

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – May 16, 2022

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

-and-

IN THE MATTER OF an appeal filed by Zaia Abraham and Romy Tittel of the decision by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks to issue Enforcement Order No. WA-EO-2018/08-SSR under the *Water Act*.

Cite as: *Abraham and Tittel v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (16 May 2022), Appeal No. 18-015-R (A.E.A.B.), 2022 ABEAB 16.

HEARING BEFORE:

Mr. Alex MacWilliam, Board Chair (ret.);
Ms. Anjum Mullick, Board Member; and
Mr. Dave McGee, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, Board Counsel and
Settlement Officer; and Ms. Valerie Myrmo,
Registrar of Appeals.

PARTIES:

Appellants: Mr. Zaia Abraham and Ms. Romy Tittel,
represented by Mr. Chris Jones, McLeod Law
LLP.

Director: Mr. Craig Knaus, Director, Regional
Compliance, South Saskatchewan Region,
Alberta Environment and Parks, represented by
Ms. Vivienne Ball, Environmental Law
Section, Alberta Justice and Solicitor General.

WITNESSES:

Appellants: Ms. Romy Tittel.

Director: Mr. Craig Knaus, Director, Regional
Compliance, South Saskatchewan Region,
Alberta Environment and Parks; Mr. Randy
Sweeney, Environmental Protection Officer,
Regional Compliance, South Saskatchewan
Region, Alberta Environment and Parks; and
Mr. Michael Zubkow, Corporate Director,
Elbow River Estates Co-operative Ltd.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Enforcement Order (the Order) under the *Water Act* to Mr. Zaia Abraham and Ms. Romy Tittel (the Appellants). The Order requires the Appellants to stop using the water well (the Well) they drilled on their residential property. The Appellants appealed the Order to the Environmental Appeals Board (the Board).

The reason for the Order is the interaction between section 21 of the *Water Act* and section 8 of the *Water (Ministerial) Regulation*. The relevant part of section 21 of the *Water Act* provides that a person may divert groundwater for “household” purposes without obtaining a water licence. This provision is the statutory replacement for “riparian rights” under the *Water Act*. However, section 21 is limited by section 8 of the Regulation, which provides that a person who is “entitled to receive” water from a municipal water supply is not entitled to divert groundwater for household purposes under section 21. The central issue in this appeal is whether the Appellants are “entitled to receive” water from a municipal water supply. The municipal water supply in question is from the Elbow River Estates Co-operative Ltd. (the Co-op), which supplies municipal water to the subdivision where the Appellants’ property is located.

The Board held a hearing and, based on the evidence and submissions presented at the hearing, concluded the Appellants’ property is appurtenant to the water licences held by the Co-op. Therefore, under the *Water Act*, the Appellants are legally entitled to receive water from a municipal water supply. The fact the Appellants must meet other requirements, such as being members of the Co-op, is irrelevant for the purposes of the *Water Act* and the Regulation.

The Board found the Order was properly issued. The Board recommended the Minister confirm the Order except for changing the deadlines for when the Well must be reclaimed and the final report submitted to AEP.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Environmental Appeals Board (the “Board”) in the appeal filed by Mr. Zaia Abraham and Ms. Romy Tittel (collectively, the “Appellants”) of Enforcement Order No. WA-EO-2018/08-SSR (the “Order”) issued under the *Water Act*, R.S.A. 2000, c. W-3. The Order was issued on October 31, 2018, by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the “Director”).¹ The Order requires the Appellants to stop using the water well (the “Well”) they drilled on their residential property.²

[2] The reason for the Order, and the central issue in this appeal, arises from the interaction between section 21 of the *Water Act* and section 8 of the *Water (Ministerial) Regulation*, Alta. Reg. 205/98 (the “Regulation”). The relevant part of section 21 of the *Water Act* provides that a person may divert groundwater for “household” purposes without obtaining a water licence.³ This provision is the statutory replacement for “riparian rights” under the *Water Act*. However, section 21 is limited by section 8 of the Regulation, which provides that a person who is “entitled to receive” water from a municipal water supply is not entitled to divert groundwater for household purposes under section 21 of the *Water Act*.⁴ The dispute in this appeal focuses on the question of whether the Appellants were “entitled to receive” water from a municipal water supply. If they were, then use of the Well drilled adjacent to their home for

¹ The hearing in this appeal and the issuance of this Report were delayed by the COVID-19 pandemic.

² The Order requires the Appellants to:

1. immediately cease diverting water from the Well;
2. render the Well ineffective by removing the pump and installing a locking well cap; and
3. reclaim (fill in) the Well so that it can no longer be used.

³ Section 21(2)(a) of the *Water Act* provides: “Subject to subsection (3) and section 23 and any exemptions specified in the regulations, a person who owns or occupies land under which groundwater exists: (a) has the right to commence and continue the diversion of the groundwater for household purposes....”

Section 1(1)(x) of the *Water Act* provides: “In this Act, ... ‘household purposes’ means the use of 1250 cubic metres of water per year per household for the purposes of human consumption, sanitation, fire prevention and watering of animals, gardens, lawns and trees.”

⁴ Section 8 of the Regulation provides: “A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 of the Act.”

household purposes was prohibited, and the Director's decision to issue the Order was appropriate.

II. FACTS

[3] The Appellants and the Director (collectively, the "Parties") are in substantive agreement regarding the facts in this appeal.

[4] In 1996, the Appellants purchased an undeveloped residential property in NE-2-24-3-W5M in the Elbow River Estates subdivision on the east edge of the City of Calgary. The Appellants built a single detached home on the property and have lived there ever since.

[5] When the Appellants purchased the property, it was subject to a restrictive covenant, which required them to become members of the Elbow River Estates Co-operative (the "Co-op").⁵ The purpose of the Co-op is to provide a municipal water supply to the homes in the subdivision.⁶ The Appellants became members of the Co-op in September 1996 and remained members until June 2016.⁷ During this time, the Appellants used the water supplied by the Co-op for their household purposes.

[6] The Appellants stated a number of "serious issues" arose between the Appellants and the Co-op. As a result, on June 1, 2016, the Appellants wrote to the Co-op, withdrawing their membership in the Co-op effective June 15, 2016. On June 15, 2016, representatives of the Co-op attended the Appellants' property and disconnected the municipal water supply.⁸

⁵ The Appellants noted that only 12 of the 70 lots in the subdivision were subject to the restrictive covenant requiring them to become members of the Co-op. See Director's Record, dated January 22, 2019, at Tab 3. The "Director's Record" refers to all documents and electronic media the Director reviewed or were available to him when making his decision with respect to the Order, including policy documents. (See Appendix A at paragraph 13.)

⁶ The Co-op is serviced by a communal water system consisting of two water licences (the "Water Licences") and a water treatment plant authorized by Registration 00018995 under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). The Water Licences held by the Co-op are Water Licence 00034574 (17 acre-feet or 20,969.2 m³ per annum) and Water Licence 00034575 (22 acre-feet or 40,704.8 m³ per annum). See Director's Record, dated January 22, 2019, at Tab 5.

⁷ The Appellants noted they did not take active steps to become members of the Co-op. When they purchased the property they were advised they were members of the Co-op and were provided with water bills, which they paid.

⁸ The dispute between the Appellants and the Co-op resulted in a civil action in Provincial Court. See *Elbow*

[7] On March 16, 2016, the Appellants' contractor drilled the Well on their property. The stated purpose of the Well was to construct a geothermal heating system for the Appellants' home. The Board notes no authorization is required under the *Water Act* for the drilling of a well for a geothermal heating system. In November 2016, the Appellants began using the Well to supply their household purposes.⁹

[8] As stated, on October 31, 2018, the Director issued the Order prohibiting the use of the Well for all purposes, including household purposes, and directing the Well be reclaimed. The Appellants indicated they may still wish to pursue the proposal to use the Well to construct a geothermal heating system for their home in the future.¹⁰ The Board notes that, for the Appellants to use the Well as part of a geothermal heating system for their home, they would have to drill a secondary well, and operation of the system would require a licence under the *Water Act*.

III. PROCEDURAL HISTORY

[9] The first part of the hearing of this appeal was held in Calgary on October 10, 2019.¹¹ The hearing was adjourned during the questioning of the Director by the Board to allow the Director to locate and review documents necessary to respond to a series of questions about the "appurtenance" of the Water Licences issued to the Co-op.¹²

River Estates Co-operative Ltd. v. Abraham (29 October 2018) Calgary P1790103651 (ABPC) at Director's Record, dated January 22, 2019, at Tab 27.4. The key finding of the Court was there were no provisions of the governing legislation or corporate documents "...prohibiting a member from withdrawing from the membership of the [Co-op]." Director's Record, dated January 22, 2019, Tab 27.4, at paragraph 35. The Provincial Court's decision was appealed to the Court of Queen's Bench, and the appeal was dismissed. See *Elbow River Estates Co-operative Ltd. v. Abraham* (20 June 2019) Calgary 1801-16692 (ABQB) at Director's Supplemental Record, dated September 11, 2019, at Tab 6.

⁹ From June 15, 2016 to November 2016, and from October 18, 2018 to today, the Board understands the Appellants had water for their household purposes trucked in and stored in a cistern, which is part of their home's water supply system.

¹⁰ The Appellants submitted two applications to Alberta Environment and Parks ("AEP") for the geothermal system, but both applications were closed (rejected) because they were not complete.

¹¹ For a full description of the hearing process, see the Board's letters dated August 22, 2019, and December 14, 2020. See also "Appendix A - Procedural History of the Appeal" attached to this Report and Recommendations.

¹² See the Board's letter, dated October 23, 2019. See also section 58(1) of the *Water Act*, which provides: "When issuing a licence, including licences issued under Part 5, Division 2, the Director must specify in the licence the land or undertaking to which the licence is appurtenant."

[10] The Board intended to reconvene the hearing in early 2020.¹³ Unfortunately, due to the COVID-19 pandemic, the continuation of an in-person hearing was not possible.¹⁴ The Parties indicated they wanted to wait until it was possible to reconvene the hearing in-person.¹⁵ By the end of 2020, it became apparent that it would not be possible to hold an in-person hearing anytime soon. Therefore, the Board scheduled the continuation of the hearing by video conference for January 27, 2021.¹⁶

[11] The hearing continued on January 27, 2021, with the Director providing additional direct evidence responding to the Board's questions that lead to the adjournment.¹⁷ The Appellants were allowed to cross-examine the Director on the additional evidence that had been presented. The Board then completed its questioning of the Director. The Appellants were provided the opportunity to provide rebuttal evidence, but they declined. The Board completed the hearing with the closing arguments from the Parties.

IV. SUBMISSIONS

[12] The Board set the following issue for the hearing of this appeal: “Was the Order properly issued?” This issue included whether:

- (i) the Director had the legal jurisdiction to issue the Order;
- (ii) the Director had the factual basis to issue the Order;
- (iii) the terms and conditions of the Order were appropriate; and
- (iv) the Director properly applied section 8 of the Regulation.¹⁸

A. Appellants

[13] The Appellants acknowledged the Director had the legal jurisdiction to issue the Order if, in the Director’s opinion, a contravention of the *Water Act* had occurred. Further, the

¹³ See the Board’s letters, dated January 3, 2020, and January 17, 2020.

¹⁴ See the Board’s correspondence, dated March 19, 2020, and March 24, 2020.

¹⁵ See the Board’s correspondence, dated March 31, 2020.

¹⁶ See the Board’s letters, dated September 9, 2020, and October 15, 2020.

¹⁷ See the additional evidence provided by the Director, dated January 16, 2020, and February 5, 2020.

¹⁸ See the Board’s letter, dated September 6, 2019.

Appellants acknowledged if the Order was properly issued, then the terms and conditions of the Order were within the Director's authority.¹⁹

[14] The focus of the Appellants' argument was the Director had not properly applied section 8 of the Regulation. Specifically, the Appellants argued that, as they were no longer members of the Co-op, they were no longer entitled to receive water from the municipal water supply provided by the Co-op. According to the Appellants, to be entitled to receive water from the Co-op, they must be members of the Co-op and merely being a landowner in the subdivision was insufficient. As they withdrew their membership in 2016, which according to the Provincial Court and Court of Queen's Bench they were entitled to do, they were not members.²⁰ Further, they pointed to the fact the Co-op physically disconnected them from the water supply, making it impossible for them to get water from the municipal water supply.

[15] The Appellants argued for a plain language reading of whether they were "entitled to receive" water from the Co-op.²¹ According to the Appellants, the "...plain and ordinary meaning of the word 'entitled' is 'having a right to certain benefits or privileges.'"²² The Appellants stated section 21 of the *Water Act* guarantees them the right to divert groundwater for their household purposes. They accepted that section 8 of the Regulation limits that right where they were entitled to water from a municipal water supply. However, the Appellants argued any entitlement to water from the Co-op was dependent on membership in the Co-op, and since they were no longer members, they were not entitled to water.

¹⁹ See the Appellants' Initial Submission, dated September 20, 2019, at paragraphs 27 and 29. The Appellants noted the terms and conditions of the Order were at odds with their desire to use the Well for a geothermal heating project, and indicated they still wished to pursue this project. The Board notes the Director stated there was currently no application before AEP for the Appellants' geothermal project, and the last application by the Appellants was deemed incomplete and closed (rejected) on July 18, 2019.

²⁰ See *Elbow River Estates Co-operative Ltd. v. Abraham* (29 October 2018) Calgary P1790103651 (ABPC) at Director's Record, dated January 22, 2019, at Tab 27.4, and *Elbow River Estates Co-operative Ltd. v. Abraham* (20 June 2019) Calgary 1801-16692 (ABQB) at Director's Supplemental Record, dated September 11, 2019, at Tab 6..

²¹ See Appellants' Initial Submission, dated September 20, 2019, at paragraph 35. The Appellants cite *R. v. I.(D.)* 2012 SCC 5.

²² Appellants' Initial Submission, dated September 20, 2019, at paragraph 36, citing Merriam Webster's Dictionary, online, *sub verbo* "entitled."

[16] The Appellants argued the *Water Act* "...is intended to promote conservation and wise use ..." of water, and in this case "...there is no concern about the Appellants 'double dipping' in respect of the water they receive as they do not have access to the [Co-op's] water supply."²³ The Appellants pointed to the "...safeguard against excessive consumption built in the [*Water Act*] itself..." whereby the amount of water a household user is entitled to take is limited.²⁴ Further, the Appellants stated they were not endangering the Co-op's water supply as their well was completed in a different aquifer.²⁵

[17] The Appellants stated that on a number of occasions, they were advised the Co-op's water production capacity was being exceeded by the demand for water. According to the Appellants, removing their property from the Co-op would be beneficial to the members of the Co-op "...without any negative impact to the purpose of the [*Water Act*]."²⁶

[18] The Appellants argued there would be no harm to the public good or the purposes of the *Water Act* if the Board recommended setting aside the Order and allowing the Appellants to use the Well for household purposes.²⁷

[19] The Appellants stated the Order was improperly issued based on an incorrect interpretation of section 8 of the Regulation. As a result, the Appellants submitted the Board should recommend to the Minister of Environment and Parks (the "Minister") that the Director's decision to issue the Order should be set aside.

B. Director

[20] The Director stated he had jurisdiction under section 135(1) of the *Water Act* to issue the Order.²⁸ The Director noted the Appellants admitted the Director had the jurisdiction to

²³ Appellants' Initial Submission, dated September 20, 2019, at paragraphs 47 and 48.

²⁴ Appellants' Initial Submission, dated September 20, 2019, at paragraph 49.

²⁵ Appellants' Initial Submission, dated September 20, 2019, at paragraph 50.

²⁶ Appellants' Initial Submission, dated September 20, 2019, at paragraph 53. See Director's Submission, dated September 30, 2019, at paragraphs 147 and 148. The Director indicated there have been no exceedances of the limits in the Co-op's Water Licences. The Director believed the Appellants might be referring to the treatment capacity of the Co-op's water treatment plant, rather than its diversion limit.

²⁷ Appellants' Initial Submission, dated September 20, 2019, at paragraph 54.

²⁸ Director's Submission, dated September 30, 2019, at paragraph 43. Section 135(1) of the *Water Act*

issue the Order.²⁹ The Director was of the opinion the Appellants contravened section 49(1) of the *Water Act* by commencing or continuing the diversion of water without a water licence or without otherwise being authorized to divert water under the *Water Act*.³⁰

[21] The Director noted the *Water Act* "...sets out the regulatory scheme for the conservation and protection of water including groundwater on and under all lands in Alberta regardless of land ownership."³¹ The Director pointed to the purposes of the *Water Act*, which is to "...support and promote the conservation and management of water, including the wise allocation and use of water..."³²

[22] The Director argued the "...common law right to divert water for household purposes has been expressly limited by the *Water Act*."³³ According to the Director, this common law right has been codified in section 21(2) of the *Water Act*, which provides:

"Subject to subsection (3) and section 23 and any exemptions specified in the regulations, a person who owns or occupies land under which groundwater exists

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

²⁹ Director's Submission, dated September 30, 2019, at paragraph 44. See Appellants' Initial Submission, dated September 20, 2019, at paragraph 27.

³⁰ Director's Submission, dated September 30, 2019, at paragraph 45. Section 49(1) of the *Water Act* provides: "Subject to subsection (2), no person shall (a) commence or continue a diversion of water for any purpose, or (b) operate a works, except pursuant to a licence unless it is otherwise authorized by this Act."

³¹ Director's Submission, dated September 30, 2019, at paragraph 53.

³² Director's Submission, dated September 30, 2019, at paragraph 54. 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;
- (f) the important role of comprehensive and responsive action in administering this Act."

³³ Director's Submission, dated September 30, 2019, at paragraph 60.

- (a) has the right to commence and continue the diversion of the groundwater for household purposes, and
- (b) may not obtain a licence for the diversion of the groundwater for household purposes.”³⁴

According to the Director, section 8 of the Regulation provides for an exception to section 21(2) of the *Water Act*. Section 8 of the Regulation states:

“A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 of the Act.”

The Director argued that because of section 8 of the Regulation, “...the Appellants are prohibited from diverting water for household purposes under section 21 of the *Water Act* because they continue to be entitled to receive water under the licence issued to the Co-op.”³⁵ The Director went on to state that, as “...the Appellants purchased the property after the communal water system was established, they have never had a right to divert for household purposes under section 21 of the *Water Act*.”³⁶

[23] The Director argued the ordinary meaning of section 8 of the Regulation “...is that the Appellants are not authorized to divert water for household purposes under section 21 of the *Water Act* because the Appellants are entitled to receive water under the licence issued ... to the Co-op.”³⁷ The Director pointed to the fact “...the Appellants received water from the licence issued ... to the Co-op for 17 years from September 1999 to June 2016 when the Appellants withdrew their membership from the Co-op.”³⁸

[24] The Director stated:

³⁴ Section 1(1)(x) of the *Water Act* provides: “In this Act, ... “household purposes” means the use of 1250 cubic metres of water per year per household for the purposes of human consumption, sanitation, fire prevention and watering of animals, gardens, lawns and trees.” The Director stated sections 21(3) and 23 of the *Water Act* were not relevant to this appeal. See Director’s Submission, dated September 30, 2019, at paragraph 64.

³⁵ Director’s Submission, dated September 30, 2019, at paragraph 68.

³⁶ Director’s Submission, dated September 30, 2019, at paragraph 70.

³⁷ Director’s Submission, dated September 30, 2019, at paragraph 78.

³⁸ Director’s Submission, dated September 30, 2019, at paragraph 80.

“When section 8 of the [Regulation] is read in the entire context of the *Water Act*, its ordinary meaning is consistent with the purposes of the *Water Act* and supports [the Director’s] role as regulator of water in Alberta.

The ordinary meaning of section 8 promotes wise allocation and use [of water] by preventing persons who are entitled to or receive water from communal water systems from diverting water for household purposes pursuant to section 21 of the *Water Act*.”³⁹

[25] According to the Director, the voluntary withdrawal of the Appellants from the Co-op did not disentitle them to water under the Water Licences issued to the Co-op, and they have “an equitable and legal right to receive water from the Co-op.”⁴⁰ The Director stated:

“The Appellants’ entitlement to receive water from the Co-op arises solely from their ownership of the property in the Elbow River Estates subdivision. The Appellants have the right to benefit from the Co-op water system without the need to satisfy any other substantive requirements or conditions....”⁴¹

[26] The Director discussed the two court decisions⁴² arising from the litigation between the Appellants and the Co-op. According to the Director, the decision of the Provincial Court, as upheld by the Court of Queen’s Bench, is consistent with the Director’s interpretation of section 8 of the Regulation.⁴³ Based on these court decisions, the Director stated it was clear the:

“...entitlement to receive water runs with the property owned by the Appellants’ (sic) because it is located in the Elbow River Estates subdivision. The entitlement to water is not a personal right of the Appellants separate and apart from their ownership of the property.

Choosing not to exercise a right does not extinguish that right. Despite their voluntary withdrawal of their membership from the Co-op, the Appellants remain entitled to receive water from the Co-op.

Something more than the Appellants’ voluntary withdrawal of their membership in the Co-op is required to extinguish the entitlement of the owner of that property

³⁹ Director’s Submission, dated September 30, 2019, at paragraphs 84 and 85.

⁴⁰ Director’s Submission, dated September 30, 2019, at paragraph 86.

⁴¹ Director’s Submission, dated September 30, 2019, at paragraph 87.

⁴² See *Elbow River Estates Co-operative Ltd. v. Abraham* (29 October 2018) Calgary P1790103651 (ABPC) at Director’s Record, dated January 22, 2019, at Tab 27.4, and *Elbow River Estates Co-operative Ltd. v. Abraham* (20 June 2019) Calgary 1801-16692 (ABQB) at Director’s Supplemental Record, dated September 11, 2019, at Tab 6.

⁴³ Director’s Submission, dated September 30, 2019, at paragraph 88. See Director’s Submission, dated September 30, 2019, at paragraphs 89 to 92.

to receive water from the Co-op. As such, when the Appellants sell their property, the entitlement to receive water from the Co-op transfers to the new property owners....

Further, the Appellants' withdrawal [from the Co-op] does not change the purpose for which the community water system or the Co-op was created....

While it is not mandatory for the Appellants to re-join the Co-op, it is entirely their decision whether to exercise their right to receive water from the Co-op's water system or not. Their decision in this regard does not affect their **entitlement.**" (Emphasis added by the Board.)⁴⁴

In specific response to the Appellants' argument that they had withdrawn from the membership of the Co-op, the Director argued that was irrelevant.⁴⁵

[27] According to the Director, interpreting section 8 of the Regulation in a manner that would allow the Appellants to use the Well for domestic purposes would lead to an absurd result.⁴⁶ The Director pointed out that, pursuant to section 27 of the *Water Act*, the Appellants' use of the Well would have a priority (the first right to water) over a person entitled to divert water pursuant to a water licence.⁴⁷ This means the Appellants would have priority over the Co-op.⁴⁸

[28] The Director stated allowing the Appellants to divert water under section 21 of the *Water Act* would disrupt the regulatory scheme and interfere with the Director's "...ability to manage the wise allocation and use of water in the public interest."⁴⁹ According to the Director, "[p]roperty owners who are entitled to receive or receive water under licences issued for

⁴⁴ Director's Submission, dated September 30, 2019, at paragraphs 93 to 95, 97, and 99.

⁴⁵ Director's Submission, dated September 30, 2019, at paragraphs 137 and 138.

⁴⁶ Director's Submission, dated September 30, 2019, at paragraph 100.

⁴⁷ Director's Submission, dated September 30, 2019, at paragraphs 101 and 102. Section 27 of the *Water Act* provides:

"A person who diverts water pursuant to section 21

- (a) does not have priority with respect to another person who is diverting water pursuant to section 21, but
- (b) has priority over a person who is entitled to divert water
 - (i) pursuant to an approval, licence or registration, or
 - (ii) that is authorized under this Act other than pursuant to section 21."

⁴⁸ Director's Submission, dated September 30, 2019, at paragraph 103.

⁴⁹ Director's Submission, dated September 30, 2019, at paragraphs 105.

municipal purposes would be incentivised to install water wells on their property....”⁵⁰ The Director stated such an approach:

“...poses potential significant risks to the environment:

- (a) if persons on a communal water system are permitted to drill their own wells into the same aquifer and divert for household purposes, there is a risk of over pumping leading to damage to the aquifer and lower production capacity because of dewatering;
- (b) more people opting out of a communal treated water system could negatively [impact] septic fields if wells are not deep enough or properly constructed; [and]
- (c) [the Director’s] experience is that persons tend to use more water if it is not metered and they are not paying for it.”⁵¹

With respect to the Appellants’ argument they were in a different aquifer than the Co-op, the Director stated the Certificate of Analysis presented by the Appellants did not support this conclusion.⁵²

[29] The Director advised there were two legal options for the Appellants to secure a domestic water supply for their property. The first was they “...can exercise their right to receive water from the Co-op.”⁵³ According to the Director, “...the Appellants have a substantive right to receive water from the Co-op, [and] the steps required to exercise that right are procedural in nature only.”⁵⁴ The Director stated this substantive right to water only required the Appellants become members of the Co-op and then request the Co-op open the service connection valve.⁵⁵ Further, the Director stated the Appellants did not present any “...evidence that there are any material obstacles to becoming members of the Co-op if they choose to do so.”⁵⁶

⁵⁰ Director’s Submission, dated September 30, 2019, at paragraph 105.

⁵¹ Director’s Submission, dated September 30, 2019, at paragraph 106.

⁵² Director’s Submission, dated September 30, 2019, at paragraphs 145 and 146.

⁵³ Director’s Submission, dated September 30, 2019, at paragraph 111.

⁵⁴ Director’s Submission, dated September 30, 2019, at paragraph 112.

⁵⁵ Director’s Submission, dated September 30, 2019, at paragraph 114.

⁵⁶ Director’s Submission, dated September 30, 2019, at paragraph 113.

[30] According to the Director, the second option that was available to the Appellants was to "...continue to use a cistern for potable water and truck water from Calgary or ... look for another approved water system near their property."⁵⁷ The Director stated:

"There is no evidence that obtaining water by trucking in from Calgary [and] operating a cistern is not a viable source of potable water for the Appellant[s].

Further there is [no] evidence that hauling water is any less economical than becoming members of the Co-op and connecting to the Co-op water system."⁵⁸

[31] With respect to the "serious issue" between the Appellants and the Co-op, the Director argued the Board was not the proper forum for the dispute. Instead, according to the Director, the Appellants have remedies available to them under the *Rural Utilities Act*, R.S.A. 2000, c. R-21, and they have not used this remedy. The Director noted, "[t]here is no evidence that at any time the Appellants requested the Director of Rural Utilities to hold an inquiry into the affairs of the Co-op...."⁵⁹ According to the Director, "...it is more appropriate for the 'serious issues' between the Appellants and the Co-op to be dealt with by the existing mechanism established for this purpose under the *Rural Utilities Act*...."⁶⁰ The Director also noted the Appellants were undoubtedly aware of the *Rural Utilities Act* because they used that statute as the basis upon which to withdraw from their membership in the Co-op.⁶¹

[32] Turning to the question of whether the terms and conditions of the Order were appropriate, the Director argued they were reasonable and pointed to the concession by the Appellants that, if the Board found the Order was properly issued, then the terms and conditions of the Order were appropriate, but for the dates.⁶²

[33] The Director submitted the Order was properly issued and the terms and conditions were reasonable. Based on this, the Director asked the Board recommend to the Minister that the appeal be dismissed.

⁵⁷ Director's Submission, dated September 30, 2019, at paragraph 116.

⁵⁸ Director's Submission, dated September 30, 2019, at paragraphs 119 and 120.

⁵⁹ Director's Submission, dated September 30, 2019, at paragraph 127.

⁶⁰ Director's Submission, dated September 30, 2019, at paragraph 130. See also Director's Submission, dated September 30, 2019, at paragraphs 133 to 136.

⁶¹ Director's Submission, dated September 30, 2019, at paragraph 132.

⁶² Director's Submission, dated September 30, 2019, at paragraphs 139 to 141. See Appellants' Initial

C. Appellants' Rebuttal

[34] In response to the Director's argument that the "Appellants have an equitable and legal right to receive water" from the Co-op, the Appellants argued this "...analysis is fatally flawed as the Memorandum [of Association] makes clear that it is membership, not ownership of property, which is a precondition to obtain water from the [Co-op]."⁶³

[35] The Appellants argued:

"It is an error to equate ownership and membership as membership rights associated with [ownership] are not absolute. In addition to the right of voluntary withdrawal recognized by the Provincial Court and affirmed on appeal, the *Rural Utilities Act* and Regulation specifically contemplate that a rural utility like the [Co-op] may terminate memberships or expel members."⁶⁴

According to the Appellants, an "...expelled member would certainly continue to be a landowner, but would no longer be entitled to receive services from the rural utility."⁶⁵ The Appellants stated, "The existence of provisions in the *Rural Utilities Act* dealing with the termination, expulsion, withdrawal, and cessation of membership make it clear that the relevant status to receive services is membership."⁶⁶

[36] The Appellants said, "It would be absurd to conclude that a landowner who was expelled from the membership of the [Co-op] would somehow still be 'entitled to' receive water from the [Co-op] despite the clear wording of the [Co-op's] Memorandum and bylaws."⁶⁷ According to the Appellants, where a member is expelled from the Co-op, they would clearly have the legal right to divert water under section 21 for household purposes, as any entitlement

Submission, dated September 20, 2019, at paragraph 29.

⁶³ Appellants' Rebuttal Submission, dated October 7, 2019, at paragraphs 3 and 4, citing the Elbow River Estates Co-operative Ltd. Memorandum of Association, at section 1, Director's Record, dated September 22, 2019, at Tab 26.17.

⁶⁴ Appellants' Rebuttal Submission, dated October 7, 2019, at paragraph 5, citing the *Rural Utilities Act*, R.S.A. 2000, c. R-21 at sections 22(5)(b), 27(7)(b), and 22(11)(b), and the *Rural Utilities Regulation*, Alta. Reg. 151/2000 at section 18 of Schedule 3.

⁶⁵ Appellants' Rebuttal Submission, dated October 7, 2019, at paragraph 7.

⁶⁶ Appellants' Rebuttal Submission, dated October 7, 2019, at paragraph 8.

⁶⁷ Appellants' Rebuttal Submission, dated October 7, 2019, at paragraph 9.

to get water from the Co-op would be lost.⁶⁸ The Appellants submitted “...there is no principled reason to treat a member who was expelled from the [Co-op] any differently from a member who has withdrawn voluntarily.”⁶⁹

[37] The position of the Appellants was that they did not have the ability to access water from a municipal water supply. Therefore, according to the Appellants, the Order was not properly issued, and the Board should recommend to the Minister that the Order be reversed.

D. Additional Evidence of the Director

[38] As previously discussed, as a result of the questioning of the Director by the Board at the public hearing, it was necessary to adjourn the hearing to allow the Director to locate additional evidence. This additional evidence was provided by the Director on January 17, 2020, and was dealt with when the hearing resumed (via videoconference) on January 27, 2021.

[39] The Director reviewed AEP files with respect to the two Water Licences held by the Co-op: *Water Act* Licences 00034575 and 00034574 (originally *Water Resources Act* Interim Licences 08117 and 16891, respectively). The Director concluded the Water Licences have a point of diversion in 6-11-24-3-W5M, which is the location of the wells providing the water to the Co-op. Further, the Director concluded the Water Licences have a point of use of “...all land parcels within the Subdivision boundary located within NW-1-24-3-W5[M], N½ 2, NE-3, [S]½-11, SW-12-24-3-W5M, regardless if the lands are subdivided into individual lots or not.”⁷⁰

[40] During the hearing in January 2021, the Director reviewed the additional documents and attachments. He described how the Water Licences held by the Co-op were for municipal (subdivision supply) purposes, but that neither licence clearly identified the location where this purpose was to be conducted. The Director described how the Water Licences were

⁶⁸ Appellants’ Rebuttal Submission, dated October 7, 2019, at paragraph 10.

⁶⁹ Appellants’ Rebuttal Submission, dated October 7, 2019, at paragraph 11.

⁷⁰ Director’s Letter, dated January 16, 2020, at page 1. See the various attachments to the Director’s letter, which refer to N½ -2-24-3-W5M.

appurtenant to an undertaking (a physical location) to supply a subdivision. He pointed to a memorandum dated August 17, 1972, entitled “Proposed Subdivision on Elbow River (Parts of NW 1, N2, S11 & SW12-24-3-W5),” that identified the subdivision which included the Appellants’ land.⁷¹ He described how the subdivision was developed in phases, eventually requiring more water to service all the lots, and how the Water Licences were amended to provide more water.⁷² The Director reviewed a map of the subdivision that was attached to *Water Act* Licence 00034575.⁷³ The map showed the proposed build-out of the subdivision as of 1984, and included the lands to the south, which would eventually be developed and would include the Appellants’ property.⁷⁴

[41] The Director also provided a follow-up letter to the Board on February 7, 2020. The letter included two additional documents: the first being the application for a water licence dated October 18, 1979; and the second being a Preliminary Permit, dated April 29, 1974, authorizing the drilling of a test well “...to help determine the feasibility of obtaining a groundwater supply for a subdivision on the following land: S½-11 and N½ -2 -24-3-W5[M]....”⁷⁵ (emphasis in the original.)

V. ANALYSIS

A. Issue

[42] The Board set the following issue for the hearing of this appeal: “Was the Order properly issued?” This issue included consideration of whether:

- (i) the Director had the legal jurisdiction to issue the Order;

⁷¹ Director’s Letter, dated January 16, 2020, at Tab 8.

The Board notes the Appellants’ property is located within NE-2-24-3-W5M and is therefore included in the lands identified by the Director

⁷² Director’s Letter, dated January 16, 2020, at Tab 11.

⁷³ Director’s Letter, dated January 16, 2020, at Tab 7.

⁷⁴ This area is now bounded by Elbow River Drive to the north and west, Range Road 31 to the east, and Township Road 241 (Highway 8) to the south.

⁷⁵ Director’s Letter, dated February 5, 2020, at page 4. At this point in time, permission was required to drill a test well. The Board notes the Appellants’ property is located within NE-2-24-3-W5M and is therefore included in the lands identified in the Preliminary Permit.

- (ii) the Director had the factual basis to issue the Order;
- (iii) the terms and conditions of the Order were appropriate; and
- (iv) the Director properly applied section 8 of the Regulation.⁷⁶

[43] As previously stated, the Appellants acknowledged the Director had the legal jurisdiction to issue the Order if, in the Director's opinion, a contravention of the *Water Act* had occurred.⁷⁷ Further, the Appellants acknowledged that, if the Order was properly issued, then the terms and conditions of the Order were within the Director's authority.⁷⁸ Finally, the Parties were in substantial agreement as to the facts. Most importantly, the Appellants previously received water from the Co-op, and except for the Co-op disconnecting the Appellants from the water supply when the Appellants withdrew their membership, they were physically able to get water from the Co-op.⁷⁹

[44] Therefore, the focus of the Appellants' argument was whether the Director had properly applied section 8 of the Regulation. The basis of the Appellants' argument was that, since they were no longer members of the Co-op, they were no longer entitled to receive water from the municipal water supply provided by the Co-op. The Appellants argued that to be "entitled" to receive water from the Co-op, they must be a member of the Co-op; merely being a landowner in the subdivision was insufficient. What the Board needs to determine is whether having access to a municipal water source, regardless of whether or not the Appellants actually access the water, is sufficient for section 8 of the Regulation to apply.

[45] Two legislative provisions are at issue in this appeal. Section 21(2)(a) of the *Water Act* provides:

⁷⁶ See the Board's Letter, dated September 6, 2019.

⁷⁷ The Board notes the Director is authorized to issue the Order pursuant to section 135(1) of the *Water Act*, which provides: "The Director may issue an enforcement order to any person if, in the Director's opinion, that person has contravened this Act, whether or not that person has been charged or convicted in respect of the contravention." Specifically, the Director was of the opinion the Appellants contravened section 49(1)(a) of the *Water Act*, which provides: "...[N]o person shall (a) commence or continue a diversion of water for any purpose, ... except pursuant to a licence unless it is otherwise authorized by this Act."

⁷⁸ See the Appellants' Initial Submission, dated September 20, 2019, at paragraphs 27 and 29.

⁷⁹ Physically disconnecting the Appellants from the Co-op's water supply involves the closing of a valve – referred to as the service connection – at the edge of the Appellants' property. It is not an action that is permanent, and it can as easily be undone as it was done.

“Subject to subsection (3) and section 23 and any exemptions specified in the regulations, a person who owns or occupies land under which groundwater exists: (a) has the right to commence and continue the diversion of the groundwater for household purposes....”

[46] Section 8 of the Regulation provides exceptions to the general application of section 21 of the *Water Act*. Section 8 of the Regulation states:

“A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 of the Act.”

[47] The right to access water as a riparian right under section 21 of the *Water Act* has been limited by section 8 of the Regulation. The Appellants acknowledged this limitation on their rights, but argued section 8 does not apply in these circumstances because they are not connected to a municipal water supply, namely the Co-op.

[48] The evidence disclosed a long history of animosity between the Appellants and the Co-op. However, this appeal is not the proper mechanism for resolving the complaints the Appellants and the Co-op have with each other. As noted by the Director, there appears to be a complaint mechanism available to the Appellants and the Co-op under sections 26 and 27 of the *Rural Utilities Act*.⁸⁰ The Board is of the view the dispute between the Appellants and the Co-op

⁸⁰ Section 26 and 27 of the *Rural Utilities Act* provide:

- “26 The Director,
- (a) on written request signed by 3 members or 10% of the membership of the association, whichever is the greater, or
 - (b) on the direction of the Minister,
- may hold an inquiry into the affairs of an association.
- 27(1) When it appears to the Minister from a report of the Director, made after investigation, that the affairs of an association
- (a) are being mismanaged,
 - (b) are not being conducted in accordance with co-operative principles, or
 - (c) are being conducted on an unsound basis,
- the Minister may do all or any of the things referred to in subsection (2).
- (2) If subsection (1) applies, the Minister may do all or any of the following:
- (a) appoint the Director as the official director of the association;
 - (b) direct the Director to call a general meeting of the association;
 - (c) cancel the incorporation of the association.”

and the complaint mechanism that may be available to them is irrelevant to the issues in this appeal.

[49] The Appellants, as recipients of the Order, had a right to appeal the Order, and the issue before the Board is the proper interpretation of the *Water Act* and the Regulation.

[50] The Appellants argued the plain reading of the *Water Act* and the Regulation is that, because they withdrew their membership in the Co-op, they were no longer “entitled to receive water” from the Co-op. The Board does not accept this argument. In the Board’s view, the Appellants’ reading of the *Water Act* and the Regulation is inconsistent with reading the *Water Act* and associated regulations as a whole.

[51] Section 21 of the *Water Act* clearly recognizes there are exceptions to the general rule of riparian rights. These exceptions are identified in the Regulation as stated in section 8.

[52] The question before the Board is whether the Appellants have access to a municipal water source. The Parties agreed, and the Board concurs, the Co-op provides municipal water services to the subdivision in which the Appellants reside. The Appellants originally received water services from the Co-op when they moved into the area, but due to some disagreement between the Appellants and the Co-op, the Appellants opted out of the Co-op and no longer receive water from the Co-op.

[53] As the Co-op explained at the hearing, the water services can be easily reconnected for the Appellants. No additional infrastructure or work would be required, except to reconnect the service connector at the Appellants’ property. This clearly indicates municipal water is available to the Appellants through the Co-op.

[54] The Appellants chose to withdraw from the Co-op and obtain household water from other sources. They drilled the Well with the intent of using it for household purposes, but are now stating their intent to use the Well for a geothermal heating project. The Board notes the Appellants have been trucking water in from other sources and using a cistern system for their household water purposes, which they are entitled to do.

[55] Membership in the Co-op is not mandatory solely because a person owns property in the subdivision it serves. However, membership is required to obtain water services from the Co-op, and the Appellants chose to give up their membership in the Co-op. Choosing not to be a member is not the same as being not entitled to receive municipal water services.

[56] Section 8 of the Regulation refers to a person who is entitled to receive water under a licence issued to another person for municipal purposes, including community water supply. The Appellants are clearly entitled to receive water from a community water supply. Choosing to not continue use of the Co-op water services does not change the fact the Appellants have the right to receive the water. Reading the section in any other way would lead to absurd results.

[57] There are three important policy reasons for the prohibition in section 8 of the Regulation against the right to divert water for household purposes. The first is the protection of the quantity of the water resource. On its own, the Appellants' use of the water resource does not appear to be significant. However, if every lot owner in the subdivision developed their own water well for household purposes, there would be significant stress put on the aquifer. The impact on the aquifer would be increased when the moderating effect of having to pay for water is removed. Every lot owner could take their full allotment of water as a household user for free. This would result in significantly larger volumes of water being taken on an annual basis. Regardless of the size of the community, this could have a significant effect on the aquifer.

[58] The second important policy reason is the protection of the quality of the water supply. In order to properly protect the water resource, water wells must be properly maintained. In the context of this subdivision, two properly licenced water wells serving the community will, in all likelihood, be properly maintained, whereas if there are 70 individual wells, there is a greater chance the water supply will become contaminated by an improperly maintained well.

[59] The final important policy reason is to ensure a safe water supply for communities. The water provided by the Co-op is treated through its water treatment system before being provided to its membership. Communal water supplies are subject to strict monitoring of water quality, reducing the risk of contaminated water being used in households.

[60] At the hearing, questions were raised regarding the appurtenance of the Water Licences.⁸¹ The Board is of the view the Director's interpretation of the historical document underlying the Water Licences is correct. While the Board is of the view the Director's interpretation that the Water Licences are appurtenant to the subdivision lands is correct, the Board also notes this may not be immediately apparent to someone viewing the Water Licences for the first time. The Board encourages the Director to amend the Water Licences to make it clear they are appurtenant to the land in question. The purpose of the Water Licences was to provide water to the subdivision. As such, the Water Licences are appurtenant to the subdivision lands. It is not surprising the Water Licences do not expressly identify the Appellants' property. The Appellants' property did not exist at the time the Water Licences were issued, but there was a clear intention the subdivision would be built out to develop the undivided land and that more lots – including the Appellants' lot – would come later. The same situation exists today. According to the evidence the undivided property associated with the subdivision is large enough to accommodate two more lots. Notably, there is sufficient allocation in the Water Licences to provide for two additional lots.

[61] The Co-op suggested it was free to provide water to anyone. The Board does not believe this to be correct. Under the Water Licences, those lot owners within the described properties are entitled to receive water from the Co-op, subject to meeting the terms set by the Co-op. If these terms are met, the Co-op cannot choose who will receive water. The entitlement to water is derived from the Water Licences, not determined by the Co-op.

[62] The purpose of the Water Licences is to provide water to the lots in the subdivision – the land to which the licences are appurtenant - for household purposes only. If the Co-op wishes to use water for any other purpose (i.e. selling water to be delivered by truck), or provide household water outside the described land locations in the Water Licences, the Co-op would be required to apply for an amendment to its Water Licences.

⁸¹ See: ESRD 2014 Guidelines Regarding Appurtenance at [Open.alberta.ca/dataset/c1bcfc26-f1bd-4c66-92f4-8bc6572be37d/resource/59a52ba2-e41e-40b2-b76f-e81bb7491b0e/download/guidelinesregardingappurtenance-apr23-2014.pdf](https://open.alberta.ca/dataset/c1bcfc26-f1bd-4c66-92f4-8bc6572be37d/resource/59a52ba2-e41e-40b2-b76f-e81bb7491b0e/download/guidelinesregardingappurtenance-apr23-2014.pdf).

[63] The key to the Board's consideration is the Appellants' entitlement to water under the Water Licences. The Board's consideration has nothing to do with whether the Appellants are entitled to water under the authority of the Co-op. That is a separate matter between the Appellants and the Co-op. In reviewing the Water Licences and acknowledging the appurtenance of the Water Licences to the subdivision, the Board is of the view the Appellants are entitled to water from the point of diversion – the water wells – and delivered to their point of use – the service connection to their home. Their relationship with the Co-op and the conditions the Co-op places on them for the delivery of the water (e.g. membership in the Co-op) are irrelevant to the Board and the Director.

[64] Under the *Water Act*, the Appellants are entitled to water under the Water Licences. As the water from the Co-op is considered a municipal water source, the Appellants are prohibited by section 8 of the Regulation from taking water from their Well for household purposes under section 21 of the *Water Act*. By using the Well for household purposes, the Appellants have contravened section 49(1) of the *Water Act*⁸² and, therefore, the Director properly issued the Order under section 135(1) of the *Water Act*.⁸³

[65] The Appellants acknowledged that, if the Board found the Director correctly issued the Order, then the terms and conditions in the Order were within the Director's jurisdiction, except for the dates set to reclaim the Well and report to the Director. The Board agrees.

[66] The Board notes that nothing in the Order compels the Appellants to use the water from the municipal water supply from the Co-op for their household purposes, and nothing in the Order compels the Appellants to be a member of the Co-op. The Appellants are free to obtain water for their household purposes from another source (i.e. trucking water in), which is properly authorized under the *Water Act*. The Order only prohibits the Appellants from using the Well on their property for household purposes.

⁸² Section 49(1) of the *Water Act* provides: "Subject to subsection (2), no person shall (a) commence or continue a diversion of water for any purpose, or (b) operate a works, except pursuant to a licence unless it is otherwise authorized by this Act."

⁸³ Section 135(1) of the *Water Act* provides: "The Director may issue an enforcement order to any person if, in the Director's opinion, that person has contravened this Act, whether or not that person has been charged or

[67] The Board recommends the Order be varied only as to the dates by which the Appellants must reclaim the Well and provide the Director confirmation that reclamation of the Well is completed.

B. Geothermal Heating

[68] The Appellants indicated the original purpose for drilling the Well was to use it as part of a geothermal heating project. If this was the purpose for the Well, the Board is uncertain why only one well was drilled when two wells are necessary for a geothermal heating project. The Board notes the Appellants applied to AEP twice to have the Well licenced as part of a geothermal heating project and, on both occasions, their applications were rejected for being incomplete.

[69] If the Appellants still plan to use the Well as part of a geothermal heating project, the Board does not believe it is appropriate to require them to reclaim the Well, only to have to go the expense of drilling a new well later. Therefore, the Board recommends the Minister vary the Order to allow the Appellants time to make application to AEP to licence the Well as part of a geothermal project. As a result, the Board recommends changing the time limits in the Order in section 4 to December 31, 2022, and in section 6 to January 31, 2023.

[70] This additional time will allow the Appellants a final opportunity to have the Well licenced as part of a geothermal heating project. However, if the Well is not licenced within that time, it must be reclaimed as stated in the Order. To be clear, even if the Well is licenced for the geothermal project, this will not permit the Appellants to use the Well for household purposes.

VI. RECOMMENDATIONS

[71] In accordance with section 99 of EPEA,⁸⁴ the Board recommends the Minister vary the Order in section 4 and section 6 with respect to the dates by which the Well must be

convicted in respect of the contravention.”

⁸⁴ Section 99 of EPEA provides:

“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

reclaimed and the date by which a report must be filed with the Director. The Board recommends changing the time limits in the Order in section 4 to December 31, 2022, and in section 6 to January 31, 2023. The Board recommends the remainder of the Order be confirmed as issued.

[72] During the course of this appeal, the Director agreed to a stay with respect to part of the Order. The stay is lifted as of the date of the Minister's decision with respect to this appeal.

[73] Under section 100(2) of EPEA,⁸⁵ copies of this report and recommendations and any decision by the Minister are to be provided to:

1. Mr. Chis Jones, McLeod Law LLP, on behalf of Mr. Zaia Abraham and Ms. Romy Tittel;
2. Ms. Vivienne Ball, Environmental Law Section, Alberta Justice and Solicitor General, on behalf of Mr. Craig Knaus, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks; and
3. Mr. Michael Zubkow, Corporate Director, Elbow River Estates Co-operative Ltd.

[74] The Board notes that, at the hearing, the Appellants reserved their right to ask for costs. A process for the costs application will be established after the Minister makes his decision in this appeal.

Dated on May 16, 2022, at Edmonton, Alberta.

"original signed by"
Alex MacWilliam
Board Chair (ret.)

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."

⁸⁵ 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."

“original signed by”

Anjum Mullick
Board Member

“original signed by”

Dave McGee
Board Member

Appendix A

Procedural History of the Appeal

[1] On October 31, 2018, the Director issued the Order prohibiting the use of the Well for all purposes, including household purposes, and directing the Well be reclaimed.

[2] On November 7, 2018, the Appellants appealed the entirety of the Order to the Board. In their Notice of Appeal, the Appellants argued the basis of the Order – that the Appellants were entitled to receive water under the Water Licences issued to the Co-op for community water supply purposes and, therefore, did not have the right to continue the diversion of water under section 21 of the *Water Act* – was incorrect. In the Notice of Appeal, the Appellants requested a stay of the Order.

[3] On November 15, 2018, the Board acknowledged receipt of the appeal and asked the Director to provide a copy of all documents and electronic media he reviewed or were available to him when making his decision with respect to the Order, including policy documents. With respect to the stay, the Board asked the Director whether he was prepared to consent to the stay, and asked the Appellants to respond to the following questions:

- “1. What are the serious concerns of Mr. Abraham and Ms. Tittel that should be heard by the Board?
2. Would Mr. Abraham and Ms. Tittel suffer irreparable harm if the stay is refused?
3. Would Mr. Abraham and Ms. Tittel suffer greater harm if the stay was refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay?
4. Would the overall public interest warrant a stay?”

[4] On November 23, 2018, the Director notified the Board he was prepared to consent to a stay of conditions 4 to 7 of the Order – the portion of the Order requiring the Appellants to reclaim the Well – but he was not prepared to consent to a stay of conditions 1 to 3 of the Order – the portion of the Order prohibiting the use of the water. The Director also identified the Co-op as a possible interested party for the purpose of the appeal. The Board contacted the Co-op on November 30, 2018, and advised it of the appeal.

[5] On November 30, 2018, the Appellants provided their response to the Board's questions with respect to the stay.

[6] On December 3, 2018, the Board received an email from the Co-op advising it was an interested party and confirmed it wished to participate in the appeal. The Board acknowledged this letter on December 5, 2018.

[7] In a letter dated December 5, 2018, the Board determined the Appellants provided sufficient information for the Board to consider granting a stay and asked the Director to provide comments with respect to a stay. The Board provided the Co-op with the opportunity to submit comments if it wished, but the Board would take the Co-op's comments into consideration only if the Board determined it was appropriate to do so.

[8] On December 10, 2018, the Director provided comments with respect to the stay. The Director consented to a stay of conditions 4 to 7, but requested the Board not grant a stay of conditions 1 to 3 of the Order. The Co-op advised it would not be providing comments with respect to the stay.

[9] On December 17, 2018, the Board received final comments with respect to the stay from the Appellants. The Appellants asked the Board to stay conditions 1 to 3 of the Order pending the outcome of the appeal.

[10] On December 18, 2018, the Board asked the Parties to provide available dates for a mediation meeting. Based on the dates provided by the Parties, the Board set the mediation meeting for March 13, 2019, in Calgary.

[11] On December 19, 2018, the Director submitted an objection to the final comments from the Appellants on the stay. The Director argued the Appellants had improperly split their case with respect to the irreparable harm component of the stay application. The Board acknowledged the Director's objection on December 20, 2018.

[12] On December 21, 2018, the Board notified the Parties the Appellants' application for the stay of conditions 1 to 3 of the Order was denied. As noted, the Director agreed to a stay with respect to the remainder of the Order – conditions 4 to 7.

[13] On January 22, 2019, the Board was provided with the Director's Record. It was subsequently provided to the Appellants and the Co-op.⁸⁶

[14] On January 29, 2019, the Board received a copy of an email between one of the Appellants and Counsel for the Director. The email advised there were several records missing in relation to telephone calls made by a member of the Director's staff. On January 30, 2019, the Board asked for comments on this email from the Director. On February 5, 2019, the Director provided copies of the missing telephone logs.

[15] The mediation meeting was held on March 13, 2019, but no resolution was reached. On March 18, 2019, the Board asked the Parties to provide available dates in late September or October for a hearing as requested by the Parties. The Board also advised the Co-op that, if it wished to intervene in the hearing of the appeal, it should make an application to the Board once the hearing was advertised.

[16] On April 8, 2019, the Board wrote to the Parties advising the hearing would be held on October 10, 2019, in Calgary.

[17] On August 22, 2019, the Board provided the procedure for the hearing of the appeal, including the deadlines for providing written submissions in preparation for the hearing. The Board proposed the issues to be considered at the hearing as follows:

“1. Was the Order properly issued? This considers both the Director's legal jurisdiction and the factual basis for the Order. For greater clarity, this also includes whether the Director properly applied section 8 of the Water (Ministerial) Regulation, A.R. 205/98, which provides: ‘A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 of the [Water] Act.’

2. Are the terms and conditions of the Order appropriate?”

[18] On August 22, 2019, the Board provided a copy of the Notice of Hearing to Rocky View County to post on its public bulletin board or website. The Notice of Hearing was published in the Rocky View Weekly on September 3, 2019, and a news release was distributed

⁸⁶ Two of the Tabs in the Director's Record were missing and were provided to the Board on January 29,

to media throughout the province by Public Affairs Bureau on September 3, 2019. Notice of the hearing was also posted on the Board's website. The Board notified the Elbow River Estates Water Co-op of the Notice of Hearing directly. The Notice of Hearing notified the public of the hearing and requested any person, other than the Parties, who wished to make representations before the Board regarding the appeal to notify the Board by September 17, 2019.

[19] On August 29, 2019, the Director notified the Board he did not consider the second issue necessary in this appeal. On September 5, 2018, the Appellants notified the Board they agreed with the Director regarding the second issue. On September 6, 2019, the Board revised the issues for the hearing requiring the Parties to only address one issue as follows:

- "1. Was the Order properly issued? This includes whether:
 - a. the Director had the legal jurisdiction to issue the Order;
 - b. the Director has the factual basis to issue the Order;
 - c. the terms and conditions in the Order are appropriate; and
 - d. the Director properly applied section 8 of the *Water (Ministerial) Regulation*, A.R. 205/98, which provides: 'A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 of the [Water] Act.'"

[20] On September 17, 2019, the Board received an intervenor request from the Co-op. The Board asked for comments from the Parties regarding the intervenor request. The Parties' provided their comments on September 24, 2019.

[21] On September 26, 2019, the Board notified the Parties and the Co-op that the intervenor request was denied. The Board found the Co-op's submission would not materially assist the Board, and any information the Co-op could provide was included in the Record or could be submitted by the Parties.

[22] The Board received the Appellants' initial written submission for the hearing on September 20, 2019, the Director's response submission on September 30, 2019, and the Appellants' rebuttal submission on October 7, 2019.

2019. These additional Tabs were also provided to the Appellants and the Co-op.

[23] On October 10, 2019, the Board held an oral hearing in Calgary. The hearing was adjourned following the questioning of the Director's panel by the Board.

[24] On October 23, 2019, the Board wrote to the Parties confirming the Board wanted additional evidence from the Director, specifically evidence regarding the appurtenance of the Water Licences held by the Co-op in relation to the Appellants. The Board asked the Director to provide an opinion identifying the lands or undertakings to which the Water Licences are appurtenant.

[25] On January 17, 2020, the Director provided his opinion in response to the Board's request for additional information.

[26] On January 23, 2020, the Board confirmed the oral hearing would proceed on April 22, 2020, in Calgary.

[27] On February 28, 2020, the Board confirmed the schedule for continuation of the hearing.

[28] On March 19, 2020, the Board notified the Parties it was conducting hearings by conference calls due to the COVID-19 situation. The Board set the process to continue the hearing via conference call on April 22, 2020.

[29] On March 25 and 31, 2020, the Parties requested the hearing be held as an in-person oral hearing.

[30] On March 31, 2020, the Board notified the Parties the April 22, 2020 hearing was postponed.

[31] On September 9, 2020, the Board wrote to the Parties noting it was unlikely the Board would be able to hold in-person hearings in the near future. The Board requested the Parties provide available dates to resume the hearing via video conference.

[32] On October 15, 2020, the Board notified the Parties the hearing would resume on January 27, 2021 via videoconference. The hearing was held via videoconference on January 27, 2021, and after the Board heard all submissions and arguments, the hearing was closed.



ALBERTA

ENVIRONMENT AND PARKS

Office of the Minister

Government House Leader

MLA, Rimbey-Rocky Mountain House-Sundre

Ministerial Order

31/2022

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. 18-015

I, Jason Nixon, 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. 18-015.

Dated at the City of Edmonton, in the Province of Alberta, this 13 day of June, 2022.



Jason Nixon
Minister

APPENDIX

Order Respecting Environmental Appeals Board Appeal No. 18-015

With respect to the decision of the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2018/08-SSR ("Enforcement Order") to Zaia Abraham and Romy Tittel, I, Jason Nixon, Minister of Environment and Parks, order that the Enforcement Order is confirmed subject to the following:

1. The Enforcement Order is varied as follows:
 - (a) In Section 4 delete "March 31, 2019" and replace it with "December 31, 2022";
and
 - (b) In Section 6 delete "April 30, 2019" and replace it with "January 31, 2023".
2. All other sections in the Enforcement Order are confirmed as is.