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**The Implications of the Brookman and
Tulick Appeal of Wetland Disturbance in
Southwest Calgary for Future Protection
of Alberta's Water Resources**

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1.0 THE IMPORTANCE OF WATER RESOURCES AND WETLANDS IN ALBERTA

The recent Environmental Appeal Board (EAB) report and recommendations to the Minister (the Minister) of Alberta Environment and Parks (AEP) to vary Approval No. 00388473-00-00 (the Approval) to disturb 24 wetlands to construct the Southwest Calgary Ring Road (SWCRR) highlight the importance of protecting water resources in semi-arid Southern Alberta. The Approval was issued by the Director, South Saskatchewan Region (the Director) of AEP pursuant to the *Water Act*¹ (Water Act). In the report, the EAB stressed the important functions of the few remaining wetlands in the rapidly urbanizing Calgary Metropolitan Area, and described the Water Act as “an ameliorative statutory scheme”² as follows:

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.³

The EAB’s role in an appeal of an approval issued under the Water Act is to examine the decision-making process for correctness. The EAB must consider evidence provided at the appeal and determine whether the Director had jurisdiction and correctly implemented applicable laws when issuing an approval in a particular case. The EAB must then prepare a written report of findings and make recommendations to the Minister. Thereafter, the Minister may adopt those recommendations in whole or in part, affirm the Director’s decision, amend or cancel the approval, or substitute a new approval through Ministerial Order.⁴ There may be occasions where the Director’s and EAB’s decisions may both be subject to Ministerial political override, as follows:

The determination of the Board can have an immediate impact on many people and significant economic development. The potential effect of the Board’s process is so significant the statutory scheme provides for a “political override.” Instead of making a final decision, the Board makes a recommendation to the Minister. As the Court has described, this structure allows the Minister to “...bring his knowledge of the political pressures to bear on the final decision. Balancing the wide and often conflicting interests as are set out in the purpose of the Act is a decision for which a Minister has qualifications and expertise by

¹ *Water Act*, R.S.A. 2000, c.W-6 (Water Act).

² See *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> (Brookman Tulick Appeal). Retrieved on February 3, 2018.

³ *Ibid.*, para. 168. 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 03-118121-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

⁴ *Brookman and Tulick Appeal*, *supra* note 2, para. 183. See the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12 (EPEA) and regulation where the Minister’s role is articulated.

virtue of his or her position.” (*Imperial Oil Limited and Devon Estates Limited v. HMQ and the City of Calgary*, 2003 ABQB 388 at paragraphs 37 – 39).⁵

... Ultimately, the role of the Board is to provide the Minister with the best possible advice to support exercising her broad jurisdiction under [the *Environmental Protection and Enhancement Act*] EPEA. The Minister uses the Board’s advice to make a better decision than the Director, which can consider a much broader range of considerations than the Director.⁶

The primary purpose of this article is to examine the EAB’s report and recommendations to the Minister following the appeals of the Approval (Appeal Nos. 17-047 and 17-050; the Brookman Tulick Appeal), as well as the Ministerial Order 06/2018 (the Ministerial Order)⁷, to determine potential grounds for judicial review of the EAB’s report and recommendations or the Minister’s decision. Second, important clarifications about the appeal process and the Minister’s role that were included in the EAB’s report are highlighted. The exact language used by the EAB and Minister is used throughout. Third, the Director’s subsequent decisions following the Ministerial Orders⁸ are briefly presented to explain the outcome of the appeal process in this case.

First, the article briefly reviews the EAB’s discussion of the gatekeeper function of the “directly affected” criterion for an Appellant to have standing to appeal, the function of the Notice of Appeal, and some procedural matters the EAB clarified. Second, the Approval and the parties to the appeal are described along with highlights in the EAB’s Executive Summary. Third, the issues before the EAB are listed. Fourth, highlights of the EAB’s restatement about the evidence provided by the Appellants concerning the terms and conditions of the Approval and provincial wetland policies are provided. The EAB’s analysis of the evidence is followed by the author’s brief critique about how the issues and evidence were addressed given current scientific information about the critical functions of wetlands and riparian lands in urbanizing landscapes. Fifth, the Minister’s decision and reasons are compared to the EAB’s recommendations, demonstrating the Minister’s commitment to protecting wetlands in Southern Alberta. Sixth, the Director’s decisions following the Ministerial Order are described and briefly analyzed for procedural and substantive error. Lastly, the paper proposes potential grounds to launch a judicial review of the EAB’s recommendations to the Minister, the Minister’s decision, or the Director’s decision following the Ministerial Order. Concluding remarks suggest that even though both the EAB and the Minister made strong statements about the critical functions and value of the few remaining wetlands in the Calgary Metropolitan Area, noting the ameliorating nature of the Water Act and their respective roles in ensuring wetlands are valued and protected, in this case, Alberta’s complex policy and regulatory system and appeal process for protecting wetlands of value were

⁵ Brookman Tulick Appeal, *supra* note 2, para. 183

⁶ *Ibid.*, para. 202.

⁷ Shannon Phillips, Minister of Environment and Parks, January 29, 2018, *Ministerial Order 06/2018 Environmental Protection and Enhancement Act* RSA 2000, c-E-12, Order Respecting Environmental Appeals Board Appeal Nos. 17-047 and 17-050 and reasons (the Ministerial Order).

⁸ 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).

all overridden by political and economic considerations. At the end of the day, the SWCRR was deemed critical to Southern Alberta's continued social and economic sustainability, while twenty-three of the 24 wetlands have been partially or completely infilled and deemed replaceable through "financial compensation."⁹

2.0 THE 'DIRECTLY AFFECTED' GATEKEEPER FUNCTION

In the report and recommendations to the Minister, the EAB explained that the EAB appeal process starts with a person filing a Notice of Appeal. The EAB clarified that it is the appeal board that determines whether a person who files a Notice of Appeal is directly affected by an approval. The EAB clarified that notwithstanding the Director's decision that a person is not directly affected when a Statement of Concern is filed with the Director, the EAB may decide differently when the person files a Notice of Appeal. The EAB explained that filing a Statement of Concern with the Director is the required first step because it provides a person with a gateway to later file a Notice of Appeal:

The Board's appeal process starts with the filing of a Notice of Appeal. The Notice of Appeal must be filed with the Board within the appeal period to be valid, although there are some limited circumstances where the Board will extend the appeal period. Further, while the filing of a Statement of Concern with the Director is a prerequisite to being able to file¹⁰ an appeal with the Board, the Director accepting a person as being directly affected is not. The Board makes its own decision whether a person is directly affected, and in this case, the Board found three of the persons who filed notices of appeal were directly affected. The requirement for a Statement of Concern to be filed, the requirement to file a Notice of Appeal in time, and the requirement to be directly affected all serve "gatekeeper" functions to ensure that only those people who are genuinely concerned about a project can appeal.¹¹

Later in its report and recommendations, the EAB discussed (at length) the gatekeeper functions, or prescribed procedural elements to appealing the Director's decision:

The Board steps in only where opposition to a project is strong enough to motivate a person to get involved in the approval process by filing a Statement of Concern, and then, after the Director makes his decision, the person is still sufficiently opposed to the Director's decision that they choose to engage the appeal process by filing a Notice of Appeal. The Board's role 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 person who filed the appeal. A core aspect of this review is to consider new evidence that was not before the Director. As stated, it is common for new technical reports to be prepared focusing on the issues that were set by the Board, and all the evidence that is brought before the Board is subject to cross-examination and questioning by the Board.¹²

⁹ *Ibid.* An additional \$1,179,900 plus GST was required to be paid following the Brookman Tulick Appeal, the Ministerial Order and the re-assessment of the value of the wetlands as ordered.

¹⁰ See: Water Act section 109(1). See: Water Act section 109(2). See: Water Act section 38. See: Water Act section 111.

¹¹ Brookman Tulick Appeal, *supra* note 2, para 174. Also see paras. 175-177.

¹² *Ibid.*, para. 186.

The EAB added that the Board’s discretion to award costs also performs a gatekeeper function:

Once the Minister has made her decision, the Board considers applications for costs. While the Board has a broad jurisdiction to award costs, the Board does not apply the “loser-pays” principle used by the Courts, nor does it apply the “automatic local intervenor funding” model used by the Alberta Energy Regulator, the Natural Resources Conservation Board, or the Alberta Energy Regulator. Rather, the Board starts with the proposition that each party pays its own way, and then the Board uses costs as a “reward” for assisting the Board. This approach also serves a “gatekeeper” function. Appellants, when deciding whether to file an appeal, must weigh their potential costs of participating in the hearing, as they cannot expect their costs will be paid. However, at the same time, it is not likely that costs will be awarded against them.¹³

These clarifications of the gateway functions of the Statement of Concern, the Notice of Appeal, a potential award of costs, and EAB’s role in ensuring that the best evidence is provided to the Minister underscore the valuable contributions made by the Appellants in the Brookman Tulick Appeal, because they were found to be directly affected and genuinely concerned watershed stewards. Their interventions resulted in improving the terms and conditions of the Approval.

3.0 CLARIFICATION OF PROCEDURAL MATTERS

3.1 The Director is a Party to the Appeal

At the hearing, the Appellants argued that the Director should not be party to the appeal. The EAB took time to explain that the Director is a party to appeals before the EAB as provided in the Environmental Appeal Board Regulation, Alta. Reg. 114/1993, section 1(d):

In the Board’s view, the active participation of the Director, where there is new evidence before the Board, is the best way to support this. Specifically, the Board also relies on the provision of the Environmental Appeal Board Regulation, Alta. Reg. 114/1993, section 1(d). This section provides: “In this regulation ... (f) “party” means (i) the person who files a Notice of Appeal that results in an appeal, (ii) the person whose decision is the subject of the Notice of Appeal, (ii.1) where the subject of the Notice of Appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the Water Act, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and (iii) any other person the Board decides should be a party to the appeal.” The regulation makes the Director a party to the appeal and makes no distinction between the role of the Director, the Appellant, and the project proponent.¹⁴

¹³ *Ibid.*, para. 180.

¹⁴ *Ibid.*, para. 200.

3.2 De Novo Jurisdiction and Standard of Review

The Appellants also argued that the EAB should hold a de novo hearing and substitute their own decision in place of the Director's with respect to the Approval. The Appellants claimed that the EAB was able to introduce and rely on scientific studies and evidence different from what the Director had before him when he issued the Approval in the first instance. The EAB confirmed its de novo jurisdiction.

The EAB also clarified that a de novo hearing is not a standard of review, and stated that this was the first occasion wherein it received full submissions on the standard of review. The EAB summarized that there are only two standards of review in Canada at this time: a, reasonableness; and b, correctness:

“EPEA” is the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and is the Act that establishes and empowers the Board. Section 95(2)(d) of EPEA provides:“(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following: ... (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made ...” The Board's de novo jurisdiction was confirmed by the Court of Appeal in *Chem-Security (Alberta) Ltd. v. Lesser Slave Lake Indian Regional Council*, 1997 ABCA 241 at paragraphs 11 and 12: “Section [95(2)] of the Act contemplates that, prior to the hearing of an appeal, the Board may determine which matters set out in a notice [of appeal] will be included in the hearing of the appeal. In making that determination the Board is entitled to consider ‘whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made.’ It follows that the hearing before the Board is a de novo hearing. The Board is empowered to consider evidence that was not before the Director. For example, if significant changes in p.c.b. emissions had occurred since the Director pronounced, the Board might consider that.”¹⁵

While the EAB established its de novo jurisdiction and ability to require new evidence be provided that was not before the Director when he made his decision to issue the Approval, (for example a cumulative effects study of the impact of removing 24 wetlands in the Calgary Metropolitan Area and the South Saskatchewan River Basin) no new evidence was requested of the proponent or Director or considered by the EAB.

The EAB's discussion of the standard of review is worth reading and further analysis, but is not dealt with in this paper. The EAB confirmed that the standard of review must be determined on a case by case basis.

¹⁵ Brookman Tulick Appeal, *supra* note 2 at para.127, reference # 18.

4.0 THE APPROVAL AND THE APPROVAL HOLDER

The proponent of the SWCRR is Alberta Transportation, but the Approval to disturb the wetlands was issued on August 11, 2017 by the Director to *KGL Constructors, A Partnership (KGL)*, the contractor(s) hired by Alberta Transportation to apply for all required approvals and construct the SWCRR. The EAB described the wetland disturbance permitted by the Approval:

The Approval allows for the permanent disturbance (in-filling) of 24 wetlands for a total of 22.07 hectares of wetland loss and to change the location of water for the purpose of dewatering wetlands. Eleven wetlands will be partially infilled, and 13 wetlands will be completely infilled as part of the construction of the Southwest Calgary Ring Road (“SWCRR”). The project involves the construction of a roadway through the Transportation Utility Corridor (“TUC”) located on the west side of the City of Calgary.¹⁶

5.0 THE WETLANDS, WETLAND AND RIPARIAN LAND POLICIES, AND THE CONSULTANT WETLAND STUDIES: WHAT WENT WRONG?

The Brookman Tulick Appeal was primarily concerned with the disturbance of five identified wetlands and one watercourse that were all components of an interconnected natural drainage system and wetland complex in the vicinity of the Weaselhead Natural Environment Park (the Weaselhead). The appeal and stay originally addressed all 24 wetlands, but the EAB reduced this to four wetlands (W06, 07, 08 & 09) and watercourse WC01. However, WC01 was later removed from the appeal file because it was not part of the SWCRR application.

According to the Director’s file, the wetlands included six Class II wetlands, 10 Class III wetlands, two Class IV wetlands and six Class V wetlands, for a total of 22.07 hectares.¹⁷ The wetlands were given numbers. However, the users of the Weaselhead refer to W06 as the ‘Beaver Pond,’ and W11 as ‘Clay Marsh.’ The wetlands had been assessed and classified by two different consultants over an 11 year period using outdated provincial policy documents such as: *Wetland Management in the Settled Area of Alberta: An Interim Policy* (the Interim Policy),¹⁸ the 2007 *Provincial Wetland Restoration/Compensation Guide* (the Guide),¹⁹ and *Stewart-Kantrud Wetland Classification System* (SK Classification).²⁰ These administrative tools had all been replaced in 2013 when the Government of Alberta (GOA) adopted the Alberta Wetland Policy

¹⁶ *Ibid.*, para.1.

¹⁷ *Ibid.*, para. 268.

¹⁸ Government of Alberta, *Wetland Management in the Settled Area of Alberta: An Interim Policy*, 1993, online: <https://open.alberta.ca/dataset/f2246350-9b0a-4c26-9c74-58da18599f7a/resource/d6d8b37a-e2a5-47df-850a-db18e315f458/download/1993-wetlandmanagementsettled-interimpolicy.pdf> (Interim Policy). Retrieved February 08, 2018.

¹⁹ Government of Alberta, *Provincial Wetland Restoration/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> (Guide). Retrieved February 8, 2018.

²⁰ See a description of the *Steward and Kantrud Wetland Classification System* online <http://www.wetlandpolicy.ca/stewart-kantrud-system/> (SK Classification). Retrieved on February 9, 2018.

Stewart, R.E. and H.A. Kantrud. *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. 1971. Resource Publication 92. 57 pp.

(AWP)²¹ and several new institutional arrangements for implementing the AWP.²² These included a new wetland classification system, several administrative directives, as well as practice protocols for use by consulting firms when classifying and assessing the value of wetlands. The AWP (and policy implementation tools) came into effect on June 1, 2015 for Alberta's settled area (private lands) as decision-support tools for the Director to use when approving applications for wetland disturbance under the Water Act. Since June 1, 2015, an applicant for an approval to disturb a wetland is required to use the AWP assessment and classification system, unless the proponent meets specific timelines for completion of fieldwork and submission of an application.²³

The GOA's adoption of the AWP and policy implementation tools followed several pilot projects and extensive public consultation with Albertans. The purpose of the AWP is stated 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."²⁴ However, in 2013 the GOA clarified its official position that not all wetlands are of equal value,²⁵ even though wetland scientists have shown, and it is common knowledge among wetland experts, that all wetlands, including small ephemeral ponds that contain no water most of the year, provide distinct ecological functions, for example, by providing breeding and nesting habitat and open water to migratory birds in early spring.²⁶ The goal of the AWP is stated 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.*

²¹ 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> (AWP). Retrieved February 8, 2018.

²² See Alberta Environment and Parks, "Alberta Wetland Policy Implementation", online: <https://www.alberta.ca/alberta-wetland-policy-implementation.aspx>. Retrieved February 8, 2018.

²³ See Government of Alberta, *Wetland Mitigation Directive*, (June 2017), online: <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."

²⁴ AWP, *supra* note 21 at 2.

²⁵ *Ibid.*

²⁶ Arlene Kwasniak, *Alberta Wetlands: A Law and Policy Guide* (2nd Ed.), (Canadian Institute of Resources Law: Calgary, Alberta, 2016).

3. Wetlands are managed by avoiding, minimizing, and if necessary, replacing lost wetland value.
4. *Wetland management considers regional context* (emphasis added).²⁷

The application to disturb the 24 wetlands was submitted to the Director on December 23, 2016. The first consultant's report by AMEC had been conducted ten years earlier, between 2005 and 2006, as part of a wetland impact assessment conducted for a federal review under the *Canadian Environmental Assessment Act* (CEAA),²⁸ with supplemental field work completed in the 2014 growing season. However, AMEC did not assess and classify all the wetlands named in the application for the Approval.

A second consultant's report by Golder had been commissioned by the original proponent 'Mountainview Partnership' who had been awarded the SWCRR construction contract in September 2016. Mountainview Partnership then subcontracted to KGL. The 'Golder Report' was completed in the 2016 growing season and included classification and assessment of all 24 wetlands. KGL and the Director took the position that the Interim Policy, Guide and SK Classification system were the correct policies to classify and assess the wetlands, even though the Golder fieldwork was not completed until the 2016 growing season. Furthermore, the GOA had introduced a completely new wetland classification system and new assessment processes to help consulting firms determine 'wetland value' in a consistent manner.

Wetlands were also to be assessed in a 'regional context' and were to be conserved and restored in areas where wetland losses have been high, such as the Calgary Metropolitan Area.²⁹ The classification and value assessment required pursuant to the AWP had not been done by either consultant because they used the Interim Policy, the Guide, and SK Classification system. In summary of what went wrong, the Director did not implement the AWP and require the consultants to identify the wetlands of high value that were proposed to be disturbed to construct the SWCRR, even though the AWP had been in effect for decision-making purposes since June

²⁷ *Ibid.*

²⁸ SC 2012, c.19 (CEAA). See Arlene Kwasniak "Minister Sharpens the Wetland Policy's Teeth, and Beaver Pond is Spared" (16 February, 2018), online: ABlawg,

http://ablawg.ca/wpcontent/uploads/2018/02/Blog_AK_Wetland_Policy.pdf. Retrieved on February 16, 2018.

"The SWCRR was subject to two federal environmental assessments under the *Canadian Environmental Assessment Act*, the first under the 1992 statute, SC 1992, c 37, and the second, research independent of the Decisions discloses, began under the 1992 statute, but then discontinued under statute statute, SC 2012, c 19, under which it no longer was required to be assessed. (See Canadian Environmental Assessment Agency assessment summary). The first was completed in 2009 and was triggered by a request for Transport Canada's financial assistance, and the second was triggered by contemplated exercise of federal authority by the Department of Fisheries and Oceans (inland fisheries), Transport Canada (navigable waters), and Aboriginal Affairs and Northern Development Canada because of the need for federal approval of the Tsuut'ina First Nation land transfer to the Province. AMEC Environment and Infrastructure prepared an impacts report in December 2014 in relation to the second exercises of federal authority. The AMEC report contained information on impacts to wetlands. The Federal Government signed off on the transfer of lands on May 1, 2015." (Weblinks provided in original.)

²⁹ Judy Stewart, "Municipal Direction, Control and Management of Local Wetlands and Associated Riparian Lands: Section 60 of Alberta's Municipal Government Act." *Alta. L. Rev.* 47 (2009): 73. By 2004, 90% of pre-settlement wetlands in the City of Calgary had been lost to development of roads, and commercial and residential subdivisions.

1, 2015. As a result, the consultants' reports did not identify wetlands of high value in the regional context where over 90% of Calgary's wetlands were already destroyed.

As noted by the EAB and the Director, some of the wetlands scheduled for partial or complete infill were permanent and naturally occurring wetlands (Class IV and V according to the SK Classification system), where the beds and shores would normally be considered claimable as public lands under section 3 of the *Public Lands Act*.³⁰ It is suggested later in this paper that, as a result of the Director's failure to require the implementation of the AWP, which was the appropriate policy regime when the application was processed, the application to disturb the 24 wetlands was never complete.

More important to the Brookman Tulick Appeal, the AWP requires that a proponent for wetland disturbance demonstrate compliance with the 'mitigation hierarchy.' The proponent is required to demonstrate attempts to avoid disturbing wetlands of assessed high value as the preferred option. Failing avoidance, a proponent is then required to demonstrate how any negative impact to the wetlands will be mitigated. Finally, only if documented attempts to avoid and then mitigate fail, may a proponent offer to financially compensate for wetland loss. In this hierarchy, infill of wetlands is the least preferred option and the very last resort.³¹

During construction activities, before the Brookman Tulick Appeal was launched, KGL also encroached upon the required 15 to 30 meter riparian buffer setback that had been established by implementing the provincial guidance document, *Stepping Back From the Water: A Beneficial*

³⁰ R.S.A, 2000, c.P-40, (PLA) s.3: 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." In this case, the lands had been previously owned by the federal government, or title to the beds and shores had been transferred to Alberta Transportation when the Transportation and Utility Corridor was created, so the PLA did not apply.

³¹ The hierarchy was formalized in the Directive, *supra* note 23 at 4: "The onus is on the Applicant to demonstrate a) avoidance of wetlands, and b) preservation of relative wetland value. Evidence of avoidance must include: • Options considered for relocating the activity • Alternative activities considered in the proposed area • Modifications considered to the proposed activity • Comparative analysis of alternative options to the proposed activity • When there is need to balance wetland avoidance with achievement of the smallest footprint on the landscape, the rationale for this balance must be documented." Historically, when using the Interim Policy and Guide, proponents for disturbance documented little or no attempt to avoid or mitigate harm to wetlands, and a calculation of compensation was regularly presented as the preferred option. Both consultant reports (AMEC and Golder) demonstrated very little compliance with the mitigation hierarchy as described in the AWP, as no attempt had been made to completely avoid the wetlands, and few attempts were made to mitigate potential harm, for example by building a bridge that avoided or directing contaminated drainage flowing from the SWCRR away from the wetland complex. Instead, the proponent proposed infilling thirteen of the wetlands, with partial infill and major impacts on eleven other wetlands, with financial compensation calculated for wetland loss based on the Guide. Under their proposal, Ducks Unlimited Canada would receive over 1.2 million dollars to restore degraded wetlands somewhere in the province, but not necessarily in the Weaselhead, the Calgary Metropolitan Area, or the Elbow River Watershed. Also see AWP, *supra* note 19 at 16. In this appeal, the Appellants pointed out to the EAB that this Approval was worse than the one in the *Hanson and Lindberg v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: County of St. Paul (20 February 2014)*, Appeal Nos. 13-005 and 006-R (A.E.A.B.), online: <http://www.eab.gov.ab.ca/dec/13-005-006-R.pdf> (Hanson and Lindberg). Retrieved on February 20, 2018. In *Hanson and Lindberg*, St. Paul County went straight to compensation without attempting to avoid or mitigate and the EAB recommended that the Approval be reversed.

Management Practices Guide for New Development Near Water Bodies in Alberta's Settled Region (Stepping Back).³² Stepping Back articulates current scientific knowledge that without sufficient riparian land buffers, water quality in receiving wetlands is at increased risk of being contaminated from storm drainage, for example runoff from the SWCRR.³³ The 15 to 30 metre riparian land buffer was included as a condition of the Approval. However, KGL had stripped and graded and stockpiled materials within five meters of the wetlands, destroying the required riparian buffers adjacent to the wetlands.

6.0 WHY DID THE APPELLANTS APPEAL?

Mr. Jeff Brookman and Ms. Allison Tulick, citizens of the City of Calgary (the Appellants) appealed the Director's decision to issue the Approval. The EAB found them both to be directly affected. The Appellants regularly used the lands where the wetlands were situated for recreational purposes, and satisfied the "use" criteria for being deemed directly affected. The Appellants were directly involved in protecting the wetlands from infill to avoid negative impacts on Calgary's drinking water system, and the increased likelihood of flooding in their neighbourhoods.³⁴

As a result of public consultation during the development of the AWP, members of the public, such as the Appellants, came to understand that wetlands (of all classifications) and their associated riparian lands function as natural systems for water purification, as well as seasonal water storage and release. It is also widely known that wetlands provide many ecological goods and services for society, and also improve the market value of adjacent residential lands. When wetlands are infilled, riparian buffers and vegetation removed, and soils compacted for urban development, storm drainage from the area transports grease, chemical contaminants and sediments that must be artificially removed through complex storm drainage collection and treatment facilities. When wetlands are replaced with impermeable surfaces, such as pavement, the amount of storm drainage from the same site increases and that increased volume runs off the land at an increased velocity into receiving water bodies, such as rivers, creeks and reservoirs.³⁵ Members of the public, such as the Appellants, also understand that the collection and release of storm drainage must be carefully managed to avoid water contamination, erosion and sedimentation of receiving water bodies.³⁶

³² 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://talkaep.alberta.ca/4435/documents/9357> (Stepping Back). Retrieved on February 12, 2018.

³³ See Alberta Low Impact Development Partnership, "The Urban Landscape May Be a Concrete Jungle, but it Doesn't Need to Behave Like One", (nd), online: <http://www.alidp.org/resources/lid-101/what-is-low-impact-development-lid> Retrieved on February 12, 2018.

³⁴ In August 2018, Jeff Brookman continues to be in regular correspondence with the EAB, the Minister's office and the Calgary media, and the author is included in the mailing list of recipients of the communications.

³⁵ Stepping Back, *supra* note 32, ALIDP, *supra* note 33 and Kwasniak, *supra* note 26.

³⁶ See Government of Alberta, *Storm Water Management Guidelines for the Province of Alberta*, 1999, online: <https://open.alberta.ca/dataset/75b4611e-d962-4411-ac56-935ec2f8dcd1/resource/c6ccd70c-1a1e-4f2a-ae23-58e287ed5ada/download/stormwatermanagementguidelines-1999.pdf> (Storm Water Guidelines). Retrieved on February 12, 2018. Alberta Water Council, "Recommendations for a New Alberta Wetland Policy" (16 September, 2008), online: https://www.awchome.ca/_projectdocs/?file=3f71924d41ee58de, pp.1-10. Retrieved on February 12, 2018. See AWP, *supra* note 21 at 4. See ALIDP, *supra* note 33.

The development of a constructed wetland or a storm drainage collection and treatment facility (or ‘stormwater pond’) requires an Approval issued pursuant to the *Environmental Protection and Enhancement Act* (EPEA).³⁷ These artificial humanmade storm drainage collection facilities are clay lined, and therefore they cannot, and do not, perform the same ecological services as their natural counterparts, such as natural flood attenuation and drought mitigation through seasonal water storage and release functions. They are designed and built to address only known capacities of surface drainage from the site based on historical data, and they do not reflect system uncertainty due to climate change or the cumulative effects of urban development occurring in a regional context, such as the Calgary Metropolitan Area or the Elbow River Watershed.³⁸

7.0 ISSUES RAISED BY THE INTERVENORS IN THE APPEAL

Several individuals and organizations intervened in the Brookman Tulick Appeal. They presented on various issues associated with disturbance and infill of the wetlands, including loss of critical wetland function and ecological goods and services, water scarcity, contamination of drinking water supplies, the connections between surface and groundwater, flooding and so forth. They raised other environmental and procedural issues, including, for example, that the Director had accepted the Golder Report from KGL that had classified and assessed the wetlands using outdated and incorrect wetland policy and implementation guidance and tools. Many felt personally at risk of harm due to the increased likelihood of flooding in their neighbourhoods if the wetlands and the spongy riparian buffer were removed. The Intervenors raised three issues that the EAB did not address in its report and recommendations to the Minister because the issues were apparently outside the application for the Approval:

- a) that the proponent had failed to obtain a Water Act approval for a “causeway” as defined in the Water Act;
- b) that the Director had failed to consider cumulative effects of the infill of the wetlands as is required in the *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)*;³⁹ and
- c) that KGL had not submitted a storm drainage management plan for the SWCRR to the Director as part of the application.

In its report, the EAB remarked on the third issue above, as follows:

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

³⁷ EPEA, *supra* note 4. See the regulations pursuant to EPEA with respect to development of storm drainage collection and treatment facilities according to guidelines and best management practices.

³⁸ Storm Water Guidelines, *supra* note 36.

³⁹ 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> Retrieved February 9, 2018.

plan will minimize the potential for runoff from the SWCRR to commingle with groundwater or surface runoff in the area (emphasis added).⁴⁰

This restatement of facts by the EAB with respect to the Intervenor’s issue concerning the lack of an approved storm drainage management plan reflects that board members had not seen such a plan for the SWCRR, and had not asked the Director or the Approval Holder to provide one, or conduct any independent studies to determine the regional context or cumulative effects of removing wetlands in the Calgary Metropolitan Area, the Elbow River Watershed, the Bow River Watershed, or the South Saskatchewan River Basin. KGL did not provide the EAB with studies of the impact of infilling the wetlands when severe climate conditions are unpredictable and increase the potential for flooding in the regional context. The Director, the EAB, and eventually the Minister relied solely on the studies provided by KGL’s consultants (AMEC and Golder) when they made their decisions about the Approval. Those reports did not address the increased volume or rate of storm drainage runoff that would occur from the SWCRR when the wetlands were infilled or removed,⁴¹ nor did they address how the removal of 24 wetlands may affect the landscape’s ability to mitigate future flood and drought conditions.

These matters raised by the Intervenor were not determined by the EAB under de novo jurisdiction, or later by the Minister and are noted in this article only because the EAB explained at length that the Department of Environment and Parks no longer has sufficient resources or trained personnel to conduct its own scientific studies and relies on the information provided in the consultant reports submitted with applications to disturb wetlands.⁴²

8.0 THE STAY

The Appellants were successful in having a stay be put in place to prevent work on the SWCRR from continuing with respect to infilling the wetlands during the appeal. Initially, the stay was in place for W06, W07, W08, W09, and watercourse WC01, but “on September 29, 2017, the Board notified the Parties the stay was varied to exclude WC01.”⁴³ Although WC01 had been infilled without a Water Act application, the required notice, or an approval, the EAB lifted the stay on WC01 because it was not part of the KGL application or the Approval. While no stay applied to W11 (Clay Marsh), aerial photographs of W11 taken by the Appellants on October 30, 2017 illustrate that the wetland was still intact at that time.⁴⁴ It has now been filled in. The stay on infill of W06, W07, W08 and W09 was also lifted when the Ministerial Order was issued.

⁴⁰ Brookman Tulick Appeal, *supra* note 2 at para. 339.

⁴¹ See Stepping Back *supra*, note 32 that addresses some of the known impacts of storm drainage runoff.

⁴² Brookman Tulick Appeal, *supra* note 2 at para.172. Paragraph 172 should be read in its entirety to understand the lack of resources available to the Director when reviewing applications to disturb wetlands.

⁴³ *Ibid.*, at para. 29.

⁴⁴ See “Aerial Photography over the SWCRR and the Weaselhead” (30, October, 2017), online: <https://wgppspphoto.smugmug.com/Aerial-Photography-over-the-SWCRR-and-the-Weaselhead/October-30flight/i-nBX2tKs>. Retrieved February 16, 2018.

9.0 THE THREE ISSUES TO BE DETERMINED BY THE EAB

After consideration of the Notice of Appeal and other documents, the EAB provided three issues that would be determined during the appeal, as follows:

1. What is the standard of review the Board should apply in the circumstances of this case? (Author's note: This was the first time that the issue of standard of review was fully argued before the EAB).
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? (emphasis added).⁴⁵

While the EAB's report and recommendations to the Minister addressed issues #1 and #3 above, the Board did not address the matters listed in issues #2(b) or 2(c) or provide any clarity with respect to the appropriateness of the Director's decision to issue the Approval with respect to the terms and conditions, the impact on the 24 wetlands listed in the Approval, and the impact on those wetlands in the context of all the wetlands impacted by the development of the SWCRR. The absence of any discussion or findings by the EAB in this regard is illustrated in the highlights of the Executive Summary of the EAB report and recommendations to the Minister provided below.

10.0 HIGHLIGHTS OF THE EAB'S EXECUTIVE SUMMARY

In the Executive Summary, the EAB listed only two significant findings from the 111 page report and recommendations to the Minister:

1. *The standard of review is "correctness, with no deference to the Director.* The correctness standard means that if the Board does not agree with the Director's decision, the Board in making its report and recommendation to the Minister of Environment and Parks can recommend that she substitute her decision for that of the Director. In this way, the appeal process allows a better decision to be made" (emphasis added).⁴⁶
2. *The Board recommended the Approval be varied "to include monitoring conditions to address concerns regarding impacts on water quality and water quantity flowing into Wetland 06.* The Board also recommended the Approval be varied to require the Approval

⁴⁵ Brookman Tulick Appeal, *supra* note 2: Executive Summary.

⁴⁶ *Ibid.*

Holder complete an assessment of the wetlands impacted by the project using the criteria specified in the 2013 Alberta Wetland Policy” (emphasis added).⁴⁷

11.0 THE TERMS AND CONDITIONS OF THE APPROVAL

11.1 EAB’s Restatement: the Appellants evidence about the Terms and Conditions

All parties in the Brookman Tulick Appeal provided evidence to support their respective positions with respect to the Approval. What follows is some of the Appellants evidence as restated by the EAB. The author submits that the EAB’s consideration and recommendations regarding these particular matters provide grounds for judicial review:

The Appellants noted AMEC missed wetlands W07, W08, W09, W10, and W12 as well as wetlands further south, including W01, W02, and W04. The Appellants stated that, even though AMEC started the fieldwork in 2005 and completed the work in 2014, the fieldwork did not relate to the 24 wetlands in the application for the Approval. The Appellants argued the completion of the fieldwork in 2014 cannot justify the use of the Interim Policy as many of the wetlands identified in the Golder Report were not included in the AMEC Report. The Appellants stated that, since fieldwork related to the 24 wetlands included in the Approval was completed in 2016, the Approval should have been based on the 2013 Policy.⁴⁸

The Appellants believed WC01 was filled-in without an approval. The Appellants disagreed construction of the causeway being built across the Elbow River need only follow the Code of Practice for Watercourse Crossings. The Appellants believed a Water Act approval was required.⁴⁹

The Appellants argued the Director should have taken into consideration the Special Protection Natural Environment Park adjacent to the TUC given Schedule 5, section 4(1) of the *Government Organization Act*. The Appellants stated the *Government Organization Act* requires that no harm occurs in lands adjacent to the TUC. The Appellants questioned why rules, policies, and procedures were ignored or relaxed given that Government projects should abide by a higher standard.⁵⁰

The Appellants pointed out the contradiction between the requirement for “no harm to adjacent areas,” provided for in Schedule 5, section 4(1)(a) and (b) of the *Government Organization Act*, and the limitation on recreational activities in the TUC that the Approval Holder identified in Alberta Infrastructure’s Transportation/Utility Corridor (TUC) Policy.⁵¹

The Appellants noted the Environmental Construction Operations Plan states a 30 metre buffer will apply for all avoidable wetlands where practical and a 15 metre buffer for the balance. The Appellants questioned how the 30 metre buffer was determined.⁵²

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at para. 284.

⁴⁹ Brookman Tulick Appeal, *supra* note 2 at para. 286

⁵⁰ *Ibid.*, at para. 297

⁵¹ *Ibid.*, at para. 298

⁵² *Ibid.*, at para. 308.

At the hearing, the Appellants asked the Board to reverse the Approval. In the alternative, the Appellants recommended the Approval be varied by adding conditions requiring the Approval Holder to:

- a) *avoid W06, W07, W08, and W11;*
- b) install the intake culvert that transects the project area at the 90th Avenue interchange;
- c) not allow the mixing of groundwater and stormwater;
- d) remove beaver dams and other impediments to WC01 which may stop the flow from reaching W06; and
- e) *monitor W06, W07, W08, and W11 for the next five years and correcting any deficiencies which prevent the flow of water from continuing* (emphasis added).⁵³

Based on the EAB's restatements of these issues, the EAB's findings about the Terms and Conditions of the Approval are described below with the author's brief analysis of those findings given the current scientific knowledge about the critical functions of wetlands and riparian lands in controlling storm drainage in urbanizing areas to sustain water quality and to mitigate negative impacts of flood and drought events.⁵⁴

11.2 EAB's findings about the Terms and Conditions

The EAB clarified that it would not comment on the size or the need for the SWCRR, and that this appeal would only address the Approval to disturb the 24 wetlands. However, for the most part, the author submits that the EAB's recommendations *were* based on political considerations with respect to completion of the SWCRR rather than on a thorough review of whether the Director had erred in the application of the Water Act and regulations prior to issuing the Approval, and whether the decision was appropriate, given the current state of knowledge of the critical functions of wetlands and riparian lands in mitigating negative impacts of storm drainage from urbanizing landscapes. The EAB did not address the failure of the Director to consider or comply with the *Government Organization Act* requirements with respect to the protected natural area or the TUC policy, nor did the EAB address the Director's failure to ensure that KGL complied with the Code of Practice for Watercourse Crossings when constructing the causeway without a Water Act approval.

Whether the SWCRR is necessary or needed to be completed within a specified time period were considerations the EAB stated were outside the appeal board's jurisdiction. As stated above, one of the three issues to be determined by the EAB was whether the Director's decision to issue the Approval was appropriate in regards to the potential environmental impacts of the authorized work, which included the Approval's terms and conditions; how the wetlands listed in the Approval may be impacted if disturbed; and the impact of disturbing these wetlands in the larger context of all the wetlands impacted by the SWCRR project.

The EAB deflected the determination of whether the decision to issue the Approval was appropriate by requiring that KGL begin and continue to monitor water quality in W06 over a 10

⁵³ *Ibid.*, at para. 333.

⁵⁴ See Stepping Back, *supra* note 32.

year period, also requiring it to make the monitoring data publicly available. It is respectfully submitted by the author that monitoring the water quality in W06 will not address the loss of water storage and release capacity on the landscape.

Details of the EAB's analyses of the terms and conditions of the Approval are presented below, followed by the author's brief analysis:

The Director, and ultimately the Board, cannot advise a project proponent to rescale a project based on whether there is need for a specific project. When an application is filed, the Director reviews the application, with assistance from the relevant staff members, to determine if the project will cause an adverse impact to the environment and, if so, whether those impacts can be effectively mitigated. The Director is not in a position to assess need or size of a proposed project. Therefore, whether the road should have been built to accommodate eight lanes or 16 lanes was not a consideration, except for any additional environmental impacts the larger project would create.⁵⁵

The Board is recommending the Approval be varied to include a condition requiring the Approval Holder to prepare a monitoring plan to assess water quality and quantity of W06. The monitoring plan should include collecting samples in the spring and fall to capture both high and low water levels. The Approval Holder should collect samples at the inflow of water into W06 from the TUC. Samples should be analyzed for total dissolved solids, salts, dissolved metals, and other parameters that would be required under the stormwater sampling program. The monitoring plan is to be approved by the Director, and once approved, shall be implemented immediately and will remain in force for a minimum of five years after the SWCRR is open to traffic. The results of the monitoring program should be provided to the Director and made publicly available within one month from the time the data are collected. The data should also be included in an annual report to be provided to the Director. To ensure the Appellants, Intervenors, and other members of the public have access to the data collected, the annual report and monitoring results should be published on a public website. The website may be AEP's Environmental Site Assessment Registry or some other publicly accessible website.⁵⁶

As the Board is recommending the monitoring be continued for five years after the SWCRR is open to the public, the Board is recommending the Approval be extended until August 10, 2027. The Board understands the project is a partnership between government and private entities. Maintenance of the road and associated structures must continue after the project is completed. As a result, monitoring conditions in the Approval will transfer to the party responsible for continuing maintenance.⁵⁷

The intent of the monitoring will be to ensure the hydrologic connection to W06 is maintained and water quality is not negatively impacted.⁵⁸

⁵⁵ Brookman Tulick Appeal, *supra* note 2 at para. 331.

⁵⁶ *Ibid.*, at para. 336.

⁵⁷ *Ibid.*, at para. 337.

⁵⁸ Brookman Tulick Appeal, *supra* note 2 at para. 338.

At the hearing, the Approval Holder stated it was working under Version 4 of its ECO Plan, specifically reducing the buffer area around the remaining wetlands. The Board appreciates the ECO Plan is a dynamic document that will evolve as the project proceeds. However, the Approval specifically incorporated by reference Version 1 of the ECO Plan, which stipulates a 15 to 30 metre buffer zone around remaining wetlands. The Board, and it appeared the Director, were surprised to hear the Approval Holder decided to change the buffer zone to five metres.⁵⁹

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.⁶⁰

11.3 Analysis of the EAB's findings about the Terms and Conditions

The author submits that four significant issues/problems concerning the terms and conditions of the Approval were not adequately addressed or clarified through the EAB's report or recommendations. First, the EAB did not address whether the Director had ever received a complete application before he issued the Approval, as is required by the *Approvals and Registrations Procedures Regulation*.⁶¹

Second, the EAB did not address the lack of any cumulative effects study by either Golder or AMEC, which would have examined the cumulative effects of removing 24 wetlands in the Weaselhead area watershed, as required by the *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)*.⁶²

Third, the EAB varied the Approval without reviewing a proposed Storm Drainage Management Plan as part of the application to disturb the wetlands.⁶³ As wetlands and their associated riparian lands would be infilled and removed, a proposed Storm Drainage Management Plan was a critical component for the Director, and later the EAB and the Minister, to determine how increased volumes and rate of flow of storm drainage from the SWCRR would be managed to protect the adjacent environment and receiving water bodies. Without knowledge of how such a plan would be put in place and implemented, the EAB could not determine if runoff from the SWCRR would commingle with surface and groundwater and have negative impacts on the

⁵⁹ *Ibid.*, at para. 340

⁶⁰ *Ibid.*, at para. 341

⁶¹ 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" (emphasis added).

⁶² See note 8.

⁶³ See note 40 regarding the lack of the storm drainage management plan before the EAB during the appeal.

environment. The EAB could not determine if approving the removal of 24 wetlands in that landscape was appropriate without knowledge and understanding of the Storm Drainage Management Plan.

Finally, the EAB did not order KGL to restore the riparian lands in the 15 to 30 meter riparian buffer that were required to be retained as a term and condition of the Approval. KGL had encroached on these environmentally significant lands by stripping and grading and stockpiling soils and other materials within five meters of the wetlands. Given the terms of the Approval to maintain a 15 to 30 meter buffer was breached, the EAB had jurisdiction to recommend, and the Minister had jurisdiction to order, that work pursuant to the Approval be delayed until the riparian buffers were restored sufficiently to provide the required riparian functions to maintain water quality in the wetlands and receiving water bodies in the area (KGL might also have been fined appropriately for failing to comply with the terms and conditions of the Approval and destroying these environmentally significant areas without an approval).

12.0 EAB's FINDINGS ABOUT THE WETLAND POLICIES

12.1 EAB's restatement of Appellants concerns about the Wetland Policies

The EAB articulated salient aspects of submissions made by the Appellants and the Director about the application of the AWP, as follows:

The Appellants noted the 2013 [Alberta Wetland] Policy requires a proponent avoid or minimize impacts before looking at replacement options. The Appellants stated there was no indication in the Director's Record that avoidance or minimization was dealt with by the Approval Holder as part of the application process. The Appellants said the 2013 Policy came into effect for the White Area of the province on June 1, 2015, so the Director should not have used the Interim Policy.⁶⁴

The Appellants believed that since the field work for the Golder Report was completed after June 1, 2015, the 2013 Policy should apply. They submitted that, since the AMEC Report did not include all 24 wetlands, it should not have been used to support the Approval application. The Appellants stated that, since only the Golder Report included all 24 wetlands, that report should have been used to determine which policy should apply. The Appellants noted that since the fieldwork was completed in 2016, the 2013 Policy should have been used, and the Approval Holder should be required to submit options to avoid and minimize wetlands and carry out a cost-benefit analysis based on the environmental, social, and economic aspects of the project. The Appellants noted there was no indication the Approval Holder conducted a proper options assessment or cost-benefit analysis.⁶⁵

The Appellants said it is not known whether it is appropriate to leave a 100 to 150 metre median, but if this constraint was removed, options for avoidance and minimization become available. The Appellants acknowledged there is an economic cost associated with spanning the wetland with a pier and beam causeway, but the application did not include an options

⁶⁴ Brookman Tulick Appeal, *supra* note 2 at 343.

⁶⁵ *Ibid.*, at para. 379.

assessment with a cost-benefit analysis that included an evaluation of the economic, environmental, and social costs.⁶⁶

The Appellants said that, even though Alberta Transportation and the Approval Holder stated they are building a six to eight-lane ring road, documents show the road is actually being built for 16 to 18 lanes. The Appellants stated the overbuild results in the situation where the Approval Holder says wetlands cannot be avoided. The Appellants believed building a six to eight-lane highway presents options to avoid the wetlands.⁶⁷

The Director indicated a review of the Approval application would have been similar using either the Interim Policy or the 2013 Policy since both policies follow the core principles of avoid, minimize, or compensate. The Director noted that, as part of the avoidance criteria, options analysis is completed for only “A” value wetlands where reasonable, as was the case for W11.⁶⁸

The Director stated the decision to issue the Approval would not have been different had the Approval application been assessed against the 2013 Policy. He explained the only difference in the Approval itself would have been Section 7, relating to compensation.⁶⁹

The Director said one of the differences between the Interim Policy and the 2013 Policy was the latter considers wetland management and compensation from a regional context which would consider higher level objectives in the watershed basins. The Director noted that regional plans do not currently exist and, therefore, cannot be considered.⁷⁰

12.2 The EAB’s Analysis of the Wetland Policies

The EAB’s analysis of the evidence provided about the wetland policies follows:

Both the Interim Policy and 2013 Policy incorporate a hierarchical approach to dealing with wetlands, with avoidance being the preferred approach, followed by minimization, and compensation, which is to be used only when avoidance and minimization cannot be effectively accomplished. The major difference between the policies is the way compensation is calculated, plus the 2013 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.⁷¹

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,

⁶⁶ *Ibid.*, at para. 347.

⁶⁷ *Ibid.*, at para. 385.

⁶⁸ Brookman Tulick Appeal, *supra* note 2 at para. 400.

⁶⁹ *Ibid.*, at para. 401.

⁶⁷ *Ibid.*, at para. 402.

⁷¹ *Ibid.*, at para. 412.

*where reasonable, taking into account the potential environmental, social, and regional impacts (emphasis added).*⁷²

*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 (emphasis added).*⁷³

According to the Director, compensation calculations under the 2013 Policy are averaging in the range of 2.5 to 2.6, meaning each hectare of impacted wetland requires 2.5 to 2.6 hectares for compensation, which is actually less than the 3 to 1 ratio used under the Interim Policy and which was paid under the Approval. Since the Board is recommending the wetlands be reviewed under the 2013 Policy, it is only reasonable compensation calculations also be done using the 2013 Policy guidelines.⁷⁴

12.3 Analysis of findings regarding the Wetland Policies

The EAB did not make any substantive findings of fact, or provide any detailed recommendations about the significant error of law that occurred when the Director erred and accepted both the AMEC and Golder studies that applied the wrong wetland policy in these circumstances and deemed the application complete. It was not a complete application at any time before the appealed Approval was issued in contravention to the regulation. Financial compensation was the preferred option presented by KGL using the Interim Policy, whereas the AWP requires that financial compensation only be applied under the hierarchy if there is evidence that the wetlands cannot be avoided, or damages to the wetlands mitigated. Other options to avoid or to mitigate damage to the wetlands were available when the application was submitted in 2016. As well, the AWP requires consideration of cumulative effects of wetland disturbance in a regional context in areas that have already experienced high wetland losses, as well as documented assessment of social, economic and ecological impacts. These studies had not been done by AMEC for the purposes of the federal review under CEAA, or by Golder for KGL or its predecessor. As the required assessment and classification work pursuant to the AWP had never been done before the appeal hearing, at no time did the Director have a complete application before him in order to issue an Approval.

The EAB relied on the studies and oral assertions made by the Director and KGL. The only clear conclusion drawn by the EAB after hearing the evidence provided by the parties to the appeal was that the wetlands should be re-assessed and re-classified, and compensation for wetland loss should be calculated in accordance with the AWP. The EAB did not consider whether any of the wetlands should be avoided or restored.

Further, the Director claimed that regional plans for wetland protection did not exist when KGL applied for the Approval in 2016. In fact, the South Saskatchewan Regional Plan 2014-2024 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

⁷² *Ibid.*, at para. 414.

⁷³ *Ibid.*, at para. 416.

⁷⁴ *Ibid.*, at para. 415.

protect riparian lands during development. As well, the Elbow River Watershed Management Plan has been in existence for years with respect to wetland and riparian land conservation and management. The EAB was either unaware or did not require the Director to reverse the Approval until such time as the application was reviewed in the regional context considering these documents. The Appellants had raised regional and wetland and riparian land conservation and management policies and strategies provided in the Bow River Watershed Management Plan. However, notwithstanding that the GOA is a signatory to the plan, the EAB did not address how the Approval was issued in direct contradiction to the plan's objectives with respect to wetlands.

13.0 EAB'S RECOMMENDATIONS TO THE MINISTER

The EAB explained why the Board issues a report and recommendations to the Minister, after noting the specialized nature of the EAB as an expert tribunal put in place to review decisions by the Director under EPEA and the Water Act. The EAB then provided its recommendations based on the information, testimony and evidence presented in the appeal hearing. Table 1 below provides the EAB's recommendations to vary the Approval,⁷⁵ and illustrates the differences between those recommendations and the Minister's decision:

- Under section 99(1) of EPEA, the Board must provide the Minister with its recommendations regarding the issues in these appeals.⁷⁶

14.0 THE MINISTER'S DECISION AND REASONING

The Minister's decision (the Ministerial Order)⁷⁷ is purportedly based on the EAB's report and recommendations, but is largely based on political factors associated with the need and status of the SWCRR. The Minister might have used the opportunity to balance political considerations, for example by stressing the critical function of wetlands in Alberta's semi-arid region, using the Water Act as an "ameliorative statutory scheme" to protect water quality or quantity, wetlands, the aquatic environment or habitat. The Minister did not apply a broad and liberal interpretation of the legislation, regulations and a 'polycentric decision-making jurisdiction' to balance the social, economic and environmental issues. The Minister took the opportunity to clarify that many of the issues raised by the Appellants would simply not be addressed in her decision about the Approval. While the EAB said it has no jurisdiction to consider political issues with respect to its review of the Director's decision to grant the Approval, this is not the case when the Minister makes a decision on the EAB's recommendations. Further, the Minister did not address whether the Director's decision to issue the Approval was appropriate given the Director's errors with respect to using the wrong wetland policy and implementation plans, and deeming the application complete without the studies required under the AWP.

⁷⁵ Brookman Tulick Appeal, *supra* note 2 at para. 424.

⁷⁶ *Ibid.*, at para. 419.

⁷⁷ Ministerial Order, *supra* note 7

In explaining the reasons for the decision in the Ministerial Order, the Minister made the following comments:

These provisions [EPEA] give me broad powers to decide how to address the appeals filed with the Board. The Court of Queen's Bench in *McColl-Frontenac Inc. v. Alberta (Minister of Environment)*, 2003 ABQB 303 at paragraph 19, quoted the Supreme Court of Canada and described the powers of the Minister, stating: "... [T]he exercise of Ministerial discretion and decision-making generally involves polycentric considerations, that is they 'require the simultaneous consideration of numerous interests and the promulgation of solutions which concurrently balance benefits and costs for many different parties: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* 1998 SCR 778 at paragraph 36."⁷⁸

...I wish to make it clear these appeals are only about the wetlands included in this Approval. These appeals are not about whether the Southwest Calgary Ring Road project should proceed. Further, these appeals are not about the design of the bridge that will be crossing the Elbow River. The Appellants have raised a concern about the effect the bridge could have on potential flooding upstream of the bridge. My understanding is that at least two studies have been done, by Alberta Transportation and the City of Calgary, which concluded that the bridge as currently designed does not increase the risk of flooding upstream of the bridge. Finally, these appeals are not about other authorizations that have been or may be issued by AEP for the Southwest Calgary Ring Road. Despite comments from the Appellants and concerns raised by members of the public, these other matters were not before the Board and therefore, are not before me in making this decision.⁷⁹

The matters listed above in the Minister's decision were clearly before her, whereby she could have exercised her 'broad polycentric jurisdiction' to address whether the Approval should have been issued, and whether it should have been reversed until the application was complete. She was also in a position to ask for a review of the possibility of using a bridge to avoid the wetlands that had not been infilled at the time of her decision. She had jurisdiction to ask that a stay be put in place to stop further infill and encroachment on the wetlands and riparian buffers until the work she ordered was complete under the AWP. In addition, she might have asked that the social and economic matters raised by the Appellants be addressed by both Alberta Transportation and KGL as the Approval Holder before any further disturbance of the wetlands continued.

The Minister's decision followed the direction of the EAB's recommendations. Although, she did go to some length to protect W06 from infill and negative impacts of construction of the SWCRR, the Minister did not reverse the Approval. As stated by the Minister in the Ministerial Order:

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

⁷⁸ Ministerial order, *supra* note 7 at para. 6.

⁷⁹ *Ibid.*, at para. 4.

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.⁸⁰

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.⁸¹

The Minister did not reverse the Approval notwithstanding that the Director did not have a complete application before him at any time. With no complete application ever having been made, it is arguable that the Approval was issued in error and as a result, the EAB and the Minister lacked jurisdiction to vary, but could only reverse and ask that a complete application be made in accordance with the legislation and regulations.⁸²

While at first glance a reader may perceive that the Minister's decision was a victory for the Appellants, in fact only one wetland, W06 was potentially protected from disturbance or infill. Avoidance and mitigation of Wetland 07 and 08 would only occur "if possible."

TABLE 1: Differences Between the EAB's Recommendations and the Minister's Decision

EAB	MINISTER	<i>DIFFERENCE</i>
1. Delete the Expiry Date and replace it with the following: "EXPIRY DATE: August 10, 2027."	1. Delete the Expiry Date and replace it with the following: "EXPIRY DATE: August 10, 2027."	<i>No difference</i>
	2. Add the following immediately after condition 3.1: "3.1.1 The Approval Holder shall undertake the activity in accordance with 00388473-R001 and 00388473R002, including any revisions or	<i>The EAB was silent on this issue concerning the encroachment on the required riparian buffer set out as a condition in the Approval. The Minister did not require the Approval Holder restore the required riparian buffer.</i>

⁸⁰ *Ibid.* at para. 8.

⁸¹ Ministerial Order, *supra* note 7 at para. 9.

⁸² See note 61

	<p>amendments approved by the Director in writing."</p>	
<p>3. Add the following immediately after condition 6.1:</p> <p>“6.2. The Approval Holder shall provide the Director with a monitoring plan for Wetland 06 that includes, as a minimum, the following:</p> <ul style="list-style-type: none"> a) monitoring of the water flow into Wetland 06 in the spring and fall of each year; b) the water quality parameters of Wetland 06 that will be measured every spring and fall of each year the plan is in effect, including total dissolved solids, salts, dissolved metals, and other parameters consistent with the stormwater sampling program; c) the results of the monitoring shall be provided to the Director <i>and made publicly available</i> within one month from the data being collected; d) the results of the monitoring and an analysis of the monitoring shall be provided to the Director in an annual report by March 31 of the year following the data being collected; and 	<p>3. Add the following immediately after condition 6.1:</p> <p>“6.2. The Approval Holder shall provide the Director with a monitoring plan for Wetland 06 (<i>identified in 003ii8473-P003</i>) that includes, as a minimum, the following:</p> <ul style="list-style-type: none"> a) monitoring of the water flow into Wetland 06 in the spring and fall of each year <i>that the plan is in effect</i>; b) monitoring of the water quality for Wetland 06 in the spring and fall of each year that the plan is in effect, including total dissolved solids, salts, dissolved metals, and other parameters consistent with a stormwater sampling program; c) the monitoring data shall be provided to the Director within one month from the date the data was collected; d) the results of the monitoring and analysis of the monitoring shall be provided to the Director in the annual report by March 31 of the year following the calendar year in which the data were collected; and 	<p><i>The Minister Identified W06 by a different identifying component.</i></p> <p><i>The Minister added “that the plan is in effect” in 6.2(a)</i></p> <p><i>The Minister changed the language slightly in 6.2(b) without changing the meaning or intent.</i></p> <p><i>The Minister removed that the results of monitoring be provided to the public in 6.2(c) but added several new provisions in 6.3-6.4 regarding public access to the monitoring data, and specifically naming the Weaselhead /Glenmore Park Preservation Society.</i></p> <p><i>No difference in 6.2(d) or 6.2(e) except the Minister used the word “shall” instead of “will.”</i></p>

<p>e) the monitoring plan will come into effect as soon as the Director approves the plan and will remain in effect for a period of five years after the road is officially opened to the public.</p>	<p>e) the monitoring plan shall come into effect as soon as the Director approves the plan and shall remain in effect for a period of five years after the road is officially opened to the public.</p> <p>6.3. The Approval Holder shall prepare the monitoring plan detailed in condition 6.2 to the satisfaction of the Director.</p> <p>6.4. The Approval Holder shall implement the monitoring plan detailed in condition 6.2 immediately upon the plan being approved by the Director in writing.</p> <p>6.5 The Approval Holder shall make the monitoring data collected pursuant to the monitoring plan publicly available within one month from the day the data were collected by:</p> <ul style="list-style-type: none"> a) posting the data to a website maintained by the Approval Holder or the Approval Holder's designate; and b) providing the data to the Weaselhead/Glenmore Park Preservation Society. <p>6.6 The Approval Holder shall make the annual report prepared pursuant to the monitoring plan publicly available by March 31 of the year</p>	<p><i>The Minister added provisions 6.3 to 6.6 regarding the monitoring plan and data.</i></p>
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	<p>following the calendar year in which the data were collected by:</p> <p>(a) posting the annual report to a website maintained by the Approval Holder or the Approval Holders designate; and</p> <p>(b) providing the annual report to the Weaselhead/Glenmore Park Preservation Society.</p>	
<p>6.3 The Approval Holder shall assess the 24 wetlands subject to this Approval using the criteria under the Alberta Wetland Policy 2013.”</p>	<p>6.7 (a) The Approval Holder shall assess the 24 wetlands subject to this Approval using the criteria under the 2013 Alberta Wetland Policy, and this assessment shall include, at a minimum, the following:</p> <ol style="list-style-type: none"> 1) a consideration of any further options that may be available for avoidance or mitigation; 2) a recalculation of the required compensation; and 3) specific proposals for avoidance and mitigation, if possible, of Wetland 07 (identified in 00388473-P003) and Wetland 08 (identified in 00388473-F003). <p>(b) The Approval Holder shall complete this assessment on or before June 30, 2018, or such earlier date as prescribed by the Director in writing, and the assessment shall be to</p>	<p><i>The Minister’s decision in 6.7 mirrors the EAB’s recommendation in 6.3, however, she elaborates by providing minimum considerations that must be addressed in the wetland assessment under the AWP. For example, in 6.7(3) the Minister requires specific proposal for avoidance and mitigation of Wetland 07 and Wetland 08, but only “if possible.”</i></p> <p><i>The Minister provides a date for when the assessment of the 24 wetlands must be assessed as June 30, 2018. However, the Director may ask for the assessment to be completed earlier, and has discretion to</i></p>

	<p>the satisfaction of the Director.</p> <p>(c) Upon completion of this assessment, the Approval Holder shall provide the assessment to the Director, and based on this assessment, the Approval Holder shall carry out the additional work or actions as prescribed by the Director in writing.</p> <p>(d) The Approval Holder shall make the assessment prepared pursuant to condition 6.7(a) publicly available by June 30, 2018, or such earlier date, as prescribed by the Director in writing, by:</p> <ol style="list-style-type: none"> 1) posting the assessment to a website maintained by the Approval Holder or the Approval Holder's designate; and 2) providing the assessment to the Weaselhead/Glenmore Park Preservation Society. <p>(e) The Approval Holder shall make the written direction of the Director provided under condition 6.7(c) publicly available within 7 days of receiving the written direction by:</p> <ol style="list-style-type: none"> 1) posting the written direction to a website maintained by the Approval Holder or the Approval Holder's designate; and 2) providing the written direction to the Weaselhead/ Glenmore 	<p><i>accept the assessment under the AWP. The Director may ask the Approval Holder to carry out additional work.</i></p> <p><i>The assessment must be publicly posted to the Approval Holder's website and must be provided to the Weaselhead/Glenmore Park Preservation Society by June 30, 2018.</i></p>
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	Park Preservation Society.”	
	<p>4. Add the following immediately after condition 8.1: WETLANDS 06. 07. and 08:</p> <p>“9.1 Notwithstanding my other provisions in this Approval, the Approval Holder shall not disturb Wetland 06.</p> <p>9.2 The Approval Holder shall implement protection measures to ensure his construction activities do not disturb Wetland 06 that are to the satisfaction of the Director.</p> <p>9.3 No further disturbance of Wetland 07 (identified in 00388473-P003) and Wetland 08 (identified in 00388473P003) is permitted without the written direction of the Director in accordance with section 6.7(c).”</p>	<p><i>The EAB was silent on these aspects of the Minister’s decision</i></p> <p><i>Wetland 06 (the Beaver Pond) is to be protected and no infill is approved.</i></p> <p><i>No further disturbance of Wetland 07 and 08 are permitted without the written direction of the Director after the Director has considered the required attempts to avoid and mitigate that the Minister ordered in 6.7(c) above.</i></p>

15.0 POST-MINISTERIAL ORDER

The Ministerial Order was received by the Director and the Appellants in January, 2018.⁸³ For several months following the Ministerial Order, Jeff Brookman and several other Intervenors and interested Calgarians followed the progress of KGL’s construction of the SWCRR in the TUC. Their observations were recorded in photographs taken by wildlife photographer Robert Ross, a Calgarian who lives in the Weaselhead area depicting continual encroachment on Wetlands 6, 7 and 8, and the lack of restoration of the 15 to 30 meter riparian land buffer around the wetlands. Jeff 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 has been formalized through

⁸³ See Letter from Wilkinson, *supra* note 8.

required court process, and whether the Ministerial Order was being enforced.⁸⁴ Jeff Brookman also contacted the EAB and made similar enquiries.⁸⁵

On or around May 9, 2018, via a letter to Cory Turkinton of KGL, the Designated Director under the Act, Regional Approvals Manager, Kevin Wilkinson ⁸⁶ had provided the Director's decision with respect to Conditions 6.7 and 9.3 of the Ministerial Order. In the May 9, 2018 decision, the Director confirmed that he had received the wetland assessment under the AWP as ordered under Condition 6.7(a) of the Ministerial Order. He stated that the assessment was received on April 26, 2018, and was deemed complete. He also provided his written direction regarding Condition 6.7(c) whereby he addressed the additional compensation payable in the amount of \$1, 179, 900 plus GST, in addition to the amount KGL had already paid to Ducks Unlimited Canada under the terms and conditions of the Approval.

The Director advised that KGL was directed to undertake the activity of further disturbing Wetland 7 and Wetland 8 in accordance with an amended Approval and the Ministerial Order, which the Director stipulated permitted further disturbance of the two wetlands. KGL was directed by the Director to make the revised wetland assessment publicly available by May 16, 2018.

The Appellants were not notified about the Director's decision, the subsequent amendment to the Approval, or that the Director had directed and approved additional disturbance of Wetlands 7 and 8. It was only after the series of letters and photographs were submitted by Robert 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 provided Robert Ross with a link to the Letter from Kevin Wilkinson, dated May 9, 2018. In turn, Robert Ross forwarded the link to Jeff Brookman and others.⁸⁷

At no time were the Appellants given notice or an opportunity to provide a Statement of Concern regarding the Director's decision dated May 9, 2018. As well, the information provided by Randy Sweeney was unknown to the Appellants until July 31, 2018.

KGL's website now 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 Randy Sweeney provided the link to the webpage to Robert Ross on July 31, 2018.⁸⁸

⁸⁴ A series of letters and various other correspondence were submitted by Jeff Brookman and others. See note 34. The author was circulated as part of the correspondence chain and is in possession of these letters.

⁸⁵ *Ibid.*

⁸⁶ See Letter from Wilkinson, *supra* note 8.

⁸⁷ See Jeff Brookman and Robert Ross email correspondence of August 1, 2018 entitled "May 9, 2018 Alberta Environment and Parks -Directors Letter Granting Approvals."

⁸⁸ KGL, "KGL and the Environment", (nd), online:<http://www.swcrrproject.com/about/environmentalmanagement/> and KGL "Environment", (nd), online:<http://www.swcrrproject.com/frequently-askedquestions/faq-environment/#104>.

16.0 POTENTIAL GROUNDS FOR APPEAL OF THE EAB'S AND MINISTER'S DECISIONS

16.1 Reviewable Errors of Law

- 1) Did the Director have jurisdiction to issue the Approval without a complete application having been submitted to disturb the wetlands as required by the Water Act, EPEA, and regulations?
 - The Director did not have the required wetland assessment information from the AWP;
 - The Director was not provided with evidence that the proponent considered the regional context and cumulative effects of the infill of the wetlands, as is required in the *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)*; and
 - The Director did not receive or review a Storm Drainage Management Plan for the SWCRR as part of the application.
- 2) Did the EAB and Minister have jurisdiction to vary the Approval when a complete application had not been reviewed by the Director, the EAB or the Minister?
- 3) If so, should the proponent to disturb the wetlands be required to submit a new application, complete with new statutory notice and opportunities for directly affected parties to participate in the decision process as prescribed in the Water Act, EPEA and regulations?
- 4) Did the EAB's or the Minister's failure to ensure a stay was put in place to protect the wetlands from infill and further development of the SWCRR until the application was complete and all appropriate information submitted to the Director amount to a reviewable error of law?
- 5) Is the EAB's failure to determine whether the Director's decision to issue the Approval was appropriate (Issue #2 listed in the issues before the EAB) a reviewable error of law or a reviewable error of fact and law to be determined by a court?

16.2 Procedural Error – Breach of Natural Justice

Did the EAB's and Minister's failure to ensure that the Appellants would be provided with notice of the Director's decision required by the Ministerial Order regarding the new assessment and classification of the wetlands, and opportunities to submit a Statement of Concern and Notice of Appeal, result in a breach of natural justice or procedural fairness as contemplated in the Water Act and EPEA?

17.0 CONCLUDING REMARKS

Wetlands 06, 07, 08 and 09 are four of the 24 wetlands that were the subject matter of the Brookman Tulick Appeal. The wetlands remain largely unnamed and unnoticed by many Albertans, but are lovingly photographed icons in the human struggle by a handful of Calgary citizens to protect them from being infilled and degraded during the SWCRR's construction. The

ring road has been deemed essential to society, while the irreplaceable wetlands have been infilled or significantly impacted. Without the wetlands and the multitude of ecological goods and services they provide to citizens in the Calgary Metropolitan Area, some neighbourhoods have been identified (by AMEC) as being more prone to flooding. As well, Calgary's drinking water supplies may be at risk of contamination from storm drainage from the highway system infiltrating the interconnected surface and groundwater system.

The current policy and regulatory system, whereby the Director has broad discretion to apply GOA policies, laws and regulations, does not seem to effectively protect water resources, especially wetlands and riparian lands. The AWP, while heralded as ground-breaking wetland policy to protect and manage Alberta's remaining wetlands during development, only applies when a proponent applies to the Director to disturb a wetland. The sole purpose of the AWP is to ensure that the Director uses consistent policy considerations and protocols that have evolved alongside science and technology about the importance of wetlands. The AWP is an administrative tool for the Director and his staff to use when issuing approvals to disturb wetlands, and the Director is therefore required to implement it. However, in this appeal, it was shown that the Director did not apply the policy, notwithstanding it has been in effect since 2015 as official GOA policy. In this article, it is suggested that if the AWP was not used to classify and assess the wetlands, then the application to disturb was incomplete and the Approval should not have been issued.

The Minister's 'reasons for decision' provided a number of cautions to the Director, and to AEP generally, that are worth mentioning here. First she stated: "Through my order, I welcome the opportunity to clarify that it is my expectation the AEP applies the highest possible standards for the protection of wetlands in all projects."⁸⁹ In this way, AEP has been put on notice that wetlands are important natural infrastructure that must be protected and sustained *in situ*. However, unless citizens such as Brookman and Tulick appeal the Director's decisions to issue approvals to disturb wetlands, the Minister may never learn whether GOA policy and her directives have been followed.

Second, the Minister clarified that: "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."⁹⁰ In Alberta, titles to land located in TUCs are owned by Alberta Transportation, and use of these lands is not regulated through the *Public Lands Act*. However, like all other proponents to disturb wetlands, Alberta Transportation is bound by GOA policy and Alberta's regulatory system.

Third, there is hope that the Director will be more cautious in interpreting the Water Act and AWP in the future. The Minister's language in the Ministerial Order is directory: "the Director *must strictly apply* the avoid, mitigate, and compensate hierarchy, particular for wetlands in urban areas."⁹¹

⁸⁹ Ministerial Order, *supra* note 7 at 21.

⁹⁰ *Ibid.*, at para. 22.

⁹¹ *Ibid.*

There is no longer any doubt that the GOA understands the importance of protecting Alberta's few remaining wetlands for the ecological goods and services they provide society. However, many environmental policy and regulatory issues were raised through this appeal that need to be further researched to assist citizens, like Mr. Brookman and Ms. Tulick, as they struggle to be conscientious and engaged watershed stewards in a rapidly urbanizing landscape. For example:

- The Water Act is an ameliorative statutory scheme and therefore must be given a broad and liberal interpretation. Therefore, the Director's broad discretion under the statutory scheme needs to be examined. Does the Director have jurisdiction to consider matters such as the social and economic impacts of disturbance of wetland complexes and interconnected drainage basins? If so, why are these issues not considered part of the subject matter when an approval is issued?
- The so-called 'gatekeeper functions' concerning access to appeal in the Water Act need to be reviewed by the legislature and the public to determine if they create significant barriers to making "the best possible decisions." For example, the directly affected gatekeeper function allows the EAB to dismiss many Notices of Appeal because the Appellant does not have of standing. Therefore, the substantive issues are never brought before the EAB to determine if the Director erred.
- The Director's decisions under this new regime of economic restraint are necessarily flawed because the Director does not have sufficient resources (money, personnel, and expertise) to ensure that all credible, scientific evidence is provided before an Approval is granted. The Director now relies on the proponent to provide scientific evidence,⁹² and the maxim "who pays the piper calls the tune" applies. Without trained staff to determine the merits of the consultants' reports submitted with an application, the proponents' consultants can provide evidence that is not necessarily focused on protecting water resources.

The significance of this article may be that it launches further discussion about improving these aspects of the current regulatory system for protecting the province's few remaining wetlands, especially in Southern Alberta.

⁹² See note 61.