

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – April 26, 2021

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

-and-

IN THE MATTER OF appeals filed by Yvon Lapointe and Lea Lapointe with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2019/09-LAR to Yvon Lapointe and Lea Lapointe and appeals filed by Donald Lapierre and 645639 Alberta Ltd. with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2019/08-LAR to Donald Lapierre and 645639 Alberta Ltd.

Cite as: *Lapointe et.al. v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (26 April 2021), Appeal Nos. 19-043 and 19-046-047-R (A.E.A.B.), 2021 ABEAB 8.

BEFORE:

Meg Barker, Acting Board Chair;
Dr. Nick Tywoniuk, Board Member; and
Kurtis Averill, Board Member.

BOARD STAFF:

Gilbert Van Nes, General Counsel and
Settlement Officer; Denise Black, Board
Secretary; Aurelia Gordon, Board Counsel.

SUBMISSIONS BY:

Appellants: Yvon Lapointe and Lea Lapointe, represented
by Nicole Melnyk.

Appellants: Donald Lapierre and 645639 Alberta Ltd.,
represented by Ken Haluschak, Bryan &
Company LLP.

Director: Simon Tatlow, Director, Regional Compliance,
Lower Athabasca Region, Alberta
Environment and Parks, represented by Erika
Gerlock and Paul Maas, Alberta Justice and
Solicitor General.

WITNESSES:

Appellants: Donald Lapierre; and Steve Engman, SE
Consulting and Design Inc.

Appellants: Yvon Lapointe; Lea Lapointe; Nicole Melnyk;
Dr. Manas Shome, Matrix Solutions Inc.; and
Dr. Markus Thorman, Matrix Solutions Inc.

Director: Simon Tatlow, Director, Lower Athabasca
Region, Regional Compliance, Alberta
Environment and Parks; Dr. German Rojas,
Hydrologist, Alberta Environment and Parks;
Jocelyn Beniuk-Elkins, Wetland Specialist,
Environmental Protection Officer, Alberta
Environment and Parks; and Dean
Litzenberger, Environmental Protection
Officer, Alberta Environment and Parks.

EXECUTIVE SUMMARY

Mr. Yvon Lapointe and Ms. Lea Lapointe (Lapointes) filed an appeal of an enforcement order issued to them under the *Water Act*, by the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the Director). The enforcement order alleged that the Lapointes constructed a berm and deposited fill materials in a wetland on their land, apparently to obstruct the natural surface drainage patterns. The enforcement order requires them to remove the berm or breach it sufficiently to restore the natural surface drainage patterns that existed before the alleged unauthorized activities. The Lapointes are also required to remove any fill materials on other areas of their land impacting the natural surface drainage patterns.

Mr. Lapointe did not deny building the berm or depositing the fill materials. He believed he was justified in constructing the berm to protect his land from flooding he claimed was caused by unauthorized activities and increased surface water runoff generated by the development of his neighbour's land to the south. Mr. Lapointe believed the deposited fill materials were also necessary to preserve his access from the east to the west side of his agricultural land.

Mr. Donald Lapierre and 645639 Alberta Ltd. (Lapierres) were issued an enforcement order under the *Water Act* for maintaining a drainage ditch on their lands that is concentrating surface flow and directing it north towards the Lapointes' land. The enforcement order requires the Lapierres to fill the drainage ditch or otherwise render it ineffective, and restore the natural surface drainage patterns. The Lapierres disputed the facts upon which the enforcement order was issued. Mr. Lapierre argued the drainage ditch was a natural swale, and he had neither constructed nor maintained the ditch.

After reviewing the evidence and considering the submissions of the Lapointes, Lapierres, and the Director, the Board determined the enforcement orders were properly issued. The Director had the factual and jurisdictional authority to issue the orders. The Board also determined the terms and conditions of the enforcement orders were appropriate in principle. As the deadlines in the enforcement orders have passed, the Board recommended new dates for the submission of the remedial plans required by the enforcement orders, and completion of the work by the Lapointes and Lapierres necessary to restore the natural surface drainage patterns.

To assist the Lapointes and Lapierras in developing the remedial plans required under the enforcement orders, the Board recommended that its core findings be incorporated into the enforcement orders. Specifically, the Board's core findings are:

1. The natural drainage in the area is from south to north, starting on farmland located to the south of the Lapierras' land, travelling north through the Lapierras' land, through the Lapointes' land, to a large wetland complex, and eventually draining into Moose Lake. Natural drainage takes several forms, including groundwater, seepage, and surface flows.
2. The Lapierras can only release the naturally occurring flow of water from the farmland south of their property and the predevelopment volumes from their land onto the Lapointes' land. The Lapierras may not release any additional water volume that results from the development of the hard surfaces on their land (i.e., parking lot areas and roofs of buildings) onto the Lapointes' land. The Lapierras are responsible for developing a remedial plan that manages this additional water volume and ensures that it does not impact the Lapointes' land.
3. The Lapointes are responsible for developing a remedial plan that restores the natural surface drainage patterns. As a part of their remedial plan, the Lapointes must accept the naturally occurring water from the farmlands located to the south of Lapierras' land, and the predevelopment volume of water from Lapierras' land. The remedial plan must also ensure the surface flow can make its way to the wetland located on their land, located directly north of Lapierras' land, further north to the wetland complex on the northern edge of their land.

A coordinated and collaborative plan between the Lapointes and Lapierras would significantly increase the success of a sustainable integrated water management plan.

Based on the foregoing, the Board recommends the Minister vary the enforcement orders.

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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”) concerning the appeals of two enforcement orders issued under the *Water Act*,¹ to Mr. Yvon Lapointe and Ms. Lea Lapointe (the “Lapointes”), and Mr. Donald Lapierre and 645639 Alberta Ltd. (the “Lapierres”) by the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the “Director”). The enforcement orders relate to contraventions under the *Water Act* and a decade long dispute between the Lapointes and Lapierres (collectively the “Appellants”) relating to water management issues between their neighbouring properties. The enforcement orders were remedial in nature, intended to bring the Appellants into compliance with the *Water Act*, and were intended to restore the natural surface drainage patterns on the Appellants’ respective properties.

[2] The Appellants each appealed their respective enforcement orders.

[3] The Board held a hearing on March 21 and March 22, 2021, and heard submissions and evidence on the following issues:

1. Were the enforcement orders properly issued? This considers both the Director’s legal jurisdiction to issue the enforcement orders and the factual basis for the enforcement orders.
2. Are the terms and conditions in the enforcement orders appropriate?

[4] Based on the evidence and arguments presented at the hearing, the Board has concluded the enforcement orders were properly issued. Both Appellants contravened the *Water Act* by engaging in unauthorized activities without the necessary approval having been issued under the *Water Act*. The Director had the legal jurisdiction and the factual basis for issuing the enforcement orders, and in general, the terms and conditions of the enforcement orders were appropriate.

¹ *Water Act*, R.S.A. 2000, c. W-3 (“*Water Act*”).

[5] In the Board's view, the enforcement orders should be amended to change the dates by which the Appellants are required to file their respective remedial plans with the Director, and the dates by which the work specified under the remedial plans must be completed. The Board is also recommending that three of its core findings be incorporated into the enforcement orders to provide the Appellants guidance in developing their remedial plans.

[6] The first core finding is that the direction of the natural surface water drainage in the area is from the south to the north. The natural water flow starts in a portion of the farmland located south of the property owned by the Lapierres. Water then flows through the Lapierre properties and enters the Lapointe property at many locations along the boundary between the Lapierre properties and the Lapointe property. Historically, a tree line along that boundary slowed and distributed the water flow entering the Lapointe property. Unless it was a particularly wet year, the water flow mainly moved in the shallow subsurface or as seepage onto and across the Lapointe property. Portions of the tree line have since been removed, such that water flow enters the Lapointe property at those locations as surface flow. Once the water enters the Lapointe property, it makes its way to a wetland located just north of the Lapierre properties. When the wetland fills, water then flows north to a dugout and then from the dugout to a wetland complex on the northern edge of the Lapointe property.

[7] The second finding is, in accordance with the principles of the *Water Act*, the Lapierres are only permitted to release onto the Lapointe property the naturally occurring water originating from the farmland in NE-13 south of their property and the predevelopment volumes of water originating from their land. The development on Lapierre Properties is in the form of buildings and hard-packed surfaces, such as gravel parking lots. Consequently, the Lapierres generate additional surface water flow volumes (water that the land would usually be absorb by the land, but for the hard surfaces). The Lapierres are not permitted to release this additional surface water volume onto the Lapointe property. The Lapierres are required, under the terms of the enforcement order, to develop a remedial plan to manage this additional water volume so that it does not impact the Lapointes.

[8] The third finding is, in accordance with the principles of the *Water Act*, the Lapointes are required to accept the naturally occurring water flowing north from the farmland in NE-13 south of their property and the predevelopment volumes of water originating from the Lapierre properties. However, they are not required to accept the additional water volume resulting from the developments on the Lapierre properties.

II. Locations and Key Terms

[9] Mr. Yvon Lapointe and Ms. Lea Lapointe are joint owners of lands legally described as SE-24-61-6 W4M referred to as the “Lapointe Property”.

[10] Mr. Donald Lapierre owns lands legally described as Plan 9926243 Lot 1 (“Lot 1”). The corporate entity 645639 Alberta Ltd. is the owner of lands legally described as Plan 8621749 Lot B (“Lot B”). Mr. Lapierre is the sole director and shareholder of 645639 Alberta Ltd. Lot 1 and Lot B are collectively referred to as “the Lapierre Properties.”

[11] There is farmland, located at NE-13-61-6 W4M (“NE-13”), which is located to the south of the Lapointe Property and Lot 1, from which surface water runoff flows north towards the Appellants’ lands.

[12] The Board notes there were a number of different terms used by the Lapointes, the Lapierras, and the Director (the “Parties”), interchangeably throughout the hearing. For the purposes of this Report, the Board clarifies these terms as defined below.

[13] The “Primary Wetland” refers to the historical wetland on the Lapointe Property that existed prior to the placement of any fill material. Fill material was later placed in the Primary Wetland in order to construct an access road or berm, which resulted in its division into two portions, which are referred to as “Wetland 1” and “Wetland 2.” The fill material that was placed in the Primary Wetland to construct an access road or berm is referred to as “Berm 1.” While discussed in greater detail below, the Board has found that historically, there was one wetland which Berm 1 divides into two wetlands.

[14] The “Wetland Complex” refers to an additional wetland north of Wetland 1, and north of the Lapointe Dugout (as explained below) on the Lapointe Property. The Wetland Complex is connected to the larger regional watershed which flows into Moose Lake.

[15] There is a decommissioned Lafarge Canada facility on a titled lot that has been subdivided from the east portion of the Lapointe Property and borders Highway 41. This titled lot is referred to as “Lot A.”

[16] The “Lapointe Dugout” refers to the dugout located on the Lapointe Property between Wetland 1 and the Wetland Complex. It has been in existence for a number of years and was likely constructed to provide fill material for the construction of Lot A or the widening of Highway 41. There is another smaller dugout located on Lot 1. This second dugout is referred to as the “Lapierre Dugout.”

[17] The “Ditch” refers to the north-south oriented drainage ditch referenced in the Lapierre Order, located on the Lapierre Properties and channels water north, through Lot 1 and Lot B.

[18] The “Old Swale” is an east-west oriented linear depression along the north boundary of Lot 1, extending to Highway 41.

[19] “Berm 2” refers to material that was placed on the Lapointe Property, along the north and west sides of the boundary of Lot B.

[20] For greater clarity, Wetland 1 and Wetland 2, the Wetland Complex, Lapointe Dugout, Berm 1 and Berm 2, the Old Swale, and the Ditch² are shown on the *Map of Area*.³ The Primary Wetland is shown on a historical air photo dating from 1997.⁴

[21] “Surface flow” or “Surface runoff” refers to water from rain or snow melt travelling over the surface of the ground.

² The Ditch is marked on the Google map photo as “N/S Trench and Lot B N/S Trench.”

³ Appendix “A”, Google map photo, 2020.

⁴ Appendix “B”, 1997 Historic Air Photograph, at Slide 16, Presentation of Ms. Jocelyn Beniuk-Elkins, Wetland Specialist, March 22, 2021.

[22] “Seepage” refers to water travelling at or near the ground surface through saturated soils and along near-surface soil layers.

[23] “Groundwater” pertains to water at a greater depth below the ground surface, travelling slowly through permeable formations commonly referred to as aquifers.

[24] Surface water flow rate is discussed in the units of litres per second per hectare “L/s/ha”.

III. BACKGROUND AND FACTS

[25] The Lapointe Property, the Lapierre Properties, and NE-13 are located in the Municipal District of Bonnyville No. 87 (the “Municipal District”).

[26] Alberta Environment and Parks (“AEP”)⁵ first received a call in May 2012 from Mr. Lapointe alleging that his neighbour had dug a north-south ditch along the boundary between his property and Lot B to drain sewage toward his property. The allegation of sewage draining toward the Lapointe Property raised a health issue, and AEP referred the matter to Alberta Health Services (“AHS”). AEP informed Mr. Lapointe that AHS would contact him if it required further information. The May 2012 call was the first of several calls to AEP by the Appellants over several years, during which the Appellants each alleged the other was guilty of contraventions of the *Water Act*.

[27] On October 2, 2019, the Director issued *Water Act* Enforcement Order No. WA-EO-2019/19-09-LAR (the “Lapointe Order”) to Mr. Lapointe and Ms. Lapointe. The Lapointe Order required: the removal of fill materials placed in the wetland areas and on other lands on the Lapointe Property that were impacting the natural surface drainage patterns across the Lapointe Property,⁶ and for either the removal of Berm 2 or for Berm 2 to be sufficiently breached to restore natural surface drainage patterns. The Lapointe Order also required a remedial plan to be developed and provided to AEP by November 21, 2019. The work under the Lapointe Order was to be completed by January 23, 2020.

⁵ AEP, in this instance, refers to the Compliance Division of AEP.

⁶ As noted previously, the fill materials are referred to as “Berm 1”.

[28] On October 9, 2019, the Board received a Notice of Appeal from the Lapointes appealing the Director's decision to issue the Lapointe Order and requesting a stay.

[29] On October 17, 2019, the Board wrote to the Lapointes and the Director acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal and the Lapointes' stay application. The Director was asked to advise if the Director would consent to a stay by October 24, 2019, and to provide the Board with a copy of the Director's Record relating to the Order. The Appellant was advised if the Director did not consent to the stay, the Lapointes would need to provide additional information to the Board regarding the Lapointes' stay application, including answering the four questions the Board uses as its test for a stay.⁷ The Board further advised the Lapointes that if the Board had sufficient information, it could issue an interim stay and would provide an opportunity for the Director to provide response comments and the Lapointes to provide final comments.

[30] The Director advised the Board on October 24, 2019, that the Director could provide the Director's Record by December 6, 2019. The Director further advised that he was willing to agree to a stay, provided the Lapointes entered into an expedited mediation process. The Director advised he was prepared to provide Records for the purposes of mediation by November 15, 2020.

[31] On October 25, 2019, the Board asked the Lapointes for comments regarding the Director's proposal concerning the stay. On October 30, 2019, the Lapointes advised the Board they agreed with the Director's proposal for an expedited mediation process.

[32] On October 18, 2019, the Director, issued *Water Act* Enforcement Order No. WA-EO-2019/19-08-LAR (the "Lapierre Order") to Mr. Donald Lapierre and 645639 Alberta Ltd. The Lapierre Order requires the Lapierres to infill or otherwise render the Ditch ineffective, such

⁷ The Lapointes were asked to answer the following questions:

1. What are the serious concerns of Mr. and Mrs. Lapointe that should be heard by the Board?
2. Would the Mr. and Mrs. Lapointe suffer irreparable harm if the stay is refused?
3. Would the Mr. and Mrs. Lapointe suffer greater harm if the stay is 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?

that the natural surface drainage patterns are restored. The Lapierre Order also required a remedial plan to be developed and provided to AEP by November 21, 2019. The work under the Lapierre Order was to be completed by January 23, 2020.

[33] On October 25, 2019, the Board received Notices of Appeal from the Lapierras appealing the Director's decision to issue the Lapierre Order and requesting a stay. The Notice of Appeal indicated the Lapierre Order was inextricably connected to the Lapointe Order.

[34] On November 3, 2019, the Board wrote to the Lapierras and the Director acknowledging receipt of the Notices of Appeal and notifying the Director of the appeal and stay application. The Director was asked to advise if the Director would consent to a stay by November 12, 2019, and to provide the Board with a copy of the Director's Record relating to the Lapierre Order. The Lapierras were advised if the Director did not consent to the stay, additional information would have to be provided to the Board regarding the stay application, including answering the four questions the Board uses as its test for a stay. The Board further advised if the Board had sufficient information it could issue an interim stay and would provide an opportunity for the Director to provide response comments and Lapierre to provide final comments.

[35] On November 3, 2019, the Board received correspondence from the Lapierras restating that the Lapointes' appeal and the Lapierras' appeals were inextricably connected and asking the appeals be heard together. The Board sought comments from the Director and the Lapointes.

[36] On November 4, 2019, the Director stated he was willing to consent to a stay of the Lapierre Order on the same terms of as the Lapointe Order, provided the Lapierras entered into an expedited mediation process. The Director stated he was willing to consent to joining the appeals for the purposes of expedited mediation. On November 8, 2019, the Lapointes advised that they did not want to join the appeals for the purposes of mediation.

[37] On November 6, 2019, the Board asked for the Lapierras' comments regarding the Director's proposal concerning the stay. On November 8, 2019, the Lapierras advised the Board they agreed with the Director's proposal for an expedited mediation process.

[38] On November 15, 2019, the Director provided the portion of the Director's Record that was relevant to the expedited mediation. The Record was subsequently provided to the Appellants.

[39] On November 20, 2019, the Board advised the Parties the Lapointe appeal and the Lapierre appeals would be joined for the purposes of the mediation.

[40] The Mediation Meeting was held on December 13, 2019.

[41] No resolution was reached at the Mediation Meeting or subsequent meetings that occurred over the course of 2020. The final meeting occurred on January 8, 2021. Concurrent with the ongoing mediation discussions, the Board scheduled the hearing and set a process for submissions.

[42] The Director provided the complete Director's Record to the Board on December 4, 2020. The Director's Record was subsequently provided to the Appellants.

[43] On November 18, 2020, the Board provided a copy of the Notice of Hearing to the Town of Bonnyville and the Municipal District to place on their respective public bulletin boards or websites. The Board did not receive any applications to intervene in the hearing. The Board also placed a Notice of Hearing in the Lakeland This Week on December 1, 2020. The notice stated that if any persons wished to file an application to intervene, they were to do so by December 20, 2020.

[44] On November 18, 2020, the Board proposed two issues for the hearing.⁸ On November 23, 2020, the Director advised that he had no concerns with the proposed issues. On November 23, 2020, the Lapointes responded and suggested including additional itemized matters under each issue. The Board finalized the issues for the hearing on December 11, 2020.

[45] The hearing was scheduled for March 21 and 22, 2021, by video conference.

⁸ The Board suggested the following issue:

1. "Were the Orders properly issued? This considers both the Director's legal jurisdiction to issue the Orders and the factual basis for the Orders.
2. Are the terms and conditions in the Orders appropriate?"

[46] The written submissions and materials for the hearing including expert reports were received from the Parties between December 9, 2020, and March 21, 2021.

[47] The hearing was held by video conference on March 21 and 22, 2021. The issues heard by the Board were:

1. Were the Orders properly issued? This considers both the Director's legal jurisdiction to issue the Orders and the factual basis for the Orders. This includes but is not limited to:
 - a. the facts upon which the Orders are based;
 - b. the historical flow of water on the parcels of land, including the observations by Mr. Lapointe of the historical flow of water along the section line (in the tree line) to the Highway 41 ditch;
 - c. the historical air photos;
 - d. the current flow of water on the parcels of land;
 - e. any unauthorized activities taking place on the parcels of land, such as ditching and berming, and the proposed plans to deal with these unauthorized activities;
 - f. whether a water management plan is required on the Lapierre lands; and
 - g. any wetland data or hydrological data.
2. Are the terms and conditions in the Orders appropriate? This includes but is not limited to:
 - a. the timelines specified in the Orders.

IV. Preliminary Matters

[48] At the outset of the hearing, Ms. Nicole Melnyk, who spoke on behalf of the Lapointes, raised an issue regarding AEP's Technical Report and visual aids filed by the Director and the Response Technical Report filed by Lapierres. She noted the date of the Response Technical Report filed by Lapierres was on March 12, 2020,⁹ and that this document contained multiple options; and AEP's Technical Report and visual aids, which included wetland delineations, was filed on March 19, 2020.

[49] Ms. Melnyk argued that the short notice upon which these documents were provided was unfair, and it was difficult to prepare a proper response. In particular, Ms. Melnyk

⁹ The technical reports referenced were: *Lapointe Wetland Stewart Evaluation* and *Evaluation of Drainage Plan Options*.

stated their team could not comment on the Option B drainage plan. The Lapointes' technical team was only able to respond to the Director's wetland delineations in the Director's December 9, 2019, Technical Report. Ms. Melnyk did not ask for extra time, instead stating it was difficult to address the information, and that they would address the information contained in the technical reports during the hearing.

[50] Counsel for the Lapierras, argued that the newest information was provided as a rebuttal to information and discussions that occurred between the Parties. It was argued that the information did not address new issues between the Parties, and instead, confirmed the Lapierras' position.

[51] The Director argued that no new evidence was being introduced in the Director's report. The Director stated it was a visual representation of evidence the Director previously provided to the Parties in the Director's Record.

[52] The Board determined the Lapointes could address the technical reports, submissions of the Director, and the Lapierras' submissions during the hearing.

V. Evidence and Arguments

1. Lapierras

[53] At the hearing the Lapierras advanced four main arguments:

- a. the facts the Director relied upon to characterize the Ditch as an unauthorized activity were not true or were inaccurate;
- b. despite being asked to provide an analysis and remedial plan to manage the property to a predevelopment flow of 4 L/s/ha, and having done so, the Director has yet to approve the remedial plan;
- c. Mr. Lapierre submitted he is not responsible to manage the surface water runoff from NE-13; and
- d. the remedial plan does not include steps to manage the surface water runoff from the NE-13.

[54] Mr. Lapierre provided the Board with a brief history of the ownership and development history of the Lapierre Properties. He stated he did not dig the Ditch. He further stated he believed it was created by several factors, including farming practices and the natural flow of water to the north.

[55] In September 2009, he purchased Lot B. He installed a small access approach approximately midway between Lot 1 and Lot B, and placed a culvert underneath it to allow water to travel in its preferred direction. In this location, water travels to the west.

[56] He explained that he had never performed any work on the Lapointe Property. However, previously, the former owner of Lot B had owned a mobile home and installed a septic field between the mobile home and the west property fence line. During the septic fields' installation, the former owner of Lot B had discarded rocks, roots and rubble over the fence line into what he referred to as "a natural swale,"¹⁰ where water travelled north towards the wetland on the Lapointe Property.

[57] In the summer of 2006, accompanied by Mr. Lapointe, he went into this area with a bobcat and cleared the area of the rocks and rubble, deposited during the installation of Lot B's septic field. He stated that in the years since, he maintained the area around the Ditch and occasionally would mow the grass in and on both sides. However, he stressed, he had not constructed it, dug it, or removed any dirt. In his view, the water naturally directed itself towards this area. This opinion was supported by Mr. Steve Engman, his expert, who later also stated he believed the Ditch was not man-made. Mr. Engman provided evidence indicating the Ditch could have been created by soil subsidence along an AltaGas Ltd. pipeline, or by compaction caused by the movement of farming machinery, and erosion caused by the subsequent flow of water over time. In his view, the Ditch has existed for decades, and regardless of the existence of the Ditch, or whether it was filled, he believed the water would find a way to travel north from the south.

¹⁰ Although Mr. Lapierre referred to a natural swale, it was in reference to the Ditch which is the subject matter of the Lapierre Order. The Ditch is marked on the Google Map Photo as "N/S Trench and Lot B N/S Trench."

[58] Mr. Lapierre stated the historical flow of water was from NE-13, into the south of Lot 1, through the centre of his yard and onwards through Lot B where it drained into the Lapointe Property towards the Primary Wetland. When the Primary Wetland filled to capacity in the spring, this flow would eventually continue north towards Slade Creek. After a few weeks, the southern tip of the Primary Wetland eventually would dry out.

[59] Mr. Lapierre stated that the Lapointes built two unauthorized berms, the second of which was designed to block the natural flow of water flowing off his properties, Lot 1 and Lot B. Consequently, Lot 1 and Lot B near the berms had become a pond or swamp. Mr. Lapierre argued the Lapointes intentionally blocked this drainage from the south.

[60] Mr. Lapierre argued there had never been flooding issues until Mr. Lapointe started constructing berms, obstructing the flow of water, preventing access to the natural outlet, which caused water to pool into the centre of his lands.

[61] Mr. Lapierre stated that there is no master stormwater drainage plan in place for the region.

[62] The Board heard evidence that Mr. Lapierre received approval from the Municipal District to develop his properties. Mr. Lapierre stated the Municipal District did not raise concerns regarding water issues when he applied for and received development permits for Lot 1.

[63] Mr. Lapierre acknowledged his responsibility to control the additional water flow created by the development of Lot 1 and Lot B above the predevelopment flow levels. He explained he had already taken steps to manage this increase in flow. He had voluntarily built the Lapierre Dugout on Lot 1 to store any incremental water created by his development, and had also planted over four hundred trees as a natural means to manage incremental water from the development. This partial development was completed in early 2000.

[64] Mr. Lapierre argued that he has no obligation to control or manage surface water runoff from the 7.4 hectare piece of farmland (NE-13) south of his property that flows through his property to the Lapointe Property.

[65] Mr. Lapierre argued his Remedial Plan meets or complies with the adequate outlet parameters of the Government of Alberta Fact Sheet for Storm Water Management titled “*Facts at Your Fingertips.*”

[66] He further argued that the *Water Act* does not concern itself with the volume of water. Mr. Lapierre submitted the relevant question is the calculated flow rate for the property in question and the impact, if any, of the post-development flow. Mr. Lapierre stated that his development had not had a significant impact on the flow rate. He argued there had not been any significant negative impact on the Lapointe Property.

[67] Mr. Lapierre argued the Director had not produced his own technical report. The Director’s target peak flow rate of (4 L/s/ha)¹¹ is incorrect, unrealistic, and unfair. He further argued it is not fair, practical, or legal to make the Lapierrés implement a solution that will fail if the Lapointes do not restore the flow of water to their property and an adequate outlet.

[68] Mr. Steve Engman, the expert for the Lapierrés, presented images to the Board as well as videos illustrating the surface flow on Lots 1 and B, and elaborated on the discussion provided by Mr. Lapierre. He explained that drainage swales and culverts direct surface runoff from NE-13 and the developed portions of Lots 1 and B into the Lapierre Dugout located on Lot 1. The Dugout is located in the concentrated flow path of the predevelopment catchment. He explained that the Ditch runs along the western property line along Lot B from the Lapierre Dugout to the northern property line of Lot B. Historic air photos from 1997 and 2005, indicate that the drainage course appears to follow this path prior to the development and ownership of Mr. Lapierre.

[69] Mr. Engman explained that the existing catchment flows south to the north towards an existing ponding area northwest of Lot B. He stated the existing ponding area does not appear to be a natural wetland based on historical photos. He explained that while there was a wetland historically north of Lot B, the surface water runoff from the Lapierre Properties and NE-13 would still flow north. He stated that once in the Primary Wetland, standing water levels

¹¹ The Director’s target peak flow rate is 4 litres per second per hectare “4 L /s/ha”).

would remain and excess surface water runoff would overflow north into the adjacent Wetland Complex until ultimately those waters reached Moose Lake.

[70] Mr. Engman further demonstrated the volume of surface runoff flows from NE-13 with the benefit of two videos and stated that there were significant surface runoff amounts arising from the spring melt that had to be managed. Using the 300 millimetre culvert at the junction between Lot 1 and Lot B as a gauge, he stated that it was his best estimate that the spring melt surface water runoff was approximately was 27 L/s/ha at when the culvert was two thirds full over 5 hectares, and when the culvert was half full it would be running at 17 L/s/ha over 5 hectares. He stated that in his opinion NE-13 was generating somewhere between 3.5-5 L/s/ha during the snow melt. In his opinion most of the water was coming from NE-13, having been gathered from both sides of the properties and traveling generally from the south.

[71] A third video which illustrated the area as viewed from the north was shown, and this showed the drainage coming in from the east. This video illustrated the post-development flow Mr. Lapierre intended to manage at the north side of the junction of Lot 1 and Lot B. Mr. Engman stated the area flowing towards the fence line between Lot B and the Lapointe Property included the surface water runoff from NE-13 and part of the post-development flow from the developed parcel. He stated the grade is going in this direction as is the water flow. In his opinion, the water would have been flowing in this direction regardless, given the slope of the property.

[72] Mr. Engman stated the Lapierre Remedial Plan¹² proposed by the Lapierras was not about accounting for surface water runoff rates from the developed property. He explained the Lapierre Remedial Plan was in part, to put in a 300 mm pipe similar in size to the culvert and expand the Lapierre Dugout to accommodate the storage capacity required for the post-development flow.¹³ The post-development flow rate would be restrict the current peak flow rate of 0.3 m³/s leaving the Lapierre Dugout to the calculated predevelopment flow rate of 0.125 m³/s by constructing an earthen berm and utilizing a 250 mm smooth wall pipe for flow control.

¹² Lapierre Expert Report, SE Design and Consulting Inc., January 6, 2021.

¹³ This was calculated as 205 m³. WA-EO-2019/08-LAR Response, SE Design Consulting Inc., December 9, 2020, at page 11 ("Lapierre Remedial Plan").

Water would drain from the flow control pipe into an improved grassed swale to the natural predevelopment flow path within the Lapointe Property. Portions of developed areas on Lot B would be restored to grassed acreage conditions to reduce the impacts of development. Finally the natural flow path and adequate outlet towards the Lapointe Property would be restored as would the connection to the receiving watercourse.

[73] Mr. Engman indicated that his solution was site specific and Mr. Rojas' solution was regional. It examines where the water is coming from and where it is going, for the specific site. Mr. Engman stated he had looked at the area draining directly through the Lapierre Properties. He did not examine the unit flow rate for the entire region, which would be an average of 50 square kilometres draining into Moose Lake. He said he provided a direct calculation for the amount draining through Lot 1 and Lot B, and from NE-13. He said if there was a Master Plan for the Moose Lake Region, he would have calculated a unit flow rate, but here, there is 7.4 hectares (the farmland to the south) draining through another 4.67 hectares (which are the combined hectares of Lots 1 and B). He stated the amount of flow coming in from NE-13 had to be understood, in order to be able to properly manage it.

[74] The Board, when viewing the slope and drainage diagrams, asked Mr. Engman about a blip that suggested an elevation in slope. Mr. Engman indicated that there appeared to be some infill on the Lapointe Property, but he could not specifically answer what it was, not having been able to enter the Lapointe Property. When asked if it would hold water back, he commented that it could potentially have that effect.

[75] Mr. Lapierre stated that with respect to the Lapierre Order issued to him:

- a. it relates to Lot B only;
- b. he believed the Ditch delineated in yellow in Appendix "A" to the Lapierre Order is not properly located, and would correspond to the natural flow of water north, if it were drawn properly;
- c. Lot 1 does not form part of the subject matter of the Lapierre Order.

[76] Mr. Lapierre denied any claims regarding discharging sewage or contaminated water. He stated he has never brought offsite snow or contaminated snow onto his lands. He stated Lot 1 and Lot B both have their own pump out and discharge system that have been in place for years, are compliant, and discharge into a depression in the trees. He suggested that if there are concerns about smells, they are likely arising from stagnant water on the Lapointe Property, or manure that Mr. Lapointe has deposited in the Primary Wetland.

[77] Mr. Lapierre asked the Board to reverse the Lapierre Order. In the alternative, the Board was asked to confirm the Lapointe Order and stay the Lapierre Order for three years in order to allow all parties to observe and measure the actual impacts of the post-development flow after the adequate outlet is restored by the Lapointes.

[78] In the further alternative, the Board was asked to confirm the Lapierre Remedial Plan, or one similar to it.

2. The Lapointes

[79] The Lapointes argued the Lapointe Order was based on information that is false, inaccurate and confusing.

[80] The Lapointes stated that between the years 2008 to 2014 a manmade trench on Lot B caused water to flow north towards their property, and the low point in their field was not able to handle the increased water. The flooded area has no outlet.

[81] The Lapointes stated water volumes accumulated and continued to increase from the Lapierre Properties. This flooded area does not allow the Lapointes to access the west portion of their agricultural land as soils in this area became oversaturated, flooding Path 2 and blocking access to the field.

[82] The Lapointes stated that Berm 1 was constructed to prevent Path 3 from flooding and prevent their cattle from drinking the water entering their lands.

[83] The Lapointes explained Berm 1 was constructed in 2012 to prevent the increasing unauthorized water from Lot B, which sometimes smelled of sewage, from entering

their property and flooding their pasture where their cattle graze. They further stated they wished to protect their only access into the fields.

[84] Ms. Nicole Melnyk provided evidence on behalf of the Lapointes. She explained the flow of water from the Ditch sometimes smelled of sewage, and the low area in the Lapointe Property is unable to handle the increase in water. She stated the Lapointes also did not want their cattle drinking the unknown water.

[85] The Lapointes stated in 2014, AEP opened a file regarding a trench and water entering their property from Lot B.

[86] The Lapointes argued Lot B is mainly impervious surfaces. There is no water management plan in place resulting in 2.5 times more water draining downstream to their property. They further stated the sewer system and greywater from the wash bays on Lot 1 drained into the manmade trench on Lot B, which further increased the water draining into their property.

[87] The Lapointes stated that Berm 1 does not stop water flow and is split so water can cross if needed.

[88] The Lapointes referred to the investigation notes from the Director's Record, which note that the Ditch was initially created without approval and in violation of section 36(1) of the *Water Act*. They further indicated that the investigation notes indicate the vegetation in the Ditch had been in place for some time and was well established.

[89] The Lapointes argued there is no permanent swale and no outlet to the Primary Wetland located on their property. The Lapointes argued trenches were built to redirect water from Lot 1 through the tree line, and out towards their property. They further argued the Old Swale was no longer in use, and now there are minimal water flows through the Highway 41 ditch.

[90] The Lapointes stated there was no contact from AEP with the Lapointes in 2016 or 2017. They noted the investigation notes required compliance with Municipal District's sewage requirements. They stated the sewer requirements may have been rectified but they were

not notified. They further noted there was a compliance agreement between Mr. Lapierre and the Municipal District, which required the trench to be filled in.

[91] The Lapointes further stated snow piling near the north side of Lot B was causing soil disruption during spring melt over two years, and this led to the construction of the Berm 2 in 2017. The Lapointes stated Berm 2 was constructed to protect their land and cattle from snow melt water. The Lapointes noted the *Snow Disposal Guidelines for the Province of Alberta*¹⁴ state it is not advisable to place snow on prime agricultural land. They stated that the Municipal District is known to use calcium chloride on its roads in the winter months and that metals, hydrocarbon residues, salts, and sand usually found in waste snow can pollute the property.

[92] The Board heard the Lapointes are frustrated the Lapointe Order was issued, as it had been seven years since the issues with the Ditch had been raised with AEP without resolution. The Lapointes argued the flow of water from the Ditch was an activity requiring an approval under the *Water Act*, and noted that no approval had been issued for the Ditch. They argued the issuing of the Lapointe Order was ill timed as there was no stormwater management plan in place for the Lapierre Properties and AEP had not required the water being discharged from the Ditch to be stopped.

[93] The Lapointes further argued they cannot remove Berm 1 and Berm 2 as there is no water management plan in place for Lot 1 and Lot B. The berms are needed for the protection of their cattle and to ensure access their agricultural fields.

[94] The Lapointes argued the problem is not the construction of the berms, but rather the increase in water flow from the Lapierre Properties. The Lapointes stated the tree line assisted with water management activities and water absorption. The Lapointes further stated over the years, the trees between Lot 1 and Lot B have been thinned resulting in an increase in surface runoff.

[95] The Lapointes further argued that water naturally pools between Lot B and the Lapointe Property, and that if it were not for the increase in surface water runoff from the development of the Lapierre Properties, water would not flow north onto the Lapointe Property.

The Lapointes stated when the Old Swale was in use, the water enter the Old Swale in the tree line, the Highway 41 ditch, and then flow to the north along the highway.

[96] It was argued that Mr. Lapointe, as a third generation owner of his property, had a better understanding of the movement of water on his property than the historical air photos could illustrate, as he had experience with the area. To the best of his knowledge, there has never been a swale, channel or ditch that drained water from one particular spot onto the Lapointe Property in a northerly direction. Ms. Melnyk stated the historic air photos show no evidence of trenches, swales or channels in the location at issue.

[97] Ms. Melnyk stated historically farmers cleared the land and discarded rocks and rubble into the tree line. There is an elevation difference in the tree line as a result of the historical farming practices. If there was a heavy rainfall, surface water runoff would be absorbed by the organic matter and would move along the natural contour of the land.

[98] Ms. Melnyk stated the Ditch was not a naturally occurring trench, swale or channel. In reviewing the historic air photos from 1997, the locating in question appeared to have been used as a path by a silage truck during the fall harvest. The truck would follow this route approximately thirty times a day for a few days.

[99] The Lapointes disputed that the Ditch is a natural swale and believe that it is in fact a manmade ditch constructed between 2008 and 2009 on Lot B. The Lapointes stated there is no natural drainage on Lot B moving water north. Ms. Melnyk stated that AltaGas Ltd. installed a main pipeline going north from the south through both quarter sections. She stated the location of the pipeline matches up with the 2007 LiDAR, for the specific location of the Ditch from the tree line to the lower area of the Lapointe Property.

[100] The Lapointes argued AEP has not provided evidence that the Ditch is natural and argued the path followed by the water as identified by AEP, follows this AltaGas Ltd. pipeline.

¹⁴ *Snow Disposal Guidelines For the Province of Alberta*, Alberta Environmental Protection, February, 1994.

[101] It was further argued that the development activity on Lot B altered the natural surface water flows, including deepening of the drainage swale¹⁵ into the Ditch, which has concentrated the flow of water onto the Lapointe Property. It was argued that historically, this area had been harrowed through and as recently as 2007 there were no signs of the any natural north – south swale existing prior to 2009.

[102] Ms. Melnyk explained that by 2009, trenches were dug on Lot 1 which redirected all of the water from Lot 1 through the tree line and out to the Lapointe Property. She further explained the Old Swale was no longer in use, and minimal water was flowing to the Highway 41 ditch. By 2019, the southwest corner of Lot B an enhanced trench was evident, which had intersected three trenches. She indicated work had been performed in the tree line by removing vegetation, which would affect the movement of water and absorption.

[103] The Lapointes disagreed that the Municipal District’s sewage requirements for Lot B were satisfied. No one had communicated to them that the sewage requirements had been rectified. They also understood that a compliance agreement between the Municipal District and Mr. Lapierre required the Ditch to be filled in or have approval from AEP, and this requirement had not been satisfied.

[104] The Lapointes argued Berm 2 was in fact already breached (despite the wording of the Lapointe Order). The Board was directed to the Director’s Record and the Investigation Notes of Environmental Protection Officer Litzenberger (“EPO”), who indicated Berm 2 as being breached on April 24, 2018, and March 26, 2019. Ms. Melnyk pointed to EPO Litzenberger’s notes of April 24, 2018, wherein he indicated the owner of Lot B had used a pump to reduce water levels, pumping water over the property line onto Berm 2 and washing part of it away. The notes referenced water flowing through a breach in the northwest corner of Berm 2.¹⁶ Photographic evidence showing water being pumped over Berm 2 was presented.

¹⁵ Ms. Melnyk referred to the path followed by the surface water flow prior to its use of the Ditch as it exists now as a swale. This is not unlike the terminology used by Mr. Lapierre. “Swale” is used here, as Ms. Melnyk used natural drainage swale, although, it was disputed whether it was a natural swale, or drainage ditch, and how it came into existence.

¹⁶ Investigation Notes, EPO Litzenberger, April 24, 2018, Director’s Record, Tab 5.3, at page 271.

[105] The Lapointes stated Lot B had a water problem prior to Berm 2 being built. The Board was advised that Lot 1 was releasing a lot of water onto Lot B through the opened tree line instead of releasing it into the Highway 41 ditch through the Old Swale in the trees, as had been done previously.

[106] Ms. Melnyk stated that Mr. Lapointe has always told AEP that the water in Wetland 1 does not flow north and that there is no outlet. Seepage only occurs when Wetland 1 has reached its maximum level. However, it was noted that the 2007 and 2014 LiDAR images suggest that there could be water movement north to the Wetland Complex.

[107] Ms. Melnyk stated there are no signs of surface water moving north through a swale, channel or trench to the Wetland Complex, however she acknowledged there does appear to be seepage going north. This explanation was supported by the Lapointes' expert, Dr. Markus Thormann, who stated it was his opinion that there was no defined surface drainage pathway from Wetland 1 northward to the large Wetland Complex. He explained that he believed that during wet years and early spring, following the freshet, natural surface water seepage occurs through wet soil between Wetland 1 and the Wetland Complex. He further stated there is no defined anthropogenic, or natural well-defined drainage pathway apparent on any of the historic air photos. He stated that while the seepage pathway is natural, it is characterized by wet soil due to the subsurface flow of water and the water is likely rarely carried above the surface.

[108] Dr. Shome explained that the Lapointes did not want to accept the incremental surface water runoff resulting from the development of Lot 1 and Lot 2. In his view, this was a reasonable position.

[109] Dr. Shome stated that he had no concerns with a flow rate of 3-4 L/s/ha in principle, but was concerned that there was no defined return period associated with the flow rate. He explained to the Board this was concerning, as this meant that there did not need to be a stormwater pond in place to manage the increase in water resulting from the development occurring on Lot 1 and Lot B. Practically speaking, this means that water could be discharged at this rate at all times, instead of only during a flood or rainfall events with return periods up to 1:100 year events, which is the design standard required by the Stormwater Management

Guidelines. He explained that in the Stormwater Management Guidelines, the storage requirement for a stormwater pond is determined by the allowable rate of flow, as a maximum flow rate from the stormwater pond when the pond is full during the design rainfall event of the 100-year 24-hour storm event. Under smaller more frequent rainfall events, stormwater runoff will enter the pond and the outflows from the pond will be governed by the water levels in the stormwater pond. The outflows from the stormwater pond will be less than the allowable flow rate.

[110] He stated that the storage volume of the stormwater pond must be large enough to contain the 1:100 year event 24-hour rainfall storm event and the size of the outlet must be appropriate to allow outflow at the maximum flow rate under the design rainfall event. He stated there had to be an adequate storage facility in place to store water during all rainfall events with return periods up to the design 1:100 year 24-hour rainfall storm event. He explained that storage volume and maximum rate of flow were interconnected components to a stormwater management plan.

[111] Dr. Shome indicated that he had reviewed the estimates for predevelopment and post-development flow rates provided by Mr. Engman. He stated that the predevelopment flow rate was calculated at a much higher rate than the rate calculated by both himself and Dr. Rojas. Dr. Shome noted that the number provided by Mr. Engman was 2.5 times higher than the rate suggested by Dr. Rojas and 5 times higher than the rate he was suggesting. Dr. Shome further noted that Mr. Engman had stated that the development within Lot 1 and Lot B had increased. He stated he had calculated and recommended a post development flow rate of 2 L/s/ha.

[112] Dr. Shome stated the Lapointes want the Ditch filled in and the excess surface water runoff arising from Lots 1 and B to be managed in a way that did not interfere with the agricultural practices occurring on the Lapointe Property. He further stated they want the use of Access Path 2 to be restored so they can access their agricultural land without damaging their equipment. Dr. Shome stated the Lapointes would like to be able to seed their crops on time and not be affected by increased water conditions.

3. The Director

[113] The Director stated the enforcement orders were issued based upon the application of the *Water Act*, with the intent of resolving the long-standing complaints between the Appellants regarding the flooding that was occurring between their respective properties. The Director was of the opinion the enforcement orders were needed to provide a permanent solution, having regard to all of the facts and the legislation, and there being no voluntary compliance from the Appellants. The Director stated he considered all of the available information and data, and argued he had properly applied all of the applicable legislation, policies and guidelines in exercising his discretion under the *Water Act* to issue the enforcement orders.

[114] The Director argued:

- a. the enforcement orders were properly issued to the Appellants; and
- b. the terms and conditions of the enforcement orders are appropriate.

[115] The Director further argued the Appellants have not met the onus of proof required to justify a recommendation from the Board to reverse or vary the Director's decision to issue the enforcement orders. The Appellants have not demonstrated that the enforcement orders were not properly issued, nor have they demonstrated that the terms and conditions of the enforcement orders are not appropriate.

[116] The Director submitted that the enforcement orders should be upheld as they are properly issued and appropriate.

[117] The Director submitted in the alternative if the Board finds that the enforcement orders were properly issued but is of the view that specific measures should be prescribed in the enforcement orders which would meet the objective of providing a permanent solution to the water management issues, the Director seeks such further recommendations from the Board.

[118] The Director stated Mr. Lapierre has in the past operated a bus washing business on a portion of Lot 1, including a parking area and buildings related to that business, and other

activities he carries out on his lands. Mr. Lapierre resides on Lot 1, and there is a rental property on Lot B. The Director noted Lot 1 is zoned for commercial purposes.

[119] The Director set out the long standing compliance issues between the Appellants. He stated on May 18, 2012, Mr. Lapointe called AEP regarding concerns with Mr. Lapierre appearing to release sewage from Lot 1 onto his land. At that time, Mr. Lapointe also complained that Mr. Lapierre had cleared and widened a water drainage path (the Ditch) on Lot B that directed water towards his property. According to the complaint, the widening of the Lot B drainage path concentrated the natural surface water flows so that they flowed north onto his property in an unobstructed manner, at a higher rate and caused flooding.

[120] On July 13, 2012, AEP was contacted by Mr. Lapierre. He alleged Mr. Lapointe was blocking the flow of surface water drainage off of his property by building a 50 to 80 foot long berm (Berm 2) across the northern boundary of his property. Berm 2 is adjacent to an access road constructed by Mr. Lapointe that runs near the bottom southwest corner of the Lafarge Canada property toward the Lapointe Property to the west.

[121] Mr. Lapierre informed the EPOs that there was some history involving the Municipal District. The EPOs contacted the Municipal District to acquire further information as well as conducted a review of the historic air photographs, Google Earth, Land Titles documents as well as other information available to assess the site.

[122] In the Director's opinion, Berm 1 was constructed by Mr. Lapointe for use as an access road for his farm equipment, to use in crossing a wet area from the east to west sides of his fields. The adjacent berm was constructed to address Mr. Lapointe's concern about contaminated water from the Lapierre Properties being released into the area of his land used by his cattle.

[123] The Director stated that on July 18, 2012, EPOs conducted an inspection. During the inspection the EPOs noted soil and manure had been deposited in a small wetland area characterized by cattails, sedges and reed grasses.

[124] On July 23, 2012, AEP contacted Mr. Lapointe to inform him that working in a wetland required an approval under the *Water Act*. He was advised that he needed to either

remove the material or apply for an approval under the *Water Act*. AEP provided him with information regarding the defined drainage area. At that time, Mr. Lapointe advised AEP that he would not remove the material. A follow up visit on July 24, 2012, confirmed that the material had not been removed from the Primary Wetland.

[125] On August 13, 2012, AEP sent a letter to the Lapointes advising the Lapointes they were in violation of the *Water Act*, and demanding the Lapointes take remedial steps in relation to manmade modifications to the Primary Wetland on the Lapointe Property.

[126] On August 28, 2012, EPOs met with Mr. Lapointe to discuss AEP's concerns and to inspect the site. EPOs reviewed AEP's information indicating the presence of a defined drainage pattern in a northerly direction. Some of the fill materials had been removed at that time and there was minimal ponding present. Due to the minimal impact to the wetland area, AEP closed its file pending further information.

[127] In September of 2014, AEP received a new complaint from Mr. Lapointe regarding his neighbour's ditch (the Ditch) changing the flow of water from his neighbour's property (Lot B), which was causing an impact to his property (Lapointe Property), as well as further allegations regarding contaminated water from a septic pump-out.

[128] On September 26, 2014, EPOs conducted a site inspection of the Lapointe Property and the Lapierre Properties. The Director stated the EPOs observed the following:

- a. Most of the area surrounding the bus wash on Lot 1 of the Lapierre Property was compacted with road-crush gravel, and sloped towards a culvert which outlets to the shallow Ditch on Lot B, which in turn runs towards the Lapointe Property.
- b. There was runoff in the culvert, the Lapierre Dugout on Lot 1, and in an old fence line ditch (the Old Swale), which runs east/west between NE-13 and the Lapointe Property and intersects Lots 1 and B on the Lapierre Properties.
- c. No runoff was observed in the shallow ditch on Lot B of the Lapierre Properties. The area was however, soggy.
- d. An area near this shallow Ditch on Lot B of the Lapierre Properties had a scaly or flaky appearance.
- e. There was no apparent effluent collection/discharge system for the bus wash on Lot 1.

- f. Old mounds of soil material, which were overgrown with vegetation, were on the Lapointe Property in a wetland, near the shallow ditch on Lot B of the Lapierre Properties.
- g. Fresh soil stockpiles had been placed north of the unpaved farm access road on the Lapointe Property in wet areas.

The EPOs also observed a number of issues with both properties that required further follow up by AEP and possibly the Municipal District. These included:

- a. review of the development on the Lapierre Properties and potential offsite impact by the Municipal District under the subdivision guide and *Water Act* requirements; and
- b. advice to Mr. Lapointe to remove the infill material and restore the natural drainage conditions.

[129] On September 29, 2014, AEP contacted the Municipal District to collect background information on Lot B. This information related to the Commercial Business Approval including approval of effluent discharge methods related to the wash bay and the storm water management plan, a copy of the Evaluation Document regarding the suitability and conformity with local and provincial legislation, and meetings minutes from August 26, 2014.

[130] In December 2014, AEP met with the Municipal District to discuss the drainage alteration issues, including the alteration of drainage, and to engage the Municipal District to address the Lapointes' concerns for which the Municipal District had jurisdiction and responsibility. In February 2015, AEP continued to communicate with the Municipal District to resolve these issues.

[131] On February 18, 2015, the Municipal District sent a letter to Mr. Lapierre regarding:

- a. the truck wash facility, the pump-out and discharge points;
- b. the existing dugout and diversion; and
- c. requesting a drainage plan to be submitted to the Municipal District by March 20, 2015.

AEP contacted the Municipal District in April and June to request an update on the letter sent to Mr. Lapierre.

[132] On June 9, 2015, AEP received a call from Mr. Lapierre alleging that Mr. Lapointe had been filling a marsh. He further alleged that Mr. Lapointe had been blaming him for flooding his land with wash water from his bay. AEP contacted the Municipal District regarding Mr. Lapierre's complaint. In August 2015, AEP had several conversations with the Municipal District regarding the issues arising from Lot B.

[133] In February 2016, the Municipal District contacted AEP and informed AEP that it had met with Mr. Lapierre to discuss the septic system. The Municipal District advised AEP that Mr. Lapierre had signed an agreement that stated that he would bring the septic system into compliance by June 2016. The Municipal District further informed AEP that on June 17, 2016, an inspection of the Lapierre septic systems had been completed and the intent of the *Alberta Safety Codes Act* had been met.

[134] The Director further stated Mr. Lapierre had sewage compliance issues relating to the Lot 1 commercial activities throughout 2015-2016. He stated that on February 18, 2015, the Municipal District wrote Mr. Lapierre a letter which stated that the bus wash facility on Lot 1 was landscaped in such a way that most of the developed surface water runoff was diverted to the Lapointe Property, and that there was evidence of a pump-out structure which discharged towards the Lapointe Property, which worsened the wet conditions. The letter stated water must not drain from the Lot B at a rate greater than predevelopment rates.

[135] The Director provided greater detail regarding the compliance agreement between the Municipal District and Mr. Lapierre, dated September 11, 2015. The compliance agreement stipulated that Mr. Lapierre would complete certain tasks on Lot 1 and Lot B. These included:

- a. ensuring the septic systems are in compliance with the Municipal Bylaw 1532 and the *Alberta Safety Codes Act*, and resolving any outstanding AEP concerns about septic issues, including obtaining any necessary permits by November 18, 2015;
- b. completing a private sewage inspection and supplying verification that the sewage system would function according to the Alberta Private Sewage Systems Standard of Practice, 2009;

- c. converting the “pump-out location” to a treatment field or mound that meets the requirements of the Standard of Practice, 2009;
- d. bringing all septic systems into compliance by June 2016; and
- e. filling the Ditch, or obtaining a *Water Act* approval for the same.

[136] The Director stated AEP advised the Municipal District that if Mr. Lapierre was going to maintain a small swale to facilitate drainage, he would require an approval under the *Water Act*.

[137] On March 30, 2016, Mr. Lapierre called AEP to report that Mr. Lapointe was causing flooding to the Lapierre Properties. At that time, Mr. Lapierre informed AEP that he had constructed a trench so that water passed through the trench, rather than his yard.

[138] On October 30, 2017, AEP receive a complaint from a staff member of the Municipal District that Mr. Lapointe was filling in a slough and had built a four foot tall berm along the southern property line of the Lapointe Property, adjacent to the Lapierre Properties, which was restricting the flow of water from flowing across the Lapierre Properties to the Lapointe Property.

[139] On April 16, 2018, AEP was informed that Mr. Lapointe had constructed a berm around the fence line of Lot B, causing flooding. EPOs conducted an investigation and observed that the spring runoff was backing up onto Lot B. Mr. Lapointe was contacted regarding Berm 2. He advised AEP that the water flows along the tree line to the east, and then into the Highway 41 ditch, but not through his property to the north. At that time AEP explained to Mr. Lapointe that AEP believed the water course flows north through his property towards Moose Lake, and Berm 2 was blocking this natural flow.

[140] On April 20, 2018, Water Management Order No. WMO-2018/02-LAR was issued to the Lapointes (the “WMO”). The WMO required Berm 2 to be breached to allow water to flow. AEP EPOs inspected Berm 2 four days later and observed a breach caused by erosion. At the time, Mr. Lapierre advised the EPOs that the breach was created when he had pumped water over the berm and that he did not contact Mr. Lapointe about having breached the berm.

[141] AEP met with Mr. Lapierre on May 24, 2018 to discuss his knowledge of the area and understanding of the water flow patterns for the area. AEP met with the Lapointes on July 5, 2018, to discuss their knowledge of the area and understanding of the water flow patterns.

[142] In March of 2019 AEP visited Lot B. Water was flowing through the breach in Berm 2 and not flooding Lot B. Further meetings occurred in the spring of 2019, after which AEP decided to proceed with enforcement orders under the *Water Act*. The enforcement orders were designed to restore the natural drainage patterns in the area.

[143] On May 23, 2019, Ms. Melnyk, called AEP alleging that Mr. Lapierre had dug a trench on Lot 1.

[144] The Director stated it was his practice to provide a person to whom he is considering issuing an enforcement order the opportunity to be heard on the factual circumstances and to discuss the compliance issues and AEP's objectives before issuing the enforcement order.

i. The Lapointe Order

[145] The Director stated he met with Mr. Lapointe to discuss AEP's concerns about the unauthorized berms and infilling activity on the Lapointe Property and to gather any relevant information to help inform his decision.

[146] On October 2, 2019, the Director issued the Lapointe Order to Lapointes for the unauthorized construction and operation of a berm and other infilling activity to restore the natural surface drainage patterns, located on the Lapointe Property.

[147] The Lapointe Order provides that:

- a. Mr. Lapointe has conducted infilling activities and constructed an earthen berm along the southeast and southwest boundaries of the Lapointe Property;
- b. The construction of the berm and the infilling activities of other areas of land (including the original access road/berm constructed in or around 2012) were unauthorized activities pursuant to section 36(1) of the *Water Act*;
- c. The Berm along the Lapointe Property, and Lots 1 and B is causing water to back up and flood the adjacent property owned by the Lapierrres;

- d. The Lapointes would submit to the Director a remedial plan with the objective of restoring the natural flows by removing or breaching the berm and removal of all fill material in the adjacent wetland area.

[148] The Director argued he has the factual and legal grounds to issue the Lapointe Order. The Director noted the Mr. Lapointe acknowledged that he had constructed both Berm 1 and Berm 2. He noted that Mr. Lapointe also refused to remove Berm 1 and the fill material. The Director argued that Berm 2 still impedes surface water runoff. The Director argued Mr. Lapointe has the onus of challenging the order issued against him and that he had not raised any factual or legal grounds to challenge the Lapointe Order.

[149] The Director stated that soil material was used to fill the Primary Wetland in order to construct an access road on the Lapointe Property. This had the effect of blocking water from getting to the Primary Wetland. This also had the effect of blocking the outlet of surface water flowing from the Primary Wetland to the Lapointe Dugout and the Wetland Complex. He stated that a second earthen berm had been constructed around Lot B causing flooding to that property by blocking the natural drainage.

[150] The Director explained that placing fill in the Primary Wetland and constructing a berm each constituted an activity under the *Water Act*, and are contraventions of section 36(1) of the *Water Act* as those activities were being carried on without an approval. He explained that “activity” has a very broad definition in the *Water Act* and includes: “placing, constructing, operating, maintaining, removing, disturbing and altering flows [or] levels of water for the purposes of drainage.”¹⁷

[151] He stated the Lapointe Order required two things: the removal of Berm 2 or for Berm 2 to be sufficiently breached to restore natural surface drainage, and for removal of any fill material, now referred to as Berm 1, placed in the wetland areas and on other lands that impact the natural surface drainage flows and patterns.

¹⁷ Section 36(1) of the *Water Act* provides:
“Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.”

[152] The remedial plan was to be provided to AEP by November 2019 and the work was to be completed by January 2020.

[153] The Director stated he had jurisdiction to issue the Lapointe Order under section 135(1) of the *Water Act*.¹⁸ The Director further observed that commencing or continuing an activity under the *Water Act* without an approval or as otherwise authorized under the *Water Act*, is an offence.¹⁹

[154] The Director stated Mr. Lapointe has the onus of demonstrating on a balance of probabilities the Director erred in the determination of a material fact, and only when Mr. Lapointe meets this onus does burden shift to the Director to prove his decision to issue the Lapointe Order was appropriate. There is no defence of justification.

[155] The Director argued Mr. Lapointe had failed to provide any evidence that demonstrated that he had failed to consider a material fact or had made an error in issuing the Lapointe Order. The Director noted that Mr. Lapointe does not dispute having constructed Berm 1 or Berm 2, nor does Mr. Lapointe plan on complying with the Lapointe Order in the immediate future.

[156] The Director submitted the Lapointe Order should be confirmed.

[157] The Director noted that in his review of the file there was a long history between Appellants resulting in multiple calls by both to AEP.

[158] The Director stated that in 2012, Mr. Lapointe constructed Berm 1, namely the infilling of the wetland area on the Lapointe Property adjacent to the access road. The Director argued this has blocked the northerly natural surface flows, and in the Director's opinion, caused water to back up and flood portions of the Lapierre properties, namely Lot B.

¹⁸ Section 135(1) of the *Water Act* states:

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

¹⁹ Section 142(1)(h) of the *Water Act* provides:

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

[159] The Director acknowledged Berm 1 is not specifically mentioned in the Lapointe Order. However, he argued that infilling the wetland area was involved in the construction of the berm, and therefore its removal is captured in the requirements of the Lapointe Order. He stated Mr. Lapointe constructed Berm 1 to block the flow of allegedly contaminated water from the bus wash located on Lot 1.

[160] The Director stated Berm 1 is clearly visible in photographs taken in 2016 by Mr. Lapierre. There is pooled water visible around both sides of the berm, and no culvert is visible.²⁰ The Director stated in another photograph taken by Mr. Lapierre at sometime during the spring of 2016, piled fill material is visible running parallel to Berm 1.²¹

[161] The Director stated that at some point in 2018, Mr. Lapointe constructed Berm 2 on the southern edge of the Lapointe Property, bordering on Lot B. The Director stated Berm 2 blocks the northerly natural surface flows and in AEP's opinion has caused flooding on portions of Lots 1 and B.

[162] In April 2018, in response to the flooding of Lot B, a four day water management order was issued to Mr. Lapointe to breach Berm 2. This berm was not breached and Mr. Lapierre pumped water over the berm. Investigation notes indicated that any breach to this berm was caused by erosion from the pumping of water over the berm by Mr. Lapierre.

[163] The Director stated that after reviewing the facts of the investigation and consulting with his counsel, he determined the appropriate enforcement (remedial) tool in the circumstances to resolve the long standing water issues between the Appellants and gain compliance with the *Water Act*, was to issue enforcement orders to both the Lapointes and the Lapierres.

[164] The Director further stated that seasonal flooding can be seen in numerous photographs, including a number of photographs provided to AEP by Mr. Lapierre in the spring of 2016 and 2018.

²⁰ Director's Record, Tab 4, at pages 113-116, and 123.

²¹ Director's Record, Tab 4, at 127.

[165] The Director argued the construction and maintenance of the berms displaced water, altered the flow of water, changed the location of water, and has the ability have an impact on the aquatic environment. The Director argued as a result, Berm 1 and Berm 2 meet the definition of an activity for which an approval was required. The Lapointes were not issued an approval. He argued the Lapointes have therefore, breached section 36(1) of the *Water Act*. The Director argued that he had a factual and legal grounds for issuing the Lapointe Order.

[166] With respect to the placing of the fill material in the Primary Wetland, the Director argued he had the factual and legal authority to issue the Lapointe Order. The Director submitted that the placing of fill in a waterbody located on the Lapointe Property meets the definition of an activity under the *Water Act*. Placing fill in the waterbody involved the “maintaining, removing, or disturbing [of] ground, vegetation or other material.” The Director argued the photographic evidence shows that the placing of infill has altered the level of water, including drainage, has changed the location of water, and may cause an effect on the aquatic environment.

[167] The Director stated AEP has not issued an approval to the Lapointes for placing fill in the wetland on or any land, water or waterbody. The Director stated the area where the fill was placed meets the definition of water body as section 1(1)(ggg) defines a water body as “any location where water flows or is present, whether the flow or presence of water is continuous, intermittent or occurs only during a flood, and includes but is not limited to wetlands.”

[168] The Director stated he consulted with a wetland specialist within AEP to determine the status of the wetland. He stated the wetland specialist completed a desktop assessment and determined that the wetland was not Crown claimable. The wetland specialist further determined that the wetland was historically either a seasonal or temporary graminoid marsh surrounded by a treed swamp. He stated the wetland specialist also determined the wetland had increased in size during the 1980s or early 1990s, when the treed vegetation surrounding the wetland was removed.

[169] He stated that the historical air photos that were a part of the wetland specialist’s review show the approximate historical boundary of the wetland. He noted that while the

boundary of the Primary Wetland would fluctuate from year to year depending on precipitation and runoff condition, Berm 1 sits within the boundary of the Primary Wetland.

[170] He stated his staff had also consulted with the wetland specialist who had recommend returning the Primary Wetland to its predisturbance condition as a preferred goal.

ii. The Lapierre Order

[171] On October 18, 2019, the Director met with Mr. Lapierre to discuss AEP's concerns about the unauthorized drainage ditch and to gather any relevant information to help inform his decision.

[172] On October 18, 2019, the Director issued the Lapierre Order to the Lapierras for the unauthorized construction and operation of a drainage ditch activity to restore the natural flows, located on Lot B.

[173] The Lapierre Order provides that:

- a. Mr. Lapointe has complained that Mr. Lapierre had cleared and widened the natural surface water flow path on the Lot B into the Ditch, which was concentrating and directing surface water flows toward the Lapointe Property;
- b. EPOs had attended the property in July 2012 and September 2014 and observed the Ditch that was concentrating and directing water towards the Lapointe Property;
- c. The Ditch is receiving water from Lot 1 and is causing flooding on the Lapointe Property; and
- d. Mr. Lapierre would submit to the Director a remedial plan with the objective of restoring the natural flows by removing or breaching the berm and removal of fill material in the adjacent wetland area.

[174] The Director explained that the operation and maintenance of a ditch that alters or will alter, or may alter, the flow, level or location of water is considered an activity as defined in

the *Water Act*.²² As there is no approval issued by AEP for the ongoing use or maintenance of the Ditch, this was also a contravention of section 36(1) of the *Water Act*.²³

[175] The Director stated he had jurisdiction to issue the Lapierre Order under section 135(1) of the *Water Act*.²⁴ The Director further observed that commencing or continuing an activity under the *Water Act* without an approval or as otherwise authorized under the *Water Act*, is an offence.²⁵

[176] The Lapierre Order required Mr. Lapierre to fill the Ditch or render it ineffective in such a manner that will restore the natural surface drainage patterns.

[177] The remedial plan was to be provided to AEP by November 2019 and the work was to be completed by January 2020.

[178] The Director stated Mr. Lapierre had contravened the section 36(1) of the *Water Act*, by constructing, operating and maintaining the Ditch. The construction, operation and maintenance of the Ditch meets the definition of activity under the *Water Act*. The Director noted the construction, operation and maintenance of the Ditch, including the disturbance of soil and vegetation, had the effect of changing the predevelopment natural surface water levels and flows, rate of water flows across Lot B, were an activity under the *Water Act* for which an approval was required.

²² Section 1(1)(b) of the *Water Act* provides in part:
“activity” means

(i) placing, constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material, or carrying out any undertaking, including but not limited to groundwater exploration, in or on any land, water or water body, that
(A) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage...”

²³ Section 36(1) of the *Water Act* provides:

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

²⁴ Section 135(1) of the *Water Act* provides:

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

²⁵ Section 142(1)(h) of the *Water Act* provides:

“A person who ... commences or continues an activity except under an approval or as otherwise

[179] The Director noted Mr. Lapierre stated he did not construct the Ditch. However, he was of the opinion that Mr. Lapierre was using the Ditch to move water more quickly across his property toward the Lapointe Property.

[180] The Director argued Mr. Lapierre either constructed or maintained the Ditch. He further argued the Mr. Lapierre is continuing to use it, in conjunction with other water management features on his property including trenches, the Lapierre Dugout, and the culvert under his own access road. The Director argued the Ditch contributed to the flooding on the Lapointe Property. The Director stated several inspections of the Lapierre Properties, and the Lapointe Property since 2012 confirmed the presence of a south to north ditch across Lot B which has directed and conveyed water in a northerly direction first from Lot 1 to Lot B, then to the Lapointe Property.

[181] The Director argued the Lapierres had failed to provide any evidence that demonstrated that he had failed to consider a material fact or had made an error in issuing the Lapierre Order. The Director stated Mr. Lapierre was performing maintenance work in the Ditch. The Director further stated the Ditch concentrated the natural predevelopment flow of surface water, or subsurface water flows by seepage, and acts as a drainage path for water flowing in a northerly direction across Lot 1 and Lot B, where it continues in a northerly direction across the Lapointe Property. He said this was evidenced by AEP investigations and the use of LiDAR.²⁶

[182] The Director stated the Lapierres have the onus of demonstrating on a balance of probabilities the Director erred in the determination of a material fact, and only when the Lapierres meets this onus does the burden shift to the Director to prove his decision to issue the Lapierre Order was appropriate.

[183] The Director submitted the Lapierre Order should be confirmed.

[184] The Director stated excess water is generated on the Lapierre Properties from the compaction of certain portions of the development, which reduces the ability for the soil to

²⁶ authorized by this Act... is guilty of an offence.”
Appendix “C” – North Bonnyville Drainage Patterns, Air Photo with LiDAR.

absorb rainfall. The Director explained the Lapierre Order was intended to address a drainage ditch that was concentrating surface water flows and directing water towards the Lapointe Property. The Director stated there were several ditches constructed between Lot 1 and Lot B which have the effect of concentrating surface water runoff from the buildings and compacted soil from the lots, and directing the water towards the Lapointe Property.

[185] The Director stated Mr. Lapierre had told him that he had not built the Ditch, but that he had stated that he had maintained the ditch by cleaning it and mowing it.

[186] The Lapierre Order is a remedial tool and is designed to allow the Lapierras to take remedial action to correct and restore the natural surface water flows across the Lapierre Properties. It requires the Lapierras to prepare a remedial plan that has as its objective rendering the Ditch ineffective and restoring the natural surface patterns and flows. The Director stated the Lapierre Order was designed to give the Lapierras flexibility in determining how the remedial works would be carried out, and to provide them with some measure of flexibility to determine how they would do so, with the assistance of a qualified professional.

[187] The Director stated he believed it was necessary to issue the Lapierre Order given the longstanding issues between the Appellants and the numerous complaints each Appellant was raising against the other, and how the activities conducted by one was causing or contributing to the flooding on both properties.

[188] The Director stated the Lapierre Order also requires details on surface drainage patterns, details of remedial construction, and details on how the water exiting the Lapierre Properties will be managed to prevent causing adverse impacts to the Lapointes.

[189] The Director clarified that he does not expect the Lapierras to be responsible for all of the water crossing their lands north towards the Lapointe Property. He stated the Lapierras are responsible for managing the excess or increased water flows generated through the development of Lot 1 and Lot B. The Director specifically stated that he did not expect the Lapierras to be responsible for the water flows entering his lands from NE-13.

[190] The Director stated the remedial plan was due January 23, 2020, and was to be prepared by a professional with expertise in hydrology. The Director stated it is a common

requirement to submit a remedial plan to render unauthorized works ineffective or to remove them, and to restore the affected area back to the predevelopment condition.

[191] The Director stated that he believed that issuing both enforcement orders in October 2019 would allow for sufficient time for the remedial plans to be reviewed and implemented prior to the spring of 2020, as the flooding issues on both the Lapointe Property, and the Lapierre Properties is the most significant in the spring months.

[192] The Director stated it has become clear as more information has become known about the file, that the restoration of the natural drainage patterns and rates on one property will by necessity involve coordination with any measures that will occur on the other property.

[193] The Director stated it was his opinion that any solution of the water management issues between the Appellants should incorporate the following principles:

- a. The Lapierres will discharge water from the northwest corner of Lot B onto the Lapointe Property at a maximum flow rate of 4 L/s/ha, a flow rate which the Director believes is an appropriate estimation of the maximum predevelopment flow rate for a 1:100 year 24 hour storm event;
- b. The Lapierres are responsible for managing, either by storing or diverting, any additional water, such that the flow rate exiting the Lapierre Properties does not exceed 4 L/s/ha in a 1:100 year 24 hour storm event;
- c. The Lapointes will breach Berm 2, allowing water from the northeast corner of Lot B to flow north to the Primary Wetland;
- d. The Lapointes will breach or place a culvert in Berm 1; and
- e. The Lapointes will allow water to flow into and re-establish the Primary Wetland and allow movement of water northward toward to the Wetland Complex.

[194] The Director explained to the Board that the oldest historic air photograph of the subject properties available dates back to 1952. The air photograph taken at that time shows the subject properties in use as agricultural land. He further explained that a review of the historic air photographs of the area showed that, over time, the development activities on the subject

properties had altered the flow, direction of the flow of water, and level of water in the Primary Wetland. Subsequent to this photograph, the historic air photographs track the industrial development that occurred from 1952 to present day.

[195] The Director concurred with the Appellants' experts that the tree line between the Lapointe Property and NE-13 was created by the historical farming practices from when the land was cleared by farmers and rocks were placed along the section line. He noted the tree line may have contributed to the changing landscape. Consequently, it was difficult to determine the historical natural flow, prior to the establishment of the tree line.

[196] The Director stated LiDAR and current surveys were used to determine the current direction and flow of water. Using LiDAR and survey information, the Director was able to determine water would travel in the same area as the Ditch. Normally water would travel north from the Lapierre Properties in several different locations, however the flow was now impeded by the berms.

[197] Dr. Rojas, an expert with AEP, showed the Board a digital topography map based on LiDAR data, which set out the concentrated flow paths.²⁷ He explained the map showed the elevations and the blue lines represented the concentration points of the water. This map reliably showed the flow of water was to the north from the south.

[198] Dr. Rojas also provided evidence regarding the Stormwater Management Guidelines. He stated these are applied when there are significant changes to the land. The recommended event to manage to is a 1:100 year event over the course of 24 hours. He stated that this means the project must be designed to manage the quantity of water for a once in a lifetime event over the course of 24 hours.

[199] Dr. Rojas stated there are concerns in using the Rational Method to calculate outflow as Mr. Engman had done. He noted the flow rate was obtained by Mr. Engman from the relationship between the peak flow areas and the drainage areas and extrapolating the relationships beyond the range data. He cautioned against using this approach and stated

²⁷ Appendix "C" – North Bonnyville Drainage Patterns, Presentation of Dr. German Rojas, Hydrologist, March 22, 2021.

uncertainties arose because several complex processes of the hydrological cycle are combined into one single coefficient. He explained that the method used by Dr. Shome and himself was the Stream Flow Method. This method uses surface outflow records to determine the peak flow set against the desired return period. He commented that they currently only have 50 years of data to estimate a 100 year event.

[200] He stated the Stormwater Management Guidelines also require an adequate outlet. He explained that in this case, identification of an adequate outlet would imply a temporal solution that should be reviewed once a baseline is identified. He indicated that extra runoff volume may be a problem for the Lapierras if water does not flow from their property. The only water losses in the system would be from evaporation and infiltration into the ground. He explained this could take time when compared to surface runoff volumes generated by precipitation events. This would result in surface water runoff accumulating and increasing the size of the wetlands. Adequate outlet capacity may need to be improved to allow flows to the north.

[201] Dr. Rojas explained to the Board that none of the plans that he had seen provided a clear objective or met the requirements of Director. In all cases, there were problems arising with the Primary Wetland. In one case, there was too much water going to the Primary Wetland and in the other case, too little water was going into the Primary Wetland.

[202] Ms. Jocelyn Beniuk-Elkins, Wetland Specialist with AEP explained that she delineated the wetland boundary through the desktop method. She stated the desktop method is an appropriate method to use when a wetland has been historically impacted. A field assessment would verify the wetland's classification and further support the delineated boundary. She stated the images showed saturated soils that were not cultivated or cleared, and evidence of a possible wetland. She stated she was on site once on April 24, 2018, to confirm if Berm 2 was removed. She stated she only had access to the site from the Lapierre Properties and did not conduct an assessment at the time.

[203] Ms. Beniuk-Elkins explained that she used historic air photographs from the Provincial Air Photos Lab, Google imagery, precipitation calculations, and available ARC Maps

to delineate the boundary. Based on her assessment of these documents, it was her opinion that the Primary Wetland would historically be classified as either a seasonal or temporary graminoid marsh surrounded by a treed swamp; it would not be Crown claimable.

[204] She further explained that this meant non-woody vegetation, like cattails and grasses. She stated the best representation of the wetland was the black boundary she had drawn on the 1997 historical air photo.²⁸ She said the water tables would be near, at or on the surface.

[205] The Director stated there may be a number of potential options “how” to incorporate these principles into an overall remedial approach that meets the overall objective of restoring natural flows (patterns and rates) and that will provide a permanent solution to the flooding issues between the two properties.

[206] The Director requested that the enforcement orders be upheld, and if the Board is of the opinion that further specific measures will meet the objectives of providing a permanent solution to the water management issues between the Appellants, the Director seeks such further recommendations from the Board.

[207] The Director stated the Lapointe Order was issued to Mr. Yvon Lapointe and Ms. Lea Lapointe for the unauthorized construction of a berm and the filling in of the Primary Wetland, which has disrupted surface drainage. The Director stated the Lapierre Order was issued against Mr. Donald Lapierre and 645639 Alberta Ltd. for the unauthorized maintenance of a south to north drainage ditch. The Director argued these were unauthorized activities pursuant to the *Water Act*.

[208] The Director argued the enforcement orders were properly issued, the Director had the legal authority and factual basis to issue the orders. The Director argued the terms and conditions of the enforcement orders were appropriate. The enforcement orders are designed to remedy the unauthorized activities and mitigate their effects on the aquatic environment. He further argued the enforcement orders will bring the Appellants into compliance by requiring the appellants to remove or otherwise ensure their respective works are rendered ineffective.

²⁸ Attached as Appendix “B” to this Report and Recommendations.

[209] The Director argued the Lapointes do not dispute having constructed the berms and did not seek approval under the *Water Act*. He pointed out that the Lapointes instead appear to argue that the berms are not violations of the *Water Act* but should be permissible as a defense mechanism. The Director noted the Lapointes further argue that the water historically flowing across the Lapierre Properties flowed east to west along the tree line and was either trapped in the tree line or directed towards the Highway 41 ditch. Lastly, the Director noted the Lapointes had been enjoying the benefits of what the Director described as a “constellation of the anthropogenic activities in the wetland area, including the installation of an access road (Berm 1),” resulting in the shrinking of the Primary Wetland and the creation of more arable land.

[210] The Director stated that Mr. Lapierre in his Notice of Appeal argued that he did not construct the Ditch, and suggested that it may have been created through other means. The Director noted that Mr. Lapierre further argues that water passes through the Lapierre Properties from the south to the north with most of the waters coming from the farmland on NE-13 to the south of Lot 1, that the Lapierre Properties contribute little additional water to the Lapointe Property.

[211] It was explained to the Board that the enforcement orders were remedial in nature, after years of attempts to bring the Appellants into compliance. The Director felt he had little choice but to issue the orders on both accounts. The Board was further advised that the Director did not believe there could be a resolution of the water management issues between the appellants, without a global solution.

[212] The Director explained that in making his decision, he reviewed the investigation notes of EPO Litzenberger, the relevant *Water Act* provisions, sought internal advice from colleagues to ensure consistent approaches and subject matter experts.

[213] He explained that his role as a decision-maker on the file is to determine the nature of the non-compliance, how that non-compliance relates to the statutory regime, the facts of the file, and the enforcement goals of the file. The Director explained that the orders were remedial in nature and not meant to be punitive. Generally, the compliance program allows for an opportunity for non-compliant parties to comply and does not immediately move to issuing an

order. The program tries to bring parties into compliance first. The Lapointe Order and Lapierre Order were remedial tools. The Director noted there are other tools within the *Water Act* available which contain punitive measures.

VI. Analysis

Agreed Upon Matters

[214] The Board notes there are a number of matters that do not appear to be in dispute between the Appellants, or between the Appellants and the Director.

[215] All Parties agree the flow of water in the general area is from the south to the north, toward the Wetland Complex, and eventually onward to Moose Lake. The specific mechanisms for how this occurs, whether it is groundwater flow, seepage, or surface water runoff varies over the course of the year, and from year to year, depending on the amount of spring runoff and precipitation.

[216] The Director and the Lapointes' experts agree that the predominant mechanism of the historic water flow that fed the Primary Wetland, the Lapointe Dugout, and the Wetland Complex was likely groundwater flow and seepage through saturated soils, and not through overland surface water flow.

[217] Air photos and photographs presented at the hearing appear to indicate the mechanism of water flow since the development of the Lapierre Properties appears to be primarily surface water flow. This is evidenced by the channel flow in the ditches, trenches and culverts on the Lapierre Properties, the flooding on the Lapointe Property, and by the flooding to Lot B. The Board notes, however, that air photos and photographs are not capable of showing groundwater or near surface seepage flow, and limited to the variability of seasonal conditions at the time of the photo.

[218] Mr. Lapointe confirmed that he placed material in the Primary Wetland to construct Berm 1 and accepts that Berm 1 divides the Primary Wetland into Wetland 1 and Wetland 2.

[219] Mr. Lapierre acknowledges it is his responsibility to manage the incremental increase in surface water runoff resulting from the development of his lands, namely Lots 1 and B.

1. Were the Orders properly issued?

[220] The Board considered the Director's Record, oral evidence and arguments, written submissions and relevant legislation in determining its recommendations to the Minister.

[221] With regard to the first issue in the appeals, being whether the enforcement orders were properly issued, each appellant has challenged whether the Director based their respective order on the correct facts and circumstances.

i. The Lapierre Order

[222] The Board heard evidence that prior to the development of the Lapierre Properties, the flow of surface water in the area had been influenced by human settlement in the area. The Board notes there were no pictures or other indications available to show how the historic drainage patterns appeared prior to the establishment of the tree line and farming of the area. The earliest air photo made available to the Board showing the area in question was from 1952.

[223] The Board heard evidence from the Lapointes that the east-west tree line located along the boundary between the Lapointe Property and Lot B has been in existence for close to 100 years and was created by clearing and farming the land. Tree lines were developed along section lines and were used as boundary lines between properties. The fields were cleared of trees but the trees on the boundaries were left standing. The boundary lines were often used for disposing of rocks and other debris. Over time, dense vegetation and soil material accumulated within these tree lines.

[224] The Director's and the Lapointes' hydrology experts and wetland experts agreed that the east-west tree line had a moderating effect on the south to north flow of surface water in the area, such that, prior to the development of Lots 1 and B, the northward flow of surface water

was spread out along the tree line, and that water passed northward across the tree line through seepage.

[225] Evidence was presented that indicated water had flowed east to west, depending on the change in ground elevation, along the Old Swale located within the tree line, and during periods of high meltwater or precipitation, water drained toward the ditch adjacent to Highway 41. This accounts for Mr. Lapointe's evidence that until the Lapierres developed their properties, Mr. Lapointe has never seen surface flow of water across his land.

[226] The evidence also demonstrated that as the development of the Lapierre Properties proceeded, which included the removal of trees along the tree line, the predominant drainage pattern across the Lapierre Properties and onto the Lapointe Property changed from seepage and spread out sheet flow, to surface water flow concentrated into defined channels and ditches.

[227] The Board notes Mr. Lapierre's statement that he did not construct the Ditch and that it was his belief that the Ditch was a natural swale. Mr. Engman provided evidence indicating the Ditch could have been created by soil subsidence along an AltaGas Ltd. pipeline, or by compaction caused by the movement of farming machinery, and erosion caused by the subsequent flow of water over time.

[228] The Lapointes, on the other hand, stated that the possibility that the Ditch was formed initially through subsidence over the AltaGas Ltd. pipeline or from frequent movement of farm machinery along one access route, proves the Ditch is not a natural feature.

[229] The Director presented evidence that the Ditch has been maintained by trimming vegetation and enhancing the profile to ensure effective flow of water. Further photographic evidence showed additional connector ditches and culverts were constructed that direct surface water flow into the Ditch, to transport water north onto the Lapointe property.

[230] The Board noted Mr. Lapierre's acknowledgment that he maintained the Ditch and that he constructed the additional connector ditches and culvert in order to divert and direct surface water flow on Lot 1 and Lot B to the Ditch.

[231] Based on the evidence, the Board finds it is likely that the Ditch could have initially started developing from surface water flowing along a ground depression over a pipeline right-of-way or along a well-travelled route used by farm equipment. That being the case, the Board accepts Mr. Lapierre's assertion that he did not construct the Ditch.

[232] However, based on the evidence presented, the Board finds that Mr. Lapierre used and maintained the Ditch, which he acknowledges. The Board finds that Mr. Lapierre's construction of ancillary ditches and culverts, which concentrate and direct surface water flow into the Ditch, as well as his continued use of the Ditch, altered the natural flow pattern of the surface water across Lot 1 and Lot B onto the Lapointe Property.

[233] The Board notes that if the Director forms the opinion that there has been a contravention of the *Water Act*, the Director may issue an enforcement order.²⁹ The Mr. Lapierre argued the Director made a mistake in issuing the Lapierre Order as he did not construct the Ditch. Mr. Lapierre believed it was a natural swale. However, the language of section 36(1) of the *Water Act* includes the operation and maintenance of the Ditch as an activity requiring the approval of the Director.³⁰

[234] Section 36(1) of the *Water Act* includes the operation and maintenance of the Ditch as an activity requiring the approval of the Director. Section 36(1) also includes the alteration, change in flow and direction in flow of water, as an activity requiring the approval of the Director.

[235] Further the Board notes from the evidence, that Mr. Lapierre had not obtained an approval for the Ditch, and therefore finds that his continued use and maintenance of the Ditch is

²⁹ Section 135(1) of the *Water Act* provides:

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

³⁰ Section 36(1) provides:

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

an unauthorized activity, and alteration of the natural drainage flow patterns without authorization to be a contravention of section 142(1)(h) of the *Water Act*.³¹

[236] The Board finds therefore, that the Lapierre Order was properly issued.

i. The Lapointe Order

[237] As noted above Mr. Lapointe confirmed that he placed material in the Primary Wetland to create Berm 1, which divides the Primary Wetland into Wetland 1 and Wetland 2 as alleged in the Lapointe Order.

[238] Mr. Lapointe also confirmed that he constructed Berm 2 along the boundary between his property and Lot B.

[239] Mr. Lapointe argued it was necessary to construct Berm 1 in 2012 to prevent what was described as unauthorized and sometimes smelly water being discharged from Lot B and being spread into the pasture where his cattle grazed. He did not want his cattle drinking the water that was entering his property. Berm 1 was also built to protect Access Path 3 from being flooded. He further argued Berm 2 was constructed to provide additional protection to his agricultural fields from the excess water coming from the Lapierre Properties. In essence, he argued the construction of the berms was justified in protecting his property from damage and flooding from the ever increasing amount of water being discharged from Lot B.

[240] Generally speaking, the Courts have recognized a common law right to protect one's lands from flooding; however, legislation can alter or extinguish common law rights, including riparian rights. The Board notes that the *Water Act* includes "flood control" and section 36(1) of the *Water Act* requires an approval to "commence or continue an activity." However, this Board has previously determined that if riparian rights to construct works to protect private lands still exist in Alberta, they are subject to the *Water Act*.³²

³¹ Section 142(1)(h) of the *Water Act* provides:
"A person who ... commences or continues an activity except under an approval or as otherwise authorized by this Act... is guilty of an offence."

³² *Tollestrup Construction (2005) Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region,*

[241] The Board notes from photographic evidence that there appears to be piles of soil, material, or other debris, at the northern tip of Wetland 1 that may have resulted from the clearing of the trees around the Primary Wetland.³³ In addition, evidence was presented that showed soil and other materials had been placed elsewhere in Wetland 1 and Wetland 2, in order to reduce the effect of flooding and create access paths across the Primary Wetland for the movement of farm equipment.

[242] The Board finds that placing materials, altering the drainage, removing vegetation and changing the water levels in the Primary Wetland were activities conducted by Mr. Lapointe in a waterbody as contemplated by the Water Act, which required the approval of the Director. This construction of Berm 1 and placement of other fill material in the Primary Wetland are activities under the Water Act which require the approval of the Director. For various reasons, Mr. Lapointe constructed and has been using the berms without the approval of the Director.

[243] The Lapointes argued the Director issued the Lapointe Order based on false or mistaken facts, and that the Lapointe Order was ill timed, given long standing water management issues arising from the Lapierre Properties. At the hearing, the Director acknowledged there were water management issues arising from the Lapierre Properties that may be impacting the surface flow on the Lapointe Property. However, he was of the view that the berms and fill material needed to be removed in order to restore the natural surface drainage patterns. This includes ensuring the Lapointes do not prevent the entry of the predevelopment surface water flow into their property, or prevent an adequate outlet for that flow from the Primary Wetland, such that the Primary Wetland is maintained and there is minimum flooding of their farmland.

[244] As with the Lapierre Order, if the Director forms the opinion that there has been a contravention of the *Water Act*, the Director may issue an enforcement order.³⁴ As explained

Alberta Environment and Parks (18 December 2019), Appeal Nos. 17-052-053-R (A.E.A.B.), 2019 ABEAB 37, at para 130.

³³ The Board notes that fill material and debris can be observed in photographs located at Tab 4, Director's Record, at page 172.

³⁴ Section 135(1) of the *Water Act* provides:

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

above, if the Director forms the opinion that there has been a contravention of the *Water Act*, the Director may issue an enforcement order.³⁵ The Board finds the evidence demonstrates the Lapointes contravened section 36(1) of the *Water Act* by constructing and using the berms and placing fill materials in other areas around the Primary Wetland, without an approval from the Director. The Board further finds the Lapointe Order was properly issued, and the Director had the legal jurisdiction and factual basis for issuing the Lapointe Order.

2. Are the terms and conditions of the Enforcement Orders appropriate?

[245] The Director stated at the hearing that the purpose in issuing the enforcement orders to the Appellants was remedial in nature. This was clarified in further detail by Dr. Rojas, who stated the objective of AEP was to restore the Primary Wetland and natural surface drainage patterns.

[246] The Board acknowledges the intent of the enforcement orders is to return the Primary Wetland to its predevelopment state and restore the historical flow and historical drainage patterns. However, this will be an approximation, as the oldest air photo available appears to date back to 1952, and the subject lands had already been farmed prior to that date. Therefore, restoring to a historical condition can, at best, mean restoring to a condition that existed at some specific, fixed date in the past.

i. Natural Surface Drainage Patterns

[247] As mentioned above, the Parties agree the overall drainage in the area flows north toward a Wetland Complex located in the northern portion of the Lapointe Property, which ultimately drains through a series of connected wetlands and creeks into Moose Lake.

[248] With specific regard to the Lapointe Property and the Lapierre Properties, the evidence presented, including the historic air photos dating back to 1952, LiDAR imagery, and contour maps, show the natural drainage patterns of the subject lands is predominantly from the south to the north, across the east-west tree line, which is located along the section line between

³⁵ Section 142(1)(h) provides:

the Lapointe Property and NE-13, and which separates the Lapointe Property and Lot 1, and which formerly extended between Lot 1 and Lot B.

[249] The Board heard evidence from the Lapointes that the Old Swale in the tree line had historically diverted and drained runoff water eastward into the ditch adjacent to Highway 41, and then flowed northward along the highway. However, the Director showed a topographic Site Plan that showed variable elevation along the section line between Lot 1 and Lot B, and explained that only a portion of the land where Lot 1 and Lot B were now located, would have drained east toward Highway 41.

[250] As explained above, expert evidence presented suggests this tree line historically had a moderating effect on the surface water flow traveling from Lot 1 north to the Lapointe Property. It was generally agreed upon by the Parties that historically the surface water travelled north through the tree line at multiple locations through seepage, and not as discrete channels of surface water flow, except in specific locations where the trees have been removed and surface flow channels have since been developed.

[251] Water historically drained north to the Lapointe Property across the tree line separating Lot 1 and Lot B, which had the effect of spreading out the flow along its length through seepage. This is in contrast to the situation today, where surface water flows through channels from the Lapierre Properties to the Lapointe Property as evidenced by the Ditch that is the subject of the Lapierre Order.

[252] Based on the historic air photos, LiDAR imagery and topographic evidence, the Board finds that the general surface water flow on the subject parcels is from the south to the north. In other words, the Board finds the surface runoff from NE-13, flows northward across Lots 1 and B, and into the Lapointe Property, and travels as either surface water flowing into manmade ditches or swales, or via seepage through saturated soils across the tree line.

[253] The Board finds, in accordance with requirements of the *Water Act*, that the Lapointes are required to accept the natural, predevelopment volume of surface water flow originating from the lands south of their property. This includes the natural surface drainage from the NE-13, plus the predevelopment surface water runoff volumes from Lots 1 and B.

ii. Predevelopment Surface Water Flow Rates

[254] The rate of natural surface water flow originating from NE-13 south of Lot 1 and the predevelopment surface water flow from Lots 1 and B were calculated independently by each of the Parties' experts. The Lapointes' expert, Dr. Shome calculated the flow rate to be 2 L/s/ha. The Director's expert, Dr. Rojas, calculated the flow rate to be 4 L/s/ha. Mr. Lapierre's expert, Mr. Engman, calculated the predevelopment flow rate from Lots 1 and B to be 9.85 L/s/ha. During the hearing, Dr. Shome, agreed that Dr. Rojas' calculated flow rate of 4 L/s/ha was reasonable.

[255] As a result of the concurrence between Dr. Rojas and Dr. Shome, the Board accepts 4 L/s/ha as a reasonable estimate for the total natural surface water flow rate from NE-13 and the predevelopment of Lot 1 and Lot B. Therefore, the Board finds that the maximum surface water flow rate the Lapierres are allowed to release onto the Lapointe Property is a maximum flow rate of 4 L/s/ha rate in a 1:100 year 24 hour event. Likewise, the Board finds the Lapointes are obligated to accept a maximum flow rate of 4 L/s/ha rate in a 1:100 year 24 hour event from the Lapierre Properties.

[256] The Board further finds, however, that any water entering the Lapointe Property from Lapierre Properties must not include industrial or commercial wastewater or sewage.

iii. Post-Development Volume of Surface Water

[257] There was evidence presented regarding the increase in the volume of surface water runoff resulting from the development of the Lapierre Properties, and such as the creation of impermeable surfaces including rooftops and hard packed parking areas.

[258] Because this increased volume of surface water is above the historic, naturally occurring flow of water across the Lapierre Properties prior to the development of the parcels, the Board finds the Lapointes are not required to accept the incremental increase in the volume of water. Managing this volume of water is the responsibility of the Lapierres, which the Board has previously noted they acknowledge. The Board therefore finds that the Lapierres are

required to manage the incremental increase in volume of water arising from the development of their lands.

[259] Pursuant to the legislation, it is the responsibility of the developer of a property to manage any increase in volume of water arising from the development of that property. Consequently, the Lapierras cannot release any of the post-development incremental flow onto the Lapointe Property without the Lapointes' consent. The same would hold true for the Lapierras if, for example, an industrial development or residential subdivision were developed on the NE-13 to the south of the Lapierre Properties. If such a development were to occur, the Lapierras would not be required to accept any incremental increase in the volume of water arising from the new development.

[260] The Board notes however, the legislation does not prohibit the Appellants from entering into an agreement with regard to the management of the post-development waters; in this case, it may be of benefit to both Appellants to consider this option.

[261] The Board notes there is a considerable difference in opinion between the Lapointes' and the Lapierras' experts regarding the corresponding volume of water that would need to be stored or otherwise managed by the Lapierras. The Lapierras' expert estimates the volume of water that needs to be managed or stored on site by the Lapierras is in the order of 240 m³, whereas the Lapointes' expert estimates the volume of water that needs to be managed or stored is in the order of 1400 m³. The Director's expert noticed the significant difference, but did not offer his own estimate, nor a possible reason for the difference between the two estimates.

[262] It is the Board's opinion that this discrepancy is cause for concern because the remedial options available to the Lapierras, and which may in turn impact the Lapointes, are greatly influenced by this volume. Therefore, the Board finds that this discrepancy needs to be resolved and a true, representative estimate of the volume of water that the Lapierras are obligated to manage needs to be identified by the Lapierras and approved by the Director. The estimated volume should consider the proposed landscape changes that have been or may be

identified in the remedial plan. This includes reducing the hard or less permeable surfaces through revegetation and other methods to increase infiltration.

[263] The Board heard several suggestions of the ways in which the Lapierras could mitigate the amount of water that had to be managed on their lands. For example, the Lapierras could build an appropriately sized above-ground impoundment structure to store the incremental increase in water. The Lapierras could also divert the surface water flow toward the Highway 41 ditch adjacent to their lands, provided he obtains the necessary approvals from Alberta Transportation and AEP. The area of hard surfaces on their lands could be reduced, thereby reducing the amount of water that would have to be managed and stored. In the end, if the increased surface water volume is not transferred or directed to the Lapointe Property, the Lapierras have to manage it themselves. This is unless some agreement can be reached between the Lapointes and the Lapierras.

[264] It is the Board's view that a collaborative approach between the Parties would result in a more effective management of the incremental increase in surface water resulting from the development of Lapierre Properties, it would also benefit the Lapointes in that the increased water flow would likely benefit the health of the Primary Wetland once it has been restored.

iv. Appropriateness of the Terms and Conditions of the Enforcement Orders

[265] The enforcement orders issued to the Lapointes and the Lapierras contain a number of similar terms and conditions to meet their stated objectives. These include:

- a. the requirement to cease all unauthorized activities on their respective lands;
- b. the requirement to submit a written remedial plan to the Director for approval that has, as its objective, the restoration of the natural surface drainage patterns across the land that existed prior to:
 - i. the infilling activities in the Primary Wetland,³⁶ and the construction of Berm 2, in the case of the Lapointes; and

³⁶ Note the Lapointe Order does not specifically reference Berm 1. However, it references fill material in the Primary Wetland. Requiring the removal of the fill material from the Primary Wetland and the restoration of the

ii. the construction of the Ditch, in the case of the Lapierras.

[266] The Board notes Condition 3(b) of the Lapierre Order pertains to infilling or otherwise rendering the Ditch ineffective. However, as previously noted, the natural surface drainage direction is from south to north, spread out over a wide area. The Board finds therefore, that if the Ditch were to be infilled, there would have to be some other means of accommodating the surface water flow from the south. For example, an approved series of north-south drainage ditches or channels across Lot 1 and Lot B would need to be installed to redistribute surface water over a wide area rather than through one single channel.

[267] Alternatively, upon approval by the Director, the Ditch could continue to be maintained in its current location or reshaped to form a wider and shallower swale, if appropriately designed, constructed, and maintained to control erosion, to facilitate equipment movement and maintenance. A further option would be to extend an appropriately designed north-south drainage ditch onto the Lapointe Property that would deliver surface water flow directly to the wetland, thereby preventing a wide area of flooded and unusable farmland on the Lapointe Property. An appropriately designed crossing for agricultural equipment could also be included.

[268] In the Board's view, the option of a properly constructed swale that begins on the Lapierre Properties and travels across the Lapointe Property towards the Primary Wetland could also prevent the back-up of water that led to the flooding of the Lapierre Properties.

[269] The Board finds notable and equally important, the evidence of the Director's hydrologist, Dr. Rojas, that a properly designed water management system requires an outlet. In this case, the topographic, air photo evidence suggests there was historically an outlet at the north of the Primary Wetland and that this outlet may have been closed by depositing debris from the clearing of brush and trees in the Primary Wetland, or by other farming activities.

[270] Therefore, the Board suggests that another option for the Appellants to consider is to design the remedial activities on their respective properties into an integrated water management system, such that the Lapointes' farmland is allowed to accommodate at least some,

natural surface drainage patterns will address Berm 1.

occasional temporary water storage (which is the situation today) during periods of high runoff, or for example, greater than a 1:100 year flood event, or consistent with municipal storm water drainage requirements. This would serve to minimize the size of the swales and culverts so as to not be overly obstructive to farming, yet it would meet the provincial design requirements for accommodating 1:100 year flood events.

[271] The Board is of the opinion that these types of options might be of benefit to both Appellants if they are willing to collaborate to make them work. The Board notes Condition 3(c) of both the Lapointe Order and Lapierre Order requires management of water exiting their respective lands so as to minimize impacts to neighbouring properties while ensuring the restoration of natural surface drainage patterns. Therefore, the Board finds the Appellants need to engage in neighbourly cooperation if there is to be a successful resolution of these water management issues. The Board notes there are several options available to the Appellants. However, most, if not all of these options, require the cooperation, collaboration, and agreement of both Appellants.

[272] Based on the evidence presented to the Board, the Board finds the remedial plan prepared by the Lapierres, including the stormwater management plan, needs to consider the incremental increase of surface water runoff from the entirety of the developed area of the Lapierre Properties, which includes both Lot 1 and Lot B. Therefore, the Board finds that the Lapierre Order needs to be amended to include Lot 1.

[273] The Board notes that both enforcement orders require remedial plans to restore the natural surface drainage patterns on the Lapointe Property and Lapierre Properties. The Board has suggested several options available to the Lapointes and the Lapierres to explore to restore the natural surface drainage patterns on their respective properties. The remedial plans for each property need to complement each other to achieve a long-term sustainable solution and to be agreeable to the Director. To that end, the Board is amenable to offering the continuation of mediation to achieve agreement between the Appellants enough to develop and implement effective remedial plans.

[274] Notwithstanding the findings and observations above, the Board finds the terms and conditions of the enforcement orders are appropriate, subject to the revisions of dates, the requirements around the maximum peak flow rate of 4 L/s/ha for a 1:100 year 24 hour event, and the inclusion of Lot 1 in the Lapierre Order, and in the inclusion of the Board's findings regarding the natural drainage pattern that must be restored.

VII. CONCLUSION

[275] The issues before the Board were:

1. Were the Enforcement Orders properly issued? and
2. Are the terms and conditions of the Enforcement Orders appropriate?

[276] The Board finds that the Enforcement Orders were properly issued. Further the Board finds that the terms and conditions of the Orders were, in principle, appropriate.

[277] Under section 99(1) of EPEA, the Board must provide the Minister with its recommendations regarding the issues in these appeals.³⁷

[278] The onus is on the Appellants to provide sufficient, reliable, and relevant evidence for the Board to recommend to the Minister to confirm, reverse, or vary the Enforcement Orders. The Board is not convinced the Enforcement Orders should be reversed. The Board finds the evidence supports a recommendation that the Lapointe Order and Lapierre Order be varied.

[279] The Board is recommending the Lapointe Order be varied to include a requirement to accept the natural surface flow from Lot B, at a maximum peak flow of 4 L/s/ha for a 1:100 year 24 hour event, to adjust the date for submission of the remedial plan to August 1, 2021, to adjust the date for completion of the work to December 31, 2021, and to include a description of the natural drainage flow that must be restored. To be clear, the natural surface

³⁷ Section 99(1) of EPEA states:

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

flow from Lot B includes the natural flow from NE-13, Lot 1, and Lot B. It does not include any incremental flow that results from the roofs and hardened areas on Lot 1 and Lot B.

[280] The Board is recommending the Lapierre Order be varied to set the maximum discharge of surface water flow from Lot B at a maximum peak flow of 4 L/s/ha for a 1:100 year 24 hour event, to adjust the date for submission of the remedial plan to August 1, 2021, and to adjust the date for completion of the work to December 31, 2021. The Board is further recommending that Lot 1 be included in the Lapierre Order to provide for the management of the surface water runoff from Lot 1 as well.

[281] During the course of these appeals, the Board issued stays of the Lapierre Order and the Lapointe Order. These stays are lifted as of the date the Minister signs the Ministerial Order regarding these appeals.

IX. RECOMMENDATIONS

[282] The Board recommends the Minister vary *Water Act* Enforcement Order No. WA-EO-2019/08/LAR issued to Donald Lapierre and 645639 Alberta Ltd. as follows:

1. The first three paragraphs of the Preamble are repealed and replaced with the following:

“WHEREAS Donald Lapierre owns the lands legally described as Plan 9926243 Lot 1 in the MD of Bonnyville No. 87 [“Lot 1”];

WHEREAS 645639 Alberta Ltd. is a corporate entity registered in Alberta and owner of the lands legally described as Plan 8621749 Lot B in the MD of Bonnyville No. 87 [“Lot B”];

WHEREAS Lot 1 and Lot B together form the “Lands” which are the subject matter of this Order;

WHEREAS there are lands to the south of the Lands, Lot 1 and Lot B, legally described as NE-13-61-6-W4M [“NE-13”];

WHEREAS there are lands to the north of the Lands, Lot 1 and Lot B, legally described as SE-24-61-6-W4M [“SE-24”];

WHEREAS the natural drainage in the area is from south to north, starting on farmland located in NE-13, travelling north through Lots 1 and B, through SE-24 to a large wetland complex, and eventually draining into

Moose Lake. The natural drainage takes several forms including groundwater, seepage, and surface flows.

WHEREAS Donald Lapierre is the sole director and shareholder of 645639 Alberta Ltd., and at all material times made the decisions in respect of the issues which form the subject-matter of this Order;”

2. The first sentence of Condition 2 is repealed and replaced with the following:

“The Parties shall submit to the Director by August 1, 2021, for the Director's approval, a written Remedial Plan (“the Plan”) signed and stamped by a Professional with experience in hydrology and restoration of natural surface water flows, that shall have as its objective the infilling of the drainage ditch, or otherwise rendering it ineffective, in such a manner that will restore natural surface drainage patterns across the Lands to that which existed prior to the construction of the drainage ditch.”

3. Condition 3(C) is repealed and replaced with the following:

“Details on the management of water exiting the Lands, details on the management of increased volume of water resulting from the hard, impermeable surfaces created by the development of Lot 1 and Lot B, details on the management of surface water flow from Lot 1 and Lot B so as to ensure the maximum rate of flow towards Sec 24 is no greater than 4 L/s/ha per 1:100 year 24 hour event, including after the proposed remedial work under the Plan, to minimize impacts to neighbouring properties while ensuring the restoration of surface drainage patterns.”

4. Condition 3(E) is repealed and replaced with the following:

“A schedule for implementing the Plan with a completion date no later than December 31, 2021”.

[283] The Board recommends the Minister vary *Water Act* Enforcement Order No. WA-EO-2019/09/LAR issued to Yvon and Lea Lapointe as follows:

1. The second paragraph of the Preamble is repealed and replaced with the following:

“WHEREAS there are natural surface water drainage flows across the Lands in a northerly direction, including coming from the property on its southeast corner, legally described as Plan 8621749 Lot B [“Lot B”];
WHEREAS there is land beside Lot B, legally described as Plan 9926243 Lot 1 [“Lot 1”];

WHEREAS there are lands to the south of the Lands, Lot 1 and Lot B, legally described as NE-13-61-6-W4M ["NE-13"];

WHEREAS the natural drainage in the area is from south to north, starting on farmland located in NE-13, travelling north through Lots 1 and B, through the Lands to a large wetland complex, and eventually draining into Moose Lake. The natural drainage takes several forms including groundwater, seepage, and surface flows."

2. The first sentence of Condition 2 is repealed and replaced with the following:

"The Parties shall submit to the Director by **August 1, 2021**, for the Director's approval, a written Remedial Plan ("the Plan") signed and stamped by a Professional with experience in hydrology and restoration of natural surface water flows, that shall have as its objective restoring the natural surface drainage patterns across the Land that existed prior to the commencement of the infilling activities and construction of the berm, by:"

3. Condition 3(E) is repealed and replaced with the following:

"A schedule for implementing the Plan with a completion date no later than **December 31, 2021**".

4. The following is added after condition 5:

"The Parties are required to accept total combined maximum peak flow of 4 L/s/ha during a 1:100 year event from both Lot 1 and Lot B."

[284] 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. Nicole Melnyk, on behalf of Mr. Yvon Lapointe and Ms. Lea Lapointe;
2. Mr. Ken Haluschak, Bryan & Company LLP, on behalf of the Donald Lapierre and 645639 Alberta Ltd.;
3. Ms. Erika Gerlock and Mr. Paul Maas, Alberta Justice and Solicitor General, on behalf of the Director, South Saskatchewan Region, Alberta Environment and Parks.

[285] The Board notes the Lapointes and the Lapierras asked for costs. A process for the costs applications will be established after the Minister makes his decision in these appeals.

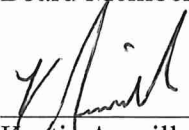
Dated on April 26, 2021, at Edmonton, Alberta.



Meg Barker
Acting Board Chair



Dr. Nick Tywoniuk
Board Member



Kurtis Averill
Board Member

Appendix A – Google Map Photo

Map of area
Google map photo 2020



Overlay of all boundaries on 1997 air photo



Appendix C – North Bonnyville Drainage Patterns

Flow Direction





ALBERTA

ENVIRONMENT AND PARKS

Office of the Minister

Government House Leader

MLA, Rimbey-Rocky Mountain House-Sundre

Ministerial Order

64/2021

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 Nos. 19-043 and 19-046-047

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 Nos. 19-043 and 19-046-047.

Dated at the City of Edmonton, in the Province of Alberta, this 4 day of June, 2021.



Jason Nixon
Minister

APPENDIX

Order Respecting Environmental Appeals Board Appeal Nos. 19-043 and 19-046-047

With respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the “Director”) to issue *Water Act* Enforcement Order No. WA-EO-2019/08-LAR to Donald Lapierre and 645639 Alberta Ltd., and with respect to the decision of the Director to issue *Water Act* Enforcement Order No. WA-EO-2019/09-LAR to Yvon Lapointe and Lea Lapointe, I, Jason Nixon, Minister of Environment and Parks, order that:

The decision of the Director to issue Enforcement Order No. WA-EO-2019/08-LAR is varied as follows:

1. The first three paragraphs of the Preamble are repealed and replaced as follows:

“WHEREAS Donald Lapierre owns the lands legally described as Plan 9926243 Lot 1 in the MD of Bonnyville No. 87 [“Lot 1”];

WHEREAS 645639 Alberta Ltd. is a corporate entity registered in Alberta and owner of the lands legally described as Plan 8621749 Lot B in the MD of Bonnyville No. 87 [“Lot B”];

WHEREAS Lot 1 and Lot B together form the “Lands” which are the subject matter of this Order;

WHEREAS there are lands to the south of the Lands legally described as NE-13-61-6-W4M [“NE-13”];

WHEREAS there are lands to the north of the Lands legally described as SE-24-61-6-W4M [“SE-24”];

WHEREAS the natural drainage in the area is from south to north, starting on farmland located in NE-13, travelling north through Lots 1 and B, through SE-24 to a large wetland complex, and eventually draining into Moose Lake. The natural drainage takes several forms including groundwater, seepage, and surface flows.

WHEREAS Donald Lapierre is the sole director and shareholder of 645639 Alberta Ltd., and at all material times made the decisions in respect of the issues which form the subject-matter of this Order;”

2. Condition 2 is repealed and replaced with the following:

“The Parties shall submit to the Director by **August 1, 2021**, for the Director's approval, a written Remedial Plan (“the Plan”) signed and stamped by a Professional with experience in hydrology and restoration of natural surface water flows, that shall have as its objective the infilling of the drainage ditch, or otherwise

rendering it ineffective, in such a manner that will restore natural surface drainage patterns across the Lands to that which existed prior to the construction of the drainage ditch.”

3. Condition 3(C) is repealed and replaced with the following:

“Details on the management of water exiting the Lands, details on the management of increased volume of water resulting from the hard, impermeable surfaces created by the development of Lot 1 and Lot B, details on the management of natural surface water flow from Lot 1 and Lot B so as to ensure the maximum rate of flow towards SE-24 is no greater than 4 L/s/ha per 1:100 year 24 hour event, including after the proposed remedial work under the Plan, to minimize impacts to neighbouring properties while ensuring the restoration of surface drainage patterns.”

4. Condition 3(E) is repealed and replaced with the following:

“A schedule for implementing the Plan with a completion date no later than **December 31, 2021**.”

The decision of the Director to issue Enforcement Order No. WA-EO-2019/09-LAR is varied as follows:

1. The second paragraph of the Preamble is repealed and replaced with the following:

“WHEREAS there are natural surface water drainage flows across the Lands in a northerly direction, including coming from the property on its southeast corner, legally described as Plan 8621749 Lot B [“Lot B”];

WHEREAS there is land beside Lot B, legally described as Plan 9926243 Lot 1 [“Lot 1”];

WHEREAS there are lands to the south of the Lands, Lot 1, and Lot B, legally described as NE-13-61-6 W4M (“NE-13”);

WHEREAS the natural drainage in the area is from south to north, starting on farmland located in NE-13, travelling north through Lots 1 and B, through the Lands to a large wetland complex, and eventually draining into Moose Lake. The natural drainage takes several forms including groundwater, seepage, and surface flows.”

2. The first sentence of Condition 2 is repealed and replaced with the following:

“The Parties shall submit to the Director by **August 1, 2021**, for the Director's approval, a written Remedial Plan (“the Plan”) signed and stamped by a Professional with experience in hydrology and restoration of natural surface water

flows, that shall have as its objective restoring the natural surface drainage patterns across the Land that existed prior to the commencement of the infilling activities and construction of the berm, by:"

3. Condition 3(E) is repealed and replaced with the following:

"A schedule for implementing the Plan with a completion date no later than **December 31, 2021.**"

4. The following is added after condition 5:

"The Parties are required to accept a total combined maximum peak flow of 4 L/s/ha during a 1:100 year 24 hour event from both Lot 1 and Lot B."