of others than the applicant, including the public interest in conservation, recreation and so on."²⁴

[120] The Appellants submitted the approach of the Court in *Tottrup* can be applied to the prohibitions in the *Water Act*. The Appellants said the Director considers the following factors in approving an application for the construction of a berm under section 38(2) of the *Water Act*:²⁵

- (1) the effects on the aquatic environment;
- (2) hydraulic, hydrological, and hydrogeological effects;
- (3) effects on household users, licensees, and traditional agriculture users;
- (4) effects on public safety; and
- (5) any other matters the Director considers relevant.

The Appellants submitted these factors demonstrate that the aims of the *Water Act* are the same as the *Water Resources Act*: to protect the property, rights, and interests of those other than the applicant, and pursue the public interest in environmental conservation and recreation.

[121] The Appellants stated that AEP encouraged construction of the Berm after the 1995

²⁴ *Tottrup v. Alberta (Environment, Minister)*, 1979 AltaSCAD 189, at paragraph 19.

²⁵ Section 38(2) of the *Water Act* states:

"In making a decision under this section, the Director

- (a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan,
- (b) may consider any existing, potential or cumulative
 - (i) effects on the aquatic environment,
 - (ii) hydraulic, hydrological and hydrogeological effects, and
 - (iii) effects on household users, licensees and traditional agriculture users,that result or may result from the activity, and
- (c) may consider
 - (i) effects on public safety, and
 - (ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant."

flood event, and gave guidance to the Appellants on how high to build the Berm, without any requirement of an approval.

[122] The Appellants submitted they had made consistent efforts to obtain approval for the Berm.

IV. STANDARD OF REVIEW

[123] The Board has considered the appropriate standard of review for these appeals and has determined the standard is correctness. The Board's role is to provide the Minister with the best possible advice. The Minister takes this advice into account in making his decision, which may reflect a broader range of factors than those considered by the Director.

V. ANALYSIS

[124] In its September 5, 2019 letter, the Board set the issues to be addressed at the hearing as follows:

1. Was *Water Act* Enforcement Order No. WA-EO-2017/05-SSR properly issued? This issue considers both the Director's legal jurisdiction and the factual basis for issuing the Order.
2. Are the terms and conditions of *Water Act* Enforcement Order No. WA-EO-2017/05-SSR appropriate?

[125] The Board considered the Director's file, the AEP record, oral evidence and arguments, written submissions, case law, and relevant legislation, in determining its recommendations to the Minister.

[126] With regards to the first issue in the appeals, being whether the Enforcement Order was properly issued, the Appellants submitted they have a common-law right to protect the Lands from flooding, as long as the actions they take in doing so do not cause harm to others. This common-law right is part of a bundle of rights referred to as "riparian rights." The Courts have defined riparian rights as "common law rights arising from the ownership of land adjoining

water.”²⁶ The Supreme Court of Canada stated, “[r]iparian rights, as the name indicates, do not carry exclusive possession; they exist as incorporeal rights arising from ownership. ...”²⁷

[127] The Courts have recognized the existence of a common-law right to protect lands from flooding; however, legislation can alter or extinguish common-law rights, including riparian rights.

[128] The Appellants submitted the Courts in *Tottrup* and *Fisher* confirmed the *Water Resources Act* recognized riparian rights to protect their Lands from flooding, and the *Water Act*, which replaced the *Water Resources Act*, did not remove that right. The Berm, in the opinion of the Appellants, is not a “diversion of water” as per section 22 of the *Water Act*. The Appellants argued the *Water Act* distinguishes between a diversion of water and activities undertaken for the purpose of flood control, and that only the right to divert water is extinguished in the *Water Act*.

[129] The Director stated the cases cited by the Appellants were all determined under the *Water Resources Act* and argued the *Water Act* removed the right to undertake flood control measures without an approval from the Director. The Director noted the *Water Act* includes “flood control” in the definition of an “activity,” and section 36(1) of the *Water Act* requires an approval to “commence or continue an activity.”

[130] The Board finds it is not necessary to determine whether riparian rights to construct works that protect private lands from flooding are still in effect in Alberta. The Board finds that if such rights exist, they are subject to the *Water Act*, which is significantly more expansive than the *Water Resources Act*. The *Water Act* does not prohibit a riparian landowner from building flood control works such as berms to protect their land, but it does require an approval to be obtained first, thereby providing AEP authority to review the works to ensure protection of the environment and of others who may be impacted.

[131] The Board finds the Berm is an “activity” under the *Water Act* that requires an approval from the Director to continue operations. For various reasons, the Appellants constructed

²⁶ *Arbutus Bay Estates Ltd. v. Canada (Attorney General)* (2016), 2016 BCSC 2083 (B.C.S.C.), at para. 67

²⁷ *Canada (Attorney General) v. Higbie*, [1945] S.C.R. 385 (S.C.C.), at para. 172.

and operated the Berm without an approval from the Director. Under section 135(1) of the *Water Act*,²⁸ if the Director's opinion is that there has been a contravention of the Act, the Director may issue an enforcement order.

[132] The Appellants submitted the Director issued the Enforcement Order based on false or mistaken facts, including the wrongful assumption the Right-of-way was public land belonging to the Province. At the hearing, the Director acknowledged the Right-of-way belonged to the City and had not yet been transferred to the Appellants. The Appellants indicated the transfer of the Right-of-way was proceeding and was imminent. The Board finds the Appellants' testimony on the Right-of-way to be credible. The Board believes the Appellants acted in good faith in their dealings with AEP. This was acknowledged by the Director in the hearing; however, the facts are that the Appellants do not have sufficient evidence of consent from the City. The Board finds the Director acted within his jurisdiction when he considered the City's lack of consent for the encroachment of the Berm as one of his reasons for issuing the Enforcement Order.

[133] The Board notes the lack of consent from the City was not the only reason the Director cited as a basis for the Enforcement Order. While the Appellants submitted that many of those reasons were inaccurate or have since been resolved, the Board finds there are issues the Director raised that remain unresolved to the Director's satisfaction, particularly the impact of the Berm on adjacent landowners.

[134] With regards to the issue of whether the Enforcement Order was properly issued, the Board finds the evidence demonstrates the Appellants contravened section 36(1) of the *Water Act* by constructing and operating the Berm without an approval from the Director, and the Director had the legal jurisdiction and factual basis for issuing the Enforcement Order to the Appellants.

[135] The second issue in the appeals is whether the terms and conditions of the Enforcement Order are appropriate. The Director indicated his desire to proceed with the appeal

²⁸ Section 135(1) of the *Water Act* provides:

"The Director may issue an enforcement order to any person if, in the Director's opinion, that person has contravened this Act, whether or not that person has been charged or convicted in respect of the contravention."

process was not driven by a pressing safety concern, but rather by his view that he did not want the status of the Berm and the Enforcement Order to be uncertain. The Board notes the Director agreed with the Appellants that there is no risk of catastrophic failure of the Berm. As the Berm is considered structurally sound, there is no urgent need to proceed immediately with all the terms and conditions of the Enforcement Order.

[136] The Parties submitted evidence regarding the appropriateness of the terms and conditions of the Enforcement Order and this evidence was considered by the Board. Based on its review of this evidence the Board has determined it is appropriate to vary the terms and conditions of the Enforcement Order.

[137] The Board agrees with the Parties that the decommissioning of the Berm is a complex matter with multiple potential impacts to take into consideration. Such considerations cannot be rushed if the objectives of the Enforcement Order are to be met. The Board finds the timelines provided by the Enforcement Order, besides being outdated due to the holding of the appeals in abeyance, are not sufficient for the Appellants to safely and efficiently decommission the Berm.

[138] The Board recommends varying the timelines to enable the Appellants to provide the Director with a thorough and efficient Decommissioning Plan that focuses on the prevention of the adverse effects listed in the Enforcement Order as follows:

- (a) the bed and shore of the Oldman River;
- (b) the hydrology of the Oldman River;
- (c) the aquatic environment of the Oldman River; and,
- (d) other property owners.

[139] The Board recognizes the value of qualified engineers in intricate matters such as this. The Decommissioning Plan must be approved by a professional engineer who is registered and in good standing with the Association of Professional Engineers and Geoscientists of Alberta.

[140] The Board is concerned about the impact the removal of the Berm would have on the AltaLink transmission towers. The Board notes the Director provided correspondence with

AltaLink from 2010 that stated AltaLink would remove the two towers from the Berm if required; however, the letter makes no mention of the cost or time it would take to relocate the towers.

[141] At the hearing, the Appellants provided the Board with an email from Mr. Drew Cunningham, a Lines Encroachment Technologist with AltaLink. In the email, Mr. Cunningham stated AltaLink could relocate the towers if required, although it was not an “ideal” option. Mr. Cunningham estimated the cost of relocating the towers would be approximately \$250,000 per pole plus an unknown cost for protecting the towers from floods. Although he did not have a cost for flood mitigation work to protect the towers, Mr. Cunningham noted similar work done in 2014 cost “north of 7 figures.” Mr. Cunningham explained in the email that AltaLink holds a utility easement for the towers, and any work done within that easement requires AltaLink’s permission, which could take six to twelve months, or longer, to obtain regulatory approvals and schedule outages for the lines.

[142] The Board notes the AltaLink towers are regulated by the Alberta Utilities Commission (“AUC”) and the Board does not have knowledge of the AUC’s regulatory process. The Board is unable to determine how long it would take to obtain regulatory approval from the AUC to relocate the towers.

[143] The Enforcement Order does not address the AltaLink presence on the Berm. The Board recommends the Enforcement Order be varied to take into account the length of time that may be required to remove the towers. As that time is currently unknown, the Director, the Appellants, and AltaLink will need to work together to develop a reasonable timeline.

[144] The Board believes there is a strong possibility of the appeals being resolved through further negotiations between the Parties, as the Appellants continue to seek a transfer of the Right-of-way from the City and make efforts to obtain an approval for the Berm. The Board encourages the Parties to continue to seek resolution of these issues, however, the Board recognizes this matter cannot continue indefinitely. For this reason, the Board recommends varying the Enforcement Order to provide certainty and fairness to both Parties and others affected by the Berm.

VI. RECOMMENDATIONS

[145] In accordance with section 99(1) of EPEA, the Board recommends the Minister of Environment and Parks order that the Director's decision to issue the Enforcement Order be varied by making the following changes to the Enforcement Order:²⁹

- (a) Condition 1 be repealed and replaced with the following:

“On or before 18 months from the date of the Minister's order, submit to the Director for approval, a written decommissioning plan for the delineation, removal and remediation of the Berm (the “Decommissioning Plan”);”

- (b) Condition 2 be repealed and replaced with the following:

“The Decommissioning Plan must be authenticated by a Professional Engineer registered and in good standing with the Association of Professional Engineers and Geoscientists of Alberta;”

- (c) Condition 4(e) be repealed and replaced with the following:

“River modelling results of the remediated site (after removal of the Berm and any final contouring of areas previously occupied by the Berm) confirming no changes to existing flood hazard mapping models for the Oldman River;”

- (d) Condition 4(f) be repealed and replaced with the following:

“A schedule of implementation of the plan with a start date three months from the date of the approval of the Decommissioning Plan and a completion date subject to the Director extending the date further.”

- (e) Condition 6 be repealed and replaced with the following:

“Within 90 days of completion of the requirements of the Decommissioning Plan subject to the Director extending it further, the Parties shall submit to the Director for approval a verification report describing the work undertaken to comply with this order (“the Verification Report”);”

- (f) Condition 7 be repealed and replaced with the following:

“The Verification Report must be authenticated by a Professional Engineer registered and in good standing with the Association of Professional

²⁹ See Appendix B of this Report and Recommendations for the original Enforcement Order terms and conditions.

Engineers and Geoscientists of Alberta.”

VII. CLOSING

[146] Pursuant to sections 100(2) and 103 of EPEA, a copy of this Report and Recommendations, and any decision by the Minister, shall be sent to the following:

- (a) Mr. Barry Weintraub, Rueters LLP, representing the Appellants, Tollestrup Construction (2005) Inc. and Honey Holdings Ltd.; and
- (b) Ms. Vivienne Ball, Alberta Justice and Solicitor General, Mr. Stephen Mathyk, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks.

[147] The Board notes the Appellants reserved their rights to ask for costs. A process for costs applications will be established by the Board after the Minister makes his decision in these appeals.

Dated on December 18, 2019, at Edmonton, Alberta.

“original signed by”

Alex MacWilliam
Board Chair

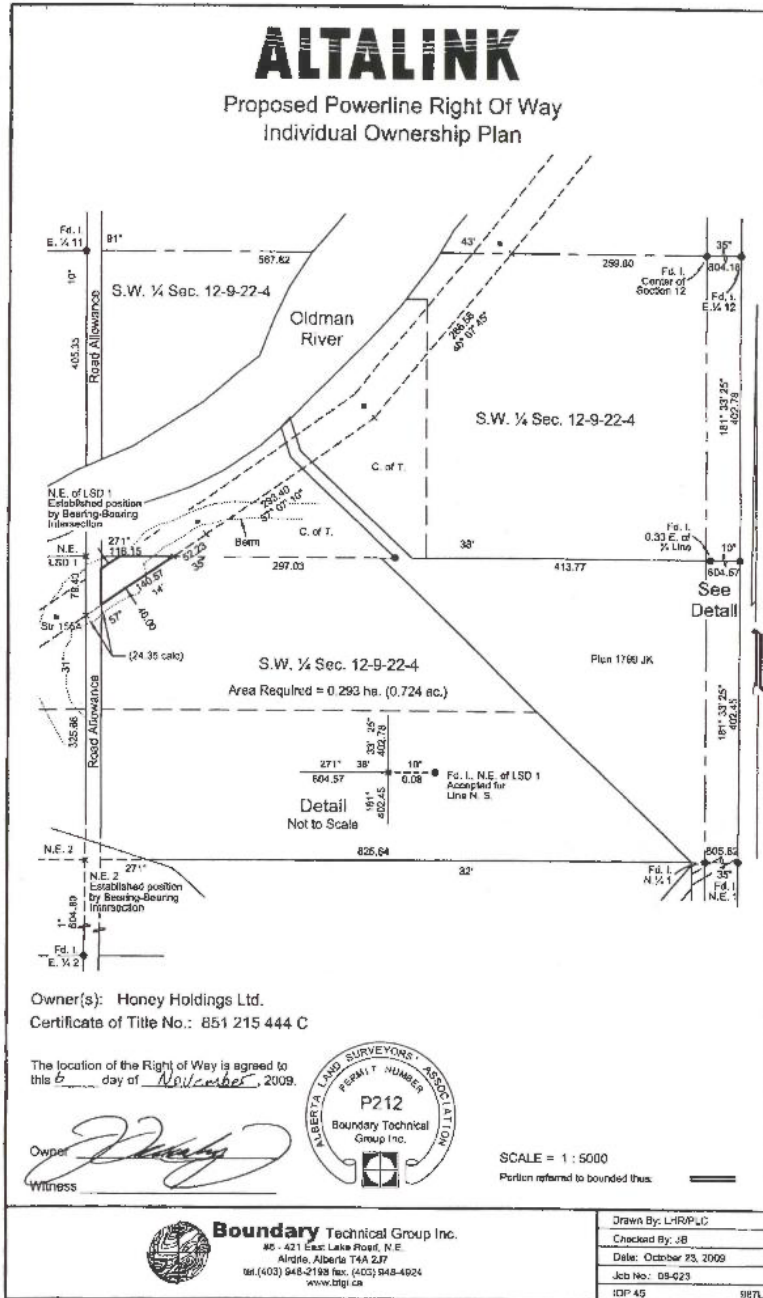
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Anjum Mullick
Board Member

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Tim Goos
Board Member

Appendix A



Appendix B

Water Act Enforcement Order No. WA-EO-2017/05-SSR



Environment and Parks

WATER ACT
BEING CHAPTER W-3 R.S.A. 2000 (the "Act")
ENFORCEMENT ORDER NO. WA-E0-2017/05-SSR

Honey Holdings Ltd.
P.O. Box 474
Lethbridge, AB
T1J 3Z1

("Honey Holdings")

Tollestrup Construction (2005) Inc.
P.O. Box 474
Lethbridge, AB
T1J 3Z1

("TCI")

(Collectively hereinafter referred to as "the Parties")

WHEREAS Honey Holdings Ltd. owns the lands ("Honey Holdings") legally described as: SE-11-009-22-W4M, SW-12-009-22-W4M, NW-01-009-22-W4M, NE-01-009-22-W4M (the "Lands") located within the City of Lethbridge, Alberta;

WHEREAS Tollestrup Construction (2005) Inc. ("TCI") owns and operates a construction business on the Lands, which consists of an office trailer, a registered asphalt plant, a gravel washing facility, gravel processing/crushing facilities, gravel stockpiles, heavy equipment staging areas and approximately 52 hectares of excavated gravel pit area, as are all shown in the attached Appendix A;

WHEREAS the majority of the Lands are located within the mapped Flood Hazard Area of the Oldman River Valley within the City of Lethbridge limits, and are directly adjacent to the Oldman River;

WHEREAS approximately 2 km of the western boundary of the Lands are directly adjacent to the Oldman River which flows in a northerly direction;

WHEREAS the Oldman River is a "water body" within the meaning of section 1(1)(ggg) of the *Water Act*,

WHEREAS on June 9, 2015, Alberta Environment and Parks ("AEP") received a public complaint regarding the ongoing construction of a berm on the Lands;

A handwritten signature in black ink, consisting of a circle with a stylized 'A' or similar character inside.

WHEREAS on May 3, 2016, the AEP Environmental Protection Officer (the "Officer") conducted an inspection of the Lands and observed:

- TCI had constructed a berm that lay along the western boundary of the Lands that are adjacent to the Oldman River (the "Berm");
- The Berm appeared to be mainly composed of compacted soil fill material;

WHEREAS on May 3, 2016, the Officer advised TCI that the construction and operation of the Berm is not approved under the *Water Act* and that any further construction and operation of the Berm must immediately cease;

WHEREAS on June 30, 2016, AEP sent a Letter of Non-Compliance to TCI that required a written plan be submitted no later than July 25, 2016, with details and proposed timelines for how the Berm will be brought into compliance under the *Water Act*,

WHEREAS on July 22, 2016, TCI provided a written response to the Letter of Non-Compliance sent June 30, 2016, that proposed the submission of a completed engineering report for Approval in spring of 2017;

WHEREAS on August 10, 2016, AEP responded in writing to TCI that the response provided by TCI in the July 22, 2016, letter did not meet the requirements set out by AEP in the Letter of Non-Compliance dated June 30, 2016;

WHEREAS by letter dated September 12, 2016, TCI advised AEP that they had retained the professional services of an engineering consultant, Tetra Tech EBA, and would submit a completed engineering report prior to January 1, 2017;

WHEREAS on October 3, 2016, staff from AEP and the City of Lethbridge conducted a further site inspection to examine the Berm and observed the following:

- The Berm is approximately 2 km in length and substantially larger in length and width towards the northerly portion of the Lands that are adjacent to the Oldman River;
- The Berm generally ranges from 4 to 40 meters in width, though in some locations it is greater than 40 meters;
- The Berm ranges from approximately 10 to 30 meters in height along its length;
- Visible signs of soil erosion, slumping and cracking were observed throughout the Berm as well as concrete slabs that had fallen into the Oldman River and/or were still embedded in the Berm;
- Various plastic pipes and culverts were observed protruding from the Berm;
- The City of Lethbridge confirmed that the northerly portion of the Berm had encroached onto City Lands;
- A portion of the Berm encroaches on Provincial Crown owned right of way;
- Recent earthen material not present in previous inspections that was used to infill further areas on the Lands and expand the width of Berm;
- TCI confirmed that this material was hauled in from a construction project at the University of Lethbridge;

WHEREAS on November 18, 2016, the Director received the following from ICI:

- Geotechnical Assessment of the Berm ("Geotechnical Assessment Tollestrup Earthen Berm," Tetra Tech EBA Inc., January 2017);
- Hydraulic Assessment related to the construction of the Berm ("Thllestrup Site Flood Protection Berm Water Level Impact," Tetra Tech EBA Inc., November 18, 2016);

WHEREAS AEP reviewed the TCI reports submitted on November 18, 2016 and it appeared there was no immediate risk of a catastrophic failure of the berm;

WHEREAS the continued construction and operation of the Berm may alter or become capable of altering the flow or level of water, may become capable of changing the location of water, and may cause or become capable of causing siltation of water or the erosion of the bed and shore of the waterbody, and may cause or may become capable of causing an effect on the aquatic environment of the waterbody;

WHEREAS the Berm is a "works" within the meaning of section 1(1)(mmm) of the *Water Act*;

WHEREAS the construction and operation of the Berm is an "activity" within the meaning of sections 1(1)(b)(i) and 1(1)(b)(ii) of the *Water Act*,

WHEREAS section 36(1) of the *Water Act* states that no person shall commence or continue an activity pursuant to an approval unless it is otherwise authorized under this *Act*,

WHEREAS AEP has never issued an approval to the Parties for the construction and operation of the Berm, and the construction and operation of the Berm is not otherwise authorized under the *Water Act*;

WHEREAS the Parties are each a "person responsible" for the Berm pursuant to section 1(1)(kk) of the *Water Act* and section 1(5) of the *Water (Ministerial) Regulation (A.R. 205/1998)*;

WHEREAS Stephen Mathyk, Compliance Manager, South Saskatchewan Region, has been appointed a Director for the purposes of issuing Enforcement Orders under the *Water Act* (the "Director");

WHEREAS the Director is of the opinion that TCI has contravened section 36 (1) of the *Water Act* which is an offence under section 142(1)(h) of the *Act*, by conducting an activity without an approval, being the ongoing construction and operation of the Berm;

WHEREAS the Director is of the opinion that the Berm may cause adverse effects to:

- the bed and shore of the Oldman River;
- the hydrology of the River;
- the aquatic environment of the River;
- other property owners;

AND WHEREAS the Director is of the opinion that the Berm must be decommissioned and

removed;

THEREFORE, I, Stephen Mathyk, the Director, pursuant to sections 135(1) and 136(1) of the Act, DO HEREBY ORDER THAT HONEY HOLDINGS LTD. AND TOLLESTRUP CONSTRUCTION (2005) INC. SHALL:

1. On or before **November 1, 2017** submit to the Director for approval, a written decommissioning plan for the delineation, removal and remediation of the Berm (the "Decommissioning Plan");
2. The Decommissioning Plan must be stamped by a Professional Engineer registered with the Association of Professional Engineers and Geoscientists of Alberta (APEGA);
3. The Decommissioning Plan shall meet the objectives of removing and remediating the Berm in such a manner to prevent any adverse effects to:
 - a. The bed and shore of the Oldman River;
 - b. The hydrology of the Oldman River;
 - c. The aquatic environment of the Oldman River; and,
 - d. Other property owners;
4. The Decommissioning Plan shall include, at a minimum, the following:
 - a. A detailed plan for the complete delineation of the vertical and lateral extent of the Berm and any fill material placed directly behind the Berm that in-fills the floodplain;
 - b. A detailed plan to assess the elevation of the lands underlying the Berm prior any Berm construction or in-filling of the floodplain;
 - c. The construction techniques, mitigation measures, materials, and remediation techniques proposed for the Berm removal;
 - d. Stamped and signed engineered drawings of the proposed final elevations and contours of the lands impacted by the Berm or in-filling of the floodplain;
 - e. River modelling results of the remediated site (after removal of the Berm and any final contouring of areas previously occupied by the Berm) confirming no changes to existing flood hazard mapping models for the Oldman River or updating the flood hazard mapping models as required; and
 - f. A schedule of implementation of the plan with a completion date no later than May 15, 2018;



5. The Parties shall implement the work set out in the Decommissioning Plan in accordance with the schedule of implementation that is approved by the Director;

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5

Enforcement Order No. WA-E0-2017/05-SSR

6. Within 60 days of completion of the requirements of Decommissioning Plan, the Parties shall submit to the Director for approval a verification report describing the work undertaken to comply with this order ('the Verification Report');
7. The Verification Report must be stamped by a Professional Engineer registered with the Association of Professional Engineers and Geoscientists of Alberta (APEGA).

DATED at the City of Lethbridge in the Province of Alberta, this 10th day of August, 2017.

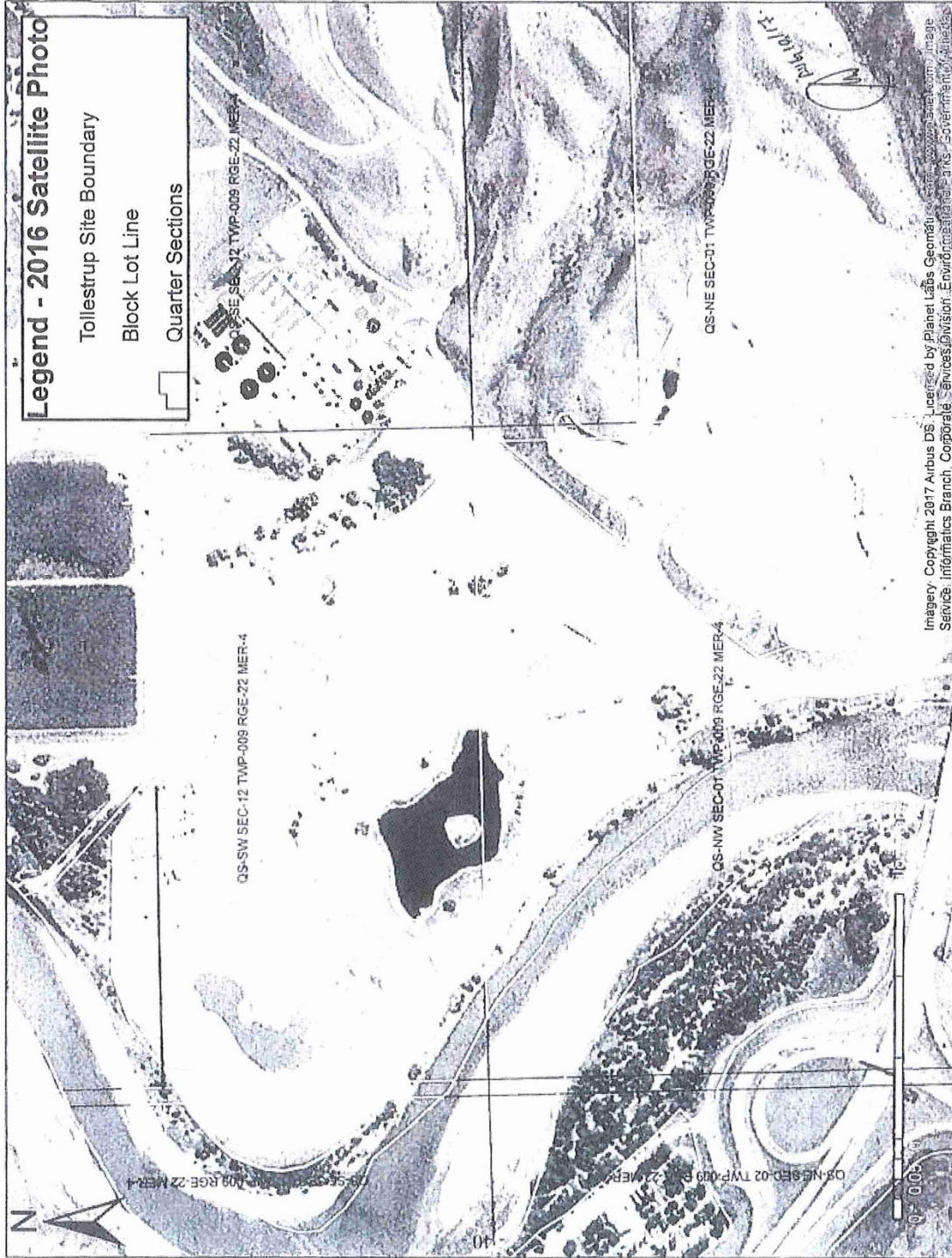


Stephen Mathyk
District Compliance Manager
Southern Region

Section 115 of the *Water Act* may provide a right of appeal against this decision to the Alberta Environmental Appeals Board. There may be a strict time limit for filing such an appeal. A copy of section 115 is enclosed. For further information, please contact the Board Secretary at #306 Peace Hills Trust Tower, 10011 - 109 Street, Edmonton, Alberta, T5J 3S8; telephone (780) 427-6207; fax (780) 427-4693.

Notwithstanding the above requirements, the Party(ies) shall obtain all necessary approvals in complying with this order under any other provincial or federal legislation.

Take notice that this enforcement order is a remedial tool only, and in no way precludes any enforcement proceedings being taken regarding this matter under this or any other provincial or federal legislation.





WATER ACT

BEING CHAPTER W-3 R.S.A. 2000 (the "Act")

ENFORCEMENT ORDER NO. WA-EO-2017/05-SSR

Amendment No. 1

Honey Holdings Ltd.
P.O. Box 474
Lethbridge, AB
T1J 3Z1

("Honey Holdings")

Tollestrup Construction (2005) Inc.
P.O. Box 474
Lethbridge, AB
T1J 3Z1

("TCI")

(Collectively hereinafter referred to as "the Parties")

WHEREAS on August 10, 2017, Stephen Mathyk, Compliance Manager, South Saskatchewan Region (the "Director") issued Enforcement Order No. WA-EO-2017/05-SSR (the "Order") to the Parties requiring the submission of a decommissioning plan for the delineation, removal and remediation of the Berm, as is further described in the Order;

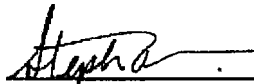
WHEREAS further to discussions as between the Parties and the Director, the Director has agreed to amend the Order by extending certain of the deadlines;

THEREFORE, I, Stephen Mathyk, Compliance Manager, South Saskatchewan Region (the "Director") pursuant to section 143 of the *Water Act*, DO HEREBY AMEND WA-EO-2017/05-SSR AS FOLLOWS:

1. In Clause 1, delete November 1, 2017 and replace with March 1, 2018.
2. In Clause 4f., delete May 15, 2018 and replace with November 1, 2018.

A handwritten signature in black ink, appearing to be the initials "SM" or similar, enclosed in a circle.

DATED at the City of Lethbridge, in the Province of Alberta, this 11th day of October, 2017. _____



Stephen Mathyk
Compliance Manager
South Saskatchewan Region

Section 115 of the *Water Act* may provide a right of appeal against this decision to the Alberta Environmental Appeals Board. There may be a strict time limit for filing such an appeal. A copy of section 115 is enclosed. For further information, please contact the Board Secretary at #306 Peace Hills Trust Tower, 10011 — 109 Street, Edmonton, Alberta, T5J 3S8; telephone (780) 427-6207; fax (780) 427-4693.

Notwithstanding the above requirements, the Party(ies) shall obtain all necessary approvals in complying with this order under any other provincial or federal legislation.

Take notice that this enforcement order is a remedial tool only, and in no way precludes any enforcement proceedings being taken regarding this matter under this or any other provincial or federal legislation.

