
ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – October 28, 2021

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

-and-

IN THE MATTER OF an appeal filed by Landrex Hunter Ridge Inc., with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 00425700-00-00 to Landrex Hunter Ridge Inc.

Cite as: *Landrex Hunter Ridge Inc. v. Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks*, (28 October 2021), Appeal No. 20-022-R (A.E.A.B.), 2021 ABEAB 26.

WRITTEN HEARING BEFORE:

Ms. Meg Barker, Acting Board Chair; Mr. Dave McGee, Board Member; and Mr. Chris Powter, Board Member.

PARTIES:

Appellant: Landrex Hunter Ridge Inc., represented by Ms. Daina Young, Reynolds Mirth Richards and Farmer, LLP.

Director: Mr. Mohammad Habib, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

Intervenor: Mr. Martin Kaup.

EXECUTIVE SUMMARY

Landrex Hunter Ridge Inc. (Landrex) is developing a housing and retail project on lands it owns on the north side of St. Albert. As part of the project, Landrex applied to Alberta Environment and Parks (AEP) for an Approval under the *Water Act* to fill in several wetlands. AEP issued the Approval, which included the requirement for Landrex to pay a wetland replacement fee of \$1,235,006.00. Most of the wetland replacement fee related to the wetland identified as Wetland 11 (W11). W11 was found by the Director to have a size of 29.5 hectares and a relative wetland value category of “C”, which resulted in a wetland replacement fee of \$1,126,900.00.

Landrex appealed the Approval to the Environmental Appeals Board (the Board). Landrex argued the size of W11 should be reduced to 5.0 hectares because anthropogenic disturbances* had increased the size. The reduction of W11’s size would decrease the wetland replacement fee for W11 from \$1,126,900.00 to \$191,000.00.

The Board decided to hold a hearing by written submission for Landrex’s appeal. The Board requested and received written submissions from the parties regarding the appeal. Landrex revised the outcomes it sought in the appeal, seeking:

- (a) exclusion of W11 from the Wetland Policy, with no replacement fee owing, reducing the total wetland replacement fee for all the wetlands from \$1,235,006.00 to \$108,106.00; or
- (b) reducing the size of W11 to 16.44 hectares and changing the relative wetland value category from “C” to “D”, reducing the wetland replacement fee for W11 from \$1,126,900.00 to \$314,004.00, and reducing the total wetland replacement fee for all the wetlands from \$1,235,006.00 to \$422,110.00.

AEP requested the Board confirm the finding that the size of W11 is 29.5 hectares and its relative wetland value category is “C”. This would maintain the wetland replacement fee at \$1,126,900.00 for W11, and the total wetland replacement fee for all wetlands at \$1,235,006.00.

* “Anthropocentric disturbance” is defined as “a change in environmental conditions caused by human activity.” See Director’s Record, dated April 12, 2021, Alberta Wetland Classification System, June 1, 2015, at page v.

After reviewing the written submissions from the parties, the Board requested additional information. The Board reviewed the additional information provided by the parties, the written submissions, the legislation, the relevant policies and directives, and relevant caselaw. The Board found there were significant gaps in the information before it, particularly regarding the amount of water that may be flowing into W11 from unauthorized anthropogenic sources. Given the information gaps, the Board determined a reasonable interpretation of the available information and balancing of interests was to recommend that the Minister:

- (a) confirm the Director's determination that the size of W11 is 29.5 hectares;
- (b) order the relative wetland value category for W11 be varied from "C" to "D" as per the Alberta Wetland Policy;
- (c) order the wetland replacement fee for W11 be reduced from \$1,126,900.00 to \$563,450.00; and
- (d) order the total wetland replacement fee for all the wetlands in the Approval be reduced from \$1,235,006.00 to \$671,556.00.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Environmental Appeals Board (the “Board”) to the Minister of Environment and Parks (the “Minister”), regarding the appeal filed by Landrex Hunter Ridge Inc. (“Landrex” or the “Appellant”) of *Water Act* Approval 00425700-00-00 (the “Approval”), issued by the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the “Director”), to Landrex.

[2] The Board held a hearing by written submissions for the appeal. The Board found significant gaps in the evidence that required the Board to use its best judgment and expertise. After reviewing the written submissions, the Director’s Record, and relevant legislation, policy, and caselaw, the Board recommends the Minister:

1. confirm the Director’s finding that W11’s size is 29.5 hectares; and
2. vary the relative wetland value category for W11 from “C” to “D”;
3. order the wetland replacement fee for W11 be reduced from \$1,126,900.00 to \$563,450.00; and
4. order the total wetland replacement fee for all the wetlands in the Approval be reduced from \$1,235,006.00 to \$671,556.00.

Varying the relative wetland value category for W11 to “D” alters the replacement ratio to 1:1, the replacement fee for W11 from \$1,126,900.00 to \$563,450.00, and the total replacement fee for all the wetlands in the Approval from \$1,235,006.00 to \$671,556.00.

II. BACKGROUND

[3] Landrex is a land development company and the registered owner of lands legally described as W 21-54-25-W4 and NW 21-54-25-W4 (collectively, the “Lands”) located in the City of St. Albert, near Sturgeon County.¹ Historical records indicated the Lands were surveyed in 1889 and 1911, with both surveys showing a natural wetland occurring in the same location as

¹ The City of St. Albert annexed the Lands from Sturgeon County.

W11. Sometime prior to 1911 a drainage ditch was constructed in the wetland. In 1964 a weir was constructed downstream of the Lands as part of Sturgeon County's Carrot Creek drainage system in the area, which included the Lands.

[4] On November 2, 2018, Landrex applied for an Approval under the the *Water Act*, R.S.A. 2000, c. W-3, as part of a commercial and residential development proposed for the Lands. The application included the infilling of eight wetlands and disturbance of three more.²

[5] Alberta Environment and Parks' ("AEP") Alberta Wetland Policy September 2013, and related directives ("Wetland Policy") provide that an applicant for an Approval under the *Water Act* that may impact a wetland, must assess the "value" of that wetland. The assessment may be done using the Alberta Wetland Rapid Evaluation Tool – Actual (ABWRET-A) Guide ("ABWRET-A").³ The assessment considers criteria such as biodiversity, water quality improvement, flood reduction, and the value of the wetland to humans, and generates a score for the wetland, which is used to assign a relative wetland value category to the wetland, ranging from A (high value) to D (low value). When an applicant for an Approval cannot avoid impacting wetlands and the activity proposed in the Approval application will result in permanent loss of the wetland the applicant may construct a new wetland, restore a previously drained wetland, or pay a wetland replacement fee. The relative wetland value category determines the size of a new or restored wetland, or as in this case, the amount of the wetland replacement fee.

[6] As part of Landrex's application for the Approval, WSP Canada Inc. ("WSP") conducted an assessment of the wetlands and provided a Wetland Assessment and Impact Report ("WAIR") in 2018. WSP used the ABWRET-A to assess the relative wetland value category for each of the twelve wetlands involved in the application and found that all but one wetland had a "D" value. Wetland 11 ("W11") was found to have a "C" value, which required a replacement ratio of 2:1 (double the size of the wetland). WSP found W11's size to be 29.5 hectares. Based on these findings, the wetland replacement fee for W11 would be \$1,126,900.00.

² Director's Record, Application, dated February 18, 2021, at Tab 2.1.

[7] In accordance with section 108(1)(a) of the *Water Act*,⁴ AEP required public notice of Landrex's application to be published in the local newspaper on May 8, 2019.⁵ A fourteen-day period was provided for members of the public to file Statements of Concern with the Director. On June 12, 2019, the Director advised Landrex that no Statements of Concern were received during the notice period.

[8] On June 18, 2019, Landrex wrote to AEP and requested a reduction in the "final in[-]lieu replacement area that will be considered for Wetland W11."⁶ Landrex acknowledged W11 had a current area of 29.5 hectares, but argued that most of the size was due to seasonal backflow of water from the Carrot Creek Drain No. 1 onto the Lands. Landrex calculated the appropriate in-lieu replacement area for W11 was 5.0 hectares, which would reduce the replacement fee from \$1,126,900.00 to \$191,000.00.

[9] Included with Landrex's June 18, 2019 letter, was a letter dated April 3, 2019, from Sturgeon County, entitled "Landrex Hunter Ridge Inc. v. HMTQ and Sturgeon County, Action No. 1409-13136, Settlement Agreement between Landrex Hunter Ridge Inc. and Sturgeon County."⁷ The letter stated its purpose was to "set out the history relating to the above noted matter and to propose terms of full and final settlement of the above captioned litigation as between Sturgeon County and Landrex Hunter Ridge Inc."⁸ The letter noted the weir in Carrot Creek Drain No. 1 caused a backflow of water onto the Lands and into W11. The letter further stated that without the backflow flooding, the size of W11 would be 5 hectares. As part of the proposed settlement, the letter said Sturgeon County would support Landrex's *Water Act* application, and Landrex would discontinue its legal action against Sturgeon County.

³ Alberta Wetland Rapid Evaluation Tool – Actual (ABWRET-A) Guide, Director's Record, dated April 12, 2021.

⁴ Section 108(1)(a) of the *Water Act* states: "An applicant for an Approval... shall provide notice of the application in accordance with the regulations."

⁵ Director's Record, dated February 18, 2021, Application, at Tab 4.

⁶ Director's Record, dated February 18, 2021, Application, at Tab 15.

⁷ Director's Record, dated February 18, 2021, Application, at Tab 15.

⁸ Director's Record, dated February 18, 2021, Application, at Tab 15.

[10] The June 18, 2019 letter also included a settlement agreement between Landrex and Sturgeon County dated April 23, 2019, which reflected the terms outlined in the April 3, 2019 letter.

[11] AEP reviewed the information provided by Landrex, and on September 25, 2019, determined the evidence suggested W11 “existed in its current size and shape since at least 1911.” AEP found W11 was a “naturally occurring wetland, and there is no evidence to suggest that the wetland has been artificially augmented in size.”⁹

[12] On April 9, 2020, Mr. Martin Kaup filed a Statement of Concern with AEP.¹⁰ The Director responded on July 15, 2020, advising Mr. Kaup the notice period for submissions of statements of concern expired on May 28, 2019. The Director wrote that although Mr. Kaup’s submission would not be accepted as a statement of concern, the Director would consider the issues Mr. Kaup raised as part of AEP’s review of the Approval application.¹¹

[13] On July 16, 2020, AEP conducted a site visit to the Lands. On August 20, 2020, AEP wetland staff wrote a memorandum to the Director regarding Landrex’s *Water Act* application. The memorandum concluded:

- (a) the wetland changed in shape since 1889 but has remained a similar size;
- (b) AEP’s wetland ecologist reviewed the WAIR and found the wetlands were naturally occurring and are therefore subject to the wetland policy and replacement costs as calculated, including the classification of “C” for W11;
- (c) the modeling data from the WSP reports supported the opinion that the Carrot Creek drainage project and the 1964 weir were not causing significant flooding in the wetlands; and
- (d) the proposed development of the Lands will not cause flooding to Mr. Kaup’s lands.

⁹ Director’s Record, dated February 18, 2021, Application, at Tab 7.

¹⁰ Director’s Record, dated February 18, 2021, Application, at Tab 34.

¹¹ Director’s Record, dated February 18, 2021, Statement of Concern, at Tab 5.

[14] On August 26, 2020, the Director issued the Approval to Landrex.¹² The Approval required Landrex to pay a wetland replacement fee for 64.66 acres totaling \$1,235,006.00. The Director found the relative wetland value category of “C” and the size of 29.5 hectares for W11 were appropriate. The wetland replacement fee for W11 was assessed at \$1,126,900.00.

[15] The Board received a Notice of Appeal from Landrex on September 1, 2020, appealing the terms of the Approval. Landrex requested the Board recommend the area considered by the Director in calculating the wetland replacement fee be reduced from 29.5 hectares to 5.0 hectares, which would change the fee from \$1,126,900.00 to \$191,000.00.¹³

[16] On September 2, 2020, the Board wrote to the Director and Landrex (collectively, the “Parties”) acknowledging receipt of the Notice of Appeal and requesting the Director provide the records related to the Approval (the “Director’s Record”).

[17] On September 18, 2020, the Board received a Notice of Appeal from Mr. Kaup, appealing the issuance of the Approval. Mr. Kaup alleged the Approval did not adequately address existing drainage and flow issues on the Lands, which caused flooding of his and his neighbours’ properties north (upstream) of the Lands. Mr. Kaup requested the Board order the Parties to resolve the drainage problems before proceeding with the Approval.

[18] On September 21, 2020, the Board wrote to the Parties and Mr. Kaup acknowledging receipt of Mr. Kaup’s Notice of Appeal.

[19] On September 25, 2020, the Director made a preliminary motion to the Board requesting it dismiss Mr. Kaup’s Notice of Appeal (“Preliminary Motion”). Between September 25, 2020, and March 24, 2021, the Board requested and received submissions and answers to the Board’s questions regarding the Director’s Preliminary Motion.

¹² Director’s Record, dated February 18, 2021, Decision, at Tab 7.

¹³ Landrex’s Notice of Appeal, dated September 1, 2020, at page 5.

[20] On February 18, 2021, the Director provided the Director's Record to the Board, which the Board distributed to the Parties and Mr. Kaup on February 20, 2021.

[21] On March 24, 2021, the Board issued its decision on the Preliminary Motion. The Board found Mr. Kaup did not file a valid Statement of Concern with the Director. The Board, therefore, dismissed Mr. Kaup's Notice of Appeal.¹⁴

[22] On March 25, 2021, the Board scheduled a hearing by written submission for Landrex's appeal. Also on March 25, 2021, Mr. Kaup applied to intervene in the hearing. The Board requested and received comments from the Parties regarding the intervenor application.

[23] On April 7, 2021, the Board wrote to the Parties and Mr. Kaup and advised the issue for the written hearing would be: Is the wetland replacement fee for wetland 11 (W11) appropriately calculated having regard to Alberta Environment and Parks' wetland policy and directives?

[24] On April 12, 2021, the Director provided the Board with AEP's Wetland Policies and related directives, which the Board distributed to the Parties on April 14, 2021.

[25] On April 20, 2021, the Board permitted Mr. Kaup to intervene and provide the Board with a written submission regarding the historical size of W11.

[26] The Board requested and received written submissions from the Parties and Mr. Kaup from April 23, 2021, to June 11, 2021.

[27] On July 8, 2021, the Board wrote to the Parties and Mr. Kaup with the following supplementary questions from the Panel appointed to hear the appeal:

- "1. It appears Public Lands has not claimed Wetland 11, or any portion of Wetland 11, as public land. The Director is requested to provide the Board with any analysis conducted by Public Lands that led to the

¹⁴ See: *Kaup v. Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Landrex Hunter Ridge Inc.* (24 March 2021), Appeal No. 20-025-D (A.E.A.B.), 2021 ABEAB 7.

decision not to claim all or part of Wetland 11 as public land. This decision appears to have been communicated by Mr. Wayne Holland in 2012. (See: Director's Record, Volume 1, Application, Tab 6, pdf page 44.)

2. Are there any authorizations (registrations, approvals, or licences) that allow for the drainage of water into Wetland 11 or the wetland complex associated with Wetland 11? This includes on any lands upstream or in road allowances. Are there any authorizations that allow for the drainage of water out of Wetland 11 or the wetland complex associated with Wetland 11? For example, has the ditch identified in the 1911 survey ever been authorized, or has the weir constructed in 1964 ever been authorized?
3. Do the Parties have additional information about the anthropogenic effects impacting Wetland 11 or the wetland complex associated with Wetland 11? For example:
 - (1) Was hydrological information filed with Alberta Environment and Parks for the 1964 weir?
 - (2) Does the Appellant have any hydrological information available for the proposed construction of the bypass ditch?
4. Based on the 1911 survey, part of the original wetland appears to include what is now identified as the main basin, and part appears to include what is now identified as the north basin. (See: Appellant's Initial Submission, Tab 6, Attachment A) Working on the premise that the total area of the original wetland is 16.44 ha, what portion of this area is the main basin, and what portion of the area is the north basin?"¹⁵

[28] The Board received responses from the Parties on August 16 and 30, 2021.

[29] The Panel met again on September 30, 2021, to consider the Parties' responses and prepare its recommendations to the Minister.

III. INTERVENOR

[30] Pursuant to section 7.1 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"), the Board published a Notice of Hearing in the St. Albert Gazette, the Morinville-Gibbons Free Press, and the Morinville-Redwater Heartland Extra on March 31,

¹⁵ Board's letter, July 8, 2021, at pages 1-2.

2021. The Board also provided a copy of the Notice of Hearing on March 30, 2021 to the City of St. Albert and Sturgeon County to place on their public bulletin board or website. The Notice of Hearing was also placed on the Board's website, and a News Release was distributed on April 1, 2021 to the media throughout the Province by the Public Affairs Bureau. The Notice of Hearing notified the public of the hearing and requested that any person, other than the Parties, wanting to make representations before the Board, should contact the Board by April 14, 2021.

[31] On April 1, 2021, the Board received Mr. Kaup's request to be an intervenor in the written hearing. The Director and Landrex both commented that Mr. Kaup would not contribute to the hearing, but if the Board allowed Mr. Kaup to be an intervenor then his intervention should be limited to the issue under the appeal. On April 25, 2021, the Board decided to permit Mr. Kaup to intervene and provide the Board with a written submission regarding the historical size of W11. The Board's reasons for the decision follow.

[32] Under section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board has the authority to determine who can make representations before it. Section 95(6) of EPEA provides:

"Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matters before the Board to any person the Board considers should be allowed to make representations."

[33] Section 9 of the Regulation, requires the Board to determine whether a person submitting a request to make representations should be allowed to do so at the hearing of an appeal. Sections 9(2) and (3) of the Regulation provide:

"(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject matter of the notice of appeal and shall give the person written notice of that decision.

(3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission."

[34] Rule 14 of the Board's Rules of Practice details the test for determining intervenor status. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties; and
- if the intervention request is late, there are documented and sound reasons why the intervenor did not earlier file for such status.”

[35] The Board considered whether Mr. Kaup's intervention would meet the tests listed above and determined he may have relevant information regarding the historical size of W11. The Board, therefore, granted Mr. Kaup's request to intervene in the written hearing and limited his intervention to the issue of the historical size of the wetland.

IV. ISSUE

[36] The Board set the following issue for the written hearing:

Is the wetland replacement fee for wetland 11 (W11) appropriately calculated having regard to Alberta Environment and Parks' wetland policy and directives?

V. SUBMISSIONS

A. Martin Kaup – Intervenor

[37] Mr. Kaup stated he had been living near W11 since 1999. He said the area of W11, including the pooled water area, water-altered soil area, and water-tolerant vegetation was approximately 50 hectares in size.

[38] Mr. Kaup noted Sturgeon County landowner maps for 1959 and 1967 showed the area of pooled water was approximately 70 acres (28.3 hectares), and the current Sturgeon County property view map shows the area of pooled water to be approximately 60 acres (24.3 hectares).¹⁶

[39] Mr. Kaup estimated the water-altered soil area and water-tolerant vegetation is equal to the area of pooled water. He noted that portions of W11 can be cut for hay in some years, but it is not actively tilled for crops. Mr. Kaup stated W11 had historically been approximately 59 hectares in size.

B. Landrex

[40] Landrex stated the Wetland Policy only applies to natural wetlands. Landrex submitted W11 is not a natural wetland, and therefore the Wetland Policy does not apply to it and, therefore, no wetland replacement fee is owed.

[41] Alternatively, if the Wetland Policy does apply to W11, Landrex submitted:

- (a) a consideration of the purpose and intent of the *Water Act* and the relevant factors would result in the exclusion of W11 from the Wetland Policy, with no wetland replacement fee owing; or
- (b) the size of W11 should be reduced to 16.44 hectares, and the classification should be changed to “D”, which would reduce the wetland replacement fee.¹⁷

[42] Landrex noted that while the Director may consider AEP’s Wetland Policy in making a decision, it is not binding. Landrex noted the language used in sections 38(2) and (3) of the *Water Act*¹⁸ is “permissive, not mandatory.”¹⁹

¹⁶ The Board converted acres into hectares for consistency.

¹⁷ Landrex’s Initial Submission, dated April 30, 2020, at Tab 6, Second Addendum, page 4.

¹⁸ Sections 38 (2) and (3) of the *Water Act* state:

- “(2) 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,

[43] Landrex advised,

“Subsequent to the filing of the Notice of Appeal, WSP undertook further analysis of the anthropogenic influences on W11, the delineation of W11’s boundaries, and the appropriate ABWRET-A score for W11. WSP’s findings and conclusions are contained in the WAIR Addendum dated December 18, 2020 (the ‘First Addendum’) and WAIR Addendum Recommendations dated March 1, 2021 (the ‘Second Addendum’).”²⁰

[44] Landrex stated the WAIR First Addendum and Second Addendum demonstrated that W11 has been significantly affected by human activity. Landrex noted WSP stated in the First Addendum that:

- (a) W11 has a higher frequency of inundation than the other wetlands on the same Lands, which is attributable to drainage improvements within the wetland and flow control imposed by a weir downstream;
- (b) ecological differences between W11 and the other wetlands is likely related to the use of W11 for stormwater management;
- (c) over one hundred years ago, local drainage improvements were implemented, incorporating W11 as part of a managed regional stormwater system;
- (d) the hydrological pattern within W11 was influenced by the construction of a drainage ditch which resulted in more frequent seasonal inundations and complete drying in the fall; and

-
- (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.
 - (3) The Director may issue an Approval subject to any terms and conditions that the Director considers appropriate.”

¹⁹ Landrex’s Initial Submission, dated April 30, 2021, at paragraph 19.

²⁰ Landrex’s Initial Submission, dated April 30, 2021, at paragraph 11. See Landrex’s Initial Submission, dated April 30, 2012, Appendix 5 (the First Addendum) and Appendix 6 (the Second Addendum).

- (e) soil development in organic matter accumulation in W11 is different from the other wetlands, which are natural isolated wetlands, indicating that W11 is being affected by upstream water flow.

[45] Landrex noted AEP required it to construct a bypass ditch to address drainage issues it had not contributed to or caused. Landrex estimated the ditch cost \$200,000.00. Additionally, flooding on the Lands required more expensive grading, which Landrex estimated to cost \$450,000.00. Landrex submitted it also incurred consulting and legal fees for this appeal.

[46] Landrex referred to section 2 of the *Water Act*,²¹ which sets out the purpose of the legislation. Landrex wrote: “Requiring the Appellant alone to bear financial responsibility for historical actions taken by or on behalf of the Province of Alberta is not consistent with these purposes, regardless of whether such action resulted in the creation of wetland features.”²²

[47] Landrex requested the Board amend the Approval and delete the wetland replacement fee for W11, which would reduce the total wetland replacement fee from \$1,235,006.00 to \$108,106.00.

[48] Alternatively, Landrex proposed that:

- (a) the ABWRET-A for W11 be adjusted from “C” to “D,” which would consider “the extent of human disturbance due to past agricultural use,

²¹ Section 2 of the *Water Act* provides:

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

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

²² Landrex’s Initial Submission, dated April 30, 2021, at paragraph 33.

land development and drainage improvements to support regional stormwater management;”²³ and

- (b) the 1911 survey boundary that found the wetland was 16.44 hectares would be the appropriate size for the adjusted relative wetland value category assessment.

The proposed adjustments would reduce the wetland replacement fee for W11 from \$1,126,900.00 to \$314,004.00 and reduce the total wetland replacement fee from \$1,235,006.00 to \$422,110.00.²⁴

C. Director

[49] The Director noted that “Alberta’s Wetland Policy is the keystone provincial policy to conserve, restore, protect, and manage Alberta’s wetlands to sustain the benefits they provide to the environment, society, and economy.”²⁵ The Director referred to various directives which enable AEP to implement the Wetland Policy, including:

- Alberta Wetland Mitigation Directive;
- Alberta Wetland Assessment and Impact Report Directive;
- Alberta Wetland Identification and Delineation Directive; and
- ABWRET-A.26

[50] The Director acknowledged that the Wetland Policy and its related directives do not define “natural wetland” or when a wetland is no longer considered natural. However, the Director stated, “It is abundantly clear that natural wetlands can continue to exist as such even if they have been extensively disturbed by human activities such as ditching and drainage. The wetland directives expressly account for human disturbances.”²⁷ The Director said human disturbances, such as ditching and drainage, do not turn a natural wetland into an anthropogenic waterbody.

²³ Landrex’s Initial Submission, dated April 30, 2021, at paragraph 28.

²⁴ Landrex’s Initial Submission, dated April 30, 2021, at paragraph 29.

²⁵ Director’s Response Submission, dated May 14, 2021, at paragraph 25.

²⁶ Director’s Record, dated April 12, 2021, Wetland Policies and Directives.

²⁷ Director’s Response Submission, dated May 14, 2021, at paragraph 34.

[51] The Director noted the AEP Wetland Specialist determined that the First Addendum was flawed as it did not account for natural variation between W11, which is a large wetland complex, and the control group of smaller isolated wetlands. The Director stated AEP's Wetland Specialist reviewed the historical and current evidence and found:

- (a) W11 has remained in the same location and the same approximate size for over 130 years and is identifiable in surveys done in 1889 and 1911;
- (b) W11 is identifiable in an aerial photo taken of the Lands in 1950;
- (c) the 1886 and 1911 surveys focused on the open water portion of the wetland and, therefore, are not a reliable source for determining the boundary of W11;
- (d) the downstream weir is at a lower elevation than W11 and, therefore, does not cause back flooding onto the Lands except during high flow events for a short period;
- (e) the Carrot Creek drainage project does not appear to have had any significant impact on W11, and the drainage ditch system generally drains water from the Lands into Carrot Creek;
- (f) presence of wetland-dependant wildlife and vegetation indicates W11 is a wetland and not a stormwater pond;
- (g) in the WAIR, WSP accurately determined the size of W11 to be 29.6 hectares and correctly assessed the relative wetland value category as a "C"; and
- (h) the calculation in the WAIR of the wetland replacement fee of \$1,126,900.00 was appropriate.²⁸

[52] The Director stated, "AEP's Wetland Specialist found that WSP's conclusions in the Second Addendum were not supported by evidence, the characterizations were misleading, and it did not accord with the Wetland Policy and wetland directives"²⁹ and that the Second Addendum appeared "to contradict WSP's conclusions in the WAIR and in its First Addendum."³⁰

²⁸ Director's Response Submissions, dated May 14, 2021, at paragraphs 44, 47, 50, 59, 63, and 70.

²⁹ Director's Response Submissions, dated May 14, 2021, at paragraph 57.

³⁰ Director's Response Submissions, dated May 14, 2021, at paragraph 58.

[53] The Director submitted that if the Board accepted Landrex's argument that W11 is not a natural wetland due to anthropogenic modifications, it "could open the door to every proponent arguing that a wetland that has been disturbed by human activity is excluded from the Wetland Policy."³¹ The Director also stated that acceptance of Landrex's argument could provide an incentive for those seeking approvals to disturb wetlands to have it excluded from the Policy and avoid the replacement fee.

[54] The Director requested the Board confirm the Approval as issued with no change to the wetland replacement fee for W11.

D. Landrex - Rebuttal

[55] Landrex noted the First Addendum stated W11 was a natural wetland but had been significantly altered by past anthropogenic drainage actions. Landrex submitted the Wetland Policy and Directives and specifically, the ABWRET-A, does not account for human influences on wetlands or clearly delineate between wetlands changed by human impact and naturally occurring wetlands. Landrex said the ABWRET-A is a rapid assessment tool that is not designed for detailed data and analysis, such as was considered in the First and Second Addendums.

[56] Landrex submitted the wetland replacement fee should reflect the actual value of the wetland, but the ABWRET-A score for W11 did not correspond with the actual value as found in the First and Second Addendums. Landrex stated, "Fairness and accuracy is, in the Appellant's submission, more important than uniformity particularly where uniformity would require unqualified reliance upon a tool that is not transparent in its application."³²

[57] Landrex said the wetland replacement fee for W11 "is not equitable or consistent with the purpose and intent of the *Water Act*, when all of the relevant information is

³¹ Director's Response Submission, dated May 14, 2021, at paragraph 52.

³² Landrex's Rebuttal Submission, dated June 11, 2021, at paragraph 28.

considered.”³³ Landrex reiterated its request that the Board amend the Approval by deleting the wetland replacement fee for W11. Alternatively, Landrex requested the Board recommend the size of W11 be reduced to 16.44 hectares and the relative wetland value category changed to “D”, which would reduce the wetland replacement fee for W11 to \$314,004.00.³⁴

VI. RESPONSE TO THE BOARD’S QUESTIONS

[58] On July 8, 2021, the Board requested the Parties and Mr. Kaup respond to four supplementary questions. The supplementary questions and a summary of the responses are listed below:

Question 1

“It appears Public Lands has not claimed Wetland 11, or any portion of Wetland 11, as public land. The Director is requested to provide the Board with any analysis conducted by Public Lands that led to the decision not to claim all or part of Wetland 11 as public land. This decision appears to have been communicated by Mr. Wayne Holland in 2012. (See: Director's Record, Volume 1, Application, Tab 6, pdf page 44.)”³⁵

[59] In answer to Question 1, the Director provided a copy of an email from AEP’s Water Bodies Unit dated May 21, 2014. The email, referring to W11, stated:

“A water body in the SW 21-54-25-5 was also previously investigated and found to be not claimable. This water body has also been affected by a ditch since the early twenties and there is no evidence that it has met the criteria of permanence prior to the ditching.”³⁶

[60] The Director stated Public Lands’ decision not to claim W11 as public land is based on determining the wetland’s historical permanence. The Director submitted the semi-permanent nature of W11 does not meet the criteria for Crown ownership.

³³ Landrex’s Rebuttal Submission, dated June 11, 2021, at paragraph 30.

³⁴ Landrex’s Rebuttal Submission, dated June 11, 2021, at paragraph 32.

³⁵ Board’s letter, dated July 8, 2021, at pages 1-2.

³⁶ Director’s Letter, dated July 30, 2021, at page 1.

Question 2

“Are there any authorizations (registrations, approvals, or licences) that allow for the drainage of water into Wetland 11 or the wetland complex associated with Wetland 11? This includes on any lands upstream or in road allowances. Are there any authorizations that allow for the drainage of water out of Wetland 11 or the wetland complex associated with Wetland 11? For example, has the ditch identified in the 1911 survey ever been authorized, or has the weir constructed in 1964 ever been authorized?”³⁷

[61] The Director stated:

“The two licences associated with this file are included in the memo to file from Andrew Patton dated August 20, 2020 in the Director’s Record (Priority No. 1986-10-21-01 and Priority No. 1977-11-04-01 each issued to the MD of Sturgeon No. 90).³⁸

With respect to authorizations related to the ditch in the 1911 survey, a review of AEP’s file 14928 indicates that the Northwest Government constructed Government Drain No. 1 between 1900 and 1902 to dewater a large tract of land between St. Albert and Morinville in order to construct a road. AEP’s file 14928 includes hundreds of pages of correspondence related to the construction and cost of Government Drain No. 1 but no water authorization per se. It is not clear if a statutory authorization was required for this activity in 1900-1902.

With respect to the 1964 weir, AEP is not aware of an authorization being issued for the weir under the Water Resources Act. The weir appears to have been authorized under an agreement between the Minister of Agriculture and Sturgeon County, which is included in the memo to file from Andrew Patton³⁹ dated August 20, 2020 in the Director’s Record.”⁴⁰

Question 3

“Do the Parties have additional information about the anthropogenic effects impacting Wetland 11 or the wetland complex associated with Wetland 11? For example:

- (1) Was hydrological information filed with Alberta Environment and Parks for the 1964 weir?

³⁷ Board’s letter, dated July 8, 2021, at pages 1-2.

³⁸ Director’s Record, dated February 18, 2021, Decision, at Tab 2.

³⁹ Director’s Record, dated February 18, 2021, Decision, at Tab 2.

⁴⁰ Director’s Response to the Board’s Questions, dated July 30, 2021, at page 3.

- (2) Does the Appellant have any hydrological information available for the proposed construction of the bypass ditch?”⁴¹

[62] The Director responded to Question 3 as follows:

“AEP does not have in its files any hydrological information filed in relation to the 1964 weir. AEP has the 1964 agreement noted above, final as-built plans for the weir once it was constructed, and correspondence related to cost sharing the construction of the weir.”⁴²

Question 4

“Based on the 1911 survey, part of the original wetland appears to include what is now identified as the main basin, and part appears to include what is now identified as the north basin. (See: Appellant's Initial Submission, Tab 6, Attachment A, pdf page 220.) Working on the premise that the total area of the original wetland is 16.44 ha, what portion of this area is the main basin, and what portion of the area is the north basin?”⁴³

[63] The Director responded to Question 4 as follows:

“As explained in paragraph 59 of the Director's written submission, the AEP wetland specialist concluded that the 1886 and 1911 survey boundaries were not an appropriate delineation of the wetland boundary, as both surveys would have focused only on the open water portion of the wetland. 16.44 ha is **not** the area of the wetland or the wetland boundary, but rather only the area of open water of the wetland observed at the time of the survey. The assessment of W11 completed by WSP as part of the 2018 WAIR accurately accounted for the wetland area based on the applicable Alberta Wetland Policy directives and guides, including a review of historical data in comparison to observed current conditions. Using the images on the historical land survey plans alone underestimates the wetland area and conflicts with the field verified information which supports the 2018 classification of W11.

Additionally, the 1886 and 1911 surveys show one wetland and no division of basins.⁴⁴ WSP started referring to the north basin and main basin as their way to try and differentiate the soils between isolated wetlands in the north in contrast with portions of W11.”⁴⁵ [Emphasis is the Director's.]

⁴¹ Board's letter, dated July 8, 2021, at pages 1-2.

⁴² Director's Response to the Board's Questions, July 30, 2021, at page 3.

⁴³ Board's letter, dated July 8, 2021, at pages 1-2.

⁴⁴ Director's Record, dated February 18, 2021, Decision, at Tab 2.

⁴⁵ Director's Response to the Board's Questions, dated July 30, 2021, at pages 3 to 4.

[64] Landrex's response to the Board's supplementary questions was not specific to any of the questions. Landrex referred to a letter dated July 23, 1963, from the Department of Water Resources (Alberta) to Sturgeon County. Landrex noted the quality of the letter was poor, however, Landrex stated it set out the basis for an agreement between the Province of Alberta and the County of Sturgeon, dated May 20, 1964. Landrex said the agreement:

- (a) acknowledged the construction of the Carrot Creek Drain No. 1 by the Northwest Territories Government;
- (b) required Sturgeon County to reconstruct a portion of the drainage system to provide flood protection to lands adjacent to the Carrot Creek Drain No. 1 outlet;
- (c) provides that the Government of Alberta would pay 70% of the cost of the work to a maximum of \$16,500.00; and
- (d) noted Sturgeon County specifically agreed to assume all responsibility for any damages to private property both during and following the work on the drainage project.

[65] Landrex also referred to multiple invoices issued to Sturgeon County for the construction of the works required under the agreement.⁴⁶

[66] Landrex referred to a letter dated September 30, 1964, from the Government to surveyors regarding the Carrot Creek Drain No. 1. The letter enclosed a report to Sturgeon County that noted some property owners had taken flood mitigation measures on their own lands which aggravated the flooding situation on neighbouring lands. Landrex stated the report said that the floodwater on private lands originated from the system of ditches adjacent to Highway #2.

[67] Landrex also referred to an email from Mr. Jeff Heck of WSP comparing a portion of W11 in 1911 to its present size.⁴⁷

[68] Landrex submitted:

⁴⁶ Landrex's Response to the Board's Questions, dated July 30, 2021, at pages 1 to 2.

⁴⁷ Landrex's Response to the Board's Questions, dated July 30, 2021, at page 2.

“These documents demonstrate that drainage in the area has been extensively modified and impacted by actions undertaken by provincial and local governments and their predecessors, as well as private landowners. In the Appellant's submission, this highlights the inequity that would result from treating W11 in its entirety as a ‘natural wetland’ for which full compensation is required to be paid, without taking into account these historical considerations and the unique physical characteristics of W11.”⁴⁸

[69] Mr. Kaup did not submit responses to the supplementary questions. Although provided the opportunity, neither the Director nor Landrex provided follow-up response submissions regarding the Board’s supplementary questions.

VII. ANALYSIS

[70] The issue for the written hearing was set by the Board as follows:

Is the wetland replacement fee for wetland 11 (W11) appropriately calculated having regard to Alberta Environment and Parks' wetland policy and directives?

[71] The Board identified three issues that are central to this issue:

- A. Was the Director correct in applying the Wetland Policy and Directives to the decision on the wetland replacement fee for W11?
- B. Did the Director correctly determine the size and class of W11?
- C. Is the wetland replacement fee assessed by the Director for W11 appropriate?

[72] The Board considered the Director’s Record, written submissions, the responses to the Board’s supplementary questions, relevant legislation, policy and caselaw in determining its recommendations to the Minister.

⁴⁸ Landrex’s Response to the Board’s Questions, dated July 30, 2021, at page 2.

A. Was the Director correct in applying the Wetland Policy and Directives?

[73] Landrex stated the Wetland Policy only applied to “natural” wetlands, and W11 is not a natural wetland due to the impact on it from anthropogenic factors. Landrex submitted W11 should be excluded from the Wetland Policy.

[74] The Director argued that natural wetland is still natural despite human disturbance. The Director stated the Wetland Policy Directives expressly account for human impact on wetlands.

[75] The Wetland Policy states:

“This Policy covers:

1. Natural wetlands in Alberta, including bogs, fens, swamps, marshes, and shallow open water.
2. All restored natural wetlands, as well as wetlands constructed for the purposes of wetland replacement.”⁴⁹

[76] The Board notes “natural” wetland is not defined in the *Water Act*, the *Water (Ministerial) Regulation*,⁵⁰ nor in the Wetland Policy. The Board considers this to be an unfortunate omission. In the absence of a clear definition of “natural”, the Board looks to the context of the term’s use to determine if the Wetland Policy applies to W11. The Board notes the following:

- (a) the Wetland Policy considers “shallow open water” as a natural wetland;
- (b) in the ABWRET-A, human disturbance is mentioned as a condition to review when assessing the wetland;⁵¹
- (c) in the Alberta Wetland Identification and Delineation Directive, human activity is recognized as an impact that can complicate the identification and delineation of a wetland;⁵² and

⁴⁹ Director’s Record, dated April 12, 2021, Alberta Wetland Policy, September 2013, at page 7.

⁵⁰ *Water (Ministerial) Regulation*, AR 205/98.

⁵¹ Director’s Record, dated April 12, 2021, Alberta Wetland Rapid Evaluation Tool – Actual (BWRET-A), Water Conservation, 2015, No. 9, at pages 18, 47, and 49.

- (d) the Alberta Wetland Assessment and Impact Report Directive notes that unauthorized impacts to wetlands must be brought into compliance prior to the consideration of a new application.⁵³

[77] The Directives cite human activity and impact on the wetland as a consideration in the overall assessment of the wetland but do not provide for a natural wetland to be changed to a non-natural wetland due to human impact.

[78] Based on the above findings, in the Board's opinion, a "natural" wetland refers to a wetland's origins rather than its present condition. A wetland is "natural" if it was formed without human interference. Wetlands that are human-made, other than wetlands that are restored and constructed as replacement wetlands, are not "natural."⁵⁴

[79] The Board notes the Public Lands section of AEP did not claim Crown ownership of the bed and shores of W11 because the wetland was deemed to be semi-permanent. Although a finding by AEP that the bed and shores are public lands would have made the Board's deliberations easier, it is not necessary for this appeal. There is a distinct difference between what is required for bed and shores to be "title vested in the Crown"⁵⁵ and the requirements for a water body to be classified as a wetland.⁵⁶

[80] Section 3(2) of the *Water Act* states: "The property in and the right to the diversion and use of all water in the Province is vested in Her Majesty in right of Alberta except as provided for in the regulations." As the owner of the water, the Government of Alberta has

⁵² Director's Record, dated April 12, 2021, Alberta Wetland Identification and Delineation Directive, June 2015, at page 22.

⁵³ Director's Record, dated April 12, 2021, Alberta Wetland Assessment and Impact Report Directive, June 2017, at page 9.

⁵⁴ Director's Record, dated April 12, 2021, Alberta Wetland Policy, September 2013, at page 7.

⁵⁵ Section 3(1) of the Public Lands Act R.S.A. 2000, c. P-40, states:
"Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of
(a) all permanent and naturally occurring bodies of water, and
(b) all naturally occurring rivers, streams, watercourses and lakes,
is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before, on or after May 31, 1984 does not convey title to those beds or shores."

⁵⁶ See: Director's Record, April 12, 2021, Alberta Wetland Policy September 2013, at page 4.

the authority to determine what anthropogenic influences are acceptable to specific wetlands. The Government of Alberta may approve modifications to wetlands that increase or decrease the wetland's size or relative value.

[81] The Board has considered anthropogenic impacts on wetlands and how to address such impacts in a wetland assessment. The Board finds the following principles helpful in evaluating wetlands impacted by anthropogenic activities:

- wetlands that have been affected by a modification approved by AEP under the *Water Act* (e.g., a ditch or a weir) should be assessed with the impacts of the modification considered as a natural feature of the wetland;
- wetlands that have been affected by unauthorized disturbances to the wetland should not be assessed until the unauthorized disturbances are addressed by AEP Compliance or, alternatively, the assessment should consider what the wetland may have been without the unauthorized disturbances.⁵⁷

[82] There is no evidence to suggest W11 is not a naturally occurring wetland. The Parties and Mr. Kaup have provided evidence that W11 has been impacted historically by anthropogenic activities. While such impacts may influence the assessment of W11's wetland relative value category, they do not change W11's status as a natural wetland.

[83] The Board finds the Wetland Policy applies to W11, and the Director was correct to apply the Wetland Policy and Directives to the decision on the wetland replacement fee for W11. A replacement fee is payable for the removal of W11.

B. Did the Director correctly determine the size and classification?

[84] Landrex's application included the WAIR prepared by WSP, which determined the wetland area for W11 was 29.5 hectares.⁵⁸ Landrex's Initial Submission acknowledged W11's current size is 29.5, but noted the 1911 survey showed the wetland did not range as far

⁵⁷ AEP Compliance is the branch of AEP that investigates contraventions of Approvals and the *Water Act* and may issue penalties and orders for contraventions.

north as it does today. In the Notice of Appeal, Landrex stated W11 was 5 hectares. However, in Landrex's submissions, Landrex submitted W11's size should be assessed at 16.44 hectares based on the 1911 survey.⁵⁹ In the WAIR, WSP assessed W11's relative wetland value category as a "C".

[85] The Director stated W11 maintained a similar size for over 130 years. The Director noted the WAIR identified 29.5 hectares as the appropriate size for W11. The Director agreed with the WAIR assessment that W11 was in a "C" category.

[86] Mr. Kaup stated W11's size increased over the years, and it is now 59 hectares. The Board notes that Mr. Kaup's evidence was from observations taken from a distance as a lay person and is inconsistent with evidence from the Parties. However, Mr. Kaup's information that he has witnessed changes in the size of W11 since 1999 supports an assumption that there was an anthropogenic impact on the size of the wetland.

[87] WSP assessed W11 in the WAIR based on a desktop review and a field program. The desktop review involved examining historical aerial photographs, government databases, and literature review. WSP wrote:

"During the historical aerial photograph review, potential wetlands/wet areas were identified based on the presence of hydrological influences (areas of standing water, bare ground, patchy vegetation, etc.) and information from the Alberta Merged Wetland Inventory. The extents of these potential wetlands were then mapped in an orthorectified geographic information system for field confirmation."⁶⁰

[88] After the initial mapping was completed, WSP conducted a field program involving surveying and mapping the wetlands, obtaining field data "pertaining to soil (abundance of redox features [i.e., gleying and mottling], presence of organic material), vegetation, water parameters (i.e. pH, temperature, conductivity, total dissolved solids), and

⁵⁸ Director's Record, dated February 18, 2021, Application, at Tab 6.

⁵⁹ Landrex's Initial Submission, dated April 30, 2021, at Tab 6, page 215.

⁶⁰ Director's Record, dated February 18, 2021, Application, at Tab 6, page 58.

surrounding landscape context were recorded to confirm wetland extent.”⁶¹ WSP’s field program was consistent with the Alberta Wetland Identification and Delineation Directive, which recognizes that surface water is not always the indicator of a wetland boundary.⁶² After conducting the desktop review and field program, WSP found the size of W11 was 29.5 hectares and the relative wetland category was a “C”.⁶³

[89] The Board finds WSP’s WAIR assessment persuasive as it involved both a desktop review and a field program. Although WSP noted in the WAIR that there were anthropogenic impacts to W11, it did not reduce the size. Likewise, the finding in the WAIR that the relative wetland category warranted a “C” category was determined by the current condition of W11, not by speculation of what the category would be if the anthropogenic impacts were absent. The Board finds this approach appropriate as some of the impacts on W11, such as the weir and the ditch, were modifications approved by the Government of Alberta. As the Board noted earlier, wetlands that have been impacted by approved modifications should be assessed with the impacts of the modification considered as a natural feature of the wetland.

[90] The Board sought further information on anthropogenic upstream flows into W11 and, in its July 8, 2021 letter, the Board asked the Parties:

“Are there any authorizations (registrations, approvals, or licences) that allow for the drainage of water into Wetland 11 or the wetland complex associated with Wetland 11? ... Are there any authorizations that allow for the drainage of water out of Wetland 11 or the wetland complex associated with Wetland 11?”⁶⁴

[91] The Director responded that there are two licences (1986 and 1977 for the diversion/drainage of water) included in the Director’s Record. The Director also advised that the Northwest Government had authorized the 1911 ditch and that the 1964 weir had been effectively authorized by way of an agreement between the Minister of Agriculture and Sturgeon

⁶¹ Director’s Record, dated February 18, 2021, Application, at Tab 6, page 59.

⁶² Director’s Record, dated April 12, 2021, Alberta Wetland Identification and Delineation Directive, June 2015, at page 19.

⁶³ Director’s Record, dated February 18, 2021, Application, at Tab 6, page 67.

⁶⁴ Board’s letter, dated July 8, 2021, at pages 1-2.

County. Landrex referred to agreements between the Government of Alberta and Sturgeon County for drainage projects along with related letters, and invoices.

[92] The Board also asked: “Do the Parties have additional information about the anthropogenic effects impacting Wetland 11 or the wetland complex associated with Wetland 11?”⁶⁵ The Parties provided information on approved modifications, but little information on unauthorized anthropogenic modifications and possible impacts of the water flow into or out of W11. Landrex provided evidence regarding government correspondence from 1964 suggesting property owners taking flood mitigation measures into their own hands by conducting ditching to divert water. There is no indication regarding whether these flood mitigation measures were authorized.

[93] Without any confirmation that there is no unauthorized alteration of the flow from upstream of the W11, the Board is faced with a gap in the evidence that is before the Board. The Board must call on the expertise of the Board members to fill these gaps.

[94] The Board finds W11 is a natural wetland that has been impacted by approved modifications, namely the ditch, constructed in 1911, and the weir, constructed in 1964. The evidence demonstrates there is water flowing into W11, but the Board has insufficient information to determine on how much of the water flow is authorized, anthropogenic, or natural.

[95] The Board assumes if Landrex had conducted a study of the amount of unauthorized water flowing into W11 the sources could have been identified and quantified. Information on the quantity and quality of the unauthorized flow would be necessary to determine the impacts on W11.

⁶⁵ Board’s letter, dated July 8, 2021, at pages 1-2.

[96] The Board finds:

- (a) the assessment of W11's size at 29.5 hectares is acceptable because it was assessed with the approved ditch and weir in place and it was originally submitted by Landrex and approved by the Director;
- (b) there is sufficient evidence to demonstrate there is unauthorized anthropogenic flow of water into W11, which may impact its relative wetland value category; and
- (c) the wetlands surrounding W11 are all assessed a relative wetland value of "D" and, if not for the unauthorized anthropogenic flow of water into W11, it too would likely be categorized at a value of "D".

[97] The Board finds it reasonable to conclude that unauthorized anthropogenic water flow moves through the wetland to the height of the weir, increases the frequency at which the wetland fills above the minimum height set by the approved weir and the duration of the water supply. The unauthorized flow may increase the water levels in W11 temporarily until the water flows over the weir or absorbs into the ground and vegetation. The increased frequency and duration of water levels has impacted the soil and caused greater vegetative growth in W11, altering the relative wetland value category from "D" to "C". The Board recommends the relative wetland value category for W11 be changed to "D", which is consistent with the surrounding wetlands and is what the category would likely be if not for the unauthorized anthropogenic water flow.

[98] The weir and ditch are modifications that have impacted W11, but these modifications were authorized by AEP and, therefore the impacts are acceptable. The Board, therefore, recommends the assessed size of W11 remain as 29.5 hectares, which includes the impacts of the weir and ditch.

C. Is the wetland replacement fee assessed by the Director appropriate?

[99] The Board notes that Landrex stated extra water flow into the Lands required the construction of a bypass ditch and extensive grading, the costs of which totalled approximately \$650,000.00. Landrex also noted it incurred consulting and legal fees for this appeal. Landrex

did not appeal these items in the Notice of Appeal. Landrex's costs are not relevant to the issues before the Board.

[100] The Board finds it would be unreasonable to expect Landrex, or any developer, to pay wetland replacement fees for a wetland that has been increased in size or quality by unauthorized water flows. As the Board is recommending changing the relative wetland value category for W11 to "D" the wetland replacement fee assessed by the Director is no longer appropriate.

[101] Changing W11's relative wetland value category to "D" alters the replacement ratio from 2:1 to 1:1. Retaining the assessed size for W11 as 29.5 hectares combined with the "D" category reduces the wetland replacement fee for W11 from \$1,126,900.00 to \$563,450.00.

D. Summary

[102] The Board notes if Landrex is not satisfied with the Board's recommendation, they can withdraw the *Water Act* application, conduct a study on the impact of unauthorized anthropogenic flows into W11, request that AEP investigate, and reapply with the new information.

[103] Without information quantifying the amount of unauthorized water flow into W11, the Board has sought to make recommendations that are a reasonable interpretation of the available information and balance of interests.

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

1. Ms. Daina Young, Reynolds Mirth Richard and Farmer, on behalf of Landrex Hunter Ridge Inc.;
2. Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General, on behalf of the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks; and

3. Mr. Martin Kaup.

VIII. RECOMMENDATIONS

[105] The Board recommends the Minister:

1. confirm the Director's determination that the size of W11 is 29.5 hectares;
2. order the relative wetland value category for W11 be varied from "C" to "D" as per the Alberta Wetland Policy;
3. order the wetland replacement fee for W11 be reduced from \$1,126,900.00 to \$563,450.00; and
4. order the total wetland replacement fee for all the wetlands in the Approval be reduced from \$1,235,006.00 to \$671,556.00.

Dated on October 28, 2021, at Edmonton, Alberta.

"original signed by"

Meg Barker
Acting Board Chair

"original signed by"

Dave McGee
Board Member

"original signed by"

Chris Powter
Board Member



ALBERTA

ENVIRONMENT AND PARKS

Office of the Minister

Government House Leader

MLA, Rimbey-Rocky Mountain House-Sundre

Ministerial Order
06/2022

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

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

Order Respecting Environmental Appeals Board
Appeal No. 20-022

I, Sonya Savage, Acting Minister of Environment and Parks, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 20-022.

Dated at the City of Edmonton, in the Province of Alberta, this 2nd day of March, 2022.

Sonya Savage
Acting Minister of
Environment and Parks

APPENDIX

Order Respecting Environmental Appeals Board Appeal No. 20-022

With respect to the decision of the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the “Director”), to issue *Water Act* Approval No. 00425700-00-00 (the “Approval”) to Landrex Hunter Ridge Inc., I, Sonya Savage, Acting Minister of Environment and Parks, order that the Approval is varied as follows:

1. the size of Wetland 11 is confirmed to be 29.5 hectares;
2. the relative wetland value category for Wetland 11 is changed from “C” to “D”;
3. the wetland replacement fee for Wetland 11 is reduced from \$1,126,900.00 to \$563,450.00;
4. the total wetland replacement fee for the lands covered in the Approval is reduced from \$1,235,006.00 to \$671,556.00;
5. condition 3.2 of the Approval is amended by deleting the phrase “Table 4-3 Summary of Wetland Replacement via in Lieu Payment” and replacing it with the phrase “Appendix B to this Approval – Summary of Wetland Replacement via in Lieu Payment”;
6. condition 5 of the Approval is amended by deleting the phrase “on or before September 30, 2020” and replacing it with the phrase “within 45 days of the date of the Minister’s Order in EAB Appeal No. 20-022”; and
7. the Approval is amended by adding the following to the end of the Approval:

“Appendix B: Summary of Wetland Replacement via in Lieu Payment

| WETLAND ID | INTERSECTED AREA ¹ (ha) | RELATIVE WETLAND VALUE | REPLACEMENT | | | ESTIMATED IN LIEU FEE |
|--------------|--|------------------------------|-------------|--------------|--------------------|-----------------------------|
| | | | RATIO | AREA (ha) | VALUE (\$/ha) | |
| W1 | 0.26 | D | 1:1 | 0.26 | \$19,100.00 | \$4,966.00 |
| W2 | 0.29 | D | 1:1 | 0.29 | \$19,100.00 | \$5,539.00 |
| W3 | 0.32 | D | 1:1 | 0.32 | \$19,100.00 | \$6,112.00 |
| W4 | 1.16 | D | 1:1 | 1.16 | \$19,100.00 | \$22,156.00 |
| W5 | 0.04 | D | 1:1 | 0.04 | \$19,100.00 | \$764.00 |
| W6 | 1.67 | D | 1:1 | 1.67 | \$19,100.00 | \$31,897.00 |
| W7 | 0.43 | D | 1:1 | 0.43 | \$19,100.00 | \$8,213.00 |
| W8 | 0.26 | D | 1:1 | 0.26 | \$19,100.00 | \$4,966.00 |
| W9 | 0.41 | D | 1:1 | 0.41 | \$19,100.00 | \$7,831.00 |
| W10 | 0.45 | D | 1:1 | 0.45 | \$19,100.00 | \$8,595.00 |
| W11 | 29.5 | D | 1:1 | 29.5 | \$19,100.00 | \$563,450.00 |
| W12 | 0.37 | D | 1:1 | 0.37 | \$19,100.00 | \$7,067.00 |
| Total | 35.16 | - | - | 35.16 | \$19,100.00 | \$671,556.00 |

Notes:

¹ The area of the wetland that is within the Property and that will be removed as a result of the Project.”