
ALBERTA

ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – March 28, 2024

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

-and-

IN THE MATTER OF appeals filed by Derek McMillan, Linda Skibsted, Rick Skibsted, Spruce Coulee Farms Ltd., Richard Clark, Wendy Clark, Half-Diamond HC Limited, Shauna Kenworthy and Jonathan Groves with respect to the decision of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Protected Areas, to issue *Water Act* Approval No. 00406489-00-00 to Badlands Recreation Development Corp.

Cite as: *McMillan et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Protected Areas, re: Badlands Recreation Development Corp.* (28 March 2024), Appeal Nos. 19-066-070, 074 & 081-R (AEAB), 2024 ABEAB 7.

BEFORE:

Ms. Tamara Bews, Board Member (Retired);
and Mr. Chris Powter, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel;
Mr. Andrew Bachelder, Counsel; Mr. Cameron
Smart, Counsel; Ms. Denise Black, Board
Secretary; and Ms. Valerie Myrmo, Registrar
of Appeals.

SUBMISSIONS BY:

Appellants: Mr. Derek McMillan, Ms. Linda Skibsted,
Mr. Rick Skibsted, Spruce Coulee Farms Ltd.,
Mr. Richard Clark, Ms. Wendy Clark, and
Half-Diamond HC Limited, Ms. Shauna
Kenworthy, and Mr. Jonathan Groves,
represented by Mr. Richard Harrison, Wilson
Laycraft LLP.

Approval Holder: Badlands Recreation Development Corp.,
represented by Mr. James Zelazo, Badlands
Recreation Development Corp.

Director: Mr. Todd Aasen, Director, South
Saskatchewan Region, Operations Division,
Alberta Environment and Protected Areas,
represented by Ms. Nicole Hartman and
Mr. Paul Maas, Alberta Justice.

WITNESSES:

Appellants: Ms. Wendy Clark, Half-Diamond HC Limited; Mr. Jon Groves; Mr. Rick Skibsted, Spruce Coulee Farms Ltd.; Dr. Angus Chu, School of Engineering, University of Calgary; Mr. Michael Devonshire, BDO; Mr. Henk de Haan, dBA Noise Consultants; and Mr. Cliff Wallis, Cottonwood Consultants.

Approval Holder: Ms. Heather Ferguson, EnviroConsult Inc.; Mr. Ross Thurmeier, Scheffer Andrew Ltd.; and Mr. James Zelazo, Badlands Recreation Development Corp.

Director: Mr. Todd Aasen, Director; Ms. Amanda Cooper, Wetlands Team Lead; Ms. Angela Fulton, Water Act Approvals Team Lead; and Mr. Joel Nicholson, Senior Species at Risk Biologist.

EXECUTIVE SUMMARY

These appeals concern Approval No. 00406489-00-00, which was issued on January 8, 2020, by the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Protected Areas*, under the *Water Act*, to Badlands Recreation Development Corp. The Approval allows for the infilling of two wetlands, modification of three wetlands, and construction, operation, and maintenance of a stormwater management system on portions of Section 22-27-21-W4M, near Rosebud, Alberta (the Badlands Activities). The Approval is related to a proposed automotive racetrack development/facility.

The Appellants are Mr. Derek McMillan; Ms. Linda Skibsted, Mr. Rick Skibsted, and their corporate entity Spruce Coulee Farms Ltd.; Mr. Richard Clark, Ms. Wendy Clark, and their corporate entity Half-Diamond HC Limited; Mr. Jon Groves; and Ms. Shauna Kenworthy. They filed appeals with the Environmental Appeals Board (the Board) of the Director's decision to issue the Approval.

In addition to the parties' written submissions, the Board held an electronic public hearing on November 2 to 4, and 7, 2022, and January 30, to February 1, 2023. Between February 28, 2023, and March 30, 2023, the Board also received from the parties written closing final arguments and additional submissions on the Board's questions. The Board closed the hearing on September 8, 2023.

After reviewing the Notice of Appeals, submissions, and other evidence filed in the hearing, the Board concluded that:

1. The Appellants did not provide sufficient evidence to demonstrate that the Approval should be reversed (cancelled).
2. The Approval Holder in its *Water Act* application for the Approval did not provide sufficient evidence to demonstrate avoidance of Wetland 2 in accordance with the Alberta Wetland Policy or the Alberta Wetland Mitigation Directive.

* Alberta Environment and Protected Areas is the successor to Alberta Environment and Parks. The Board will use Alberta Environment and Protected Areas for the purpose of this report.

3. The Approval should be varied to allow the Badlands Activities to proceed for Wetlands 1, 3, 4, and 5 but under different terms and conditions.
4. The Minister should vary the Approval as set out in Appendix 2 of this Report.

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PART 1. BACKGROUND

[1] This is the Environmental Appeals Board’s (the “Board”) Report and Recommendations regarding nine appeals filed by Mr. Derek McMillan, Ms. Linda Skibsted, Mr. Rick Skibsted, and their corporate entity Spruce Coulee Farms Ltd.; Mr. Richard Clark, Ms. Wendy Clark, and their corporate entity Half-Diamond HC Limited; Mr. Jon Groves; and Ms. Shauna Kenworthy (collectively, the “Appellants”) regarding *Water Act* Approval No. 00406489-00-00 (the “Approval”).

[2] Dr. Chidinma Thompson, who was Chair of the Board and a member of the panel throughout these appeals was appointed to the Court of King’s Bench on October 23, 2023. This Report and Recommendations is issued by the remaining Board panel members Ms. Tamara Bews and Mr. Chris Powter.¹

1. THE APPROVAL

[3] The Approval was issued on January 8, 2020, by Mr. Todd Aasen, Director, South Saskatchewan Region, Operations Division (the “Director”), Alberta Environment and Protected Areas² (the “Department” or “EPA”) under the *Water Act*, RSA 2000, c W-3 (the “*Water Act*”) to Badlands Recreation Development Corp. (the “Approval Holder” or “Badlands”). The Approval has an effective date of January 8, 2020, and an expiry date of January 7, 2045.

[4] Subject to prescribed conditions, the Approval was appurtenant to the following activities: (1) to place fill in two wetlands, (2) to modify three wetlands, and (3) to construct, operate, and maintain a storm water management system for surface water runoff to the Rosebud River and wetlands on Section 22-27-21-W4M (collectively the activities are referred to as the “Badlands Activities”) near Rosebud, Alberta.

¹ Pursuant to section 6(3) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93.

² On October 21, 2022, Alberta Environment and Parks (AEP) was renamed Alberta Environment and Protected Areas (EPA). For the purposes of this report, EPA includes AEP as the context requires.

[5] The Approval in Condition 3.1 incorporates by reference two technical reports prepared for the Approval Holder:

1. Report No. 00406489-R001 – Badlands Motorsport Resort Stormwater Management Plan Within Sec 22-27-21-W4M, Kneehill County, Alberta (the “Final SMP”) dated November 6, 2018; and
2. Report No. 00406489-R002 – Wetland Assessment and Impact Report (WAIR) for the Badlands Motorsports Resort near Rosebud, Alberta (the “Final WAIR”), dated October 9, 2019.

2. THE PARTIES

[6] The parties to these appeals are the Appellants, the Approval Holder, and the Director (collectively, the “Parties”).

2.1. Director

[7] The Director provided a witness panel at the hearing consisting of:

1. Mr. Todd Aasen, Approvals Manager – Red Deer District (the Director);
2. Ms. Angela Fulton, Water Approvals Coordinator;
3. Ms. Amanda Cooper, Wetlands Team Lead; and
4. Mr. Joel Nicholson, Senior Species at Risk Biologist.

[8] Although the application for the Approval was referred to other subject matter experts in the Department (namely, Mr. Gordon Ludtke, Senior Water Administration Engineer; Mr. Matthew Wilson, Wetlands Team Lead; and Mr. Scott Stevens, Senior Wildlife Biologist), they did not participate in the hearing.

2.2. Approval Holder

[9] The Approval Holder was represented by Mr. James Zelazo, one of its corporate directors.

[10] The Approval Holder owns, since 2006, approximately 508 acres in a portion of Section 22-27-21-W4M³ (the “Badlands Lands”), which is adjacent to the Rosebud River and is subject to the Approval.

[11] The Badlands Lands are primarily located in Kneehill County. However, a portion of the Badlands Lands are in Wheatland County.

[12] As part of an undertaking at the hearing, the Approval Holder provided an updated map of the area where the Badlands Activities are located (the “Badlands Development Area”) which was not objected to by the other parties.⁴ Therefore, for the purposes of this Report, the Board finds that the Badlands Activities are located on lands within the area as shown on the updated map found in Appendix 1A.

[13] The Badlands Lands are approximately five kilometres north-east of Rosebud, a small hamlet of around 100 residents, in Wheatland County.

[14] The Approval Holder noted that approximately 25 acres of the property adjacent to the Rosebud River has been designated by Badlands as an environmental easement reserve and will be conserved for public recreation and enjoyment; Kneehill County approved the reserve on May 25, 2017.⁵

[15] The Approval Holder provided a witness panel at the hearing consisting of:

1. Mr. James Zelazo, CFO & Development Manager, Badlands Recreation Development Corp.;
2. Ms. Heather Ferguson, EnviroConsult Inc.; and
3. Mr. Ross Thurmeier, Scheffer Andrew Ltd.

³ The Approval Holder’s lands consist of three titled units: Portion of SE¼-22-27-21W4M; Descriptive Plan 1310666, Block 3, Lot 1; and Portion of W½-22-27-21W4M, (as more particularly described in Certificate of Title Nos. 131 054 490, 141 031 715, and 161 089 670). See Director’s Record at Tabs 4, 5, and 7 and Hearing Exhibit 7.

⁴ Board Letter dated February 21, 2023; Hearing Exhibit 20.

⁵ Approval Holder’s Submission at paragraph 6; Badlands Project Overview at pages 5, 17 and 38.

[16] Although the Approval Holder had previously filed written evidence of Mr. Rick Grol, he did not participate in the hearing.

2.3. Appellants

[17] In *Andrew Reiffenstein et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp.* (28 April 2020), Appeal Nos. 19-059-085-ID1 (AEAB), 2020 ABEAB 16 (“*Reiffenstein*”), the Board granted standing to Mr. Skibsted, Ms. Skibsted, Spruce Coulee Farms Ltd., Mr. Clark, Ms. Clark, Half-Diamond HC Limited, and Mr. McMillan.

[18] Following the Alberta Court of Appeals decision in *Normtek Services Ltd v. Alberta Environmental Appeal Board*, 2020 ABCA 456 (“*Normtek*”), and after a reconsideration request filed by individuals who were not granted standing in *Reiffenstein*, the Board granted standing to Ms. Kenworthy and Mr. Groves in *McMillan v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp.* (31 May 2022), Appeal Nos. 19-066 to 071, 074, 081, and 083-085-ID4 (AEAB), 2022 ABEAB 22 (“*McMillan ID4*”).

[19] In *Reiffenstein*, the Board noted that Ms. Clark, Mr. Clark, Ms. Skibsted, Mr. Skibsted, and Mr. McMillan own or work property immediately adjacent to the Badlands Activities which creates a nexus between them and the impacts of the Approval.⁶

[20] Mr. McMillan, Ms. Skibsted and Mr. Skibsted own or operate Spruce Coulee Farms Ltd. Spruce Coulee Farms Ltd. owns over 2,000 acres of land in Kneehill and Wheatland Counties. Spruce Coulee Farms Ltd.’s lands are adjacent to or in the vicinity of the Badlands Lands and the Rosebud River. All lands owned by Spruce Coulee Farms Ltd. are subject to a conservation easement granted by Western Sky Land Trust Society on or about January 10, 2020.⁷

⁶ *Reiffenstein* at paragraphs 111 and 113.

⁷ Appellants’ Evidentiary Documents attached to the Appellants’ Initial Submission at pages 502 to 531.

[21] Mr. Clark and Ms. Clark own and operate Half-Diamond HC Limited. The Clarks own over 1,500 acres of land and Half-Diamond HC Limited owns over 600 acres of land, which are adjacent to or in the vicinity of the Badlands Lands and the Rosebud River. All lands owned by Mr. Clark, Ms. Clark and Half-Diamond HC Limited are in Wheatland County, except for Section 14-28-21W4M which is in Kneehill County. All lands owned by Mr. Clark, Ms. Clark and Half-Diamond HC Limited are subject to a conservation easement granted to Western Sky Land Trust Society on or about January 21, 2020⁸ except for NW¼-10-28-21W4M.

[22] Ms. Skibsted and Mr. Skibsted (as joint tenants to an undivided 50% interest); and Ms. Clark and Mr. Clark (as joint tenants to an undivided 50% interest) are the joint owners of the lands legally described as Portion NE¼-16-27-21-W4M located in Wheatland County.

[23] In *McMillan ID4*, the Board granted Ms. Kenworthy standing because she resided on land owned by Mr. Skibsted, whose land was previously found by the Board as potentially impacted by the proposed stormwater management system, and because she claimed her economic interest as a photographer is directly affected by the Badlands Activities authorized by the Approval.⁹

[24] Mr. Groves has agreements in place with landowners to run his wildlife photography tours through their properties. Those agreements cover the properties that are directly adjacent to the Badlands Activities. In *McMillan ID4*, the Board found that the Approval may impact Mr. Groves' economic interests as a tour group operator and as a wildlife photographer.¹⁰

[25] The Appellants filed their Notices of Appeal pursuant to section 115(1)(a) of the *Water Act* and section 91(1)(p) of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("EPEA") on January 20, 2020, and January 21, 2022.

⁸ Appellants' Evidentiary Documents attached to the Appellants' Initial Submission at pages 458 to 499.

⁹ *McMillan ID4* at paragraph 123.

¹⁰ *McMillan ID4* at paragraphs 107 and 108.

[26] In their Notices of Appeal, the Appellants stated, among other things, that the Approval failed to:

- Acknowledge that the affected wetlands are of high (A) category;
- Properly apply the 2013 Alberta Wetland Policy of avoid, minimize and replace, particularly with respect to the relative Wetland Value category of the affected wetlands;
- Properly weigh the environmental impacts with the economic benefits of the proposed project, contrary to the express provisions of the *Water Act*;
- Consider the 2013 South Saskatchewan Regional Plan; and
- Properly apply the precautionary principle.

[27] Consequently, the Appellants submitted that the Approval ought not to have been granted, or alternatively, the conditions of Approval were insufficient to meet the requirements of the *Water Act*, the 2013 Alberta Wetland Policy (the “Wetland Policy”) and the 2013 South Saskatchewan Regional Plan (“SSRP”).

[28] The Appellants stated that the Final SMP and Final WAIR supporting the Approval and relied upon by the Director in granting the Approval, were deficient and they required opportunity to rebut those reports. They also stated that they were precluded from providing the Director all their evidence or submissions concerning the five wetlands affected by the Approval, as they did not have access to the wetlands.

[29] The Appellants requested in the Notices of Appeal that the Board:

1. Stay the Approval;¹¹
2. Recommend to the Minister that the Approval be reversed in its entirety;
3. In the alternative, recommend to the Minister that the Approval be varied such that it reflects Alberta’s statutory approval framework; and

¹¹ Addressed in *Reiffenstein* at paragraphs 123 to 154.

4. Grant access to the affected wetlands so as to be able to perform its own reporting in response to the Final SMP and Final WAIR relied upon by the Director in granting the Approval.¹²

[30] The Appellants provided a witness panel at the hearing consisting of:

1. Ms. Wendy Clark;
2. Mr. Jon Groves;
3. Mr. Rick Skibsted;
4. Mr. Cliff Wallis, Cottonwood Consultants;
5. Dr. Angus Chu, Professor, Schulich School of Engineering, Department of Civil Engineering, University of Calgary;
6. Mr. Michael Devonshire, BDO Canada LLP;¹³ and
7. Mr. Henk de Haan, dBA Noise Consultants Ltd.

[31] As noted above, the Board granted Mr. Clark, Ms. Kenworthy, Mr. McMillan, and Ms. Skibsted standing or full participation rights in the hearing. The Director's Record includes copies of their Statements of Concern.¹⁴ However, they did not provide any oral evidence at the virtual hearing. As a result, they were not available for cross-examination by the other parties or for questioning by the Board panel.

3. THE BOARD'S PROCESS IN THE APPEALS

[32] The Board conducted the hearing of the nine Appeals using written and oral processes. The written portion of the hearing consisted of the Board considering submissions and evidence from February 21, 2020 to October 22, 2022, including the impact of *Normtek* on the Appellants' participation in the Appeals.

¹² Letter from the Board to the Parties dated March 5, 2020, stating that "The Board notes Mr. Zelazo has declined the Appellants' site visit request, at this time. The Board will not order a site visit."

¹³ At the hearing, Mr. Devonshire indicated he had left employment at BDO Canada LLP in September of 2022.

¹⁴ See Director's Record, Tabs 99, 118, 137, and 124, respectively.

[33] At the request of the Appellants, the Board performed a site visit on September 2, 2022. The Parties did not participate. The Board conducted its site visit based on guidance and materials provided by the Parties.¹⁵

[34] The oral portion of the hearing consisted of direct evidence, cross-examination, and arguments (oral and written) and was conducted by videoconference over 7 days in November 2022, January 2023, and February 2023.

[35] The Board closed the hearing on September 8, 2023.

PART 2. ISSUES

[36] The Board considered the following issues:

1. What is the scope of the project and activities which require authorization from the Director under the *Water Act*?
2. What is the relevance of the economic analysis report and noise report to these Appeals?
3. What is the effect of the environmentally significant areas designation?
4. What concerns have been raised by the Appellants with the application process which should be addressed by the Board as part of the de novo hearing?
5. What is the standard of review and onus in these Appeals?
6. Do the South Saskatchewan Regional Plan and the *Alberta Land Stewardship Act* apply to the Approval?
7. Were the matters and factors for the approved water management plan for the South Saskatchewan River Basin considered by the Director?
8. Was the precautionary principle properly applied?
9. Was the Wetland Policy properly applied?
10. What, if any, are the potential impacts to wildlife, and specifically species at risk?

¹⁵ *McMillan v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp.* (23 August 2022), Appeal Nos. 19-066-070, 074, and 081-ID5 (AEAB), 2022 ABEAB 34.

PART 3. WHAT IS THE SCOPE OF THE PROJECT AND ACTIVITIES WHICH REQUIRE AUTHORIZATION FROM THE DIRECTOR UNDER THE *WATER ACT*?

4. PROJECT DESCRIPTION

[37] The Approval Holder plans to develop a comprehensive motorsports resort on a portion of the Badlands Lands located within Kneehill County (the “Badlands Motorsport Resort” or “BMR”). The Approval Holder intends for the Badlands Motorsport Resort to develop into an exclusive automotive racetrack, as well as a full-service recreational resort and residential community. The BMR will include a resort with two racetracks, a driver training facility that includes a smaller practice course, associated facilities, condominium resort residences, a hotel/club-house, and recreational amenities.¹⁶

[38] The two racetracks are: (1) the “Upper Track” located on the plateau above the valley break and (2) the “Valley Track”, located below the valley break and above the Rosebud River flood plain, which will circle a large central knoll (see the map in Appendix 1A).¹⁷ A third racetrack, the “Mountain Track”, connecting the Upper Track and the Valley Track, was included in the 2013 *Badlands Motorsports Resorts Area Structure Plan* (“ASP”)¹⁸ but removed from the final BMR design.¹⁹

[39] The Approval Holder developed plans and received the following associated municipal authorizations from Kneehill County to develop the BMR²⁰:

1. The ASP;

¹⁶ Badlands Project Overview at page 11.

¹⁷ For the purposes of this Report, the Upper Track includes the Upper Course or Upper Road Course; and the Valley Track includes the Valley Course or Lower Road Course as described in the Final SMP, Final WAIR, or other technical reports. Similarly, submissions of the Parties refer to the track and the racetrack without specifying which racetrack or if one or more of the racetracks is being referred to. The Board has retained the original text unless it was obvious which racetrack was being referenced.

¹⁸ Hearing Exhibit 16.

¹⁹ ASP at page 31.

²⁰ Badlands Project Overview at pages 7, 8, 11, 12, 38, and 39.

2. Development Site Agreement dated June 7, 2017, between Kneehill County and Badlands Recreation Development Corporation, which agreement is pursuant to a condition of the subdivision approval;²¹
3. In January of 2014, Kneehill County passed a Direct Control Bylaw to regulate site design and development;²²
4. In support of the ASP, the Approval Holder submitted an Environmental Impact Assessment / Environmental Protection Plan (the “EIA/EPP”)²³ to Kneehill County which they approved in 2015;²⁴
5. In March of 2016, Badlands submitted a Comprehensive Site Development Plan for Kneehill County;²⁵ and
6. On May 25, 2017, Kneehill County approved the application for subdivision of the lands zoned Direct Control District 4 in Section 22-24-21 W4M which would subdivide the proposed Valley Track area from the Upper Track area.²⁶ On January 30, 2020, Kneehill County Municipal Planning Commission approved the re-application for subdivision approval, and on September 9, 2020, a 3-year extension was granted for the subdivisions which now expire January 30, 2024.²⁷

[40] As noted in the Final WAIR, the Approval authorizes Badlands to partially fill Wetland 2 to make way for the Valley Track and completely fill Wetland 3 to accommodate the BMR. As noted in the Final SMP, the Approval authorizes Badlands to modify Wetlands 1, 4, and 5 to accommodate surface runoff and drainage.

[41] The locations of the five wetlands (the “Badlands Wetlands”) and the proposed water flow to and from each are shown in Appendix 1B. Further details on each wetland are provided in the Final WAIR in section 3.2.

²¹ Director’s Record at Tab 39.

²² Badlands Project Overview at page 7.

²³ Appellants’ Supplemental Evidentiary Submission at pages 5 to 209 attached to the Appellants’ Supplemental Submission.

²⁴ Final WAIR at page 1.

²⁵ Badlands Project Overview at page 12; Appellants’ Evidentiary Documents attached to the Appellants’ Initial Submission at page 2268.

²⁶ Badlands Project Overview at page 38.

²⁷ Badlands Project Overview at page 39.

[42] The Approval Holder's Final SMP proposes a system of nine clay-lined dry ponds and one clay-lined wet pond²⁸ to control stormwater runoff at the top of the escarpment (see Appendix 1B). Runoff from the upper plateau is discharged down the coulees and roadside ditches at a controlled release rate. In the lower plateau the Final SMP incorporates Wetlands 1, 2, 4 and 5 (the "Valley Wetlands") to detain stormwater runoff.²⁹

[43] Control structures will be placed in each pond and Wetlands 4 and 5 to control peak discharge rates,³⁰ and forebays will be constructed at the entrance of each wetland to trap the sediments and solids flowing into the wetlands.³¹

[44] Wetlands 4 and 5 discharge to the Rosebud River at two separate points.³²

[45] The Final SMP includes construction specifications, operations plans, and methods of operation.³³

5. SUBMISSIONS

5.1. Appellants

[46] In their Notices of Appeal, various appellants identified concerns with operation of the racetracks, in addition to concerns about the Badlands Activities:

- Ms. Skibsted (EAB 19-067) – An improperly done noise study and what effect realistic noises will have on our quality of life and what effect it will have on the wildlife whether they are at risk or not.
- Ms. Clark (EAB 19-070)
 - I am concerned about fenced racetracks blocking the major corridor from my land (in Wheatland County) for wildlife to access the wetlands and the river.

²⁸ The Final SMP, at page 12, indicates that a constructed wetland (SWMF6) has been proposed to control the runoff from the backsloping of the lower track adjacent to the Rosebud River. Table 5 of the Final SMP shows SWMF6 as a wet pond, in addition to wet pond SWMF2.

²⁹ Final SMP at page 8 and Figure 5.

³⁰ Final SMP at page 15.

³¹ Final SMP at page 13.

³² Final SMP at Figure 5.

³³ Approval Holder's Closing Arguments at page 5.

- Rosebud's own acoustician, Paul Lasson, presented at public hearings evidence of short comings in the Noise Impact Assessment provided by the opponent. I am concerned the proponent did not address these concerns and did not consider of the sensory disturbance to an abundance of species populating this wetland and river habitat.
- I am concerned the proponent has not considered all the impacts to wildlife during construction and operation of a racetrack.
- Ms. Kenworthy (EAB 19-074) – Aside from the obvious pollution implications and their effect on the unique wetlands in the area, the noise from the cars that would be racing there will reverberate down the valley into Rosebud and up into the adjoining lands, disturbing birds, wildlife and the neighboring landowners.
- Mr. Groves (EAB 19-081)
 - Badlands fails to adequately recognize the impacts of sensory disturbance of an operational racetrack on wildlife and species at risk anywhere in their planning documents.
 - Although timing constraints are addressed as mitigation for construction phases of the development, Badlands fails to note the impacts of an operational motorsports facility and associated infrastructure on sensitive species.

[47] In her Will Say Statement, Ms. Clark stated:

“There is considerable evidence outlining the uses that are considered by this project. They include vehicles travelling in excess of 160 km/hour; a skid pad for drivers and a burnout pad to burn off the tires on their cars; a gas station and other mechanical workshops; commercial, industrial and residential. No consideration has been provided for the pollution from these uses.”

[48] In his 2020 report *Badlands Motorsports Resort Wetland and Biodiversity Considerations* (the “2020 Wallis Report”), Mr. Wallis raised concerns about Federally listed Threatened³⁴ species such as the bank swallow feeding over the wetlands and adjacent native habitats being at elevated risk from vehicle collisions along the racetrack during spring and

³⁴ Mr. Wallis referenced Schedule 1 of the *Species at Risk Act*, SC 2002, c 29 (“SARA”), which identifies species which are Extirpated, Endangered, Threatened, and of Special Concern.

summer months.³⁵ Mr. Wallis reiterated his concerns about vehicle collisions in his 2021 report *Comments on EnviroConsult and Scheffer Andrew Responses* (the “2021 Wallis Review”).³⁶

[49] The Appellants argued that the proposed land use, in this case a high velocity racetrack, has applicability to the *Water Act*. Finding otherwise was and is in error.³⁷

[50] The Appellants submitted that the Director testified that he began his review of the Approval Holder’s application with the racetrack then changed his mind. According to the Appellants, the Director considered the use of the racetrack on the issue of avoidance.³⁸

[51] The Appellants submitted that the Director’s own witnesses contradicted his attempts to exclude the racetrack from consideration in that:

- Mr. Nicholson testified that land use did have a factor to play, particularly where it impacted a species at risk and that in measuring setback distances, the project area ought to have been used because of the proposed land use, and that the ambient noise from the racetrack was relevant to considering whether to grant the Approval;
- Mr. Thurmeier affirmed that land use, incorporated 26 times in the Final SMP, played a critical role in the proposed stormwater management system;
- Ms. Cooper testified that implementing the Wetland Policy requires examination of land use; and
- Ms. Fulton testified that consideration of the Approval also requires consideration of structures or changes to the water courses, wetlands, and drainage.³⁹

[52] In brief, the Appellants argued, the Director acted unreasonably in refusing to consider the racetrack’s impact. The Appellants submitted that the *Water Act* requires consideration of land use when deciding whether to grant an approval.⁴⁰

³⁵ 2020 Wallis Report at page 3.

³⁶ 2021 Wallis Review at page 11.

³⁷ Appellants’ Closing Arguments at paragraph 700.

³⁸ Appellants’ Closing Arguments at paragraph 697.

³⁹ Appellants’ Closing Arguments at paragraph 701.

⁴⁰ Appellants’ Closing Arguments at paragraph 702.

[53] The Appellants submitted that section 36 of the *Water Act* sets out the circumstances in which an approval is required:

“36(1) 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.”⁴¹

[54] The Appellants stated that land use is material to obtaining an approval because the words “continue an activity” in section 36 of the *Water Act* contemplate that the way an activity is carried on is material to an approval. The Appellants submitted that the Board is statutorily required to consider the intended use of the Approval because of the expansive definition of “activity” in the *Water Act*:

“1(1)(b) ‘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 “works” that

(A) *alters, may alter or may become capable of altering the flow or level of water*, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage,

(B) *changes, may change or may become capable of changing the location of water or the direction of flow of water*, including water in a water body, by drainage or otherwise,

(C) *causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body*, or

(D) *causes, may cause or may become capable of causing an effect on the aquatic environment;*⁴² (*Emphasis added by the Appellants.*)

[55] The Appellants contended that the “works” intended by the Approval is a racetrack. The racetrack contemplates a gas station, car wash and 1,200 users per day. The BMR also

⁴¹ Appellants’ Closing Arguments at paragraph 703.

⁴² Appellants’ Closing Arguments at paragraph 704 and 705.

includes elements beyond a racetrack, including extensive commercial and retail space, restaurant, banquet and conference facilities, a driver education school, automotive repair garage, a multi-story car storage building with 770 parking bays, a hotel and clubhouse and a condo apartment complex, in addition to the infrastructure required to service at least 326,870 annual visitors. As such, the intended use of the Approval is relevant to the Board's deliberations.⁴³

[56] Further, the Appellants argued the Director's claim that these issues were firmly outside the scope of his review is belied by the fact that he requested from Badlands both the ASP and the Development Agreement between Kneehill County and Badlands.⁴⁴

[57] The Appellants argued that the proposed land use will undoubtedly change the aquatic environment because it will change the wetlands and the Rosebud River. By "affecting" those water bodies, the racetrack falls within the express definition of "activity".⁴⁵

[58] The Appellants further argued that the definition of "activity" also includes "carrying out an undertaking". "Undertaking" is defined in section 1(1)(ddd) of the *Water Act*. The Appellants submitted that the proposed land use – a racetrack – is the diversion of water. It is a structure "made by a person" which was acknowledged by Mr. Thurmeier in cross-examination. The racetrack, therefore, clearly fits within the definitions of "activity", "undertaking" and "works."⁴⁶

[59] The Appellants submitted that the Board in *Fenske v. Director, Central Region, Regional Services, Alberta Environment, re: Beaver Regional Waste Management Services Commission* (22 September 2008), Appeal No. 07-128-ID1 (AEAB), 2008 ABEAB 33 ("*Fenske*")

⁴³ Appellants' Supplemental Rebuttal Submission at paragraphs 104 and 105; Appellants' Closing Arguments at paragraph 707.

⁴⁴ Appellants' Closing Arguments Rebuttal at paragraph 74.

⁴⁵ Appellants' Closing Arguments at paragraph 708.

⁴⁶ Appellants' Closing Arguments at paragraphs 709 and 710.

had previously decided that it has concurrent jurisdiction with municipalities to consider certain criteria:

“[116] Some issues, such as noise, buffers, and working hours can be controlled by the municipality or it can be included as a condition in an approval issued by the Director. *These are matters of concurrent jurisdiction. Although the Director will often leave these issues to the municipality, the Director has the authority under EPEA to regulate noise levels and, related to noise effects, hours of operation. Therefore, the issues where there is concurrent jurisdiction will be assessed to determine if issue estoppel applies.*

[134] Therefore the Board will hear arguments on the operation of the Landfill as it relates to litter, odour, noise, operating hours, and aesthetics. The Board will hear arguments on these issues, but it is limited to the effects that result from the Landfill expansion authorized under the Approval.”⁴⁷ (*Emphasis added by Appellants.*)

5.2. Approval Holder

[60] The Approval Holder submitted that the Approval being examined in these appeals arises out of the need for a stormwater management plan for the BMR, plus the need to deal with wetlands which were identified on the Badlands Lands as soon as environmental work commenced in 2007.⁴⁸

[61] The Approval Holder described the stormwater management system as a system of dry ponds, sediment forebays, one wet pond, and utilizing the existing natural wetlands which already receive runoff from the catchment area to detain the stormwater runoff resulting from the proposed development.⁴⁹ The infrastructure and physical footprint of the stormwater management system is shown in Figure 5 of the Final SMP and the design and construction of the components of the stormwater management system is provided in the Final SMP (pages 12 to 14).

⁴⁷ Appellants’ Closing Arguments Rebuttal at paragraph 71.

⁴⁸ Approval Holder’s Submission at paragraph 13.

⁴⁹ Final SMP at page 8.

[62] At the hearing, Mr. Zelazo stated that determination of zoning on private land falls under the jurisdiction of the local municipality, and that the Appellants had opportunity during the municipal decision process to have their concerns heard.⁵⁰

5.3. Director

[63] The Director stated that the Approval is the subject of this appeal; it does not concern the municipal land use decision to allow the zoning for a racetrack, or the Badlands racetrack itself.⁵¹

[64] The Director testified that the municipality makes the decision on land use and then the Approval Holder requests relevant environmental authorizations from the Department; it is not the role of the Department to decide on appropriate land use.

[65] The Director submitted that the Board has no jurisdiction to consider municipal legislation or policies, or municipal land use or planning decisions. The Director's position is that the Board has been consistent on this point in numerous cases, including *Larsen v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Lafarge Canada Inc.* (28 August 2018), Appeal No. 15-021-ID1 (AEAB), 2018 ABEAB 12 at paragraph 109 and *McLay v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Minsky* (25 May 2017), Appeal No. 16-004-R (AEAB), 2017 ABEAB 7 ("*McLay*") at paragraph 49, and *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment, re: Parkland County* (1 August 2001) Appeal Nos. 01-045, 046 and 047-D (AEAB), 2001 ABEAB 40 ("*Paron*"), at paragraph 58.

[66] Based on these decisions, the Director argued that the proper forum to deal with negative impacts which were the result of land use decisions by the local municipality that do not directly relate the approval under appeal – was and always will be the municipality. Therefore, the Board is not the correct forum to raise municipal planning concerns.

⁵⁰ Approval Holders' Submission at paragraph 15; Timeline Badlands Motorsport Resort Development.

⁵¹ Director's Response Submission at paragraphs 1 and 2.

[67] The Director noted that the Board had previously commented on the relationship between environmental and municipal issues:

“The Board is of the view that the Appellants *concerns regarding non-compliance with municipal plans, is demonstrative of the fact that while her concerns have their foundations in protecting the environment; they really relate to land use in a municipal context.*”⁵² (*Emphasis added by the Director.*)

[68] The Director submitted that it is also critical that the Board delineate the boundary between (1) the environmental aspects of the municipal planning issues the Appellants have raised (which are irrelevant) and (2) the environmental issues that are relevant to these appeals of a provincial *Water Act* Approval.⁵³

6. BOARD’S ANALYSIS

[69] The Appellants agreed that the Approval is for the diversion of water but submitted that the proposed land use – the BMR – is the diversion of water. The Appellants submitted that the Approval is inextricably linked to the BMR, and more specifically to the racetracks, and therefore the Director was required to consider the impacts of the BMR as a whole. The Board disagrees.

[70] As noted above, the Approval authorizes the Approval Holder to (1) to place fill in two wetlands, (2) to modify three wetlands, and (3) to construct, operate, and maintain a storm water management system for surface water runoff to the Rosebud River and wetlands on Section 22-27-21-W4M. These constitute an “activity” as defined by the *Water Act* because they alter and change the flow and level of water in a water body and therefore require an approval from the Director. The construction and management of the BMR is not something required to be, or capable of being, approved under the *Water Act*. The Board finds that just because the Approval

⁵² Director’s Closing Arguments at paragraph 18, citing *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment, re: Genstar Development Company* (28 December 2001), Appeal No. 01-074-D (AEAB), 2001 ABEAB 78 (“*Blodgett*”) at paragraph 57.

⁵³ Director’s Closing Arguments at paragraph 16.

Holder wants to divert, change, or alter a water body to further the Approval Holder's chosen development, that does not make the development an activity under the *Water Act*.

[71] The Board is of the view that the BMR is not an "undertaking" under section 1(1)(ddd) of the *Water Act*. An undertaking means a project that is established, proposed to be established, required to be established, or carried on *pursuant to the Water Act* (*Emphasis added by the Board*.) The BMR is not proposed to be established pursuant to the *Water Act*. It is a motorsports park, not a *Water Act* undertaking. In this case, the undertaking is the filling in and modification of the Badlands Wetlands and the construction, operation and maintenance of a storm water management system.

[72] Nor is the BMR a "works" under section 1(1)(mmm) of the *Water Act*. A motorsports park is not capable of being approved under the *Water Act*.

[73] The Board notes that *Fenske*, relied upon by the Appellants, involved an approval authorizing the construction, operation, and reclamation of a landfill where more than 10,000 tonnes per year of waste is disposed. The Board concluded that the land-use issues related to location of the landfill and the buffer zones were not within the Board's jurisdiction but that issues such as noise, operating hours, odour, litter, and aesthetics were within the concurrent jurisdiction of the Board and the municipality as those issues have an environmental aspect as well as a land use aspect.

[74] In other words, in *Fenske*, the very thing that required an approval under EPEA (a landfill) directly caused some limited environmental impacts (noise, litter, etc.) and engaged the jurisdiction of the Board under EPEA on those specific issues. This is different from the case before us. Under the *Water Act*, what the Approval Holder is proposing to build only matters to the extent that their proposal alters the flow or level of water in a water body or changes the direction of flow of water including in a water body. Whether the Approval Holder wants to build a shopping mall, or a racetrack, the Director and the Board would only have the jurisdiction under the *Water Act* to consider what is to be built to the extent that it may alter or change the flow or level of water or a water body.

[75] The Board notes that the Approval Holder considered the hydrological impacts of the BMR on water volumes and flows in designing the stormwater management system as set out in the Final SMP, and the Director relied on the conclusions of the Approval Holder's technical experts and the comments of his staff in approving the stormwater management system. So, to the extent that the BMR will or may alter the flow of water or change the location of water including for drainage, the Board finds that the Director properly considered what is proposed to be built by the Approval Holder. To that extent, the Board agrees that the use of the land has a factor to play as Mr. Nicholson, Mr. Thurmeier, Ms. Cooper, and Ms. Fulton testified at the hearing.

[76] Both the Approval Holder and the Director stated the Approval was separate and distinct from Kneehill County's municipal land use decisions for the BMR. The Board agrees that building the BMR is separate and apart from what was approved by the Director under the *Water Act*.

[77] On January 21, 2020, in response to the stay request from the Appellants, the Board wrote:

“Finally, the Board also wishes to be clear about the scope of these appeals and the scope of any potential stay it may issue. *The Board's jurisdiction is limited to the work authorized under the Approval issued by Alberta Environment and Parks. The Board is not reviewing the project as a whole.* The Board is only reviewing the work with respect to the wetlands and the stormwater management system.”
(*Emphasis added by the Board.*)

[78] Having regard to the above, the Board finds that the Director considered various aspects of the BMR to the extent those aspects directly impacted the conservation, management, allocation, and use of water on the Badlands Lands, including adverse effects on the aquatic environment. It is not the BMR that constitutes the activities properly before the Board in these Appeals. The Board agrees with the Director that the Approval is the subject of these Appeals, and the Approval addresses the infilling of two wetlands, modification of three wetlands, and construction, operation, and maintenance of a storm water management system for surface water runoff to the Rosebud River and wetlands on the Badlands Lands.

[79] In summary, the Board finds that any remaining negative impacts of the BMR raised by the Appellants are the result of the land use decisions made by the County of Kneehill for the BMR and do not directly relate to the Approval under the Appeals. In the Board's view, the proper forum to deal with the Appellants' concerns was and always will be the County of Kneehill. In making this finding, the Board relies on and applies the reasoning from *Paron*⁵⁴ where the Board wrote:

“[23] Finally, the Appellants argue that the work authorized by the Approval will result in an increased number of people using the area for recreational purposes, which will in turn have a negative impact on the Appellants through such things as traffic, crime, and noise. Again, this argument does not demonstrate a proximate and rational connection between the work carried out under the Approval and the impacts. It is not the cutting of weeds or the restoration of the beach that may cause traffic, crime or noise. These things have no direct connection. Rather, the traffic, crime, or noise may be caused by the *use* of the areas that is going to be authorized by the Approval Holder – a use authorized under the MGA, not under EPEA or the *Water Act*.” (*Emphasis in the original.*)

PART 4. WHAT IS THE RELEVANCE OF THE ECONOMIC ANALYSIS REPORT AND NOISE REPORT TO THESE APPEALS?

7. WHAT IS THE RELEVANCE OF THE ECONOMIC ANALYSIS REPORT TO THESE APPEALS?

7.1. Submissions

7.1.1. Appellants

[80] The Appellants submitted that the clear direction contained within the purpose statement (section 2(b) of the *Water Act*) requires a Director to balance “economic prosperity” on one hand with “managing and conserving water resources to sustain our environment” on the other. In granting the Approval, the Director failed to give any consideration to the economic/environmental balance. Nowhere in the Approval or the Record is there evidence that the Director ever turned his mind to whether the economic realities of this project ought to be factored into his decision to grant the Approval.⁵⁵

⁵⁴ See also *Blodgett* at paragraph 59.

⁵⁵ Appellants' Closing Arguments at paragraphs 258 and 260.

[81] Section 2(b) of the *Water Act* addresses the purpose of the Act, and reads:

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

...

(b) the need for Alberta’s economic growth and prosperity;”

[82] The Appellants cited two Court of King’s Bench cases to show that the Director and the Board ought to consider section 2 when exercising their discretion under the *Water Act*:

Pembina Institute v. Alberta (Environment and Sustainable Resources Development), 2013 ABQB 567 at paragraphs 27 to 31.

979899 Alberta Ltd. v. Alberta, 2008 ABQB 57 at paragraph 14.

[83] The Appellants also cited a previous Board decision (*Gadd v. Director, Central Region, Regional Services, Alberta Environment, re: Cardinal River Coals Ltd.* (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (AEAB), 2005 ABEAB 13 (“*Cardinal River*”)) to show that when determining whether to issue a *Water Act* approval or license, the Board had previously cited section 2(b) of the *Water Act* as requiring a balance between economic benefits and environmental trade-offs. For example, in *Cardinal River*, the Board held as follows:

“[126] Although the Appellant requested the Board set aside the Approvals, the Board must take into consideration all of the purposes of EPEA and the Water Act. Both of these acts require the Board to balance the economic growth with the environmental effects ... The Board appreciates the concerns of the Appellant and the Cadomin Residents regarding the loss of wildland areas in the region, but the Board must also listen to the concerns expressed by the Approval Holder, the Town of Hinton, and the other intervenors who appeared before the Board. They expressed the economic benefits of the project and how the Board’s decision could affect their livelihood. Therefore, in reviewing the submissions and evidence and in making its recommendations for minimizing and mitigating negative impacts on the environment, the Board *must* consider these competing interests in recognizing

"...the need for Alberta's economic growth and prosperity in an environmentally responsible manner...."⁵⁶ (*Emphasis added by the Appellants.*)

[84] The Appellants stated the Board undertook a similar analysis in *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment, re: Capstone Energy Ltd.* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (AEAB), 2004 ABEAB 9 (“*Capstone Energy*”):

“[169] Section 2 of the Water Act requires that conservation and management of water be carried out in a manner that recognizes the need for Alberta's economic growth and prosperity...

[171] ...However, the *Water Act*, which is the Minister of Environment’s purview, and particularly section 2, obligates the Director to bear in mind the need for economic growth and prosperity in Alberta. For fresh water, this is best done by fairly and fully considering the impact of the project with respect to the environment, other water users, and water management. This should not be construed to mean that the Director is not obligated to consider whether alternatives to the use of fresh water are available, because as is discussed further... in our view he is required to undertake and articulate this consideration pursuant to section 2 of the *Water Act*, which corresponds to the Water for Life principles.”⁵⁷

[85] The Appellants stated that the decision in *Capstone Energy* turned on the Board’s requirement to balance economic interests with environmental degradation. The Board added conditions, reducing the certificate holder’s ability to draw fresh water.⁵⁸

[86] The Appellants further stated that the Wetland Policy assists the Appellants’ argument that the Director and the Board have jurisdiction to consider economics. The policy, they argue, thoroughly incorporates economic considerations into applying its core value of avoiding, minimizing, and replacing wetlands. The policy frequently mentions the need to balance social, economic, and environmental goals in its execution. Even the wetland replacement option in the Mitigation Directive demonstrates an economic purpose: what is the replacement value of a wetland. The entire policy focuses on this singular question.

⁵⁶ Appellants’ Closing Arguments at paragraph 302.

⁵⁷ Appellants’ Closing Arguments at paragraph 304.

⁵⁸ Appellants’ Closing Arguments at paragraph 305.

[87] The Appellants cited multiple locations in the Wetland Policy that support this argument, including page 5 which provides, in part:

“Over the past several decades, Alberta has enjoyed considerable economic prosperity. This prosperity has presented a range of challenges and responsibilities *in terms of balancing the environmental, social, and economic needs of Albertans*. The cumulative effects of both rapid population and economic growth are placing considerable pressure on Alberta’s landscapes.”⁵⁹ (*Emphasis added by the Appellants*).

[88] The Appellants submitted they were seeking an analysis by the Board into whether the economic benefits associated with the Approval outweigh the environmental costs of the Approval. Any analysis ought to begin with the fact that Southern Alberta has limited riparian resources. Acknowledgment of this fact was considered by the Board in *Brookman and Tulick v. Director, South Saskatchewan Region, Alberta Environment and Parks, re: KGL Constructors, A Partnership* (24 November 2017), 17-047 and 17-050-R (AEAB), 2017 ABEAB 13 (“*Brookman*”):

“[168] ... Decisions under the *Water Act* are important to ensure the protection of the environment, especially in Southern Alberta where there are limited water supplies (in some areas of this region, all surface water has already been allocated) and where wetlands have a significant environmental value because they are comparatively few.”⁶⁰

[89] The Appellants argued that there are cases, such as *Brookman*, in which the environmental degradation associated with *Water Act* approvals are justified on the basis that the economic benefit outweighs that degradation. However, they stated that this is not one of those cases:

“There is no economic benefit to be derived from the project contemplated by this Approval. The project is unviable. The harm, both actual and contemplated, resulting from the removal of 2 wetlands, the modification of a further 3 wetlands and the construction of a storm water management system far outweighs any economic benefit derived from the project for which the Approval is sought.”⁶¹

⁵⁹ Appellants’ Closing Arguments at paragraph 283.

⁶⁰ Appellants’ Initial Submission at paragraph 24.

⁶¹ Appellants’ Initial Submission at paragraph 26 and 27.

[90] The Appellants stated that the Board must weigh the protections afforded in the Approval with the impacts of the Approval, and that, in doing so, one factor the Board ought to consider in this balancing act is the economic merits of the project.⁶²

[91] The Appellants submitted that the purpose of the 2020 BDO Report⁶³ was to provide conclusions on the economic viability of the proposed BMR as of August 31, 2020.⁶⁴

[92] The Appellants submitted the 2020 BDO Report demonstrated the BMR is not economically viable.⁶⁵

[93] The Appellants submitted that, as the only evidence on the issue of economic viability, the conclusions contained in the 2020 BDO Report must be accepted by the Board. The Board must conclude as a fact that the BMR is not economically viable. It ought to then incorporate that finding into its recommendation to the Minister.⁶⁶

[94] The Appellants noted that no other economic evidence was submitted by either the Director or Badlands. Mr. Devonshire's evidence on this subject is unchallenged, and the conclusions reached by Mr. Devonshire are thereby crystallized.⁶⁷

[95] The Appellants submitted that, like the *Water Act*, the Board's decision to recommend a course of action under EPEA section 99(1) is entirely discretionary, and EPEA section 2 purpose statement supports the wide discretion to consider an array of issues. They argued that should the Board ignore the discretion granted it under both the *Water Act* and EPEA, it will have fettered its discretion. That is because, under EPEA section 100(1)(a), the Minister is granted the express authority to confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make. Section 100(1)(a), however,

⁶² Appellants' Initial Supplemental Submission at paragraphs 16 and 18.

⁶³ *Economic Viability of Badlands Recreation Development Corp.* prepared for the Appellants by Mike Devonshire, BDO, Calgary, Alberta.

⁶⁴ 2020 BDO Report at page 1.

⁶⁵ Appellants' Initial Supplemental Submission at paragraph 7.

⁶⁶ Appellants' Rebuttal Submission at paragraph 58.

⁶⁷ Appellants' Closing Arguments at paragraph 333.

does not limit what considerations the Minister is entitled to make when deciding. Nowhere does EPEA limit the matters that the Minister may consider to section 38 of the *Water Act* or elsewhere.⁶⁸

[96] Rather, the Appellants submitted, as noted by the Court of Appeal in *Normtek* (at paragraph 126), the Board is “an independent commission of inquiry”. Under section 4 of the *Public Inquiries Act*, RSA 2000, c P-39, the Board has the authority to consider all evidence that it deems “to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire”. The Appellants submitted that the Board and the Minister may both be fettering their discretion should they limit the matters that the Minister considers in deciding the Appeal (for example, an analysis into the economic viability of the BMR). If the Minister fails to consider the economic viability of the project in issuing a decision under section 100, the Minister will have fettered her discretion. It is the responsibility of this Board to ensure that the Minister can consider the full weight of evidence and issues that are relevant to determining the issues before it.⁶⁹

7.1.2. Approval Holder

[97] The Approval Holder submitted that under the scheme of the *Water Act* a review of economic, financial, or business aspects of the proposed development is beyond the authority of the Director. Nor does the Board have jurisdiction or authority in this regard. Section 2(b) of the *Water Act* does not in and of itself provide the Director or the Board with the authority to consider economic considerations of a proposed development.⁷⁰

[98] The Approval Holder submitted that the Appellants’ economic analysis is not within the scope of the issue set by the Board. A requirement that an economic viability test be passed to receive an approval isn’t a “terms and conditions of the approval” matter. Instead, it

⁶⁸ Appellants’ Closing Arguments at paragraphs 274 to 279.

⁶⁹ Appellants’ Closing Arguments at paragraphs 279 to 281.

⁷⁰ Approval Holder’s Closing Arguments at page 17.

could perhaps be described as a “pre-condition” or “screening” that must be carried out before acceptance of an application.⁷¹

[99] The Approval Holder stated that while there may be cases where the Board is called upon to balance environmental impacts against economic growth and prosperity (as set forth by the Appellants) there first must be some significant impacts to balance – and this is not such a case.⁷²

[100] The Approval Holder noted the Appellants’ submissions that the Board must accept the Appellants’ evidence regarding the economic viability and its expert report because the Director and Approval Holder failed to contest the conclusions of the Appellants’ expert is flawed and misguided. The Approval Holder disagreed with the findings of the Appellants’ expert report and stated at best it is opinion evidence.⁷³

7.1.3. Director

[101] The Director submitted that the purpose of the *Water Act* is “to support and promote the conservation and management of water, including the wise allocation and use of water.” Section 2 supplements this primary purpose by recognizing” several factors, including “the need for Alberta’s economic growth and prosperity”.⁷⁴

[102] The Director submitted that the Director and Board do not have jurisdiction to consider the economic viability analysis within the BDO Report pertaining to “the economic merits of the [BMR].” Furthermore, the economic analysis in the BDO Report as well as Mr. Devonshire’s testimony about the viability of the Approval Holder’s business activities is outside the scope of the main issue set by the Board.⁷⁵

⁷¹ Approval Holder’s Submission at paragraphs 64 and 66; Approval Holder’s Supplemental Submission at paragraph 22.

⁷² Approval Holder’s Submission at paragraph 70.

⁷³ Approval Holder’s Supplemental Submission at paragraph 26.

⁷⁴ Director’s Closing Arguments at paragraph 73.

⁷⁵ Director’s Closing Arguments at paragraph 69.

[103] At the hearing, the Director stated he does not consider the economic viability of a project in considering approval applications under the *Water Act*, whether for industrial purposes, municipal purposes, or agricultural purposes. He stated that none of the applicable policies, standards, guidelines, or procedures for *Water Act* approvals require him to consider the Approval Holder's business. Thus, it is unsurprising that Mr. Devonshire stated at the hearing he has never prepared an economic viability assessment in support of a *Water Act* approval application. This suggests there is no established practice where a proponent would submit such information to the Department.⁷⁶

[104] The Director stated that his and the Board's expertise relate to analyzing the environmental merits of a proposed *Water Act* activity, not analyzing the profitability, cash flow dynamics or other accounting matters regarding the viability of a *Water Act* applicant's business.⁷⁷

[105] The Director submitted that if the Board were to find directors must evaluate the economic viability of an overall project or development when reviewing *Water Act* approval applications for ancillary activities, they would essentially be setting departmental policy, which is outside the Board's authority.⁷⁸

[106] The Director cited the Board's comment at paragraph 171 in *Capstone Energy* that, for a *Water Act* director, the best way to give effect to this element of the *Water Act*'s purpose – that is, recognizing the need for Alberta's economic growth and prosperity – is by fairly and fully considering the environmental impacts of a project, not performing an overall economic analysis of the project. The Director noted that in paragraph 242 of *Capstone Energy*, the Board found that a determination as to “the overall economic analysis and appropriateness” of the project at issue was “best left to the” proponent to determine, not the director.⁷⁹

⁷⁶ Director's Closing Arguments at paragraphs 82 and 83.

⁷⁷ Director's Closing Arguments at paragraph 72.

⁷⁸ Director's Closing Arguments at paragraph 84.

⁷⁹ Director's Closing Arguments at paragraphs 74 and 76.

[107] The Director submitted that the technical accounting analysis of the economic viability of the BMR in the 2020 BDO Report is not relevant to the issue of whether the terms and conditions of the Approval are adequate.⁸⁰

[108] The Director stated that it is unclear how adding conditions to the Approval could address the alleged economic unviability of the BMR.⁸¹ Similarly, it is unclear why the 2020 BDO Report would be informative in determining which terms and conditions in the Approval are appropriate to mitigate adverse effects the Badlands Activities might have on the aquatic environment.⁸²

[109] The Director submitted that, although EPEA establishes the Board and sets out most of the provisions relating to appeals, it remains a separate and distinct regulatory regime from the *Water Act*. As such, its purpose provisions are not applicable to *Water Act* approvals.⁸³

7.2. Board's Analysis

[110] In *Wilkening et al. v. Director, Central Region, Operations Division, Alberta Environment and Water, re: Matt Schultz* (22 May 2012), 11-060, 064-067, 072-074, 077-96, 113-146, 151-155, 166-168, and 174-ID1 (AEAB), 2012 ABEAB 17, an appeal regarding a licence for diverting water for commercial purposes (hauling heated water), the Board stated:

“[89] The economic benefits or liabilities of the proposed operation are the Licence Holder’s concern. It does not factor into the Director’s decision or the Board’s recommendations. It is not within the Board’s jurisdiction to conduct a benefit-cost analysis of the project.”

[111] The Board agrees with the Appellants’ assertion that the Director and the Board ought to consider section 2 when exercising discretion under the *Water Act*. Section 2(b) says that the purpose of the *Water Act* is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing the need for Alberta’s economic

⁸⁰ Director’s Response Submission at paragraph 123.

⁸¹ Director’s Closing Arguments at paragraph 89.

⁸² Director’s Response Submission at paragraphs 129 and 130.

⁸³ Director’s Closing Arguments at paragraph 80.

growth and prosperity. Section 2(b) of EPEA similarly provides that the purpose of EPEA is to support and promote the protection, enhancement and wise use of the environment while recognizing the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning. From these purpose statements, the Appellants argued that the Director and Board must consider the economic viability of the BMR, and the economic benefits associated with the Approval. The Appellants also asked the Board to analyze whether the economic benefits of the BMR outweigh the environmental costs.

[112] The Board cannot support the Appellants' interpretation of section 2(b) of the *Water Act* or EPEA. Firstly, as explained above, the construction and management of the BMR does not constitute an "activity" under the *Water Act* and has not been, and is not capable of being, approved under the Act. In short, while related to it, the BMR is not the subject of the Approval. The economic viability of the BMR is not within the Director's or Board's jurisdiction under the *Water Act*. Secondly, recognizing the need for Alberta's economic growth and prosperity does not require the Director or the Board to undertake an analysis of the economic viability of a proposed development, particularly in this case where the proposed development is not the subject of an approval under the *Water Act*.

[113] Concerning the interpretation of section 2(b) of the *Water Act*, the Board has previously determined that "... the need for Alberta's economic growth and prosperity" is a general statement that requires the Board to balance the conservation and management of water resources with economic growth in Alberta.⁸⁴ Therefore, the Board is not required under section 2(b) to determine the economic viability of each individual project.

[114] The Board finds that the Wetland Policy does not assist the Appellants' argument. As with sections 2 of the *Water Act* and EPEA, the Wetland Policy simply acknowledges that

⁸⁴ See Reconsideration Decision: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment, re: Municipal District of Rocky View No. 44 and Her Majesty the Queen in Right of Alberta* (2 October 2008), Appeal Nos. 07-131 & 07-132-RD (AEAB), 2008 ABEAB 34 at paragraph 60.

economic growth places pressure on Alberta's natural resources. Nowhere does the Wetland Policy require or suggest that projects associated with *Water Act* approvals be evaluated for their specific economic viability.

[115] The cases cited by the Appellants, *Cardinal River* and *Capstone Energy* also do not support the Appellants' submissions.

[116] In *Cardinal River*, the Director had issued an approval under the *Water Act* for the construction, operation, and reclamation of a private haul road. Two intervenors in the appeal expressed their views that the haul road would benefit the local economy.⁸⁵ In no way did the Board undertake any analysis of the economic viability of the haul road, which was the subject of the approval, or of the larger project associated with the haul road (the Cheviot coal mine). The Board did not examine the merits of the intervenors' claims of economic benefits or determine that the economic benefits of the haul road outweighed the environmental impacts.

[117] In *Capstone Energy*, the Director issued a preliminary certificate and associated proposed licence under the *Water Act* for the diversion of water from the Red Deer River for oilfield injection to enhance recovery of oil. A number of landowners argued that there was no evidence of economic benefit to the certificate holder.⁸⁶ An intervenor argued that the oilfield in question is old, has a local history of poor productivity throughout, and the certificate holder failed to prove the economics to ensure productivity warrants costs to the environment.⁸⁷ The certificate holder argued that the Director should not balance the economic benefits and environmental impacts of the proposal, while stating that the environmental impacts would be small and the economic benefits in the form of royalties would be significant.⁸⁸ The Board held:

“[169] Section 2 of the *Water Act* requires that conservation and management of water be carried out in a manner that recognizes the need for Alberta's economic growth and prosperity ...

⁸⁵ *Cardinal* at paragraphs 111 and 119.

⁸⁶ *Capstone Energy* at paragraph 23.

⁸⁷ *Capstone Energy* at paragraph 76.

⁸⁸ *Capstone Energy* at paragraph 49.

[170] Mr. Graham stated that oilfield injection will increase the recovery of oil from the Tindastoll Belly River Oil Pool from 7 percent of the original oil in place to an expected 14 percent, with a potential ultimate recovery of 15-20 percent (approximately 3 million barrels) ... This illustrates the tension between the conservation and economic use of two of Alberta's natural resources (oil and gas under the *Oil and Gas Conservation Act* and water under the *Water Act*) and the need for policy direction in circumstances where the use of the natural resources and especially the increasing use of diminishing fresh water, overlap ...

[171] The Board concurs with the Director that the overall economic analysis and appropriateness of the oilfield flood scheme is best left to the Certificate Holder as a commercial venture and the AEUB in the administration of the *Oil and Gas Conservation Act* ...”

[118] In *Capstone Energy*, the Board did not examine the economic viability of the oilfield project or the claims of the certificate holder regarding the economic benefits that would result from issuance of the certificate. Rather, the best way, the Board held, to bear in mind the need for economic growth and prosperity in Alberta was to fairly and fully consider the impact of the project with respect to the environment, other water users, and water management.⁸⁹

[119] Likewise, in this case questions about the overall economic analysis and appropriateness of the BMR are best left with the Approval Holder. Recognizing the need for Alberta's economic growth does not require an examination by the Director or the Board of the economic viability of this, or any, proposed project associated with a *Water Act* application. In keeping with *Capstone Energy*, the best way to recognize Alberta's need for economic growth and prosperity is to fairly and fully consider the impact of the Badlands Activities with respect to the environment, other water users, and water management.

[120] The Board finds that the Director and the Board are not required by the *Water Act* or EPEA to consider the economic viability of the BMR as put forward in the 2020 BDO Report. Because the BMR is not the subject of the Approval, to consider the economic viability of the BMR in the manner requested by the Appellants would be acting outside of the Director's and Board's jurisdiction under the *Water Act*.

⁸⁹ *Capstone Energy* at paragraph 171.

[121] The Board further finds that the 2020 BDO Report focused on economic viability of the BMR rather than any economic impacts the Badlands Activities might have on the Appellants. As determined by the Board previously in this Report, the activities properly before the Board are those set out in the Approval: the infilling of two wetlands, modification of three wetlands, and construction, operation, and maintenance of a storm water management system are the activities. The BMR itself, and its economic viability, is not properly an issue before the Board.

[122] To the Appellants' submissions that the Board and the Minister may both be fettering their discretion should they not consider the 2020 BDO Report and the economic viability of the BMR, the Board disagrees. As explained above, an economic analysis of the viability of the BMR or a weighing of the economic benefits with the environmental impact of the BMR is not required under the *Water Act* or EPEA and is outside the jurisdiction of the Board and the Minister under the *Water Act*. As such, in deciding not to consider the economic viability of the BMR, there can be no fettering of discretion on the part of the Board or Minister.

8. WHAT IS THE RELEVANCE OF THE NOISE REPORT TO THESE APPEALS?

[123] On August 8, 2022, the Appellants submitted the Noise Report⁹⁰ in response to the Board's May 25, 2022, decision to grant the Appellants' motion to provide additional evidence.⁹¹ The purpose of the Noise Report was to determine what the expected environmental impacts are of the noise caused by construction and operations of the BMR, with an emphasis on the potential for human annoyance.⁹²

[124] Several of the Appellants raised concerns about noise arising from racetrack operations in their Notices of Appeal.⁹³

⁹⁰ Letter report prepared August 1, 2022, on the Appellants by Henk de Haan, dBA Noise Consultants Ltd.

⁹¹ *McMillan v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp.* (25 May 2022), Appeal Nos. 19-066-071, 074, 081, and 083-085-ID3 (AEAB), 2022 ABEAB 21.

⁹² Noise Report at page 1.

⁹³ Mr. Skibsted, Notice of Appeal 19-067; Mr. Clark, Notice of Appeal 19-069; Ms. Clark, Notice of Appeal 19-070; and Ms. Kenworthy, Notice of Appeal 19-074.

[125] The Noise Report concluded that the level of noise from the racetrack far exceeded the criterion recommended by Health Canada for human receptors. No evidence was presented on the impact noise would have on surrounding wildlife, and Henk de Haan could not testify to that as that information was outside his expertise.⁹⁴

[126] The Appellants noted that the bank swallow is a social songbird. Mr. Nicholson articulated that noise would be a relevant consideration in this circumstance. The fact is that no one – not Badlands nor the Director – thought it worthwhile to examine what impact the racetrack would have on the ability of a threatened songbird to communicate. According to the Appellants, this is yet another reason to refuse this application. Until someone can describe the impact the racetrack’s noise levels will have on the bank swallow, the Approval is deficient.⁹⁵

[127] The Approval Holder submitted that noise is not regulated under the *Water Act*; it is regulated at the municipal level through bylaws, area structure plans, specific control districts, and operating permits.⁹⁶

[128] The Director submitted that most if not all the information in the Noise Report is irrelevant to the issue for hearing. Save for a few limited comments about construction noise, the Noise Report appears entirely focused on the anticipated noise that may be generated by the BMR itself while in operation, particularly the noise of vehicles using the racetrack. This is entirely unrelated to the Badlands Activities under appeal.⁹⁷

[129] The Director stated that, to the extent that the Noise Report comments on construction noise, it:

- does not specifically state what impact construction noise can be expected to have; and

⁹⁴ Appellants’ Closing Arguments at paragraphs 778 and 779.

⁹⁵ Appellants’ Closing Arguments at paragraphs 780 to 781.

⁹⁶ Approval Holder’s Supplemental Submission at paragraph 34.

⁹⁷ Director’s Supplemental Submission at paragraphs 49 and 50; Director’s Closing Arguments at paragraph 31.

- does not distinguish between construction noise resulting from the Badlands Activities and noise resulting from the construction of the racetrack, the latter of which is not related to the Badlands Activities.⁹⁸

8.1. Board's Analysis

[130] In *McLay*, regarding an approval for the construction, operation, and maintenance of a surface water drainage system, the Board stated that:

“[49] The Appellant raised a number of concerns regarding the work being conducted on the Approval Holder’s property. Some of her concerns were not issues the Board has the jurisdiction to consider, such as the positioning and building of the berms adjacent to her property and the ongoing construction noise from the site. These are issues under the jurisdiction of Sturgeon County.”

[131] The Board’s decision in *Paron* is instructive both regarding the clear boundary between municipal land use decisions and *Water Act* approvals as well as the specific issue of noise:

“[23] Finally, the Appellants argue that the work authorized by the Approval will ... have a negative impact on the Appellants through such things as ... noise. Again, this argument does not demonstrate a proximate and rational connection between the work carried out under the Approval and the impacts. It is not the [approved activity] that may cause ... noise ... Rather, the ... noise may be caused by the use of the area that is going to be authorized by the Approval Holder – a use authorized under the *Municipal Government Act*, not under EPEA or the *Water Act*.”

[132] The Board’s view is that, as stated above, it is not the BMR that constitutes the activities properly before the Board in this Appeal. The Approval is the subject of this Appeal, and the Approval only addresses the infilling of two wetlands, modification of three wetlands, and construction, operation, and maintenance of a stormwater management system. The Board finds that the Appellants’ concerns about the noise emanating from the proposed BMR are land use concerns and outside of the jurisdiction of the Board under the *Water Act*.

⁹⁸ Director’s Supplemental Submission at paragraph 51.

PART 5. WHAT IS THE EFFECT OF THE ENVIRONMENTALLY SIGNIFICANT AREAS DESIGNATION?

9. SUBMISSIONS

9.1. Appellants

[133] The 2013 Wallis Report⁹⁹ states that it is not possible for Badlands to minimize the risk of environmental impact given the nature of the proposed development. There will be direct loss of native habitat from proposed roads, racecourses, activity areas and paddocks in a high value Environmentally Significant Area (“ESA”) including loss of rare plains rough fescue grassland. Depending on use patterns, foot traffic could also have a significant impact on native vegetation. There may be additional impacts on species of concern that nest or reside in the area. Recommended setbacks from nesting areas of some species of concern, e.g., prairie falcon, would preclude this type of development in most of the ESA recognized by Kneehill County.

[134] The Appellants stated that the Director testified he placed no value on the ESA designations assigned to the project area, but that he should have because information in the report is clearly relevant to assessing the merits of granting the Approval.¹⁰⁰

9.2. Approval Holder

[135] The Approval Holder submitted that a portion of the Approval Holder’s lands within Kneehill County have been designated by Kneehill County as Environmentally Significant Area (ESA-2, High); an Environment Impact Assessment, required by the Municipality for any project development in these designated lands, was submitted.¹⁰¹

[136] The EnviroConsult Response at page 4 noted that:

⁹⁹ *Badlands Motorsports Resorts Area Structure Plan, Kneehill County, Biodiversity Considerations. Evidence of Cliff Wallis P. Biol.* in Appellants’ Evidentiary Documents attached to the Appellants’ Initial Submission at page 1803.

¹⁰⁰ Appellants’ Closing Arguments at paragraphs 182 to 184.

¹⁰¹ Letter from EnviroConsult Inc. to Brander Law titled *Badlands Recreation Development Corp. EAB File Numbers: 19-059 – 19-085, Environmental Appeals Board Hearing, Water Act Approval No. 00406489-00-00* dated January 7, 2021 (the “EnviroConsult Response”) at page 4 and the EIA/EPP at page 1.

Project designers located most of the project components on the upland flat cultivated areas which are non-ESA, and reduced construction in the ESA-2 lands to the lower track only. The ESA-2 lands within the Project Area have already been impacted by transportation, oil and gas activity, grazing, and mowing and there are vehicle tracks and weedy species throughout.

9.3. Director

[137] The Director stated that much of the 2020 Wallis Report focuses on ESAs, yet Mr. Wallis acknowledged “ESAs currently have no policy context and are only intended to be an information tool to help inform land use planning and policy”. According to the Director, ESAs are irrelevant to the *Water Act*, the Badlands Activities, and the issue for hearing, being the terms and conditions of the Approval.¹⁰²

[138] The Director submitted that the ESA designation would be relevant to the municipality’s consideration of the ASP and other municipal regulatory approvals. The Director confirmed he was aware of and did consider ESAs during the SOC process.¹⁰³

10. BOARD’S ANALYSIS

[139] The Board heard conflicting views on the relevance of the environmentally significant area designation by Kneehill County.

[140] The Board agrees with the Parties that the Valley Wetlands and Valley Track are within lands designated by Kneehill County as ESA-2 (High) as shown in the 2010 Summit Environmental Consultants Ltd. report prepared for Kneehill County. The Board notes that the designation does not prohibit development.

[141] As previously discussed, the Board finds that Kneehill County is responsible for land use decisions, and specifically for decisions on what types of activities may be permitted in ESA-2 (High) lands, therefore the designation has no direct relevance to the issuance of the Approval.

¹⁰² Director’s Response Submission at paragraph 262.

¹⁰³ Director’s Closing Arguments at paragraph 12.

PART 6. APPLICATION PROCESS CONCERNS, BIAS, AND FETTERING OF DISCRETION

11. APPLICATION PROCESS CONCERNS

[142] In their submissions and oral testimony, the Appellants raised concerns about the processing and consideration of Badlands' *Water Act* applications by the Department and the Director. In the present proceedings, the Board finds that the Appellant's concerns can be summarized as follows: (1) procedural and evidentiary issues; and (2) issues related to the substance/completeness of the application.

[143] In *Brookman*, the Board summarized the Director's decision-making process for a *Water Act* Approval:

“[170] The decision-making process for a *Water Act* approval starts when the project proponent planning to undertake an activity (i.e. the construction of a roadway) that impacts a waterbody, such as any of the wetlands in this case, makes an application to the Director. Upon receiving the application, the Director undertakes an administrative review and may require the proponent to provide additional information.

[171] When all necessary information has been provided, the application is declared administratively complete, and the proponent is required to publish notice of the application. The Director will only accept Statements of Concern for a limited time, which is seven days when the application is for a *Water Act* approval. The Director reviews these Statements of Concern and is required to consider the concerns of any person that he believes is directly affected. The Director then undertakes his technical review and decides whether to issue the approval.

[172] In the past, the Director has had his technical staff undertake an independent technical review of the information provided by the proponents. For example, in the past, the Director's staff may have done their own calculations to determine if the information filed by the proponent is valid. However, due to resource restraints, the Board has heard evidence from the Director that his staff now only ensure the information provided by the proponent is complete, and the Director relies on the conclusions drawn by the proponent's experts to make his decision.

[173] If the Director issues the approval, he notifies the proponent and any of the persons who filed Statements of Concern that he determined to be directly affected. He does not notify anyone who's Statement of Concern he rejected for not being directly affected or that was filed late. Once the approval has been issued, the appeal period starts to run. In the case of an approval under the *Water Act*, the

appeal period is seven days from the day a person receives notice of the Director's decision to issue the approval.”

[144] The Board adopts and applies the above analysis/reasoning of *Brookman*.

11.1. Key Procedural Steps in the Department's Consideration of the *Water Act* Applications

[145] As noted above, Badlands has been pursuing regulatory approvals for the BMR since 2008 (see, e.g., filing of the ASP). Similarly, the Appellants have engaged in various regulatory processes (including participation in the municipal hearings) and have consistently argued that the proposed BMR will have adverse environmental effects and impacts. However, the Board cannot and will not consider application matters/concerns outside its jurisdiction.

[146] In this case, Badlands filed two applications to seek the required approvals under the *Water Act* for its proposed “activities” (which triggered the Department's application and the Director's decision-making processes).

[147] On December 13, 2017, Badlands filed its first *Water Act* application (the “Initial SMP”) for an approval to construct works and a stormwater management system in support of the BMR which was prepared by Scheffer Andrew Ltd., on Badlands' behalf.¹⁰⁴

[148] On February 13, 2018, Badlands filed its second *Water Act* application relating to the wetland assessments and wetland compensation, which was prepared by EnviroConsult Inc., on Badlands' behalf.¹⁰⁵ At that time, the Board finds that the second *Water Act* application consisted of: (1) the Wetlands Assessment and Impact Report dated November 2017 (the “Initial WAIR”);¹⁰⁶ (2) the Environmental Impact Assessment and Environmental Protection Plan (which was apparently dated March 18, 2015 or March 2016);¹⁰⁷ and (3) the Biophysical Impact

¹⁰⁴ Director's Record at Tabs 1 and 2.

¹⁰⁵ Director's Record at Tabs 1, 2, and 35; Timeline - Badlands Motorsport Resort Development.

¹⁰⁶ See, for example, the reference on the Wetland Administrative Procedure – Internal Referral Form dated March 22, 2018, in Director's Record at Tab 41.

¹⁰⁷ The EnviroConsult Response refers to Environmental Impact Assessment and Environmental Protection Plan dated March 18, 2015. Director's Record at Tabs 41 and 42, refer to BIA/EPP dated March 2016.

Assessment and Environmental Protection Plan (“BIA/EPP”) (which was apparently February 12, 2018).¹⁰⁸

[149] However, the Board finds that the Department and the Director considered the two separate applications as part of an integrated *Water Act* application for the proposed wetlands disturbance and the stormwater management system that provided information required under Alberta’s legislation.

11.2. Department’s Processes – Integrated *Water Act* Application

[150] In this case, the Board finds that the Department’s processes for the integrated *Water Act* application included (1) a preapplication town hall meeting in Rosebud, (2) the receipt of the applications, technical reports, and amendments, (3) the technical review of the applications, as amended, including requests for supplemental information, (4) the public notice of application processes, (5) application meetings with Badlands and its technical representatives, (6) the Director’s decision and issuance of the Approval.

11.2.1. Pre-application Town Hall Meeting in Rosebud

[151] On September 8, 2016, the Director and some of the Department’s wetland team (e.g., Ms. Deb Ballas, Ms. Fulton, and Mr. Pervez Sunderani) held a town hall meeting in Rosebud with approximately 20 to 30 community members. On behalf of the Department, the Director and his team made presentations, participated in a tour of the valley, and listened to a community presentation. Mr. Skibsted was in attendance.¹⁰⁹

[152] Mr. Skibsted testified that the Director made some statements at the town hall which were concerning (e.g., it is not my job to turn down development, he could add enough conditions to the Approval that it would be impossible to build, he advised the parties filing statements of concerns that they should not pay for third-party experts or hire a lawyer until appeal time, no matter which way he decided on this Approval – the Approval was going to be appealed).

¹⁰⁸ The EnviroConsult Response refers to Environmental Impact Assessment and Environmental Protection Plan dated February 12, 2018.

¹⁰⁹ Mr. Skibsted’s Will Say Statement; Appellants’ Closing Arguments at paragraph 186 to 189.

Mr. Skibsted believed that Ms. Ballas took notes at the town hall. However, Mr. Skibsted testified that he has not seen the notes in the Director's Record.¹¹⁰

[153] Concerning the Director's advice to the Appellants that they did not require a lawyer or third-party experts during the application process, the Director acknowledged this. However, the Director explained that his intent was simply to save the Appellants the cost of legal counsel or third-party experts, as their assistance was more relevant during the appeal process in his experience.¹¹¹

[154] With respect to the Director's statement to the Appellants that it was not his job to turn down development, the Director acknowledged this. However, the Director explained that "[e]ssentially the local authority makes the development decision. I ensure that they minimize their environmental footprint on that activity that was approved by the County and if they can't mitigate to acceptable limits by a policy and legislation then they will be asked to either fix it or a refusal to an issue will occur if they do not satisfy the concerns."¹¹²

[155] In this case, the Board finds that the Director's Record commenced with the filing of the integrated *Water Act* application on December 13, 2017. As a result, the Board has not received any disclosure of pre-application activities conducted by the Director and the Department with any of the parties. At the time the town hall was conducted in Rosebud, the Board finds that the Director and the Department recognized that any *Water Act* application filed by Badlands and any resulting approval by the Director would be litigious. Nevertheless, the Board accepts the Director's explanation of his advice to the Appellants regarding legal counsel and third-party experts in the application process and finds that the Director's statements were made in good faith, based on his own experience.

[156] With respect to Mr. Skibsted's remaining concerns, the Board finds that these concerns are incorporated into the issues before the Board in these proceedings. Therefore, the

¹¹⁰ Mr. Skibsted's Will Say Statement; Appellants' Closing Arguments at paragraph 186 to 189.

¹¹¹ Director's Closing Arguments at paragraph 215.

¹¹² Appellants' Closing Arguments at paragraph 186.

Board will consider all the evidence and submissions by the parties regarding Mr. Skibsted's remaining concerns, as part of the issues within the Board's de novo hearing.

11.2.2. Applications, Technical Reports, and Amendments

11.2.2.1 Wetland Assessment, Wetland Assessment and Impact Report, and Biophysical Impact Assessment and Environmental Protection Plan

[157] On February 13, 2018, Badlands submitted its original November 2017 Wetlands Assessment to the Department to support its second *Water Act* application; this happened after the Wetland Policy was published and the Initial WAIR¹¹³ was prepared. The original November 2017 Wetlands Assessment is not found in the Director's Record.

[158] As the Board found above, Badlands submitted an Environmental Impact Assessment and Environmental Protection Plan (date unclear) and/or a BIA/EPP for the BMR to support its second *Water Act* application on February 13, 2018.¹¹⁴ However, based on the Board's review of the evidence and submissions, the Board finds on a balance of probabilities that Badlands provided two documents to the Department: (1) the Environmental Impact Assessment and Environmental Protection Plan dated March 18, 2015 ("EIA/EPP"); and (2) the BIA/EPP for the BMR dated February 12, 2018.

[159] In making this finding, the Board relies on the written evidence of Ms. Ferguson¹¹⁵ where she wrote that "The primary reports I authored that are relevant to this project include:

- ABWRET – A Wetland Assessment for the Badlands Motorsports Resort Near Rosebud Alberta, dated November 12, 2017;
- the Biophysical Impact Assessment and Environmental Protection Plan for the Badlands Motorsports Resort near Rosebud, Alberta (dated February 12, 2018) and the previous Environmental Impact Assessment and Environmental Protection Plan dated March 18, 2015; and
- The Wetland Assessment and Impact Report ("WAIR") for the Badlands Motorsports Resort near Rosebud Alberta, dated October 9, 2019."

¹¹³ Director's Supplemental Record at Tab 13.1(b).

¹¹⁴ Director's Record at Tab 41.

¹¹⁵ EnviroConsult Response at page 2.

Also, the Board notes that Ms. Ferguson confirmed that the EIA/EPP (which was prepared for the County of Kneehill for County approval) was provided to the Department as part of the *Water Act* approval to disturb the wetlands.

[160] On November 13, 2018, Badlands replaced its original November 2017 Wetlands Assessment because the Department had determined that it did not conform to the requirements of the Wetland Policy and its directives (e.g., Wetland Application Checklist; Wetland Assessment and Impact Directive; Alberta Wetland Classification System; Alberta Wetland Identification and Delineation Directive; and Alberta Wetland Mitigation Directive (the “Mitigation Directive”), including a proposed wetland replacement plan),¹¹⁶ and the Department requested that Badlands submit an updated wetland assessment and impact report under the requirements of the Wetland Policy.¹¹⁷

[161] On May 17, 2019, October 17, 2019, and November 10, 2019, Badlands filed updated versions of the WAIR with the Department.¹¹⁸

[162] Based on the Director’s Record, the Board finds that Badlands filed their replacement/updated WAIRs in response to four rounds of supplementary information requests (“SIRs”) issued by the Department to: (1) address the requirements set out in the Wetland Policy, the Wetland Assessment and Impact Report Directive (June 2015, revised June 1, 2017), the Alberta Wetland Identification and Delineation Directive, and Mitigation Directive, including a proposed wetland replacement plan; (2) the fact that the original WAIR was based on a previous wetlands classification system (e.g., the Stewart and Kantrud Wetland Classification System (1971)); and (3) other items noted by the Department in its review of the integrated *Water Act*

¹¹⁶ Director’s Record at Tabs 41, 42, 43, 44, 48, and 50.

¹¹⁷ Director’s Record at Tabs 41 and 43.

¹¹⁸ Director’s Record at Tabs 27, 54, 55, 56, 70, 71, and 75.

application. (e.g., hydrology, *Public Lands Act*, RSA 2000, c P-40 authorizations, stormwater management, water quality (SWMP), wetlands, wildlife surveys, etc.).¹¹⁹

[163] On or about October 16, 2020, the Director informed the Parties that the Final WAIR attached to the Approval was the incorrect version, and the correct version was found in Tab 77 of the Director's Record (the "Updated WAIR").¹²⁰ The Board notes that these two WAIR versions are both dated October 9, 2019.¹²¹

[164] The Appellants argued that there are substantial differences between the Final WAIR attached to the Approval and the Updated WAIR. The Appellants' position is until the Minister orders the Updated WAIR to replace the Final WAIR, the Approval's compliance conditions are under the Final WAIR.¹²²

[165] Here, the Board finds that the substance and completeness of the Final WAIR and the Director's reliance on the conclusions drawn by Badlands' experts to make his decision, are key issues in these appeals. Therefore, the Board will consider all the evidence and submissions by the Parties on these key issues, as part of the Board's de novo hearing.

11.2.2.2 Stormwater Management Plan

[166] On December 13, 2017, Badlands filed the Initial SMP with the Department. On November 6, 2018, Badlands replaced its original stormwater management plan to respond to the Department's first SIR issued on September 5, 2018, which included the Department's comments on hydrology, the stormwater management plan, and water quality.¹²³

¹¹⁹ SIR #1 – September 5, 2018 (Director's record, Tab 44), SIR #2 – March 20, 2019 (Director's Record at Tab 54), SIR #3 – September 4, 2019 (Director's Record at Tab 67), and SIR #4 – November 7, 2019 (Director's Record at Tab 75).

¹²⁰ Covering letter for Director's Supplemental Record dated October 16, 2020, which states that the WAIR at Tabs 70 and 77 had been revised in accordance with EPA direction and was submitted to the Department on November 10, 2019 (see email from Ms. Ferguson to Ms. Fulton in Director Record at Tab 76); and Appellants' Closing Arguments at paragraphs 20 to 23.

¹²¹ Director's Record at Tabs 27, 70, and 77.

¹²² Appellants' Closing Arguments at paragraphs 22 and 23; Hearing Exhibit 1.

¹²³ Director's Record at Tabs 44 to 47.

[167] Between September 5, 2018 and November 10, 2019, Badlands' technical experts, EnviroConsult Inc. and Scheffer Andrew Ltd., responded to four Department SIRs regarding the integrated *Water Act* application's impacts, and provided replacement/updated reports and plans to support the Department's review of the integrated *Water Act* application.

[168] To support the Director's decision-making process for the Approval, the Department conducted an internal review of the integrated *Water Act* application, including the technical reports filed with the application, and issued SIRs to Badlands based on their review. The Department's staff involved were Ms. Angela Fulton, Water Approvals Team Leader; Mr. Matthew Wilson, Wetland Management Specialist; Mr. Scott Stevens, Senior Wildlife Biologist; and Mr. Gordon Ludtke, Senior Water Administration Engineer.¹²⁴

11.2.3. Technical Review of the Applications

[169] Concerning the Department's internal review of the integrated *Water Act* application, the Appellants were particularly concerned that:

1. There is no evidence in the Director's Record that the BIA/EPP was reviewed by the Department prior to the Director making his decision;¹²⁵
2. Mr. Stevens' previous written advice to Ms. Fulton on April 19, 2018 (e.g., potential impacts on bank swallows)¹²⁶ and on January 10, 2019 (e.g., sharp tailed grouse survey) and Mr. Steven's previous advice in a conversation with Mr. Groves (e.g., regarding the potential discovery of northern leopard frog (an endangered species) by another Department biologist adjacent to the Badlands property along the Rosebud River¹²⁷ was not considered by the Director);¹²⁸
3. There are factual inconsistencies between the 2018 BIA/EPP and the Final WAIR, authored by Ms. Ferguson, with respect to species of special concern (e.g., prairie falcons); and
4. An adverse inference ought to be drawn against EPA due to its failure to produce Mr. Stevens and the biologist who located the northern leopard frog

¹²⁴ Director's Record at Tabs 37 to 42, 49 to 52, and 58 to 77.

¹²⁵ Appellants' Closing Arguments at paragraph 177; Evidentiary Documents of the Appellants at page 1360.

¹²⁶ Director's Record at Tab 42.

¹²⁷ Appellants' Closing Arguments at paragraphs 71, 73, 374 and 375.

¹²⁸ Director's Record at Tab 42; Appellants' Closing Arguments at paragraphs 71 to 73.

as witnesses for the appeals, such that the Board should rule that the northern leopard frog was found immediately adjacent to the racetrack.¹²⁹

[170] The Appellants argued that the 2018 BIA/EPP authored by Ms. Ferguson confirmed that prairie falcons occur “within the 1 km radius of the project area”. However, the Final WAIR authored by Ms. Ferguson made no mention of the prairie falcon in the section dedicated to “species of special concern.”¹³⁰

[171] The Appellants argued that Mr. Stevens’ advice to Ms. Fulton and Mr. Groves was relevant evidence which should have been considered by the Director.

[172] The Appellants were further concerned that Mr. Stevens who had been involved in the Department’s internal application review/referral was not made available as a witness in the appeals hearing. Despite the Appellants’ requests, the Appellants argued that the Director refused to produce Mr. Stevens as a witness to testify about what information he provided the Director about bank swallows, however his response to Ms. Fulton confirms that bank swallows inhabit the area.¹³¹ At the hearing, the Director’s counsel stated that Mr. Stevens is for health reasons unable to attend this hearing and as Mr. Stevens’ employer, the Government of Alberta is not able to require him to attend contrary to his medical requirements.¹³²

[173] In response, the Director submitted that Mr. Stevens concluded that the Badlands application had met the requirements for mitigation of wildlife impacts specific to the *Water Act* referral.¹³³

[174] The Director stated that the record shows he considered each recommendation from Department subject matter experts (“SME”) within the broader context of the regulatory scheme

¹²⁹ Appellants’ Closing Arguments at paragraphs 376.

¹³⁰ Appellants’ Closing Arguments at paragraphs 79 and 80; Final WAIR at page 58.

¹³¹ Appellants’ Closing Arguments at paragraph 42.

¹³² See also September 16, 2022, letter from the Director to the Board listing the Director’s Panel members and explaining Mr. Stevens will not be able to attend due to health reasons.

¹³³ Director’s Record at Tab 60.

and the purposes of the *Water Act*.¹³⁴ Furthermore, the Director argued where there was insufficient information, the Department requested additional information from Badlands.¹³⁵ Finally, as the Board heard from the Director and as evidenced by the Director's Record, many of the SME's questions and recommendations were incorporated into multiple SIRs and Badlands' responses.¹³⁶

[175] In this case, the Board finds that Appellants and the Director appear to disagree on whether Mr. Stevens concluded that the Badlands' second *Water Act* application, as amended, including the updated technical reports filed in response to SIRs, met the requirements for mitigation of wildlife impacts specific to the *Water Act* referral.

[176] In the Board's view, the substance and completeness of the Final WAIR and other technical reports (e.g., EIA/EPP, BIA/EPP, etc.) prepared by EnviroConsult Inc. in support of the integrated *Water Act* application, and the Director's reliance on the conclusions drawn by Badlands' experts to make his decision on wildlife impacts specific to the *Water Act* referral, are key issues in these appeals. Therefore, the Board will consider all the evidence and submissions by the Parties on the requirements for the mitigation of wildlife impacts specific to the integrated *Water Act* application, as part of the Board's de novo hearing.¹³⁷

[177] The Appellants argued that the Director assisted Badlands in completing the integrated *Water Act* application. Based on the Director's Record, the Appellants documented forty-eight separate instances where the Director assisted Badlands, Ms. Ferguson, and Mr. Thurmeier in completing the application. The Appellants argued that there is not one documented instance where the Director assisted the Appellants. This is not a "system" set up to assist them.

¹³⁴ Director's Closing Arguments at paragraph 119.

¹³⁵ Director's Closing Arguments at paragraph 120.

¹³⁶ Director's Closing Arguments at paragraph 120.

¹³⁷ See *McMillan ID4* at paragraph 306 and *Chem-Security (Alberta) Ltd. v. Lesser Slave Lake Indian Regional Council*, 1997 ABCA 241, at paragraph 12.

[178] After reviewing the evidence and the submissions, the Board finds that it was Badlands' responsibility to ensure that their two separate *Water Act* applications were complete, and it was the Department staff's responsibility to ensure the technical information provided by Badlands' experts was complete, such that the Director could rely on the conclusions drawn by Badland's experts to make his decision.

11.2.4. Public Notice of the Applications

[179] Based on the Director's Record, the Board finds that the Department decided to proceed with the Public Notice of the integrated *Water Act* application on or about April 5, 2018.¹³⁸

[180] The Board finds that Badlands placed the public notice of its integrated *Water Act* application in three local newspapers from April 15, 2018, to April 25, 2018.¹³⁹ At the time the public notice was being prepared or published by Badlands, the Department was conducting its own internal review of the integrated *Water Act* Application from March 22, 2018, to April 24, 2018. Based on this internal review, the Department received comments and advice from its subject matter experts, Gordon Ludtke on April 11, 2018¹⁴⁰ and Mr. Stevens on April 19, 2018,¹⁴¹ that the two technical reports, the Stormwater Management Plan and the Wetland Assessment, would need to be replaced.¹⁴² As found above, these two technical reports were replaced in November 2018 in response to the Department's first SIR.

[181] Given the seriousness of the Appellants' concerns, the fact that both the Initial SMP and the original November 2017 Wetlands Assessment were replaced in November 2018 after the Public Notice of Application was published, the fact that four rounds of SIRs took place, and the fact that the WAIR (which replaced the original November 2017 Wetlands Assessment) was subsequently updated multiple times after November 13, 2018, the Board will consider all the

¹³⁸ Director's Record at Tabs 86 to 88.

¹³⁹ Director's Record at Tab 89.

¹⁴⁰ Director's Record at Tab 40.

¹⁴¹ Director's Record at Tab 42.

¹⁴² Director's Record at Tabs 40, 41, and 43.

evidence and submissions by the Parties on these technical reports, as part of the Board's de novo hearing.

[182] On or about April 15, 2018, to April 25, 2018, the Public Notice of Badlands' integrated *Water Act* Application was advertised in three newspapers, and on the Department's website.¹⁴³ The Public Notice stated, among other things, that:

“Badlands Recreation Dev. Corp, has filed an application under the provisions of the Water Act for an Approval to construct, operate and maintain a stormwater management system that outlets to the Rosebud River and to modify 5 wetlands located in Section 22-27-21-W4M. The proposed development is for the Badlands Motorsports Resort as outlined in the attached map.”

(Board Note: The map is in Appendix 1C).

[183] On or about April 25, 2018, Badlands received questions from four people, including Ms. Clark and Mr. Skibsted concerning the application. Badlands forwarded copies of the Initial SMP and the 2018 BIA/EPP, as per their request. Badlands stated that there were no further questions about these documents.¹⁴⁴

[184] In response to the Public Notice, the Appellants filed statements of concerns.

[185] On November 13, 2018, after the two original technical reports had been replaced, the Director sent written correspondence to Badlands and the Appellants separately.

[186] In the Director's November 13, 2018, letter to the Approval Holder, the Director advised, among other things, that the Department had received and accepted several Statements of Concern regarding the Public Notice of Application. The Director supplied Badlands with copies of the Statements of Concern and requested that Badlands contact the Statement of Concern filers to respond to their concerns and to copy the Department on any discussions or correspondence with them.

¹⁴³ Director's Record at Tab 87.

¹⁴⁴ Approval Holder's Response Submission to stay application dated March 13, 2020, at page 2.

[187] In the Director's November 13, 2018, letters to each of the Appellants, the Director advised their letter had been accepted as an official Statement of Concern, pursuant to the *Water Act* and that they would be advised of the Director's decision on this application. Also, the Director advised each of the Appellants that their concerns would be considered in the review of the application; and that Badlands was being advised of their application concerns, by being copied on the letter.

[188] The Board finds that the Public Notice of Application contained information that (1) five wetlands would be modified; (2) the stormwater management system supporting the BMR included lands (Ptn. S½ 22-27-21W4M) directly adjacent to the Rosebud River; and (3) the stormwater management system supporting the BMR was situated on land (Ptn. S½ 22-27-21W4M) whose boundary was the railway.

[189] Given that the Public Notice of Application provided the factual context and process for the Appellants' statement of concerns, the Board finds that information contained within in it should be similar or consistent with the filed applications with the Department.

[190] In this case, the Public Notice of Application stated that five wetlands would be modified. However, Badlands' first *Water Act* application filed December 13, 2017, stated that two wetlands (Wetland 2 and Wetland 3) would be removed and the remaining wetlands (Wetlands 1, 4, and 5) would be avoided. Unfortunately, the Board cannot confirm what terminology was used for the five wetlands in Badlands' second *Water Act* application filed on February 13, 2018, including the original November 2017 Wetlands Assessment, because the application documents were not provided (i.e., they are not part of the Director's Record). In the Board's view, the different language used by Badlands to describe its proposed "activities" for the five wetlands in the Public Notice of Application vis a vis its previously filed applications are concerning (e.g., remove, infill, modify, etc.). The Board finds that wetland disturbance/avoidance is a key issue in this proceeding. Therefore, the Board will consider all the evidence and submissions by the Parties on this key issue, as part of the Board's de novo hearing.

[191] Similarly, the Public Notice of Application map shows that the stormwater management system will discharge to the Rosebud River, and that the stormwater outlets are on lands (Ptn. SW¼-22-27-21W4M and Ptn. SE ¼-22-27-21W4M)) directly adjacent to the Rosebud River. Given this context, the Appellants raised factual issues regarding the Rosebud River (e.g., the applicability of the SSRP, the relevant boundary between the Kneehill and Wheatland Counties as it relates to the Rosebud River, and the applicability of *Public Lands Act* authorizations, etc.). The Board's determination of these factual issues is important to these appeals. Therefore, the Board will consider all the evidence and submissions by the parties on these factual issues, as part of the Board's de novo hearing.

11.2.5. Application Meetings with Badlands and its Technical Representatives

[192] On January 22, 2019, after the first *Water Act* application was filed, some of the Department's staff (Ms. Fulton, Water Approvals Team Leader; Mr. Sunderani, EPEA Team lead; Mr. Bin Hein, Hydrogeologist; and Mr. Julian Huang, EPEA Municipal), Badlands (Mr. Zelazo), and Badlands' technical experts (Mr. Thurmeier, Mr. Shane Sparks of Sparks Consulting, and Ms. Ferguson) participated in a meeting.¹⁴⁵

[193] As part of the January 22, 2019 meeting record, the participants agreed, among other things, that (1) the Wetland Policy directives will be followed; however, the wetland construction directive has not been released so use of the Department's 1999 Stormwater Management Guidelines (the "Stormwater Management Guidelines") is acceptable; (2) the first *Water Act* application will be reviewed along with the pending second *Water Act* application (i.e., the wetland impact application); and (3) the stormwater report needs to address the minimization of impacts to the wetlands and the Rosebud River.¹⁴⁶

[194] By emails dated July 29, 2019, August 13, 2019, and December 24, 2019, the Approval Holder requested a meeting with the Director and the Department.¹⁴⁷ However, the

¹⁴⁵ Director's Record at Tab 35.

¹⁴⁶ Director's Record at Tab 35.

¹⁴⁷ Director's Record at Tab 84.

Board notes that there is no documentation in the Director's Record which indicates that this requested meeting was held.

11.2.6. Director's Decision and Issuance of the Approval

[195] On January 8, 2020, the Department prepared the *Water Act* Licence/Approval Resume (the "Approval Resume") which summarized the decision-making process for the Approval (which was co-signed by the Director).¹⁴⁸ Also, on January 8, 2020, the Director prepared his decision statement (the "Decision Statement") for the Approval.¹⁴⁹ On that basis, the Director issued the Approval on January 8, 2020.¹⁵⁰

[196] By letters dated January 8, 2023, the Director advised the Approval Holder and the Appellants that the Approval had been issued.¹⁵¹

12. DID THE DIRECTOR HAVE A CLOSED MIND?

12.1. Submissions

12.1.1. Appellants

[197] The Appellants alleged that the Director had a closed mind when he made his decision to issue the Approval. The allegation stems from a September 8, 2016, town hall meeting between the Director and members of the Rosebud River community at which the Director made several statements (the "Town Hall Statements").¹⁵²

[198] According to Mr. Skibsted and Ms. Clark:

On September 8, 2016, Alberta Environment and Parks (AEP) held a town hall with members of the community. Mr. Aasen, Ms. Fulton, Mr. Sunderani and Ms. Ballas presented on behalf of AEP. At the meeting, Mr. Aasen made the following statements:

"It is not my job to turn down development";

¹⁴⁸ Director's Record at Tab 31.

¹⁴⁹ Director's Record at Tab 32.

¹⁵⁰ Director's Record at Tab 28.

¹⁵¹ Director's Record at Tab 34.

¹⁵² Appellants' Initial Submission at paragraph 90.

He could “add enough conditions to the Approval that it would be impossible to build”;

No matter what he decided “the Approval would be appealed”; and

Parties filing statements of concern “should not pay for any third-party experts or hire a lawyer until appeal time.”¹⁵³

[199] According to Ms. Clark the Director also stated:

“All components of the development will be evaluated together”, which I interpreted to include sewage and the road that the Approval Holder is required to build. The Development Agreement to build the road was entered subsequent to the town hall.¹⁵⁴

[200] The Appellants submitted that the Town Hall Statements lend themselves to two errors: bias and fettering of discretion.¹⁵⁵

12.1.2. Approval Holder

[201] The Approval Holder submitted that “evidence of a closed mind” was not raised as an issue by the Appellants in their Notices of Appeal and should therefore not be allowed under section 95(2) of the EPEA.¹⁵⁶

[202] The Approval Holder submitted that it is unique to have the Appellant try to raise issues of bias and fettering discretion at the hearing based on a meeting held over a year before the Application was filed. Also, the Appellants said nothing about apprehension of bias in their Statements of Concern filed in April and May of 2018, or in their Notices of Appeal filed in January 2020.¹⁵⁷

[203] The Approval Holder also argued that if the Director was biased or his mind was made up in September 2016, he clearly forgot to inform his staff. According to the Approval

¹⁵³ Will Say Statement of Mr. Skibsted.

¹⁵⁴ Will Say Statement of Ms. Clark.

¹⁵⁵ Appellants’ Initial Submission at paragraph 91.

¹⁵⁶ Approval Holder’s Submission at paragraph 99.

¹⁵⁷ Approval Holder’s Submission at paragraph 100.

Holder, EPA staff did a detailed review of the materials and asked cogent questions, including via four SIRs, which resulted in revisions to the Initial SMP and the WAIR.¹⁵⁸

12.1.3. Director

[204] The Director submitted that although the Appellants provided no explanation as to how the Director's comments at a town hall meeting demonstrated "evidence of a closed mind", the Director submitted there is no evidence of bias, or that his authority was fettered.¹⁵⁹

12.2. Board's Analysis

[205] A hearing before the Board is a de novo hearing. As the Board explained in *Brookman*:

"[186] The Board's role is to conduct a review of the Director's decision, but that review is not focused on the procedure that the Director followed. Rather, the Board's focus is on whether the Director's decision is sound considering the concerns raised by the person who filed the appeal. A core aspect of this review is to consider new evidence that was not before the Director."

[206] In previous appeals before the Board, complaints have been made by appellants that the decisions made by a director have been tainted by bias. While the Board has addressed these complaints in the past, it has also made clear that such complaints are of limited consequence given the de novo nature of the hearing process. As the Board held in *Alberta Foothills Properties Ltd. v. Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, (20- December 2013) Appeal No. 11-179-R, 2013 ABEAB 40 ("*Alberta Foothills*"):

"[151] In its original submission, the Appellant raised allegations of bias on the part of the Director on the basis the consulting firm used by Okotoks in this Appeal, Worley Parson, had also done work for AESRD. The Appellant also raised concerns regarding the potential bias of having Worley Parsons present evidence. The Director clearly stated he had no discussions with Worley Parsons regarding its role in the development of new guidelines to determine when groundwater is under the direct influence of surface water.

¹⁵⁸ Approval Holder's Submission at paragraph 101.

¹⁵⁹ Director's Response Submission at paragraph 171.

[152] It is important to note a hearing before the Board is a de novo hearing, so any perceived bias the Appellant may believe existed with the Director is not relevant to the Board making its recommendations.”

[207] The Board finds that there is no substance to the Appellants’ allegation of reasonable apprehension of bias on the part of the Director. The Appellants have provided no explanation as to how the Town Hall Statements demonstrate bias. In any event, even if the Board was persuaded that the Director was biased as evidenced by the Town Hall Statements, any such bias would be cured by the de novo hearing process and would be irrelevant to the Board in making its recommendations.

13. WAS THE DIRECTOR’S DISCRETION FETTERED?

13.1. Submissions

13.1.1. Appellants

[208] The Appellants submitted that the Town Hall Statements lend themselves to fettering of discretion.¹⁶⁰

[209] The Appellants also submitted that the Director fettered his discretion by not considering the “economic viability” of the BMR.¹⁶¹

[210] The Appellants argued that section 38(2)(c)(ii) of the *Water Act* gives the Director broad authority to consider economic issues and he cannot try to limit that authority.¹⁶² The Appellant submitted that by the Director’s own submissions, he admitted to fettering his discretion because he adopted an inflexible policy of not considering economic issues when his enabling statute specifically grants him that authority.¹⁶³ By ignoring the economic merits of the Badlands Motorsport Resort, the Director fettered his discretion.¹⁶⁴

¹⁶⁰ Appellants’ Initial Submission at paragraph 91.

¹⁶¹ Appellants’ Rebuttal Submission at paragraphs 28 and 29; Appellants’ Closing Arguments at paragraphs 262 and 263.

¹⁶² Appellants’ Rebuttal Submission at paragraphs 30 and 31; Appellants’ Closing Arguments at paragraphs 264 and 265.

¹⁶³ Appellants’ Rebuttal Submission at paragraph 34; Appellants’ Closing Arguments at paragraph 267.

¹⁶⁴ Appellants’ Rebuttal Submission at paragraph 35; Appellants’ Closing Arguments at paragraph 268.

[211] The Appellants submitted that while the Director claimed not to have the expertise to assess economic issues, the Director acknowledged that the purpose of the *Water Act* is to encourage economic development. The Appellants argued that the Department can retain outside assistance as it had in relation to the creation of the ABWRET-A form.¹⁶⁵

[212] The Appellants also submitted that the Director fettered his discretion because he treated non-legislative guidelines or policies as binding, specifically the Stormwater Management Guidelines, and the ABWRET-A form, and he refused to apply standards that exceeded those guidelines.¹⁶⁶

[213] The Appellants submitted that the Director is required to follow the Wetland Policy, however, he has a certain level of discretion in how he applies the policy. The Director's use of the ABWRET-A form fettered the discretion awarded him.¹⁶⁷

[214] The Appellants argued that the Director refused to consider anything above the bare minimum standards contained in the Stormwater Management Guidelines. He refused to apply SARA. He refused to consider economics.¹⁶⁸

[215] The Appellants submitted that the Director said that he valued the wetlands properly because he applied the ABWRET-A form and only the ABWRET-A form. According to the Appellants, the Director treated the ABWRET-A form as binding and refused to consider other factors which is the definition of fettering.¹⁶⁹ If the Director had used the form as one piece of the puzzle, the Appellants submitted that they would not have had an overwhelming objection to its use. However, the form was the entire puzzle for the Director.¹⁷⁰

¹⁶⁵ Appellants' Closing Arguments Rebuttal at paragraphs 269 to 271.

¹⁶⁶ Appellants' Closing Arguments Rebuttal at paragraphs 53, 55, and 57.

¹⁶⁷ Appellants' Closing Arguments at paragraph 620.

¹⁶⁸ Appellants' Closing Arguments Rebuttal at paragraph 55; Appellants' Closing Arguments at paragraph 622.

¹⁶⁹ Appellants' Closing Arguments Rebuttal at paragraph 57; Appellants' Closing Arguments at paragraph 623.

¹⁷⁰ Appellants' Closing Arguments at paragraph 625.

[216] The Appellants submitted that like the ABWRET-A form, the Director's reliance upon the Stormwater Management Guidelines was also unreasonable and the Director's outsized reliance on them fettered his discretion.¹⁷¹

[217] By way of example, the Appellants submitted, when Mr. Matthew Wilson (EPA Wetlands Team Lead) raised concerns about metal contamination entering the wetlands, Ms. Fulton referred him to the guidelines. In refusing to consider concerns that were outside the guidelines, the Director fettered his discretion.¹⁷²

[218] The Appellants argued that relying on the guidelines to the exclusion of other, more stringent standards in an ecologically sensitive area, was unreasonable and, without question, fettered the Director's discretion.¹⁷³

[219] The Appellants submitted that confirmation of the Director's fettered discretion comes from his desire to place further conditions upon the Approval, which the Director offered to do midway through the hearing.¹⁷⁴

13.1.2. Approval Holder

[220] The Approval Holder submitted that the Director made the Town Hall Statements over a year before they submitted their application. The Appellants never raised concerns about the statements in their statements of concern or in their Notice of Appeal.¹⁷⁵

[221] The Approval Holder disagreed with the Appellants' submissions that the Director fettered his discretion by not considering economic issues because the case authorities cited by the Appellants have a different context and are fact specific.¹⁷⁶

¹⁷¹ Appellants' Closing Arguments at paragraph 629.

¹⁷² Appellants' Closing Arguments at paragraph 631.

¹⁷³ Appellants' Closing Arguments at paragraph 633.

¹⁷⁴ Appellants' Closing Arguments at paragraph 634.

¹⁷⁵ Approval Holder's Submission at paragraph 100.

¹⁷⁶ Approval Holder's Supplemental Submission at paragraph 29.

[222] The Approval Holder argued that under the scheme of the *Water Act*, a review of economic, financial, or business aspects of the proposed development is beyond the authority of the Director.¹⁷⁷

13.1.3. Director

[223] The Director submitted that allegations of a closed mind are unfounded and there is no evidence that the Director's authority was fettered.¹⁷⁸

[224] The Director submitted that none of the enumerated factors in section 38(2) of the *Water Act* require the Director to undertake a detailed analysis of the economic viability of a proposed project and had the legislature intended the Director to do so, section 38 would have expressly said so.¹⁷⁹

[225] The Director submitted that section 38(2)(b) and (c) of the *Water Act* give him discretion to determine what information is relevant to his decision. This includes not only recognizing information that is outside his jurisdiction, such as federal and municipal matters, but also what weight to give documents.¹⁸⁰

[226] As detailed previously in this Report, the Director stated he does not consider the economic viability of a project in considering approval applications under the *Water Act*, whether for industrial purposes, municipal purposes, or agricultural purposes. He stated that none of the applicable policies, standards, guidelines, or procedures for *Water Act* approvals require him to consider the Approval Holder's business.¹⁸¹

¹⁷⁷ Approval Holder's Closing Arguments at page 17.

¹⁷⁸ Director's Response Submission at paragraph 171.

¹⁷⁹ Director's Response Submission at paragraphs 100 to 102.

¹⁸⁰ Director's Closing Arguments at paragraph 130.

¹⁸¹ Director's Closing Arguments at paragraphs 82.

[227] The Director also submitted that the Appellants provided no compelling arguments to establish that an economic analysis of the Badlands Motorsport Resort is at all relevant to the issue for hearing.¹⁸²

[228] To the Appellants' submissions that the Director's discretion was fettered in his application of a variety of Departmental policies, standards, and guidelines, the Director submitted that the Appellants point to nothing in the Director's Record or in the Director's testimony that demonstrates the Director believed he could not impose terms and conditions that exceeded the policies, standards, and guidelines, or was otherwise bound to follow them.¹⁸³

[229] To the Appellants' submissions that the Director confirmed he fettered his own discretion by placing additional conditions on the Approval during the hearing, the Director submits that directors routinely provide their views to the Board about changes they might recommend to an approval after having heard new evidence at a de novo hearing. It is not fettering for the Director to, after hearing new evidence, suggest additional conditions. Nor does it demonstrate the Director erred in his decision to issue the Approval based on the information before him at the time.¹⁸⁴

13.2. Board's Analysis

[230] The Appellants referred the Board to the Alberta Court of Appeal's decision in *Lac La Biche (County) v. Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 305:

“[11] Procedural fairness demands that administrative decision-makers do not fetter their discretion by adopting inflexible policies or rules, as the very existence of discretion implies that it can and should be exercised differently in different cases. A decision maker who always exercises it discretion in a particular way improperly limits the ambit of its power. Adopting a policy of only acting on the recommendation of a third party also constitutes fetter discretion. A decision maker

¹⁸² Director's Response Submission at paragraph 131.

¹⁸³ Director's Closing Arguments at paragraph 118.

¹⁸⁴ Director's Closing Arguments at paragraphs 286 and 287.

that fetter its discretion by failing to exercise the discretion the legislature conferred upon it commits a jurisdictional error.”

David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at 206-07, 210.

[231] The Appellants also referred the Board to the Supreme Court of Canada’s decision in *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2. This was an appeal from the Federal Court of Appeal’s judgment written by Le Dain J. The issue was whether the Minister of Economic Development (1) had discretion to deny permits under the *Export and Import Permits Act* (Canada), RSC 1985, c E-19 and (2) if so, whether the discretion was properly exercised.

[232] To the first question, the Supreme Court adopted the analysis of Le Dain J, who held:

“The permit which the Minister may issue pursuant to section 8 is certainly subject to the terms and conditions imposed by the Regulations but that is a different thing from conditions which qualify or eliminate altogether his discretion as to whether to grant a permit at all. In conclusion, it is my opinion that section 8 confers a discretionary authority to issue import permits and does not create a duty to issue them upon the fulfillment of certain conditions.”

[233] To the second question, the Supreme Court also adopted the analysis of Le Dain J, who held:

“The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141 at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* 1964 CanLII 196 (ON CA), [1965] 1 O.R. 259).”

[234] Finally, the Appellants referred the Board to the Alberta Court of King’s Bench decision in *Cidex Developments Ltd. v. Calgary (City)*, 2018 ABQB 519:

“[30] Discretion is fettered when a statutory body treats non-legislative guidelines or policies as binding to the exclusion of other valid or relevant reasons for the exercise of discretion: *Maple Lodge Farms Ltd v. Canada*, 1982 CanLII 24 (SCC), [1982] 2 SCR 2 at para 6, citing LeDain J, in *Hopedale Developments Ltd and the*

Town of Oakville, 1964 CanLII 196 (ONCA), [1965] 1 OR 259 (Ont. CA) at 513. As stated by the Alberta Court of Appeal in *La Biche (County) v. Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 305:

Procedural fairness demands that administrative decision-makers do not fetter their discretion by adopting inflexible policies or rules, as the very existence of discretion implies that it can and should be exercised differently in different cases.”

[235] Section 38 of the *Water Act* provides:

“38(1) Subject to section 34, the Director may issue or refuse to issue an approval to an applicant to commence or continue an activity.

(2) In making a decision under this section, the Director

(a) must consider, with respect to the applicable areas of the Province, the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan,

(b) may consider any existing, potential or cumulative

(i) effects on the aquatic environment,

(ii) hydraulic, hydrological and hydrogeological effects, and

(iii) effects on household users, licensees and traditional agriculture users,

that result or may result from the activity, and

(c) may consider

(i) effects on public safety, and

(ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant.

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

(4) The Director may issue an approval that authorizes the temporary diversion of water associated with carrying out an activity.

(5) An approval authorizing the temporary diversion of water associated with carrying out an activity does not provide any priority with respect to that water.

(6) When the Director issues an approval it must include an expiry.”

[236] The Board agrees with the Appellants that the Legislature, as demonstrated by section 38 of the *Water Act*, has clearly granted the Director broad discretion in deciding whether to issue or refuse to issue an approval.

[237] The Board also agrees with the Appellants that the cases they cite properly set out the law relating to fettering of discretion. As a statutory decision maker, the Director must exercise his discretion flexibly, and differently in different cases. In addition, he cannot, for example, bind himself to non-legislated policy guidelines.

[238] The Appellants rely on the Town Hall Statements as evidence the Director fettered his discretion. However, as with the allegation of bias, the Appellants provide no explanation of how the Town Hall Statements show that the Director fettered his discretion.

[239] Section 38(2)(c) of the *Water Act* relied upon by the Appellants is permissive. As discussed previously in this decision, there is nothing in the *Water Act* that expressly requires the Director to consider the economic viability of a proposed project. As such, the Director could not have limited his authority under section 38(2)(c) by not considering the economics of the BMR as set out in the 2020 BDO Report.

[240] Also, the Board finds there can be no fettering of discretion on the part of the Director for not considering the 2020 BDO Report in issuing the Approval because it was not before him at the time.

[241] The Board finds that the Appellants' allegations that the Director relied on the Stormwater Management Guidelines to the exclusion of other more stringent standards, or that he relied solely on the ABWRET-A form are not by themselves evidence of fettering. The Board agrees with the Director that the Appellants have not provided evidence that the Director tied his own hands or felt prevented from imposing terms and conditions that exceeded the policies, standards and guidelines.

[242] The Board further finds that placing additional conditions on the Approval by the Director at the hearing is not evidence of fettering. The Board agreed with the Director that it is not unusual for directors to recommend changes to an approval after having heard new evidence

at a de novo hearing. In the Board's view, that is one of the benefits of a de novo hearing. The Appellants have not shown how this constitutes evidence of any errors on the part of the Director.

PART 7. WHAT IS THE STANDARD OF REVIEW AND ONUS IN THESE APPEALS?

14. STANDARD OF REVIEW

14.1. Submissions

14.1.1. Appellants

[243] The Appellants' October 28, 2020, submission was limited to the assertion that the standard of review of a decision issued by a Director under the *Water Act* is correctness.

[244] The Appellant's February 5, 2021, rebuttal submission expanded on their standard of review submissions to rely on the decision in *Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)*, 2015 ABCA 85 ("*Capilano*") as providing further support for the application of a standard of review of correctness. The Appellant took the position that, read together, *Capilano* and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") support the finding that a statutory right of appeal will inform the standard of review and a standard of review of correctness should apply.

[245] The Appellants referred the Board to *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166 ("*Bahcheli*") and *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 ("*Newton*") to support the application of a standard of review of correctness and noted significant facts relevant to the application of those authorities included:

1. The Board's process is a de novo hearing.
2. The Board has the ability to hear new evidence.

[246] The Appellants submitted the Board should consider all Parties' acknowledgment that the hearing was a de novo hearing in deciding the standard of review.

[247] The Appellants compared other internal review processes, such as Sub-division Appeal Board ("SDAB") and Land and Property Rights Tribunal ("LPRT") matters, to the Board's to support the position the standard of review of correctness applies. The Appellants pointed out

the SDAB and the LPRT have the authority to “confirm, revoke, or vary” the decision appealed to them, much like the Board’s authority to “confirm, reverse or vary”.

[248] The Appellants submitted the Board, like the SDAB and the LPRT, is given more authority than the Director, including:

1. A requirement to hold a hearing;
2. A wider mandate (i.e., all the “powers of a commissioner under the *Public Inquiries Act*”);
3. Not sending mistaken decisions back to original decision maker; and
4. Hearing new evidence and arguments.

[249] In the Appellants’ June 13, 2023, response to the Board’s May 30, 2023, letter the Appellants’ referred the Board to a paper by Justice Slatter relevant to this issue filed in their previous submissions and which referenced the decision in *Moffat v. Edmonton (City) Police Services*, 2021 ABCA 183 (“*Moffat*”).

[250] The Appellants noted they had adopted the approach suggested by *Moffat* of analyzing the statutory scheme. The Appellants noted they had compared the Board’s legislative framework to nearly identical statutory appeal frameworks. The Appellants reminded the Board of the importance of their previous submissions on the broad and all-encompassing appeal and the de novo appeal process in support of the application of a standard of review of correctness.

[251] The Appellants’ submitted that *Moffat* concluded that *Vavilov* did not overrule previous decisions on internal standards of review. The Appellants submitted that *Vavilov* should not be read to alter the standard of review the Board set out in *Brookman*.

[252] The Appellants also argued that the Director’s suggestion there should be different standards of review for different issues should be rejected. The Appellants submitted neither *Moffat* nor other authorities relied on by the Director support this approach.

14.1.2. Approval Holder

[253] The Approval Holder submitted that standard of review was not defined as a hearing issue by the Board.¹⁸⁵

[254] The Approval Holder also submitted that the Board's decision in *Brookman*, also being a *Water Act* approval related to wetlands, should be applied and the proper standard of review was "correctness, with no deference to the Director".¹⁸⁶

[255] The Approval Holder's response to the Board's May 30, 2023, correspondence indicated they agreed with the Director's submissions of June 27, 2023.

14.1.3. Director

[256] The Director initially argued that *Vavilov* had changed the law around internal standard of review. In response to the Board's request to review and comment on *Moffat*, the Director withdrew those arguments and conceded *Vavilov* did not change the law on "internal standard of review"¹⁸⁷.

[257] The Director went on to submit that *Moffat* confirms that *Newton* governs the determination of the correct standard of review in internal appeals.

[258] The Director submitted that if the Board found, through the *Newton* analysis, that the standard of review was reasonableness, *Vavilov* would provide the Board with guidance on how to apply the reasonableness standard.

[259] The Director responded to the Appellants' reliance on the de novo hearing in the standard of review analysis. The Director submitted the ability or decision to hold a de novo hearing is not determinative of the standard of review.

[260] The Director referred the Board to the list of factors set out in *Newton* that should be considered to determine the correct standard of review for each issue before it. The Director

¹⁸⁵ Approval Holder's Submission at paragraph 26.

¹⁸⁶ Approval Holder's Submission at paragraph 27.

¹⁸⁷ Letter to Ms. Valerie Myrmo from Ms. Nicole Hartman dated June 27, 2023.

submitted *Moffat* reinforces that tribunals must remain flexible and not apply a single standard of review to all issues. The Director submitted the Board must consider the *Newton* factors in respect to each issue and determine the correct standard of review for each issue.

14.2. Board's Analysis

[261] The Board finds *Brookman* remains current law in relation to the findings that there are three different standards of review that may apply in relation to a decision of the Board:

1. The standard of review applied by the Board to a decision of the Director (“the internal standard of review”);
2. The standard of review applied by Court of King’s Bench to a decision of the Board (“judicial review standard of review”); and
3. The standard of review applied by the Court of Appeal to a decision of the Court of King’s Bench (“appellate standard of review”).

[262] The Board finds that these appeals deal with the first type of standard of review, the internal standard of review. As such, while the Board has considered and reviewed the authorities the Parties have provided that deal with the judicial review standard of review and appellate standard of review, the Board notes they have limited relevance to the internal standard of review that will apply to the Board’s review of the Director’s decision to issue the Approval.

[263] The Board’s review of *Moffat* confirms that *Vavilov* does not operate to change the legal principles applied by the Court in *Newton*, and related cases, regarding internal standard of review.

[264] As noted by the Parties, the Board analysed the question of the standard of review that would apply in appeals of the Director’s decision under the *Water Act*, being an internal standard of review, in depth in the *Brookman* decision.

[265] Given the Court’s findings in *Moffat*, the Board regards the *Brookman* decision as highly relevant to this appeal and the Board’s analysis on this issue follows the guidelines set out in *Brookman*. The Board also recognizes that elements of the *Newton* analysis are dependent on the specific facts of the case. Further, the Parties have raised slightly different arguments on standard of review than was before the Panel in *Brookman*. As such, the Board will engage in a

review of how the *Newton* analysis applies in these appeals but finds there have not been any significant changes in the law around internal standard of review since the *Brookman* decision was issued.

[266] *Newton* sets out a five-part test to determine whether the internal standard of review will be correctness or reasonableness. Specifically, the Board must consider:

1. The nature of the statutory scheme;
2. The roles of the appellate body and decision-maker of first instance under the enabling legislation;
3. The nature of the issues being decided;
4. A comparison of the expertise and “advantageous position” of the appellate body and the decision-maker of first instance, including whether new evidence can be considered in the hearing of the appeal (is the hearing *de novo*); and
5. The need to be economical with the appeal process (the number, length, and cost of appeals), including the need to respect the role of the decision maker of first instance (preserving the economy and integrity of the first decision-making process).

[267] The first *Newton* factor, the nature of the statutory scheme, remains as it was described in *Brookman* at paragraphs 181 to 183. In short, the statutory scheme the Board administers is ameliorative, designed to protect the water resources of the Province. The Board must balance competing interests including environmental protection and economic development. The potential effect of the Board’s process is so significant that instead of making a final decision, the *Water Act* requires the Board to make a recommendation to the Minister. As in *Brookman*, the Board finds that the first factor in the *Newton* test supports application of a standard of review of correctness.

[268] In relation to the second *Newton* factor, the Board must consider the respective roles of the Director and the Board in the approval process under the *Water Act*. The Board’s role, as stated in *Brookman*, is to:

“conduct a review of the Director’s decision, but that review is not focused on the procedure the Director followed. Rather, the Board’s focus is on whether the

Director's decision is sound considering the concerns raised by the Appellants and any directly affected individuals granted status to participate in the appeal."

The Board continues to regard its ability to consider new evidence that was not before the Director as a critical element of its role in the approval process. In these particular appeals, the Director has acknowledged that evidence has been filed in the appeal which he had not been aware of, and which would have affected his decision on conditions. Another fundamental difference between the Board's role in the approval process when compared to the Director's is the ability of all parties to test the evidence being relied on by way of cross-examinations and questioning by the Board itself.

[269] The Board adopts the findings in *Brookman* at paragraph 187 regarding the distinctions between the Board process and the processes of other boards discussed in *Newton* and *Lum*, specifically that "... the Board is composed of experts with a high level of expertise and significantly better evidence before them than before the Director when he made his decision."

[270] Particularly given the facts of these appeals, where the Board heard a significant volume of new evidence that was not before the Director for consideration prior to issuing the Approval, the Board finds the second *Newton* factor also supports an application of a standard of review of correctness in these appeals.

[271] The third *Newton* factor requires consideration of the nature of the issues before the Board. The Board in *Brookman* found it was faced with "a complex mix of facts and law, in the form of policy, combined with polycentric considerations of the competing purposes under the *Water Act*." The hearing of these appeals raised a different set of issues, although with many similar considerations to *Brookman*, and which are set out in Part 2 of this Report.

[272] The Board in these appeals is faced with complex issues that require the Board to bring to bear a detailed understanding of the Badlands Activities, the new technical evidence and other evidence filed during the hearing process, the relevant legislation and policies including the interaction with the Wetland Policy, relevant directives and stormwater standards and guidelines. These appeals also involve a much more in-depth analysis of the ABWRET-A process than arose

in the *Brookman* decision. As previously noted, to fully explore all relevant issues the Board has been presented with evidence and arguments that were not put before the Director as part of his decision-making process.

[273] With consideration to the legal nature of most of the issues before the Board, particularly with consideration to the new evidence and analysis made available to the Board, the Board finds this *Newton* factor also supports the application of a standard of review of correctness and notes that was also the finding in *Brookman*.

[274] The fourth factor in *Newton* requires consideration of:

1. The respective expertise of the Board and the Director;
2. Any advantageous position the Board has in deciding the issues in the appeal as compared to the Director when deciding the original approval; and
3. Whether new evidence can be considered during the appeal.

[275] As discussed in *Brookman*, the Board has a significant level of expertise and, unlike the Director, the *Water Act* allows the Board to receive evidence that can be fully tested through cross examination by the other parties and by questioning by the Board panel. Also, the *Water Act* allows for new evidence from scientific and technical experts that may not have been before the Director at first instance. Finally, the Board can examine relevant policies in more detail and hear legal arguments on them.

[276] The Board's ability to hear new evidence during an appeal is well accepted. In these appeals, the Board heard extensive new evidence, particularly in relation to the error in the correct version of the WAIR and the evidence of Mr. Wallis and Dr. Chu.

[277] Weighing all the considerations under the fourth *Newton* factor, the Board concludes that this factor also supports the application of a correctness standard of review.

[278] The fifth, and final, *Newton* factor requires the Board to consider what is most consistent with an economical approach to the appeal process and respect for the role of the original

decision maker. The Board has reviewed the findings in *Brookman* on this factor and adopts them as they apply on all fronts to the facts in this appeal.

[279] The Board finds the fifth and final factor in the *Newton* analysis also supports application of a standard of review of correctness.

[280] To the Director's submission that the Board must engage in the above analysis in relation to each individual issue in the appeal, the Board is not persuaded. Such an approach is impractical, particularly in complex cases involving many issues, and is not supported by legal authority. It is also somewhat redundant in light of the *Newton* third factor which requires the Board to consider the nature of the issues to be decided.

15. ONUS

15.1. Submissions

15.1.1. Appellants

[281] The Appellants' initial submission did not address the issue of onus, which was first raised in the Director's January 8, 2021, submission.¹⁸⁸

[282] The Appellants' response to the Director's submissions focused on the argument that as the Appeals were an appeal de novo, the Appellants had no onus to meet. In this regard, the Appellants' submissions overlapped into the matter of standard of review, which the Board has addressed previously in this Report:

“The Director suggests that this EAB ought to afford him deference and that the Appellants are forced to meet an onus. This is not the case. There is no onus to meet because this EAB owes no deference to the Director. This is a de novo hearing.”¹⁸⁹

[283] The Appellants' submissions did not provide any Board decisions which directly support that position. The Appellants did refer to the Board's decision in *McLay*. The Appellants

¹⁸⁸ Director's Response Submission at paragraph 231.

¹⁸⁹ Appellants' Closing Arguments at paragraphs 495 and 496.

also submitted that the Board's decision in *Lapointe* should not be relied on in relation to onus as it was an enforcement decision.

[284] The Appellants did not provide authorities to suggest the Board's previous decisions, also cited by the Director, in *Fenske* were no longer correct in law.

15.1.2. Approval Holder

[285] The Approval Holder submitted that 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 Approval.¹⁹⁰

15.1.3. Director

[286] The Director submitted that in this case, the onus is on the Appellants to provide evidence that demonstrates the terms and conditions of the Approval are inadequate, having regard to the potential environmental impacts of the Badlands Activities. In particular, the onus is on the Appellants to show:

- the construction, operation and maintenance of the stormwater management system or the infilling or modification of the Wetlands, as allowed under the Approval, will have a significant adverse impact on the environment, and
- the terms and conditions of the Approval are inadequate to address any potential adverse impacts on the environment.¹⁹¹

[287] The Director referred the Board to its past decisions in *Fenske* and *Visscher* as examples of past decisions where the Board has confirmed the onus rests on the Appellant. The Director also referred to the Board to the decision in *Lapointe*, all as authority for the finding that the onus in these appeals is on the Appellants.

[288] The Director took the position that whether the appeal is de novo or not is irrelevant to the onus in these appeals.¹⁹²

¹⁹⁰ Approval Holder's Closing Arguments at page 25.

¹⁹¹ Director's Response Submission at paragraph 86.

¹⁹² Director's Closing Arguments at paragraph 105.

[289] The Director submitted that the Appellants had not met the onus of proof to support a recommendation to either reverse or vary the Approval.¹⁹³ Specifically, the Director submitted the Appellants did not meet the onus to demonstrate there will be adverse environmental impacts because of the existing Approval.

15.2. Board's Analysis

[290] The Board acknowledges the Appellants' submissions included their position on the onus that may have been on the Approval Holder in the Director's Approval process. While the Director's Approval process may be a relevant consideration in relation to standard of review in this Appeal, the Board does not find it relevant to a determination of onus in the Appeal process.

[291] The Parties' submissions at times referred the Board to concepts, positions and authorities which were relevant to standard of review, but appeared to be relied upon in relation to which party had the onus of proof in the appeal. The Board's findings on standard of review are set out in previously in this Report. The concept of onus, or burden of proof, is distinct from standard of review.

[292] The Board finds that, in appeals under section 115(1)(a) of the *Water Act* and section 91 of EPEA, the onus is on the Appellant in the matter to provide sufficient evidence and argument to demonstrate to the Board that the Director's approval should be reversed or varied.

[293] The Director referred the Board to its previous decisions in *Fenske* and *Visscher* for this proposition. The Director also referred the Board to *Lapointe*, a case the Appellants challenged as distinguishable.

[294] The Appellants did not directly argue that *Fenske* or *Visscher* were decided incorrectly. The Appellants did argue that Board decisions that held the onus fell on the Appellants were distinguishable if the decisions did not specifically deal with the de novo nature of the Board's appeal process.¹⁹⁴

¹⁹³ Director's Response Submission at paragraph 85.

¹⁹⁴ Appellants' Closing Arguments Rebuttal at paragraphs 32 to 38.

[295] In *Fenske*, the Board found the appellant had not provided sufficient evidence to justify a recommendation for a reversal of the Director's decision. However, that Board was persuaded the appellant had identified sufficient gaps in information to raise a concern that something may have been missed in the Director's process. The Board in *Fenske* recommended a variance to the approval to provide additional information to the Director.

[296] *Visscher* was an appeal under the *Water Act*, although with very different facts. The Board found the onus was on the appellants. The Board found the appellants raised concerns based on speculation and ultimately found the appellants had not met the onus of providing sufficient evidence to support a recommendation to vary the approval.

[297] The Board considered the Appellants' arguments that if a previous Board decision on onus did not specifically address the de novo nature of the Board appeal process, it should be distinguished. The Board is not persuaded by those submissions. The de novo nature of Board appeals was established decades ago, certainly no later than the Alberta Court of Appeal decision in *Chem-Security (Alta.) Ltd. v. Alta (Environmental Appeal Board)*, 1997 ABCA 241 cited by the Appellants.¹⁹⁵

[298] The Board finds that *Fenske*, and *Visscher* correctly find the onus is on an appellant in a Board appeal.

[299] The onus in these appeals is on the Appellants to provide evidence and submissions to support a recommendation to reverse or vary the Approval. However, the Board acknowledges that the standard of proof required to support a recommendation to vary may be lower than that for a recommendation to reverse, as seen in *Fenske*.

¹⁹⁵ Footnote 18 of *Brookman* at Tab 22 of Appellants' Closing Arguments and paragraph 283 of Tab 82 in the Appellants' Closing Arguments.

PART 8. DO THE SOUTH SASKATCHEWAN REGIONAL PLAN AND THE *ALBERTA LAND STEWARDSHIP ACT* APPLY TO THE APPROVAL?

16. SUBMISSIONS

16.1.1. Appellants

[300] The Appellants stated that the Rosebud River generally, and in this case specifically, is subject to the SSRP and the Approval granted under the *Water Act* must meet the standards of the SSRP.¹⁹⁶ The Appellants provided the following rationale for this assertion:

1. Wheatland County is subject to the SSRP (South Saskatchewan Regional Plan Map);
2. The Rosebud River is a tributary to the South Saskatchewan River;
3. The boundary between Kneehill and Wheatland Counties is, in the relevant location, the registered railway plan which lies at the bottom of the Rosebud River valley. The Rosebud River meanders back and forth under the railway plan via a series of trestles which formerly carried the tracks (the tracks and the railway ties are now removed); and
4. The Rosebud River forms part of the north boundary for the South Saskatchewan Region.¹⁹⁷

[301] The Appellants then noted that Section 2(e) of the *Water Act* requires attention to trans-boundary water management:

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

(e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management.”¹⁹⁸

¹⁹⁶ Appellants’ Initial Submission at paragraphs 83 and 85.

¹⁹⁷ Appellants’ Initial Submission at paragraph 83.

¹⁹⁸ Appellants’ Initial Submission at paragraph 84.

[302] The Appellants quoted section 15 of the *Alberta Land Stewardship Act*, SA 2009, c A-26.8, (“ALSA”) when they asserted that any approval granted under the *Water Act* must meet the standards of the SSRP.¹⁹⁹

[303] The Appellants quoted several statements in the SSRP that the Approval failed to meet, including:

1. Giving consideration for biodiversity issues, at-risk species;
2. That wetlands in this region are not abundant because of development and this region’s geography;
3. The necessity to ensure that harm to remaining riparian resources is avoided until that harm can be properly (and completely) mitigated; and
4. The economic benefits of the proposed project are far outweighed by the negative trade-offs, necessitating a refusal of the Approval Holder’s application.²⁰⁰

[304] The Appellants submitted that the SSRP itself makes it clear that its non-binding portions must still be considered by municipal and provincial regulators even though they are non-binding. This intent is shown in section 4(1) of the SSRP’s Regulatory Details section, which requires local governments and provincial “decision-makers” to “consider” the SSRP’s non-binding policy portions, including the SSRP’s implementation plan, when they are “carrying out any function in respect of the powers, duties and responsibilities” in the South Saskatchewan region.²⁰¹

[305] The Appellants concluded that “even though many of the aforementioned policy statements appear in the “non-binding” portion of the SSRP, the Board would be cautioned in ignoring them as the Director did”.²⁰²

¹⁹⁹ Appellants’ Initial Submission at paragraph 85.

²⁰⁰ Appellants’ Initial Submission at paragraph 88.

²⁰¹ Appellants’ Closing Arguments at paragraph 587.

²⁰² Appellants’ Closing Arguments at paragraph 693.

16.1.2. Approval Holder

[306] According to the Approval Holder, the Appellants asserted that: (1) the SSRP applies to the Rosebud River because Wheatland County is subject to the SSRP; (2) the Rosebud is a tributary to the South Saskatchewan; and (3) the Rosebud River forms part of the north boundary of the SSRP. The Appellants then leaped to section 2(e) of the *Water Act* which recognizes “the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management.”

[307] The Approval Holder further noted that it would appear the Appellants assumed that because the Rosebud River is part of the boundary between Wheatland County (subject to the SSRP) and Kneehill County (not subject to the SSRP), that somehow makes approvals in Kneehill County a trans-boundary issue subject to the SSRP.

[308] The Approval Holder submitted that the suggested interpretation does not survive even the simplest exercise in statutory interpretation, for the following reasons:

- Section 2(e) of the *Water Act* is limited to working with “governments of other jurisdictions” with respect to “trans-border water management”;
- Sections 6(1)(d) and (e) of the *Water Act* allows the Minister to enter into agreements with “governments ... of another jurisdiction” with respect to “trans-boundary water”. Section 6(1) of the *Water Act* distinguishes “government of another jurisdiction” from a “local authority” (such as a county);
- It would then seem obvious that section 2(e) of the *Water Act* is intended encourage dealings between governments of different jurisdictions, such as two provinces, or a province and a State, not, between local authorities. Section 2(e) is not intended make the *Water Act* subservient to the SSRP which only encompasses certain local authorities; and
- This interpretation is reinforced by the fact that the only mentions of “transboundary” in the SSRP are to the Master Agreement on Apportionment between Canada, Alberta, Saskatchewan, and Manitoba regarding water sharing between the Prairie provinces, and the Boundary Waters Treaty between Canada and the United States.

Nothing in the foregoing supports the conclusion that Act approvals in Kneehill County are somehow subservient to the SSRP.²⁰³

[309] The Approval Holder submitted that, even if the SSRP did apply, the SSRP policies, which the Applicants say “must” be met, are, in fact, not binding. The “policies” identified by the Applicants at SSRP pages 23 to 39 are from the “Strategic Plan” portion of the document, and the “policies” identified by the Applicants at SSRP pages 40 to 84 are from the “Implementation Plan” portion of the document. The Strategic Plan and Implementation Plan are specifically identified on page 8 of the SSRP (Binding Nature of the South Saskatchewan Regional Plan) as being non-binding portions of the SSRP.²⁰⁴

16.1.3. Director

[310] The Director noted that the “planning region” to which the SSRP applies is the South Saskatchewan Integrated Planning Region, established by Order in Council O.C. 307/2011.²⁰⁵

[311] The Director submitted that the Badlands Activities are in Kneehill County, which is in the Red Deer Region, not the South Saskatchewan Region. As a result, the SSRP does not apply to the Approval.²⁰⁶ The Director stated that it would be an error in law for the Director, Board, or Minister to apply the SSRP.²⁰⁷

[312] The Director stated that the policy statements included in the Appellant’s written submission are not binding as they are all in the Strategic Plan and Implementation Plan portions of the SSRP, which are not binding.²⁰⁸

²⁰³ Approval Holder’s Submission at paragraphs 95 and 96.

²⁰⁴ Approval Holder’s Submission at paragraph 97.

²⁰⁵ Director’s Response Submission at paragraph 160.

²⁰⁶ Director’s Response Submission at paragraph 160.

²⁰⁷ Director’s Closing Arguments at paragraph 68.

²⁰⁸ Director’s Response Submission at paragraph 167.

[313] Therefore, the Director submitted the Board should not consider the Appellants' submissions relating to the SSRP.²⁰⁹

16.2. Board's Analysis

[314] ALSA provides for establishment of integrated planning regions (section 3) and development of regional plans (section 4) by the Lieutenant Governor in Council.

[315] Section 15 of ALSA reads, in part,

“15(1) Except to the extent that a regional plan provides otherwise, a regional plan binds

(a) the Crown, ...

(c) decision-makers,

(2) Subsection (1) is given effect, if at all, only

(a) by the provisions of the regional plan itself,”

[316] Section 4.1 of the *Water Act* requires that:

“Where the Minister or the Director is empowered or directed to take an action under this Act, the Minister or the Director, as the case requires, must act in accordance with any *applicable* ALSA regional plan.” (*Emphasis* added by the Board.)

[317] The SSRP identifies strategic directions for the region over the next 10 years. The SSRP is implemented by decision-makers having legal authority to grant some form of statutory consent, such as a development permit, a water licence, or a project approval. Decision-makers include municipal governments and Government of Alberta departments, boards and agencies, and other organizations.²¹⁰

[318] Wheatland County is contained within the SSRP boundaries,²¹¹ however, as the Director noted, Kneehill County is in the Red Deer region, which has no approved regional plan.

²⁰⁹ Director's Response Submission at paragraph 170.

²¹⁰ South Saskatchewan Regional Plan at pages 1 and 5.

²¹¹ South Saskatchewan Regional Plan, Map on page 9.

[319] The Board finds that the Badlands Lands include some land within Wheatland County (subject to the SSRP), however the Badlands Activities are all north of the railway line and therefore in Kneehill County.²¹²

[320] In their submission, the Appellants noted that the Rosebud River is a tributary to the South Saskatchewan River. The Board finds this is incorrect as the Rosebud River is a tributary to the Red Deer River.²¹³

[321] Having regard to the above, the Board finds that the SSRP does not apply to the Badlands Activities or the Approval. As a result, ALSA does not apply since there is no regional plan in place applicable to the Badlands Activities or Approval.

PART 9. WERE THE MATTERS AND FACTORS FOR THE APPROVED WATER MANAGEMENT PLAN FOR THE SOUTH SASKATCHEWAN RIVER BASIN (ALBERTA) CONSIDERED BY THE DIRECTOR?

17. LEGAL FRAMEWORK – APPROVED WATER MANAGEMENT PLAN FOR THE SOUTH SASKATCHEWAN RIVER BASIN (ALBERTA)

[322] As noted above, the Director’s authority to issue or refuse to issue the Approval to Badlands to “... commence or continue an activity...” is set out in section 38 of the *Water Act*.

[323] In making his decision on an “an activity”, the Director must consider the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan (section 38(2)(a) of the *Water Act*).

[324] The Director’s Approval Resume confirms that the Approved Water Management Plan for the South Saskatchewan River Basin (Alberta) (the “Approved Water Management Plan”) applies to the Badlands Development Area and must be considered by the Director in issuing the Approval for the Badlands Activities.

²¹² Badlands Project Development Area Map in Appendix 2B.

²¹³ Director’s Response Submission at paragraph 164.

[325] Table 2 in the Approved Water Management Plan lists eight matters and factors that the Director must consider in making his decision on applications for an approval affecting surface water in the South Saskatchewan River Basin:

1. Existing, potential, and cumulative effects on the aquatic environment;
2. Existing, potential, and cumulative effects on any applicable instream objective and/or Water Conservation Objective;
3. Efficiency of use;
4. Net diversion;
5. Existing, potential, and cumulative hydraulic, hydrological, and hydrogeological effects;
6. With respect to irrigation, the suitability of the land for irrigated agriculture;
7. Existing, potential, and cumulative effects on the operation of reservoirs or other water infrastructure; and
8. First Nation Rights and Traditional Uses.

[326] In these appeals, the Board finds that the Parties focussed their submissions on two matters and factors of the Approved Water Management Plan, including specific topics of concern for the Badlands Activities as follows:

1. Existing, potential, and cumulative effects on the aquatic environment,
 - a. Contamination,
 - b. Erosion and sedimentation, and
 - c. Cumulative effects; and
2. Existing, potential, and cumulative hydraulic, hydrological, and hydrogeological effects,
 - a. Hydrology, and
 - b. Hydrogeology.

[327] Concerning the other six matters and factors, the Director's Approval Resume states "the Matters and Factors have been considered and the Guidelines have been met." Neither the Appellants nor the Approval Holder raised concerns or provided evidence that the Director did not consider these other matters and factors of the Approved Water Management Plan, in making

his decision on Badlands' integrated *Water Act* application. Therefore, the Board finds that these six matters and factors were considered by the Director in making his decision on the Approval.

[328] Based on the Parties' evidence and submissions, the Board will now consider whether the Director considered the two matters and factors he was statutorily mandated to consider (i.e., the existing, potential, and cumulative effects on the aquatic environment; and the existing, potential, and cumulative hydraulic, hydrological, and hydrogeological effects).

18. EXISTING, POTENTIAL, AND CUMULATIVE EFFECTS ON THE AQUATIC ENVIRONMENT

18.1. Contamination Concerns

18.1.1. Submissions

18.1.1.1 Appellants

[329] Ms. Clark, Mr. Clark, Mr. Skibsted, Ms. Skibsted, and Ms. Kenworthy raised specific concerns in their Notices of Appeal about changes to water quality to the wetlands and the Rosebud River that the Director should have considered before issuing the Approval:

Ms. Clark:

- I am concerned that the design, construction, and maintenance of stormwater off racetracks, motor vehicle paddocks, a skid pad, and a commercial/residential development carries a risk of failure both in quantity and composition.²¹⁴
- I am concerned that the SWMP²¹⁵ includes runoff from the upper and lower tracks passing through Wetlands 4 and 5. Even considering the design that includes sediment forebays to promote sedimentation of solids, it seems there is still a possibility that stormwater generated from the development (including "debris and grease") could reach waters of Wetlands 4 and 5 and degrade water quality.²¹⁶
- I am very concerned that no plan was mentioned in either the SWMP or the BIA and EPP documents that will address water quality changes that are likely to occur to the wetlands that have stormwater flowing through them.

²¹⁴ Ms. Clark's Notice of Appeal 19-070.

²¹⁵ The Board understands "SWMP" to mean the Badlands stormwater management plan.

²¹⁶ Statement of Kimberley Murray, adopted by Ms. Clark as part of her Notice of Appeal 19-070.

It seems that no pre-disturbance water quality tests have been conducted at Wetlands 4 and 5 to understand background levels that would be necessary to understand changes that are likely to occur to water quality following development.²¹⁷

Mr. Clark:

- I am concerned for the water quality of the wetlands and the Rosebud River going forward.²¹⁸

Mr. and Ms. Skibsted:

- Concerns that tire rub (all the car forums chat about how they are looking forward to burning off new tires on this track) and petrochemical spill were not addressed sufficiently.²¹⁹

Ms. Kenworthy:

- Aside from the obvious pollution implications and their effect on the unique wetlands in the area ...²²⁰

[330] In support of their concerns about the Approval's impacts to the water quality of the wetlands and the Rosebud River, the Appellants filed several reports prepared by Mr. Wallis and Dr. Chu. Also, the Appellants presented Mr. Wallis and Dr. Chu to provide accompanying oral testimony for the reports that they prepared.

[331] Concerning the evidence in the 2020 Wallis Report, the Appellants' primary positions were:

1. The wetlands and the natural drainage system will be impacted by increased or more rapid water flows and contaminants related to the expansion of hard surfaces as well as cuts and fills associated with grading for the racecourses and stormwater drainage system (page 3).
2. The forebays will help settle some contaminants before discharging into the Rosebud River (page 20).

²¹⁷ Statement of Kimberley Murray, adopted by Ms. Clark as part of her Notice of Appeal 19-070.

²¹⁸ Mr. Clark's Notice of Appeal 19-069.

²¹⁹ Mr. and Ms. Skibsted's Notices of Appeal 19-067 and 19-068.

²²⁰ Ms. Kenworthy's Notice of Appeal 19-074.

[332] Concerning the evidence in the 2022 Wallis Report,²²¹ the Appellants' primary submissions were:

1. Wetlands 1, 4 and 5 will be impacted by alterations in flow, adjacent cuts and fills, increased sedimentation, and potential contamination (page 23).
2. Quoted from the Department's Stormwater Management Guidelines "Also, [urban] stormwater carries a variety of water contaminants that may accumulate and damage aquatic environments and/or restrict water use to some degree" (page 37).²²²

[333] The Appellants submitted that nowhere in the Approval is there any consideration for the impact of hydrocarbons on the wetlands. Nowhere does the Director give consideration for a car wash or a wastewater management plan.²²³

[334] In their final argument, the Appellants raised new concerns regarding Badlands' winter use of the racetrack, which Mr. Zelazo testified to at the hearing and was a fact that the Appellants argued that Mr. Thurmeier was unaware of when preparing the Final SMP. The Appellants submitted that the Final SMP indicates that stormwater is going to drain off the road, into a ditch and into Wetland 5. Dr. Chu noted that in both circumstances, de-icing fluid is a concern. The Appellants argued that none of these facts regarding winter use received any consideration by the Director.²²⁴

[335] Concerning the evidence in the 2020 Chu Report and Dr. Chu's oral testimony, the Appellants adopted Dr. Chu's recommendation that the Department should be treating Badlands' stormwater management system as a commercial/industrial drainage rather than a municipal drainage; and the Department should be applying monitoring requirements from a commercial/industrial approval. Specifically, the Appellants relied on Dr. Chu's distinction between a municipal drainage and an industrial drainage and his opinion that elements of this

²²¹ Badlands Motorsports Resort, Wetland and Biodiversity Considerations, August 2022 update, prepared by Cliff Wallis.

²²² Pages 2 and 3 of the Stormwater Management Guidelines.

²²³ Appellants' Initial Submission at paragraph 81.

²²⁴ Appellants' Closing Arguments at paragraph 667.

development necessitated an industrial drainage design because of the following key requirements: (1) better removal of particulates, (2) better concentration limits and monitoring, and (3) better water retention capacity.²²⁵

[336] Alternatively, the Appellants argued that if the Board recommends granting the Approval, the Appellants are seeking the additional conditions outlined by Dr. Chu.²²⁶ Specifically, the Appellants referred to the 2020 Chu Report, where Dr. Chu recommended the following conditions should be added to the Approval with respect to stormwater quality:

1. A condition be added to the Approval requiring that releases from the project run-off system to the surrounding watershed should meet the following limits:

Parameters	Parameter or Concentration Limits
pH	>6.0 and <9.5 pH units
Oil and Grease	No visible sheen
Benzene	0.005 mg/L
Toluene	0.024 mg/L
Ethylbenzene	0.0016 mg/L
Xylenes	0.02 mg/L
C6 – C10 (F1 minus BTEX)	2.2 mg/L
C10 – C16 (F2)	1.1 mg/L
TDS	<2500 mg/L
TSS	<25 mg/L
COD	<50 mg/L
Chloride	<120 mg/L
Sodium	<200 mg/L

²²⁵ Appellants' Closing Arguments at paragraphs 766 and 767.

²²⁶ Appellants' Closing Arguments at paragraphs 752, and 761 to 768.

2. A condition be added to the Approval requiring that the approval holder should monitor the run-off control system for the above parameters (except for sodium) as detailed in a table on page 6 of 2020 Chu Report. In this table, Dr. Chu provided a detailed table of the sample types sampling frequencies, sampling location, and reporting in a table on page 6 of his report. Dr. Chu noted that the sample location A is defined as the discharge point to the Rosebud River.
3. A condition be added to the Approval which adopts a stormwater treatment train approach which involves:
 - a. Litter and gross solids removal (e.g., using screens);
 - b. Oil/grease/hydrocarbon removal (e.g., including oil/grit separators for the removal of Light Non-Aqueous Phase Liquids);²²⁷ and
 - c. Removal of suspended solids, heavy metals and other contaminants via swales and wetlands.

[337] Dr. Chu noted the conditions in 3 above were taken from a stormwater management plan prepared for a motorsport development and associated business park in New Zealand (which in his opinion can serve as an example based on a literature review he undertook to investigate other similar developments around the world).

[338] At the hearing, Dr. Chu questioned the Director's use of the term CBOD (chemical and biological demand) as a parameter to be monitored, rather than BOD (biological oxygen demand) and COD (chemical oxygen demand) as they are two separate tests. Dr. Chu indicated you could test both but that recommended BOD as the most relevant. Dr. Chu also noted that while visible sheen may indicate hydrocarbon contamination it does not provide information on the type of hydrocarbon, and in some cases, visible sheen may be present when there is no hydrocarbon contaminant present.

²²⁷ A groundwater contaminant such as petroleum oil, gasoline or diesel fuel that is less dense than water and is not very soluble in water. Sometimes referred to as LNAPL.

[339] The Appellants stated that the Director acknowledged in cross examination that there were likely deficiencies in how his conditions were worded. The Appellants submitted that the Board ought to accept Dr. Chu's revisions to the Director's further conditions.²²⁸

18.1.1.2 Approval Holder

[340] The Approval Holder submitted that the Appellants concerns about water quality were resolved by the design of the stormwater management system which includes forebays upstream of Wetlands 1, 4 and 5 to clean and polish storm runoff before it enters the wetlands prior to being discharged from Wetlands 4 and 5 to the Rosebud River. The Approval Holder noted that the Director further addressed these concerns by adding conditions related to siltation and erosion.²²⁹

[341] The Approval Holder stated that, in the event of an accident, all emergency response vehicles will have the necessary supplies to clean up any contaminants. The number and staging location of the emergency response vehicles will be managed to maintain a target response time of 60 seconds to an incident anywhere on the course.²³⁰

[342] The Approval Holder did not agree with the suggested chemical analyses and monitoring requirements in the 2020 Chu Report Recommendations 1 and 2, stating that the proposed standards were apparently derived from an unspecified industrial approval and the comparison of the BMR to a large industrial site and approval is fundamentally flawed – particularly when the industrial site has unknown characteristics.²³¹

[343] The Approval Holder agreed with the 2020 Chu Report that an oil/grit separator should be provided for the fueling station(s) catchment areas, and Mr. Zelazo testified that this would be added later in the design phase when the location of the fuel station is known.²³²

²²⁸ Appellants' Closing Arguments at paragraph 768.

²²⁹ Approval Holder's Submission at paragraph 41; Final SMP at page 8 and Figure 5.

²³⁰ Badlands Project Overview at page 44.

²³¹ Scheffer Andrew Response at page 10.

²³² Scheffer Andrew Response at page 10.

[344] The Approval Holder also noted that the BMR will include dedicated street sweepers that run multiple times per day, which is expected to capture significant pollutants from the track surfaces.²³³

[345] In response to Dr. Chu's suggestion that the stormwater management system be considered a commercial/industrial system not a municipal one, the Approval Holder submitted that the system is properly classified as "municipal" because the proposed BMR has the same properties, uses, and risks as a municipal drainage system.²³⁴

[346] The Approval Holder stated that the Final WAIR (at page 63) contains mitigation measures designed to prevent spills at hazardous waste and fuel storage sites.

18.1.1.3 Director

[347] The Director's Approval Resume stated that the stormwater runoff will be controlled, and water quality has been addressed in the Final SMP with incorporation of sediment forebays to treat stormwater prior to outletting into 3 wetlands and then into the Rosebud River.²³⁵

[348] The Director stated the stormwater management system as described in the Final SMP will not adversely impact the aquatic environment because: (1) the stormwater management system includes measures to adequately reduce sediments to meet the Standards and Guidelines²³⁶ for water quality, and (2) adequate measures have been proposed to minimize siltation, erosion, and water quality impacts on the Badlands Development Area and to the Rosebud River.²³⁷ The Director also noted that the sediment forebays will be monitored for sediment build-up and cleaned when sediment accumulation will significantly reduce available volume in the forebay.²³⁸

²³³ Scheffer Andrew Response at page 9.

²³⁴ Scheffer Andrew Response at page 8.

²³⁵ Director's Record at Tab 31.

²³⁶ *Standards and Guidelines for Municipal Waterworks, Wastewater and Storm Drainage Systems* (2012) consists of five parts.

²³⁷ Director's Response Submission at paragraph 205.

²³⁸ Director's Response Submission at paragraph 202.

[349] The Director submitted that the stormwater management system in the Final SMP controls the quality of water flowing from the development areas to the wetlands and then the Rosebud River through:

- extra cleaning, maintenance and restrictions on the racetrack itself to mitigate pollutant impacts and the use of existing wetlands to provide additional stormwater storage and treatment prior to discharging into the Rosebud River;
- the use of dry and wet ponds on the upland areas to control runoff flows to pre-development rates and thereby minimize the potential for additional erosion on the existing drainage paths from the uplands areas to the valley floor – these wet and dry ponds met the design considerations outlined in the Standards and Guidelines;
- the use of sediment forebays at the inlets of the existing wetlands to trap 85% of sediment and solids larger than 75 µm – these are designed in accordance with section 5.3.5.1 of the Standards and Guidelines and section 6.5.1.7 of the Stormwater Management Guidelines, to minimize sediment loads entering the wetlands; and
- the use of existing wetlands to provide additional stormwater storage and treatment prior to discharging into the Rosebud River.²³⁹

[350] The Director noted that the Approval Holder proposed that the stormwater ponds at the top of the escarpment within the stormwater management system be lined with a “native clay liner to prevent infiltration or instability” and to mitigate seepage.²⁴⁰

[351] The Director noted that the Final SMP: (1) provided sediment forebay sizing information, and a monitoring and maintenance program for these forebays; and (2) modified the Initial SMP to indicate that an Erosion and Sediment Control Plan needed to be prepared and implemented.²⁴¹

[352] The Director noted that at the hearing, Mr. Thurmeier stated that in the event of a fuel leak, any fuel would move at 4 cm per week due to the clay soils “of ... low permeability.”

²³⁹ Director’s Response Submission at paragraphs 200 and 201.

²⁴⁰ Director’s Closing Arguments at paragraph 264.

²⁴¹ Director’s Response Submission at paragraph 196.

In his view, there would be “ample time to clean up” a leak “before it could seep through all that clay out into the groundwater”.²⁴²

[353] The Director stated that at the hearing Dr. Chu acknowledged that:

- In his opinion, the stormwater management system, as approved, did not fail to meet any of the Department’s stormwater management policies and guidelines for a municipal drainage system;
- The 2014 approval included in the 2020 Chu Report at Schedule 1 was an industrial approval for a landfill/compost facility regulated under EPEA;
- The limits he suggested in condition 1 in the 2020 Chu Report in the table on page 4 were not taken from a *Water Act* approval and that the Chu Review contained no examples of *Water Act* approvals containing a similar condition; and
- In his opinion, it would be unfair and unrealistic to require the Approval Holder to adhere to the drainage standards for industrial operators.²⁴³

[354] The Director noted that Dr. Chu confirmed at the hearing that the changes he had proposed to the Approval would require a larger footprint on the landscape, which was a contrast to Mr. Wallis’ demand for a smaller project footprint.²⁴⁴

[355] Specifically with respect to stormwater quality, the Director’s Decision Statement noted that the Approval Holder met or exceeded the province’s stormwater guidelines. The water is treated prior to entering the natural wetlands that will be used to provide flow attenuation prior to the water reaching the river. According to the Director, the Approval Holder also indicated that the racetracks would be maintained (swept) more often than a residential street and would have on-site spill management staff allowing for quicker cleanup of spills than normal.²⁴⁵

[356] The Director submitted that as an extra measure to ensure the stormwater management system functions as expected, as described in the Final SMP, and to further mitigate

²⁴² Director’s Closing Arguments at paragraph 265; Director’s Record at Tab 31.

²⁴³ Director’s Closing Arguments at paragraph 269.

²⁴⁴ Director’s Closing Arguments at paragraphs 270 and 271.

²⁴⁵ Director’s Record at Tab 32.

any risk to water quality or quantity, he has proposed the Approval be amended to require Badlands to prepare, submit, and implement a monitoring program for Wetlands 1, 4, and 5 (proposed condition 7.0).²⁴⁶

[357] The Director testified that his proposed addition to the Approval of a Wetland Monitoring Program²⁴⁷ would include a requirement to monitor for pH, visible sheen of hydrocarbons, and chemical and biological oxygen demand (“CBOD”).

[358] The Director submitted that, having heard Dr. Chu’s testimony at the hearing, he wished to correct the “CBOD” parameter in the proposed monitoring conditions he provided. The Director’s intent was to refer to “carbonaceous biochemical oxygen demand (CBOD)”, not “chemical and biological oxygen demand (CBOD)”.²⁴⁸

[359] With respect to Dr. Chu’s recommendation that the stormwater management system be classified as an industrial activity, the Director stated at the hearing that municipal storm guidelines incorporate both urban and rural development scenarios, which include industrial, recreational, and commercial developments within the footprint of those developments. This project is essentially a residential recreational project. The Director went on to state that he disagreed with Dr. Chu’s recommendation since there's nothing in the BMR that is different from a municipality or an urban municipality development – there are gas stations, roadways, residences, and commercial activities occurring.

18.1.2. Board’s Analysis

[360] The *Water Act* defines aquatic environment as:

“1(1)(h) the components of the earth related to, living in or located in or on water or the beds or shores of a water body, including but not limited to

(i) all organic and inorganic matter, and

²⁴⁶ Director’s Closing Arguments at paragraph 283.

²⁴⁷ See Appendix 2 of this Report.

²⁴⁸ Footnote to the Director’s Closing Arguments at paragraph 284.

(ii) living organisms and their habitat, including fish habitat, and their interacting natural systems;”

[361] The *Water Act* defines water body, in part, as:

“1(1)(ggg) any location where water flows or is present, whether or not the flow or the presence of water is continuous, intermittent or occurs only during a flood, and includes but is not limited to *wetlands* and aquifers ...” (*Emphasis* added by the Board.)

[362] The Board notes that the Department’s Stormwater Management Guidelines state that:

“stormwater from street runoff and other impervious surfaces combined with runoff from pervious ground areas such as lawns, parks, and agricultural land can contain several different contaminants in relatively high concentrations. These contaminants can have significant impact on the quality of receiving streams” (page 5-2).

[363] The Board further notes that the Stormwater Management Guidelines indicate that dry ponds provide little contaminant removal, but that sediment forebays, grassed swales, and wetlands are capable of contaminant removal.

[364] The Board considered Dr. Chu’s distinction between a municipal drainage and an industrial drainage and his opinion that elements of the BMR necessitated an industrial drainage design because of the following key requirements: (1) better removal of particulates, (2) better concentration limits and monitoring, and (3) better water retention capacity. The Board also considered the Approval Holder’s submission that: (1) the BMR is a municipal development because it has the same properties, uses, and risks as a municipal drainage system, and correctly designed the stormwater management system accordingly; and (2) the Director’s view that there is nothing in the Badlands Development that is different from a municipality or an urban municipality development – there are gas stations, roadways, residences, and commercial activities occurring.

[365] Having regard to the above, and Dr. Chu’s acknowledgement that in his opinion, the Final SMP, appended to the Approval, did not fail to meet any of the Department’s stormwater management policies and guidelines for a municipal drainage system and it would be unfair and

unrealistic to require the Approval Holder to adhere to the drainage standards for industrial operators, the Board finds that the Approval Holder and Director properly classified the BMR as being a municipal development, and correctly prepared the Final SMP based on this classification. The Board therefore finds that application of commercial/industrial water quality standards as suggested by the Appellants is not warranted.

[366] Regarding the Appellants' concerns about potential contamination of water arising from the Final SMP, the Board accepts and adopts the Director's suggested precautionary measure which requires Badlands to prepare, submit, and implement a monitoring program for Wetlands 1, 4 and 5. Therefore, the Board will recommend that the Approval be varied to incorporate this new condition.

[367] With respect to the Appellants' concerns about de-icing during winter conditions, the Board notes that the Approval does not authorize the release of substances into the environment. Section 108 of EPEA prohibits the release of a substance in an amount, concentration, or level or at a rate of release that is in excess of that expressly prescribed by an approval, a code of practice, or the regulations. EPA has several remedies under Part 5 of EPEA to address the unauthorized release of substances including issuing an environmental protection order or emergency environmental protection order and taking emergency measures.

[368] Having heard the differing interpretations of the Appellants and Director on what CBOD means, and the Director's subsequent clarification of the term, the Board finds that CBOD means carbonaceous biochemical oxygen demand, not chemical and biological oxygen demand. Therefore, the Board will also recommend that the new Wetlands Monitoring Program condition for Wetlands 1, 4 and 5 be revised to reflect this finding.

18.2. Erosion and Sedimentation Concerns

18.2.1. Submissions

18.2.1.1 Appellants

[369] Ms. Clark raised two additional concerns in her Notice of Appeal about changes to water quality arising from erosion and sedimentation to the wetlands and the Rosebud River that

the Director should have considered before issuing the Approval. Specifically, Ms. Clark relied upon and adopted the following statement of Kimberley Murray as part of her Notice of Appeal 19-070:

I am concerned that the SWMP includes runoff from the upper and lower tracks passing through Wetlands 4 and 5. Even considering the design that includes sediment forebays to promote sedimentation of solids, it seems there is still a possibility that stormwater generated from the development could include particles that are under 75 µm that are not anticipated to settle out in the designed forebays.

[370] The 2020 Wallis Report (at page 20) quoted from the Final SMP “there are cuts and fills in excess of 2.0 m proposed throughout the upper and lower track and residential development and as part of the development of the stormwater management facilities” and stated that erosion from the cuts and fills will impact the quality of water in the wetland system.

[371] The 2022 Wallis Review²⁴⁹ (at page 20) noted that the significant cuts and fills associated with the racetrack as mapped by Scheffer Andrew will increase erosion risk on steeper slopes upslope from Wetlands 2 and 4 along with the addition of stormwater poses risks to these wetlands. The Review also stated (at page 21) that in wetland ecology, even cuts as small as 0.5 m can be significant and lead to hydrological changes, including premature drying up of wetlands.

[372] The Appellants acknowledged that the forebays will help settle some contaminants before discharging into the Rosebud River; however, the surface vegetation and soil disturbance is so extensive, and the cuts and fills are so deep that there is no conceivable remediation for all the wetland and drainage system impacts in the valley.²⁵⁰

[373] The 2021 Chu Report stated that most of the mass of the total suspended solids in typical Alberta runoff is smaller than 75 µm in size, which makes the 85% removal of solids greater than 75 µm guideline somewhat misleading and inappropriate. Dr. Chu noted that a review of the

²⁴⁹ *Comments on EnviroConsult and Scheffer Andrew Responses, Badlands Recreation Development Corp., Alberta Environmental Appeals Board File: 19-059 – 19-085, Water Act Approval 00406489-00-00 Update: August 2022*, prepared by Cliff Wallis.

²⁵⁰ 2020 Wallis Report at page 20.

borehole logs from the Approval Holder's geotechnical investigation²⁵¹ found that approximately 90% by mass of the suspended solids were less than 75 µm.

[374] At the hearing, Dr. Chu recommended that the Approval adopt the City of Calgary requirement of 85% removal of particles greater than 50 µm, as opposed to the current 85% removal of particles greater than 75 µm. The Appellants urged the Board to apply this more stringent requirement which they said Mr. Thurmeier acknowledged at the hearing was achievable.²⁵²

18.2.1.2 Approval Holder

[375] The Approval Holder stated that the proposed stormwater management system as described in the Final SMP will provide peak flow attenuation during the major storm events and particulate removal that meets the minimum performance criteria of 85% removal of 75-micron particulates, outlined in the Standards and Guidelines.²⁵³ Sediment forebays will be installed at the inlets of the existing wetlands to promote sedimentation of solids.²⁵⁴

[376] The Approval Holder submitted that the Approval conditions requiring the Approval Holder to: (1) develop a Siltation and Erosion Control Plan, and (2) monitor and repair any erosion that occurs in the stormwater management system and in the downstream watercourse²⁵⁵ to the Rosebud River will mitigate erosion and sedimentation concerns.²⁵⁶ The Approval Holder also pointed to the mitigation provisions in the BIA/EPP, specifically Condition 8.5: Sediment and Erosion Control, and the provision in the Final SMP for forebays to be cleaned a minimum of every 5 years or when sediment in excess of 0.5 m has accumulated.²⁵⁷

²⁵¹ Appellants' Evidentiary Documents attached to the Appellants' Initial Submission at page 1955.

²⁵² Appellants' Closing Arguments at paragraph 767.

²⁵³ Final SMP at page 16.

²⁵⁴ Final SMP at page 13.

²⁵⁵ The Board notes that Approval Condition 3.5 references "the downstream watercourse to the Rosebud River", however there is no definition of the term nor an explanation of where a "downstream watercourse" is found either in the stormwater management system or on the Badlands Development Area.

²⁵⁶ Approval Holder's Submission at paragraphs 31 and 38.

²⁵⁷ Approval Holder's Submission at paragraph 40; Final SMP at page 13.

[377] At the hearing, Mr. Thurmeier stated the Siltation and Erosion Control Plan required by the Approval had not yet been developed.

[378] The Final SMP (at page 8) noted that the reduction in peak discharge rate from this site (from a pre-disturbance rate of 434 L/s to 3.0 L/s) will reduce the risk of erosion and allow more time for settlement of suspended particles prior to discharge.

[379] The Final SMP (at page 13) recommended that erosion protection in the form of riprap will be required at all the inlet and outlet pipes, and silt fencing or geo-ridge around the stormwater management facility (“SWMF”) and wetlands perimeter is also an effective measure in slowing down the flow to minimize erosion and silts reaching the wetlands and Rosebud River during construction.

[380] The Scheffer Andrew Response²⁵⁸ noted that:

On the lower bench, runoff is routed through grass swales and collected in inlet forebays to remove sediment before being discharged into wetlands 1, 4, and 5 (at page 5).

Runoff from the north-east portion of the upper track is controlled by two dry ponds (SWMF 4 and SWMF 5 on Exhibit 5) and then routed through more than 300 m of grassed ditch/swale that will filter the runoff. At the end of the grassed ditch/swale, it enters a forebay designed to settle out sediment, and then is discharged to Wetland 5, prior to being discharged to the Rosebud River (at pages 7 and 8).

In addition, cuts in the range of 2 m are proposed for forebay areas to respect and protect the natural drainage system. On a micro level, cuts or fills in the range of 2 to 4 m are significant, but with a larger view, our opinion is that they are not significant when compared to the surrounding topography and do not change the natural drainage patterns. For reference, the surrounding topography includes an 8 to 10 m rise from the river bottom to the lower bench/wetlands, a 40 m rise from the lower bench/wetlands to the central knoll, and a 60 m rise from the lower bench to the upper plateau (at page 11).

²⁵⁸ January 5, 2021, letter from Scheffer Andrew to Brander Law.

[381] At the hearing, Mr. Zelazo would not commit to the 85% removal of particles greater than 50 µm standard recommended by Dr. Chu but acknowledged that standard is used in Calgary.

18.2.1.3 Director

[382] The Director submitted that mitigation measures in the Final WAIR (which forms part of the Approval), and requirements in the Approval (Conditions 3.4, 3.5, 3.7, 3.8, 4.0, 4.1, 4.2, 5.0, 5.1), impose an obligation on Badlands to actively take steps to protect the aquatic environment from potential adverse impacts of the Approval activities.²⁵⁹

[383] The Director noted that the Final WAIR lists mitigation measures, including that silt fences will be installed prior to stripping of the project area to prevent transfer of sediment into wetlands.²⁶⁰

[384] At the hearing, the Director stated he did not think it was necessary to use the 85% removal of particles greater than 50 µm standard recommended by Dr. Chu but acknowledged that standard is used in Calgary.

[385] The Director argued that Dr. Chu in his oral evidence (direct and cross) acknowledged, among others, that: (1) in his opinion, the Final SMP, as approved, did not fail to meet any of the Department's stormwater management policies and guidelines for a municipal drainage system; and (2) he had never prepared a stormwater management plan in support of a *Water Act* application.²⁶¹

18.2.2. Board's Analysis

[386] The Board acknowledges Ms. Clark's concerns about erosion and sedimentation risks arising from construction and operation of the BMR and the Badlands Activities, and the potential impacts to the Valley Wetlands.

²⁵⁹ Director's Response Submission at paragraph 225.

²⁶⁰ Director's Response Submission at paragraph 223.

²⁶¹ Director's Closing Arguments at paragraph 269.

[387] The Board also notes that the Approval already requires the Approval Holder to protect the aquatic environment from erosion and sedimentation (see Conditions 3.4, 3.5, and 3.7 of the Approval).

[388] The Board finds that sedimentation and erosion risks can be effectively mitigated through the appropriate development and implementation of the Siltation and Erosion Control Plan required by the Approval prior to commencing the Badlands Activities (see Conditions 4.0, 4.1, and 4.2 of the Approval).

[389] The Board heard conflicting evidence on the need for and value of a change in the guideline for sediment control, from 85% of sediment and solids larger than 75 µm to 85% removal of sediment and solids larger than 50 µm recommended by the Appellants.

[390] In this case, the Board prefers the evidence of the Director that the appropriate standard for particulate removal for municipal drainage system is set out in the Department's Stormwater Management Guidelines (trap 85% of sediment and solids larger than 75 µm). In making this finding, the Board notes that (1) Dr. Chu acknowledged that the Final SMP, as approved, did not fail to meet any of the Department's stormwater management policies and guidelines for a municipal drainage system; and (2) he had never prepared a stormwater management plan in support of a Water Act application. Therefore, the Board is not convinced that Appellants request to require the City of Calgary guidelines of 85% removal of sediment and solids larger than 50 µm is appropriate for this Approval.

18.3. Cumulative Effects on the Aquatic Environment

18.3.1. Submissions

18.3.1.1 Appellants

[391] At the hearing, Mr. Wallis stated that cumulative effects are the effects of all human activities on the landscape (including the wetlands and the native grasslands), and more specifically related to this appeal, the cumulative effects within this local area and region in terms of the loss of habitat. This project adds to all the existing effects from previous development decisions.

[392] The 2020 Wallis Report (at page 21) asserted that:

- There was no mention of cumulative effects in the Final WAIR (page 21);
- Given the rarity of wetlands within the Rosebud River valley, it is unacceptable that there has been no consideration of cumulative effects on wetlands and associated biodiversity in the valley (page 21); and
- The Approval does not consider cumulative effects (page 4).

18.3.1.2 Approval Holder

[393] The Approval Holder responded to the 2020 Wallis Report by noting that “there are no other developments planned within the vicinity that we are aware of that would add to the potential cumulative effects caused by development of these lands, so a cumulative effects assessment was not possible”.²⁶²

[394] The EIA/EPP (at page 57) noted that removal of Wetland 3 will not have any significant effects on the wetland habitat capability of the region, and in addition, compensation for disturbance to Wetlands 2 and 3 will be paid to restore or enhance wetland habitat and ensure there is a no-net-loss of wetland habitat in the region.

[395] At the hearing, Mr. Zelazo stated that the Badlands Lands is such a small area in comparison to all the other available habitats that it really should not even be a discussion on whether the impacts are significant.

18.3.1.3 Director

[396] The Director’s position was that the Appellants provided little argument and no evidence as to how the infilling and modification of wetlands authorized by the Approval will result in adverse environmental impacts or cause a significant adverse effect on the aquatic environment.²⁶³

[397] The Director submitted that it was unclear from the Appellants’ Initial Submission what, if any, adverse impacts to the environment the Appellants anticipate because of the Badlands

²⁶² EnviroConsult Response at page 11.

²⁶³ Director’s Response Submission at paragraph 233.

Activities. “Their submissions are speculative, and do not provide evidence of any potential environmental impacts they might allege”.²⁶⁴

[398] The Director also submitted the approved impacts to wetlands, as allowed under the *Water Act* and the Wetland Policy, do not constitute “serious or irreversible damage” to the aquatic environment. As the Final WAIR demonstrates, the infilling of the wetlands will have a limited adverse impact on the aquatic environment. Furthermore, wetland losses because of this activity will be offset through EPA’s Wetland Replacement Program.²⁶⁵

[399] The Director acknowledged the infilling of two wetlands and modification of three wetlands will have some limited impact on the environment. However, the Director submitted these Badlands Activities will not have a significant adverse effect on the aquatic environment or other water users.²⁶⁶

[400] Notwithstanding the limited impact, the Director noted that Approval Condition 3.4 addresses protection of the aquatic environment:

“The Approval Holder shall not undertake the activity in any manner or use any material that causes or may cause an adverse effect on the aquatic environment, human health or public safety.”

[401] At the hearing, Ms. Cooper testified that cumulative effects are addressed through the requirement for wetland replacement.

18.3.2. Board’s Analysis

[402] The Board heard the Appellants’ concerns that neither the Final WAIR nor the Approval addressed cumulative effects. The Board reiterates its previous finding that these appeals deal solely with the Badlands Activities, therefore the Appellants’ concerns related to the construction and operation of the BMR are not relevant here.

²⁶⁴ Director’s Response Submission at paragraph 232.

²⁶⁵ Director’s Response Submission at paragraph 243.

²⁶⁶ Director’s Response Submission at paragraph 176.

[403] The Approval Holder stated the Badlands Activities comply with relevant policies and guidelines, and the Director submitted that cumulative effects to the wetlands were addressed through the Wetland Replacement Program.

[404] The Board accepts the Approval Holder's statements that the Badlands Activities occupy a very small portion of the Rosebud River Valley and therefore are unlikely to contribute meaningfully to cumulative effects in the region.

[405] The Board finds that the Director considered the potential for cumulative effects to the aquatic environment and addressed them by including a provision in the Approval. Condition 3.4 of the Approval provides that the Approval Holder shall not undertake the activity in any manner or use any material that causes or may cause an adverse effect on the aquatic environment, human health or public safety. Furthermore, wetland losses due to the Badlands Activities will be offset through EPA's Wetland Replacement Program.

[406] The Board acknowledges that the Clark's and the Skibsted's have placed some of their lands in conservation easements through Western Sky Land Trust and commends their efforts to protect the Rosebud River valley. The Board also notes that the Approval Holder has designated a portion of the Badlands Lands as an environmental easement reserve. The Board is of the view that these efforts should help mitigate the potential cumulative effects of the Badlands Motorsport Resort in the valley.

19. EXISTING, POTENTIAL, AND CUMULATIVE HYDRAULIC, HYDROLOGICAL AND HYDROGEOLOGICAL EFFECTS

19.1. Hydraulic and Hydrological Effects

19.1.1. General Comments

[407] Key hydrology issues raised included adequacy of stormwater modelling, risk of the Rosebud River flooding, drainage into the Clark's lands in the northwest corner of the Badlands Development Area, and changes to wetland flow.

[408] Concerning the Approval's stormwater impacts to water quantity and drainage patterns, the Appellants specifically referenced Figure 4 (which shows the predevelopment

drainage basin) and Figure 5 (which shows the proposed stormwater drainage plan) from the Final SMP and testimony at the hearing, which they submitted demonstrated a significant alteration to the amount of water received by Wetlands 1 and 5.²⁶⁷

[409] Based on this evidence, the Appellants stated that the Final SMP proposes that Wetland 1 (the highest value Valley Wetland) will receive much less water because its catchment area is significantly reduced; and Wetland 5 will receive more water because of its larger catchment area.²⁶⁸

[410] The Appellants submitted that the water from the western coulee currently drains to Wetland 1, which then overflows to Wetlands 2 and 5. Under the Final SMP, the Appellants stated that water from the western coulee will flow to Wetland 4, where it will then overflow to the Rosebud River. The Appellants' position is the primary water source (the west coulee) for the best producing wetland (Wetland 1) will be redirected to Wetland 4.²⁶⁹

[411] The Appellants argued that the Director was unaware, until the hearing, that the Final SMP proposed sending less water to Wetland 1 and more water to Wetland 5.²⁷⁰ Therefore, there was "little or no consideration of the starving Wetland 1 and overflowing Wetland 5" until the hearing.²⁷¹

[412] Based on Figures 4 and 5 of the Final SMP, the Appellants further submitted that Badlands appears to propose using the county road and its ditch for drainage and that drainage will eventually flow into a forebay and then Wetland 5.²⁷²

²⁶⁷ Appellants' Closing Arguments at paragraph 154.

²⁶⁸ Appellants' Closing Arguments at paragraph 154, 658, and 659.

²⁶⁹ Appellants' Closing Arguments at paragraph 659.

²⁷⁰ Appellants' Closing Arguments at paragraphs 155 and 661.

²⁷¹ Appellants' Closing Arguments at paragraph 661.

²⁷² Appellants' Closing Arguments at paragraph 242.

[413] Ms. Clark stated that she was concerned the hydrological function of the whole natural system (the land above, the wetlands, and the river) is not clearly understood.²⁷³

[414] Concerning the evidence in the 2020 Wallis Report, the Appellants' primary positions were:

1. The Approval ignores the guidance for stormwater management, namely the objectives related to predevelopment hydrological conditions ... and preserving the natural drainage system (page 4);
2. The stormwater drainage system in the Final SMP is an extraordinarily complex endeavour with significant potential for disruption to the remainder of the wetland and drainage system (page 19). The Final SMP focuses on the mechanics of the stormwater drainage system, not on the natural vegetation and wildlife associated with the natural wetland and drainage system (page 20); and
3. It is my contention that all the objectives outlined in Alberta's guidance for stormwater management cannot be fully met if the Final SMP is allowed to proceed (page 32).

[415] The Approval Holder relied on the findings of the stormwater modelling in the Final SMP which addressed issues such as pre-development runoff, pre-development drainage pattern, and pre-development flow to develop a post-development model and the Final SMP. The post-development model showed that by matching the pre-development 24-hour runoff volume the resulting post-development peak discharge rate is conservatively lower than the pre-development peak discharge rate, which will reduce the risk of erosion and allow more time for settlement of suspended particles prior to discharge.²⁷⁴

[416] The Approval Holder noted that the Final SMP was designed to comply with the Stormwater Management Guidelines²⁷⁵ and that the stormwater management system design ensures that peak storm runoff will not exceed the current discharge from the lands.²⁷⁶

²⁷³ Ms. Clark's Notice of Appeal 19-070.

²⁷⁴ Director's Record at Tab 26.

²⁷⁵ Final SMP at page 9.

²⁷⁶ Approval Holder's Submission at paragraph 41.

[417] The Director stated the stormwater management system will not have significant adverse hydraulic, hydrological, or hydrogeological effects because: (1) post-development flow will be controlled to pre-development rates; (2) an adequate outlet exists for the proposed stormwater management system; and (3) no other significant water management impacts are anticipated.²⁷⁷

[418] The Director noted that the Final SMP: (1) provided a requirement to monitor and maintain the draws where new flow regimes will occur; (2) provided safe setbacks from top of slope for all ponds and lined ponds to prevent potential seepage; (3) provided sediment forebay sizing information, and a monitoring and maintenance program for these forebays; and (4) detailed how off-site drainage will be routed through the BMR to the Rosebud River.²⁷⁸

19.1.2. Stormwater Modelling

19.1.2.1 Submissions

Appellants

[419] The Appellants raised the following concerns that the Director should have considered in issuing the approval:

- I am concerned about the methodology used by the consultant of the SWMP to model storm runoff and the stormwater management facility sizing. The modelling used precipitation data from the City of Calgary, that is approximately 80 km away, to create the designed storms required for analyses. Given that precipitation is regionally variable and different in Calgary compared to Drumheller, and therefore also likely the Rosebud River Valley, it could be worrisome that the stormwater management plan is justified with a model that uses incorrect precipitation data;²⁷⁹
- I am concerned about the complex storm water plan that appears doomed to failure when we know the actual rainfall and spring runoff at this location are much greater;²⁸⁰

²⁷⁷ Director's Response Submission at paragraph 205.

²⁷⁸ Director's Response Submission at paragraph 196.

²⁷⁹ Statement of Kimberley Murray, adopted by Ms. Clark as part of her Notice of Appeal 19-070.

²⁸⁰ Mr. Clark's Notice of Appeal 19-069.

- You acknowledge having no site-specific rainfall data. There is no basin or regional plan supporting spot zoning of large-scale development in the Rosebud River Valley. We continue to be concerned rainfall events and snowfall melts greater than those modeled in your storm water plan have occurred, will continue to occur, and will not be mitigated. In other words, the storm water plan will fail for both the upper and lower track areas;²⁸¹ and
- I have concerns with the storm water management plan. There have not been enough studies and data recorded to provide accurate assessments of what is necessary to properly manage storm water for this type of development. We had a storm a couple years ago that dumped over 4 inches of rain in less than 2 hours. It created massive washouts in very minimal slope areas despite established roots in the crops. I can not imagine the mess it would have made with a development like that proposed on the valley slopes.²⁸²

[420] The Appellants' SOCs also noted the lack of site-specific rainfall data used in the stormwater management report as a concern.²⁸³ They noted that the use of Calgary rainfall data (intensity duration frequency ("IDF") curves) does not capture severe local rainfall events.²⁸⁴ Also, the current Guidelines reliance on historical data may not reflect the frequency and severity of future rainfall events influenced by climate change.²⁸⁵

[421] The Approval ignores the guidance for stormwater management, namely the objectives related to predevelopment hydrological conditions, confining development and construction to the least critical areas, minimizing changes to topography, and preserving the natural drainage system.²⁸⁶

[422] The 2020 Chu Report recommended that the Final SMP be revised such that:

²⁸¹ Response by Mr. and Ms. Clark to the Approval Holder in Director's Record at Tab 211.

²⁸² Mr. McMillan's Notice of Appeal 19-066.

²⁸³ Appellants' SOCs in Director's Record at Tabs 99, 100, 118, 137, and 142.

²⁸⁴ Mr. McMillan's Notice of Appeal 19-066; John Elton and Ann Gray-Elton Statement of Concern in Director's Record at Tab 213.

²⁸⁵ 2020 Chu Report at page 2; 2021 Chu Report at page 2.

²⁸⁶ 2020 Wallis Report at page 4.

1. It accommodates a minimum of 25% increase in rainfall to address climate change considerations; and
2. It can accommodate shorter and more severe rainfall events (i.e., that can collect and store stormwater run-off for events up to, at a minimum, the peak discharge from a 1 in 25 year, 24-hour duration rain fall event. The amount of stormwater that should be stored is approximately 30,000 m³).

Approval Holder

[423] The Approval Holder submitted that the stormwater system design ensures that peak storm runoff will not exceed the current discharge from the Badlands Lands.²⁸⁷

[424] In response to the Appellants' SOC's about the lack of site-specific rainfall data used to develop the Final SMP, the Approval Holder stated:

Site specific rainfall monitoring is not practical as, even if the monitoring time period was 5 to 10 years, it would not be long enough to reliably interpret what the 1:100-year rainfall intensity could be, whereas longer records are available for City's and Town's. For example, the City of Calgary IDF curve that was used is based on statistical probability using 48 years of data. The IDF curve for Calgary was used for modelling as it represents a conservatively higher 24-hour rainfall depth than that for Brooks, Medicine Hat, or Drumheller which are the other nearest reliable records.²⁸⁸

[425] In response to the 2020 Chu Report recommendation to revise the Final SMP to include 25% increase in rainfall assumptions to address climate change, and confirm that the system can accommodate shorter and more severe rainfall events, the Approval Holder stated that in the Final SMP design:

1. Ponds are sized based on the 1:100-year 24-hour rainfall. The system can also accommodate shorter duration events such as the 1:100-year 1-hour rainfall event which is more intense but less overall rainfall than the 24-hour event; and

²⁸⁷ Approval Holder's Submission at paragraph 41.

²⁸⁸ Scheffer Andrew SOC Response at page 2.

2. The proposed ponds all include 0.50 m of freeboard storage above the 1:100-year modelled elevations. This freeboard provides a significant safety factor.²⁸⁹

[426] Mr. Thurmeier stated at the hearing that the combination of Wetlands 1, 4 and 5, and the ponds being added in the Final SMP provided total storage of approximately 43,000 m³, thus meeting the storage volume suggested in the 2020 Chu Report.

[427] At the hearing, Mr. Thurmeier indicated that severe storms like the one mentioned by Mr. McMillan in his SOC would be larger than the 90 mm, 1 in 100 year, 24-hour storm the model is based on. However, the Final SMP (at page 16) noted that during major rainfalls greater than the 1:100-year event, stormwater would overflow into the downstream watercourse or directly into Rosebud River.

Director

[428] The Director noted that the Approval Holder had responded to the Appellants' SOCs, including their concerns about the lack of site-specific rainfall data used in the stormwater management plan.²⁹⁰

[429] The Director stated that the stormwater management system controls the quantity of water flowing from the development areas to the wetlands and ultimately the Rosebud River through:

- the use of dry and wet ponds on the upland areas to control runoff flows to pre-development rates and thereby minimize the potential for additional erosion on the existing drainage paths from the uplands areas to the valley floor – these wet and dry ponds met the design considerations outlined in the Standards and Guidelines;
- the use of grassed swales to transport water from the upland areas to the valley floor and in between the wetlands; and

²⁸⁹ Scheffer Andrew Response at pages 6 and 7.

²⁹⁰ Director's Response Submission at paragraph 24.

- the use of existing wetlands to provide additional stormwater storage... prior to discharging into the Rosebud River.²⁹¹

[430] The Director noted that in his 2020 Chu Review as well as at hearing, Dr. Chu raised concerns about climate change (although he notes that the stormwater management system “may already be built to address climate change in the region”) and the 1:100-year return period, which is the standard return period in the Stormwater Management Guidelines. The Director submitted that, respectfully, these are largely policy concerns that do not reveal a deficiency in the Director’s exercise of authority in deciding to issue the Approval or deciding which terms and conditions to include within it.²⁹²

19.1.2.2 Board Analysis (Stormwater Modelling)

[431] The Appellants raised concerns about the use of Calgary rainfall data in the stormwater modelling and were concerned specifically that the data would not reflect local severe storm events.

[432] The Approval Holder explained that the City of Calgary IDF curve is based on statistical probability using 48 years of data. The IDF curve for Calgary was used for modelling as it represents a conservatively higher 24-hour rainfall depth than that for Brooks, Medicine Hat, or Drumheller which are the other nearest reliable records. The Approval Holder also noted that the peak storm runoff from the system would be lower than the pre-development case.

[433] However, the Approval Holder did acknowledge that local severe storm events might not be reflected in the model data. Mr. Thurmeier did say that during major rainfalls greater than the 1:100-year event, stormwater would overflow into the downstream watercourse or directly into Rosebud River.

²⁹¹ Director’s Response Submission at paragraphs 200 and 201.

²⁹² Director’s Closing Arguments at paragraphs 66 and 67.

[434] The Board finds that using the Calgary data for stormwater modelling was appropriate for the Final SMP because they have a long history, are more conservative than data from nearby cities, and because site-specific data are not available.

[435] The Board further finds that, even if the model did not capture rare severe local storms, the stormwater management system was designed so that the additional rainfall would be safely conveyed off site (i.e., to the Rosebud River).

[436] With respect to Dr. Chu's recommendation that stormwater storage capacity be increased, the Board heard Mr. Thurmeier explain that the combination of the three wetlands (1, 4 and 5) and the ponds being added in the Final SMP provided total storage of approximately 43,000 m³, thus meeting Dr. Chu's recommended storage volume. Therefore, the Board finds that the storage capacity concerns have been addressed.

19.1.3. Flooding

19.1.3.1 Submissions

Appellants

[437] The Appellants' SOC's noted concern with increased runoff to the Rosebud River affecting flood level on the river.²⁹³

[438] The 2020 Chu Report (at page 2) acknowledged that a flood risk analysis for the Rosebud River was completed but noted that in his opinion the analysis should have used the 1:150-year or 1:200-year "hydraulic grade line", not the standard 1:100-year line.

Approval Holder

[439] The Approval Holder stated that the proposed development and the locations of stormwater management facilities²⁹⁴ in the Valley will be approximately 4.0 m to 5.5 m above the

²⁹³ Appellants' SOC's in Director's Record at Tabs 99, 100, 118, 137, and 142.

²⁹⁴ The Board understands "stormwater management facilities" to mean the components of the stormwater management system (e.g., the ponds, swales, and wetlands).

Rosebud River floodplain²⁹⁵, and that the flood study for Rosebud River used flow data from the Rosebud River, not City of Calgary data as understood by Dr. Chu.²⁹⁶

[440] In response to the Appellants' SOCs about increased runoff to the Rosebud River, the Approval Holder stated:

During a rainfall or snowmelt event, the peak discharge rate from the site to the River will be controlled by the proposed stormwater system. The proposed stormwater system will add 28,581 cm of runoff storage to control the increased runoff rate resulting from the paved areas; and

The total catchment area of the Badlands Site is only about 0.02% of the River's 478,590 ha catchment area, so the site has an extremely limited ability to contribute to downstream seasonal flooding on the river.

Director

[441] The Director stated that minimal impacts from the BMR to the Rosebud River were anticipated, provided the stormwater management system in the Final SMP is properly constructed, operated, and maintained.²⁹⁷

19.1.3.2 Board Analysis

[442] The Appellants raised concerns about flooding of the Rosebud River from excess water leaving the stormwater management system and the potential for the Rosebud River to flood the stormwater management system.

[443] The Appellants raised a concern about increased runoff affecting flood level of the Rosebud River, and Dr. Chu recommended using the 1:150- or 1:200-year "hydraulic grade line" rather than the 1:100-year line.

[444] The Approval Holder noted there is no infrastructure in the modelled flood plain, and that the catchment area of the Badlands Lands is only a fraction of the Rosebud River's total

²⁹⁵ Final SMP at page 6; Comprehensive Site Development Plan at page 12.

²⁹⁶ Approval Holder's Closing Arguments at page 14.

²⁹⁷ Director's Record at Tab 31.

catchment area, so the BMR has an extremely limited ability to contribute to downstream seasonal flooding on the river.

[445] Based on the Approval Holder's modelling, the Board is persuaded that there will be limited potential for increased flooding of the Rosebud River arising from the BMR because the peak storm runoff from the stormwater management system would be lower than the pre-development case and that the small size of the Badlands Lands has an extremely limited ability to contribute to downstream seasonal flooding on the river.

[446] The Board also finds that flooding of the Rosebud River will have no impact on the BMR or Badlands Activities because the BMR and Badlands Activities infrastructure is above the river's flood line.

[447] Having regard to the above, the Board finds that: (1) flood risk due to the Rosebud River has been adequately quantified in the Final SMP and found to be negligible, and (2) the stormwater management system as designed in the Final SMP will not increase the risk of the Rosebud River flooding.

19.1.4. Drainage

19.1.4.1 Submissions

Appellants

[448] The Appellants stated that the Badlands Development Area Map (Exhibit 20) does not contain the drainage proposed in the Final SMP (Figure 5) along the County road and its ditch in the southeast portion of the Badlands Development Area.²⁹⁸

[449] At the hearing Ms. Clark expressed concern that the stormwater management system design would not necessarily prevent water from the BMR moving on to her property, which was why she was requesting the berm shown in the Final SMP be built.

²⁹⁸ Appellants' Closing Arguments at paragraph 240, 242 and 243.

[450] The Appellants argued that if the Board recommends granting the Approval, the Appellants are seeking the additional conditions outlined by Ms. Clark:²⁹⁹

1. Specifically, Ms. Clark requested that a condition be added to the Approval requiring a 6 foot tall berm (as identified in Figure 2, Figure 5, and Table 3 of the Final SMP) be built at the same time the stormwater system is constructed.³⁰⁰ Concerning access to construct the berm, Ms. Clark submitted that Badlands can use the road allowances on the west, north and northeast parts of the project area;³⁰¹ and
2. In addition, Ms. Clark also requested a condition that the two culverts (one in the berm and one under the racetrack on the west side) referenced in the Final SMP be constructed such that any water flowing through these culverts flows onto the Badlands' property and that Badlands maintain the flow through the culvert (i.e., that it be kept free of ice, debris and wildlife).³⁰²

Approval Holder

[451] The Approval Holder stated Ms. Clark's concern about the stormwater pond adjacent to the low point on the west shared property line (SWMF3 shown as "D" on Figures 5 and 5A in the Final SMP) spilling onto her property, was shown to be incorrect. The elevation along the shared property line, the pond's normal water level, high water level, and spill elevation through Badlands' land were reviewed to demonstrate that the pond could only ever spill through Badlands' land.³⁰³

[452] At the hearing, Mr. Zelazo agreed to have a condition requiring Badlands to build the berm identified in the Final SMP between his property and that of the Clark's. However, he noted that access to the Clark's property would be required to properly construct the berm.

²⁹⁹ Appellants' Closing Arguments at paragraphs 752 to 757.

³⁰⁰ Appellants' Closing Arguments at paragraphs 752 to 757.

³⁰¹ Appellants' Closing Arguments at paragraphs 753 and 754.

³⁰² Appellants' Closing Arguments at paragraph 757.

³⁰³ Approval Holder's Closing Arguments at page 13; Exhibit 4 in Scheffer Andrew Response showing contour lines and water flow direction at the property line.

Director

[453] The Director noted that the Final SMP detailed how off-site drainage will be routed through the development to the Rosebud River.³⁰⁴

19.1.4.2 Board Analysis

[454] With respect to the Appellants' assertion that the Badlands Development Area Map (Exhibit 20) does not contain the drainage proposed in the Final SMP (Figure 5) along the County road and its ditch in the southeast portion of the Badlands Development Area, the Board notes that the Badlands Development Area Map was developed solely as a visual aid for the hearing, and that the map in the Final SMP has been incorporated by reference into the Approval and therefore is the official map for the stormwater management system.

[455] With respect to Ms. Clark's concerns about potential drainage from the Badlands Development Area onto her property, the Approval Holder explained that drainage from the Clarks' land will run onto the Badlands Development Area, not the other way around and that the stormwater management system was designed conservatively to accommodate runoff more than the 1:100-year storm. The Board finds that Ms. Clark did not provide technical evidence to rebut the Final SMP. Therefore, the Final SMP's design of the stormwater management system is adequate to protect the Clark lands.

[456] Notwithstanding that the Final SMP found that drainage would not be a problem, the Approval Holder agreed in the hearing to construct the berm along the Clarks' property, providing they could get access to the Clarks' land to conduct the work. The Board notes that Ms. Clark indicated that the Approval Holder could use current road allowances to build the berm. The Board adopts the Approval Holder's suggestion and will recommend the Approval be varied to require construction of the berm.

³⁰⁴ Director's Response Submission at paragraph 196.

19.1.5. Water Flow

19.1.5.1 Submissions

Appellants

[457] The Appellants submitted that there is scant evidence on the impacts of stormwater on Wetland 1 and Wetland 5.³⁰⁵

[458] Ms. Clark indicated in her Notice of Appeal that the Director should have considered the following in issuing the Approval:

- Wetlands 4 and 5 being described as "avoided" does not indicate that any adverse effects could happen to these wetlands, when in fact stormwater will flow through these wetlands, and the SWMP indicates that, "there would be between 5 and 10 times the amount of water entering Wetland 4 and Wetland 5 than what occurs during current conditions" and that "their function would change somewhat" due to the increase in water.³⁰⁶

[459] The 2020 Wallis Report stated that Wetlands 1, 4 and 5 will be impacted by alterations in flow. The report noted that wetlands will be impacted by more rapid water flows and contaminants associated with the expansion of hard surfaces in the valley and on the uplands as well as native vegetation removal and cuts and fills associated with grading for the racecourses and stormwater drainage system.³⁰⁷ Specifically, the Appellants noted that:

Under the proposed stormwater plan, Wetland 1 will receive much less water because its catchment area is significantly reduced. Currently, water from the western coulee drains to Wetland 1, which then overflows to Wetlands 2 and 5. Under the stormwater plan, water from the coulee will flow to Wetland 4, where it will then overflow to the Rosebud River. The primary source of water (the west coulee) for best producing Wetland 1 will be redirected. In similar fashion, Wetland 5 receives much more water. Currently, its primary source of water comes from Wetland 1. Under the stormwater plan, Wetland 5 will receive a substantially larger catchment area. There is little to no consideration of the impacts of starving Wetland 1 and overflowing Wetland 5. As noted above, the Director was unaware

³⁰⁵ Appellants' Closing Arguments at paragraph 657.

³⁰⁶ Statement of Kimberley Murray, adopted by Ms. Clark as part of her Notice of Appeal 19-070.

³⁰⁷ 2020 Wallis Report at pages 18 and 20.

that the storm water plan proposed sending less water to Wetland 1 until the hearing.³⁰⁸

Approval Holder

[460] The Approval Holder stated that Wetland 1 drains into Wetlands 4 and 5, before draining into the Rosebud River. The stormwater management system is expected to result in increased and more frequent runoff into these wetlands compared to the pre-development scenario.³⁰⁹

[461] In the final stormwater management system design, Wetlands 1, 4 and 5 will be hydraulically connected via grass swales. Wetland 1 will overflow through a culvert into Wetland 4 and overflow through a grassed swale into Wetland 5. Storm runoff from the upper and lower tracks will pass through these wetlands to maintain pre-development flow patterns prior to reaching Rosebud River.³¹⁰ Wetlands 4 and 5 will have control structure to control the peak discharge rate to 433 L/s and the total volume of water release within 24 hours to the predevelopment runoff level.³¹¹

Director

[462] The Director proposed addition of a Wetland Monitoring and Reporting condition to the Approval that would address, among other things, any changes to the wetlands.

19.1.5.2 Board's Analysis

[463] The Appellants expressed concerns about the effect of flow changes to Wetlands 1, 4, and 5, specifically that Wetland 1 will get much less inflow while Wetlands 4 and 5 will get much more, thus potentially affecting their function. The Board notes that the Appellants have not provided specific examples or other supporting evidence to show what the "effects" to the wetlands

³⁰⁸ Appellants' Closing Arguments at paragraphs 658 to 661.

³⁰⁹ Final SMP at page 9.

³¹⁰ Final SMP at page 12.

³¹¹ Final SMP at page 14.

might be, and the Board is therefore unable to find that the effects, if any, would not be mitigated by the stormwater management system design.

[464] The Approval Holder agreed that flows will change but noted that Wetlands 4 and 5 will have structures to control the peak discharge rate to 433 L/s and the total volume of water release within 24 hours to the predevelopment runoff level.

[465] The Board finds that, from a hydrological perspective, changes in water flow to the individual wetlands may occur but the overall hydrology is adequately controlled by the stormwater management system design.

[466] The Board adopts the Director's proposed addition of a Wetland Monitoring and Reporting condition to the Approval and will recommend varying the Approval to include the proposed Wetland Monitoring and Reporting condition.

19.2. Hydrogeological Effects

19.2.1. Submissions

19.2.1.1 Appellants

[467] The 2020 Chu Report (at page 2) noted that a geotechnical evaluation was done by the Approval Holder, and the 2021 Chu Report (at page 3) noted that out of the 33 boreholes in the geotechnical evaluation only 2 (BH-01 and BH-28) were completed to bedrock. Neither of these boreholes, completed with groundwater monitoring wells, showed any signs of water. The remaining boreholes drilled on this lower bench were completed to a shallower depth and did not encounter the bedrock.

[468] The 2020 Chu Report asked:

Were any shallow unconfined aquifers detected? Since this site is on the banks of the Rosebud River, I would expect some influence of the river water level to affect the flood plain aquifer. It is this aquifer that poses the most susceptibility to effect due to surface drainage. Many traditional Geotechnical reports do not investigate this phenomenon. Their primary interest are geotechnical considerations, and their monitoring program reflects this. Of more interest to this site is the effect of stormwater runoff on the ground and surface waters. This is accomplished with a Hydrogeologic investigation, where depth to groundwater is determined and hydraulic conductivities and gradients are measured and assessed.

[469] The 2021 Chu Report noted that geotechnical investigations such as the one done for Approval Holder are not designed to detect and assess shallow unconfined aquifers and the potential of their impairment. Dr. Chu stated that just because groundwater was not detected in the boreholes does not prove that there is no shallow groundwater. Only two of the boreholes were completed to bedrock and neither of those was in the vicinity of the Valley Track where the potential for ground water contamination from surface water drainage is the greatest.³¹²

[470] The 2020 Chu Report (at page 3) concluded “In my opinion, a proper hydrogeology investigation should occur prior to granting any approval for this site.”

[471] During testimony at the hearing, Dr. Chu confirmed that the cost of a hydrogeological investigation was relatively low and ought to be performed given the type of soils present at the Badlands site.³¹³

19.2.1.2 Approval Holder

[472] The Approval Holder stated that stated the geotechnical investigation did not encounter groundwater in any of the test holes after drilling, nor 16 and 18 days after drilling, and included 10 boreholes in the vicinity of the lower track nearer to the river.³¹⁴

[473] At the hearing, Mr. Thurmeier stated that the clays on the upper plateau have very low permeability and would isolate any surface water from the groundwater aquifer. Mr. Thurmeier also noted he was not aware of a hydrogeological study being a requirement of the stormwater management design, and one was not requested by EPA throughout the approval process.³¹⁵

³¹² 2021 Chu Report at pages 2 and 3.

³¹³ Appellants’ Closing Arguments at paragraph 764.

³¹⁴ Scheffer Andrew Response at page 7.

³¹⁵ Approval Holder’s Closing Arguments at page 15.

19.2.1.3 Director

[474] The Director relied on the provisions of the Approval to address potential groundwater issues:

Badlands must investigate any complaints accepted by the Director related to allegations of surface water or groundwater interference as a result of the Badlands Activities, and report the results of the investigation to the Director, including remedial and mitigative measures.³¹⁶

[475] At the hearing the Director stated that a hydrogeological assessment was not required because the Approval Holder found no groundwater and therefore no consequence to the groundwater which would require a separate authorization.

19.2.2. Board's Analysis

[476] Dr Chu recommended a hydrogeological investigation be conducted since the geotechnical investigation done for Badlands was not suitable to detect and assess shallow unconfined aquifers and the potential of their impairment, specifically in vicinity of the Valley Track where the potential for groundwater contamination from surface water drainage is the greatest.

[477] The Approval Holder and the Director indicated that hydrogeological investigations are not required for stormwater management system design.

[478] The Board acknowledges the Appellants' concerns about potential groundwater contamination but declines to require a hydrogeological investigation for the Badlands Development Area as the Approval Holder has demonstrated that no groundwater was found during the geotechnical investigation. Further, the clays on the upper plateau have very low permeability and would isolate any surface water from the groundwater aquifer.

20. SUMMARY

[479] The Board finds that the Director considered all the mandatory Matters and Factors in the Approved Water Management Plan when he issued the Approval.

³¹⁶ Director's Response Submission at paragraph 225.

[480] However, the Board will make recommendations to the Minister to address some of the Appellants' specific concerns for the Badlands Activities related to the two Matters and Factors of the Approved Water Management Plan, as found in Sections 16 and 17 above.

PART 10. WAS THE PRECAUTIONARY PRINCIPLE PROPERLY APPLIED?

21. SUBMISSIONS

21.1. Appellants

[481] The Appellants submitted that the Director failed to properly apply the precautionary principle in issuing the Approval.³¹⁷

[482] They stated their submission coincided with the precautionary principle adopted by the Supreme Court of Canada in *Spraytech*:

`In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.³¹⁸

[483] They also noted that the Board in *Mikisew Cree First Nation v. Director, Northern Region, Regional Services, Alberta Environment, re: Truenorth Energy LP*. (21 April 2005), Appeal No. 02-141-D (AEAB), 2005 ABEAB 20 ("*Mikisew*") at paragraphs 52 and 53 relied on and applied this principle.³¹⁹

[484] The Appellants submitted that the Approval as drafted, with few exceptions, applies an "if you break it, try to fix it and let us know" approach. It is not designed to prevent damage to riparian resources nor to prevent negative impacts to the aquatic environment. The Approval is thereby distinguishable from the approval considered in *Mikisew*. In that decision, the Board noted

³¹⁷ Appellants' Initial Submission at paragraph 5.

³¹⁸ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 ("*Spraytech*") at paragraphs 31 and 32.

³¹⁹ Appellants' Closing Arguments at paragraph 664.

that it was satisfied that the approval met the requirements of the precautionary principle. Contrast that with the current circumstances, in which this Approval sorely lacks any adherence to the precautionary principle.³²⁰

[485] The Appellants submitted that the precautionary principle is endemic throughout the Wetland Policy.³²¹ For example, they cited the Avoidance section:

Under the wetland mitigation hierarchy, the primary and preferred response is to avoid all impacts on wetlands. *Avoidance is the most efficient and effective mitigation strategy, as it eliminates the potential risks and inherent uncertainty of other mitigation practices.* Since avoidance prevents direct wetland impacts, it is typically the most desired form of wetland mitigation.³²² (*Emphasis added by the Appellants.*)

[486] The Appellants stated that the importance of applying the precautionary principle is highlighted by what the Appellants referred to as the Director's lackluster enforcement. The Appellants noted the Board's reliance upon *Lapointe* wherein EPA issued a stop work order and enforced requirements contained within the *Water Act*. Unfortunately, EPA's enforcement is not evenly applied. The Appellants cited another decision where EPA previously advised the Appellants' counsel that it is the sole responsibility of proponents to identify whether they are in compliance or outside compliance with the *Water Act*.³²³ The Appellants submitted that *Lapointe* is an outlier in terms of EPA enforcement, and its outlier status reinforces the necessity of applying the precautionary principle to this Approval.³²⁴

[487] The Appellants also expressed concern with the Approval's complaint reporting process, stating that Mr. Zelazo testified that the Approval Holder will develop an operational plan

³²⁰ *Mikisew* at paragraphs 52 and 53.

³²¹ Appellants' Closing Arguments at paragraph 666.

³²² Appellants' Closing Arguments at paragraph 665.

³²³ Appellants' Closing Arguments at paragraph 774.

³²⁴ Appellants' Closing Arguments at paragraphs 771 to 775.

once there is a complaint that needs to be dealt with. In the Appellants' view, the bifurcated reporting process contemplated in this Approval is the reason the precautionary principle exists.³²⁵

21.2. Approval Holder

[488] The Approval Holder acknowledged that the Appellants have successfully identified the well-known judicial consideration of the precautionary principle by the Supreme Court of Canada in *Spraytech*. However, the Appellants ignored the following condition in the quote: "lack of scientific certainty."³²⁶

[489] The Approval Holder submitted that the Final WAIR discloses solid evidence as to why the Wetland classification is correct, and the precautionary principle does not come into play for the Badlands Development Area. The field data collected is not uncertain, or based on old policies, or waiting on new policies or further studies – the Badlands Development Area has been studied for years and have resulted in continually updated reports.³²⁷

[490] The Approval Holder stated that 'harm' related to the Approval is not speculative either – it is known for a fact that Wetlands 2 and 3 will be filled in. It is also known as a fact that the Approval Holder paid \$32,275 for wetland replacement and there is no danger of other harm because filling in the other wetlands is not allowed by the Approval. The other wetlands will be modified by the introduction of forebays to allow for cleaning of the water before it gets into Wetlands 1, 4, and 5 – this is to avoid impacting the wetlands and the Rosebud River. Furthermore, the Approval Holder submitted that all the work will be done under specific Approval conditions, plus the stringent conditions contained in the Final WAIR and EIA/EPP.³²⁸

³²⁵ Appellants' Closing Arguments at paragraphs 769 and 770.

³²⁶ Approval Holder's Submission at paragraph 86.

³²⁷ Approval Holder's Submission at paragraphs 87 and 88.

³²⁸ Approval Holder's Submission at paragraph 89.

[491] The Approval Holder concluded that nothing in the Badlands Motorsport Resort has anything close to the type of uncertainty that would justify invoking the precautionary principle.³²⁹

21.3. Director

[492] The Director submitted that the Appellants stated an application of the precautionary principle and the Wetland Policy required the Director to find that Badlands must avoid all the wetlands. The Director stated that the precautionary principle does not preclude all development that could have impacts on the environment.³³⁰

[493] The Director stated that the Appellants have made numerous submissions about the precautionary principle, suggesting that it “is endemic throughout the Wetland Policy.” They seem to argue that “until there is full and adequate consideration” of certain issues, the precautionary principle “requires avoidance.” The Director maintained that this is a misapplication of the Wetland Policy, which allows for minimization and replacement where impacts to wetlands are unavoidable. The Wetland Policy details guiding principles to respond to uncertainty (e.g., Wetland Policy at page 17, Minimization Guiding Principles 2, 3, 4, 5, 6, 7 and 8) and does not “require avoidance” simply because uncertainty exists.³³¹

[494] The Director submitted that, in discussing the precautionary principle, the Board in *Mikisew* found, at paragraphs 52 and 53, that a director can give effect to the precautionary principle by including approval conditions “in order to respond to situations that may arise that were not anticipated.” The Board observed that “it is virtually impossible to predict all potential effects of a project,” and in light of this uncertainty, an approval can incorporate the precautionary principle through notification provisions, mitigation measures, reporting requirements and monitoring programs. To the extent that the precautionary principle applies to these facts, the

³²⁹ Approval Holder’s Submission at paragraph 90.

³³⁰ Director’s Response Submission at paragraphs 238 and 24.

³³¹ Director’s Closing Arguments at paragraphs 277 and 278.

Director has given effect to it by including mitigative and remedial terms and conditions in the Approval.³³²

22. BOARD'S ANALYSIS

[495] The precautionary principle comes from international law, specifically the *Bergen Ministerial Declaration on Sustainable Development* (1990) which states³³³:

“In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

[496] Underlying the precautionary principle seems to be an assumption that development is necessary and desirable. Based on that assumption, there are two components of the principle. The first component says that for development to be sustainable, it must be undertaken in a way that protects the environment. This recognizes the fact that development that causes serious or irreversible environmental damage will hinder any future development. It is a balancing exercise. Similarly, the Board concluded earlier in this Report that the best way to bear in mind the need for economic growth and prosperity in Alberta in accordance with section 2(b) of the *Water Act* is to fairly and fully consider the impact of a proposal with respect to the environment, other water users and water management.

[497] The second component says that because sustainable development relies upon protection of the environment, lack of full scientific uncertainty about potential environmental harm should not be an excuse to avoid protective measures.

[498] In *Mikisew*, the Board found that the director had “integrated” the precautionary principle by prescribing terms and conditions that addressed potential problems and minimized harm to the appellants, the public and the environment:

³³² Director's Closing Arguments at paragraphs 279 and 280.

³³³ *Spraytech* at paragraph 31.

“[52] With respect to the precautionary principle, the Appellant’s argued in their submission that “...uncertain effects of unproven technology on the environment are such that irreparable harm could occur if they are not adequately dealt with. As such the Precautionary Principle should be applied.” After reviewing the Approval, the Board notes a number of the terms and conditions in the Approval incorporate the cautionary principle ... These are all indicative of the precautionary principle being applied within the Approval ... Although it is virtually impossible to predict all potential effects of a project, the Director has incorporated these conditions into the Approval in order to respond to situations that may arise that were not anticipated, thus following the precautionary principle.

[53] The Board is of the opinion the Director has taken the appropriate measures in the Approval to ensure potential problems are identified quickly, and the risk of any harm to the Appellants or the public in general, and the environment would be minimized, and thereby the precautionary principle has been integrated into the Approval.”

[499] The Board also discussed the precautionary principle in *Alberta Foothills and Municipality of Crowsnest Pass v. Director, Southern Region, Environmental Management, Alberta Environment*, (23 December 2009), Appeal No. 08-016-R (AEAB), 2009 ABEAB 27 (“*Crowsnest Pass*”).

[500] *Alberta Foothills* involved an appeal of the director’s decision refusing to issue a licence or preliminary certificate for diversion or use of groundwater. The main issue for the director when reviewing the application was whether the proposed source of water was connected to surface water and, if it was connected, then the source of water was reserved water, and a licence could not be issued according to the terms of an allocation order. The director refused the application on the basis of incomplete information, including insufficient technical details required on the presence or absence of a barrier between the aquifer and reserved water. The director had asked the appellant to undertake further testing, but the appellant declined to do so. The evidence submitted by the appellant did not demonstrate on the preponderance of the evidence that a barrier existed that prevented the proposed wells from being hydraulically connected to reserved water.

[501] In *Crowsnest Pass*, the Board found that based on the evidence and data provided, significant uncertainty remained as to whether the water applied for was hydraulically connected to surface water. Given the absence of compelling site-specific data that could demonstrate with

a greater degree of certainty that the aquifer is not connected to a surface water body, the Board upheld the Director's decision and recommended no licence be issued.

[502] *Alberta Foothills* and *Crowsnest Pass* involved situations where there was significant scientific uncertainty regarding whether groundwater was in fact reserved water. In keeping with the precautionary principle, that uncertainty was not used as an excuse to avoid protective measures. Since the issue in both cases was whether the water applied for was hydraulically connected with reserve water and therefore incapable of being licensed, the only practical protective measure available was to deny the application.

[503] The Board understands that the Appellants have concerns about uncertainty arising from the type of development and the potential impacts that may arise, as well as concerns about whether the Approval Holder or Director will follow through when complaints are made.

[504] Insofar as the precautionary principle requires balancing the interests of development with protection of the environment and prevents using scientific uncertainty as an excuse not to impose environmentally protective measures, the Board is satisfied that the Director has acted in accordance with it. To the first component, the Director in this case was satisfied that he had sufficient evidence in front of him to issue the Approval. The Director imposed several terms and conditions, including: to monitor for and repair erosion; to ensure reclamation be done in conjunction with and upon completion of construction; to develop and implement a written siltation and erosion control plan; and to investigate written complaints accepted by the Director. To the second component there are no scientific uncertainties in this case akin to those that were present in *Alberta Foothills* and *Crowsnest Pass*, and whatever uncertainties exist were not used by the Director to justify the Approval.

PART 11. WAS THE WETLAND POLICY PROPERLY APPLIED?

23. ARE THE WETLAND POLICY, ANY OF THE DIRECTIVES, OR ANY APPLICABLE GUIDELINES BINDING?

23.1. Submissions

[505] The Appellants submitted the Wetland Policy, the Mitigation Directive, and the Stormwater Management Guidelines have been elevated to subordinate legislation and are legally binding on the Director. They argue that if a policy is elevated to the status of a law, then the decision maker is required to follow it.³³⁴

[506] Of the three regulatory documents, the Appellants submit the Wetland Policy is the only one binding upon the Director.³³⁵

[507] The Appellants acknowledge that while the Director is required to follow the Wetland Policy, the Director has a certain level of discretion in how he applies it.³³⁶

[508] The Appellants noted that the Director stated at the hearing that he afforded the Wetland Policy great weight.³³⁷

[509] According to the Appellants it was through the Wetland Policy that the Director applied the ABWRET-A³³⁸ and considered Badlands' efforts at avoidance.³³⁹

[510] The Director submitted that the Wetland Policy is not subordinate legislation but is a non-binding policy document.³⁴⁰

³³⁴ Appellants' Closing Arguments at paragraphs 536 and 544.

³³⁵ Appellants' Closing Arguments at paragraph 557.

³³⁶ Appellants' Closing Arguments at paragraph 620.

³³⁷ Appellants' Closing Arguments at paragraph 561.

³³⁸ The Board notes that the Parties and the Department's documents refer to the ABWRET-A as a form, a tool and a model. In this Report, the Board uses ABWRET-A a generic term for all of these.

³³⁹ Appellants' Closing Arguments at paragraph 560.

³⁴⁰ Director's Closing Arguments at paragraphs 140 to 145.

23.2. Board's Analysis

[511] By the Appellants' own submissions, the Director applied the Wetland Policy, and the Director has discretion in deciding how to apply it. The Appellants disagree with how the Director exercised his discretion in applying the Wetland Policy. It is the Board's view that the Wetland Policy is applicable, and that questions about how it was and should be applied are properly before the Board. As such, whether the Wetland Policy constitutes subordinate legislation and is legally binding and enforceable is immaterial. Therefore, the Board makes no determination as to the legally binding nature of the Wetland Policy and whether it constitutes subordinate legislation.

[512] The Board finds that the purpose of the Wetland Policy is to provide a strategic framework for conserving, restoring, and protecting Alberta's wetlands.³⁴¹ The strategic framework informs the management of wetlands throughout Alberta.³⁴² It provides the strategic direction, tools, guidelines, and knowledge systems required to support a comprehensive, cumulative effects-based management approach to wetlands.³⁴³ It enables a robust decision-making framework for approvals.³⁴⁴

[513] The Board finds that the Wetland Policy focuses on three strategic directions, one of which is flexible wetland management. This flexibility ensures that place-based environmental, social, and economic values are reflected in wetland management.³⁴⁵ The Wetland Policy allows for regional differences in its application and implementation.³⁴⁶

[514] The Board finds that, while the Wetland Policy is intended to be primarily implemented through decisions made under the *Water Act*, the Policy does not exempt a proponent

³⁴¹ Wetland Policy at page 6.

³⁴² Mitigation Directive at pages 1 and 2.

³⁴³ Wetland Policy at pages 2, 5, and 6.

³⁴⁴ Wetland Policy at page 5.

³⁴⁵ Wetland Policy at page 8.

³⁴⁶ Wetland Policy at page 10.

from other regulatory requirements set out under federal, provincial and municipal statutes and policies.³⁴⁷

24. AVOIDANCE CONSIDERATION UNDER THE WETLAND POLICY

24.1. Submissions

24.1.1. Appellants

[515] The Appellants quoted the definition of “avoid” in the Wetland Policy (at page 5):

To prevent impacts to a wetland by identifying an alternate project, activity, design, or site, or abandoning the project or activity altogether or by denial of an application by the regulator.

[516] They submitted that contrary to the Director’s statement that it was not his role to turn down development, the definition of ‘avoid’ specifically contemplates his authority to do so: one way to avoid is for the regulator to deny the application.³⁴⁸

[517] The Appellants submitted that the Director failed to follow the guiding principles (in the Wetland Policy at page 16) when evaluating Badlands’ responsibility to avoid. The Appellants submitted:

1. Avoidance was never properly considered in this case. The Director only relied upon a 3-paragraph statement in the Final WAIR that contained a series of misrepresentations when explaining the proponent’s attempts at avoidance;
2. These wetlands were never properly valued, making the practicality of avoidance impossible to determine;
3. Badlands never demonstrated “that alternative projects, project designs, and/or project sites have been thoroughly considered and ruled out for justifiable reasons”; and
4. The Director never articulated a process for evaluating feasible project alternatives. Most importantly, the Director repeatedly stated that he refused to consider economic factors when evaluating this project.³⁴⁹

³⁴⁷ Wetland Policy at page 6.

³⁴⁸ Appellants’ Closing Arguments at paragraphs 650 and 651.

³⁴⁹ Appellants’ Closing Arguments at paragraph 576.

[518] The Appellants stated that the Wetland Policy requires the Department to value wetlands to make decisions about avoidance, minimization, and replacement. The higher the wetland value, the more impetus on avoiding impacts to that wetland.³⁵⁰

[519] They further submitted that the Wetland Policy's emphasis on avoidance is paramount to its function,³⁵¹ and pointed to statements in the Wetland Policy in support of their argument:

In applying this approach, the Wetland Policy will focus first on the avoidance and minimization of impacts on all wetlands, regardless of their relative wetland value category (at page 13).

The mitigation hierarchy will encompass consistent and predictable processes. It will begin with (and place the greatest emphasis on) wetland avoidance... (at page 15).

[520] The Appellants further submitted that the Mitigation Directive outlines that it is the responsibility of the proponent to demonstrate avoidance. The Mitigation Directive provides direction on the requirement to prove avoidance:

The onus is on the applicant to demonstrate (a) avoidance of wetlands, and (b) preservation of relative wetland value. Evidence of avoidance can include:

- Options considered for relocating the activity;
- Alternative activities considered at the proposed location;
- Modifications considered to the proposed activity; and
- A comparative analysis of options.³⁵²

The Appellants stated that alternatives to the racetrack's impact on the Valley Wetlands were never seriously considered³⁵³ and that no evidence of avoidance was presented by Badlands.³⁵⁴

³⁵⁰ Appellants' Closing Arguments at paragraph 99.

³⁵¹ Appellants' Rebuttal Submission at paragraph 95.

³⁵² Appellants' Closing Arguments at paragraph 150.

³⁵³ Appellants' Rebuttal Submission at paragraph 95.

³⁵⁴ Appellants' Closing Arguments at paragraph 151.

Further, they state that the Director neither asked for nor was he presented with any evidence of the foregoing considerations.³⁵⁵

[521] The Appellants stated that the Mitigation Directive (at page 3) provides that “avoidance may be required by the regulatory body in consideration of, but not limited to, any of the following: ... Municipal plans and bylaws under the *Municipal Government Act*.” In this case, the ASP specifically incorporated avoidance of all four Valley Wetlands. Despite this fact, the Director repeatedly testified at the hearing that he gave the Area Structure Plan little consideration.³⁵⁶

[522] The Appellants submitted that section 4.1 of the Final WAIR discussing avoidance contained several errors, including a statement that “The original track layout had it remained in the initial option, would have resulted in the complete removal of all five wetlands.” The Appellants noted that Maps 7 to 9 in the ASP showed that the original track layout avoided all four Valley Wetlands.³⁵⁷

[523] The Appellants stated that at the hearing, both the Director and Mr. Thurmeier acknowledged that the racetrack was not redesigned to avoid steep slopes. Three sections of the Valley Track – (1) the section east of Wetland 5, (2) the section west of Wetland 4, and (3) the section east of Wetland 4 – all use steep slopes. As noted by Mr. Thurmeier, using those steep slopes makes the track more entertaining for drivers.³⁵⁸

[524] The Appellants noted another important consideration in the Mitigation Directive (at page 3) is that the Directive requires avoidance when “wetland-dependent species that are listed as endangered or threatened species under the *Wildlife Act*, RSA 2000, c W-10, *Wildlife Regulation*, Alta. Reg. 143/1997 (Schedule 6), or SARA.”³⁵⁹

³⁵⁵ Appellants’ Closing Arguments at paragraph 171.

³⁵⁶ Appellants’ Closing Arguments at paragraphs 599 to 601.

³⁵⁷ Appellants’ Closing Arguments at paragraph 159.

³⁵⁸ Appellants’ Closing Arguments at paragraph 164.

³⁵⁹ Appellants’ Closing Arguments at paragraph 602.

[525] The Appellants noted that the Wetland Policy is clear that impacts to wetlands are only permissible if they “cannot be avoided”. The Policy is not clear on when avoidance is not possible. For example, the Policy never specifies what types of developments or inputs “cannot be avoided”.³⁶⁰

[526] The Appellants stated that to their knowledge, the Board has not articulated a standard test for avoidance. The question “when does an applicant meet the requirement to avoid” has not received a definitive answer. The Director never articulated what avoidance means. When he concluded that “the applicant demonstrated avoidance,” he failed to set out exactly what standard Badlands met. This case demonstrates the need for an established standardized test for avoidance that will assist proponents with understanding what is required, and it will assist opponents in ensuring that the test for avoidance is met. In this case, avoidance was so woefully applied by the Director that his conduct necessitates standardizing it.³⁶¹

[527] The Appellants recommended that a unified test on avoidance should require a proponent to demonstrate that avoidance is impractical, having regard to the following:

1. Is there an alternative project that avoids the wetlands;
2. Is the alternative project suitable for the subject site;
3. Is there an alternative project design that would avoid impacting the wetlands;
4. Is there an alternative project site;
5. The proposed impact on the wetland; and
6. The relative value of a wetland, with stronger evidence of avoidance demonstrated for higher valued wetlands.³⁶²

24.1.2. Approval Holder

[528] The Approval Holder stated that Badlands demonstrated avoidance and minimization of impacts to the greatest extent possible and has paid compensation for the

³⁶⁰ Appellants’ Initial Submission at paragraph 75.

³⁶¹ Appellants’ Closing Arguments at paragraphs 641, 642, 644, and 645.

³⁶² Appellants’ Closing Arguments at paragraph 655.

disturbance and loss of 0.82 hectares of wetland to ensure there would be a no-net-loss of wetland habitat in the region.³⁶³

[529] The Approval Holder acknowledged that the wetland value determined by the ABWRET-A assists both the proponent and EPA in decisions regarding avoidance, minimization, and replacement ratios where they are required.³⁶⁴

[530] The Approval Holder submitted that the principles of avoidance, mitigation and replacement were followed for this project. The initial plan was for three racetracks which would affect all five wetlands. The middle racetrack down the escarpment was eliminated to avoid slope disturbance, and the lower racetrack was re-configured to avoid Wetlands 1, 4 and 5.³⁶⁵

[531] The Approval Holder noted that numerous discussions were held with the course designers and road course plans were redesigned several times to specifically avoid and minimize disturbance to the wetlands. Wetland disturbance has been limited to Wetland 3 (Class B, 0.31 ha in size) and Wetland 2 (Class D, 0.51 ha in size). The Approval Holder stated that avoiding Wetland 2 was not deemed possible as it would have meant cutting into the steep slope associated with the large upland on the west side of the large West Draw. Cutting into the base of this slope would have potentially destabilized the slope and impacted the proposed development to be constructed on the upland. Consequently, construction through Wetland 2 will be minimized as much as possible by building the track through the central, most narrow portion of this wetland.³⁶⁶

24.1.3. Director

[532] The Director submitted that he considered the entirety of the Final WAIR in determining whether the Approval Holder had adequately demonstrated avoidance.³⁶⁷ He stated that the Final WAIR details that Badlands discussed several racetrack alignments to avoid

³⁶³ Approval Holder's Closing Arguments at page 11.

³⁶⁴ Final WAIR at page 17.

³⁶⁵ Approval Holder's Submission at paragraph 41.

³⁶⁶ Final WAIR at pages 28 and 60.

³⁶⁷ Director's Closing Arguments at paragraph 147.

Wetland 2. After considering other options, Badlands' course designers determined that avoiding Wetland 2 would involve cutting a steep slope along the upland West Draw, which might have destabilized the slope. The Final WAIR provides that the designers instead decided that the racetrack would bisect Wetland 2 at its narrowest point and use culverts to maintain natural drainage patterns.³⁶⁸

[533] EPA's Wetland Specialist reviewed the Final WAIR and stated that avoidance and minimization were clearly demonstrated in the report. The third racetrack was removed from plans, and the Valley Track avoided the three largest wetlands.³⁶⁹

[534] The Director submitted that, at the hearing, the Board heard Ms. Ferguson say that Badlands modified its designs as new information arose through discussions between herself, the engineers, and the roadway planners. In particular, Ms. Ferguson commented on Wetland 2, noting that it would not be possible to avoid Wetland 2 because a different alignment would have destabilized the slope.³⁷⁰

[535] The Director stated that the Final WAIR demonstrated avoidance, minimization, and compensation for unavoidable impacts in accordance with the Wetland Policy and associated directives.³⁷¹

[536] The Director submitted that the Board heard Ms. Cooper at the hearing state that the Wetland Policy does not insist upon avoidance. She said that avoidance is a primary goal, but not the only goal of the policy. While avoidance is preferable and must be considered, Ms. Cooper testified that the Wetland Policy also allows for minimization and replacement if avoidance cannot occur. She further stated that Badlands' avoidance statement was satisfactory and that it meets EPA's policy requirements.³⁷²

³⁶⁸ Director's Response Submission at paragraphs 188 and 189.

³⁶⁹ Director's Record at Tab 74.

³⁷⁰ Director's Closing Arguments at paragraph 157.

³⁷¹ Director's Supplemental Submission at paragraph 45.

³⁷² Director's Closing Arguments at paragraphs 150 and 151.

[537] The Director further submitted that regarding the impacts to Wetland 2, and wetland avoidance more generally, the Appellants have provided no technical or engineering evidence that would rebut slope destabilization concerns. Instead, they have alleged testimonial inconsistencies that they say show the racetrack redesign was motivated not by wetland avoidance, but by other factors.³⁷³

[538] The Director noted that even if there were additional motivations for the racetrack redesign, it does not follow that Badlands did not adequately demonstrate avoidance in accordance with the Wetland Policy. One design can accomplish multiple goals, including demonstrating avoidance per the policy; increasing driver safety; addressing slope stability and erosion concerns; and providing entertainment value.³⁷⁴

[539] The Director stated that the Appellants have also made much of the purported discrepancy between the three-racetrack layout in Kneehill County Bylaw 1597, the ASP, and the two-track layout on which the Final SWMP is based. This discrepancy is immaterial, particularly to wetland avoidance. The Director's Record shows how the technical information supporting the *Water Act* application evolved both prior to and throughout the Department's review of the application.³⁷⁵

24.2. Board's Analysis

[540] As stated above, the Board finds that the Wetland Policy is a strategic framework that provides direction, tools and knowledge systems that can be used by various regulators to make informed, place-based wetland management decisions.³⁷⁶ One of the key concepts of the Wetland Policy relevant to these Appeals is wetland mitigation.³⁷⁷

³⁷³ Director's Closing Arguments at paragraph 164.

³⁷⁴ Director's Closing Arguments at paragraph 165.

³⁷⁵ Director's Closing Arguments at paragraphs 166 and 167.

³⁷⁶ Wetland Policy at pages 2, 5 and 6.

³⁷⁷ Wetland Policy at page 11.

[541] Mitigation consists of management activities taken to avoid and minimize negative impacts on wetlands, and to replace lost wetlands where necessary. Mitigation uses a three-stage approach termed the Wetland Mitigation Hierarchy (the “Mitigation Hierarchy”), which involves, in order of descending priority, (a) avoidance of negative wetland impacts – the primary and preferred response, (b) minimization of negative wetland impacts – where avoidance is not possible, and (c) replacement to account for negative wetland impacts that could not be avoided or minimized – as a last resort.³⁷⁸

[542] The Mitigation Hierarchy begins with (and places the greatest emphasis on) wetland avoidance, proceeds through minimization only if avoidance is deemed not practicable, and considers wetland replacement only as a last resort.³⁷⁹

[543] The four guiding principles to achieve avoidance under the Wetland Policy are:

1. Avoidance should always be the primary considerations for any activity that could have adverse effects, regardless of wetland value;
2. In cases where avoidance is deemed impracticable and a negative wetland impact is likely to occur, wetlands of higher relative value should require stronger evidence of effort to avoid than lower value wetlands;
3. In cases where avoidance is deemed not practicable, it is the responsibility of the proponent to adequately demonstrate that alternative projects, project designs, and/or project sites have been thoroughly considered and ruled out for justifiable reasons; and
4. The process for evaluating feasible project alternatives must be fair, efficient and consistent, and should take into account environmental, social, and economic considerations.³⁸⁰

[544] The purpose of the Mitigation Directive is to inform planning and decision-making to avoid and minimize negative impacts to wetlands and, where necessary, replace lost wetland

³⁷⁸ Wetland Policy at page 14.

³⁷⁹ Wetland Policy at page 15.

³⁸⁰ Wetland Policy at page 16.

area and value.³⁸¹ The Mitigation Directive is the operational guidance manual that supports the execution of informed wetland planning and management decisions in the approval process.

[545] The Mitigation Directive states that avoidance may be required by the regulatory body in consideration of any of:

1. Wetland-dependent species that are listed as endangered or threatened species under the *Wildlife Act*, *Wildlife Regulation* (Schedule 6), or the *Species at Risk Act (Canada)*; and
2. Effects on the aquatic environment under the Act, Section 38.³⁸²

[546] The Mitigation Directive also specifies that regulatory applicants must demonstrate they have made a concerted effort to avoid wetland impacts, and the onus is on the applicant to demonstrate (a) avoidance of wetlands, and (b) preservation of relative wetland value.

[547] The Mitigation Directive states that evidence of avoidance can include:

1. Options considered for relocating the activity;
2. Alternative activities considered in the proposed location;
3. Modifications considered to the proposed activity; and
4. Comparative analysis of options.

[548] Evidence of avoidance may be sufficient except for A-value category wetlands which require at least one option that will avoid the A-value wetland(s) entirely.³⁸³

[549] Minimization, as the second step of the Mitigation Hierarchy, is only applied, when avoidance has been justifiably ruled out as a feasible alternative for a project. The intent of minimization is to reduce negative impacts on wetlands to the smallest practicable degree during any stage of development, including planning, design, construction, and operation, as well as during the execution of activities that could harm wetlands.³⁸⁴

³⁸¹ Mitigation Directive at page 1.

³⁸² Mitigation Directive at page 3.

³⁸³ Mitigation Directive at page 3.

³⁸⁴ Wetland Policy at page 17.

[550] The Board considered the Appellants' request for a unified test to demonstrate avoidance and their suggestions when avoidance is impractical. However, in the Board's view, the Appellants' question "when does an applicant meet the requirement to avoid" is not a legal test. Rather, the application of the Mitigation Hierarchy (avoid, minimize, replace) arises in the context of a specific *Water Act* licence or approval. As a result, the Board is not persuaded that there is a unified test to demonstrate avoidance that can be properly framed for all instances.

[551] The Board has applied the four guiding principles for avoidance under the Wetland Policy and the requirements of the Mitigation Directive in its avoidance considerations.

[552] In this case, the Approval authorizes the infilling of two wetlands (namely, Wetlands 2 and 3), and the modification of three wetlands (namely, Wetlands 1, 4, and 5).

[553] Concerning Wetlands 1, 4, and 5, the Final WAIR and the Final SMP acknowledge that the inflows and outflows of water will be modified for these wetlands. However, the Final WAIR and Final SMP confirm that Wetlands 1, 4, and 5 will be physically avoided or retained during the construction of the BMR project. Therefore, the Board finds that the Approval Holder has demonstrated Avoidance under the first stage of the Wetlands Mitigation Hierarchy for these wetlands, and no further analysis is required.

[554] Concerning Wetlands 2 and 3, the Final WAIR and the Final SMP confirm that Wetland 3 will be removed completely, and Wetland 2 will be filled to the extent necessary to build the Valley Track, and a culvert will be placed under the racetrack.³⁸⁵ Therefore, the Board will consider if the Approval Holder has provided sufficient evidence to demonstrate avoidance for these two wetlands. During the Department's ABWRET-A review, EPA determined the Wetland 2 is a class D-value wetland and Wetland 3 is a class B-value wetland.³⁸⁶

[555] Wetland 3 is being removed to allow for the construction of the facilities associated with the BMR. The Board heard evidence from the Parties that Wetland 3 is highly disturbed

³⁸⁵ Approval Holder's Submission at paragraph 45.

³⁸⁶ Director's Record at Tab 67.

having been cultivated over the years. Many of the major facilities and buildings supporting the BMR are to be constructed on the upper plateau where Wetland 3 is located. No submissions were made arguing for these facilities and buildings to be constructed elsewhere or in a manner to avoid Wetland 3.

[556] On that basis, the Board finds that avoidance was not possible nor was minimization feasible or effective for Wetland 3 as outlined in the Wetland Policy. Therefore, the Approval Holder could fulfil their replacement obligation for Wetland 3 by (1) making a payment the Wetland Replacement Program or (2) restoring, enhancing, or constructing a wetland. In this case, the Approval Holder chose to make a payment to the Wetland Replacement Program (i.e., paid an amount determined in accordance with the Wetland Policy for the removal of Wetland 3). Therefore, the Board finds that the Approval Holder satisfied the Wetland Policy for Wetland 3.

[557] Wetland 2 is a category D-value wetland, and as such the Approval Holder is not required to provide stronger evidence of avoidance efforts, as would be required for a category A-value wetland under the Mitigation Directive. As set out in the Mitigation Directive, adequate evidence of modifications considered to the proposed activity would be sufficient.

[558] However, it is the responsibility of the Approval Holder to adequately demonstrate that alternative project designs have been considered and ruled out for justifiable reasons. The onus is on the Approval Holder to demonstrate avoidance of Wetland 2 was impractical, regardless of its relative value category.

[559] The Board notes that multiple racetrack layouts were considered during the development of the project. Some of those layouts avoided Wetland 2 while the final layout reviewed by the Director in the Approval application showed Wetland 2 was removed.³⁸⁷ In addition, the Approval Holder stated there was a further alternative racetrack layout that impacted

³⁸⁷ At the hearing, Mr. Thurmeier acknowledged that various terms were used to describe the impacts to Wetland 2 and that in his opinion the most appropriate term to use was “removed”.

all five wetlands,³⁸⁸ although the record does not contain a figure showing this design. The Board understands the following documents were prepared showing different racetrack layouts that affected or avoided Wetland 2:

1. There were three racetracks in the 2013 ASP, which avoided all the wetlands;
2. The racetrack layout in the 2014 E2K Report avoided Wetland 2, and the report recommended an 18 m setback from the top of slope for the racetrack and any subgrade supported structures based on 33 boreholes at the Badlands Development Area;³⁸⁹
3. The two-track layout in the 2015 EIA/EPP appears to be similar to the layout considered in the 2014 E2K Report, but Wetland 2 is not shown. The report notes that the Valley Track is located in the lowland section of the project area, circles over the large central knoll, and has been realigned to avoid the wetlands in this area as much as possible;³⁹⁰
4. The racetrack layout in the 2015 E2K Report showed Wetland 2 removed and a short connecting track immediately to the west of Wetland 2;³⁹¹
5. The racetrack layout in the 2016 Comprehensive Site Development Plan had the same layout that was considered in the 2015 E2K Report;
6. The racetrack layout in the Initial SMP had the same layout as the one considered in the 2015 E2K Report; and
7. The racetrack layout in the 2018 Final SMP had the same layout as the one considered in the 2015 E2K Report.

[560] What is lacking in the evidence before the Board, are reasons for the various changes in the Valley Track layout in relation to Wetland 2. The Director relied on the Final WAIR prepared by a professional biologist which he said demonstrated avoidance, minimization,

³⁸⁸ Final WAIR at page 60: The original track layout had it remained in the initial option, would have resulted in the complete removal of all five wetlands.

³⁸⁹ *Geotechnical Investigation Badlands Motorsports Resort SEC 22, TWP 27, RGE 21 W4M Near Rosebud, Alberta* prepared July 2014 by E2K Engineering Ltd. in the Appellants' Evidentiary Documents attached to the Appellants' Initial Submission at page 1955.

³⁹⁰ EIA/EPP Figure 4 and pages 6 and 7.

³⁹¹ *Addendum – Lower Track Slope Stability Assessment Badlands Motorsports Resort Kneehill County, Alberta* prepared March 15, 2015, by E2K Engineering Ltd. in the Appellants' Evidentiary Documents attached to the Appellants' Initial Submission at page 2539.

and compensation for unavoidable impacts in accordance with the Wetland Policy and associated directives. The Final WAIR asserted that avoiding Wetland 2 was not possible as it would have meant cutting into the steep slope on the west side which would have potentially destabilized the slope and impacted the proposed development to be constructed on the upper plateau. The Board notes with some concern that the Director relied on the opinion of a professional biologist rather than a geotechnical professional when the stated rationale for avoidance was geotechnical in nature.

[561] The Board finds that the 2014 and 2015 E2K Reports were not put forward as evidence by the Approval Holder to support the slope destabilization assertion. There was no evidence provided to show how any destabilization would have impacted the development on the upper plateau and whether there were steps that could have been taken to reduce the slope instability or mitigate the impacts. Therefore, the Board gives little weight to Ms. Ferguson's assertions in the Final WAIR regarding slope instability as the reason for not avoiding Wetland 2.

[562] The Board also heard Mr. Thurmeier acknowledge at the hearing that three sections of the Valley Track – (1) the section east of Wetland 5, (2) the section west of Wetland 4, and (3) the section east of Wetland 4 – all use steep slopes.

[563] The Board heard testimony that the Director was aware of the ASP racetrack layout that avoided Wetlands 1, 2, 4, and 5.

[564] The Board notes the Director's Record did not contain the 2016 Comprehensive Site Development Plan prepared by Scheffer Andrew for Badlands, nor the two slope stability engineering reports prepared by E2K Consulting for Badlands. However, the Board also notes that the 2014 E2K Report which avoided Wetland 2 was referenced in the Final SMP³⁹² which the Director incorporated by reference into the Approval.

[565] The Board agrees with Ms. Cooper's testimony that avoidance is a primary goal, but not the only goal of the Wetland Policy. However, the Board respectfully disagrees with the

³⁹² Final SMP at page 6.

Director's assertion that the discrepancy in racetrack layouts is immaterial given that some racetrack layouts avoided Wetland 2 and others did not.

[566] The Board heard various reasons for the racetrack redesign, ranging from claims of slope instability to a more entertaining driving experience. Whatever the reasons given, the Board finds that they seemed to be supported by little or no evidence. In short, given the various proposals for the racetrack layout, the Board cannot determine on the evidence why the Approval Holder settled on the final design in the Final WAIR which required placing fill in Wetland 2.

[567] The onus is on the Approval Holder to demonstrate that their *Water Act* application, including supporting documents, met the above requirements. In this case, the Approval Holder failed to do so.

[568] Therefore, the Board finds that: (1) the Approval Holder did not provide sufficient evidence to adequately demonstrate that avoidance of Wetland 2 was impractical or not feasible pursuant to the Wetland Policy; and (2) the Approval Holder did not provide sufficient evidence to demonstrate avoidance of Wetland 2 in accordance with the Mitigation Directive. To the Approval Holder's assertion that the disturbance to Wetland 2 would be minimized by the installation of a culvert, the Board finds that as explained above, under the Mitigation Directive, minimization only applies when avoidance has been justifiably ruled out as a feasible alternative.

[569] Consequently, the Board recommends to the Minister that the Approval as it relates to Wetland 2 be varied by adding two conditions:

1. Before any disturbance or modification of Wetland 2 can proceed, the Approval Holder must first provide a "Wetlands 2 Avoidance Report" to the Director for his review and approval. The Wetlands 2 Avoidance Report shall document the reasons why Wetland 2 could not be avoided considering the four types of avoidance evidence listed in the Alberta Wetland Mitigation Directive. The Wetlands 2 Avoidance Report shall be signed by a person with applicable professional qualifications. In preparing the Wetlands 2 Avoidance Report, the Approval Holder shall consider, at a minimum: (1) the application of the Wetland Mitigation Hierarchy; and (2) the application of the four guiding principles to achieve avoidance under the Alberta Wetland Policy. If the Director is satisfied that the Approval Holder has demonstrated that avoidance of Wetland 2 is not practicable and

has adequately demonstrated that alternative designs for the Valley Track have been thoroughly considered and ruled out for justifiable reasons, the Director may authorize the disturbance of Wetland 2 to proceed.

2. Alternatively, if the Director is not satisfied, or if the Approval Holder decides to modify the design of the Valley Track so that Wetland 2 is avoided, the Approval Holder shall submit a report to the Director detailing the changes to the Valley Track. If the Director is satisfied that the changes to the Valley Track avoid Wetland 2 and do not impact the Valley Wetlands over and above what has already been authorized under the Approval, the Approval Holder may proceed accordingly.

25. DID THE ABWRET-A PROPERLY CATEGORIZE THE BADLANDS WETLANDS?

25.1. What is the Purpose and Function of the ABWRET-A?

[570] The Appellants noted that the ABWRET Guide³⁹³ sets out the purpose behind the ABWRET-A:

ABWRET-A generates scores for a wetland's functions which then are used, with other inputs, to assign a wetland to a value category (A, B, C, or D) in a consistent and transparent manner. That category is intended to assist the wetland approvals applicant and EPA in decisions about wetland avoidance, minimization, and replacement, as well as the replacement ratios where that is required.³⁹⁴

[571] The Appellants submitted that the Wetland Policy requires EPA to value wetlands to make decisions about avoidance, minimization, and replacement. The higher the wetland value, the more impetus on avoiding impacts to that wetland. EPA uses the ABWRET-A form to implement the requirement of valuing wetlands.³⁹⁵

[572] The Approval Holder submitted that the purpose of the ABWRET-A is to standardize wetland assessment in the Province of Alberta. The tool is used when any anticipated permanent project-related impacts to wetlands will occur.³⁹⁶

³⁹³ 2016 Guide to the Alberta Wetland Rapid Evaluation Tool - Actual (ABWRET-A) for the Boreal and Foothills Natural Regions.

³⁹⁴ Appellants' Closing Arguments at paragraph 98.

³⁹⁵ Appellants' Closing Arguments at paragraphs 99 and 100.

³⁹⁶ EnviroConsult Response at page 7.

[573] At the hearing, the Director's Wetlands Team Lead, Ms. Cooper, referenced the ABWRET Guide, which provides context for use of the ABWRET-A. The Board is of the opinion that the relevant statements from the ABWRET Guide are:

1. ABWRET-A is a standardized method for rapidly assessing some of the important natural functions of all types of wetlands present in Alberta. The "A" stands for "actual", meaning it uses data obtained partly from an on-site visit (page 5).
2. ABWRET-A generates scores for a wetland's functions which then are used, with other inputs, to assign a wetland to a value category (A, B, C, or D) in a consistent and transparent manner. That category is intended to assist the applicant and EPA in decisions about wetland avoidance, minimization, and replacement, as well as the replacement ratios where that is required (page 7).

[574] The Board finds the Parties are in general agreement as to the purpose of the ABWRET-A, though they differ in their views on how the data for the model are collected and analyzed, which will be discussed later. The Board therefore finds that the ABWRET-A is the Wetland Value Assessment Tool adopted by the province.

25.2. Were the Badlands Wetlands Properly Assessed and Valued?

25.2.1. Submissions

25.2.1.1 Appellants

[575] The Appellants stated that Ms. Ferguson was the wetland specialist retained by Badlands to complete the ABWRET-A form. The 'S' tab indicates that the form was completed by Ms. Ferguson on October 6, 2017, and Ms. Ferguson submitted the form to EPA on February 13, 2018. Ms. Ferguson also used a third party – Ian Macdonald – to conduct the November 2014 survey. No information is provided about Mr. Macdonald, except to say that he is a botanist. Importantly, there is no information or evidence about whether Mr. Macdonald is certified to conduct survey work to complete the ABWRET-A form.³⁹⁷

³⁹⁷ Appellants' Closing Arguments at paragraphs 102 to 105, and 115.

[576] The Appellants stated that the ABWRET-A form is filled out as a single point in time (according to testimony at the hearing by Ms. Cooper) and that Ms. Ferguson did not complete the form as a point in time; rather, as she noted in the Final WAIR, the form was completed “during the wetland assessment process which began in 2008”. The wetlands were surveyed three separate times for the purpose of completing the ABWRET-A form: July 2008, the first week of November 2014 and October 6, 2017; the Appellants noted that the 2008 and 2014 assessments were done prior to the release of the ABWRET Guide.³⁹⁸

[577] The Appellants further noted that November 2014 and October 6, 2017, are outside the growing season. The ABWRET Guide makes repeated mention of the value of surveying the wetlands during the growing season and the ABWRET-A form requires input data from the ‘growing season’ on 12 separate occasions.³⁹⁹ The Appellants say that Ms. Ferguson should have consulted Mr. Skibsted and other adjacent landowners as contemplated in the ABWRET Guide if the Authenticating Wetland Professional (“AWP”) cannot visit the wetland Assessment Area⁴⁰⁰ during both the wettest and driest times of the growing season.

[578] The Appellants submitted that Ms. Ferguson had difficulty completing the ABWRET-A form, and that EPA provided her assistance in completing the form on nine separate occasions in 2018.⁴⁰¹

[579] At the hearing, Mr. Wallis noted that the ABWRET-A form does not allow input of important factors such as Environmentally Significant Area designations or critical habitat for species at risk, among others.

[580] The Appellants noted that Wetlands 2, 4 and 5 received a ‘D’ classification in the Final WAIR, while Wetlands 1 and 3 each received a ‘B’ classification and submitted that all five

³⁹⁸ Appellants’ Closing Arguments at paragraphs 108 to 110, and 113.

³⁹⁹ Appellants’ Closing Arguments at paragraph 114.

⁴⁰⁰ “Assessment Area” is defined in the Alberta Wetland Identification and Delineation Directive (at page 1) as the entire delineated wetland, or a portion thereof, which reflects the area of predicted impact to the wetland. The Board notes that the Parties may have used this term differently.

⁴⁰¹ Appellants’ Closing Arguments at paragraph 106.

of the wetlands ought to receive an ‘A’ (high) value. The Appellants stated there were several reasons why the wetlands were undervalued by the Director. In brief, the most significant reasons are that the Valley Wetlands:

1. Support significant colonies of bank swallows;
2. Are critical habitat for bank swallows;
3. Are habitat for northern leopard frogs;
4. Support five species of special concern;
5. Exist in a dry region with a lower proportion of wetlands; and
6. Function as a unique set of wetlands in the heart of the Rosebud River Valley and support a wide array of biodiversity.⁴⁰²

[581] The Appellants based this position on the emphasis of the Wetland Policy on: (1) wetland abundance (the dearth of wetlands in the area); (2) the significant biodiversity of the site and the wetlands in particular; (3) the presence of the two SARA-listed species (bank swallow and little brown myotis) as well as other species of special concern that depend on the wetlands; and (4) the location of the wetlands in an environmentally significant area.⁴⁰³

[582] The Appellants raised several concerns with the Normalized Scores for the Wetland Functions:

- Songbird, Raptor and Mammal Habitat: none of the wetlands scored a 1.00, despite the reliance placed on Wetlands 1, 2, 4 and 5 by the following species: bank swallows, prairie falcons, golden eagles, and sora, all three of which are songbirds or raptors;
- Stream Flow Support: Wetland #1 scored a 0.00 despite having an outflow channel, dug by Mr. Clark’s father, confirmed by Mr. Thurmeier, confirmed still present by Mr. Skibsted and confirmed not filled in by Mr. Zelazo;
- Streamwater Cooling: Wetland #1 scored a 0.00 despite having an outflow channel;
- Amphibian Habitat: none of the wetlands scored a 1.00, despite Mr. Stevens finding a northern leopard frog adjacent to the project area; and

⁴⁰² Appellants’ Initial Submission at paragraphs 62 and 72; Appellants’ Closing Arguments at paragraph 636.

⁴⁰³ Appellants’ Initial Submission at paragraphs 65 to 69.

- Human Use and Recognition: none of the wetlands scored a 1.00, despite Mr. Skibsted's evidence that he used to hunt over those wetlands and the evidence of historical First Nations use.⁴⁰⁴

[583] The Appellants were also concerned with the use of Relative Wetland Value Assessment Unit ("RWVAU") 16 to arrive at the final wetland values; the abundance factor for RWVAU 16 is 0 (that is, no adjustment, upward or downward, is made to the Value Category before determining the Final Score). The Appellants stated that "Within walking distance, 'just over 3 km away', was zone 13 that has an abundance factor of +1." Approximately three quarters of RWVAU #16 is parkland, whereas almost the entirety of RWVAU #13 is grassland. The wetlands are also in the grassland region of Alberta. All but one of the 50 calibration wetlands in RWVAU #16 are in parkland. Relying on Ms. Cooper at the hearing, they argued that had the wetlands been just over the border in RWVAU 13, each wetland would likely receive a high enough score to augment their values by one letter grade.⁴⁰⁵ Specifically, this meant that Wetlands 1 and 3 would have received an A score, and according to Ms. Cooper's testimony at the hearing, had any of the wetlands received a value score of 'A', there would have been more responsibility to avoid those wetlands.⁴⁰⁶

[584] At the hearing, Mr. Wallis and Mr. Skibsted raised several data entry concerns they had with the ABWRET-A form "F" tab data entered by Ms. Ferguson.⁴⁰⁷ Mr. Wallis, a wetland specialist, is certified by EPA to enter data on the ABWRET-A form. He relied on two sources of information to contest the accuracy of Ms. Ferguson's data: his knowledge of the wetlands and information provided by Mr. Skibsted. Mr. Skibsted testified as to his knowledge and ability to provide information to Mr. Wallis.

⁴⁰⁴ Appellants' Closing Arguments at paragraph 134.

⁴⁰⁵ Appellants' Closing Arguments at paragraphs 137-139 and 626.

⁴⁰⁶ Appellants' Closing Arguments at paragraphs 140 and 144.

⁴⁰⁷ Appellants' Closing Arguments at paragraphs 199 to 236. At the hearing, Mr. Wallis and Mr. Skibsted made specific references to rows F5, 10, 24, 25, 26, 27, 54, 65, and 69, and provided their views on what data Ms. Ferguson should have entered.

[585] Mr. Wallis also testified that in the “F” tab for sensitive amphibian range, there is no acknowledgement of the historical presence of northern leopard frog as noted by EPA wildlife biologist Mr. Stevens.

[586] The Appellants stated that the Director was critical of the way Mr. Wallis challenged Ms. Ferguson’s data in the ABWRET-A form. They argued that the Director criticized Mr. Wallis’ reliance upon Mr. Skibsted without visiting the wetlands. They argued that Mr. Wallis is entitled to rely upon information obtained from Mr. Skibsted given that the ABWRET Guide states:

The field component of ABWRET-A involves visiting as much of the AA as possible and filling out two field forms (F and S). The field component will generally require less than three hours (large or complex sites may take longer). If circumstances allow, visit the AA during both the wettest and driest times of the growing season. *If you cannot, you must rely more on the aerial imagery, maps, other office information, and discussions with the landowner and other knowledgeable sources. (Emphasis added by the Appellants.)*

The Appellants also pointed out that “Notably, the Director never visited the wetlands either”.⁴⁰⁸

[587] The Appellants noted that Mr. Wallis only provided analysis into the factors he could confirm were inaccurate without the necessity of site visits.⁴⁰⁹ The Appellants further stated that “They cannot provide a wetland value because they don’t have access to the wetlands. Access was denied by Mr. Zelazo, and the Board refused to order a site visit to permit Mr. Wallis the opportunity to evaluate the wetlands.”⁴¹⁰

⁴⁰⁸ Appellants’ Closing Arguments at paragraph 200; Appellants’ Closing Arguments Rebuttal at paragraphs 19 and 20.

⁴⁰⁹ Appellants’ Closing Arguments Rebuttal at paragraph 22.

⁴¹⁰ The Appellants referenced their April 5, 2020, letter to the Parties requesting “a site visit for their experts” and the May 5, 2020, response letter from the Board which stated “The purpose of a site visit is to allow the Board Panel ... to collect information to help inform its Report and Recommendations A site visit is not to permit the parties to an appeal to undertake an inspection of the project.”; Appellants’ Closing Arguments Rebuttal at paragraph 24.

25.2.1.2 Approval Holder

[588] The Approval Holder submitted that the Final WAIR met EPA's reporting requirements for determining the appropriate classification of the wetlands.⁴¹¹

[589] The Final WAIR (at page 6) noted that environmental investigation began on this project in 2007 with an initial desktop delineation that included a review of Google air photos and regional wetland information. After reviewing the air photos, a field survey was carried out in the summer of 2007 and the wetland boundaries were surveyed to confirm wetland extent and confirm the initial desktop delineation. The Approval Holder stated that over the years, and on each site visit, the wetlands were reviewed, and the wetland information including incidental observations of wildlife found to be using the wetlands, was updated to keep the baseline data up to date.⁴¹²

[590] The ABWRET-A field work to fill out Data Forms F and S was completed on October 6, 2017, during a warm sunny snow free day when the vegetation was observable, and access was attained for all five wetlands and 100% of the Assessment Areas were visited.⁴¹³

[591] The Approval Holder submitted that, contrary to the Appellants' assertions, the data collected is not uncertain, or based on old policies, or waiting on new policies or further studies – the lands have been studied for years and have resulted in continually updated reports.⁴¹⁴

[592] The Approval Holder submitted that after going through the ABWRET-A process all the wetlands were initially considered to be Class D. Further refinement resulted in Wetland 3 being upgraded to Class B.⁴¹⁵

25.2.1.3 Director

[593] At the hearing, the Director's Wetlands Team Lead, Ms. Cooper, referenced the ABWRET Guide, which provides context for use of the ABWRET-A.

⁴¹¹ Final WAIR at page 4.

⁴¹² Approval Holder's Closing Arguments at page 10.

⁴¹³ Final WAIR at page 6.

⁴¹⁴ Approval Holder's Submission at paragraph 88.

⁴¹⁵ Approval Holder's Submission at paragraph 41.

[594] For ease of reference, the Board has summarized the relevant statements from the ABWRET Guide:

ABWRET-A uses visual (field) and GIS-based assessments of weighted ecological characteristics (called indicators) to generate the scores for a wetland's functions. The number of indicators that is applied to estimate a particular wetland function depends on which function is being assessed, and not all indicators are assessed for every wetland. The indicators are combined in a spreadsheet using mathematical formulas (models) to generate the score for each wetland function (page 7).

For most ABWRET-As, physical or biological processes that influence a given function were first identified and then indicators of those processes were chosen and grouped accordingly. The indicators then were phrased as questions in the data forms. None of ABWRET-A's field-level indicators require measurement; they all are based on visual estimates (page 118).

Some of the requested information may not be accurately inferred during a single visit to a wetland, particularly if that visit occurs outside the growing season. Some wetland conditions vary dramatically from year to year and even within a growing season. Thus, the accuracy of results will be greater if users are familiar with the changes in wetland conditions that typically occur locally or consult landowners or others who are familiar with local conditions and variability (page 11).

ABWRET-A scores only indicate a wetland's functions relative to other wetlands in a specified region (page 11).

It is possible that two ABWRET-A users, viewing the same wetland, will interpret some indicator questions differently. Potentially, this could result in different scores for one or more of the wetland functions (page 12).

[595] At the hearing, Ms. Cooper presented detailed information on how the ABWRET-A works.⁴¹⁶ The Board has summarized the key points from this presentation:

1. The ABWRET-A was calibrated using 207 wetlands in the province, about 50 of which are in the RWVAU that includes the Badlands Development Area;
2. The ABWRET-A is based on a point in time field assessment that is designed to be quick (approximately one to three hours of field work);

⁴¹⁶ Director's Direct Evidence PowerPoint presentation at slides 82 to 101.

3. Wetlands are scored based on their function – the four functional groups are: (1) ecological health and biodiversity; (2) water quality improvement, (3) flood reduction and hydrologic function, and (4) human use;
4. The functional groups are further sub-divided into sub-functions: six for ecological health and biodiversity, five for water quality improvement, and two for flood reduction and hydrologic function (there is only one function in human use). These sub-functions are found in the tabs in the ABWRET-A Excel spreadsheet (Director’s Record at Tab 66);
5. The functional groups are weighted when determining the final wetland value category, such that human use is given a weight of 10% while the other three are weighted 30% each;
6. The ABWRET-A also uses GIS data to determine wetland value (this is done automatically in the model, not by the wetland consultant);
7. There are 75 indicators used in the field assessment and 73 indicators in the GIS assessment;
8. The ABWRET-A is conservative in that it values a wetland based on the highest scoring sub-function in a functional group; and
9. The ABWRET-A raw scores (0 to 10) are normalized (set to a value between 0 and 1) based on the calibration data for the region (RWVAU) prior to assigning the wetland category.

[596] With respect to the Appellants’ concerns about the “point in time” nature of the ABWRET-A, Ms. Cooper testified that the assessment is done at a point in time, but the wetland professional is expected to enter data based on an understanding of the site in a typical year; in this case there have been multiple site visits over multiple years.

[597] The Director submitted that an overarching theme of the Appellants’ submissions and evidence has been that they disagree with various Alberta Government policies, guidelines, and tools, including the Wetland Policy and the ABWRET-A. The Director stated that this hearing is not the proper forum to change the contents of the ABWRET Guide, such as which species should be considered as “animals of conservation concern” for the purposes of cell F69 of the

ABWRET-A data form. Rather, the Board's role is to assess whether the ABWRET Guide was properly considered and applied in respect of the Badlands application.⁴¹⁷

[598] The Director stated that any changes to the calculated values of the Badlands Wetlands may have a marginal impact, if any, on the Director's decision to issue the Approval or on its terms and conditions. Furthermore, a change in a wetland relative value letter grade would not automatically mean an Approval would not have been issued. While a change in relative value letter grade may have impacted the Director's consideration of avoidance or have required the payment of additional replacement fees, the Wetland Policy allows infilling and permanent impacts even to "A" value wetlands, so long as the application complies with the Wetland Policy's mitigation hierarchy and associated directives.⁴¹⁸

[599] The Director submitted that EPA noted errors in the Badlands consultant's initial ABWRET-A field-based responses to EPA that led to an incorrect evaluation of two of the wetlands. Consequently, Badlands' consultant submitted a revised ABWRET-A to EPA, which EPA used to calculate and return the corrected results. EPA's review of the Determination of the Normalized Wetland Score determined that Wetlands 1 and 3 are Class B wetlands, while Wetlands 2, 4 and 5 are Class D wetlands.⁴¹⁹

[600] The Director stated that the Appellants argue that "assigning a 'D' value to these wetlands is incorrect" and that the wetlands should have received an 'A' value. They base this assertion on:

- the presence of the little brown myotis and bank swallow, which they argue "depend on [the] wetlands";
- a determination that the wetlands are environmentally sensitive areas ("ESA");
- biodiversity in the area; and

⁴¹⁷ Director's Closing Arguments at paragraphs 50 and 59.

⁴¹⁸ Director's Closing Arguments at paragraph 207.

⁴¹⁹ Director's Response Submission at paragraphs 182 and 183.

- a purported dearth of wetland resources in the project area”⁴²⁰.

[601] The Director continued that “[i]n support of this assertion, the Appellants reference the considerations set out in the Wetland Policy. However, the Appellants make no reference to the ABWRET-A wetland categorization tool, which EPA uses to assign objective and reasonable relative wetland value categorizations”.⁴²¹

[602] The Director submitted that the Board should give limited weight to Mr. Wallis’ opinion as to the accuracy of Ms. Ferguson’s data in filling out the ABWRET-A form. The Director stated that although he is an AWP, Mr. Wallis acknowledged in cross-examination that he has never been within the Assessment Areas of the Badlands Wetlands, as required by the ABWRET Guide. He also agreed that visiting a site is a requirement to fill out an ABWRET-A form, and that the data obtained in such a site visit are to be based on observations of or within the Assessment Area. Additionally, Mr. Skibsted is not an AWP, and he has no professional expertise in the preparation of a wetland assessment and impact report. Mr. Skibsted also acknowledged at the hearing he had not been on the Badlands Lands or within the Assessment Areas for the Badlands Wetlands since Mr. Zelazo purchased the property around 2006. The Director did not doubt Mr. Skibsted has personal knowledge of the general Rosebud River area, but he is not the owner of the Badlands Lands and may not be considered a “knowledgeable source” with respect to the Badlands Wetlands as contemplated by the ABWRET Guide on page 17. It was not reasonable for Mr. Wallis to rely on Mr. Skibsted’s information regarding specifics of the Badlands Wetlands.⁴²²

[603] With respect to the Appellants’ suggestion that Ms. Ferguson erred by not including bank swallows when filling out cell F69 on the ABWRET-A form, the Director submitted that it was appropriate for Ms. Ferguson not to include bank swallows in filling out cell F69 of the Badlands ABWRET-A form. The ABWRET Guide establishes which species an AWP can

⁴²⁰ Director’s Response Submission at paragraph 234.

⁴²¹ Director’s Response Submission at paragraph 235.

⁴²² Director’s Closing Arguments at paragraphs 194 to 198.

consider when filling out cell F69 of the ABWRET-A form. As Ms. Cooper described in her evidence, the ABWRET Guide requires that an AWP only fills out the applicable F69 cell for a rare or sensitive waterbird species or sensitive songbird species within the Assessment Area if they detect one of the specific species listed in the ABWRET Guide for that indicator. Although there are undoubtedly other species of concern the ABWRET Guide does not currently capture, EPA has established the species lists it expects all AWPs to consistently apply when filling out the data form. Even if an AWP detects other species in an Assessment Area that they consider to be of conservation concern, it would be an error to include those species in the form contrary to the established guidance.⁴²³

[604] The Director submitted that the ABWRET-A is used to evaluate all wetlands within the Parkland/Grassland areas in Alberta. The score is an assessment of function, and is the result of multiple variables, not only the presence of rare species. This model weighs all criteria to determine wetland values. The Director submitted the Wetlands were assigned the proper value using the ABWRET-A. The Director stated that, while Mr. Wallis may not agree with the model, it is not for him to determine the adequacy of EPA policy. His opinion does not constitute evidence the Approval does not comply with the Wetland Policy or related directives.⁴²⁴

[605] The Director submitted that the Appellants have not met the onus of establishing the relative values of the Badlands Wetlands, as set out in the WAIR and relied upon by the Director, were incorrect.⁴²⁵ The Director stated that in the Board's review of the Director's decision, it is critical for the Board to distinguish between the Appellants' opinions about the use of the ABWRET-A and ABWRET Guide, and the actual evidence regarding how the Badlands Wetlands were valued. A change in a wetland relative value letter grade would not automatically mean an Approval would not have been issued.⁴²⁶

⁴²³ Director's Closing Arguments at paragraphs 200 to 205.

⁴²⁴ Director's Supplemental Submission at paragraphs 47 and 48.

⁴²⁵ Director's Closing Arguments at paragraph 193.

⁴²⁶ Director's Closing Arguments at paragraphs 206 and 207.

25.2.2. Board's Analysis

[606] The Wetland Policy's objective is to minimize the loss and degradation of wetlands, while allowing for continued growth and economic development in Alberta.⁴²⁷ To achieve this goal, the Policy focuses on the following outcomes:

1. Wetlands of the highest value are protected for the long-term benefit of all Albertans;
2. Wetlands and their benefits are conserved and restored in areas where losses have been high;
3. Wetlands are managed by avoiding, minimizing, and if necessary, replacing lost wetland value; and
4. Wetlands management considers regional context.⁴²⁸

[607] The Board finds that a key concept supporting the outcomes of the Wetland Policy is Relative Wetland Value. The Relative Wetland Value considers that wetlands are not all of equal value, and that some wetlands provide more functions and benefits than others. It acknowledges the relative contribution of an individual wetland to water quality improvement, hydrology, biodiversity, and various human uses. As the Wetland Policy states, the Relative Wetland Value is a cumulative effects management approach that enables planners and decision makers to consider the broader importance of an individual wetland on the landscape, while incorporating knowledge and understanding of Alberta's vast wetland diversity into making informed management decisions.⁴²⁹

[608] The Board finds that the Relative Wetland Value concept compares wetlands, across a list of metrics derived from five key functional groups that includes current abundance/density and historical loss considerations, within a broader context that includes the landscape upon which the wetland is found. Relative Wetland Value also balances environmental, social, and economic priorities in the execution of management decisions.⁴³⁰ Based on the sum of

⁴²⁷ Wetland Policy at page 2.

⁴²⁸ Wetland Policy at pages 2 and 8.

⁴²⁹ Wetland Policy at page 11.

⁴³⁰ Wetland Policy at pages 11 to 14.

all metrics, wetlands are assigned one of four relative wetland value categories A (highest) through D (lowest). These A to D categories reflect the relative importance of a wetland on the landscape from an ecological and human use perspective.⁴³¹

[609] The Board finds that implementation of the Wetland Policy is supported by a broad range of integrated data products required to support and enable the Wetland Policy including:

1. Provincial Wetland Inventory which provides a listing of all wetlands in the province;
2. Provincial Wetland Value Assessment System which provides a GIS-level assessment of value for all wetlands in the province. The resulting data layer will augment the Wetland Inventory, further enabling wetland policy decisions and providing a common foundation for land use planning activities in the Province;
3. Wetland Value Assessment Tool which augments the provincial wetland value assessment system, incorporating ground level data (e.g., species composition, water quality information, etc.) into the decision-making process. The Wetland Policy notes that both the provincial and site-level value assessments are crucial to the regulatory approvals process. The Wetland Policy expects that project proponents and/or consultants would be the primary users of this tool; and
4. Certification Systems for both wetland assessment specialists and wetland restoration agencies.⁴³²

[610] With respect to the Appellants' concerns about the "point in time" nature of the ABWRET-A, Ms. Cooper testified that the assessment is done at a point in time, but the wetland professional is expected to enter data based on an understanding of the site in a typical year; in this case there have been multiple site visits over multiple years including some in the growing season.

[611] With respect to the Appellants' concerns about the lack of consultation with Mr. Skibsted, the Director submitted that Mr. Skibsted acknowledged at the hearing he has not been on the Badlands property or within the Assessment Areas for the Badlands Wetlands since Mr. Zelazo purchased the property around 2006. The Director did not doubt Mr. Skibsted has

⁴³¹ Wetland Policy at page 13.

⁴³² Wetland Policy at page 21.

personal knowledge of the general Rosebud River area, but he is not the landowner of the Badlands property and may not be considered a “knowledgeable source” with respect to the Badlands Wetlands as contemplated by the ABWRET Guide.

[612] Based on the information in the ABWRET Guide, and the evidence of the Approval Holder and the Director before the Board, the Board finds that the data collection procedures followed by the Approval Holder’s consultant were consistent with the ABWRET Guide.

[613] The Appellants raised several concerns with the methods for calculating the wetland value:

1. Mr. Wallis and Mr. Skibsted raised several data entry concerns they had with the ABWRET-A form “F” tab data entered by Ms. Ferguson, specifically with reference to rows F5, 10, 24, 25, 26, 27, 54, 65, and 69, and provided their views on what data should have been entered;
2. The Normalized Scores for the Wetland Functions were incorrectly determined:
 - a. Songbird, Raptor and Mammal Habitat: none of the wetlands scored a 1.00, despite the reliance placed on Wetlands 1, 2, 4 and 5 by the following species: bank swallows, prairie falcons, golden eagles and sora, all three of which are songbirds or raptors;
 - b. Stream Flow Support: Wetland #1 scored a 0.00 despite having an outflow channel, dug by Mr. Clark’s father, confirmed by Mr. Thurmeier, confirmed still present by Mr. Skibsted and confirmed not filled by Mr. Zelazo;
 - c. Streamwater Cooling: Wetland #1 scored a 0.00 despite having an outflow channel;
 - d. Amphibian Habitat: none of the wetlands scored a 1.00, despite Mr. Stevens finding a northern leopard frog adjacent to the project area; and
 - e. Human Use and Recognition: none of the wetlands scored a 1.00, despite Mr. Skibsted’s evidence that he used to hunt over those wetlands and the evidence of historical First Nations use;
3. RWVAU 16 has an abundance factor of 0 (that is, no adjustment, upward or downward, is made to the Value Category before determining the Final Score). The Appellants, relying on Ms. Cooper at the hearing, argued that had the wetlands been just over the border in RWVAU 13, each wetland

would likely receive a high enough score to augment their values by one letter grade; and

4. The Appellants submitted that Wetlands 2, 4 and 5 received a 'D' classification in the Final WAIR, while Wetlands 1 and 3 each received a 'B' classification and submitted that all five of the wetlands ought to receive an 'A' (high) value. The Appellants stated there were several reasons why the wetlands were undervalued by the Director. In brief, the most significant reasons are that the Valley Wetlands:
 - a. Support significant colonies of bank swallows;
 - b. Are critical habitat for bank swallows;
 - c. Are habitat for northern leopard frogs;
 - d. Support five species of special concern;
 - e. Exist in a dry region with a lower proportion of wetlands; and
 - f. Function as a unique set of wetlands in the heart of the Rosebud River Valley and support a wide array of biodiversity.

[614] The Appellants based this position on: the emphasis of the Wetland Policy on: (1) wetland abundance; the dearth of wetlands in the area; (2) the significant biodiversity of the site, and the wetlands in particular; (3) the presence of the two SARA-listed species (bank swallow and little brown myotis) as well as other species of special concern that depend on the wetlands; and (4) the location of the wetlands in an environmentally significant area.

[615] As previously stated in this Report, the ABWRET-A is the provincially accepted method for evaluating wetlands. The Board finds that the use of RWVAU 16 by the Approval Holder and Director is consistent with the ABWRET Guide and that proximity to another RWVAU is not relevant.

[616] The Board finds that the Wetlands were correctly valued based on the ABWRET-A requirements. The Board further finds that the Appellants have provided no site-specific data that would support their assertion that the data collected by Ms. Ferguson were inaccurate and that the Appellants have not demonstrated that any changes to the calculated values of the Badlands Wetlands would have had any impact on the Director's decision to issue the Approval.

[617] The Board agrees with the Director that an individual approval is not the correct place to argue the merits of the ABWRET Guide or the ABWRET form; these are policy decisions that should be addressed in other forums.

[618] Of the five Wetlands, only Wetlands 2 and 3 are being filled in, and as explained earlier in this Report, the Board is satisfied that Wetland 3 could not be avoided. Regarding Wetland 2, the Board is satisfied that it was correctly assigned a D value. These valuations are important for applying the wetland avoidance system. As noted earlier in this Report, the Board will recommend the Minister require further rationale for why Wetland 2 could not be avoided.

25.3. Is the “Black Box” Nature of the ABWRET-A Unfair?

25.3.1. Submissions

25.3.1.1 Appellants

[619] The Appellants used the term “black box” to describe the process used by EPA to calculate the results of the Approval Holder’s input data. In brief, they stated that only EPA knows how the input data inserted by Ms. Ferguson into tab ‘F’ is used to calculate the final valuation scores contained in the ‘AllSitesA’ tab. The Appellants do not have access to that information. Neither the Approval Holder nor its technical consultant have access to that information. They argued that the Board does not have access to that information.⁴³³

[620] At the hearing, Mr. Wallis pointed to several steps in the ABWRET-A process where data or calculations are not public:

- Ms. Ferguson’s data (in the “F” tab) was combined with Off-Site GIS Data. The Off-Site GIS Data is not publicly available.
- Ms. Ferguson’s data and the Off-Site GIS Data were used to populate the 14 function models. Those calculations are not publicly available.
- The 14 function calculations are used to populate the ‘AllSitesA’ tab. Those calculations are not publicly available.

It is that information which Mr. Wallis terms the ‘black box’.⁴³⁴

⁴³³ Appellants’ Closing Arguments at paragraphs 117 to 120.

⁴³⁴ Appellants’ Closing Arguments at paragraphs 124 to 127.

[621] The Appellants also stated that how information is transferred from the tabs labelled ‘F’ and ‘S’ to produce the scores in the ‘AllSitesA’ tab is not displayed in real time or fully known to biologists when filling out the ABWRET-A. That final calculation is inherently discretionary upon the Director.⁴³⁵

[622] The Appellants further submitted that, because the Department does not disclose how the input data is used to calculate wetland scores, there is no way for the Appellants to know whether there are any other issues with the ABWRET-A and there is no way to respond to the Director’s determination of wetland scores.⁴³⁶

[623] The Appellants argued that this is a breach of the Appellants’ right to procedural fairness. The Director prevents parties, like the Appellants, from knowing the case they need to meet to respond to an Approval (citing *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at paragraph 38, and *JH v. Alberta (Minister of Justice and Solicitor General)*, 2020 ABCA 317 at paragraphs 95 and 96).⁴³⁷

25.3.1.2 Approval Holder

[624] The Approval Holder responded to the Appellants’ letter of October 27, 2022, stating that Badlands is not aware of “how information is transferred from tables labelled ‘F’ and ‘S’ to produce the scores in ‘AllSitesA’, nor is it fully known to Ms. Ferguson when filling out the ABWRET-A spreadsheet.

25.3.1.3 Director

[625] On October 28, 2022, the Director responded to the Appellants letter of October 27, 2022:

The Director acknowledges the Appellants do not have access to the underlying formulas and calculations used in the ABWRET-A – these formulas are not available to the public or provided to applicants or qualified wetland specialists during the *Water Act* approval process.

⁴³⁵ Letter from the Appellants to the Board dated October 27, 2022.

⁴³⁶ Letter from the Appellants to the Board dated October 27, 2022.

⁴³⁷ Letter from the Appellants to the Board dated October 27, 2022.

However, the Director submits this is not a breach of procedural fairness, as the Appellants knew, or ought to have been aware, that these formulas were not available to them well before the Director brought the consultant's review of the model to their attention.

The ABWRET Guide specifically acknowledges there are underlying assumptions and calculations that are not transparent to the user:

ABWRET's scoring is based on logic models programmed into the calculator spreadsheet which generates the function scores and value categories. Although this has the potential to create a "black box" wherein underlying assumptions and calculations are not transparent to the user, transparency has been assured by the open architecture of the Excel™ spreadsheet as well as by detailed explanations of the assumptions and mathematics of each scoring model (Appendix C of the ABWRET Guide).

[626] On November 1, 2022, the Director provided a correction to his October 28, 2022, letter:

At that time, I advised the Board the Appellants did not have access to the underlying formulas and calculations used in the ABWRET-A to determine the relative wetland values of the Badlands wetlands. This was incorrect. We have now determined the Department in fact sent the Board, the Appellants, and their counsel the excel spreadsheet with the original uncorrected formulas that was used to calculate the relative values of the Badlands wetlands on March 5, 2020 ... As such, the Appellants have had access to the detailed ABWRET-A, including the underlying calculations and formulas, for over two years.

Additionally, my October 20, 2022, letter attached an excel spreadsheet with the Badlands ABWRET-A submission containing calculations using the corrected formulas.

The Director provided a further revised version of the ABWRET-A excel spreadsheet previously provided on October 20, 2022, containing additional information in the tabs displayed on the bottom of the spreadsheet that showed: (1) where a formula had changed, (2) which formulas are visible, and (3) commentary related to the formula change(s).

25.3.2. Board's Analysis

[627] The Board is satisfied that the purpose and function of the ABWRET-A is to generate scores for a wetland's functions intended to assist applicants and the Department in making decisions about wetland avoidance, minimization and replacement.

[628] To the Appellants' submission that their right to procedural fairness has been breached because they do not fully know how the Director used the input data in certain tables, the Board finds no merit in this argument. The Appellants' have failed to explain to the satisfaction of the Board how their right to appeal the Approval has somehow been compromised by lack of this knowledge. In any event, as explained by the Director, the Board is satisfied that the Appellants had this information. As the Director explained, the Department sent the Appellants and their counsel the excel spreadsheet with the original uncorrected formulas that was used to calculate the relative values of the Wetlands in March of 2020.

[629] Despite Mr. Wallis' characterization of the ABWRET-A as a "black box", Ms. Cooper at the hearing demonstrated, and the Board agrees, that the ABWRET Guide provides extensive descriptions and explanations of the ABWRET-A calculations for scoring and categorizing Alberta wetlands. The ABWRET Guide states that "Although this has the potential to create a "black box" wherein underlying assumptions and calculations are not transparent to the user, transparency has been assured by the open architecture of the Excel™ spreadsheet as well as by detailed explanations of the assumptions and mathematics of each scoring model". The Board finds that, as Ms. Cooper also explained, this tool is consistently used for wetlands across the province and includes built-in redundancies to reduce bias in assessments.⁴³⁸

25.4. Do Ownership and Permanence of the Wetlands Affect the Approval?

25.4.1. Submissions

25.4.1.1 Appellants

[630] The Appellants stated that:

The *Public Lands Act* has legislated that the title to the beds and shores of 'all permanent and naturally occurring bodies of water' are "vested in the Crown in right of Alberta.

⁴³⁸ Director's Closing Arguments at paragraphs 186 and 187.

The five wetlands at issue in these proceedings are not owned by the Approval Holder and the Approval Holder has no rights to them, except as granted by an Approval awarded pursuant to the Act.⁴³⁹

[631] The Appellants submitted that when determining whether to recommend the Approval, the Board ought to be mindful of the fact that water bodies subject thereto are owned and titled to the Crown in right of Alberta. Put another way, they are owned for the benefit of all Albertans. Surrendering his Majesty's right to those water bodies ought to only occur where there is a clear mandate to do so. That discretionary determination, which is made by the Director, the Board and the Minister, is informed by section 2 of the *Water Act*. That section requires the mandate to be balanced by both economic realities and environmental stewardship. In this case, that balancing act requires that the Board refuse to recommend the Approval.⁴⁴⁰

[632] The Appellants submitted that Badlands only provided two instances, November 2014 and October 2017, when the wetlands were partially dry. The evidence contained in the Final WAIR and the Appellants' supplemental evidentiary submissions indicate that these wetlands have a longstanding historical presence and easily meet the threshold requirement of being "present over an extended period of time"⁴⁴¹.

[633] The Appellants cited *Despins v. St. Alberta (City)*, [1994] AJ No 1449 at paragraphs 38 to 40, and *Erik v. McDonald*, 2019 ABCA 217 at paragraphs 186 to 192, to support their argument that "permanence" in clause 3(1)(a) of the *Public Lands Act* is not a required feature of the Crown's title to bodies of water. What is required is that "water is present over an extended period of time as a result of the acts of nature."⁴⁴²

[634] The Appellants argued that there have been instances where the Director has relied on the analysis of an EPA wetland specialist to determine that a wetland was not Crown

⁴³⁹ Appellants' Initial Submission at paragraphs 7 and 10.

⁴⁴⁰ Appellants' Closing Arguments at paragraph 310 and 311.

⁴⁴¹ Appellants' Closing Arguments Rebuttal at paragraph 47.

⁴⁴² Appellants' Closing Arguments Rebuttal at paragraphs 42 to 44.

claimable⁴⁴³ and others where the Director has relied on Public Lands to determine if a wetland will be claimed.⁴⁴⁴

25.4.1.2 Approval Holder

[635] In response to a request at the hearing by the Board for an undertaking to produce their correspondence with the Lands Division of EPA (“Public Lands”) on land ownership of the Badlands Wetlands, the Approval Holder provided copies of four letters sent by Ms. Ferguson to EPA asking if Public Lands holds any interest in any of the wetlands within the project area. The letters were sent: January 15, 2015; November 13, 2018; April 24, 2019; and October 8, 2020.⁴⁴⁵

[636] The Approval Holder noted that in the Director’s Resume Referrals,⁴⁴⁶ Public Lands is shown as “N/A” – leading Badlands to conclude that EPA also did not consider land ownership to be an issue.⁴⁴⁷

[637] The Approval Holder stated that the wetlands in question are not “permanent” – the evidence in the Final WAIR and in the BIA/EPP shows them to be seasonal wetlands, and the cultivation marks through Wetland 3, and the hay bales in the other wetlands are dead giveaways. Consequently, title to the land under them is not vested in the Crown.⁴⁴⁸

25.4.1.3 Director

[638] The Director submitted that:

“The *Water Act* and approvals issued under the *Water Act* do not convey or affect land ownership or authorize designated directors to dispose of Crown-owned lands. Rather, it is the *Public Lands Act* which vests the title to the beds and shores of ‘all permanent and naturally occurring bodies of water’ in the Crown. The *Water Act*

⁴⁴³ For example, *Lapointe* at paragraph 168.

⁴⁴⁴ For example, *Landrex Hunter Ridge Inc. v. Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks* (28 October 2021), Appeal No. 20-022-R (AEAB), 2021 ABEAB 26 (“*Landrex*”) at paragraph 59.

⁴⁴⁵ Hearing Exhibits 2 to 5.

⁴⁴⁶ Director’s Record at Tab 31.

⁴⁴⁷ Approval Holder’s Submission at paragraph 50.

⁴⁴⁸ Approval Holder’s Submission at paragraph 50.

vests the property in and right to the diversion and use of all *water*, not the lands underlying the water.” (*Emphasis added by the Director.*)⁴⁴⁹

[639] At the hearing the Director confirmed that when he issued the Approval neither he nor his staff had received confirmation from the relevant Department staff that the wetlands were not going to be claimed under the *Public Lands Act*. He further stated that Ms. Ferguson performed the initial analysis of the wetlands’ permanence, finding that all of them were non-permanent in nature. According to EPA guidance documents, a proponent is not required to seek EPA confirmation of a wetland’s Crown claimability if it is non-permanent. The Director argued that the Appellants failed to produce clear evidence at hearing that would show the Badlands Wetlands are permanent in nature. As such, the Director’s determinations are entitled to deference.⁴⁵⁰

[640] The Director stated the wetlands approved to be impacted under the Approval are seasonal and not permanent, and therefore title to the underlying beds and shores is not vested in the Crown. The Director argued, contrary to the Appellants’ submission, the riparian lands are owned by Badlands.⁴⁵¹

25.4.2. Board’s Analysis

[641] Section 3 of the *Public Lands Act*, reads, in part

“3(1) Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of

(a) all permanent and naturally occurring bodies of water, and

(b) all naturally occurring rivers, streams, watercourses and lakes,

is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before, on or after May 31, 1984 does not convey title to those beds or shores.”

[642] “Body of water” is not defined in the *Public Lands Act*. However, “water body” is defined, in part, in the *Water Act* (s. 1(1)(ggg)) as:

⁴⁴⁹ Director’s Response Submission at paragraph 54.

⁴⁵⁰ Director’s Closing Arguments at paragraphs 218 and 219.

⁴⁵¹ Director’s Response Submission, at paragraph 55.

“... any location where water flows or is present, whether or not the flow or the presence of water is continuous, intermittent or occurs only during a flood, and *includes but is not limited to wetlands and aquifers ...*” (*Emphasis added by the Board.*)

[643] Section 9 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011, provides for issuance of dispositions for various uses of public land.

[644] The Board heard various views on the permanence of the wetlands and how the interpretation might affect the Crown’s claim to the wetlands. However, the Board finds the Approval Holder made numerous efforts to get confirmation from EPA regarding the Crown’s claim to the wetlands, and that EPA provided no response.

[645] The Board is satisfied that the Approval Holder provided sufficient evidence to demonstrate that the Crown has not claimed title to the wetlands on the Badlands Lands, and therefore, a *Public Lands Act* disposition was not required by Badlands for the Badlands Activities, as per the *Public Lands Act* and the *Public Lands Administration Regulation*.

25.5. Does the Quality Assurance/Quality Control Work Undertaken by Alberta Environment and Parks Regarding the ABWRET-A Affect the Approval Being Appealed?

[646] On October 12, 2022, the Director notified the Board and the other Parties that “in a process unrelated to these Appeals, EPA hired a consultant to

“... review ... its ABWRET-A wetland rapid evaluation tool. In performing this review, the consultant raised a question about the calculations used in the tool. We are seeking further information and have asked for a detailed explanation of potential impacts.”

[647] On October 20, 2022, the Director provided additional information on the review of the ABWRET-A and the impacts to final classifications of the five wetlands:

“EPA and the consultant have now corrected the formula errors [in the ABWRET-A] and run the Badlands ABWRET-A submission data using the corrected calculator. The calculated results showed a slight difference in the raw and normalized scores of a number of functions used to calculate the relative value scores. However, only the final normalized value score of Wetland 4 changed. This change in normalized value score did not impact the final letter score of Wetland 4, and Wetland 4 remains a D-value wetland. The final normalized value

scores of Wetlands 1, 2, 3 and 5 remained unchanged, as did their respective final letter scores (B, D, B, D).”

[648] In an October 27, 2022, letter to the Board the Appellants raised several concerns with respect to the revised ABWRET-A form and the process to develop it:

1. What were the errors in the ABWRET-A used by the Director to calculate the wetland scores for the impugned approval;
2. What other errors are in the ABWRET-A;
3. When were those errors discovered by EPA and when did they first retain the consultant;
4. Why could not EPA fix the errors themselves; and
5. What credentials does the consultant have to fix the ABWRET-A.

[649] At the hearing Ms. Cooper stated that until the Department completes its review and decides how and whether it will update the tool and guidance, the current ABWRET-A and existing ABWRET Guide will continue being applied to assess relative wetland values in the province.⁴⁵²

[650] The Approval Holder acknowledged the Director’s statement that the quality assurance/equality control work undertaken by EPA does not affect the Approval being appealed, and the final letter score of each wetland remained the same as the values the Director considered in making his decision to issue the Approval.⁴⁵³

[651] Having regard for the above, the Board finds that the changes to ABWRET-A are not relevant to these Appeals as they have not been implemented by the Department, and in any case, did not result in a change to the wetland valuations.

⁴⁵² Director’s Closing Arguments at paragraphs 61 and 62.

⁴⁵³ Letter from Approval Holder October 27, 2022.

26. WHICH WETLAND ASSESSMENT AND IMPACT REPORT SHOULD BE INCORPORATED INTO THE APPROVAL?

26.1. Submissions

26.1.1. Appellants

[652] The Appellants stated that, prior to the hearing, the Director informed the parties that the Final WAIR attached to the Approval was the incorrect version of the WAIR. The correct version of the WAIR (the “Updated WAIR”) was provided by the Director on October 16, 2020.⁴⁵⁴ The Appellants submitted that the differences between the Final WAIR and the Updated WAIR were substantial.⁴⁵⁵

[653] The Appellants submitted that until the Minister Orders that the Updated WAIR replaces the Final WAIR, the Final WAIR remains appended to the Approval and its compliance is a condition for Approval.

26.1.2. Approval Holder

[654] The Approval Holder submitted the Updated WAIR to the Department on November 10, 2019.⁴⁵⁶

[655] At the hearing, Ms. Ferguson stated that she thought the wrong WAIR had been appended to the Approval by the Department.

26.1.3. Director

[656] The October 16, 2020, covering letter to the Board supplying the Director’s Supplemental Record noted that:

“With respect to the WAIR, the initial version [the Final WAIR] was submitted to EPA on October 17, 2019. This old version, which can be found at Tab 27, was incorrectly incorporated by reference into the Approval and stamped as Report 00406489-R002. The correct and final version of the WAIR [the Updated WAIR] that should have been incorporated into the Approval can be found at both Tabs 70 and 77. The WAIR at Tabs 70 and 77 had been revised in accordance with EPA

⁴⁵⁴ Director’s Record at Tab 77.

⁴⁵⁵ Appellants’ Closing Arguments at paragraph 22.

⁴⁵⁶ Director’s Record at Tab 76.

direction and was submitted to the Department on November 10, 2019 (Directors Record at Tab 76). However, both the initial version (Tab 27) and the final version (Tabs 70 and 77) show the same report date of October 9, 2019.”

[657] The Director proposed to amend the Approval by replacing the Final WAIR with the Updated WAIR.⁴⁵⁷

26.2. Board’s Analysis

[658] Section 38(3) of the *Water Act* provides that:

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

[659] The Director incorporated by reference the Final WAIR in Condition 3.1 of the Approval and recommended replacing it with the Updated WAIR.

[660] After reviewing Exhibit 1 provided by the Appellants, the Board finds that most of the differences between the Final WAIR and the Updated WAIR relate to changes in text or font attributes and therefore are not substantive changes. Where text was changed, added, or deleted it appears to be mostly in response to the Director’s November 7, 2019, supplemental information request to:

1. Remove references to Wetland 3 being an ephemeral waterbody and/or a Stewart and Kantrud (S&K) Class III as it is a temporary to seasonal marsh under the AB Wetland Classification System (AWCS) – specifically pages 5 and 28.
2. Further, revise all S&K classification for surveys after 2014 to the AWCS classification code for wetland class, form and type, as required in the Wetland Assessment and Impact Report Directive. In each wetland table (Table 4-8) and throughout the document, classify to AWCS class-form-type for all surveys after 2014 rather than S&K.⁴⁵⁸

[661] Having regard to the above, the Board will recommend to the Minister that the Updated WAIR should be incorporated by reference in the Approval as proposed by the Director.

⁴⁵⁷ Hearing Exhibit 12.

⁴⁵⁸ Director’s Record at Tab 75.

PART 12. WHAT, IF ANY, ARE THE POTENTIAL IMPACTS TO WILDLIFE, AND SPECIFICALLY SPECIES AT RISK?

27. APPLICABILITY OF THE SPECIES AT RISK ACT AND THE RECOVERY STRATEGY FOR THE BANK SWALLOW (*RIPARIA RIPARIA*) IN CANADA

27.1. Submissions

27.1.1. Appellants

[662] The Appellants argued at length about the provisions of SARA and how SARA operates to in essence prohibit the Badlands Motorsport Resort. According to the Appellants, if the Approval proceeds, the Board will be authorizing an indictable offence.⁴⁵⁹

[663] The Appellants submitted that SARA is applicable to these proceedings.⁴⁶⁰ According to the Appellants, the racetrack is critical habitat protected by a final recovery strategy for bank swallows (the “Recovery Strategy”)⁴⁶¹ and, under section 57 of SARA all of the bank swallow’s critical habitat is protected.⁴⁶² Once critical habitat is designated through a recovery strategy and an action plan, that critical habitat is automatically protected by operation of section 57 of SARA.⁴⁶³ The Appellants argued that section 58 of SARA is clear: all of the critical habitat belonging to a migratory bird covered under the *Migratory Birds Convention Act*, SC 1994 (“MBCA”), including the bank swallow is protected.⁴⁶⁴

[664] The 2022 Wallis Report (at page 17) noted that some of the Badlands Lands fall into the final critical habitat boundary for bank swallow as shown in the Recovery Strategy. Mr. Wallis stated that “In total, at least 24 ha of bank swallow critical habitat would be directly

⁴⁵⁹ Appellants’ Closing Arguments at paragraph 462.

⁴⁶⁰ Appellants’ Closing Arguments at paragraph 388.

⁴⁶¹ Environment and Climate Change Canada. 2022. *Recovery Strategy for the Bank Swallow (*Riparia riparia*) in Canada*. Species at Risk Act Recovery Strategy Series. Environment and Climate Change Canada, Ottawa. Included in the Supplemental Evidentiary Submissions of the Appellants.

⁴⁶² Appellants’ Closing Arguments at paragraphs 388, 391 and 393.

⁴⁶³ Appellants’ Closing Arguments at paragraph 400.

⁴⁶⁴ Appellants’ Closing Arguments at paragraphs 402 and 403.

destroyed by the Badlands Motorsport Resort” (at page 21). In the 2022 Wallis Report (Figure 5), Mr. Wallis overlaid the bank swallow critical habitat map onto the Badlands Lands.⁴⁶⁵

[665] The Appellants submitted that, based on the map from Environment and Climate Change Canada (“ECCC”) titled *Bank Swallow (Riparia riparia) Rosebud 1233_AB_9*,⁴⁶⁶ approximately $\frac{3}{4}$ of the Badlands’ property is deemed critical habitat for bank swallows, including all four Valley Wetlands.⁴⁶⁷

[666] The Appellants submitted that no evidence was presented by either Badlands or the Director contradicting Mr. Wallis’ conclusions that the Valley Wetlands are part of the critical habitat designation in the Recovery Strategy, nor was evidence presented contradicting Mr. Wallis’ conclusions that the Badlands Activities would destroy habitat designated critical in the Recovery Strategy.⁴⁶⁸

[667] The Appellants noted the Director’s January 8, 2021, submission statement at paragraph 148 that:

The Director agrees that section 58 of SARA will apply to prohibit the destruction of any part of the bank swallow’s critical habitat, but only once critical habitat has been identified in a finalized and approved recovery strategy that is posted on the federal Species at Risk Public Registry in accordance with section 43 of SARA.⁴⁶⁹

And further noted that, since ECCC published the Recovery Strategy, “one would think that the Director would finally acknowledge the applicability of SARA to the Approval site.”

27.1.2. Approval Holder

[668] The Approval Holder submitted that federal regulatory constraints must be followed by Badlands, just as it has to follow various municipal and provincial requirements. None of these affect the jurisdiction of the Board to deal with the Approval or put the Board at risk of

⁴⁶⁵ Appellants’ Closing Arguments at paragraphs 63.

⁴⁶⁶ Appellants’ Supplemental Evidentiary Submissions at page 4.

⁴⁶⁷ Appellants’ Closing Arguments at paragraph 58.

⁴⁶⁸ Appellants’ Closing Arguments at paragraphs 64 and 66.

⁴⁶⁹ Appellants’ Closing Arguments at paragraph 380.

legal sanction. The Approval Holder noted that in its view, the implementation of SARA is not within the Board’s jurisdiction, but facts with respect to species are, as the Board previously found in *Hanson and Lindberg v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: County of St. Paul*, (7 November 2013), Appeal Nos. 13-005 and 006-ID, 2013 ABEAB 34 (“*Hanson*”).⁴⁷⁰

[669] The Approval Holder submitted that there is nothing in the Recovery Strategy that designates any of Approval Holder’s lands as critical habitat of bank swallows, or subject to SARA restrictions.⁴⁷¹

27.1.3. Director

[670] The Director argued that he does not have jurisdiction to apply SARA, but if he did, the Badlands Activities would not contravene SARA.⁴⁷² Furthermore, the Director argued, the SARA prohibitions against the destruction of critical habitat do not apply to the Approval because the Badlands Development Area is located on private, non-federal land.⁴⁷³

[671] The Director submitted that the 2020 Wallis Report speculated the presence of vehicles on the racetrack will be “harmful to listed species of concern” but provided no site-specific evidence to this effect or studies related to racetracks.⁴⁷⁴

[672] The Director stated that:

“[m]ore importantly, the presence of vehicles is irrelevant to the Approval and issue for hearing. The operation of the overall racetrack is not subject to appeal, as it does not form part of the Badlands Activities ... The County of Kneehill made the decision allowing Badlands to develop and operate a racetrack on their private lands. The municipality’s land-use decision is not under appeal in this hearing.”⁴⁷⁵

⁴⁷⁰ Approval Holder’s Submission at paragraphs 72 and 82.

⁴⁷¹ Approval Holder’s Closing Arguments at pages 11 and 18.

⁴⁷² Director’s Closing Arguments Appendix II paragraph 1.

⁴⁷³ Director’s Closing Arguments Appendix II paragraph 2 and 23.

⁴⁷⁴ 2020 Wallis Report at pages 3, 22, and 34 to 36.

⁴⁷⁵ Director’s Record at Tab 27.

27.2. Board's Analysis

[673] To the extent that SARA is applicable to these proceedings, the Board adopts its previous comments in *Hanson*:

“[85] The *Species at Risk Act* is not within the Director's or the Board's jurisdiction to ensure compliance. However, the *Species at Risk Act* may be referred to identify species that are endangered or at risk. The *Species at Risk Act* can only be used as a reference to identify species that should be considered; it cannot be used to determine what the Director should or should not consider when issuing the Approval.”

[674] The Board finds that it does not have jurisdiction, nor would it be appropriate to opine on whether SARA applies to the Approval Holder to prohibit some or all of the BMR. The Board agrees with the Director that a provincial *Water Act* approval cannot authorize the Approval Holder to contravene federal legislation, nor can the Board override federal legislation. The Board further agrees with the Director that obtaining a *Water Act* approval to conduct an activity as part of an overall development does not release the Approval Holder from the requirements imposed by SARA, or any other federal enactment. Nor does a *Water Act* approval impede the federal government from investigating the Approval Holder and taking appropriate enforcement action if it were determined a federal law was contravened.

[675] The Appellants and the Director have submitted two very different interpretations of SARA and how and whether it applies to the Badlands Motorsport Resort. While accepting the limited application of SARA as set out in *Hanson*, above, the Board takes no position on the competing interpretations of the Parties as to the application of SARA vis a vis the Approval Holder. In short, it is up to the Approval Holder to determine compliance with SARA.

[676] To the Appellants' submission that one would think that the fact that two listed species use the impugned wetlands would factor into the Board's determination of the environmental impacts of the Approval,⁴⁷⁶ the Board agrees and notes this is consistent with its

⁴⁷⁶ Appellants' Closing Arguments paragraph 445.

previous decision in *Hanson*. The Board finds that SARA is useful as a reference to identify species that should be considered.⁴⁷⁷

[677] The Board rejects the Appellants' suggestion that the Board would be authorizing an indictable offence under SARA because the Board has no authority to override federal legislation under its governing legislation (namely, EPEA and the *Water Act*). In summary, the Approval Holder is responsible for ensuring it complies with all applicable federal and provincial legislation and obtains all required authorizations in carrying out the Badlands Activities and/or the building of the BMR.

28. WHAT ARE THE POTENTIAL IMPACTS TO WILDLIFE?

28.1. General

28.1.1. Appellants

[678] Mr. Clark and Ms. Clark raised specific concerns about wildlife and wildlife habitat protection that the Director should have considered:

- Ms. Clark is concerned that during construction, the wildlife will be driven away from the site possibly to our adjacent property. I am [also] concerned about fenced racetracks blocking the major corridor from my land (in Wheatland County) for wildlife to access the wetlands and the river;⁴⁷⁸
- Ms. Clark is concerned the proponent's studies have not identified all the wildlife that depends on the wetlands, the river, and the valley. I am concerned the proponent has not considered all the impacts to wildlife during construction and operation of a racetrack. I am concerned plans, policies, land use guidelines, and legislation (federal, provincial, municipal, regional) for protection of wildlife and native grassland have not been followed;⁴⁷⁹
- Ms. Clark is concerned that the BIA and EPP provide mitigation strategies to reduce the damage imposed on wildlife due to wetland removal and alteration. I am concerned that, even with these measures in place, a loss of wildlife to the area will occur that is associated with wetland loss and

⁴⁷⁷ For example, see section 28.2 of this Report.

⁴⁷⁸ Ms. Clark's Notice of Appeal 19-070.

⁴⁷⁹ Ms. Clark's Notice of Appeal 19-070.

alteration, particularly of species that are already considered to be of special status;⁴⁸⁰

- Mr. Clark is concerned the moose travelling across my land will neither be able to use the main wildlife corridor to the wetlands or river, and not be able to access the wetlands at all,⁴⁸¹ and
- Mr. Clark has concerns for the northern harriers that nest at the wetlands, for the golden eagles and the prairie falcons, and the hopes for the return of the peregrine.⁴⁸²

[679] Mr. Groves and Ms. Kenworthy both indicated their economic interests would be affected by the Badlands Activities as they receive income from photographing the wildlife using the Badlands Wetlands. Mr. Groves specifically referenced the golden eagles that feed on the ducks in the Badlands Wetlands, and the bank swallows whose “principle foraging habitat are Wetlands 1, 2, 4 and 5” as being integral to his photography and tour guide business.⁴⁸³ Ms. Kenworthy specifically referenced the bank swallows, golden eagles and prairie falcons that depend on the Badlands Wetlands.⁴⁸⁴

[680] The Appellants’ SOCs also noted a concern with animals which use the wetlands as their habitat.⁴⁸⁵

[681] The Appellants submitted that the Rosebud River valley is habitat to numerous species deemed sensitive by the Province of Alberta, including, among others, the short-eared owl, northern harrier, prairie falcon, golden eagle, Sprague’s pipit, common yellowthroat, sora, American badger, and plains rough fescue.⁴⁸⁶

⁴⁸⁰ Statement of Kimberley Murray, adopted by Ms. Clark as part of her Notice of Appeal 19-070.

⁴⁸¹ Mr. Clark’s Notice of Appeal 19-069.

⁴⁸² Mr. Clark’s Notice of Appeal 19-069.

⁴⁸³ *McMillan et al. ID4* at paragraphs 109, 110, 112 and 113.

⁴⁸⁴ *McMillan et al. ID4* at paragraph 123.

⁴⁸⁵ Appellants’ SOCs in Director’s Record at Tabs 99, 100, 118, 137, and 142.

⁴⁸⁶ Appellants’ Closing Arguments at paragraphs 10 and 74.

28.1.2. Approval Holder

[682] The Approval Holder made no recommendations for additional wildlife conditions in the Approval.

[683] Concerning the specific concerns of Mr. Clark, Ms. Clark, Mr. Groves, and Ms. Kenworthy, the Approval Holder submitted that the Final WAIR noted that Badlands Lands are considered to provide good habitat capability for wildlife and there are 12 special status wildlife species that are reported by EPA as occurring within 5 km of the BMR. Although no special status species were observed, there is potential for them to frequent the area. Consequently, mitigation measures including providing disturbance categories and setback distances have been included in the BIA/EPP.⁴⁸⁷ They also include avoiding stripping and grading the site during the sensitive reproductive period for wildlife species listed (i.e., April 15 to August 31), and planting disturbed areas with specific seed mixes as a final habitat restoration and erosion control measure (page 67). The Approval Holder stated that the Final WAIR and its mitigation strategies are incorporated by reference in Condition 3.1 of the Approval.⁴⁸⁸

[684] The Approval Holder noted that the Badlands Lands are currently unfenced, and apart from a few obstacles caused by the rail line and the Rosebud River, the Badlands Lands currently provide relatively unrestricted access to wildlife moving through it. For safety reasons, the Approval Holder anticipates that a continuous full height enclosure fence (i.e., 2.5 m) similar in design to highway fencing along the TransCanada Highway in Banff National Park will be erected around the perimeters of the two track areas to control the movement of humans and to prevent wildlife from wandering onto the tracks during operation. Wildlife will still be able to move freely around the perimeter of the Badlands Development Area from the upland areas along

⁴⁸⁷ Approval Holder's Submission at paragraph 40.

⁴⁸⁸ Approval Holder's Submission at paragraph 31.

the tops of the escarpment and down into the riparian habitats along the Rosebud River.⁴⁸⁹ The BIA/EPP provides design criteria for the wildlife fence.⁴⁹⁰

28.1.3. Director

[685] The Director acknowledged the Badlands Activities would have some limited impact on wildlife, as would any activity on previously undeveloped agricultural lands. However, the Director submitted the Badlands Activities, including the removal of two wetlands from the area, would have no significant adverse effects on wildlife, including the bank swallow and the little brown myotis.⁴⁹¹

[686] The Director submitted that the Approval includes conditions that adequately protect wildlife through incorporation by reference of the Final WAIR.⁴⁹²

[687] In particular, the Director referenced the following provisions in the Final WAIR:

The WAIR recommends that construction within the wetland habitats be conducted outside of the sensitive reproductive and rearing periods for wildlife to avoid potential disturbances during the breeding and rearing seasons (i.e., April 15 to August 31). Specifically, it is recommended that clearing of vegetation occur during the winter or fall months and stripping of the topsoil will occur only prior to when the site is going to be developed.

Where construction activities are scheduled to begin during the summer, the WAIR requires that the targeted area shall be surveyed prior to disturbance for any special status wildlife species that have potential to occur, and/or to determine if there is any active nesting. If either is evident, work shall be redirected to another area or postponed until after August 31. Additionally, construction activities will be scheduled during daylight hours to avoid disturbing nocturnal wildlife.⁴⁹³

[688] At the hearing, Mr. Nicholson described the review process relative to wildlife impacts, including the series of SIRs and related responses from the Approval Holder, and noted that the Senior Biologist (Mr. Stevens) concluded that Badlands met the obligations for wildlife

⁴⁸⁹ BIA/EPP at page 58.

⁴⁹⁰ BIA/EPP at pages 118 and 119.

⁴⁹¹ Director's Response Submission at paragraph 206.

⁴⁹² Director's Response Submission at paragraph 227.

⁴⁹³ Director's Response Submission at paragraphs 228 and 229.

assessment and mitigation for the Approval.⁴⁹⁴ Based on the EPA Wildlife Biologist's review, the Director was satisfied that additional referrals or on-site surveys were not required. As noted in his decision statement, the Director concluded the Badlands Activities "will have no significant impact on endangered species due to the observations and recommendations made by [Badlands'] biology consultant".⁴⁹⁵

[689] Mr. Nicholson testified to the wildlife mitigative measures in the BIA/EPP and the Final WAIR.⁴⁹⁶ The Director stated he relied on the Final WAIR and the BIA/EPP, which addressed wildlife in several ways.⁴⁹⁷ The Director noted that mitigation measures during construction, outlined in the BIA/EPP and Final WAIR, take wildlife disturbance, features, and habitat into consideration.

[690] Mr. Nicholson concluded his testimony by stating that:

The approval activities that could have adverse effects on wildlife are highly local, and have been mitigated by the measures in the supporting WAIR and BIA/EPP, including:

- conducting appropriate wildlife surveys of the site,
- avoiding habitat and minimizing habitat loss where possible,
- timing of construction activities,
- adherence to wildlife setback and restricted activity periods, and
- conducting pre-construction wildlife sweeps.⁴⁹⁸

[691] The Director submitted the 2020 Wallis Report provided no site-specific assessments or actual evidence of potential impacts the Badlands Activities may have on wildlife.

⁴⁹⁴ Director's Response Submission at paragraph 29.

⁴⁹⁵ Director's Response Submission at paragraph 214.

⁴⁹⁶ Director's Direct Evidence PowerPoint presentation at slides 130 to 134.

⁴⁹⁷ Director's Response Submission at paragraph 208.

⁴⁹⁸ Director's Direct Evidence PowerPoint presentation at slide 136.

Therefore, the Board should not consider any parts of the 2020 Wallis Report relating to wildlife, as much of it is irrelevant to the issue for hearing.⁴⁹⁹

[692] The Director submitted the Appellants have not met the onus to demonstrate the Badlands Activities will have a significant adverse effect on any wildlife species and did not refer to any evidence of potential impacts in their written submission.⁵⁰⁰

[693] The Director concluded that, in his opinion, no additional terms or conditions related to wildlife or wildlife habitat were required in the Approval.⁵⁰¹

28.2. Bank Swallows

28.2.1. Appellants

[694] In Mr. Clark's Notice of Appeal, he stated he was concerned about the destruction of these wetlands and for the 500 pairs of bank swallows nesting immediately across the road that are so plentiful you have to reduce your speed to avoid hitting them.

[695] The Appellants submitted that the Final WAIR enumerates the species at risk that are present at the site but "omits mention of either the bank swallows or the little brown myotis that use the wetlands. Most concerning is that the report confirms that the bank swallows have active breeding colonies observed in the steep north facing cliffs above the Rosebud River"⁵⁰² and stated that this is the only mention of bank swallows in the entirety of the Final WAIR.⁵⁰³

[696] The Appellants submitted that there are three sources of evidence that place bank swallow colonies directly adjacent to the racetrack: Mr. Marc Cyr, Mr. Skibsted, and Mr. Wallis:

1. In Federal Court Action No. T-716-20, Mr. Marc Cyr, wildlife biologist with Canadian Wildlife Service of ECCC in the Migratory Birds

⁴⁹⁹ Director's Response Submission at paragraphs 258 and 266; Director's Supplemental Submission at paragraph 34.

⁵⁰⁰ Director's Response Submission at paragraph 265.

⁵⁰¹ Director's Direct Evidence PowerPoint presentation at slides 127 to 129; Mr. Nicholson referenced the Director's Record at Tab 60; Director's Response Submission at paragraph 230.

⁵⁰² Appellants' Initial Submission at paragraph 33.

⁵⁰³ Appellants' Closing Arguments at paragraph 39.

Conservation Unit, undertook to provide photos and maps of bank swallow locations adjacent to the racetrack;

2. At the hearing, Mr. Skibsted confirmed the location of, with few exceptions, the bank swallow colonies photographed by Mr. Cyr; and
3. Each of Mr. Wallis' reports provide evidence of bank swallows, including videos, photographs and maps produced by Mr. Wallis based on his site visits.

At the hearing, Mr. Skibsted and Mr. Wallis identified 700 to 800 pairs of bank swallows nesting directly adjacent to the proposed racetrack. With 98% of this species extirpated, the bank swallows adjacent to the racetrack represent a sizeable portion of the remaining 2% of this Canadian species.⁵⁰⁴

[697] The Appellants submitted that “Also uncontroverted is the fact that bank swallows use wetlands 1, 2, 4 and 5 to forage” and that, at the hearing, both Mr. Skibsted and Mr. Wallis testified that they observed bank swallows leave their colonies to forage over the wetlands.⁵⁰⁵

[698] The Appellants provided seven videos taken June 29, 2022, and located in the “federally designated critical habitat for bank swallows in the BMR project area and nearby Rosebud River,” which shows bank swallows flying and feeding over “the BMR property” and bank swallow nesting sites on and adjacent to “the BMR property.”⁵⁰⁶

[699] Mr. Wallis contested Ms. Ferguson's assertion that there are other wetlands in the area, stating that most of the wetlands mapped by Ducks Unlimited Canada within this potential bank swallow critical habitat and included in the EnviroConsult Response at Figure 1 are not wetlands; he cited eight places on the map identified as wetlands that were not wetlands in his opinion.⁵⁰⁷

⁵⁰⁴ Appellants' Closing Arguments at paragraphs 31 to 35, and 37.

⁵⁰⁵ Appellants' Closing Arguments at paragraphs 44 and 45.

⁵⁰⁶ 2022 Wallis Report at page 49.

⁵⁰⁷ 2021 Wallis Review at page 5.

[700] The Appellants submitted that both Ms. Ferguson and the Director confirmed at the hearing that they had made no efforts to document what use the bank swallows make of the Valley Wetlands.⁵⁰⁸ The Appellants further stated that, given the statements of Ms. Ferguson and the Director, the Director's decision statement⁵⁰⁹ is difficult to reconcile:

The activities under consideration under the *Water Act* will have no significant impact on endangered species due to the observations and recommendations made by the applicant's biology consultant.⁵¹⁰

[701] The 2020 Wallis Report identified several concerns related to wildlife and wildlife habitat that the Appellants submitted the Director should have considered:

1. Federally listed Threatened species such as the bank swallow feed over the wetlands and adjacent native habitats and they occur in significant numbers along the Rosebud River, nesting both on banks of the Badlands Lands as well as across the river on other banks (page 3);
2. The Approval does not consider the loss of Wetland 2, the modifications to Wetlands 1, 4 and 5 and presence of vehicles on the racecourse network as harmful to listed species of conservation concern, including the Threatened bank swallow (page 4); and
3. In 2020, there were five active bank swallow colonies on banks on both the Badlands Lands and properties on the opposite side of the Rosebud River. Numbers ranged from small colonies of 10 pairs to colonies with hundreds of nesting pairs. Bank swallows are known to feed over the wetlands in the valley that are in proximity to the racetrack. I personally have observed them feeding over wetlands in the valley and picking up gravel on the wellsite access road on the Badlands Lands (page 16).

[702] The 2022 Wallis Review stated that:

1. It is clear to me from the record that the use of these wetlands by bank swallows was not considered by the Approval Holder or its consultants. The documentation is devoid of mention of the presence of multiple colonies on the project area and immediately adjacent lands, the significant use of the project area by bank swallow travelling between nesting colonies and

⁵⁰⁸ Appellants' Closing Arguments at paragraphs 47 and 48.

⁵⁰⁹ Director's Record at Tab 32.

⁵¹⁰ Appellants' Closing Arguments at paragraphs 47 to 49.

project area wetlands, and the use of the project area wetlands for foraging (page 16); and

2. EnviroConsult does not mention doing specific surveys for little brown myotis using established Alberta protocols. It is not even clear if they were actively searched for (page 18).

28.2.2. Approval Holder

[703] The Approval Holder concluded that the only things clear on the record with respect to the bank swallow, and are properly before the Board, are that:

1. it is in the vicinity of the Badlands Development Area,
2. it is designated as “Sensitive” under the Alberta system,⁵¹¹
3. it is a migratory bird under the MBCA,
4. it is considered “Threatened” under SARA, and
5. data and expert opinion are available on the bank swallow.⁵¹²

[704] Ms. Ferguson submitted that bank swallow nest sites were noted along the north- and south-facing cliffs above the Rosebud River are outside of the project area boundaries. As has always been the plan these areas will be avoided entirely during development of the BMR.⁵¹³

[705] The Approval Holder stated that the potential project-related impacts to bank swallows caused by the removal of 0.51 ha of Wetland 2 in comparison to the abundance of adjacent foraging habitats is low and insignificant. Bank swallows were never observed feeding over the wetlands during any visits to the project area since 2007.⁵¹⁴

[706] Ms. Ferguson also noted that bank swallows forage over wetlands and watercourses where flying insects are the most plentiful. There are numerous wetlands and available foraging

⁵¹¹ The Board understands “the Alberta system” to refer to the General Status of Alberta Wild Species.

⁵¹² Approval Holder’s Submission at paragraph 84.

⁵¹³ EnviroConsult Response at page 5.

⁵¹⁴ Approval Holder’s Closing Arguments at page 11.

habitat sites up and down the river valley as well as on all adjacent agricultural lands.⁵¹⁵ She referenced a Ducks Unlimited map of available wetlands in the local area.⁵¹⁶

[707] The Approval Holder provided many instances in the Final WAIR and the BIA/EPP where bank swallows are addressed.⁵¹⁷ Ms. Ferguson referred to the WAIR and the BIA/EPP which stipulate that in the wetland areas construction occurs outside the sensitive breeding and reproduction season of April 15 to August 31. Furthermore, other construction scheduled for the summer requires the target area to be surveyed for special status wildlife species potential, or active nesting – and if those are evident work is postponed until after August 31.⁵¹⁸

28.2.3. Director

[708] The Director acknowledged that bank swallows are a listed species of migratory birds under the Schedule to the MBCA.⁵¹⁹

[709] The Director did not dispute that wetlands have value for local ecosystems and a variety of wildlife species, including bank swallows.⁵²⁰ However, with respect to the wildlife concerns raised in the 2020 Wallis Report, the Director stated that the Appellants have submitted no evidence to suggest the Badlands Activities will have a significant impact on any wildlife, including the bank swallow.⁵²¹

[710] The Appellants' submission speaks to SARA generally and how it might apply if a SARA-listed species had an approved recovery strategy with designated critical habitat. However, there is no reference to how the actual Badlands Activities might impact wildlife, beyond stating that bank swallows “use the wetlands”.⁵²²

⁵¹⁵ EnviroConsult Response at page 5.

⁵¹⁶ EnviroConsult Response, Figure 1 at page 14.

⁵¹⁷ Approval Holder's Submission at paragraph 77.

⁵¹⁸ EnviroConsult Response at page 11.

⁵¹⁹ Director's Supplemental Submission at paragraph 24.

⁵²⁰ Director's Closing Arguments at paragraph 224.

⁵²¹ Director's Response Submission at paragraph 257.

⁵²² Director's Response Submission at paragraph 257.

[711] The Director stated that the 2020 Wallis Report includes an anecdotal observation of bank swallows near the Approval site by the author, and states little brown myotis “occur widely along the Rosebud River” but cites no studies or reports in support.⁵²³ The Director stated this is not evidence that these species rely on the wetlands approved to be infilled or modified.

[712] The Director submitted merely noting the presence of a sensitive species in the general vicinity of the Approval site does not constitute evidence the Badlands Activities will have a significant adverse impact on a species or pose an imminent threat to their survival.

[713] Furthermore, the Director noted the Approval does not authorize activities on the banks of the Rosebud River where the bank swallow colonies are found.⁵²⁴

28.3. Other Species of Concern

28.3.1. Appellants

[714] The Appellants stated that part of Mr. Groves’ testimony at the hearing concerned a conversation with Mr. Stevens:

Mr. Harrison: What did Scott Stevens tell you about the northern leopard frog?

Jon Groves: I just asked him specifically where it was found, if he had any more detail on distance from the site or direction or anything, particulars like that, and he informed me that it was not him who found the northern leopard frog but a colleague and he didn’t tell me who this colleague was. My impression was that he did not want to say who this colleague was and I tried to follow up but I did not get any more information on that.

Q: And where did he tell you that this northern leopard frog was found?

A: He just said to his knowledge it was adjacent to the property along the river itself, the Rosebud River.

[715] The Appellants submitted that an adverse inference ought to be drawn against EPA due to its failure to produce the biologist who located the species. Any dispute as to the location of the northern leopard frog ought to be decided against EPA. The Appellants further submitted

⁵²³ 2020 Wallis Report at pages 16 and 37.

⁵²⁴ Director’s Closing Arguments at paragraph 234.

that the Board ought to rule that a northern leopard frog was found immediately adjacent to the racetrack.⁵²⁵

[716] The Appellants noted that the Final WAIR makes no mention of the little brown myotis that use the wetlands. They stated they were not aware of any revisions to the WAIR Report since the details relating to the little brown myotis were clarified on appeal. Without overstating the author's professional responsibility, these considerations ought to have been reflected in an amended report as soon as they were made clear to the Approval Holder.⁵²⁶

[717] The Appellants stated that they were concerned that Ms. Ferguson has never discussed how or whether little brown myotis use the wetlands. It is more concerning that the Director never asked for this information.⁵²⁷

[718] The 2020 Wallis Report identified several concerns related to wildlife and wildlife habitat that the Appellants submitted the Director should have considered:

1. All species of garter snakes are listed as Sensitive in Alberta (Alberta Environment and Parks, 2015) and an unidentified species of garter snake was observed on the east side of Wetland 5 (EIA/EPP and Final WAIR) (page 16). No search was conducted for snake hibernacula despite the observation of a garter snake at Wetland 5 (page 37);
2. Prairie falcon, listed as Sensitive in Alberta (Alberta Environmental Protection, 2015), nest on Badlands Lands and nearby areas on cliffs of the Rosebud River (page 16); and
3. The occurrence of a pair of short-eared owls on several occasions on the prairie butte (as noted in the EIA/EPP and Final WAIR) in the valley that is surrounded by wetlands 1, 2 4 and 5 likely indicates nesting in the vicinity (page 16).

[719] The Appellants submitted that the Final WAIR made no mention of the prairie falcon nor the golden eagle in the section dedicated to "species of special concern," although they

⁵²⁵ Appellants' Closing Arguments at paragraph 376.

⁵²⁶ Appellants' Closing Arguments at paragraph 356; Appellants' Rebuttal Submission at paragraph 10.

⁵²⁷ Appellants' Closing Arguments Rebuttal at paragraph 84.

noted the BIA/EPP does mention their presence within a 1 km radius and 5 km radius, respectively.⁵²⁸

[720] The Appellants submitted that both Mr. Groves and Mr. Wallis confirmed that prairie falcons reside on the project site. They have both seen the prairie falcons at a location in the southwest corner of the project site. Mr. Groves testified that he has witnessed golden eagles hunt over the Valley Wetlands and Mr. Skibsted testified that the prairie falcons hunt over the Valley Wetlands.⁵²⁹

[721] The 2022 Wallis Review (at page 14) stated that common yellowthroat occurs in the area, but Mr. Wallis did not have access to assess their occurrence at Wetlands 1, 2, 4 and 5. It also stated that EnviroConsult did not mention doing any recent surveys using appropriate protocols.

[722] The Appellants stated that the Approval Holder was twice asked by EPA to conduct surveys for the sharp tailed grouse, and they were never done.⁵³⁰ At the hearing, Mr. Groves provided testimony on how the sharp tailed grouse use the project site to lek, which is their unique mating dance.⁵³¹

[723] The Appellants noted that the only mention of the sora in the Final WAIR comments that an “individual [was] observed in Wetland 1 in 2008. Not observed during the 2014 or 2017 surveys. Status: sensitive”.⁵³²

28.3.2. Approval Holder

[724] The Approval Holder submitted that the Final WAIR indicated the nature, timing, and extent of field work done to identify wildlife and wildlife habitats (pages 57 to 59), and

⁵²⁸ Appellants’ Closing Arguments at paragraphs 80 and 81.

⁵²⁹ Appellants’ Closing Arguments at paragraph 76.

⁵³⁰ Appellants’ Closing Arguments at paragraph 82.

⁵³¹ Appellants’ Closing Arguments at paragraph 87.

⁵³² Appellants’ Closing Arguments at paragraph 90.

described the results relative to species of special concern with potential to occur within the project area:

1. Northern Leopard Frog – The northern leopard frog surveys included review of springs and permanent water bodies with sufficient green leafy vegetation cover. The wetlands were investigated specifically for northern leopard frog by walking the wetland perimeters, turning over rocks and logs, and listening for calls, and observing movement. EPA biologists identified northern leopard frog during their September 2016 survey along the banks of the Rosebud River (pers. comm. Mr. Stevens AEP Feb 8, 2018). It is not known how close their observations were to this site, but no observations were noted within the project area by the biological team (page 58);
2. Ferruginous Hawk – No ferruginous hawks were observed during any of the surveys. Since the project area provides marginal native grassland habitat for Richardson’s ground squirrels, the prey species upon which this raptor depends, and there is limited treed habitat within the project area boundaries for nesting, the potential use of the site by this raptor is considered to be low (page 58);
3. Peregrine Falcon – The species was not observed within the project area. In addition, as there will be no anticipated disturbances to the Mr. face above the Rosebud River Valley, any potentially occurring nest sites for any raptor species nesting in these areas will not be impacted by the development (page 58);
4. Short-eared owl – Habitat did occur for this species within the upland stubble field, and two species were observed during the 2008 field surveys. The upland cultivated field was surveyed for this owl on June 10, 2017. The upland was walked back and forth in a zig zag pattern looking for ground nesting activity and no breeding activity, nest sites, or adults were observed. The field has since been seeded to tall grasses and forbs and is no longer considered to provide suitable nesting habitat for this species (page 59); and
5. Sprague’s Pipit – Although pipits were heard in the low grasslands within the project area in 2008, species confirmation was not made. There is good potential for the project area to provide the habitat requirements for Sprague’s pipits; consequently, as a precaution to avoid the possibility of direct disturbance to pipit nests, it is recommended that stripping and grading in native grassland areas be conducted outside of the active breeding season for this species (i.e., April 15 to August 31) (page 59).

[725] The BIA/EPP (at page 1) noted that northern leopard frog (*Lithobates pipiens*) was recorded in the Fish and Wildlife Internet Mapping Tool (“FWIMT”) by Alberta Environment and Sustainable Resource Development (“AESRD”) as occurring within five kilometres of the Badlands Motorsport Resort area, and that EPA biologists identified northern leopard frog during their September 2016 survey along the banks of the Rosebud River (personal communication from Mr. Stevens EPA February 8, 2018 to Approval Holder’s consultant).⁵³³

[726] The BIA/EPP (in Table 9) noted that the northern leopard frog is listed as endangered by COSEWIC and is in Schedule 1 of SARA.

[727] In terms of mitigation measures, the BIA/EPP provided that:

- The riparian habitats along the Rosebud River will be avoided during development of this project. Location of the stormwater outfall structure will be chosen to avoid any potentially occurring northern leopard frog habitat (page 73);
- Construction will be conducted outside of the sensitive reproductive and rearing periods for wildlife to avoid potential disturbances (i.e., April 15 to August 31) (page 117); and
- If construction (i.e., clearing) activities are scheduled to begin during the summer, the site shall be surveyed by a Registered Professional Biologist prior to disturbance to determine if there is active nesting. If nesting is occurring, work shall be redirected to another work area or postponed until after August 31 (page 117).

[728] The BIA/EPP (in Table 17) indicated the *Setback Distances and Disturbance Categories for Special Status Wildlife Species* (the “Manitoba Setbacks”) did not specify distances for northern leopard frog.

[729] With respect to the little brown myotis, the Approval Holder noted that neither the Approval Holder nor EPA have observed the species at the Badlands Development Area.⁵³⁴

⁵³³ BIA/EPP at page 61.

⁵³⁴ Approval Holder’s Submission at paragraph 77.

28.3.3. Director

[730] The Director stated that the Badlands Development Area does not comprise any critical habitat of the little brown myotis as defined in the *Recovery Strategy for the Little Brown Myotis (Myotis lucifugus), the Northern Myotis (Myotis septentrionalis), and the Tri-colored Bat (Perimyotis subflavus) in Canada* (Government of Canada, 2018). The recovery strategy for the bat species identifies their critical habitat as “[a]ny site where Little Brown Myotis ... has been observed hibernating during the winter at least once since 1995.” It also specifies the geographical locations of critical habitat in Alberta, none of which occur near the Approval site.⁵³⁵

[731] The Appellants’ submission speaks to SARA generally and how it might apply if a SARA-listed species had an approved recovery strategy with designated critical habitat. However, there is no reference to suggest the Badlands Activities will have a significant impact on any wildlife beyond stating that the little brown myotis “use the wetlands.”⁵³⁶

[732] The Director continued that the 2020 Wallis Report otherwise relies on observations of wildlife species noted in the Final WAIR, which the Director reviewed and considered in making his decision. Notably, the Final WAIR indicated the sora was not observed in the 2014 or 2017 surveys and was unable to confirm the falcon nest sites observed “on steep cliffs adjacent to the Rosebud River in the southwestern section and outside of the project area” were prairie falcon.⁵³⁷

[733] Mr. Nicholson testified at the hearing that the senior wildlife biologist who completed the referral had requested that Badlands provide the methodology of wildlife surveys, and survey information for northern leopard frog and sharp-tailed grouse from the BIA. In his review, Mr. Nicholson found the concerns raised by the senior wildlife biologist were addressed in a subsequent WAIR Badlands submitted to the Department.⁵³⁸

⁵³⁵ Director’s Response Submission at paragraph 146.

⁵³⁶ Director’s Response Submission at paragraph 257.

⁵³⁷ 2020 Wallis Report at page 16; Director’s Record at Tab 77 at pages 55 and 56.

⁵³⁸ Director’s Direct Evidence presentation at slide 127.

28.4. Board's Analysis

[734] The Appellants raised concerns about several wildlife species, but focused primarily on bank swallows, golden eagles, prairie falcons and northern leopard frog. Their concerns centred on: (1) the impacts to the bank swallows caused by high-speed vehicles on the racetrack, (2) the importance of the Badlands Wetlands as feeding grounds for the bank swallows, (3) the reliance of golden eagles on the ducks feeding in the Badlands Wetlands as a food source, (4) the effect of provincial setback distances for prairie falcons on the ability of Badlands to construct the BMR and the Badlands Activities, and (5) whether there are northern leopard frogs present on the Badlands Lands. Mr. Groves and Ms. Kenworthy specifically linked the eagles, banks swallows and falcons to their business interests.

[735] The Appellants also expressed concerns about the ability of wildlife to migrate freely and safely through the Badlands Lands when the racetrack is operational. Their specific issues were the fences Badlands proposes to protect wildlife from the racetrack and the noise disturbance caused by the racetrack.

[736] With respect to the importance of the Badlands Wetlands to the bank swallows and ducks, the Board heard from the Appellants that the Badlands Wetlands are unique in the Rosebud River valley and an important feeding ground for the bank swallows nesting along the Rosebud River. The Board saw the Appellants' videos showing bank swallows feeding over wetlands and the Appellants' maps showing bank swallow nesting areas along the Rosebud River.

[737] The Board heard from the Appellants that it is "uncontroverted ... that bank swallows use Wetlands 1, 2, 4 and 5 to forage" and that, at the hearing, both Mr. Skibsted and Mr. Wallis testified that they observed bank swallows leave their colonies to forage over the wetlands.

[738] The Board also heard the Approval Holder state that there are numerous wetlands and available foraging habitat sites up and down the river valley as well as on all adjacent agricultural lands that the bank swallows could use. The Appellants contested this assertion,

stating that the Ducks Unlimited map identified many locations that were not wetlands in Mr. Wallis' opinion.

[739] The Director did not dispute that wetlands have value for local ecosystems and a variety of wildlife species, including bank swallows but stated that the Appellants have submitted no evidence to suggest the Badlands Activities will have a significant impact on any wildlife, including the bank swallow. The Director stated that the 2020 Wallis Report includes an anecdotal observation of bank swallows near the Approval site by the author and that this is not evidence that these species rely on the wetlands approved to be infilled or modified. The Director submitted merely noting the presence of a sensitive species in the general vicinity of the Approval site does not constitute evidence the Badlands Activities will have a significant adverse impact on a species or pose an imminent threat to their survival.

[740] The Board finds that the Appellants provided evidence, including observations that banks swallows use the Badlands Wetlands and videos of bank swallows flying and feeding over what Mr. Wallis described as "the BMR property," however they did not provide conclusive evidence that the Valley Wetlands are the only feeding ground for the bank swallows. The Board notes Ms. Ferguson's comment that bank swallows forage over wetlands and watercourses where flying insects are the most plentiful, and there are numerous wetlands and available foraging habitat sites up and down the river valley as well as on all adjacent agricultural lands.

[741] The Final SMP acknowledged that there will changes to water flows in Wetlands 1, 4 and 5. The Final WAIR provided photographic evidence that the water levels and extent of the Valley Wetlands naturally fluctuate considerably over time.

[742] The Board notes that the Director was satisfied with the mitigation measures in the Final WAIR and BIA/EPP.

[743] The Board finds that while there will be changes in the Valley Wetlands there was insufficient evidence of potential harm to the bank swallows arising from those changes, and that furthermore, mitigation measures will be taken during construction of the Badlands Activities. The Board also notes that the Director has proposed adding a new condition to the Approval

requiring a Wetland Monitoring and Reporting program. The Board is of the view that these measures, taken together, will serve to minimize potential impacts to the bank swallows.

[744] As with the bank swallows, the Board finds that while Mr. Groves testified that he has witnessed golden eagles hunt over the Valley Wetlands, the Appellants provided no conclusive evidence to show that the eagles feed only on ducks in the Badlands Wetlands or how changes to the wetlands may affect their presence and use of the wetlands.

[745] The Board acknowledges that Mr. Groves and Ms. Kenworthy were accepted in *McMillan ID4* as having standing in these appeals because they were able to demonstrate a prima facie case for potential economic harm. However, the Board finds Mr. Groves did not provide any specific documentary evidence (e.g., contracts, invoices, financial statements, etc.) in this hearing to demonstrate that his ecotourism business will be adversely affected by the Approval. In the absence of this written evidence, the Board makes no findings on the economic impacts to Mr. Groves. The Board further notes that Ms. Kenworthy did not participate in the hearing as a witness and therefore the other parties did not have the opportunity to cross-examine her. As a result, the Board makes no findings on Ms. Kenworthy's claims of economic harm.

[746] With respect to the concerns over northern leopard frogs, the Board heard only one reference to a sighting of a northern leopard frog in the vicinity of the Rosebud River. Ms. Ferguson did not observe northern leopard frogs in her surveys. The Board finds that the Appellants have not provided sufficient evidence to show that the northern leopard frog occupies the Badlands Lands or might be impacted by the Badlands Activities. However, the Board finds that the mitigation measures in the BIA/EPP (which is referenced in the Final WAIR), will prevent potential harm to the northern leopard frog if present.

[747] The Board will address the setback issue for prairie falcons in the next section.

29. WHAT ARE THE APPLICABLE SETBACK DISTANCES AND TIMING RESTRICTIONS FOR PRAIRIE FALCON?

29.1. Submissions

29.1.1. Appellants

[748] The Appellants requested that a condition be added to the Approval requiring minimum setbacks for special status species during construction and operation⁵³⁹, based on Alberta's *Recommended Land Use Guidelines for Protection of Selected Wildlife Species and Habitat within Grassland and Parkland Natural Regions of Alberta* (the "Alberta Setbacks").

[749] The Appellants submitted that the Director and Ms. Ferguson applied the wrong setbacks for the prairie falcon. They stated that the Final WAIR used the Manitoba Setbacks for peregrine falcon (500 m, 750 m and 1,000 m for Low, Medium, and High Impact activities, respectively) instead of the Alberta Setbacks for prairie falcon (1,000 m from March 15 to July 15, and 50 m, 100 m and 1,000 m from July 16 to March 14) recommended in the 2020 Wallis Report.⁵⁴⁰

[750] The 2020 Wallis Report at page 16 stated that prairie falcon nests on Badlands Motorsports Resort lands and nearby areas on cliffs of the Rosebud River, and the species is known to hunt at the wetlands. The Report also provided a map showing presence of a prairie falcon nest site in the southwest corner of the Badlands Development (see Appendix 1D).⁵⁴¹ The 2021 Wallis Review, replying to comments in the EnviroConsult Response, further stated that prairie falcons were observed at a nest site in 2020 and in previous years on the project lands. EnviroConsult did not mention doing any recent surveys using appropriate protocols. If they had, they would have observed prairie falcon nesting on the project property.⁵⁴²

⁵³⁹ Appellants' Initial Submission at paragraph 4.

⁵⁴⁰ Appellants' Closing Arguments at paragraph 680.

⁵⁴¹ Figure 5 in the 2020 Wallis Report at page 17.

⁵⁴² 2021 Wallis Review at page 14.

[751] Both Mr. Groves and Mr. Wallis confirmed that they have seen the prairie falcons at a location in the southwest corner of the Badlands Development Area. Mr. Skibsted also testified that prairie falcons hunt over the Valley Wetlands.⁵⁴³

[752] The Appellants submitted that the *only* mention of the prairie falcon in the Final WAIR reads as follows: “Falcon species: *Falco* sp.: nest sites observed on steep cliffs adjacent to the Rosebud River in the southwestern section and outside of the project area. Thought to be Prairie Falcon. Status: Sensitive”. That location is consistent with both Messrs. Groves’ and Wallis’ evidence. (*Emphasis added by the Appellants.*)⁵⁴⁴ The BIA/EPP does confirm that prairie falcons occur “within the 1 km radius of the project area.”⁵⁴⁵

[753] At the hearing Mr. Wallis stated he was not aware of any legally binding setback requirements in Alberta.

[754] Mr. Groves stated in his SOC that:

If this development were an industrial compressor station on public lands, a 1,000 m setback would be employed for prairie falcon nest sites (one on the cliffs within the southwest corner of the project area and the other 400 m to the east on cliffs immediately adjacent and above the Rosebud River). This setback would essentially negate a small industrial development within the entire project area. Instead, we have a much larger development in scope and scale with no mitigations in place to reduce disturbance from an operational racetrack with impacts similar to a small town or village.

Setback distances from biophysical features should never be measured from the centre of a development, particularly a development of this scale (in essence, when EnviroConsult Ltd. measures setbacks from the centre of the development this provides for a handy 500 m "buffer" related to species at risk recommended setbacks). Never in any experience as environmental consultant have I seen this approach, which I believe, is used to minimize or negate potential impacts in favour of the development.

⁵⁴³ Appellants’ Closing Arguments at paragraph 76.

⁵⁴⁴ Appellants’ Closing Arguments at paragraph 79.

⁵⁴⁵ Appellants’ Closing Arguments at paragraph 80, citing the BIA/EPP at page 2.

[755] The Appellants stated that Ms. Ferguson misapplied the correct setback distance. In calculating the distances, Ms. Ferguson used distances from the centre of the Badlands Development Area. At the hearing, Mr. Nicholson confirmed that this was in error because high intensity activities take place along the borders of the Badlands Development Area, meriting a setback calculation from the borders, not the centre.⁵⁴⁶ And at the hearing, Mr. Wallis called into question Ms. Ferguson's ability to determine setback distances for the prairie falcon when she did not undertake bird surveys in the Rosebud River valley within 1,000 m of the Badlands Development Area. He also noted that all the Valley Wetlands are within a 1,000 m radius from the prairie falcon nest in the SW corner of the Badlands Development Area.

29.1.2. Approval Holder

[756] The Approval Holder noted setback distances were included in the BIA/EPP (at pages 119 to 121) for the species identified by the Appellants including the bank swallow, prairie and peregrine falcon, golden eagle, and northern leopard frog. The Manitoba Setbacks were used to establish recommended setback distances for 10 special status species, except for the prairie falcon setback for the high-disturbance category which was taken from the AEP-Species at Risk Conservation Management Plan No. 9⁵⁴⁷ (the "Alberta Prairie Falcon Setbacks").

[757] The BIA/EPP explained how the setback distances would be used:

The project area shall be surveyed prior to construction to observe nesting activity and identify approximate nesting locations. *Once an approximate nesting location has been identified, the setback distances can be set from that location* and the contractor will modify their activities to make them less disturbing, and/or work in an area that is outside of the setback distance to minimize disturbances to special status wildlife species.⁵⁴⁸ (*Emphasis added by the Board.*)

⁵⁴⁶ Appellants' Closing Arguments at paragraph 685.

⁵⁴⁷ The Board notes the correct title for this report is *Prairie Falcon Conservation Management Plan. Alberta Environment and Parks. Species at Risk Conservation Management Plan No.9.*

⁵⁴⁸ BIA/EPP at page 119.

[758] The Approval Holder confirmed that they applied the Manitoba Setback distances based on distance from the centre of the Badlands Development Area.⁵⁴⁹

[759] At the hearing the Approval Holder also confirmed that they did not observe prairie falcons on the site during their field surveys. The BIA/EPP contains the following references to prairie falcon and peregrine falcon nest sites:

- Page 2: There have been reported sightings by a local interest group of peregrine falcon nesting along the steep south facing cliffs outside of the southwest and northeast corners of the project area. These close sightings of peregrine nesting just outside of the project area boundaries in the SW and NE corners have not been recorded by AESRD. Peregrine falcons are not reported as nesting even within 2.4 km of the site's centre (AESRD, FWIMT January 2015). They are recorded as occurring at a distance of 2.5 km from the centre of the project area. Since AESRD has prairie falcon as occurring within 1 km of the project centre, it is likely that the interest group sightings were of prairie falcon rather than peregrine falcon;
- Pages 58 and 59: Although not observed, it has been noted that peregrine falcon have been observed nesting on the cliffs outside of the southwest corner of the property above the Rosebud River and in a treed area somewhere outside of the northeast corner of the project area. A search of the FWIMT identified sightings reported 2 kms from the project. During the 2008 survey, what were thought to be raptor nesting sites were observed in the southeast cliffs above the Rosebud River, but specific species use of the nest sites was not confirmed by the Project Team. A follow up survey was conducted on June 10, 2017, and no active nesting was observed within the boundaries of the project area or along the escarpment lands;
- Page 61: In a 2008 survey, a potential falcon nesting site was also observed on the cliffs to the Rosebud River;
- Figure 16 and Table 8: Prairie falcon nests are shown as being recorded at 1.9 km from project centre, and peregrine falcon at 2.0 km; and
- Figure 17: Shows 1 km setbacks from the two recorded peregrine falcon nest sites and neither of those 1 km setbacks covered the Badlands Development.⁵⁵⁰

⁵⁴⁹ BIA/EPP at page 71.

⁵⁵⁰ The Board notes there is no similar figure for prairie falcon nest sites.

29.1.3. Director

[760] The Director submitted that the Appellants provided no rationale for their request for setbacks, nor detail as to what minimum setbacks would be appropriate. Moreover, the Appellants included no site-specific evidence the Badlands Activities will occur in proximity to any “special status species” or their habitat.⁵⁵¹

[761] At the hearing the Director stated that setback distances and sensitive timing periods for wildlife were appropriately identified in the BIA/EPP and that the Badlands Activities that could have adverse effects on wildlife are highly local and have been mitigated by the measures in the supporting Final WAIR and BIA/EPP, including adherence to wildlife setback and restricted activity periods.

[762] In response to the Appellants’ allegation that the Director failed to consider appropriate wildlife setbacks by allowing Badlands to use the Manitoba Setbacks rather than the Alberta Setbacks, Mr. Nicholson testified the Alberta Setbacks are recommendations for best practices to help land users minimize or avoid potential adverse effects; they are not legally binding. He explained that although he would consider the Alberta Setbacks in referrals, they are not comprehensive and do not cover every species, so he might make recommendations based on several different sources.⁵⁵²

[763] At the hearing Mr. Nicholson stated that generally setbacks are determined based on the distance from the centre of the site to the location of the species of concern.

29.2. Board’s Analysis

[764] The Board heard from the Parties that there are three issues with respect to setbacks: (1) which guidelines are appropriate, (2) is the setback distance measured from the centre of the project or the edge of the project, and (3) is a prairie falcon nest site present in the southwest corner of the Badlands Development Area.

⁵⁵¹ Director’s Response Submission at paragraph 270.

⁵⁵² Director’s Closing Arguments at paragraphs 238 and 239.

[765] With respect to the appropriate setbacks, the Board heard that the Approval Holder used the Manitoba Setbacks for most species but used the Alberta Prairie Falcon Setbacks for prairie falcon.

[766] On the other hand, the Appellants recommended using the Alberta Setbacks.

[767] The Board notes that the key difference between these two recommended setback guidelines is that the Approval Holder's approach requires setbacks only for the April 15 to July 15 period for prairie falcons, whereas the Appellants' approach requires setbacks year-round (table below prepared for illustrative purposes by the Board):

	Period Covered	Low Disturbance	Medium Disturbance	High Disturbance
Approval Holder's Setbacks	April 15 to July 15	500 metre setback	750 metre setback	1,000 metre setback
Appellants' Setbacks	March 15 to July 15	1,000 metre setback	1,000 metre setback	1,000 metre setback
	July 16 to March 14	50 metre setback	100 metre setback	1,000 metre setback

The Board notes that the Approval Holder's setback table provides a footnote that the Low Disturbance and Medium Disturbance setbacks are adopted from the Manitoba Setbacks for peregrine falcons, whereas the 1,000-metre setback for High Disturbance category activities is from the Alberta Prairie Falcon Setbacks. However, the Board notes that the Manitoba Setbacks for peregrine falcon are 250 m and 500 m.

[768] The Board also notes the Director's statement that the Alberta Setbacks are recommendations for best practices, and they are not legally binding, and that Mr. Wallis confirmed he was not aware of any legally binding setback requirements in Alberta.

[769] With respect to the applicable setback distances for prairie falcons, the Board finds that since the Alberta Setbacks proposed by the Appellants are best practices rather than requirements, and since the Director did not challenge the Approval Holder's use of the Alberta Prairie Falcon Setbacks, the Alberta Prairie Falcon Setbacks are appropriate.

[770] There was conflicting information and testimony on where the setbacks are measured from. The Appellants submitted that the setbacks should be based on the edge of the disturbance not the middle, whereas the Approval Holder used the centre of the disturbance. Mr. Nicholson confirmed at the hearing that setbacks are generally determined based on the distance from the centre of the site to the location of the species of concern, though the Appellants quoted him at the hearing confirming that high intensity activities taking place along the borders of the project site merit a setback calculation from the borders, not the centre.

[771] The Board finds that none of the Parties provided evidence to establish required methods for measuring appropriate setbacks set in legislation or policy. Based on the preponderance of evidence at the hearing and the Director's acceptance of the methods used in the BIA/EPP, the Board finds that the setback distance should be measured from the centre of the Badlands Activities.

[772] The Board heard conflicting information on the presence and location of a prairie falcon nest in the southwest corner of the Badlands Development. Since the setback distances discussed above are based on the location of a nest site it is important to determine whether the nest site noted by the Appellants is present and active. Therefore, the Board will recommend to the Minister that the Approval Holder conduct a field survey to determine the exact location and current use status of this nest to properly determine setback distances for construction work associated with the Badlands Activities. In making this recommendation the Board reaffirms its earlier finding that the setback distances are only in respect of the Badlands Activities, not the BMR.

PART 13. RECOMMENDATIONS

[773] After reviewing the Director's Record, all the written submissions of the Parties including oral testimony and new information provided at the hearing pursuant to section 95(2)(d) of EPEA, the Board recommends the Minister vary the Approval as set out in Appendix 2.

Dated on March 28, 2024, at Edmonton, Alberta.

- original signed -

Tamara Bews
Board Member

- original signed -

Chris Powter
Board Member

APPENDIX 1: MAPS

Appendix 1A: Badlands Motorsport Resort Development Area Map

[774] At the hearing the Board requested the Approval Holder prepare a revised map showing the location of the proposed footprint of the Badlands Motorsport Resort Area, an undertaking at the hearing.

[775] On February 10, 2023, the Approval Holder provided the Badlands Motorsport Resort Development Area Map.

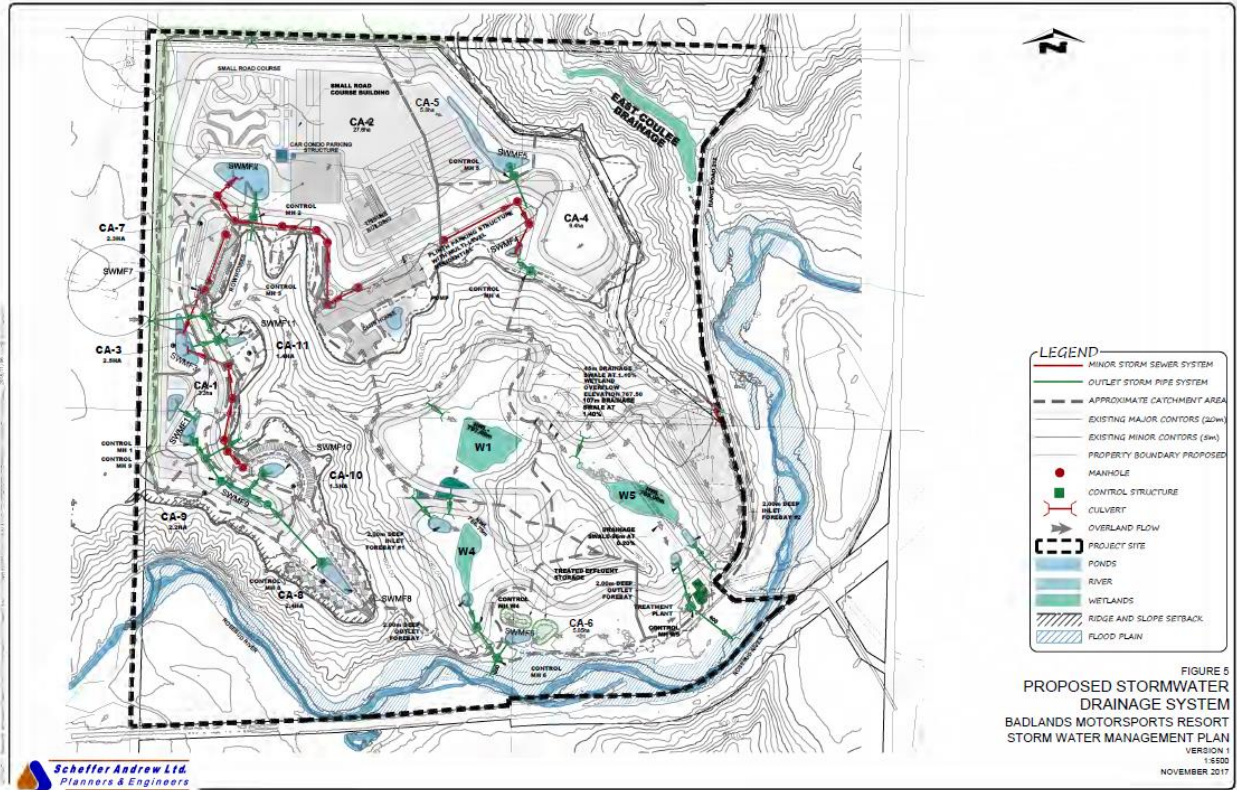


LEGEND

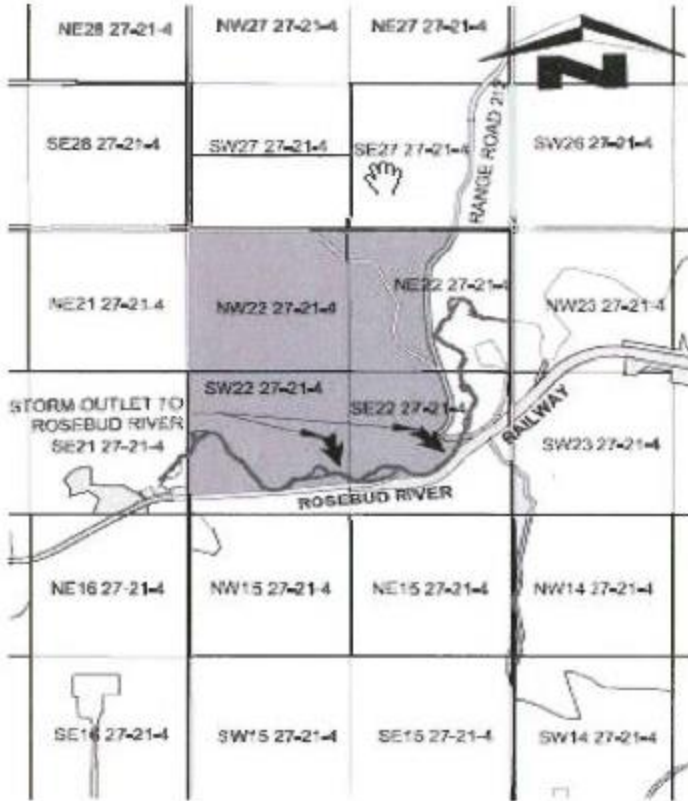
- ASP BOUNDARY
- RIVER
- WETLANDS
- STORM POND
- PROJECT DEVELOPMENT AREA
- RIDGE AND SLOPE SETBACK
- BUILDING
- ROADS AND TRAILS
- PAVED AREAS
- BERM
- EXISTING PROPERTY BOUNDARY
- SOUND FENCING
- TRAILS

BADLANDS DEVELOPMENT AREA
BADLANDS MOTORSPORTS RESORT
 VERSION 11
 1.8500
 FEBRUARY 2, 2023

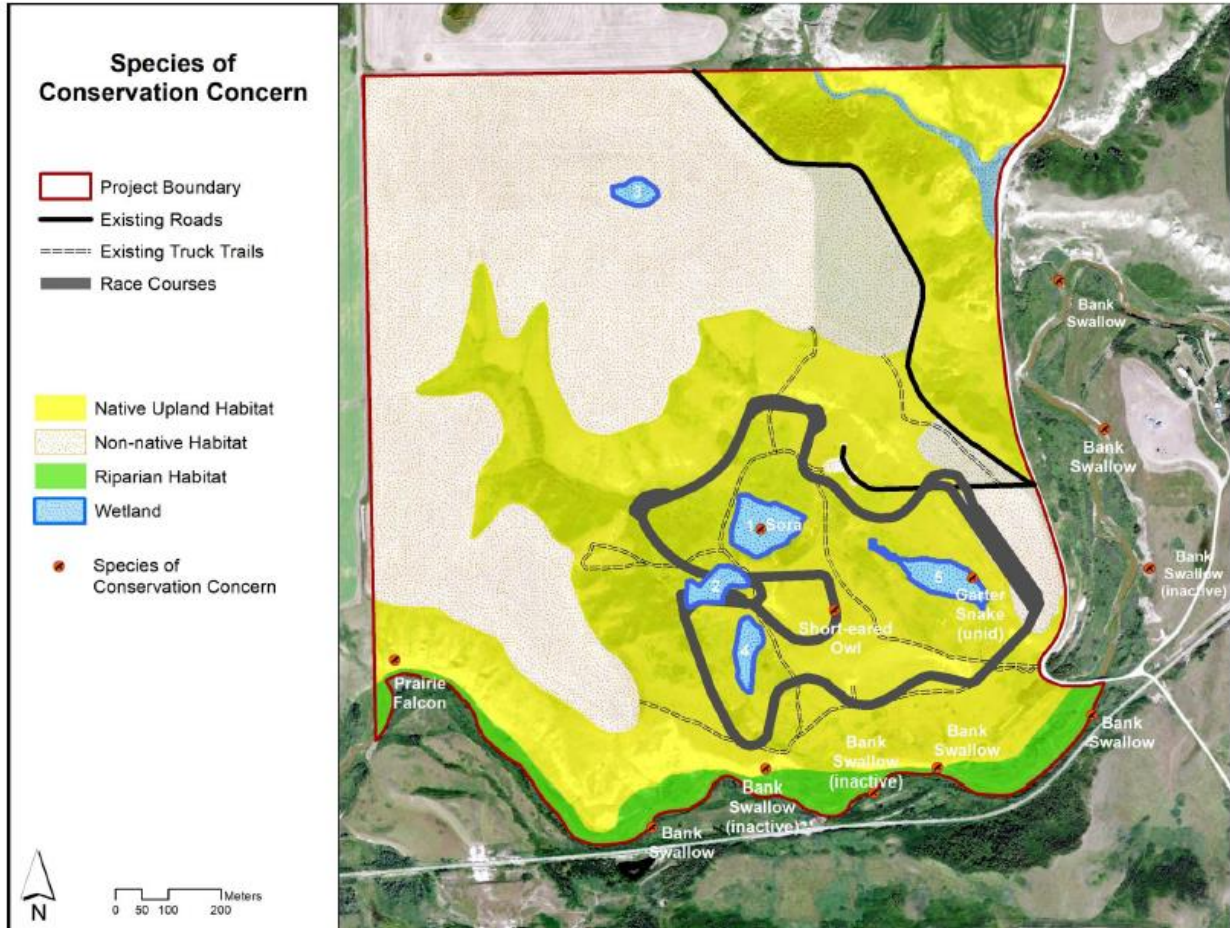
Appendix 1B: Stormwater Management System
Figure 5 in Final SMP.



Appendix 1C: Map Appended to the Public Notice



Appendix 1D: Map Showing Possible Location of a Prairie Falcon Nest
Figure 5 in the 2020 Wallis Report.



APPENDIX 2: RECOMMENDED AMENDMENTS TO THE APPROVAL TERMS AND CONDITIONS

6. The Activity Location on the cover page of the Approval is amended by adding “a portion of” before “Section 22-027-21-W4M”;
7. Condition 1.1(e) is amended by striking out the word “and”;
8. The following is added after Condition 1.1(f):
 - (g) “grab sample” means an individual sample collected in less than 30 minutes that is representative of the substance sampled; and
 - (h) “Valley Track” means the Lower Track as shown in Figure 2 of Report No. 00406489-R001;
9. Condition 3.0 is amended by adding “a portion of” before “Section 22-027-21-W4M”, and by striking out “Report No. 00406489-R002” and substituting “Report No. 00406489-R003.”;
10. The table in Condition 3.1 is amended by:
 - (a) adding “, received November 10, 2019” after “October 9, 2019”, and
 - (b) striking out “00406489-R002” and substituting “00406489-R003”;
11. Condition 3.2 is amended by striking “December 31, 2023” and substituting “December 31, 2026”;
12. Duplicate Condition 4.2 on page 4 of the Approval is struck out;
13. Condition 5.1 is amended by striking “7.0” and substituting “5.0”;
14. The following is added after Condition 6.0(b):

MONITORING AND REPORTING

7.0 The Approval Holder shall submit a Wetland Monitoring Program Proposal for Wetlands 1, 4 and 5 (the "Wetlands") identified in Report 00406489-R003 to the Director by February 14, 2025.

7.1 The Wetland Monitoring Program Proposal shall include, at a minimum, the following information:

- (a) for each Wetland, an annual plan for a water quality sampling program to be undertaken during the growing season that includes the following:
 - (i) a description of the frequency of water quality sampling, which shall be performed at least once per year;
 - (ii) a plan showing the location of water quality sampling and monitoring points;

- (iii) a description of the methodology for water quality sampling, which shall be performed by collecting grab samples;
 - (iv) a list of the parameters to be monitored using water quality sampling, which shall include at least the following:
 - (A) pH;
 - (B) visible sheen of hydrocarbons;
 - (C) total suspended solids (TSS); and
 - (D) carbonaceous biochemical oxygen demand;
 - (v) a plan to monitor geodetic water surface elevation, which shall be measured at least three times per year;
 - (vi) proposed limits for each of the parameters to be monitored, as well as a justification for each proposed limit;
 - (vii) a description of the monitoring, sampling and analytical procedures; and
 - (viii) any other information required in writing by the Director; and
- (b) a plan to annually determine the ecological health of the Wetlands that:
- (i) includes delineation of each Wetland consistent with the Alberta Wetland Identification and Delineation Directive, as amended; and
 - (ii) includes a description of the methodology that will be used to monitor the vegetation in and around each Wetland, which shall include at a minimum the following:
 - (A) a description of the location of annual photo stands and vegetation sampling stations; and
 - (B) a description of how the percent coverage of each vegetation species at the vegetation sampling stations will be measured.

7.2 If the Wetland Monitoring Program Proposal is found deficient by the Director, the Approval Holder shall:

- (a) correct all deficiencies identified by the Director; and
- (b) resubmit the Wetland Monitoring Program Proposal by a date specified in writing by the Director.

7.3 The Approval Holder shall:

- (a) implement the Wetland Monitoring Program Proposal as authorized in writing by the Director;
- (b) implement the Wetland Monitoring Program Proposal during construction of the storm water management system and for a period of 5 years following completion of the construction;
- (c) not undertake the activity until the Wetland Monitoring Program Proposal is authorized in writing by the Director; and
- (d) retain a copy of the Wetland Monitoring Program Proposal at the site of the activity at all times while conducting the activity.

7.4 If the water quality sampling program shows any exceedance of any proposed limit established under Condition 7.1(a)(vi) for any parameter, the Approval Holder shall immediately report the exceedance to 1-800-222-6514.

7.5 The Approval Holder shall compile an Annual Wetland Monitoring Program Summary Report for each calendar year.

7.6 The Annual Wetland Monitoring Program Summary Report shall include, at a minimum, the following:

- (a) the results of the monitoring and sampling as required in the Wetland Monitoring Program Proposal;
- (b) interpretation of all data collected since the last reporting period, including an analysis of any trends;
- (c) if the trend analysis demonstrates deterioration in the ecological health or a diminishment in the size of any of the Wetlands, a Mitigation Strategy Proposal to address the deterioration or diminishment;
- (d) any proposed modifications to the Wetland Monitoring Program Proposal, including rationale for the modifications; and
- (e) any other information requested in writing by the Director.

7.7 The Approval Holder shall submit the Annual Wetland Monitoring Program Summary Report to the Director:

- (a) on or before February 28th of each year following the calendar year in which the information on which the report is based was collected; or
- (b) within a time period specified in writing by the Director.

7.8 If the Mitigation Strategy Proposal required by Condition 7.6(c) is found deficient by the Director, the Approval Holder shall:

- (a) correct all deficiencies identified by the Director; and

(b) resubmit the Mitigation Strategy Proposal by a date specified in writing by the Director.

7.9 The Approval Holder shall implement the Mitigation Strategy Proposal as authorized in writing by the Director;

15. The following is added after Condition 7.9:

WETLAND 2 AVOIDANCE REPORT

8.0 Before any disturbance or modification of Wetland 2 can proceed, the Approval Holder must first provide a "Wetland 2 Avoidance Report" to the Director for his review and approval. The Wetland 2 Avoidance Report shall document the reasons why Wetland 2 could not be avoided considering the four types of avoidance evidence listed in the Alberta Wetland Mitigation Directive.

8.1 The Wetland 2 Avoidance Report shall be signed by a person with applicable professional qualifications.

8.3 In preparing the Wetland 2 Avoidance Report, the Approval Holder shall consider, at a minimum: (1) the application of the Wetland Mitigation Hierarchy; and (2) the application of the four guiding principles to achieve avoidance under the Alberta Wetland Policy.

8.4 If the Director is satisfied that the Approval Holder has demonstrated that avoidance of Wetland 2 is not practicable and has adequately demonstrated that alternative designs for the Valley Track have been thoroughly considered and ruled out for justifiable reasons, the Director may in writing authorize the disturbance of Wetland 2 to proceed.

8.5 Alternatively, if the Director is not satisfied, or if the Approval Holder decides to modify the design of the Valley Track so that Wetland 2 is avoided, the Approval Holder shall submit a report to the Director detailing the changes to the Valley Track. If the Director is satisfied that the changes to the Valley Track avoid Wetland 2 and do not impact Wetlands 1, 4 and 5 over and above what has already been authorized under the Approval, the Approval Holder may proceed accordingly;

16. The following is added after Condition 8.5:

PRAIRIE FACON NEST SURVEY

9.0 The Approval Holder shall conduct a field survey to determine if there is an active prairie falcon nest in the southwest corner of the Project Site shown in Figure 5 of Report No. 0406489-R001.

9.1 The Approval Holder shall provide the Director a report on the survey results (the "Field Survey Report").

9.2 The Field Survey Report shall identify mitigation measures for the Director's approval, including applicable setback distances, if an active nest is located.

9.3 The Approval Holder shall implement the mitigation measures in the Field Survey Report once approved by the Director;

Correction April 9, 2024: The Board notes condition 8.2 above was not used in the Appendix and corresponding Ministerial Order.

17. The following is added after Condition 9.3:

BERM

10.0 Prior to completing construction of the storm water management system, the Approval Holder shall construct the western portion (running north/south) of the berm shown in Appendix 1A, being Exhibit 20.

10.1 The berm shall be constructed on Section 22-027-21-W4M, entirely within the Project Development Area identified in Appendix 1A and shall not be built on any lands not owned by the Approval Holder.

10.2 The berm shall be designed by a Professional Engineer and have regard to the possibility of a road being built in the road allowance adjacent to the Project Development Area, such that it will not interfere with the construction of the road.

10.3 The Approval Holder shall submit to the Director an as-built drawing showing the berm's location and dimensions and shall provide the Director written confirmation, signed by a person with applicable professional qualifications, that the berm will not interfere with the operation of the storm water management system.

10.4 The as-built drawings and written confirmation shall be provided to the Director within 60 days of completion of construction of the berm.

Ministerial Order

07/2024

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. 19-066-070, 074 and 081**

I, Rebecca Schulz, Minister of Environment and Protected Areas, 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. 19-066-070, 074 and 081.

Dated in the Province of Alberta, this 8th day of April, 2024.

“original signed by”
Rebecca Schulz
Minister

APPENDIX

Order Respecting Environmental Appeals Board Appeal Nos. 19-066-070, 074 and 081

With respect to the decision of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue *Water Act* Approval 00406489-00-00 to the Badlands Recreation Development Corp, I, Rebecca Schulz, Minister of Environment and Protected Areas, order the following:

Approval 00406489-00-00 is varied as follows:

1. The Activity Location on the cover page of the Approval is amended by adding “a portion of” before “Section 22-027-21-W4M”.
2. Condition 1.1(e) is amended by striking out the word “and”.
3. The following is added after Condition 1.1(f):
 - (g) “grab sample” means an individual sample collected in less than 30 minutes that is representative of the substance sampled; and
 - (h) “Valley Track” means the Lower Track as shown in Figure 2 of Report No. 00406489-R001.
4. Condition 3.0 is amended by adding “a portion of” before “Section 22-027-21-W4M”, and by striking out “Report No. 00406489-R002” and substituting “Report No. 00406489-R003”.
5. The table in Condition 3.1 is amended by:
 - (a) adding “, received November 10, 2019” after “October 9, 2019”, and
 - (b) striking out “00406489-R002” and substituting with “00406489-R003”.
6. Condition 3.2 is amended by striking out “December 31, 2023” and substituting with “December 31, 2026”.
7. The duplicate Condition 4.2 on page 4 of the Approval is struck out.
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9. The following is added after Condition 6.0(b):

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7.0 The Approval Holder shall submit a Wetland Monitoring Program Proposal for Wetlands 1, 4 and 5 (the “Wetlands”) identified in Report 00406489-R003 to the Director by February 14, 2025.

7.1 The Wetland Monitoring Program Proposal shall include, at a minimum, the following information:

(a) for each Wetland, an annual plan for a water quality sampling program to be undertaken during the growing season that includes the following:

(i) a description of the frequency of water quality sampling, which shall be performed at least once per year;

(ii) a plan showing the location of water quality sampling and monitoring points;

(iii) a description of the methodology for water quality sampling, which shall be performed by collecting grab samples;

(iv) a list of the parameters to be monitored using water quality sampling, which shall include at least the following:

(A) pH;

(B) visible sheen of hydrocarbons;

(C) total suspended solids (TSS); and

(D) carbonaceous biochemical oxygen demand;

(v) a plan to monitor geodetic water surface elevation, which shall be measured at least three times per year;

(vi) proposed limits for each of the parameters to be monitored, as well as a justification for each proposed limit;

(vii) a description of the monitoring, sampling and analytical procedures; and

(viii) any other information required in writing by the Director; and

(b) a plan to annually determine the ecological health of the Wetlands that:

(i) includes delineation of each Wetland consistent with the Alberta Wetland Identification and Delineation Directive, as amended; and

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(A) a description of the location of annual photo stands and vegetation sampling stations; and

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7.2 If the Wetland Monitoring Program Proposal is found deficient by the Director, the Approval Holder shall:

(a) correct all deficiencies identified by the Director; and

(b) resubmit the Wetland Monitoring Program Proposal by a date specified in writing by the Director.

7.3 The Approval Holder shall:

(a) implement the Wetland Monitoring Program Proposal as authorized in writing by the Director;

(b) implement the Wetland Monitoring Program Proposal during construction of the storm water management system and for a period of 5 years following completion of the construction;

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(d) retain a copy of the Wetland Monitoring Program Proposal at the site of the activity at all times while conducting the activity.

7.4 If the water quality sampling program shows any exceedance of any proposed limit established under Condition 7.1(a)(vi) for any parameter, the Approval Holder shall immediately report the exceedance to 1-800-222-6514.

7.5 The Approval Holder shall compile an Annual Wetland Monitoring Program Summary Report for each calendar year.

7.6 The Annual Wetland Monitoring Program Summary Report shall include, at a minimum, the following:

(a) the results of the monitoring and sampling as required in the Wetland Monitoring Program Proposal;

(b) interpretation of all data collected since the last reporting period, including an analysis of any trends;

(c) if the trend analysis demonstrates deterioration in the ecological health or a diminishment in the size of any of the Wetlands, a Mitigation Strategy Proposal to address the deterioration or diminishment;

(d) any proposed modifications to the Wetland Monitoring Program Proposal, including a rationale for the modifications; and

(e) any other information requested in writing by the Director.

7.7 The Approval Holder shall submit the Annual Wetland Monitoring Program Summary Report to the Director:

(a) on or before February 28th of each year following the calendar year in which the information on which the report is based was collected; or

(b) within a time period specified in writing by the Director.

7.8 If the Mitigation Strategy Proposal required by Condition 7.6(c) is found deficient by the Director, the Approval Holder shall:

- (a) correct all deficiencies identified by the Director; and
- (b) resubmit the Mitigation Strategy Proposal by a date specified in writing by the Director.

7.9 The Approval Holder shall implement the Mitigation Strategy Proposal as authorized in writing by the Director.

10. The following is added after Condition 7.9:

WETLAND 2 AVOIDANCE REPORT

8.0 Before any disturbance or modification of Wetland 2 can proceed, the Approval Holder must first provide a “Wetland 2 Avoidance Report” to the Director for his review and approval. The Wetland 2 Avoidance Report shall document the reasons why Wetland 2 could not be avoided considering the four types of avoidance evidence listed in the Alberta Wetland Mitigation Directive.

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8.4 If the Director is satisfied that the Approval Holder has demonstrated that avoidance of Wetland 2 is not practicable and has adequately demonstrated that alternative designs for the Valley Track have been thoroughly considered and ruled out for justifiable reasons, the Director may in writing authorize the disturbance of Wetland 2 to proceed.

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11. The following is added after Condition 8.5:

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9.0 The Approval Holder shall conduct a field survey to determine if there is an active prairie falcon nest in the southwest corner of the Project Site shown in Figure 5 of Report No. 00406489-R001.

9.1 The Approval Holder shall provide the Director with a report of the survey results (the "Field Survey Report").

9.2 The Field Survey Report shall identify mitigation measures for the Director's approval, including applicable setback distances, if an active nest is located.

9.3 The Approval Holder shall implement the mitigation measures in the Field Survey Report once approved by the Director.

12. The following is added after Condition 9.3

BERM

10.0 Prior to completing construction of the storm water management system, the Approval Holder shall construct the Western Berm shown in Attachment #1 to this Ministerial Order (being an annotated version of Exhibit 20 in the Environmental Appeals Board hearing regarding EAB Appeal Nos. 19-066-070, 074 and 081).

10.1 The berm shall be constructed on Section 22-027-21-W4M, entirely within the Project Development Area identified in Attachment #1 to this Ministerial Order and shall not be built on any lands not owned by the Approval Holder.

10.2 The berm shall be designed by a Professional Engineer and have regard to the possibility of a road being built in the road allowance adjacent to the Project Development Area, such that it will not interfere with the construction of the road.

10.3 The Approval Holder shall submit to the Director an as-built drawing showing the berm's location and dimensions and shall provide the Director written confirmation, signed by a person with applicable professional qualifications, that the berm will not interfere with the operation of the storm water management system.

10.4 The as-built drawings and written confirmation shall be provided to the Director within 60 days of completion of construction of the berm.

All other conditions in Approval 00406489-00-00 are confirmed.

Attachment #1

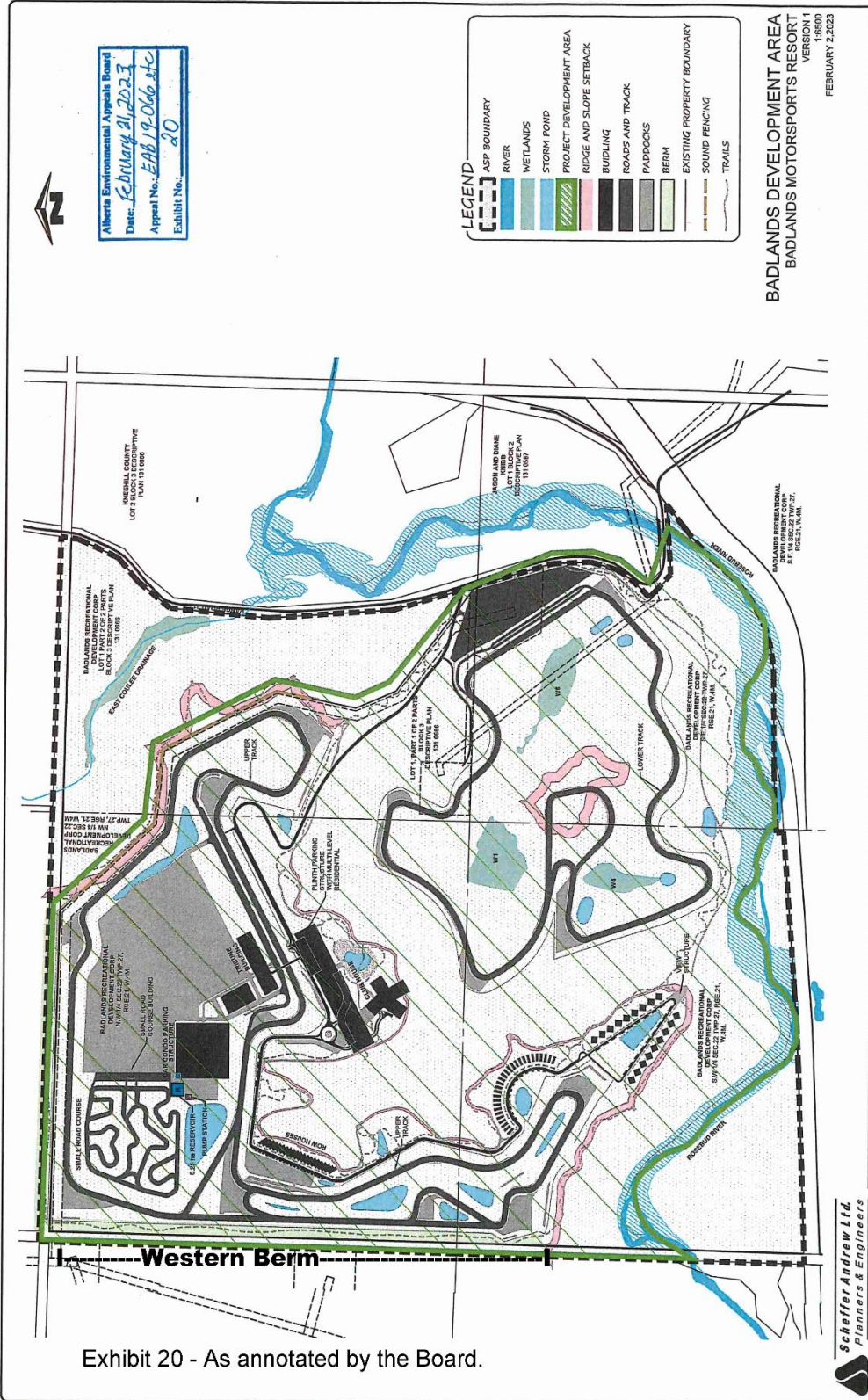


Exhibit 20 - As annotated by the Board.

