
ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – June 21, 2019

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

-and-

IN THE MATTER OF an appeal filed by Donald Belland with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2018/09-RDNSR to Donald Belland.

Cite as: *Belland v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (21 June 2019), Appeal No. 18-014-R (A.E.A.B.), 2019 ABEAB 18.

BEFORE:

Mr. Alex MacWilliam, Board Chair;
Mr. Chris Powter, Board Member; and
Ms. Sarah Palmer, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Denise Black, Board Secretary; Ms. Valerie Myrmo, Registrar of Appeals; and Ms. Marian Fluker, Associate Counsel.

SUBMISSIONS BY:

Appellant: Mr. Donald Belland.

Director: Mr. John Collins, Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Lisa Semenchuk and Ms. Meagan Bryson, Alberta Justice and Solicitor General.

Intervenor: Town of St. Paul, represented by Mr. Derek King, Brownlee LLP.

WITNESSES:

Appellant: Mr. Donald Belland.

Director: Mr. John Collins, Director, Compliance Manager, Red Deer-North Saskatchewan Region, Alberta Environment and Parks; Mr. Brendon Payette, former Environmental Protection Officer, Alberta Environment and Parks; and Mr. Ryan Adams, Wetland Specialist, Alberta Environment and Parks.

Intervenor: Ms. Kim Heyman, Chief Administrative Officer, Town of St. Paul; Mr. Steven Jeffrey, Director of Public Works, Town of St. Paul; and Mr. Josh Maxwell, WSP.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Enforcement Order under the *Water Act* to Mr. Donald Belland for conducting an activity without an approval. Specifically, AEP found Mr. Belland had filled in a watercourse on his lands adjacent to the Town of St. Paul (the Town) that resulted in flooding within the Town.

Mr. Belland filed an appeal with the Environmental Appeals Board (the Board) of AEP's decision to issue the Enforcement Order.

The Board granted intervenor standing to the Town, and an oral hearing was held.

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

1. Was the Enforcement Order properly issued? This considered both the AEP's legal jurisdiction and factual basis for the Enforcement Order.
2. Are the terms and conditions in the Enforcement Order reasonable?

The Board determined AEP properly issued the Enforcement Order.

The Board recommended the terms and conditions of the Enforcement Order be varied to clarify the work required under the Enforcement Order. The Board encouraged Mr. Belland to work with AEP and the Town to comply with the Enforcement Order and address the water flow issues in the area.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's report and recommendations in respect of an appeal of Enforcement Order No. WA-EO-2018/09-RDNSR (the "Enforcement Order") issued to Mr. Donald Belland (the "Appellant"). Alberta Environment and Parks ("AEP") issued the Enforcement Order to the Appellant under the *Water Act*, R.S.A. 2000, c. W-3 with respect to activities conducted on SW-5-58-9-W4M, which the Appellant owns, and the SE-5-58-9-W4M, owned by Ms. Rita Belland (collectively, the "Lands"). The Lands are located within the County of St. Paul (the "County"), adjacent to the Town of St. Paul (the "Town").

[2] The Town operates a storm water drainage system that directs water into an unnamed waterbody that crosses the Lands and drains southeast into Upper Therien Lake. The storm water drainage system included an outfall that consisted of two corrugated metal pipes (inlets) bringing water into a vault, the vault itself, and a corrugated metal pipe allowing water to flow from the vault into the watercourse on the Lands. The vault (an outlet) is located at 53rd Street and 43rd Avenue in the Town, and the outlet from the vault is located north of the Lands and extends onto the Lands.

[3] The Enforcement Order alleged the Appellant contravened the *Water Act* by commencing or continuing an activity, namely obstructing the watercourse on the Lands, thereby altering the flow or changing the location of water in the watercourse, without authorization under the *Water Act*.

[4] The Appellant appealed AEP's decision to issue the Enforcement Order.

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

1. Was the Enforcement Order properly issued? This considers both the Director's legal jurisdiction and the factual basis for the Enforcement Order.
2. Are the terms and conditions in the Enforcement Order reasonable?

[6] After reviewing the file, oral evidence and arguments, written submissions, and the AEP record, the Board recommends the Enforcement Order be varied. Specifically, the Board is recommending the terms and conditions of the Enforcement Order be varied to provide clarity what work is required.

II. BACKGROUND

[7] On October 23, 2018, the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the “Director”), issued the Enforcement Order to the Appellant.

[8] On October 26, 2018, the Board received a Notice of Appeal from the Appellant appealing the Enforcement Order and requested the Director provide the records related to his decision (the “Record”).

[9] On October 31, 2018, the Board acknowledged the Notice of Appeal and notified the Director of the appeal.

[10] On December 10, 2018, the Town requested it be included as a party to any proceedings related to the appeal, including the mediation meeting. The Town stated it was directly affected by the Enforcement Order and the actions taken by the Appellant that resulted in the Enforcement Order being issued.

[11] On December 17, 2018, the Board acknowledged the Town’s request and explained the Town can only participate in the mediation meeting if both the Appellant and the Director (collectively, the “Parties”) agree.

[12] On December 17, 2018, the Board notified the Parties that, based on the available dates provided, the mediation meeting would be held on February 14, 2019, in Edmonton.

[13] On December 18, 2018, the Board received a copy of the Director’s Record, and the Board provided a copy to the Appellant on December 20, 2018.

[14] On December 20, 2018, the Director notified the Board that he considered the participation of the Town as a full party to the appeal was justified since the Town is directly impacted by the activities that were subject to the Enforcement Order.

[15] On January 15, 2019, the Board acknowledged a telephone call from the Appellant whereby he did not consent to the Town participating in the mediation meeting. The Board confirmed the Town would not be permitted to attend the mediation meeting.

[16] On January 17, 2019, the Director withdrew his consent to participate in the mediation meeting because he considered the Town's participation essential to resolving the matter.

[17] On February 8, 2019, the Board confirmed the mediation meeting was cancelled. The Board asked the Parties to provide any preliminary motions and available hearing dates. The Board also asked the Parties to provide comments on the following proposed issues:

1. Was the decision to issue the Enforcement Order appropriate?
2. Are the terms and conditions in the Enforcement Order appropriate?

[18] On March 1, 2019, the Board advised the Parties the hearing would be held on April 17, 2019.

[19] On March 7, 2019, the Director asked the Board to re-schedule the hearing because one of his intended witnesses was not available in April.

[20] On March 29, 2019, the Board acknowledged a telephone conversation with the Appellant on which he asked the Board to deal with two preliminary motions:

1. he wished to proceed with the hearing on April 17, 2019, because AEP was pumping water across his land and the Director could proceed with another witness; and
2. a request to summarily dismiss the Enforcement Order on the basis of "double jeopardy" since a previous application to the Court of Queen's Bench filed by the Director in July 2018 was dismissed.

The Board requested the Director to respond to the preliminary motions raised.

[21] On April 8, 2019, the Director responded to the Appellant's preliminary motions. The Director advised AEP was not pumping water onto the Appellant's land. He further stated holding the hearing on April 17, 2019, would not provide sufficient time for AEP to address the participation of interested persons and would limit the submission process. In response to the

second motion, the Director noted section 135 of the *Water Act* does not prevent the issuance of a series of orders when there are recurring and ongoing contraventions of the *Water Act*.¹

[22] On April 18, 2019, the Board advised the Parties the hearing would be held on May 23, 2019, in Edmonton. The Board also set the schedule to receive submissions from the Parties. The Board confirmed the issues for the hearing as follows:

1. Was the Enforcement Order properly issued? This considers both the Director's legal jurisdiction and the factual basis for the Enforcement Order.
2. Are the terms and conditions in the Enforcement Order reasonable?

[23] On April 23, 2019, the Board published a Notice of Hearing in the St. Paul Journal advising that if any person, other than the Parties, wished to make representations before the Board, to contact the Board office by May 7, 2019. A news release was distributed by the Public Affairs Bureau to media throughout the Province, and the Board placed the news release on its website.

[24] On April 30, 2019, the Board provided its decision to the Appellant's preliminary motions.² The Board started the Director's request to adjourn the hearing despite the Appellant's concerns. Further, the Board advised it could not consider the Appellant's request to summarily dismiss the Enforcement Order as a preliminary motion. The Board advised the "double jeopardy" argument could only be considered at a full hearing of the appeal.

[25] On April 29 and 30, 2019, the Board received the Appellant's initial submission for the hearing.

¹ Section 135 of the *Water Act* states:

- "(1) 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.
- (2) If the Director issues an enforcement order, the Director must give a copy of it to the person to whom it is directed."

² See: *Belland v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (30 April 2019), Appeal No. 18-014-DL1 (A.E.A.B.), 2019 AEAB 11.

[26] On May 3, 2019, the Director filed a preliminary motion to dismiss the appeal on the basis the statutory requirements for written submissions had not been met, and the appeal was without merit.

[27] On May 6, 2019, in response to the Notice of Hearing, the Board received a request to intervene from the Town. The Town requested to participate as a full party to provide evidence of the impacts of the Appellant's actions, provide the factual basis underlying the issuance of the Enforcement Order, ensure the terms and conditions of the Enforcement Order are not varied, ensure any additional terms and conditions imposed requires the Town's infrastructure is repaired, and ensure any additional terms and conditions imposed are consistent with existing storm water management infrastructure and pending storm water management plan.

[28] On May 7, 2019, the Board notified the Parties and the Town that the Director's motion to dismiss the appeal was denied.³ The Board accepted the Appellant's submission did not clearly disclose the facts or evidence he intended to rely on at the hearing. However, even though there was the potential the Director could have been potentially prejudiced by making it more difficult to prepare for the hearing, the proper remedy was not to summarily dismiss the appeal. The prejudice to the Appellant outweighed any prejudice to the Director.

[29] On May 7, 2019, the Board notified the Parties and the Town that the Board was granting the Town intervenor standing.

[30] On May 9, 2019, the Board received the Director's written submissions for the hearing.

[31] On May 16, 2019, the Board received the Appellant's rebuttal submission and the Town's submission.

[32] On May 22, 2019, the Board received additional comments from the Appellant for his rebuttal submission.

[33] The hearing was held on May 23, 2019, in Edmonton.

³ See: *Belland v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (7 May 2019), Appeal No. 18-014-DL2 (A.E.A.B.), 2019 AEAB 13.

III. SUBMISSIONS

A. Appellant

[34] The Appellant stated his grounds of appeal were:

1. *Habeas corpus*;⁴
2. discrimination;
3. double jeopardy;
4. false accusation;
5. defamation;
6. punitive damages;
7. trespassing rules; and
8. *Water Act* rules.

[35] The Appellant objected to the issuance of the Enforcement Order.

[36] The Appellant stated the Town was running sewer water contaminated with black mould and other contaminants through the Lands. The Appellant explained he cannot use the Lands for agricultural purposes since he cannot raise cattle on the Lands nor grow canola on the Lands, and the sewer water running across the Lands is endangering his health and impacting his livelihood.

[37] The Appellant said the land that is the source of the water was formerly a landfill. The Appellant stated the water flooding the Lands has caused \$45,000.00 in damages. He explained the water has caused washouts on the Lands.

[38] The Appellant stated the Town is draining the water off its lands in the wrong location according to the planning authority. The Appellant said a developer directed the water into the watercourse without permission. The Appellant explained there was no water on the

⁴ *Habeas corpus* is defined as:
“a writ requiring a person to be brought before a judge or into court, especially to investigate the lawfulness of their detention.”
See: Oxford Concise English Dictionary, 10th ed., s.v. “*habeas corpus*”.

Lands when he acquired the property, and there was no issue with water on the Lands until 2004 when the developer blocked off drainage to the east.

[39] The Appellant argued the Director is working for the Town and the developer and is not protecting the local residents. He explained he filed three complaints with AEP and they did not investigate until the developer filed a complaint against him.

[40] The Appellant said the water coming from the Town is coming from industrial areas and lands that are contaminated. The Appellant explained prior to the developer blocking the drainage, the water flowing to Upper Therien Lake at this location came only off his Lands, not from 43rd Avenue. He stated water would flow for three days and would be gone, leaving the Lands workable.

[41] The Appellant noted the Town did not replace topsoil on his land when the area was developed even though the Town was required to do so according to a July 17, 1987 Town Council Agreement.

[42] The Appellant argued the Lands referred to in the Enforcement Order is not a watercourse. He said he was not consulted prior to the stormwater outfall being built at the edge of his property so there was no agreement or easement.

[43] The Appellant said the Town has refused to use the sanitation line on 43rd Avenue. The Appellant stated the water flow has been altered and not allowed to follow the lay of the land. The Appellant said the drainage ditch for the storm water system should be two blocks east from where it currently is constructed.

[44] The Appellant stated the Town is damaging water bodies in the area, including Upper Therien Lake.

B. The Town

[45] The Town stated the Enforcement Order was issued as a consequence of the Appellant commencing and continuing activities without an approval and disturbing works, specifically the Town's storm water drainage system.

[46] The Town said the Appellant's activities impacted its storm water drainage system and impacted private and public land within the Town by causing flooding, requiring timely and costly steps to redirect water away from the endangered lands and to ensure surface water is able to reach Upper Therien Lake.

[47] The Town stated the Director had the jurisdiction to issue the Enforcement Order, which was supported by facts that demonstrated the Appellant disturbed the Town's storm water drainage works, and disturbed and altered the watercourse.

[48] The Town stated the issuance of the Enforcement Order was necessary, and the Appellant needed to comply with the Enforcement Order to avoid harm to the watercourse, the Town's storm water drainage system, and public and private lands.

[49] The Town said there was no material error of fact, law, or jurisdiction in the Director's decision to issue the Enforcement Order, nor in the terms and conditions of the Enforcement Order. However, the Town believed the terms and conditions should be expanded to provide greater specificity to the Appellant to ensure full and complete effective remediation of the Appellant's harm is achieved, to ensure full restoration of the Town's infrastructure and functionality of the Town's storm water drainage system, and to ensure the potential impact on Upper Therien Lake is properly assessed.

[50] The Town explained that prior to October 2014, the watercourse on the Lands was intact and included a slough located close to the outfall on the Lands.

[51] The Town stated the Appellant started filling in the slough and parts of the watercourse in October 2014. The Town said the slough was never restored, but water has still been able to flow in the watercourse, especially during spring runoff when water flooding adjacent lands and overflowing the outfall vault escapes back onto the Lands, carrying away portions of the fill placed within the watercourse.

[52] The Town said that between May and September 2017, the Appellant commenced grading and fill activities that effectively removed critical portions of the watercourse and disturbed the operation of the Town's storm water drainage system, including removing a pipe

which formed a part of the outfall. The Town said the Appellant had to repeat the activities numerous times in 2017, as water continued to reestablish its flow through the watercourse.

[53] The Town stated that on August 7, 2017, as a result of the Appellant having filled in the watercourse and disturbing the storm water drainage works, surrounding lands were flooded and water overflowed the outfall's vault, onto the Lands, and partly reestablished the channel within the watercourse. On August 15, 2017, the Town discovered the Appellant was proceeding to refill the watercourse and was raising the level of the surrounding lands to prevent water from flowing onto his property.

[54] The Town explained it inspected the area north of the Lands in September 2017 to develop a mitigation plan to address the flooding risk created by the Appellant's unauthorized activities. The Town noted the Appellant did not comply with Enforcement Order No. WA-EO-2017-06-RDNSR (the "2017 Order"), and he had done additional damage to the storm water outlet.

[55] The Town said that, given its concerns for the potential flooding risk, it removed a berm running along the north boundary of the walking trail along the northern boundary of the Lands.

[56] The Town explained it hired a consultant, WSP, to prepare and submit plans to AEP for the approval of a storm water management plan. The Town said it offered to work with the Appellant to establish an easement along each bank of the watercourse and to construct two engineered culvert crossings to allow the Appellant to continue use of the Lands without disturbance of the watercourse.

[57] On May 9 and 10, 2018, the Town observed the Appellant filling in portions of the watercourse to block the flow of water on the Lands, and the Appellant refused to discuss the Town's offer any further.

[58] In October 2018, the Town observed the Appellant undertaking activity within the watercourse and on the surrounding lands, and the Appellant raised the level of the surrounding lands adjacent to the outfall to a level above the grade of the walking trail that runs west to east along the northern boundary of the Appellant's property.

[59] The Town noted that, on April 18, 2019, the Appellant commenced further work to fill in portions of the watercourse that had been cleared by the overflow of water from surrounding lands and the vault over the preceding weeks. The Town said the Appellant filled in the watercourse adjacent to the outfall and placed large rocks immediately adjacent to the outfall where the Appellant had previously removed the outfall culvert.

[60] The Town noted that section 36(1) of the *Water Act* prohibits a person from commencing or continuing an activity unless that activity is subject to an approval or otherwise authorized under the *Water Act*.⁵

[61] The Town noted the definition of “activity” under section 1(b) of the *Water Act*, and the definition of “works” under section 1(mmm).⁶

⁵ Section 36(1) of the *Water Act* states:

“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.”

⁶ Section 1(b) of the *Water Act* states:

“‘activity’ means

- (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
 - (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....”

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

“‘works’ means 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.”

[62] The Town stated the Appellant conducted a series of activities, as defined in the *Water Act*, without approval and in contravention of section 36 of the *Water Act*, including:

- a. the removal and disturbance of works;
- b. the disturbance of ground; and
- c. the carrying out of an undertaking on lands and within a water body,

all of which has altered the flow and level of water and changed the direction of the flow of water.

[63] The Town argued the activities undertaken by the Appellant may have caused or are capable of causing the siltation of water, namely Upper Therien Lake, by placing soil into the watercourse.

[64] The Town explained it constructed and operates a storm water drainage system pursuant to Approval No. 1182-01-00 (the “Approval”), issued in November 1999, and pursuant to Registration No. 263110-00-00 (the “Registration”) for the construction, operation, and reclamation of a storm drainage system. The Town stated the Registration authorizes the construction and operation of the storm water outfall at 53rd Street and 43rd Avenue in the Town of St. Paul.

[65] The Town explained there is typographical error in the Registration indicating the outfall immediately north of the Lands is to discharge into a field on SE 4-58-9-W4M and then into Upper Therien Lake, but the Lands are the SW and SE 5-58-9-W4M. The Town said it is a typographical error since any outfall intended to discharge into SE 4-58-9-W4M is dealt with by three other outfalls, and SE 4-58-9-W4M is primarily covered by Upper Therien Lake. The Town stated the location of the outfall at the intersection of 53rd Street and 43rd Avenue is immediately north of the Lands, and there is an unnamed watercourse flowing from the outfall site across the Lands to Upper Therien Lake.

[66] The Town explained the water flowing through the outfall comes from a low lying area behind properties on 53rd Street and water collected in ponds on the St. Paul Golf Course (“Golf Course”). The Town said the water flowing through the Golf Course originates from an area northwest of the Town, in the County of St. Paul, drawing surface water from an

850 hectare basin. The water flows over a mix of agricultural, natural, park, and developed lands.

[67] The Town explained the outfall directs water flow from the pond on the southeast corner of the Golf Course and the 53rd Street low lying area into the existing watercourse on the Lands and through to Upper Therien Lake. The outfall consists of an inlet pipe running from the southeast pond on the Golf Course to the vault, and a second inlet pipe routes water from the low lying area east of 53rd Street. The Town said the outfall would route the water for discharge into the unnamed watercourse through a corrugated metal outlet pipe on the south side of the vault.

[68] The Town emphasized its storm water drainage system only collects surface water runoff and is entirely independent of its sanitary sewage system.

[69] The Town stated the Appellant has removed the corrugated outlet metal pipe and blocked the vault at the discharge point, repeatedly filled in the watercourse, and raised the grade of the watercourse and surrounding lands. The Town said these actions effectively blocked the operation of the outfall and prevented the storm water drainage system from operating as designed. The Town explained this results in the water backing up to a level where it forces the water back into the Golf Course and the 53rd Street low lying area, and causes water to overflow from the top of the vault and spills onto the Lands. The Town stated that forcing the water upstream and into areas where water would not usually flow into, prevents or delays water from reaching Upper Therien Lake.

[70] The Town explained that preventing water from flowing past the outfall causes significant flooding events, usually in the spring but also during significant rainfall events. The Town stated disturbance at the outfall causes:

1. water to back up within the ponds on the Golf Course, which in turn floods the Golf Course and then floods lands adjacent to the Golf Course, such as 53rd Street west of the outfall;
2. the backup of water to the northeast into low lying areas immediately east of properties on 53rd Street, causing a serious flooding risk for adjacent residents, which can only be mitigated by the Town's intervention;
3. the vault to overflow and water to escape to the east, west, and southward across the Lands, creating new channels and partially unblocking the

unnamed watercourse, and likely carrying sediment downstream to Upper Therien Lake; and

4. the Town to have to intervene each time water levels rise and flooding begins. The Town had to secure heavy duty pumping equipment to drain the vault and transport large volumes of water away from the area to mitigate flooding in the residential area, Golf Course, and other adjacent lands, including the Lands. The Town has not been able to pump enough water to prevent flooding altogether.

[71] The Town stated the mitigative actions it has had to take due to the Appellant's interference with the storm water drainage system imposed a significant demand on the Town's personnel, infrastructure, and taxpayers.

[72] The Town submitted the terms and conditions in the Enforcement Order should, at a minimum, be upheld. The Town stated that, given the harm done to the watercourse and the conduct of the Appellant, the terms and conditions should be expanded to ensure the watercourse is properly restored, the outfall is repaired and restored, and to ensure Upper Therien Lake has not been adversely impacted by the placement of soil in the watercourse.

[73] The Town noted the Director has the authority to require restoration of a watercourse to a condition satisfactory to the Director and to direct how the work is to be completed.

[74] The Town took the position that minimizing the effort and costs required of the Appellant to comply with the Enforcement Order, and minimizing the need for third party assistance, should not be a consideration in reviewing the terms and conditions of the Enforcement Order. The Town stated what needs to be considered is how to ensure the remedial work required is done properly and professionally.

[75] The Town did not believe the Appellant had the skills to determine the appropriate elevations of the watercourse to restore it and adjacent lands to pre-disturbance conditions, or to ensure the watercourse and surrounding lands are restored to these elevations.

[76] The Town submitted the Enforcement Order should be amended to require the Appellant retain a qualified consultant to analyze the pre-disturbance elevations and conditions of the watercourse, design a plan to reestablish those elevations and conditions, and do the work

or, at least, ensure the work done by the Appellant meets the design specifications set by the consultant.

[77] The Town submitted the terms and conditions of the Enforcement Order should direct the Appellant to allow the Town and its contractors to enter the Lands to access the watercourse and repair the outfall, including reinstallation of the corrugated metal pipe, and to ensure the outfall operates as designed.

[78] The Town stated the Appellant should be required to retain a consultant to review the potential impacts of the Appellant's activities on Upper Therien Lake, such as increased siltation, and provide a report summarizing the review to the Director.

[79] The Town stated the Appellant's allegations that it was putting water into the watercourse without authorization, the water running through the watercourse was contaminated sewer water, the flooding was damaging the Lands, and his land use concerns, were not relevant to the issues set for the hearing and were not supported by evidence.

[80] The Town stated it has authority, by way of the Approval and Registration, to discharge storm water into the unnamed watercourse on the Lands. The Town acknowledged the Appellant may be referring to the typographical error in the Registration for the outfall and 53rd Street and 43rd Avenue. The Town said it was clear the Registration intended to permit discharge of storm water from the outfall into the watercourse on the Lands, notwithstanding the typographical error.

[81] The Town reiterated the water captured by its storm water drainage system is surface water runoff, and the system is entirely independent from the Town's sanitary sewage system. The Town confirmed the storm water drainage system was not designed for and does not transport sewage.

[82] The Town explained that, on June 13, 2018, it tested water from the vault for a broad range of parameters, including dissolved metals and microbiological content. The Town stated the test results demonstrated the water was not contaminated sewage. It said the tests indicated elevated levels of coliforms, including fecal coliforms, but this was not unexpected given the majority of the water collected by the system originates from farm lands in the County.

[83] The Town stated it is not flooding the Lands, and it is the Appellant who is causing flooding on the Lands. The Town said any flooding on the Lands is a consequence of the Appellant's unlawful activities, including filling in the watercourse and blocking the outfall, thereby forcing the water overflowing in the vault to seek alternate routes to Upper Therien Lake across the Lands.

[84] The Town was uncertain what the Appellant was referring to when he alleged certain lands were a former nuisance ground. The Town noted that, based on documents attached to the Appellant's Notice of Appeal, the nuisance grounds may have been on the Lands located in the County. The Town stated the Appellant did not provide evidence to support his allegation the Town was responsible for buried materials on his lands or that it failed to replace soil as a consequence of a former project. The Town stated the Board has no jurisdiction to address these allegations and they are irrelevant to the issues in this appeal.

[85] The Town stated the Director had the jurisdiction to issue the Enforcement Order and had a well-established basis for issuing the Enforcement Order, including:

- a. the Appellant interfered with the watercourse by attempting to fill in the watercourse and modify the grades of the surrounding lands to prevent surface water from flowing through his property to Upper Therien Lake; and
- b. the Appellant disturbed the Town's storm water drainage works by repeated attempts to remove the watercourse, removing the outflow culvert that forms a part of the outfall, and trying to prevent the storm water drainage system from functioning as designed.

[86] The Town noted the Appellant did not dispute his actions.

[87] The Town argued the Appellant failed to meet his onus of proving, on a balance of probabilities, the Director made an error of law or jurisdiction or material error of fact to justify granting his appeal.

[88] The Town submitted the appeal should be dismissed subject to the Board expanding and elaborating the terms and conditions of the Enforcement Order to ensure the remedial work required to restore the watercourse is done effectively by qualified persons and potential impacts to Upper Therien Lake are properly assessed.

C. Director

[89] The Director noted the Appellant did not dispute he undertook the activity in contravention of the *Water Act*, and he did not raise any factual or legal grounds to challenge the Enforcement Order.

[90] The Director explained he issued the Enforcement Order to the Appellant for commencing or continuing an activity without an approval, specifically disturbing works, disturbing soil in and around a water body, and obstructing a water body, thereby altering the flow or changing the location of water in the water body.

[91] The Director explained the Town operates a storm water drainage system that directs water into the unnamed waterbody that crosses the Lands and drains southeast into Upper Therien Lake.

[92] The Director stated the 2017 Order was issued to the Appellant for commencing or continuing an activity without an approval, specifically for obstructing the watercourse on his property, and altering the flow or changing the location of the water in the watercourse. The Director said the 2017 Order was not complied with, and the 2018 spring melt partially opened the obstruction placed in the watercourse by the Appellant.

[93] The Director said the Town provided photographs of the Appellant conducting activities that obstructed the watercourse. AEP staff verified that heavy equipment had been used to obstruct the watercourse.

[94] The Director said an Environmental Protection Officer (“EPO”) walked the watercourse from the outfall to Upper Therien Lake on November 5, 2018, and noted additional activities that obstructed the watercourse on the Lands. The Director issued an amendment to the Enforcement Order on November 26, 2018, which included the additional activities and gave the Appellant additional time to comply with the Enforcement Order.

[95] The Director noted the Appellant has not complied with the Enforcement Order, and the Appellant undertook additional activities that obstructed the watercourse in April 2019.

[96] The Director submitted he had jurisdiction to issue the Enforcement Order pursuant to section 135(1) of the *Water Act*.⁷ The Director noted that, under section 142(1)(h) of the *Water Act*, commencing or continuing an activity except under an approval or as otherwise authorized under the *Water Act*, is an offence.⁸

[97] The Director stated the Appellant has the onus of proof to demonstrate on a balance of probabilities the Director erred in the determination of a material fact, and only when the Appellant meets his onus of proof does the onus fall on the Director to prove his decision to issue the Enforcement Order was appropriate.

[98] The Director argued the Appellant failed to provide any evidence that demonstrated or suggested the Director made an error in issuing the Enforcement Order. The Director noted the Appellant did not dispute any of the facts on which the Enforcement Order was issued.

[99] The Director submitted the appeal should be dismissed without further discussion.

[100] The Director explained the Director's Record includes facts that support the issuance of the Enforcement Order.

[101] The Director stated the Appellant did not dispute, and actually admitted, he is the person who undertook the activities identified in the Enforcement Order.

[102] The Director stated the definition of "activity" in section 1(1)(b) of the *Water Act* includes the following activities commenced and continued by the Appellant and which altered the flow of water or changed the location of water:

- a. disturbing works;

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 142(1)(h) of the *Water Act* provides:

"A person who ... commences or continues an activity except under an approval or as otherwise authorized by this Act... is guilty of an offence."

- b. disturbing ground in and around a water body, specifically the watercourse; and
- c. obstructing the watercourse on the Lands.⁹

[103] The Director noted the Appellant does not have an approval and is not authorized under the *Water Act* to commence or continue any of the activities.

[104] The Director explained the Town operates a storm water drainage system, authorized under the Registration, with an outfall structure immediately north of the Lands at the corner of 53rd Street and 43rd Avenue in the Town.¹⁰ The Director said the placing, constructing, installing, and removal of an outfall structure that discharges to a water body is subject to the *Code of Practice for Outfall Structures on Water Bodies* and is designated as an activity that does not require an approval.¹¹ The Director noted the outfall is a works as defined in section 1(1)(mmm) of the *Water Act*.¹²

⁹ Section 1(b) of the *Water Act* states:

“‘activity’ means

- (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
 - (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....”

¹⁰ The Town holds EPEA Registration 263110-00-00 for the construction, operation, and reclamation of the storm water drainage system.

¹¹ See: Section 3(5) of the *Water (Ministerial) Regulation*, Alta. Reg. 205/98, which provides:

“The placing, constructing, installing, maintaining, replacing or removing of an outfall structure that discharges to a water body, as defined in the *Code of Practice for Outfall Structures on Water Bodies*, published by the Department and as amended or replaced from time to time, is designated as an activity that does not require an approval if, and only if, the activity is

[105] The Director noted the definition of a water body under section 1(1)(ggg) of the *Water Act* includes any location where water flows or is present.¹³ The Director stated the photographs clearly indicate water is present and flowing in the watercourse on the Lands, and a wetland specialist for AEP confirmed the watercourse is a natural drainage pathway. Based on this, the Director considered the watercourse a water body where water is present and has been flowing for a lengthy period of time.

[106] The Director stated he had the appropriate factual basis to issue the Enforcement Order to the Appellant.

[107] The Director referred to section 136(1) of the *Water Act*, which identifies what can be included in an enforcement order.¹⁴

-
- (a) commenced,
 - (b) continued, and
 - (c) carried out

in accordance with the *Code of Practice for Outfall Structures on Water Bodies.*”

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

“‘Works’ means 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.”

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

“‘water body’ means 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....”

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

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

- (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;

[108] The Director noted the Enforcement Order requires the Appellant to do the following:

- a. immediately remove all soil and any other material within the watercourse on the Lands;
- b. deposit the removed soil and any other material away from the watercourse;
- c. restore the watercourse elevation where the soil and other material has been removed;
- d. seed the area and take steps to prevent further siltation or erosion;
- e. inform the Director in writing upon completion of the requirements; and
- f. not place any further soil or any other material in the watercourse on the Lands.

[109] The Director stated the terms and conditions in the Enforcement Order are within the authority of the Director to include. He explained the terms and conditions were the minimal steps required to correct the unauthorized activities, would require minimal cost, and could likely be completed without assistance from a third party contractor or consultant.

-
- (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; ...
 - (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; ...
 - (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; ...
 - (r) the taking of any other measure that the Director considers necessary to facilitate compliance with the order or this Act.”

[110] The Director said the terms and conditions in the Enforcement Order are appropriate, and the Appellant did not raise any concerns regarding the appropriateness of the terms and conditions.

[111] The Director believed the Appellant's use of "*habeas corpus*" in his submission suggested the burden of proof be reversed so the Director must prove the Enforcement Order was validly issued.

[112] The Director noted the Appellant's concerns raised in his Notice of Appeal were:

- a. the Town or a developer was putting water into the watercourse without authorization or permission;
- b. the water running through the watercourse was contaminated sewer water, which was impacting his health and use of the Lands for agricultural purposes;
- c. flooding was damaging the Lands; and
- d. land use concerns, including the Town not replacing black dirt during the development of the area neighbouring the Lands, previous use of the area as a nuisance grounds, and buried materials in the area.

[113] The Director stated none of the above listed matters was relevant to the Enforcement Order or the issues set by the Board and, therefore, they should not be considered by the Board. The Director said the Appellant's concerns did not appear to be based on fact and no evidence was provided to support his concerns.

[114] The Director stated the Town has all the authorizations and permissions it requires to operate its storm water drainage system and discharge the water into the watercourse. The Director said the water being discharged by the Town into the watercourse is storm water, not sewer water. The Director noted the Town took samples of the water at the point where it discharges onto the Lands, and the analysis completed showed the water was consistent with water flowing through a golf course and not contaminated sewer water.

[115] The Director stated it was evident the watercourse has been a natural drainage path to Upper Therien Lake from at least 1965. The Director said any manmade changes channelized the flow but did not change the location of the flow down the watercourse. The

Director argued the existence of the watercourse and its characteristics as a natural drainage path are the actual concerns of the Appellant, not the Enforcement Order.

[116] The Director noted the Appellant's issues with the Town related to the replacement of soil and the residential use of the area adjacent to the Lands are not within the Board's jurisdiction.

[117] The Director stated he carefully considered the evidence before him and appropriately exercised his discretion in issuing the Enforcement Order.

[118] The Director argued the Appellant did not meet his onus of demonstrating there was a material error of fact or an error in law or jurisdiction. The Director noted the Appellant admitted to the essential facts of the unauthorized activity, which formed the basis of the Enforcement Order. The Director also noted the Appellant did not raise concerns with the terms and conditions of the Enforcement Order.

[119] The Director requested the Board confirm the Enforcement Order as issued.

D. Appellant's Response Submission

[120] The Appellant argued the Director was in collusion with the Town and developer to commit fraud.

[121] The Appellant stated he was discriminated against since the Director refused to investigate the three complaints he filed.

[122] The Appellant noted the decision of the Court of Queen's Bench regarding an action taken by the Director requiring the Appellant to comply with the 2017 Order. The Appellant explained the Court dismissed the action against him. He estimated there has been about \$45,000.00 damage to his property.

[123] The Appellant said there was no agreement to allow diversion of water across his land, and there is no watercourse on the Lands. He stated he did not block the water flow. The Appellant expressed concern of contamination from the Town runoff polluting his Lands.

[124] The Appellant stated that farming is a way of life, and to deprive it would be endangering his health and life. He referred to the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14.¹⁵

[125] The Appellant said he wants his land repaired to its original state and compensation for the wrongdoing he has suffered.

IV. ANALYSIS

[126] Under section 99(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), the Board must provide the Minister with its recommendations regarding the issues in these appeals.¹⁶

[127] The issues before the Board were:

1. Was the Enforcement Order properly issued? This considers both the Director’s legal jurisdiction and the factual basis for the Enforcement Order.
2. Are the terms and conditions in the Enforcement Order reasonable?

A. Issuance of Enforcement Order

[128] Under section 135(1) of the *Water Act*, the Director has the authority to issue an enforcement order when there has been a contravention of the legislation.¹⁷ Commencing or

¹⁵ At the hearing, the Appellant, upon questioning by the Board, stated the section of the *Alberta Bill of Rights* he was referring to was section 1(a), which provides:

“It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression, the following human rights and fundamental freedoms, namely:

- (a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law....”

¹⁶ 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.”

¹⁷ 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

continuing an activity without an authorization is a contravention of the *Water Act* under section 142(1)(h).¹⁸

[129] Section 36(1) of the *Water Act* states a person cannot commence or continue an activity without authorization.¹⁹ An “activity” is defined under section 1(b) of the *Water Act*.²⁰

[130] In this case, the Director had evidence, through complaints and photographs provided by the Town and field verification by AEP staff that an activity, specifically the filling of the watercourse with soil and other material, had occurred. It is also important to note the Appellant did not deny he was responsible for filling in the watercourse. These actions altered the flow of water, an “activity” under the *Water Act*. Although the Appellant believed he was

contravened this Act, whether or not that person has been charged or convicted in respect of the contravention.”

¹⁸ Section 142(1)(h) of the *Water Act* states:

“A person who ... commences or continues an activity except under an approval or as otherwise authorized by this Act... is guilty of an offence.”

¹⁹ Section 36(1) of the *Water Act* states:

“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.”

²⁰ Section 1(b) of the *Water Act* defines an “activity” as:

“(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

- (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 subclause (i) or (ii) that is conducted by a licensee in a works that is owned by the licensee, unless specified in the regulations....”

doing what he was allowed to do to protect his Lands, his actions resulted in an activity that required an authorization.

[131] The evidence presented to the Board, through submissions and photographs, clearly showed the Appellant was conducting an activity in the watercourse, and he did not provide any evidence to show he had an authorization to conduct the activity.

[132] Therefore, in response to the first issue considered by the Board, the Director had the jurisdiction to issue the Enforcement Order to the Appellant for conducting an activity in the watercourse without authorization, being an offence under section 142(1)(h) of the *Water Act*.

[133] With respect to the Director's authority to issue the Enforcement Order, the Board notes the argument of the Appellant references the *Alberta Bill of Rights* and, in particular, "the right of an individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law...."²¹

[134] The Board understands the Director follows a process of offering a person to whom he is considering issuing an enforcement order, or other form of enforcement action, the opportunity to attend a "due process" meeting. In this meeting, the Director discusses the evidence he has and his intention to issue an enforcement order, and provides an opportunity for the intended recipient to respond. In the Board's view, this is consistent with the *Alberta Bill of Rights*.

[135] If the Director does not carry out this process correctly or the person does not avail themselves of the opportunity, the person to whom the enforcement order is issued still has access to the appeal process conducted by the Board. In this case, the Appellant has taken advantage of the due process opportunity the Board provides. As part of this process, the Appellant had:

1. a full copy of the Director's Record upon which the Director made his decision;
2. the opportunity to bring any challenges to the Board's process that he wanted in the form of preliminary motions;

²¹ Section 1(a) of the *Alberta Bill of Rights*.

3. the opportunity to provide the Board with written and oral submissions and evidence;
4. the opportunity to review the Director's and the Town's written submissions before the hearing;
5. the right to cross-examine the Director's and the Town's witnesses; and
6. the opportunity to provide closing submissions and respond to the closing submissions of the Director and the Town.

[136] In summary, the Appellant was afforded due process to respond to the decision of the Director to issue the Enforcement Order and, as a result, the requirements of the *Alberta Bill of Rights* have been met.

B. Terms and Conditions

[137] The onus is on the Appellant to provide sufficient, reliable, and relevant evidence if he wants the Board to recommend to the Minister that the Enforcement Order be reversed or varied. Based on the evidence and arguments presented by the Parties and the Town, the Board is not convinced it should recommend to the Minister the Enforcement Order be reversed. However, the Board does find the evidence supports a recommendation the Enforcement Order be varied in order to clarify certain aspects of the Enforcement Order.

[138] When there are issues between rural property owners and urban development, the Director must consider what steps should be taken to mitigate the impacts on rural properties while allowing urban development to proceed.

[139] The Town's consultants, WSP, were retained to develop a Water Management Plan in conjunction with the County. The Board considers this a productive endeavour to alleviate issues arising from urban development adjacent to rural areas. As urbanization increases, there will be more impacts on rural lands. This was identified in the Stormwater Management Guidelines issued by AEP in 1999. This document recognizes the impact urbanization may have on rural watersheds, and states:

“Where urbanization occurs in an essentially rural watershed the changes that occur in the hydrologic regime are very significant to the downstream system. Specific changes that will usually occur:

- (a) An overall increase in the annual volume of runoff,
- (b) A much faster rate of runoff for any given event,
- (c) Summer rainfall events that can result in significant runoff from the urbanized areas, while little or no runoff comes from the rural portion of the basin.
- (d) Stream base flows (low flows) decrease

The seasonal change in the runoff pattern is particularly important. Many rural drainage channels routinely overflow their banks and cause flooding of adjacent land during spring runoff. Usually this is not a problem, provided the excess water drains away quickly. In many cases, particularly in the upper reaches of a watershed, the primary drainage routes are not incised channels but broad overland flow routes active only during spring runoff. During the summer months these flood plains may be productive farmland where flooding would cause extensive economic damage.”²²

[140] The Town requested the Board recommend the Minister vary the Enforcement Order by including conditions with specific instructions the Appellant would have to follow. As demonstrated by the Town’s comments regarding the terms and conditions of the Enforcement Order, the Director had the authority to include specific terms and conditions on what was expected from the Appellant to comply with the Enforcement Order. Instead, the Director provided the Appellant some leniency in what steps the Appellant would take to ensure the desired outcome of the Enforcement Order, to restore the watercourse, was achieved.

[141] The Director issued the Enforcement Order with generalized requirements rather than specific requirements, with the intent of encouraging the Appellant to conduct the work quickly to prevent further flooding in the Town. However, the Appellant did not undertake any of the work required under the Enforcement Order and, in fact, continued conducting work in the watercourse in April 2019. The Appellant said the work he did in the watercourse was his effort to comply with the 2017 Order.

²² Stormwater Management Guidelines for the Province of Alberta, Alberta Environmental Protection, January 1999, at page 2-3.

[142] The Board understands the Town's argument that the Board should recommend the Enforcement Order be varied to require a consultant complete the work, thereby providing additional assurance the work is done correctly. The Director was of the view this was not necessary as he had confidence the work required to prevent further flooding within the Town could be undertaken by the Appellant. The Director noted that if this work was not completed to his satisfaction, additional orders could be issued.

[143] Taking both the Town's and the Director's concerns and approaches into consideration, the Board recommends the Appellant provide an appropriate plan to complete the required work. The plan must be provided to the Director for his approval, and the work the Appellant undertakes must comply with the plan as approved. If the Appellant is unable to complete the work required in the approved plan, the Appellant may have to hire the services of a third party who has the experience to complete the work to the satisfaction of the Director.

[144] At the hearing, the Town stated it was willing to conduct work on the Lands to establish a proper water management system. If the Appellant agrees to allow the Town to conduct the work, the conditions of the Enforcement Order will be fulfilled at no cost to the Appellant. The work would still have to be completed to the satisfaction of the Director. However, if the Appellant refuses to work with the Town to re-establish the watercourse and water management system, the Appellant will be responsible for completing the work as specified in the Enforcement Order, whether he completes the work himself or retains a third party to do it. Either way, the work will still have to be completed to the Director's satisfaction.

[145] The Board recommends the Enforcement Order be varied to require the Appellant provide a plan to the Director, for the Director's approval, within 30 days of the Minister issuing the Ministerial Order. The plan must detail the work the Appellant intends to undertake in order to comply with the Enforcement Order. The work required under the plan must start within 30 days after the plan is approved by the Director, and all work must be completed by October 31, 2019, or by such other date set by the Director.

[146] The Director argued the matters raised by the Appellant in his Notice of Appeal, including the Town putting water into the watercourse without authorization, and the impacts of the water running through the Lands, should not be considered by the Board. To the contrary,

the Board is of the view this information provides an understanding and possible reasoning behind the Appellant's actions and relates to the issue of whether the Director was correct in issuing the Enforcement Order or whether there were extenuating circumstances that might have avoided the need to issue the Enforcement Order.

[147] The Director submitted the Appellant's real concerns were the existence of the watercourse on his property and the characteristics of the natural drainage pathway. The Board does not entirely agree with this argument. The watercourse has been on the Appellant's property for years, and it does not appear he had concerns with it running across his property. Water was usually only in the watercourse during spring runoff and high rainfall events and, as the Appellant explained, was only there for a few days before the land became workable again. The Appellant's concerns were raised due to the increased amount of water entering his property from the Town's outfall.

[148] The Appellant stated he had notified AEP on three occasions about the water flowing from Town property onto the Lands. A review of the Director's Record provided no indication the first two complaints were investigated. In response to questioning by the Board, the Director could not say with any degree of certainty the complaints were investigated, and if so, what the results of the investigation showed. Even though, as suggested by the Director, there might have been issues with staffing at that time, it is important that complaints be followed up and if further investigation is not required, notes are kept on file to explain the reasoning for not investigating further. It would also be helpful to notify the complainant about the outcome of the investigation, even if the complaint is not investigated further. This is even more important when there are staffing issues in order to provide other staff with a more complete understanding of events.

[149] At the hearing, the Director stated the 2017 Order was repealed in the recitals to the current Enforcement Order. The Board did not find this to be the case, therefore, the Board recommends the Minister repeal the 2017 Order.

C. Concerns Raised by the Appellant

[150] In his initial written submission, the Appellant raised the following concerns with the issuance of the Enforcement Order:

- “1. Habeas corpus;
2. discrimination;
3. double jeopardy;
4. false accusation;
5. defamation;
6. punitive damages;
7. trespassing rules; and
8. Water Act rules.”²³

[151] *Habeas corpus* is a petition to the court for an order that a person being detained be produced before a Justice of the Court of Queen’s Bench for a hearing to decide whether the detention is lawful. The principal of *habeas corpus* is not applicable to an appeal to the Board and is not within the jurisdiction of the Board. However, as noted, based on his responses to questions from the Board at the hearing, the Board understands the Appellant is using the idea of *habeas corpus* to advance an argument similar to his argument based on the *Alberta Bill of Rights*, being his demand for due process by the Director to issue the Enforcement Order.

[152] As discussed, in the Board’s view, the hearing process the Appellant participated in provided him with due process. As a result, the Board finds the Director’s decision to issue the Enforcement Order to be appropriate.

[153] The Board understands the Appellant’s argument about discrimination relates to the apparent failure of AEP to follow up on the complaints he filed, while following up on complaints made by other parties against him. While the Board believes that AEP could have done better in following up on all the Appellant’s complaints, this does not constitute discrimination, nor does it undermine the appropriateness of the Director’s decision to issue the Enforcement Order.

²³ Appellant’s submission, dated April 24, 2019.

[154] While not discussed in detail at the hearing, the Appellant argued the current Enforcement Order should be dismissed because the Court of Queen's Bench refused to require compliance with the 2017 Order. While not strictly appropriate here, in criminal law terms, this argument is referred to as "double jeopardy."

[155] The Board has very little evidence as to the basis for the Court of Queen's Bench decision. In particular, the Appellant has simply explained that in his view, he won before the Court of Queen's Bench and the Director should not be allowed to try again by issuing a second Enforcement Order. The Director testified it was his understanding the Court of Queen's Bench refused to require compliance with the 2017 Order to restore the watercourse because, by the time the matter reached the Court, "mother nature" had already restored the flow of water in the watercourse.

[156] Based on the information before it, in the Board's view, the Court of Queen's Bench hearing regarding the 2017 Order is irrelevant to the appeal currently before the Board. There is no provision in the *Water Act* that limits the ability of the Director to issue more than one Enforcement Order. As result, the Board finds there is no "double jeopardy" principal at work here that would limit the ability of the Director to issue the Enforcement Order in this case.

[157] The Appellant has also identified concerns relating to false accusation and defamation. The Appellant did not present any substantive arguments or evidence regarding these concerns. In general, the Board understands the Appellant believes that many of the statements made by other parties are not true, and he feels they are harming his reputation. However, as discussed, the Appellant does not dispute the fact that he undertook work on the Lands, although he rejects the idea that there is a watercourse on the Lands. Respectfully, the arguments about false accusations are not relevant to the Board's decision in this matter, and the Board does not have the jurisdiction to make any decision on defamation. In making this statement, the Board wishes to be clear that it is not suggesting any defamatory statements have been made by any person in these proceedings.

[158] The Appellant argued he suffered \$45,000 damage to his property, and he intends to pursue this claim, along with punitive damages. The Board does not have the authority to

grant either regular or punitive damages, and during his testimony at the hearing, the Appellant acknowledged this.

[159] The Appellant suggested that a number of people have trespassed on the Lands. He has also argued the Town does not have the authority to discharge water onto the Lands and this constitutes trespassing. The Board notes there were questions at the hearing about how the portion of the outlet structure that was on the Lands was constructed and the testimony was the Appellant installed the outlet pipe on his own Lands. The Board notes any work that is undertaken on the Lands by any person other than the Appellant needs to be legally authorized to do so, by agreement or some type of order. However, in the Board's view, the discharge of water into the watercourse by the Town does not constitute trespass and does not undermine the authority of the Director to issue the Enforcement Order.

[160] Finally, with respect to the "*Water Act Rules*", the Board is confident this has been adequately addressed previously in the Board's report and recommendations.

V. RECOMMENDATIONS

[161] The Board recommends the Minister vary *Water Act* Enforcement Order No. WA-EO-2018/09-RDNSR as follows:

1. Repeal WA-EO-2017-06-RDNSR;
2. Repeal conditions 1 through 5 of WA-EO-2018/09-RDNSR and replace with the following:

“1. Belland must prepare a plan (the “Plan”) to restore the Watercourse and adjacent area and provide it to the Director for his approval, within 30 days of the issuance of the Ministerial Order. The Plan shall include, at a minimum, the following requirements:

- a. all soils and any other material within the Watercourse on the Lands shall be removed immediately;
- b. all soils and any other material removed from the Watercourse shall be deposited to a location on the Lands that is at least 10 metres away from the Watercourse;
- c. restore the Watercourse elevation – where the soil and any other material is removed – to pre-disturbance conditions

that match the depth and width of the adjacent undisturbed areas of the Watercourse;

- d. seed the areas in and around the Watercourse with naturally occurring vegetation similar to that in the immediate vicinity of the Watercourse on the Lands; and
 - e. take steps to prevent any further siltation or erosion of the Watercourse.
3. Belland shall complete the requirements of the Plan, as approved by the Director, no later than **October 31, 2019**, or the date set by the Director in writing.
 4. Belland shall inform the Director in writing immediately upon completion of the requirements of the Plan and no later than **November 15, 2019**, or the date set by the Director in writing.
 5. Belland shall not, at any time, place any soil or any other material within the Watercourse on the Lands.”

[162] In accordance with sections 100(2) and 103 of EPEA,²⁴ the Board shall provide copies of this Report and Recommendations, and the decision of the Minister, to the following:

1. Mr. Donald Belland;
2. Ms. Lisa Semenchuk and Ms. Meagan Bryson, Alberta Justice and Solicitor General, on behalf of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks; and
3. Mr. Derek King, Brownlee LLP., on behalf of the Town of St. Paul.

[53] The Board notes neither of the Parties, nor the Town, reserved their right to ask for costs.

Dated on June 21, 2019, at Edmonton, Alberta.

²⁴ Section 100(2) of EPEA states:

“The Minister shall immediately give notice of any decision made under this section to the Board and the Board shall, immediately on receipt of notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the Board and to all other persons who the Board considers should receive notice of the decision.”

Section 103 of EPEA provides:

“On complying with section 100(2), the Board shall publish or otherwise make available the Board’s report and recommendations, or a summary of them, and a notice of the Minister’s decision in the manner the Board considers appropriate.”

-original signed by-
Alex MacWilliam
Board Chair

-original signed by-
Chris Powter
Board Member

-original signed by-
Sarah Palmer
Board Member