

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendation – February 20, 2014

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by David Hanson, Donna Hanson, Roy Lindberg, and Gordon Lindberg with respect to the decision of the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, to issue *Water Act* Approval No. 00297021-00-00 to the County of St. Paul.

Cite as: *Hanson and Lindberg v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: County of St. Paul (20 February 2013), Appeal Nos. 13-005 and 006-R (A.E.A.B.).

BEFORE:

Ms. A.J. Fox, Panel Chair; Mr. Eric McAvity, Q.C., Board Member; and Dr. David Evans, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Denise Black, Board Secretary; and Ms. Marian Fluker, Associate Counsel.

SUBMISSIONS BY:

Appellants: Mr. David Hanson and Ms. Donna Hanson; and Mr. Roy Lindberg and Mr. Gordon Lindberg.

Approval Holder: County of St. Paul, represented by Ms. Daina Young, Reynolds Mirth Richards & Farmer.

Director: Mr. Patrick Marriot, (Former) Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Nicole Hartman, Alberta Justice and Solicitor General.

WITNESSES:

Appellants: Mr. David Hanson; Ms. Donna Hanson; Mr. Roy Lindberg; and Mr. Gordon Lindberg.

Approval Holder: Mr. Ray Makowecki, EnviroMak Inc.; Ms. Sheila Kitz, Chief Administrative Officer, County of St. Paul; and Mr. Doug Lunde, Genivar Inc.

Director: Mr. Todd Aasen, Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development; and Mr. Ken Bullis, Water Administration Engineer, Alberta Environment and Sustainable Resource Development.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval under the *Water Act* to the County of St. Paul (the County) to fill in part of a water body to construct a road.

Mr. David Hanson, Ms. Donna Hanson, Mr. Roy Lindberg and Mr. Gordon Lindberg (the Appellants) appealed the decision to issue the Approval and requested a stay. The Environmental Appeals Board (the Board) granted the stay until the Minister makes his decision respecting these appeals.

The Board received and reviewed the written submissions, assessed the oral evidence and arguments presented at the hearing, and reviewed the AESRD record on the following issues:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

The Board recommended the Approval be reversed. Of primary concern, the Board found AESRD did not consider the requirements of the Provincial Wetland Restoration/Compensation Guide (the “Guide”). The Guide requires a consideration of avoidance of the wetland, mitigation if the wetland cannot be avoided, and compensation when avoidance and mitigation cannot occur.

The application for the Approval did not consider avoidance, only compensation, and AESRD did not ask for supporting information to explain why the wetland could not be avoided. At the hearing, the County stated the road needed to be built for public safety reasons and had to be built through the wetland because that was the location of the municipal right-of-way. However, the issue of public safety was not discussed or raised in the documents before AESRD when the Approval was issued, and therefore could not have been considered by the Director when he made his decision.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's report and recommendations in respect of appeals of Approval No. 00297021-00-00 (the "Approval") issued to the County of St. Paul (the "Approval Holder" or the "County"). Alberta Environment and Sustainable Resource Development ("AESRD") issued the Approval to the County under the *Water Act*, R.S.A. 2000, c. W-3, for the purpose of filling in part of a water body to build a road. Mr. David and Ms. Donna Hanson, and Mr. Roy Lindberg and Mr. Gordon Lindberg (collectively, the "Appellants") appealed the decision to issue the Approval and requested a stay. After receiving and reviewing the submissions provided by the Appellants, AESRD, and the Approval Holder on the stay, the Environmental Appeals Board (the "Board") issued a stay to remain in force until the Minister of Environment and Sustainable Resource Development makes his decision respecting these appeals.

[2] The Board held a hearing to hear submissions and evidence on the following issues:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

[3] As part of the application review process under the *Water Act*, AESRD may consider the applicable policies and guidelines, including the Provincial Wetland Restoration/Compensation Guide (the "Guide"). The Guide requires an assessment as to whether the wetland can be avoided, and if that is not possible, what mitigation steps can be taken to minimize the impacts on the wetland. The third choice, if avoidance and mitigation are not achievable, is that the project proponent can compensate for the loss of wetlands.

[4] After reviewing the evidence, submissions, and the record, it did not appear AESRD considered avoidance of the wetland and only considered compensation. Therefore, the Board is recommending the Approval be reversed.

II. BACKGROUND

[5] On April 26, 2013, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), issued Approval No. 00297021-00-00 under the *Water Act* to the County. The Approval allows for the filling of part of a water body (0.66 ha) on an unnamed lake and wetlands at W1/2 04-59-10 W4M in the County of St. Paul to build a road within an existing road allowance.

[6] On May 6, 2013, the Board received Notices of Appeal from the Appellants appealing the Approval and requesting a stay.

[7] On May 7, 2013, the Board wrote to the Appellants, Approval Holder, and the Director (collectively, the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and Director of the appeals. The Board asked the Director for a copy of the documents upon which the Director made his decision (the “Record”).

[8] On May 8, 2013, the Board acknowledged a telephone call received from Ms. Hanson requesting a stay of the Approval. The Board asked the Appellants to respond to the Board’s questions regarding their stay request.¹

[9] On May 13, 2013, the Board received a request from the Appellants to put the stay request on hold pending the mediation meeting. The Board granted the request.

[10] On June 14, 2013, the Board received a copy of the Record, and copies were provided to the Parties on June 17, 2013.

[11] The mediation meeting was held on July 24, 2013, in St. Paul. No resolution was reached.

¹ The Appellants were asked to respond to the following questions:

1. What are the serious concerns of the Hansons and Lindbergs that should be heard by the Board?
2. Would the Hansons and Lindbergs suffer irreparable harm if the Stay is refused?
3. Would the Hansons and Lindbergs suffer greater harm if the Stay was refused pending a decision of the Board than the County of St. Paul would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are the Hansons and Lindbergs directly affected by AESRD’s decision to issue the Approval to the County?

[12] On July 26, 2013, the Board asked the Appellants to answer the stay questions if they wanted the Board to consider their stay request. The Appellants provided their responses on August 8, 2013.

[13] On August 9, 2013, based on the information provided in the Appellants' responses, the Board granted a temporary stay of the Approval to allow time to receive comments from the Approval Holder and Director regarding the stay application. The temporary stay prohibited the Approval Holder from doing any work under the Approval that may affect the bed, bank, or shore of the lake and associated wetlands. The Approval Holder and Director provided their responses on August 23, 2013. The Appellants' final submission was received on September 5, 2013.

[14] The Board received submissions on the issues for the hearing between August 15, 2013, and September 5, 2013.

[15] On September 27, 2013, the Board notified the Parties that the hearing would be held on January 23, 2014.

[16] On November 7, 2013, the Board notified the Parties that the Appellants were directly affected and the stay was to remain in place until after the Ministerial Order was issued.²

[17] The Board published the Notice of Hearing in the Bonnyville Nouvelle and the St. Paul Journal. The Board also provided a copy of the Notice of Hearing to the Town of St. Paul and the County of St. Paul to place on their public bulletin board or website. The Notice of Hearing was also placed on the Government of Alberta and Board websites. The Board issued a News Release that was distributed to the media throughout the Province by the Public Affairs Bureau. The Notice of Hearing notified the public of the hearing and requested that if any person, other than the Parties, wanted to make representations before the Board, to contact the Board by November 23, 2013. The Board did not receive any intervenor applications.

[18] Submissions for the hearing were received on December 17 and 18, 2013.

² See: Stay and Issue Decision: *Hanson and Lindberg v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: County of St. Paul (07 November 2013), Appeal Nos. 13-005 and 006-ID1 (A.E.A.B.).

[19] The hearing was held on January 23, 2014, in St. Paul. The issues heard by the Board were:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

III. PRELIMINARY MATTERS

A. Evidence of Mr. Dave Prescott

[20] On the day prior to the hearing, the Director provided an e-mail from Mr. Dave Prescott, a biologist with AESRD. Mr. Prescott did not attend the hearing. The Board asked the Parties to provide comments on whether the Board should accept Mr. Prescott's e-mail as evidence at the hearing.

[21] The Appellants did not believe the e-mail should be accepted as evidence since the letter was not in front of the Director when he made his decision.

[22] The Approval Holder had no objection to admitting the e-mail as evidence.

[23] The Director explained the e-mail was provided to address the evidence of the Appellants regarding species at risk. The Director believed the Approval Holder's consultant could respond to the Appellants' evidence on endangered or threatened species.

[24] The Board stated it would take the comments under advisement when the evidence was presented.

B. Relevant Policy Documents

[25] In the Board's interim decision, the Board discussed the Alberta Wetland Policy (the "Wetland Policy") stating:

"Although the Wetland Policy was released in September 2013, similar concepts existed when the Director made his decision."³

³ Stay and Issue Decision: *Hanson and Lindberg v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: County of St. Paul (07 November 2013), Appeal Nos. 13-005 and 006-ID1 (A.E.A.B.) at paragraph 79.

[26] The Board then stated:

“The Board, when preparing its recommendations, must consider existing legislation, policies, and guidelines that are in force at the time of the Board’s decision, which may be different than what existed at the time the Director made his decision. Therefore, an issue the Board will hear is whether the terms and conditions in the Approval adequately consider all of the relevant legislation, policies, and guidelines that currently pertain to dealing with wetlands. This would include the Wetland Policy.”⁴

[27] In the written submissions provided for the hearing, the Approval Holder and Director argued the Wetland Policy is not applicable to the Approval because the Wetland Policy expressly states it is not retroactive, and the Wetland Policy is not yet in force because supporting documentation has not been completed.

[28] The Board accepts the arguments of the Director and the Approval Holder, so the policy document that is applicable in this case is the Guide. While this document may not be binding like the Wetland Policy would be, the Guide still incorporates the basic principles for the protection of wetlands, which is first avoid if possible, then mitigate impacts if avoidance of the wetland cannot be achieved, and the last option is to provide compensation when avoidance and mitigation cannot be achieved.

IV. SUBMISSIONS

A. Appellants

[29] The Appellants stated their main concern is the conservation and protection of the wetland listed as “Lake 10” and the connected habitat that would be affected by the construction of the proposed road.

[30] The Appellants requested the Board reverse the Director’s decision to issue the Approval.

[31] The Appellants provided a recording of the sounds of the birds and animals in and around the wetlands. They stated there are many frogs that use the area, some considered at risk

⁴ Stay and Issue Decision: *Hanson and Lindberg v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: County of St. Paul (07 November 2013), Appeal Nos. 13-005 and 006-ID1 (A.E.A.B.) at paragraph 80.

or endangered. The Appellants said there were also sounds of a night hawk, another species at risk, and the sounds of a piping plover, an endangered species.

[32] The Appellants noted there are no sounds of traffic, even though the main reason cited for the construction of the proposed road is heavy traffic.

[33] The Appellants stated there are many species that use the wetland that are not currently at risk or endangered, but they still deserve protection before they too become “at risk.”

[34] The Appellants stated the lake is a unique environment in the area and should be given special consideration given the loss of wetlands in the area due to intensive grain farming and “progress.”

[35] The Appellants argued the destruction of the wetland is unnecessary because there is an adequate road that bypasses the lake within 350 metres that has served the area for over 70 years. The Appellants stated there is adequate access for area farmers to get to their land without building one more mile of road, through a wetland, with the road ending in a deadend where Range Road 104 intersects with Township Road 590. The Appellants noted there is an alternate route already in place that avoids the wetland.

[36] The Appellants did not believe the terms and conditions of the Approval adequately addressed the impacts of the proposed project on the aquatic environment of Lake 10. The Appellants stated the wetlands in the area have been depleted over the years, and protection of what is left from unnecessary development should be AESRD’s prime concern.

[37] The Appellants did not believe the Approval was based on complete and accurate information, and it did not comply with AESRD’s policies and the Government of Alberta’s position on the environment. The Appellants argued the Director’s decision was pre-conceived. They noted that, two days before the Approval was issued, Mr. Bullis stated in an email that the information provided to that date did not contain enough information to be considered an acceptable plan, so he included a requirement that a Siltation and Erosion Plan be submitted to the Director prior to the start of construction.

[38] The Appellants stated the day before the Approval was issued Mr. Bullis was still receiving information, which the Appellants considered inaccurate, regarding water channels coming into the lake from the north across Township Road 590.

[39] The Appellants argued it was within the Director's right to deny an application based on past performance. The Appellants stated many roads built in the area were built without considering the wetlands and, often, without a *Water Act* approval.

[40] The Appellants stated the Director has the ability to deal with *Species At Risk Act*, S.C. 2002, c. 29 ("SARA"), given the AESRD policy as stated in "Alberta's Strategy for the Management of Species at Risk" and the "Sensitive Species Inventory Guidelines." The Appellants did not believe it was AESRD's policy to relinquish control to any other level of government.

B. Approval Holder

[41] The Approval Holder explained the Approval allows for the construction of a road within the statutory road allowance designated as Range Road 104.

[42] The Approval Holder explained it began improving Range Road 104 before 2002, starting at its intersection with Highway 28 and moving south, and it has now been improved to the southwest corner of SW-17-69-10 W4M⁵ where it turns east and becomes Township Road 591. The Approval Holder stated the purpose of the road is to provide a quality through road linking the improved portion of Range Road 104 to Township Road 590 thereby improving access between Highway 28 and Township Road 590. The Approval Holder stated the proposed road is intended to address safety concerns by diverting traffic from the existing road that runs from Township Road 591 to Township Road 590 through the Hamlet of Owlseye, a community with 17 residents.

[43] The Approval Holder said the close proximity of the existing road to the houses is a concern for the County and the residents of Owlseye. The Approval Holder stated the existing road affects residents' quality of life and enjoyment of their properties and raises safety concerns.

⁵ On reviewing the maps of the area, the Board notes the legal description should be SW 9-59-10 W4M as to the location where Range Road 104 turns east to become Township Road 591.

[44] The Approval Holder explained there are further safety concerns with visibility issues arising from the angle of the existing road for southbound traffic turning onto Township Road 590 and eastbound traffic on Township Road 590 turning north onto the existing road.

[45] The Approval Holder explained that it considered upgrading the existing road, but the safety concerns regarding the existing road would be increased with the improvements and increased traffic. The Approval Holder said the location of the existing road between the residences and the railway prevented the widening of and improvement of the existing road.

[46] The Approval Holder stated it received support from residents for the continuation of Range Road 104 southward to Township Road 590. The Approval Holder said the development of the statutory road allowance for Range Road 104 was the best option available to it.

[47] The Approval Holder stated the Approval contains terms and conditions to address the impacts on the aquatic environment, human health and public safety, and provides for payment of wetlands compensation.

[48] The Approval Holder explained its consultant, EnviroMak Inc. (“EnviroMak”) prepared an environmental assessment of the potential effects of the road construction on the aquatic and terrestrial ecosystems (“EnviroMak Report”)⁶ and concluded one wetland area and the riparian edge would be impacted.

[49] The Approval Holder acknowledged the construction of the road is an activity that requires an approval under the *Water Act*. The Approval Holder stated that, pursuant to section 38 of the *Water Act*, the only matter the Director must consider is an applicable approved water management plan, but there is no approved water management plan for the area where the wetlands affected by the road are located.⁷ The Approval Holder said that under section 38 of

⁶ During the application process, EnviroMak completed three versions of its report. The initial report, dated September 7, 2011, was initially provided to the Director. The Director noted insufficiencies and requested additional information. This resulted in the second version, dated October 18, 2011. An updated version of the report was provided on February 20, 2013. In this report and recommendations, “EnviroMak Report” will refer to the February 20, 2013 version.

⁷ Section 38(2) of the *Water Act* states:
“In making a decision under this section, the Director

the *Water Act*, the Director may consider applicable guidelines and policies to provide additional guidance. The Approval Holder noted there are two applicable policies, the Wetland Management in the Settled Area of Alberta - An Interim Policy (the “Wetland Management Policy”) and the Guide.

[50] The Approval Holder stated the Wetland Management Policy encourages the retention of wetlands and the mitigation of damages where necessary, but it does not name specific factors that must be considered by the Director when issuing an approval.

[51] The Approval Holder stated the Guide requires an approval applicant to:

1. avoid damage or destruction of the wetland;
2. minimize the impact and provide applicable compensation; and
3. compensate for unavoidable damage or destruction.

[52] The Approval Holder stated the EnviroMak Report addressed all considerations properly before the Director, including section 38 of the *Water Act*, the Water Management Policy, and the Guide.

[53] The Approval Holder stated the Wetland Policy was issued in September 2013, after the Approval was issued. The Approval Holder noted the Wetland Policy states that it does not apply retroactively to *Water Act* approvals issued prior to the policy implementation date.

[54] The Approval Holder stated the Wetlands Policy is not an applicable policy which the Board should consider in the present case. The Approval Holder argued it would be inequitable if it was required to consider a policy document that was non-existent at the time of the application and the issuance of the Approval. The Approval Holder stated the Wetland

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- (a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan,
 - (b) may consider any existing, potential or cumulative
 - (i) effects on the aquatic environment,
 - (ii) hydraulic, hydrological and hydrogeological effects, and
 - (iii) effects on household users, licensees and traditional agriculture users,that result or may result from the activity, and
 - (c) may consider
 - (i) effects on public safety, and
 - (ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant.”

Policy relies on relative wetland value, but the assessment system is currently under development, and the inventory is not present on the site. The Approval Holder said that although the Wetland Policy may provide guiding principles, without a concrete assessment tool, the utility of the Wetland Policy is lessened.

[55] The Approval Holder submitted the Board has no jurisdiction to consider the Wetland Policy, but "...the Approval issued to the County is consistent with the Wetlands Policy."⁸

[56] The Approval Holder noted the Wetland Policy emphasizes avoidance of wetland above mitigation of wetlands. The Approval Holder stated the path of the proposed road along the statutory road allowance was determined to be the only safe and practicable way of constructing a high quality road to connect the improved section of the road north of Township Road 590 to Township Road 591. The Approval Holder indicated assessing the need for an improved road is not within the Board's jurisdiction.

[57] The Approval Holder noted that, under the Wetland Policy, where the road is constructed is a relevant consideration. The Approval Holder stated there were few options available to link Range Road 104 north of Township Road 590 to Township Road 591.

[58] The Approval Holder explained it considered the option presented by the Appellants, improving Owlseye Road, but it was determined to be impractical, because there is insufficient land bordering Owlseye Road to allow for widening and improvements and for safety concerns with the proximity to the residences. The Approval Holder stated there are visibility and safety concerns at the intersection of the existing road and Township Road 591 that would be exacerbated by road improvements.

[59] The Approval Holder said the proposed road runs through the wetland in the most direct route possible and has been placed to avoid any unnecessary curves to make the construction process easier, thereby minimizing potential impacts.

⁸ Approval Holder's submission, dated December 18, 2013, at paragraph 38.

[60] The Approval Holder stated that avoidance of the wetland was not possible in this case and, as stated in the Wetland Policy, minimization of impacts and replacement must be addressed through the terms and conditions in the Approval.

[61] The Approval Holder stated the EnviroMak Report assessed the wetland, particularly the area designated for the road, identified potential environmental effects, and suggested mitigation and compensation.

[62] The Approval Holder stated the road is to pass through the riparian edge of a class V wetland,⁹ there are no fish or fish habitat in the area, and no rare or endangered wildlife or plants were known to be in the area or found on a site visit. The Approval Holder explained that, in response to the Appellants' concerns regarding the piping plover, EnviroMak made a second visit to the site, and in its addendum to the EnviroMak Report, concluded the area is not suitable habitat for the piping plover.

[63] The Approval Holder noted the following impacts on the wetland:

1. some upland areas would be disturbed or altered including some hay lands, trees, shrubs, grasses, and forbs;
2. some riparian areas would be altered;
3. at the north site, some wetland areas, amounting to approximately 6,628 square metres, would be influenced by the road construction;
4. erosion and sedimentation could occur;
5. contaminant spills could occur;
6. with the removal of some vegetation, migratory bird nests could be destroyed;
7. invasive weeds could be introduced to the area or transported away from the area; and
8. cumulative environmental effects could occur.

[64] The Approval Holder stated the EnviroMak Report identified mitigation methods, including:

1. implementation and maintenance of erosion control devices;
2. re-vegetation of the site;

⁹ EnviroMak used the Stewart and Kantrud (1971) Wetland Classification System. A Class V wetland under this classification system is defined as a permanent pond or lake with a permanent open water zone.

3. clearing of vegetation to minimize impacts on migratory birds;
4. installing culverts to maintain water flow; and
5. standard construction mitigation.

[65] The Approval Holder stated these mitigation methods were incorporated into the terms and conditions of the Approval, which requires a Siltation and Erosion Plan be prepared and filed prior to construction.

[66] The Approval Holder stated the road will encroach on 6,628 square metres of wetland, so in addition to the mitigation steps, the Approval Holder must pay compensation to Ducks Unlimited Canada in the amount of \$19,883.00. This amount was calculated based on the 3:1 mandatory compensation and represents the restoration of 19,883 square metres of wetland.

[67] The Approval Holder argued the appeals did not identify any relevant factors that were not addressed by the Director in issuing the Approval. The Approval Holder stated all of the environmental impacts on the wetland had been assessed and, where possible, steps to mitigate have been and will continue to be taken. The Approval Holder stated the compensation paid to Ducks Unlimited Canada is representative of the impact on the wetland as a result of the road construction and it offsets the environmental impacts.

[68] The Approval Holder requested the Board uphold the Approval on the terms and conditions as granted by the Director. The Approval Holder stated the terms and conditions of the Approval serve to mitigate the impact of the road construction on the surrounding area, and the compensation required is sufficient and in accordance with established guidelines.

[69] The Approval Holder requested the Approval be extended for one year from the date the Minister's decision is issued to compensate for the time lost in the appeal process.

C. Director

[70] The Director noted the October 18, 2011 environmental assessment indicated the proposed road was not located in an environmentally significant area since the road would not be located in an ecological reserve, special wildlife project, or in a recorded environmentally sensitive area.

[71] The Director noted he intends to amend clause 3.2 of the Approval to reference the February 20, 2013 EnviroMak Report. Clause 3.2 of the Approval currently references the October 18, 2011 EnviroMak Report.

[72] The Director noted the October 18, 2011 EnviroMak Report indicated a search of the Fisheries and Wildlife Management Information System (“FWMIS”) and the Alberta Conservation Information Management System (“ACIMS”) did not list any endangered or threatened species in the area of the proposed road.

[73] The Director said the lands branch of AESRD advised the Director that the proposed road did not affect any Crown-owned bed and shore, and it did not have any concerns with the project.

[74] The Director stated that, in response to the Hansons’ concerns regarding erosion and siltation, he revised the draft Approval to require the Approval Holder submit a Siltation and Erosion Plan before it could start work under the Approval.

[75] The Director said he incorporated the Approval Holder’s Wetland Compensation Agreement with Ducks Unlimited Canada into the Approval.

[76] The Director stated he issued the Approval on April 25, 2013, after considering the application, the supplemental information, and the Statements of Concern.

[77] The Director submitted the Approval adequately addresses the impact to the aquatic environment and was issued based on a review and application of the *Water Act* and applicable policies and guidelines.

[78] The Director explained that, in deciding whether to issue an approval, he may consider any existing, potential, or cumulative effects on the aquatic environment.

[79] The Director stated he reviewed the technical information provided by the Approval Holder including a detailed engineering design, the wetland assessment, and the wetland compensation proposal. The Director relied on EnviroMak’s technical reports and AESRD’s technical expertise. The Director also reviewed and considered the Statements of Concern.

[80] The Director stated he was satisfied the Approval Holder's application, including the environmental assessment, design plans, and the wetland compensation plan, met the requirements of the *Water Act*, and the terms and conditions of the Approval would adequately address the impacts of the proposed project on the aquatic environment.

[81] The Director noted the Approval restricts the Approval Holder from using any material that may cause an adverse effect on the aquatic environment and any released water must be of an equal or better quality than the wetland.

[82] The Director stated he shared the Appellants' concerns regarding siltation and erosion, and therefore he included terms and conditions in the Approval to address these issues including:

1. a requirement to minimize siltation and erosion of the wetland;
2. a requirement of submitting a written Siltation and Erosion Plan before starting the activity and to implement the plan as authorized in writing by the Director;
3. a description of what must be included in the Siltation and Erosion Plan, including site preparation practices, measures to minimize removal and disturbance of bank vegetation, measures to manage water flow and excavated material, and measures to stabilize disturbed areas; and
4. a requirement to undertake the proposed activity in accordance with the February 20, 2013 EnviroMak Report including: implementing and maintaining erosion control measures adjacent to the wetland; timely roadside landscaping and re-vegetation; periodic monitoring for evidence of erosion; and post-construction monitoring of re-vegetation on disturbed areas.

[83] The Director was satisfied the terms and conditions of the Approval were sufficient to control and minimize the erosion and siltation that may occur.

[84] The Director stated the Approval Holder must comply with the terms and conditions of the Approval, and there are compliance tools available under the *Water Act* to ensure compliance.

[85] With respect to the Appellants' concerns regarding the disturbance and destruction of wildlife and wildlife habitat, the Director explained he relied on the technical reports provided by the Approval Holder. The Director noted the EnviroMak Report indicated the FWMIS and ACIMS databases did not identify any rare or endangered terrestrial plant or

animal resources at the site. The Director explained the FWMIS is the Government of Alberta's fisheries and wildlife database that contains site records of fisheries and wildlife occurrences. The ACIMS is a biodiversity information database maintained by the Parks Division of Alberta Tourism, Parks and Recreation, and it assists in identifying critical areas in need of protection. The Director stated these databases are a broad resource that can be used to identify potential areas of concern and may indicate sites requiring more scrutiny.

[86] The Director noted the EnviroMak Report indicated the search of the FWMIS and ACIMS databases showed the proposed road was not located in an ecological reserve, special wildlife project, or recorded environmentally sensitive area.

[87] The Director stated the onsite assessment completed by EnviroMak on May 24, 2011, reported 12 bird species and two frog species, but none of the species were considered threatened or endangered by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") or Alberta's Endangered Species Conservation Committee. The Director explained SARA appointed COSEWIC as an expert advisory body to ensure the federal government considers the committee's science-based designations when establishing the legal list of wildlife species at risk. Alberta's Endangered Species Conservation Committee was created under the *Wildlife Act*, R.S.A. 2000, c. W-10, as an expert advisory body to make recommendations to the Minister regarding which species should be listed as endangered.

[88] The Director stated that, had there been an indication of a threatened or endangered species in the area, the matter would have been referred to AESRD Fish and Wildlife for further comments, or the Approval Holder may have been required to conduct further on-site surveys. The Director said he was satisfied that additional referrals or on-site surveys were not required.

[89] The Director noted EnviroMak said that migratory bird nests could be destroyed when vegetation was removed for the proposed road, but it did not see any migratory bird nests near the site when the assessment was conducted.

[90] The Director stated the EnviroMak Report did not identify any fish or fish habitat associated with the wetland or any other feature on the proposed road right-of-way.

[91] The Director believed no additional terms or conditions related to wildlife or wildlife habitat were required in the Approval beyond how wildlife concerns were addressed in the EnviroMak Report, which forms part of the Approval under Clause 3.2.

[92] The Director explained he considered the proposed road would fill in only a portion of the wetland, therefore some local habitat and aquatic environment would be maintained. The Director stated the requirement of the Approval Holder to pay wetland compensation at a 3:1 ratio would create a new wetland in the region and provide wildlife habitat offsets in accordance with policy requirements.

[93] The Director noted the Approval Holder completed an additional site assessment of the wetland on July 29, 2013, in response to the Appellants' concerns. The Director said that five bird species were observed, no suitable habitat for piping plovers was found, and no endangered or threatened species were seen or heard.

[94] The Director submitted the applicable legislation, policies, and guidelines were appropriately considered.

[95] The Director explained that under the *Water Act*, the Director may, when deciding to issue an approval, consider any existing, potential, or cumulative effects on the aquatic environment or hydraulic, hydrologic, and hydrogeological effects that may result from the activity.

[96] The Director stated he required the Approval Holder to submit engineering design details of the proposed road including the number, size, and location of the culverts, and the Approval Holder must comply with the design plans outlined in the County of St. Paul Rge. Rd 104 Owlseye Rd. St Paul Project 5C 122 Plan and Profile (the "Design Plan") prepared by Genivar. The Director explained the Design Plan includes:

1. figures showing the location of the road;
2. the footprint of the project;
3. the cut and fill locations;
4. the side slopes used in cut and fill;
5. the grade of the road; and
6. the elevation of the road compared to the original ground.

[97] The Director noted the Design Plan requires the Approval Holder to install two 800 mm culverts to maintain the same water level on both sides of the proposed road, and the location, number, and size of the culverts reduces the risk of water overtopping the road during high flow periods or drying out one section of the water body during low periods. The Director confirmed he was satisfied these Design Plans mitigated any impacts to the hydrology of the site.

[98] The Director said he does not have jurisdiction to enforce federal legislation such as SARA, and he cannot accept or assess a study conducted pursuant to that legislation. The Director submitted SARA studies are only required where the land has been designated as critical habitat in a recovery strategy. The Director stated there is no evidence the land on which the road is to be built has been designated as critical habitat or that any species designated under SARA as threatened or endangered are near the proposed road.

[99] The Director explained that, in terms of compensation for impacts to or loss of wetlands, the primary document considered is the Guide. He stated the Guide provides for mitigating the loss of wetlands by “avoiding impacts to the wetland; minimizing impacts and requiring applicable compensation; and compensating for impacts that cannot be avoided or minimized.”¹⁰

[100] The Director stated the Guide requires compensation for loss of wetlands to be a minimum ratio of 3:1. The Director submitted the Approval adequately addresses the requirements of the Guide by requiring the Approval Holder to pay Ducks Unlimited Canada \$19,884.00 in order to restore 1.99 ha of wetland habitat at a 3:1 replacement ratio.

[101] The Director noted the Wetland Policy is not in effect even though it was released in September 2013. The Director stated the Wetland Policy will be effective from the date of implementation, but it does not apply retroactively to *Water Act* approvals issued prior to the implementation date. The Director stated that, as the policy has not been implemented, it would be speculative to apply the policy to this Approval.

[102] The Director submitted he is not required to consider the location of the road or alternative routes under the current policies and guidelines. The Director argued it is not his role to choose the site of the project, but he must assess the potential impacts of the project and

¹⁰ Director’s submission, dated December 18, 2013, at paragraph 79.

determine whether it is environmentally acceptable. The Director submitted the siting of the proposed road is a land use decision made by the County, and land use planning decisions are not within the jurisdiction of the Director or the Board.

[103] The Director requested the Approval be upheld as issued.

D. Analysis

[104] There were two issues before the Board:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

[105] The Board will first discuss the issue of whether the applicable legislation, policies, and guidelines were considered by the Director when he issued the Approval.

[106] The Wetland Policy is not applicable in these appeals. The Wetland Policy was released in September 2013, but it is not yet in force as detailed evaluation protocols are being developed by AESRD. The Board notes many of the principles included in the Wetland Policy currently exist under the Guide, which is applicable in these appeals.

[107] Section 38 of the *Water Act* states the Director must consider applicable approved land use plans, but the Director may consider other applicable policies and guidelines and any other relevant documents.¹¹ Since the policies and guidelines are prepared to assist the Director,

¹¹ Section 38(2) of the *Water Act* states:
“In making a decision under this section, the Director

- (a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan,
- (b) may consider any existing, potential or cumulative
 - (i) effects on the aquatic environment,
 - (ii) hydraulic, hydrological and hydrogeological effects, and
 - (iii) effects on household users, licensees and traditional agriculture users,that result or may result from the activity, and
- (c) may consider
 - (i) effects on public safety, and
 - (ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant.”

as well as project proponents, in the application process, it seems reasonable that applicable policies and guidelines be considered by the Director in making his decision on whether to issue an approval. In this case, the Director considered the Guide, at least in part, as was evident in the Record and as stated at the hearing. For example, when the initial application was provided to the Director, the Approval Holder had calculated a 1:1 ratio for wetland compensation. The Director notified the Approval Holder this was not adequate and, according to the Guide, a 3:1 ratio for compensation was required. This indicates the Director knew and understood the requirements of the Guide and intended to have the Approval Holder comply with the requirements as set out in the Guide. The Director cannot chose to require one section of the Guide be complied with and ignore other sections that are applicable.

[108] In section 2.0 of the Guide, it specifies what needs to be included in the supporting documentation for an approval that will result in the disturbance of a wetland.¹² Included in the requirements is an explanation of why the wetland cannot be avoided including supporting technical information. The Guide makes it clear that it is a three step process in considering wetland compensation and that avoidance of a wetland is the preferred choice. The Guide and the *Water Act* acknowledge that it is not always feasible to avoid a wetland when balancing environmental protection and economic growth. Therefore, if avoidance cannot be achieved, then the project proponent must demonstrate the mitigative measures that will be undertaken to minimize impacts to the wetland. The last alternative available, if the wetland cannot be avoided and mitigation cannot prevent loss of wetlands, is for the proponent to provide compensation to support the construction of equivalent wetlands elsewhere.

[109] When section 2.0 of the Guide was pointed out to the Director, he stated that particular issue was met by the Statements of Concern and the conversation held between the Approval Holder and Mr. Bullis. There was no information in the application that indicated the Approval Holder evaluated the feasibility of avoiding the wetland. The Approval Holder stated the EnviroMak Report addressed all considerations before the Director, including the Guide. The Approval Holder acknowledged the Guide requires an assessment of avoidance, mitigation,

¹² Section 2.0 of the Guide states the application for an approval must include:

“A report describing the existing wetland site and the proposed development including a statement (and supporting technical information) indicating why it is not possible to avoid or minimize the impact on the wetland.”

and compensation, in that order. However, EnviroMak was instructed to prepare the application for the Approval and was not required to consider avoidance or mitigation, only compensation.

[110] EnviroMak confirmed it was not asked by the Approval Holder to consider avoidance or mitigation, only compensation. A project proponent cannot just offer compensation for the wetland and ignore the preferred option of avoidance. The proponent, in these appeals the Approval Holder, must provide some evidence or data to show the Director that the wetland cannot be avoided. It appears the Approval Holder did not consider avoidance of the wetland from an environmental perspective. The Approval Holder appeared to consider only that the proposed route was a right-of-way and it only had to deal with compensation, not avoidance or mitigation.

[111] The Wetland Impact Assessment Form attached to the application, requires the proponent to provide a reason why the wetland could not be avoided or mitigation measures taken. In the form provided by the Approval Holder, the reason was simply stated as “road allowance.” This does not provide the explanation or technical reasons why the wetland could not be avoided. The mere fact the County has a right-of-way is not a valid environmental consideration that negates the need to consider avoidance. Further, this indicates the application submitted to the Director was deficient and no effort was made by the Director to ensure the missing information was provided before he made his decision to issue the Approval.

[112] The Approval Holder argued there are safety concerns with the Range Road 104 as it is currently built, primarily since it passes through the Hamlet of Owlseye and the intersection of Range Road 104 with Township Road 590. In reviewing the Record, there is no indication the Director was aware that this was the reason the Approval Holder decided to build the proposed road in that location. In his testimony at the hearing, Mr. Bullis stated the issue of public safety was mentioned by the Approval Holder when they did a site visit after the application was filed and the Statements of Concern were received. There is no indication in the Record this was conveyed to the Director. Therefore, it is uncertain if the Director was aware of the safety issues raised by the Approval Holder. Further, this would still not be sufficient to meet the requirements of the Guide to consider avoidance.

[113] The Board understands that not all conversations the Director has with AESRD staff would be included in the Record. The requirement to look at avoidance and mitigation measures is a requirement in the Guide which the Director purportedly considered prior to making his decision to issue the Approval. There should be some indication in the Record that he received information and considered avoidance of the wetland. This is more than a conversation that was not included; it was a step in the decision making process of the Director that should be documented.

[114] The EnviroMak Report stated the proposed road was to improve the road design. The EnviroMak Report did not state the proposed road is to address safety concerns. The consultant from EnviroMak testified that he did not consider whether avoidance of the wetland was the proper approach. Instead, he did as he was instructed, which was to ensure the Approval was issued. EnviroMak stated he was aware of the Guide, yet he chose to apply for a 1:1 ratio for compensation and did not discuss with the Approval Holder the requirement for a consideration of avoidance or mitigation of the existing wetland.

[115] The Approval Holder argued the proposed road is to be built on a right-of-way, so it is entitled to build the road there. There is no requirement that the Approval Holder must build the road in the right-of-way. The Board understands it may be more convenient and possibly less expensive to build the road through the right-of-way, but it is not an automatic requirement. The Director, in making his decision regarding the proposed road, should not take the right-of-way as being the only option available and accept, because it is a right-of-way, that avoidance of the wetland does not have to be considered.

[116] As part of the application process, it is common for the Director to request additional information. As stated by Mr. Bullis, in an ideal application, all of the information is clearly provided, but in most cases, clarification or additional information may be required to ensure a complete application. EnviroMak provided revised versions of its report to the Director in response to the Director's comments and questions regarding the proposed project including further details of the road design, impacts to the wetland and surrounding area, and compensation. Although this was an opportunity for the Director to ask for information on the steps taken to avoid the wetland and the mitigation measures taken, the question was not asked of the Approval Holder. Mr. Bullis acknowledged the question should have been asked. The

Board agrees that would have been a reasonable opportunity to ensure the Director had all of the relevant information before him before the decision was made.

[117] The Appellants raised the issue of avoidance in their Statements of Concern. The Director should have required the Approval Holder to address this issue when responding to the Statement of Concern filers. The Director asked for additional information from the Approval Holder, and he stated he required a Siltation and Erosion Plan in response to the Statements of Concern filed. The Board is uncertain why the Director took the extra step to include the Siltation and Erosion Plan to address some of the Appellants' concerns but chose not to address the concerns regarding avoidance, something that is specifically stated in the Guide.

[118] The Director testified the issue of safety was included in the Record. However, what the Director referred to was the Statement of Concern filed by the Lindbergs. It was not mentioned in the Approval Holder's application or in any correspondence with the Director. It is not appropriate for the Director to consider the issue of safety being raised by a statement of concern filer as being an adequate basis for assuming that that is the reason the Approval Holder filed the application. It is the project proponent's responsibility to provide a complete application with complete explanations of the project.

[119] As stated in the Board's previous decision of *Gansky*:¹³

“While zoning is within a municipality's control and outside the jurisdiction of both Alberta Environment and the Board, a development that meets zoning requirements may not proceed unless the development is determined to be environmentally acceptable.”

[120] In this case, it is the Approval Holder's decision as to where road construction will take place. However, the Approval Holder is still required to comply with all of the applicable legislation. As with any project, before it can proceed, it must obtain all of the required approvals, including provincial and federal approvals if required. In the application for this Approval, the Approval Holder should have considered the environmental consequences of the proposed road and it was the Director's responsibility to ensure the environmental impacts were considered and addressed.

¹³ *Ganske v. Director, Northern Region, Regional Services, Alberta Environment re: CCS Inc.* (9 September 2005), Appeal No. 04-090-R (A.E.A.B.) at paragraph 87.

[121] It is not the Board's jurisdiction to assess the need for the road. That decision is the County's jurisdiction. The Approval Holder claimed using the right-of-way was the only safe and practical way of building a high quality road. There was no indication in the application or in the EnviroMak Report to support this statement.

[122] The *Water Act* and applicable environmental policies and guidelines apply equally to all project proponents, whether it is a municipality, industry, or a landowner. The Board acknowledges the additional responsibilities a municipality has to ensure public safety, but this does not exempt a municipality from following the applicable guidelines or policies.

[123] The Board acknowledges the Approval Holder's responsibility for ensuring public safety. However, providing a statement that a project is for public safety purposes without some further explanation or documentation should not be accepted by the Director without question as this would result in the Director fettering his discretion. The Director must actively consider any application and must not defer to statements made about public safety without balancing the environmental impacts.

[124] EnviroMak stated the Crown is now selling lands that were once wetlands in the area. This signals the importance of avoiding existing wetlands whenever possible given the current loss of area wetlands.

[125] The Board finds the Director did not consider the applicable legislation, policies, and guidelines prior to issuing the Approval. There is no evidence before the Board that the Director considered the environmental impacts of constructing the road at that location and he did not appear to balance the environmental impacts against other issues, such as safety. The Board considers this a necessary step in assessing whether an application is complete and an approval should be issued.

[126] Therefore, the Board recommends the Approval be reversed.

[127] The Approval Holder may choose to file another application with the Director if it wants to proceed with the construction of the road. All of the relevant data must be included in the application and the Director must consider the application taking into consideration all of the applicable legislation, policies and guidelines in effect at the time the application is received. Depending on when the application is submitted, the Wetland Policy may apply. The Approval

Holder may consider the issues raised by the Appellants and address their concerns in any subsequent report prepared.

[128] If the Wetland Policy is not in place, then the Director is required to consider all of the policy directions set out in the Guide, including avoidance of the wetland. In doing so, it is possible that, after the Approval Holder provides information on the issue of public safety and reasons why the wetland cannot be avoided or further mitigation measures cannot be taken, the Director may come to the same conclusion as in this application. However, alternatives to disturbing the wetland are to be included and considered as part of the discussion on avoidance and mitigation. This information must be included as part of the application should the County decide to re-apply for an approval to construct a road at this location.

[129] As the Board recommends the decision of the Director be reversed, the first issue, on whether the terms and conditions of the Approval are adequate, is now moot. This also applies to the admissibility of Mr. Prescott's evidence, which was submitted by e-mail.

V. RECOMMENDATIONS

[130] The Board recommends the Minister reverse the Director's decision to issue the Approval.

[131] With respect to sections 100(2) and 103 of EPEA, the Board recommends that copies of this Report and Recommendations, and the decision of the Minister, be sent to the following:

1. Mr. David Hanson and Ms. Donna Hanson;
2. Mr. Roy Lindberg and Mr. Gordon Lindberg;
3. Ms. Daina Young, Reynolds Mirth Richards & Farmer LLP, on behalf of the County of St. Paul; and
4. Ms. Nicole Hartman, Alberta Justice and Solicitor General, on behalf of the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

VI. COSTS

[132] The County of St. Paul reserved its right to submit a final costs application. If it chooses to do so, the Board requests that such applications be provided to the Board within two



ALBERTA
ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT

*Office of the Minister
MLA, West Yellowhead*

Ministerial Order

28/2014

Environmental Protection and Enhancement Act

R.S.A. 2000, c. E-12.

Water Act, R.S.A. 2000, c. W-3.

**Order Respecting Environmental Appeals Board
Appeal Nos. 13-005 and 006**

I, Robin Campbell, Minister of Environment and Sustainable Resource Development, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 13-005 and 006.

Dated at the City of Edmonton, in the Province of Alberta, this 25th day of February, 2014.

-original signed by-

Robin Campbell
Minister

Appendix

Order Respecting Environmental Appeals Board Appeal Nos. 13-005 and 006

With respect to the April 26, 2013 decision of the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”) to issue Approval No. 00297021-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3 to the County of St. Paul, I, Robin Campbell, Minister of Environment and Sustainable Resource Development, order that the decision of the Director is reversed and that the Approval is cancelled.