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Minister Sharpens the Wetland Policy's Teeth, and Beaver Pond is Spared

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Decisions Commented On: [*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 (AEAB), EAB Report, Minister's Order, and Minister's Reasons)

The physical setting relating to the 111 page EAB Report (ER), Minister's Order (MO), and Minister's Reasons (MR), includes the geologically and ecologically unique [Weaselhead Flats Natural Environment Park](#) in south Calgary (containing the only delta in the City), the Tsuut'ina First Nation Reserve, a series of wetlands that drain into the Park and the Glenmore Reservoir, and the long-time materializing Calgary Ring Road. The complex and sometimes intense fact situation may be summarized as follows:

- The Calgary Ring Road highway has been planned since the early 1970's. The Southwest Calgary Ring Road (SWCRR) would complete the highway. The SWCRR must be located within the Transportation and Utility Corridor (TUC) established by the City of Calgary. Alberta Transportation is the proponent of the SWCRR, and KGL Constructors, A Partnership (KGL) is responsible for building the road, and holds the *Water Act*, [RSA 2000, c W-3](#), Approval that is the subject of the appeal (MR para 2 (all references in this post are to paragraphs unless otherwise noted)).
- An essential step in the development of the SWCRR was the Province's acquiring land from the Tsuut'ina First Nation, which it did in May 2015. The land became part of the TUC. A term of the land transfer Agreement from the Tsuut'ina First Nation is that unless the project is completed by May 22, 2022, unless there is a *force majeure*, the land and any added infrastructure reverts back to Canada for the benefit of the Tsuut'ina First Nation. So, the clock is ticking.
- 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 2012 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 (MR 2, ER 236).

- On January 4, 2017 KGL submitted an application to the South Saskatchewan *Water Act* director (Director) for a *Water Act* approval to partially or completely infill 24 wetlands in the course of its construction of the SWCRR (ER 268). The application included a Wetlands Impact Assessment dated December 2016 that was prepared by Golder Associates (ER 268). Accordingly there were two consultant assessments relevant to the decisions, the AMEC report from 2014, and the Golder report from 2016.
- The Director determined that the [Interim Wetland Policy](#) of 1993 applied to the approval application rather than the 2013 [Alberta Wetland Policy](#) that replaced the *Interim Policy*. Both policies set out the processes for *Water Act* directors and project proponents when a project could result in harm to wetlands and requires an approval under the *Water Act*. There are a number of differences between the policies, but both have comparable mitigation hierarchies. Both policies require, in the following order of preference, avoidance of wetland disturbance, minimization of wetland disturbance, and, as a last resort, compensation for disturbance (*Interim Policy*, p 3; *Alberta Wetland Policy*, p 14). Compensation is mainly by the replacement of wetlands elsewhere. A key difference between the two policies is that the *Interim Policy* replacement ratio is a straight 3:1 area based ratio, and the *Alberta Wetland Policy* replacement determination is based on an assessment of relative wetland value, which is based on “relative abundance on the landscape, supported biodiversity, ability to improve water quality, importance to flood reduction, and human uses” (*Alberta Wetland Policy*, pp 19, 2). Depending on relative wetland value, under the 2013 *Policy* replacement ratio could be anywhere from 0.125:1 to 8:1 in hectares of wetlands (*Alberta Wetland Policy* p 19).
- Regarding which policy applies, the then applicable *Alberta Wetland Mitigation Directive* provided:

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.
 - was completed during the growing season of 2015, up until May 31, and is submitted to the regulatory body prior to June 1, 2018.

If these prerequisites are not met, then the 2013 Policy would apply (ER 408, 409).
- On August 11, 2017 the Director issued the Approval for infilling of 24 wetlands. The Director required that the Approval Holder pay replacement compensation, based on the *Interim Policy*, to Ducks Unlimited Canada, the provincially designated agent for wetland compensation in Alberta, in the amount of \$1,275,090.00 plus GST for the disturbance of 24 wetlands (totaling 22.07 hectares) (ER 256 and 274).
- Also on August 11, 2017 Jeff Brookman submitted a Notice of Appeal and applied to the EAB for a stay of the Approval. Allison Tulick appealed on August 15th, and she also requested a stay. The Appeal related to the *Water Act* Approval, and not to whether the SWCRR should proceed.
- The Board found these two Appellants to be directly affected, and therefore able to appeal the Director’s decision, though it dismissed the Notices of several others on the basis that they were not directly affected. The Board did, however, permit a number of Intervenor to participate in the appeal (ER 16).

- Interestingly, the Director did not find the Appellants to be directly affected and therefore they were not able to file Statements of Concern regarding the approval process. However filing the Statements of Concern did reserve their right to appeal the Director's decisions, should the EAB find them to be directly affected, which it did (*Environmental Protection and Enhancement Act*, [RSA 2000, C E-12, s 91](#) (EPEA)).
- The EAB issued a temporary stay with respect to all of the wetlands but later confined the stay to wetlands W06 (locally known as Beaver Pond), W07, W08, and W09 (ER 42).

The EAB Hearing, Report, and Recommendations

The EAB hearing was held October 23 to 25, 2017, in Calgary. Under section 98 of the EPEA the Board may “confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and ... make any further order the Board considers necessary for the purposes of carrying out the decision.” EPEA requires the EAB, within 30 days of the hearing, to “submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it” (EPEA s 91).

The Board completed its decision and reasons on November 24, 2017. The issues before the EAB were:

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

The Board's analysis of issue #1 deserves its own ABlawg post; suffice it to say here that the EAB determined the standard of review to be, in this case, correctness. One might ponder why *standard of review* is even the right concept if the Board's hearing is *de novo*, but nevertheless, the Board's discussion of the different considerations regarding the EAB's review of a director's decision, compared to a Court of Queen's Bench review of an EAB decision, and to a Court of Appeal review of a Queen's Bench decision on a review of an EAB decision, is certainly worth the read. The EAB's analysis undoubtedly will be important in future EAB hearings (see ER 153-202).

Regarding issue #2, the Appellants and the Intervenors wanted the EAB to reverse the Approval. In the alternative the Appellants asked the EAB to vary the Approval to add a number of conditions including avoiding disturbing Beaver Pond (W06), W07, W08, and W11, and monitoring these wetlands for the next five years and addressing any impacts to the continuance of water flow (ER 333). The Appellants and Intervenors also argued that the Ring Road is

“overbuilt” and that it could be constructed to avoid wetland loss, and the attendant loss of wetland values such as providing water quality and flood control (ER 385). The Appellants voiced particular concern over saving Beaver Pond (W06) from any disturbance given its ecological and hydrological values, and the fact that it formed part of wetland ecosystem educational programs at the Weaselhead Flats Natural Environment Park (ER 328, 96). The Approval Holder and Director defended the Approval arguing that given the limitations constructing the SWCRR within the TUC, the wetland disturbance was unavoidable. Both pointed out how through the process projected disturbance to Beaver Pond (W06) was reduced from 29% to 5% (ER 335).

Regarding issue #3, the Appellants argued that the Approval ought to have been based on the 2013 *Alberta Wetland Policy* and not the *Interim Policy*. A key argument was, as mentioned earlier, that the Golder wetland impact assessment report and fieldwork were not completed until December 2016. The Golder report considered all 24 wetlands subject of the Approval, whereas the AMEC wetland impact assessment, completed in December 2014 report, apparently did not consider Wetlands 01, 02, and 04, and Wetlands 07-10 (ER 284). Because the Golder wetland impact assessment was not completed until 2016, plainly, the Appellants argued, in accordance with the *Alberta Wetland Mitigation Directive* (discussed above) the Approval ought to have been considered under the 2013 Policy (ER 242, 243, 208-210). For applications submitted prior to June 1 2018, the Directive only permits the *Interim Policy* to apply if the fieldwork and assessment is completed by May 2015.

The Approval holder basically argued that since the mitigation hierarchy is the same in both policies it didn't matter which was applied. The only concrete difference, they suggested, was the way compensation is determined (ER 388). The Approval Holder suggested that applying the relative wetland value formula in the 2013 *Alberta Wetland Policy* might have resulted in less than a 3:1 wetland replacement ratio (ER 391), and the Director made a similar statement, based on past average compensation under the 2013 *Policy* (ER 415). The Director argued that since the fieldwork began in 2014 the *Interim Policy* applied (ER 367). He also said that the main difference between the two policies is the way compensation is calculated (ER 369).

In the end, the Board varied the Approval including by:

- extending the expiry date to 2027 (to permit for monitoring conditions);
- adding a monitoring plan for Beaver Pond, W06, including on water quality and flow into the wetland;
- providing the monitoring reports to the Director and the Director making them public; and
- requiring the Approval Holder to assess the 24 wetlands subject to the Approval using the criteria under the 2013 *Alberta Wetland Policy 2013* (ER 424).

Regarding the last mentioned, the Board determined the 2013 *Policy* applied by virtue of “when the work was completed, the timing of the filing of the application, what was applied for in the application, and the prerequisites included in the *Alberta Wetland Mitigation Directive*” (ER 405). In short, given the timing of the Golder report the Directive required that the 2013 Policy be applied.

Comments on EAB Decision

I will make two comments on the EAB's Approval variance.

First, there is no mention of any follow up and adaptive management that would require the Approval Holder to *do anything* if the monitoring reveals unacceptable impacts to flow to or water quality in Beaver Pond. Although monitoring is good, without follow up and response requirements, and change in environmental management as required, they are hollow. The EAB could have put adaptive management conditions on the Approval in addition to monitoring.

Second, although the EAB says that the 2013 *Policy* ought to have been applied, the Board does not leave much room for a substantially different result with respect to the Approval. For example, applying the 2013 *Policy* could result in requiring complete avoidance of Beaver Pond and other wetlands. It could even result in denying the application for an Approval, in whole or in part. After all, the 2013 *Alberta Wetland Policy* defines "avoid" – the preferred mitigation hierarchy alternative – as "To prevent impacts to a wetland by identifying an alternate project, activity, design, or site, or abandoning the project or activity altogether or by denial of an application by the regulator" (*Alberta Wetland Policy* p 24, emphasis added). Although it is hard to imagine that the Approval would not be granted in some form in the end, it seems presumptive to think that applying the 2013 *Policy* would only result in adding a monitoring program, reporting requirements, and changing the method of assessing compensation. Although it is not possible to get into a comparative analysis of the two policies in this post, I can say that, as a former member of the Water Council multi-stakeholder Wetland Review Committee that met for several years to assist Government in developing new wetland policy direction, a follower of wetland policy for decades, and author of wetland related publications (e.g. *Alberta Wetlands: A Law and Policy Guide, Second Edition* (Calgary: CIRL/NAWMP 2016)), there are many differences beyond the manner of ascertaining compensation. One is that the *Policy* requires, for higher relative value wetlands, "stronger evidence of effort to avoid than lower value wetland." And, where avoidance is "deemed not practical" the proponent must "demonstrate that alternative projects, project designs, and/or project sites have been thoroughly considered and ruled out for justifiable reasons" (*Alberta Wetland Policy* p 16).

Minister's Order, Reasons, and Variance of EAB Decision

After receiving the EAB's Report, the Minister of Environment and Parks (Minister) may then, by order:

- (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,
... and
- (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision. (EPEA s 100)

The EAB Report, Ministerial Order, and Ministerial Reasons were released together on January 29th, 2018. The Minister varied the EAB's decision in a five page Order and provided nine pages of reasons.

The Minister is not obliged to provide reasons for her decision, and, from my limited research it appears that in the history of the EAB, this is only the second time a Minister has done so. The other time for which I found reasons involved different circumstances, as the then-Minister was asked by the Court of Queen's Bench to provide reasons with respect to an appealed decision (see Ministerial Order [19/2002](#)).

The Minister's provision of reasons is most welcome and supports administrative fairness and transparency, though it may raise complexities if the EAB and Minister's decision were appealed. For example, would the same standard of review apply to both of them? In my view, the Minister's variance and provision of reasons deserves an ABlawg post of its own. Unfortunately, the topic cannot be further pursued here.

In addition to monitoring and reporting conditions and requiring that the 24 wetlands be assessed under the 3013 *Alberta Wetland Policy*, the Minister's Order varied the EAB decision in a number of ways. For one, the Minister better clarified the purpose and effect of the 24 wetlands being assessed under the 2013 *Policy*, and specifically left room for Approval revisions as a result of applying the *Policy*. She ordered:

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:
 - (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 ... and Wetland 08
- (b) The Approval Holder shall complete this assessment on or before June 30, 2018 ... to the satisfaction of the Director.
- (c) ... [T]he the Approval Holder shall carry out the additional work or actions as prescribed by the Director in writing.

As well, the Minister goes considerably farther than the EAB to protect key wetlands that might otherwise be destroyed or at least disturbed. It is of particular note that she orders that Beaver Pond be saved from any disturbance (i.e. complete avoidance):

WETLANDS 06, 07, and 08

... 9.1 Notwithstanding any other provision in this Approval, the Approval Holder shall not disturb Wetland 06.

9.2 The Approval Holder shall implement protection measures to ensure its construction activities do not disturb Wetland 06 that are to the satisfaction of the Director.

9.3 No further disturbance of Wetland 07 ... and Wetland 08 ... is permitted without the written direction of the Director in accordance with section 6.7.

The Minister, like the EAB, does not cancel the Approval and speak to redesigning the project to avoid all or most wetland destruction or disturbance. In her words:

If we were to attempt to redesign and rebuild the project now, it would result in significant costs increases, and in the process, I am concerned we would cause more environmental impacts, cause more disturbance to the people living in the area, and potentially delay a significant provincial infrastructure project. I wish the outcome could be different, but after careful consideration of all the facts and competing interests, I have concluded it would not be in the best interests of Albertans to undertake a redesign at this stage. ... Further, given the time between the federal signoff of the initial Environmental Impact Assessment in 2009 and the implementation of the 2013 Alberta Wetland Policy, I am disappointed that the previous government's inclination to over-design roadways has resulted in environmental impacts and that this project is now too far along to undo these impacts. (MR 20, 21)

But, as mentioned above, she does require the complete avoidance of a key wetland, and orders no further disturbance of two others. Moreover she requires the re-assessment of all of the wetlands in accordance with the 2013 *Policy*, and that could result in the avoidance or minimization of further wetland disturbance.

Finally, the Minister's Reasons are significant as they substantiate and reinforce the mandatory nature of the *Alberta Wetland Policy* and they underline the importance of the *Policy* and the wetlands it is meant to protect. In the Minister's words: "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" (MR 21).

This post will close with Minister Shannon Phillips' reflective closing statement:

Lastly, I want to thank the Appellants for bringing these appeals forward. These appeals have highlighted the importance of strictly applying the avoid, mitigate, and compensate hierarchy, particular for wetlands in urban areas. The appeals have made it clear that we need to do a better job in designing and approving roadways, particularly where they have been over-designed and have disproportionate impacts on wetlands. While I understand the Appellants would have wanted to see more significant changes for this project, I am hopeful they can be satisfied that they have set the stage for better projects from this point forward. (MR 21)

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