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THE BROOKMAN AND TULICK APPEALS OF WETLAND DISTURBANCE IN SOUTHWEST CALGARY: A CRITIQUE TWO YEARS TOO LATE

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Background

Jeff Brookman and Allison Tulick (the Appellants), are citizens of Calgary. They appealed¹ (the Appeals) to the Environmental Appeals Board (EAB), *Water Act*² Approval No. 00388473-00-00 (the Approval)³ to disturb 24 wetlands to construct the Southwest Calgary Ring Road (SWCRR). The Appellants satisfied 'use' criteria for being directly affected by the authorized work and many intervened in the Appeals. The Appellants and intervenors claimed that the wetlands were of significant cultural and ecological value in the Weaselhead area.

The Approval enabled partial infill of 11 wetlands, complete infill of 13 others, and wetland dewatering. 22.07 hectares of wetlands would be disturbed, including 6 Class II wetlands, 10 Class III wetlands, 2 Class IV wetlands, and 6 Class V wetlands, as classified using the Stewart and Kantrud Wetland Classification System (Stewart and Kantrud)⁴. The wetlands were numbered. W06 was known by the Appellants and others as the Beaver Pond, and W11 was known as the Clay Marsh.

On August 18, 2017, the EAB notified the parties that a stay of the Approval concerning disturbance of wetlands W06, W07, W08, W09, and watercourse WC01 would remain in place until the Appeals were determined. Later, the stay for WC01 was lifted because disturbance of the watercourse was not authorized through the Approval.

The Appellants wanted the Approval reversed or, alternatively, varied to include several conditions, including that the proponent:

- avoid W06, W07, W08, and W11;
- install the intake culvert that transected the project area at the 90th Avenue interchange;
- not allow the mixing of groundwater and stormwater;
- remove beaver dams and other impediments to a watercourse (WC01) which may stop the flow from reaching W06;
- monitor W06, W07, W08, and W11 for the next five years; and
- correct any deficiencies which prevent the flow of water from continuing.⁵

The EAB listed three issues to be determined, as follows:

1. What is the standard of review the Board should apply in the circumstances of this case?
2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:
 - a. the terms and conditions in the Approval;
 - b. the impact of disturbing the wetlands included in the Approval; and
 - c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.
3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?⁶

The Executive Summary of EAB's Report and Recommendations (the Report)⁷ to the Minister of Alberta Environment and Parks (the Minister) summarized key findings. First, the standard of review of the decision of the Director South Saskatchewan Region (the Director) to approve the application is correctness, with no deference to the Director. Second, the Board recommended the Approval be varied to include monitoring conditions to address concerns about the impacts on water quality and quantity flowing into W06. Third, the EAB recommended that the Approval be varied to require the approval holder to classify and assess all 24 wetlands using criteria specified in the Alberta Wetland Policy.⁸

This article critiques the Report, focusing on whether the EAB addressed all of the listed issues. While the Report addressed issues #1 and #3, and partially addressed #2(a) above, the Board did not address issues #2(b) or #2(c) to determine whether the Director's decision to issue the Approval was appropriate





The critique extends to the Ministerial Order 06/2018⁹ (the Ministerial Order) and the Minister's written Reasons for Decision¹⁰ for varying the Approval.

Finally, details are provided about how the Ministerial Order was implemented and EAB's recent decision (in 2019) to deny the Appellants' applications for costs.¹¹

The proponent, application and wetland classification and assessment reports

The proponent of the SWCRR was Alberta Transportation as the landowner of the Transportation and Utility Corridor (TUC). On September 2016, Alberta Transportation awarded Mountainview Partnership the SWCRR construction contract, which subsequently subcontracted to KGL Constructors (KGL) to obtain approvals and construct the SWCRR.

The application was submitted by KGL to the Director on December 23, 2016. Previously, Mountainview Partnership had commissioned a report that classified and evaluated the wetlands from Golder. Golder's fieldwork was not completed until the 2016 growing season and included classification and assessment of all wetlands listed in the application.

The application attached the Golder report and an earlier report prepared by AMEC that was prepared between 2005 and 2006 for a federal review of the project under the *Canadian Environmental Assessment Act, 2012*.¹² AMEC also submitted supplemental field work conducted in the 2014 growing season. AMEC did not classify and assess all the wetlands listed in the application. Neither consultant assessed the cumulative social and ecological impacts of losing hectares of high value wetlands in the watershed or regional context.

In assessing and classifying the wetlands, both Golder and AMEC used the outdated *Wetland Management in the Settled Parts of Alberta: An Interim Policy* (the Interim Policy);¹³ Stewart and Kantrud, and the *Wetland Restoration and Compensation Guide (2007)* (the Guide).¹⁴

The Interim Policy, Stewart and Kantrud and the Guide were replaced between 2013 and 2015 when the government officially adopted the new Alberta Wetland Policy¹⁵ and several new policy implementation tools. These included the new Alberta wetland classification system, the wetland evaluation matrix, and several administrative directives and practice protocols for consulting firms. These came into effect on June 1, 2015 for Alberta's settled area (private lands) as decision-support tools for the Director when reviewing applications to disturb wetlands on private lands.

As Alberta Transportation owned the TUC, the wetlands were deemed to be private lands as opposed to public lands. As private lands, the Alberta Wetland Policy applied to their classification and evaluation. Since June 1, 2015, an applicant for an approval to disturb a wetland on private lands was required to use the Alberta Wetland Policy and the policy implementation tools unless the proponent met specific conditions and timelines,¹⁶ which had expired in this case.

When reviewing KGL's application submitted in late December, 2016, the Director incorrectly decided that the Interim Policy, the Stewart

and Kantrud Classification System, and the Guide were the relevant policies and implementation tools to classify and evaluate the 24 wetlands. Based on the information in the consultants' reports, the Director granted the Approval to KGL on August 11, 2017.

It is respectfully submitted the Director did not have jurisdiction to accept and consider reports based on the outdated Interim Policy and implementation tools. The Director exceeded his jurisdiction by not requiring KGL to implement the Alberta Wetland Policy as correct government policy. Without the required studies, the application was not complete when the Director issued the Approval, arguably without jurisdiction. The EAB and the Minister also lacked jurisdiction to vary the Approval issued before the application was complete. The only reasonable option was to reverse the Approval.

The Alberta Wetland Policy and implementation tools

The purpose of the Alberta Wetland Policy is to provide "the strategic direction and tools required to make informed management decisions in the long-term interest of Albertans," and is intended to "minimize the loss and degradation of wetlands, while allowing for continued growth and economic development in the province."¹⁷ The goal of the policy is to:

...conserve, restore, protect, and manage Alberta's wetlands to sustain the benefits they provide to the environment, society, and economy. To achieve this goal, the policy will focus 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.
4. Wetland management considers regional context.¹⁸

Under the Alberta Wetland Policy, wetlands are to be assessed in a 'regional context' and conserved and restored in areas where wetland losses have been high, such as the Calgary Metropolitan Area where 90% of Calgary's wetlands have already been disturbed.¹⁹

A proponent for wetland disturbance must comply with a mitigation hierarchy and demonstrate attempts to avoid disturbing wetlands of assessed high value. High value wetlands are not necessarily permanent and naturally occurring, and determining high value is a scientific process using a specific evaluation matrix.

Failing avoidance of a high value wetland, a proponent must demonstrate how any negative impact to the wetland will be mitigated. Finally, only if documented attempts to avoid and then mitigate fail, may a proponent apply to financially compensate for wetland loss. In this hierarchy, infill of high value wetlands is the least preferred option and the very last resort.²⁰ Documented attempts to avoid the wetlands and mitigate negative impacts must be submitted along with applications to disturb wetlands.



Critique of the recommendations to vary

In the Report, the EAB stressed the important functions of the few remaining wetlands in Southern Alberta, and described the *Water Act* as “an ameliorative statutory scheme, which requires a broad and liberal interpretation.”²¹ However, EAB’s recommendation to the Minister to slightly vary the terms and conditions of the Approval undermined that statement. The Director and the EAB relied upon consultant reports that significantly devalued them, as discovered when re-evaluation netted an increased compensation value of over \$1 million dollars.²²

The EAB explained that the Alberta Environment and Parks Ministry (AEP) no longer has sufficient resources to conduct its own scientific studies, and therefore the Director relies on the information provided in consultant reports when making decisions.²³ These reports provide factual information regarding the matters and factors that the Director must consider when issuing an Approval. It is respectfully submitted that when data and information are incorrect, the Director cannot logically make appropriate or correct decisions.

The EAB stressed that its role in an appeal is to examine the Director’s decision-making process for correctness. EAB had the required expertise and jurisdiction to require that correct studies be conducted by the proponent or by a third party to ensure that the Director’s decision to approve the wetland disturbance was appropriate and correct. EAB did not do so. Neither the EAB nor the Minister ensured that correct wetland classification and evaluation were done prior to making decisions on the Appeals, even though they knew that the consultant reports submitted with the Application were incorrect. As the Director lacked jurisdiction to accept those reports, slight variances to the Approval were insufficient to address the unassessed and unknown cumulative effects of the loss of high value wetlands in a regional or watershed context where there had been significant wetland loss.

One of the three issues to be determined by the EAB was whether the Director’s decision to issue the Approval was appropriate having regard to the potential environmental impacts of the work authorized by the Approval. As noted by the EAB, wetlands and riparian lands are essential natural infrastructure for managing storm drainage in urbanizing areas. Among other ecological goods and services they provide, they sustain water quality and mitigate negative impacts of flood and drought events.²⁴

The EAB recommended that the Approval be varied to require KGL to prepare a monitoring plan to assess water quality and quantity of W06, and the monitoring criteria to be used in that plan were provided. The Director was required to approve the monitoring plan, and once approved the plan was required to be implemented immediately and remain in force for a minimum of five years after the SWCRR opened to traffic. The results of the monitoring program were to be provided to the Director and made publicly available within one month from the time the data were collected and included in an annual report to be provided to the Director and published on a publicly accessible website.²⁵ The EAB recognized that upon completion of the SWCRR, monitoring would become the responsibility of the party responsible for highway maintenance - Alberta Transportation.²⁶

It is respectfully submitted that monitoring the quality of the water in W06 will not address:

- a. the loss of water storage and release capacity in the immediate vicinity of the SWCRR;²⁷
- b. the loss of critical wetland function in the Weaselhead; or
- c. the social and ecological impacts of wetland loss in the watershed or regional context.

The EAB stated specifically that the “intent of the monitoring will be to ensure the hydrologic connection to W06 is maintained and water quality is not negatively impacted.”²⁸ However, the EAB did not articulate how monitoring data was to be used by KGL or Alberta Transportation to achieve that objective. The EAB did not require management responses if water quality indicator thresholds were exceeded, such as are envisioned in the *South Saskatchewan Surface Water Quality Management Framework*.²⁹

The EAB found that the Approval specifically incorporated by reference ‘Version 1 of the ECO Plan’ associated with the construction project which required a 15 to 30 meter riparian land buffer be maintained around remaining wetlands. This requirement was included as a condition of the Approval. The buffer setback had been established by implementing the provincial guidance document, *Stepping Back from the Water: A Beneficial Management Practices Guide for New Development Near Water Bodies in Alberta’s Settled Region*, (Stepping Back). Stepping Back articulates current scientific knowledge that without sufficient riparian land buffers, water quality in receiving wetlands is at increased risk of contamination due to higher volumes and faster rates of storm drainage runoff from hard surfaces.

However, KGL stripped and graded the land and stockpiled materials within 5 meters of the wetlands, destroying the required riparian land buffers. The EAB and the Director were both surprised to hear that KGL had arbitrarily decided to reduce the buffer to 5 meters without approval.³⁰ The EAB discussed the significance of KGL’s decision to encroach on the required riparian land buffers, but did not require KGL to restore these lands to their previous condition so that they could perform their functions.³¹

The Appellants and several intervenors raised concerns about KGL’s failure to comply with the setback requirements. They pointed out that no approved storm drainage management plan accompanied the application, and although the plan was discussed during the appeals the EAB had not seen such a plan for the SWCRR,³² nor asked KGL to provide one. The Director, EAB, and eventually the Minister all relied on the consultant reports provided by AMEC and Golder which did not address the increased volume or rate of storm drainage that would run off the SWCRR when the wetlands were infilled.

There are four significant issues regarding the terms and conditions that were not adequately addressed through the EAB’s recommendations. First, the EAB did not address whether the Director had received a complete application before he issued the Approval, as is required by the *Approvals and Registrations Procedures Regulation*.³³

Second, the EAB did not address the lack of any specific cumulative social and ecological impacts study done in the regional context by either Golder or AMEC. The cumulative effects of removing 22.07 hectares of wetlands in the Weaselhead area of the Elbow River watershed, where a significant number of wetlands have already been destroyed, is a factor that is required to be considered by the



Director when making a decision, as set out in the *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)*.³⁴

Third, the EAB varied the Approval without reviewing an approved Storm Drainage Management Plan as part of the application.³⁵ As wetlands and their associated riparian lands would be infilled and removed, the Storm Drainage Management Plan was a critical component for the Director, and later the EAB and the Minister to review. They needed to review the plan to determine how increased volumes and rate of storm drainage runoff from the SWCRR would be managed to protect the adjacent environment and receiving water bodies when the wetlands were infilled. Without consideration of how the plan would be implemented both during and after construction, the EAB could not determine if runoff from the SWCRR would commingle with surface and groundwater or have negative impacts on water quality and the wetland ecosystem.

Finally, the EAB did not order KGL to restore the riparian lands in the 15 to 30 meter riparian land buffers required to be retained as a term and condition of the Approval. KGL had encroached within 5 meters of the wetlands. Given that the term of the Approval was breached, the EAB had jurisdiction to recommend, and the Minister had jurisdiction to order that construction work be stayed until the riparian buffers were functionally restored to maintain water quality in the wetlands.

Critique of the EAB's findings about the Alberta wetland policy

The EAB made several questionable findings about the Alberta Wetland Policy. First the EAB compared the Interim Policy and Alberta Wetland Policy and found that "[t]he major difference between the policies is the way compensation is calculated, plus the [Alberta Wetland Policy] requires the project proponent to consider social or regional assessments and to provide an analysis of alternatives to avoid or minimize impacts to "A" value wetlands, where reasonable."³⁶

It is respectfully submitted that the EAB did not adequately consider the significance of the new requirements of the Alberta Wetland Policy.

The way compensation is calculated is not the major difference between the policies or what is required to be provided to the Director by a proponent when applying to disturb wetlands. The new policy, implementation tools, directives, and protocols are extensive.³⁷ For example, the requirement that a proponent determine wetlands of high value using a specific valuation matrix is completely different from what was recommended under the Interim Policy. The new valuation matrix can only be used by an accredited qualified wetland professional. Plus, a proponent must demonstrate attempts to avoid wetlands of high value, reflecting a major change in policy intent. The new policy requires a proponent to classify and assess the social and ecological impacts of disturbing wetlands in a regional context, which is also a major policy change.

If the Alberta Wetland Policy had been used in this case, these considerations may have identified that the loss of 22.07 hectares of functioning high value wetlands and associated riparian lands in the Weaselhead would have significant social and ecological impacts in the watershed or regional context.

The EAB did find that KGL should have used the Alberta Wetland Policy. The Board recommended that the wetlands be re-classified and re-evaluated using the criteria in the Alberta Wetland Policy for compensation purposes, even though several had already been significantly disturbed.³⁸ However, the Board did not make any substantive findings of fact, or provide any detailed recommendations about the significant error of law that occurred when the Director accepted and relied on consultant reports that applied the wrong wetland policy, contrary to current government directives. The Board did not address the *Approvals and Registrations Procedures Regulation* regarding completeness, nor cumulative effects that must be considered by the Director when determining whether to issue an Approval as required by the *Approved South Saskatchewan Basin Water Management Plan (Alberta)*.

Further, the Director claimed that regional plans for wetland protection did not exist in 2016 when KGL applied for the Approval. In fact, the *South Saskatchewan Regional Plan 2014-2024*³⁹ did exist with respect to protection and management of wetlands in the settled area of Southern Alberta, with strong guidance and direction for land-use decision-makers to avoid wetlands and protect riparian lands during land development. As well, the *Elbow River Watershed Management Plan*⁴⁰ had been in existence for years with respect to wetland and riparian land conservation and management.

Critique of the ministerial order

The EAB's recommendations to vary the Approval⁴¹ illustrate the differences between those recommendations and the variances included in the Ministerial Order. The Ministerial Order is purportedly based on the EAB's report and recommendations, but, it is respectfully submitted that her decision is largely based on political factors associated with the need and status of the SWCRR construction. This is reflected in her concluding remarks in the Reasons for Decision: "after careful consideration of all the facts and competing interests, I have concluded it would not be in the best interests of Albertans to undertake a redesign at this stage."⁴²

While thanking the Appellants for their dedication and for bringing the Appeals, the Minister took the opportunity to clarify that she would not address many of the issues raised by the Appellants in her decision. However, the Minister had jurisdiction to:

- ask for a review of the possibility of using a bridge to avoid the wetlands that had not yet been infilled;
- to stay further infill and encroachment on the wetlands and riparian land buffers until the work she ordered was complete; and
- to order that the social and ecological matters raised by the Appellants be addressed by KGL before any further disturbance of the wetlands.

The Minister did go to some length to protect W06 from infill and negative impacts of construction of the SWCRR,⁴³ and she did require KGL to re-classify and re-evaluate the wetlands using criteria in the Alberta Wetland Policy. She also ordered that KGL follow the Alberta Wetland Policy mitigation hierarchy before the construction work continued regarding Wetlands 07 and 08, unless the Director decided to allow construction to proceed. However, she made no order that required KGL to restore wetlands of high value or restore riparian land



buffers that had been destroyed in breach of the Approval's terms and conditions.

Instead of requiring KGL to restore the riparian land buffers, the Minister directed KGL to apply to the Director for a revised Eco Plan to get an approval to keep disturbing them.⁴⁴ Given the critical function of these buffers, the Minister might have ordered that all construction work be stopped until these landscape features were functionally restored in accordance with the Approval.

Finally, nowhere in her decision did the Minister address whether the Director's decision to issue the Approval was appropriate, given the Director's lack of jurisdiction to rely on outdated wetland policy and implementation tools. She basically adopted the EAB's recommendations, clarifying what KGL must do to bring its construction work into alignment with existing government policy and the terms and conditions of the Approval. Except for the specific orders to halt certain aspects of construction until required reports and monitoring plans were submitted and approved by the Director, the stay was removed.

What happened to the wetlands after the ministerial order?

Brookman, several intervenors and interested Calgarians followed the progress of KGL's construction of the SWCRR for a few months after the Ministerial Order was received in January 2018. They recorded their observations in photographs taken by wildlife photographer Robert Ross (Ross), a Calgarian who lives in the Weaselhead area, Ross depicting continual encroachment on wetlands 06, 07 and 08, and the lack of restoration of the 15 to 30 meter riparian land buffer around the wetlands. Brookman and others sent several letters via e-mail to both the Minister and the Premier of Alberta requesting information on whether the Ministerial Order had been formalized through required court process, and whether the Ministerial Order was being enforced.⁴⁵ Brookman also contacted the EAB and made similar enquiries.⁴⁶

On or about May 9, 2018, via a decision letter to Cory Turkinton of KGL, the Designated Director under the Act, Regional Approvals Manager, Kevin Wilkinson (Wilkinson)⁴⁷ provided the Director's decision with respect to Conditions 6.7 and 9.3 of the Ministerial Order regarding Wetlands 06, 07, 08 and 09 (Letter from Wilkinson). In that letter, Wilkinson confirmed that he had received the wetland re-assessment under the Alberta Wetland Policy as ordered under Condition 6.7(a) of the Ministerial Order, and that the reassessment was deemed complete. He also provided his written direction regarding Condition 6.7(c). Additional compensation was payable to the province after re-calculation in the amount of \$1,179,900 plus GST, in addition to the amount KGL had already paid to Ducks Unlimited Canada under the previous terms and conditions of the Approval.

Wilkinson stated that KGL was approved to disturb Wetland 07 and Wetland 08 in accordance with an amended Approval, and was ordered to make the revised wetland assessment publicly available by May 16, 2018.

The Appellants had not been notified about Wilkinson's decision, the subsequent amendment to the Approval, nor that Wilkinson had approved continued disturbance of Wetlands 07 and 08. It was only

after the series of letters and photographs were submitted by Ross to the Premier and the Minister that on July 31, 2018, Randy Sweeney, Environmental Protection Officer, Inspector, Alberta Environment and Parks, South Saskatchewan Region (Sweeney) provided Ross with a link to the Letter from Wilkinson. In turn, Ross forwarded the link to Brookman and others.⁴⁸

The Appellants were neither given notice nor an opportunity to provide a Statement of Concern regarding Wilkinson's May 9, 2018 decision. The information provided by Sweeney was also unknown to the Appellants until July 31, 2018.

KGL's website dedicates a webpage to links for the public providing the wetland assessment and other documentation about the continued work on the SWCRR. However, the public and the Appellants were not informed that such a webpage existed until Sweeney provided the link to the webpage to Ross on July 31, 2018.⁴⁹

The Appellants' costs application 2019

The EAB denied the Appellants' application for an award of costs, and summarized, as follows:

After the Minister released her decision, the Appellants filed a costs application totaling \$378,471.67. KGL did not file a costs application. The Board reviewed the submissions from the parties and assessed the costs application with the criteria used by the Board to determine if costs should be awarded. The Board considered the participation of the Appellants in the hearing was part of the obligations Albertans have to bring environmental issues forward. The Board found much of the evidence presented by the Appellants and their witnesses related to matters outside of those set for the hearing. Therefore, the Board awarded no costs to the Appellants.⁵⁰

The EAB's commentary in the costs award decision about the value of the Appellants' contributions undermines the Minister's final comments in her written decision, wherein she thanked the Appellants for having brought the Appeals.⁵¹

Conclusion

The critique highlights trade-offs made by the EAB and the Minister to uphold the Approval with only slight variances. Both made strong statements about the important functions and value of the remaining wetlands in Southern Alberta. However, 23 of the 24 wetlands in the SWCRR TUC in the Weaselhead have been partially or completely infilled with significant or complete loss of function. Soils in riparian land buffers associated with the wetlands were compacted during construction of the SWCRR after removal of vegetation, topsoil and complex root structures. The wetlands and riparian land buffers were replaced with storm drainage collection and treatment facilities that will require maintenance over time at significant public costs.⁵²

The sole purpose of the Alberta Wetland Policy is to ensure that the Director uses consistent policy considerations and protocols that have evolved alongside science and technology when approving wetland disturbance. However, provincial policies, laws and regulations do not seem to effectively protect wetlands and riparian



lands when Alberta Transportation is constructing major highways, such as the SWCRR.

In Alberta, titles to land located in TUCs are owned by Alberta Transportation. However, like all other proponents, to disturb wetlands on private lands Alberta Transportation is required to comply with Alberta's regulatory system. The Minister did clarify that: "[t]he appeals have made it clear that we need to do a better job in designing and approving roadways, particularly where they have been over-designed and have disproportionate impacts on wetlands."⁵³ However, she did not right the over-design problem in this case.

The Minister's reasons for decision cautioned the Director and AEP generally: "[t]hrough my order, I welcome the opportunity to clarify that it is my expectation that the AEP applies the highest possible standards for the protection of wetlands in all projects,"⁵⁴ adding that the Director must strictly apply the avoid/mitigate/compensate hierarchy, particular for wetlands in urban areas.⁵⁵

The Minister put AEP on notice that wetlands are important natural infrastructure that must be protected and sustained. However, unless citizens, such as Brookman and Tulick appeal, the Minister may never learn when provincial policy and directives have not been implemented by the Director.

In turn, through the denial of cost awards to Brookman and Tulick, the EAB put citizens on notice that they will be participating on their own dime if they appeal the Director's decisions. The participation of Appellants in EAB hearings is considered part of the obligations Albertans have to bring environmental issues forward.⁵⁶

Biography of Dr. Judy Stewart

Judy Stewart, LL.M, PhD, practices law in Cochrane, Alberta, primarily at the nexus of water law and municipal law. Her thesis for her Master of Laws at the University of Calgary focused on the legal framework surrounding municipal tools to protect wetlands and riparian lands in Alberta. She has published an article in the Alberta Law Review on municipal water management planning under section 60 of the *Municipal Government Act*, which provides municipalities "with direction, control and management" of water bodies within their jurisdiction. Recently, she completed transdisciplinary research in a doctorate program in the Faculty of Environmental Design at the University of Calgary, where she assessed the reflexivity of Alberta's environmental policy and regulatory legal instruments in place in 2014 and designed a reflexive legal framework for bridging organizations in regional environmental governance and management. Her Master of Laws thesis was about municipal legal tools to protect wetlands and riparian lands. This article is adapted from her upcoming CIRL occasional paper entitled "The Implications of the Brookman and Tulick Appeal of Wetland Disturbance in Southwest Calgary for Future Protection of Alberta's Water Resources."



Notes

- ¹ *Brookman and Tulick v. Director, South Saskatchewan Region, Alberta Environment and Parks, re: KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.) online: <http://www.eab.gov.ab.ca/dec/17-047-050-R.pdf> (the Appeals). Retrieved on February 3, 2018.
- ² Water Act, R.S.A. 2000, c.W-6 (Water Act).
- ³ Water Act, Approval No. 00388473-00-00 (the Approval).
- ⁴ Stewart, R.E. and H.A. Kantrud. 1971. Classification of Natural Ponds and Lakes in the Glaciated Prairie Region, Bureau of Sport Fisheries and Wildlife, U.S. Fish and Wildlife Service, Washington, D.C., USA. Resource Publication 92. (the Stewart and Kantrud System).
- ⁵ Alberta Environmental Appeals Board Report and Recommendations in the matter of sections 91, 92, 95, 97 and 99 of the Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, and section 115 of the Water Act, R.S.A. 2000, c.W3, November 24, 2017, online: <http://www.assembly.ab.ca/lao/library/egovdocs/2017/aleab/225780.pdf> (the Report) at 1. Retrieved on February 3, 2019.
- ⁶ The Report, *supra* note 5 at 1
- ⁷ The Report, *supra* note 5: Executive Summary.
- ⁸ Government of Alberta, *Alberta Wetland Policy*, 2013, online: <https://open.alberta.ca/dataset/5250f98b-2e1e-43e7-947f-62c14747e3b3/resource/43677a60-3503-4509-acfd-6918e8b8ec0a/download/6249018-2013-alberta-wetland-policy-2013-09.pdf> (the Alberta Wetland Policy). Retrieved on November 25, 2019.
- ⁹ The Report, *supra* note 5. See the Ministerial Order 06/18: Environmental Protection and Enhancement Act R.S.A. 2000, c. E-12; and Water Act R.S.A. 2000, c. W-3. Order Respecting Environmental Appeals Board Appeal Nos. 17-047 and 17-050: Ministerial Order and the Minister's Reasons for Decision (Ministerial Order).
- ¹⁰ The Report, *supra* note 5. See the attached Reasons of the Minister of Alberta Environment and Parks EAB Appeals No. 17-047 and 17-050 (the Reasons for Decision).
- ¹¹ Alberta Environmental Appeals Board Decision November 7, 2019 In the Matter of sections 91, 92, 95, 96, and 97 of the Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, and section 115 of the Water Act, R.S.A. 2000, c. W-3 (the Brookman Tulick costs application). Not available online on December 1, 2019.
- ¹² Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52
- ¹³ Government of Alberta, *Wetland Management in the Settled Parts of Alberta: An Interim Policy*, May, 1993, online: <https://open.alberta.ca/dataset/f2246350-9b0a-4c26-9c74-58da18599f7a/resource/d6d8b37a-e2a5-47df-850a-db18e315f458/download/1993-wetlandmanagementsettled-interimpolicy.pdf>, (the Interim Policy). Retrieved on November 25, 2019.
- ¹⁴ Government of Alberta, *Provincial Wetland Restoration and Compensation Guide (2007)*, online: <https://open.alberta.ca/dataset/49aa20de-2fba-46e2-822c-d758029ab726/resource/356a13e6-9fbb-4b01-98ff-0be645f992d5/download/2007-wetlandrestorationcompensation-guide.pdf> (the Guide). Retrieved on November 25, 2019.
- ¹⁵ Alberta Wetland Policy, *supra* note 8.
- ¹⁶ See Government of Alberta, *Wetland Mitigation Directive*, (June 2017), online: [https://open.alberta.ca/dataset/2e6ebc5f-3172-4920-](https://open.alberta.ca/dataset/2e6ebc5f-3172-4920-9cd5-0c472a22f0e8/resource/56a7d06c-b3e2-40c4-8bfd-4cd79bfc1aa8/download/AlbertaWetlandMitigationDirective-Jun2017.pdf)

[9cd5-0c472a22f0e8/resource/56a7d06c-b3e2-40c4-8bfd-4cd79bfc1aa8/download/AlbertaWetlandMitigationDirective-Jun2017.pdf](https://open.alberta.ca/dataset/2e6ebc5f-3172-4920-9cd5-0c472a22f0e8/resource/56a7d06c-b3e2-40c4-8bfd-4cd79bfc1aa8/download/AlbertaWetlandMitigationDirective-Jun2017.pdf) (the Directive), at 3. "Wetland Impact Assessments that were completed in the White Area under the interim policy will be accepted and reviewed if the assessment was completed during the growing season of 2014 and is submitted to the regulatory body before December 22, 2017; or was completed during the growing season of 2015, up until May 31, and is submitted to the regulatory body prior to June 1, 2018." At 2, the Directive also advises that: "Adherence to requirements put forth in this Directive is mandatory. Applicants seeking to obtain an authorization to impact a wetland must mitigate wetland impacts and demonstrate that the requirements of this Directive have been met."

¹⁷ Alberta Wetland Policy. *supra* note 8 at 2

¹⁸ *Ibid.*

¹⁹ City of Calgary, *Calgary Wetland Conservation Plan*, 2004, online: https://www.calgary.ca/CSPS/Parks/Documents/Planning-and-Operations/Natural-Areas-and-Wetlands/wetland_conservation_plan.pdf?noredirect=1 at 6. Retrieved on November 25, 2019.

²⁰ Alberta Wetland Policy, *supra* note 8 at 14.

²¹ The Report *supra*, note 5 at para. 168: "This legislation [the Water Act] is essential to protect the water resources in Alberta, which are necessary for human life, the environment, and economic development. In the case before the Board, the Water Act regulates the disturbance of wetlands to allow the construction of a major roadway. 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 there are comparatively few. Wetlands support a wide variety of flora and fauna and play an essential role in attenuating the impacts of both drought and flooding. The Water Act is an ameliorative statutory scheme, which requires a broad and liberal interpretation." Also see *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (A.E.A.B.) for discussion about the importance of water resources in Alberta, online: http://www.eab.gov.ab.ca/dec/03-116_118-121-R.pdf (Capstone). Retrieved on February 2, 2018.

²² Letter from Kevin Wilkinson Regional Approvals Manager, Designated Director under the Act to Cory Turkington, Environmental Coordinator, KGL Constructors, dated May 9, 2018, online: http://www.swcrrproject.com/wp-content/uploads/2016/11/00388473_MO-Directors-Letter.pdf (Letter from Wilkinson). Retrieved on November 25, 2019.

²³ The Report, *supra* note 5 at para. 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. (At the request of the Director, the Board modified its hearing process. In the past, the Director used to go before the project proponent. Now, to



reflect the Director is relying on the proponent's experts, the project proponent goes before the Director.)"

²⁴ See Alberta Wetland Policy, *supra* note 8. Also see Government of Alberta, *Stepping Back From the Water: A Beneficial Management Practices Guide for New Development Near Water Bodies in Alberta's Settled Region*, 2012, online:

<https://open.alberta.ca/dataset/1c70eb43-a211-4e9c-82c3-9ffd07f64932/resource/6e524f7c-0c19-4253-a0f6-62a0e2166b04/download/2012-SteppingBackFromWater-Guide-2012.pdf> (Stepping Back) at 3. Retrieved on November 25, 2019.

²⁵ The Report, *supra* note 5 at para. 336.

²⁶ The Report, *supra* note 5 at para. 337.

²⁷ See Stepping Back, *supra* note 24.

²⁸ The Report, *supra* note 5 at para. 338.

²⁹ Government of Alberta, South Saskatchewan Region Plan Surface Water Quality Monitoring Framework, 2014, online:

<https://open.alberta.ca/dataset/ac375c32-eb74-4e21-9468-6f78e2348d3e/resource/94da67c4-fc86-4581-80dc-c2de39dff4d/download/6700521-2014-south-saskatchewan-region-surface-water-quality-management-framework.pdf> (SWQMF). Retrieved on November 25, 2019.

³⁰ The Report, *supra* note 5 at para. 340.

³¹ The Report, *supra* note 5 at para. 341: "The Approval requires a 15 to 30 metre area of protection around the remaining wetlands. The Approval Holder believed it was possible to conduct the work while maintaining that distance but is now suggesting a smaller buffer zone would be sufficient, making for easier construction around the wetlands. The Approval was issued with conditions to ensure impacts to the wetlands would be minimized. If the Approval Holder wants the buffer area to be changed, it must submit an amendment application to the Director and, if the Director approves, the Approval can be amended. The Approval Holder would then be required to follow the conditions in the amended Approval."

³² The Report, *supra* note 5 at para. 339: "Although the stormwater plan was not part of the Approval currently before the Board, the Board believes it would be prudent for the Approval Holder to post this plan, when approved by the Director, on a publicly accessible website. The Board understands the stormwater plan will minimize the potential for runoff from the SWCRR to commingle with groundwater or surface runoff in the area."

³³ *Approvals and Registrations Procedures Regulation*, Alta Reg. 113/1993, section 4: "4(1) The Director shall not review an application for the purpose of making a decision until it is a complete application. (2) Where the application is not complete, the Director shall notify the applicant in writing and request the information necessary to make the application complete. (3) Where the information is not supplied by the applicant within a reasonable time, the Director may reject the application and shall forthwith advise the applicant in writing of that fact."

³⁴ See Government of Alberta, *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)*, 2006, online:

<https://open.alberta.ca/dataset/7541cb1e-b511-4a98-8b76-af33d7418fa1/resource/483eb9b0-29fd-41d4-9f81-264d53682b9a/download/2006-SSRB-ApprovedWaterManagementPlan-2006.pdf>. (Approved Plan) at 15. Retrieved on November 25, 2019.

³⁵ See note 33 regarding the lack of the storm drainage management plan.

³⁶ The Report, *supra* note 5 at para. 412.

³⁷ See Government of Alberta, 'Alberta Wetland Policy Implementation', (nd), online: [https://www.alberta.ca/alberta-](https://www.alberta.ca/alberta-wetland-policy-implementation.aspx)

[wetland-policy-implementation.aspx](https://www.alberta.ca/alberta-wetland-policy-implementation.aspx). Retrieved on November 25, 2019.

³⁸ The Report, *supra* note 5, at para 416: "The Board finds the Director should have instructed the Approval Holder to assess the 24 wetlands impacted by the Approval using the 2013 Policy. As a result, the Board recommends the Approval be amended requiring the Approval Holder to re-classify the wetlands and assess each of the 24 wetlands identified in the Approval using the criteria in the 2013 Policy. This includes completing an options analysis of the "A" value wetlands, where reasonable, taking into account the potential environmental, social, and regional impacts. Therefore, the Board recommends the Approval be varied, requiring the Approval Holder to assess the wetlands impacted using the criteria found in the 2013 Policy."

³⁹ Government of Alberta, *South Saskatchewan Regional Plan*, 2014-2024, Amended to May, 2018, online:

<https://landuse.alberta.ca/LandUse%20Documents/South%20Saskatchewan%20Regional%20Plan%202014-2024%20-%20May%202018.pdf>. Retrieved on November 25, 2019.

⁴⁰ Elbow River Watershed Partnership, Elbow River Watershed Management Plan, 2008, revised January 2009, online:

<https://erwp.org/index.php/educational-documents/66-elbow-river-basin-water-management-plan/file>. Retrieved on November 25, 2019. The AEP is a signatory to this authorized plan.

⁴¹ The Report, *supra* note 5 at para. 424.

⁴² Reasons of the Minister of Alberta Environment and Parks EAB Appeals No. 17-047 and 17-050, *supra* note 10 at para. 20. "I understand the desire of the Appellants to have KGL and Alberta Transportation redesign and rebuild this project to a higher standard. However, given the current state of construction, I do not believe it would be prudent to consider a redesign of the project. If we were to attempt to redesign and rebuild the project now, it would result in significant costs increases, and in the process, I am concerned we would cause more environmental impacts, cause more disturbance to the people living in the area, and potentially delay a significant provincial infrastructure project. I wish the outcome could be different, but after careful consideration of all the facts and competing interests, I have concluded it would not be in the best interests of Albertans to undertake a redesign at this stage."

⁴³ See Ministerial Order, *supra* note 9 at para. 8: "Given the importance and use of the Beaver Pond by the public I agree with the Board that monitoring Wetland 06 will ensure that it is properly protected. I also believe it is important to ensure the Appellants, the other participants in the hearing, and members of the public have easy access to this information to ensure the features included in the design of the roadway protect Wetland 06 as intended. If it becomes apparent the features included in the design of the roadway are not protecting Wetland 06 as intended, then AEP can take steps under their legislation to ensure that any deficiencies are corrected."

⁴⁴ See Ministerial Order, *supra* note 9 at para. 9: "I understand from the Board's Report, KGL has updated the Southwest Calgary Ring Road Eco Plan (referred to in the Approval as 00388473-R001) and the Remaining Wetland Protection Plan (referred to in the Approval as 003 88473-R002) without informing AEP. These plans form part of the Approval as they are incorporated by reference. I agree with the Board that it is not appropriate to make changes to these plans without first obtaining the approval of AEP. There must be clarity in what terms and conditions are in place in an approval, and any change to a document incorporated by reference into an approval must be approved by AEP before the approval holder is permitted to act on the change. Therefore, I am accepting the Board's recommendation. I am ordering that the Approval Holder may undertake the activities authorized by the Approval in accordance



with the Southwest Calgary Ring Road Eco Plan and the Remaining Wetland Protection Plan, but any revisions or amendments to these plans must be approved by AEP in writing before KGL is permitted to act under these plans.”

⁴⁵ Jeff Brookman and Robert Ross email correspondence of August 1, 2018 entitled “May 9, 2018 Alberta Environment and Parks - Directors Letter Granting Approvals.” The author was circulated as part of the correspondence chain and is in possession of these letters.

⁴⁶ *Ibid.*

⁴⁷ See Letter from Wilkinson, *supra* note 22.

⁴⁸ See Jeff Brookman and Robert Ross email correspondence of August 1, 2018 copied to the author entitled “May 9, 2018 Alberta Environment and Parks -Directors Letter Granting Approvals.”

⁴⁹ KGL, “KGL and the Environment”, (nd), online:

<http://www.swcrrproject.com/about/environmental-management/>,

and KGL “Environment”, (nd), online:

<http://www.swcrrproject.com/frequently-asked-questions/faq-environment#104>.

⁵⁰ See note 11.

⁵¹ Reasons for Decision, *supra* note 10 at para. 22: “Lastly, I want to thank the Appellants for bringing these appeals forward. These appeals have highlighted the importance of strictly applying the avoid, mitigate, and compensate hierarchy, particular for wetlands in urban areas. The appeals have made it clear that we need to do a better job in designing and approving roadways, particularly where they have been over-designed and have disproportionate impacts on wetlands. While I understand the Appellants would have wanted to see more significant changes for this project, I am hopeful they can be satisfied that they have set the stage for better projects from this point forward.”

⁵² Jennifer Drake & Yiping Guo ‘ Maintenance of Wet Stormwater Ponds in Ontario’, *Canadian Water Resources Journal* 2008 33:4, 351-368, DOI: [10.4296/cwrj3304351](https://doi.org/10.4296/cwrj3304351)

⁵³ Ministerial Order, *supra* note 9 at para. 22.

⁵⁴ Ministerial Order, *supra* note 9 at para. 21.

⁵⁵ *Ibid.*

⁵⁶ See note 51.

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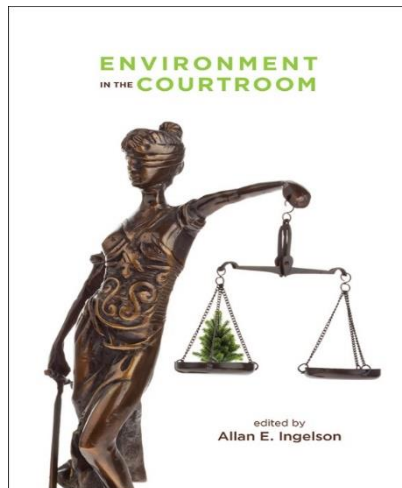
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