

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Hearing – February 15, 2017

Date of Decision – March 17, 2017

**IN THE MATTER OF** sections 91, 92, 94, 95, and 98 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** an appeal filed by Gordon Atkins and Creekworks Ltd. with respect to Administrative Penalty No. 16/02-AP-SSR-16/04 issued to Gordon Atkins and Creekworks Ltd., under the *Water Act*, by the Director, South Saskatchewan Region, Alberta Environment and Parks.

Cite as: *Atkins and Creekworks Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Parks* (17 March 2017), Appeal No. 16-027-D (A.E.A.B.).

**BEFORE:**

Mr. Alex MacWilliam, Board Chair;  
Mr. Jim Barlishen, Board Member; and  
Ms. Meg Barker, Board Member.

**BOARD STAFF:**

Mr. Gilbert Van Nes, General Counsel and  
Settlement Officer; Ms. Valerie Myrmo,  
Registrar of Appeals; Ms. Marian Fluker,  
Associate Counsel; and Mr. Jacob Marchel,  
Student-at-Law.

**SUBMISSIONS BY:**

**Appellants:**

Mr. Gordon Atkins and Creekworks Ltd.

**Director:**

Mr. Stephen Mathyk, Director, South  
Saskatchewan Region, Alberta Environment  
and Parks, represented by Ms. Jade Vo,  
Alberta Justice and Solicitor General.

**WITNESSES:**

**Appellants:**

Mr. Gordon Atkins.

**Director:**

Mr. Stephen Mathyk, Director, South  
Saskatchewan Region, Alberta Environment  
and Parks; and Ms. Coreen Bates,  
Environmental Protection Officer, South  
Saskatchewan Region, Alberta Environment  
and Parks.

## EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Administrative Penalty to Mr. Gordon Atkins and Creekworks Ltd. (the Appellants) for contravention of the *Water Act*. AEP determined the Appellants conducted an activity, specifically the infilling and re-sloping of the bank of Lees Creek near Cardston, Alberta, without first obtaining an approval under the *Water Act*. The Appellant appealed the Administrative Penalty of \$5,000.00.

Based on the submissions and evidence provided at the hearing, the Board varied the Administrative Penalty, reducing it to \$2,500.00. The base penalty was reduced from \$2,500.00 to \$1,500.00 as the Board considered the offence had a minor potential for an adverse effect and conducting an activity of this type without an approval was considered a moderate type of offence.

The Board reduced each of the adjustment factors (a) for the importance of the regulatory scheme, and (b) wilfulness or negligence, from \$1,500.00 and \$1,000.00 respectively to \$500.00 each.

Therefore, the varied penalty is calculated as \$1,500.00 for the base penalty, \$500.00 for adjustment factor (a), and \$500.00 for adjustment factor (b), resulting in the total penalty of \$2,500.00.

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BACKGROUND.....	1
III.	PRELIMINARY MATTERS.....	3
IV.	SUBMISSIONS .....	4
	A.    Appellants .....	4
	B.    Director .....	6
V.	ANALYSIS .....	15
	A.    Was the Administrative Penalty Properly Issued?.....	15
	1.    Due Diligence .....	16
	2.    Officially Induced Error.....	18
	3.    Fairness .....	18
	4.    Summary .....	19
	B.    Amount of the Administrative Penalty .....	19
	1.    Base Penalty.....	20
	2.    Adjustment Factors .....	22
	3.    Summary .....	25
VI.	CONCLUSION.....	25
VII.	ORDER OF THE BOARD .....	26

## I. INTRODUCTION

[1] These are the decision and reasons of the Environmental Appeals Board (the “Board”) regarding the appeal filed by Mr. Gordon Atkins and Creekworks Ltd. (collectively, the “Appellants”) of Administrative Penalty No. 16/02-AP-SSR-16/04 (the “Administrative Penalty”). The Director, South Saskatchewan Region, Alberta Environment and Parks (the “Director”) issued the Administrative Penalty to the Appellants for contravening the *Water Act*, R.S.A. 2000, c. W-3.

[2] The Administrative Penalty, issued for conducting an activity, in this case the infilling and re-sloping the bank of Lees Creek (as referred to in the Administrative Penalty),<sup>1</sup> without an approval, totalled \$5,000.00.

[3] Upon review of the submissions and the evidence presented at the hearing, the Board varied the Administrative Penalty, reducing the total penalty to \$2,500.00.

## II. BACKGROUND

[4] On August 31, 2016, the Director issued the Administrative Penalty to the Appellants. The Administrative Penalty was issued for contravening section 36(1) of the *Water Act*.<sup>2</sup> The Director has the authority to issue an administrative penalty under section 152 of the *Water Act*.<sup>3</sup>

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<sup>1</sup> At the hearing, the Director stated the name of the creek is Lees Creek but it is commonly known as Lee Creek. Since the Administrative Penalty referred to Lees Creek, the Board will also refer to it as Lees Creek in this decision.

<sup>2</sup> Sections 36(1) of the *Water Act* states:  
“Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.”

<sup>3</sup> Section 152 of the *Water Act* provides, in part:

“(1) Where the Director is of the opinion that a person has contravened a provision of this Act that is specified for the purposes of this section in the regulations, the Director may, subject to the regulations, by notice in writing given to that person, require that person to pay to the Government an administrative penalty in the amount set out in the notice for each contravention.

(1.1) A notice of administrative penalty may require the person to whom it is directed to pay either or both of the following:

(a) a daily amount for each day or part of a day on which the contravention occurs and continues....”

[5] On September 23, 2016, the Board received a Notice of Appeal from the Appellants. The lands in question are owned by Creekworks Ltd., and Mr. Gordon Atkins is the sole director and shareholder of Creekworks Ltd.

[6] On October 4, 2016, the Board acknowledged receipt of the appeal and notified the Director of the appeal. The Board also requested the Director provide the Board with a copy of the record (the "Record") relating to the Administrative Penalty. The Record was received on November 4, 2016, and was subsequently provided to the Appellants.

[7] On December 22, 2016, the Board confirmed the hearing would be held on February 15, 2017.

[8] On January 12, 2017, the Board stated the issues for the hearing as follows:

1. Was the Administrative Penalty properly issued? In determining whether the Administrative Penalty was properly issued, the Board will among other matters be considering:
  - (a) Whether the Appellant was duly diligent, meaning he took all the reasonable steps to comply with the legal requirements in undertaking the activities in Lees Creek;
  - (b) Whether any government officials officially induced an error on the part of the Appellant, meaning whether the Appellant was misled or not provided enough information about what the legal requirements were to undertake the activities on Lees Creek; and
  - (c) Whether the process the Director followed in issuing the Administrative Penalty was fair, meaning [whether] it complied with the principles of natural justice and procedural fairness?
2. Are the Adjustment Factors for the Administrative Penalty properly applied?

[9] The Director and Appellants (collectively, the "Parties") provided their written submissions for the hearing on February 1, 2017.

[10] On February 8, 2017, the Board noted clarifications of correspondence dates referred to in the Director's Decision dated August 31, 2017, which was attached to the Administrative Penalty. All of the correspondence was found in the Record.

[11] The hearing was held on February 15, 2017, in Calgary, Alberta, before a panel of three members of the Board.

### III. PRELIMINARY MATTERS

[12] The Board appreciated the submissions and evidence presented at the hearing of this appeal by both parties. The Board in particular notes the Appellant's participation in the hearing and the effective presentation of his evidence as an unrepresented Appellant.

[13] Mr. Atkins came across as a truthful and forthright witness. He believed he was doing the right thing by reinforcing the slopes along Lees Creek to prevent further damage to his property from potential future flood events. Mr. Atkins was aware he required a regulatory approval to conduct an activity in a waterbody, and he did apply for and obtain an approval for the project, albeit after the work that led to the Administrative Penalty was essentially done. The evidence showed that work was done in an environmentally responsible manner given few changes had to be made to the approach with which the work was undertaken after the approval was obtained.

[14] Mr. Atkins did not attempt to conduct the activity in an evasive manner. In fact, he invited representatives from AEP and the federal Department of Fisheries and Oceans to attend at the site prior to and while the work was being done. Nevertheless, Mr. Atkins did conduct this work without first obtaining the requisite *Water Act* approval. His evidence demonstrated a misunderstanding on his part of the requirements of the *Water Act* vis-à-vis a landowner's legal rights to carry on activities on his own land and recover one's property following an avulsion.<sup>4</sup>

[15] Respectfully, the *Water Act* clearly requires that approval be obtained before work is done near a water body where the work has the potential to negatively impact the water body, regardless of land ownership.

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<sup>4</sup> See: *The Concise Oxford Dictionary*, 8<sup>th</sup> ed., s.v. "avulsion."

"Avulsion" is defined as:

"[The] sudden removal of land by a flood etc. to another person's estate."

#### **IV. SUBMISSIONS**

##### **A. Appellants**

[16] The Appellants believed they had the right to replace soil lost by extraordinary events within the boundaries of their title and to prevent future loss by making the edge of the property more permanent.

[17] The Appellants said they had discussions with the Senior Land Research Analyst from Alberta Sustainable Resource Development (“SRD”),<sup>5</sup> and explained the development plans. The Appellants said the Analyst sent an email outlining a discussion on landowner’s rights adjacent to a water body. The Appellants took this information and their own belief in ownership rights as permission to allow them to proceed with restoration work on the lands provided the work did not displace or enter the water.

[18] The Appellants stated that, based on the various conversations they had with government departments and the emergency applications they had made to do work in the water, they understood they would only require a *Water Act* approval if they were going to construct displacement damming or conduct activities in Lees Creek.

[19] The Appellants believed they were doing the right thing and were following all the rules.

[20] The Appellants stated, after the offence was committed, they were more careful and followed all the regulatory requirements and restrictions. The Appellants explained the application for an approval was nearly complete and the planned mitigation proposal was completed and being circulated for comment prior to the work they did on their dry land.

[21] The Appellants accepted the Director’s assessment of the work as “moderate.” However, the Appellants did not agree with the Director’s definition of “infilling and re-sloping Lees Creek” since they were replacing lost material within the Appellant’s legal land boundary and protecting it from further damage.

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<sup>5</sup> Throughout the hearing the Appellants made reference to individuals employed by Alberta Sustainable Resource Development. In 2010, when the Appellants first proposed the project, there was a separate department of Sustainable Resource Development. In 2012, the departments of Sustainable Resource Development and Alberta Environment and Water (“AEW”) merged into Alberta Environment and Alberta Sustainable Resource Development. The Department is now called Alberta Environment and Parks (“AEP”). AEP now regulates public lands (formerly Alberta Sustainable Resource Development) and water (formerly Alberta Environment and Water).

[22] The Appellants disagreed with the Director's assessment of the potential for adverse effect as being "moderate." The Appellant said the earthwork was protected by an erosion fence, on their land, well removed from the water or water flow. The Appellants said the addition of rip rap would provide the necessary protection to ensure fish habitat would not be impacted from uncontrolled erosion during a high water event.

[23] The Appellants stated their actions were neither willful nor negligent.

[24] The Appellants said they believed they had the right to conduct activities aimed at protection, recovery, and mitigation within the boundaries of their property line and believed such work done did not require an approval. The Appellants said they proceeded to restore drainage by back sloping and installing rip rap. The Appellants stated there was an erosion fence at the bottom of the slope. The Appellants acknowledged the lower grade could become the edge of the bank during another 1-in-100 year flood event, but it was part of their land. The Appellant stated the *Water Act* definition of what is bed, bank, and shore is ambiguous, and the work done was interpreted by the Director as an infringement of the *Water Act*.

[25] The Appellants argued the Administrative Penalty was punitive, arbitrary, and appeared to punish someone trying to do the right thing. The Appellants believed they were mitigating lost property and essential infrastructure based on their understanding of their property rights, and the work was done on their property. The Appellants said they proceeded with all necessary precautions in place to protect the aquatic environment.

[26] The Appellants explained they were issued a stop work order before the Environmental Protection Officer ("EPO") met with them or inspected the work. The Appellants disagreed with the EPO's interpretation of the definition of activity or ownership of land and subsequent rights. The Appellants explained, by the time the EPO visited the site, most of the work was completed, including all the work at the toe inside the erosion fence. The Appellants said they ordered their contractors to stop work. However, the Appellants had the crew resume work later in the afternoon. All work stopped at the end of day on September 26, 2014. The Appellants said the work at the potential water level was completed days before the stop work order was given and, therefore, no potential harm could result from compacting soil 10 feet above a future flood level.

[27] The Appellants asked the Board to reverse the Administrative Penalty and replace it with a warning. The Appellants suggested AEP structure its regulatory process so that a facilitator be assigned to each applicant to guide the applicant through the complicated set of regulations under the *Water Act*.

**B. Director**

[28] The Director stated the Administrative Penalty was issued for conducting the infilling and re-sloping of the bank of Lees Creek on September 18, 2014, without a *Water Act* approval. The Director said the Appellants had received clear direction from AEP that a *Water Act* approval was required before conducting activities in Lees Creek.

[29] The Director submitted the Administrative Penalty was properly issued and the adjustment factors were properly and reasonably applied. The Director stated the Appellants did not establish a valid defence to the contravention such that the Administrative Penalty should be varied or reversed.

[30] The Director requested the Administrative Penalty be confirmed as issued.

[31] The Director noted Mr. Atkins is the sole director and shareholder of Creekworks Ltd. Lees Creek runs through the quarter-section owned by the Appellants.

[32] The Director provided the following history:

1. Lees Creek flooded in 2010, and the Appellants claimed they lost approximately 100 feet of their land due to the creek bank eroding;
2. The Appellants proposed to develop the bed and shore of Lees Creek to protect their lands from further erosion;
3. A Land Management Officer from SRD sent a letter to the Appellants on May 26, 2010, regarding the proposal and reviewing it for possible bed and shore issues;
4. On April 28, 2011, the Senior Land Research Analyst from SRD notified the Appellants' consultant that consent with respect to the location of the bank of Lees Creek was not required if there were no substantial changes to the surveyed plan;
5. In February 2012, the Senior Water Administration Officer from what is now known as AEP advised the Appellants that further federal authorization may be required due to the potential presence of the Rocky

Mountain Sculpin, a threatened species under the *Species at Risk Act*, S.C. 2002, c. 29, in Lees Creek;

6. In April 2013, the Senior Water Administration Officer notified the Appellants' consultant that prior approval under the *Water Act* was required for the placement of the proposed structures, and if work was conducted without any approval from the required agencies, even for temporary purposes, there would be "knowing" non-compliance with two provincial and two federal pieces of legislation;
7. The Senior Water Administration Officer conducted a site inspection on May 10, 2013, and notified the Appellants that placement of debris on the top of the bank as erosion protection would be considered an activity under the *Water Act*, which required an approval, and conducting the activity would be considered non-compliance with the *Water Act*;
8. On May 21, 2013, the Senior Land Research Analyst told the Appellants' consultant that regardless of whether the Crown bed and shore was affected by the erosion protection works, other approvals were still required, including under the *Water Act*;
9. On June 18, 2014, the Appellants notified AEP they needed to conduct emergency works in Lees Creek to stabilize a bank due to high water flow from precipitation occurring the previous week;
10. The EPO determined the bank stabilization work was not deemed to be an emergency under the AEP's definition and the Appellants would need to apply for a *Water Act* approval;
11. On September 18, 2014, an AEP Fisheries Biologist observed instream work occurring, and on September 23, 2014, he reported the unauthorized activity and instream work;
12. The EPO visited Lees Creek on September 26, 2014, and observed unauthorized instream works. She advised the Appellants that all work must stop immediately until a *Water Act* approval was obtained. Initially work stopped, but later in the afternoon the Appellants instructed the equipment operators to resume working. The EPO observed the equipment resume work in the creek and issued a water management order ("WMO") to the Appellants to stop the activity;
13. The EPO conducted a follow-up inspection with the Appellants on October 1, 2014, and informed them that they were under investigation for contravening the *Water Act*;
14. AEP's approvals team received the Appellants' *Water Act* application for Lees Creek Bank Stabilization on October 2, 2014;
15. AEP issued a Notice of Investigation to the Appellants on October 15, 2014; and

16. *Water Act* Approval No. 00355950-00-00 was issued to the Appellants on March 13, 2015, to place or construct works on Lees Creek. *Water Act* Approval No. 00355942-00-00 was issued to the Appellants on August 14, 2015, to remedy the potential for the infill to be eroded into the creek as sediment.

[33] The Director explained that during the investigation, it was confirmed the Appellants stopped work at Lees Creek the weekend of September 27, 2014. The Director said the Appellants' consultant confirmed he told the Appellants before September 18, 2014, that any activity in the watercourse required an approval, but the Appellants believed they were not working in the watercourse and continued the activity.

[34] The Director said he met with the Appellants to discuss the Preliminary Assessment of Administrative Penalty, and the Appellants indicated they believed they could conduct activities in Lees Creek based on correspondence they had received from SRD. The Director stated the Appellants confirmed they made a business decision to continue the activity for the remainder of the day after the water management order was issued to them on September 26, 2014.

[35] The Director stated the Appellants contravened section 36(1) of the *Water Act*.<sup>6</sup>

[36] The Director stated it is an offence, for which an administrative penalty may be issued, to commence or continue an activity except where an approval is issued or the activity is otherwise authorized under the *Water Act*.<sup>7</sup>

[37] The Director explained it is a two-step process for assessing the administrative penalty amount. First, the Director assesses the amount based on the Base Penalty Table found in section 5 of the *Water (Offences and Penalties) Regulation*, Alta Reg. A.R. 193/98 (the "*Regulation*"). Second, the Director may increase or decrease the base penalty amount by considering the adjustment factors.<sup>8</sup>

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<sup>6</sup> Section 36(1) of the *Water Act* provides:  
"Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act."

<sup>7</sup> Section 142(1)(h) of the *Water Act* states:  
"A person who ... commences or continues an activity except under an approval or as otherwise authorized by this Act ... is guilty of an offence."

<sup>8</sup> Section 5 of the *Water (Offences and Penalties) Regulation* provides:

[38] The Director explained the Regulation does not stipulate the increments by which the adjustment factors may be increased or decreased, but AEP has historically varied the factors by increments of \$500.00.

[39] The Director explained that, according to the AEP's Compliance Assurance Management Framework 2013, administrative penalties are issued to penalize the offender, deter future non-compliance, and are primarily educational in nature with a monetary penalty to reinforce the appropriate change in behaviour. The Director said that, in this case, he determined the Appellants contravened the *Water Act* and an administrative penalty was the appropriate enforcement response.

[40] The Director stated that, under common law, landowners whose lands are bordered or crossed by a water body have riparian rights to restore their lands after a flood event, but they are still required to obtain applicable authorizations to do work in or around that water body if what they are doing meets the definition of "activity" under the *Water Act*.

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"(1) Subject to subsections (2) and (3), the amount of an administrative penalty shall be the base penalty calculated by the Director in accordance with the following Table:

	Type of Contravention			
		Major	Moderate	Minor
Potential for Adverse Effect	Major	\$5000	\$3500	\$2500
	Moderate	\$3500	\$2500	\$1500
	Minor	\$2500	\$1500	\$1000

(2) Subject to section 169(3)(f) of the Act, the Director may increase or decrease the amount of the administrative penalty from the amount set out in the Base Penalty Table on considering the following factors:

- (a) the importance to the regulatory scheme of compliance with the provision;
- (b) the degree of wilfulness or negligence in the contravention;
- (c) whether or not there was any mitigation relating to the contravention;
- (d) whether or not steps have been taken to prevent reoccurrence of the contravention;
- (e) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
- (f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention;
- (g) any other factors that, in the opinion of the Director, are relevant.

(3) If a contravention of a provision listed in the Schedule occurs or continues, the person who commits the contravention is liable for an administrative penalty for each day or part of a day on which the contravention occurs or continues.

(4) In accordance with section 169(3)(f) of the Act, the maximum administrative penalty that may be charged in respect of each contravention is \$5000."

[41] The Director noted the definition of “activity” under the *Water Act*.<sup>9</sup> He said “activity” includes altering the flow, direction, or level of water for the purposes of flood or erosion control.

[42] The Director stated an activity includes actions in or on any land, water, or water body that may cause erosion of the bed and shore and may cause an effect on the aquatic environment.

[43] The Director said the Appellants’ activities were not limited to dry land, and activities occurred in the creek and surrounding land that may impact fish habitat and may cause erosion of the creek bank.

[44] The Director stated the Appellants’ actions clearly fall within the definition of activity under the *Water Act*, and the Director’s assessment that a contravention occurred was reasonable and appropriate.

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<sup>9</sup> Section 1(1)(b) of the *Water Act* defines “activity” as:

- “(i) placing, constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material, or carrying out any undertaking, including but not limited to groundwater exploration, in or on any land, water or water body, that
  - (A) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage,
  - (B) changes, may change or may become capable of changing the location of water or the direction of flow of water, including water in a water body, by drainage or otherwise,
  - (C) causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body, or
  - (D) causes, may cause or may become capable of causing an effect on the aquatic environment;
- (ii) altering the flow, direction of flow or level of water or changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose; ...

but does not include an activity described in subclause (i) or (ii) that is conducted by a licensee in a works that is owned by the licensee, unless specified in the regulations....”

Section 1(1)(ggg) of the *Water Act* defines “water body” as:

“... any location where water flows or is present, whether or not the flow or the presence of water is continuous, intermittent or occurs only during a flood, and includes but is not limited to wetlands and aquifers but does not include except for clause (nn) and section 99 ‘water body’ that is part of an irrigation works if the irrigation works is subject to a licence and the irrigation works is owned by the licensee, unless the regulations specify that the location is included in the definition of water body....”

[45] The Director explained the base penalty for the count is made up of two factors: the type of contravention and the potential for adverse effect. The Director explained that, in this case, he assessed the type of contravention as “moderate” because it was an unauthorized activity where an approval would have likely been issued. The Director said he assessed the potential for adverse effect as “moderate” given the potential for the fill material to cause localized erosion and moderate effects on water quality in a fish bearing creek.

[46] The Director submitted the assessment did not require him to prove that actual adverse effect occurred, only that he was satisfied there was a potential for adverse effect. The Director noted the activity on September 18, 2014, occurred during the restricted activity period (“RAP”), which has a higher likelihood of actually causing an adverse effect on fish in the creek and the aquatic environment. The Director stated the assessment of moderate potential for adverse effect was reasonable and appropriate.

[47] The Director calculated the base penalty at \$2,500.00 based on a moderate contravention type and a moderate potential for adverse effect in the Base Penalty Table.

[48] The Director said he increased Adjustment Factor (a), the importance to the regulatory scheme of compliance, by \$1,500.00, and Adjustment Factor (b), the degree of wilfulness or negligence in the contravention, by \$1,000.00. Adding these adjustments to the base penalty resulted in a total Administrative Penalty of \$5,000.00, the daily maximum allowed under the *Regulation*.

[49] The Director explained the defence of due diligence is codified in the *Water Act*. It provides that a person shall not be convicted of a strict liability offence if that person establishes, on a balance of probabilities, the person took all reasonable steps to prevent its commission.<sup>10</sup> The Director stated he considered whether the defence of due diligence could be made before he issued the Administrative Penalty.

[50] The Director submitted the Appellants did not provide any evidence to show they had taken all reasonable steps to prevent the contravention from occurring. The Director noted

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<sup>10</sup> Section 143(4) of the *Water Act* states:

“A person shall not be convicted of an offence referred to in subsection (2) if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.”

the Appellants were told on multiple occasions the proposed erosion protection activity on Lees Creek required approval under the *Water Act*, but they did not take any reasonable steps to follow up with AEP staff for further information. The Director submitted the Appellants either did not read the correspondence fully or misinterpreted the correspondence.

[51] The Director argued that a reasonable person would not have started the infilling and re-sloping of the bank of Lees Creek when they should have known an approval was required, and a reasonable person would not have continued the unauthorized activity after being told to stop.

[52] The Director submitted the Appellants did not meet the onus of establishing the defence of due diligence.

[53] The Director explained the doctrine of “officially induced error” provides a defence when the accused shows evidence he was induced by government officials into believing that his conduct was legal.

[54] The Director stated the test for officially induced error, as described in the Supreme Court of Canada decision of *Levis v. Tetreault*,<sup>11</sup> requires the accused person to meet all of the following six elements in order to benefit from the defence:

1. that an error of law or mixed law and fact was made;
2. the person who committed the act considered the legal consequences of his or her actions;
3. the advice obtained came from an appropriate official;
4. the advice was reasonable;
5. the advice was erroneous; and
6. the person relied on the advice in committing the act.

[55] The Director stated the Appellants did not meet the test for officially induced error because the advice provided was not erroneous. The Director said the Appellants did not follow the advice of AEP officials to obtain a *Water Act* approval prior to conducting the proposed activities in Lees Creek.

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<sup>11</sup> See: *Levis v. Tetreault*, [2006] 1 SCR 420.

[56] The Director submitted the process for issuing the Administrative Penalty met the administrative law requirements of fairness. The Director explained the requirements of procedural fairness have been incorporated into the decision-making process. The Director said the following steps must occur before a decision is made:

1. the subject knows the case against it;
2. the statutory decision-maker heard the evidence and submissions from the investigation staff and the response received from the subject of the enforcement;
3. the subject had the opportunity to review and challenge all evidence and make submissions to the statutory decision-maker;
4. the statutory decision-maker was satisfied of the facts surrounding the non-compliance; and
5. the statutory decision-maker ensured he had jurisdiction over the matter.

[57] The Director stated that, as the statutory decision-maker, he has the jurisdiction under the *Water Act* to issue the Administrative Penalty. The Director noted the Appellants knew by October 1, 2014, that they were being investigated as a result of the unauthorized activities. The Appellants were provided with the Preliminary Assessment of Administrative Penalty, totaling \$4,500.00, to review the evidence, and the Appellants were given the opportunity to challenge the evidence and make submissions. The Director said he considered the Appellants' submissions and all relevant information in the investigation file and provided his reasons for issuing the Administrative Penalty. The Director submitted he complied with all the principles of procedural fairness required of him as a statutory decision maker.

[58] The Director stated he determined Adjustment Factor (a), the importance of compliance with the regulatory scheme, should add \$1,500.00, an increase of \$500.00 over the Preliminary Assessment, to the Administrative Penalty base amount.

[59] The Director explained this amount reflected the importance to the overall regulatory scheme is greater where the activity is conducted during the RAP for fish and aquatic environment and where the water body is known to have a threatened species, compared to a water body without threatened species.

[60] The Director explained the Adjustment Factor is not limited to actual harm. The Director explained Adjustment Factor (a) is intended to show certain provisions in the legislation

are considered very important to the overall regulatory scheme, such as commencing an activity without an approval. The Director said that without an approval, the regulator would have no way of knowing that an activity had occurred, unless a public complaint was made, had no opportunity to review the proposal for potential impacts, and could not include terms and conditions in an approval to mitigate impacts. The Director stated that, given the activity occurred in a creek situated on private land, it is more important for compliance because the Director would not have staff regularly checking the creek.

[61] The Director explained he determined Adjustment Factor (b), degree of wilfulness or negligence in the contravention, should add \$1,000.00 to the Administrative Penalty.

[62] The Director stated he considered the Appellants or their consultant were aware of the requirement to obtain a *Water Act* approval for the activities, and the Appellants initially refused to cease working in the creek even after a WMO was issued.

[63] The Director noted AEP advised the Appellants on numerous occasions that a *Water Act* approval was required prior to starting the activity. The Director stated the Appellants knew there were regulatory requirements that had to be met, and they did not have an approval on September 18, 2014, when the activity took place.

[64] The Director stated the Administrative Penalty was issued for the activity of infilling and re-sloping the bank of Lees Creek, not for other activities such as placing materials (i.e. rip rap) on the banks.

[65] The Director said there was no evidence the full application for the approval was nearly completed and ready to provide to various authorities. The Director said an application does not authorize the activity.

[66] The Director said he used his discretion to increase the Administrative Penalty by Adjustment Factors (a) and (b), he considered all relevant evidence, and applied the factors reasonably and appropriately.

[67] The Director requested the Administrative Penalty be confirmed.

## V. ANALYSIS

[68] Under section 98 of the *Environmental Protection and Enhancement Act*, R.S.A 2000, c. E-12 (“EPEA”), the Board is the final decision maker with respect to appeals of administrative penalties.<sup>12</sup> The issues before the Board in this appeal were:

1. Was the Administrative Penalty properly issued? In determining whether the Administrative Penalty was properly issued, the Board will among other matters be considering:
  - (a) Whether the Appellant was duly diligent, meaning he took all the reasonable steps to comply with the legal requirements in undertaking the activities in Lees Creek;
  - (b) Whether any government officials officially induced an error on the part of the Appellant, meaning whether the Appellant was misled or not provided enough information about what the legal requirements were to undertake the activities on Lees Creek; and
  - (c) Whether the process the Director followed in issuing the Administrative Penalty was fair, meaning [whether] it complied with the principles of natural justice and procedural fairness?
2. Are the Adjustment Factors for the Administrative Penalty properly applied?

### A. Was the Administrative Penalty Properly Issued?

[69] The Appellants conceded they undertook work that led to the Administrative Penalty - they did not “act.” However, they argued the work they undertook was not an activity requiring an approval under the *Water Act*. First, they argued they did work only on their own land and the definition of bed, bank, and shore in the *Water Act* is ambiguous, such that an approval should only be required if work was done in the water, which it was not. Further, they argued they had defences to the Administrative Penalty: (1) they were duly diligent; (2) the

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<sup>12</sup> Section 98 of EPEA provides:

- “(1) In the case of a notice of appeal submitted under section 91(1)(n) or (o) of this Act or a notice of appeal submitted under section 115(1)(j), (l) or (q) of the *Water Act*, the Board shall, within 30 days after the completion of the hearing of the appeal, make a written decision on the matter.
- (2) In its decision, the Board may
  - (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and

government officially induced an error; and (3) the Administrative Penalty process may have been unfair.

[70] As a result, the Appellants requested the Administrative Penalty be reversed and a warning letter be issued in its place. Further, they argued that AEP should modify its process to provide for a “one stop” advisor to help people work their way through the regulatory process.

[71] Respectfully, as the Board has stated, the *Water Act* is clear. The work done by the Appellants was an activity under the *Water Act* for which an approval was required before the work was conducted. It is irrelevant the work was conducted on private land. What is relevant is the work was conducted near a water body and the work had the potential to negatively impact the water body.

[72] Therefore, notwithstanding the good intentions of Mr. Atkins, the Board finds the Appellants committed an offence under the *Water Act*, and the Administrative Penalty is the appropriate enforcement response. As is discussed below, none of the defences raised by the Appellants overcome the offence. However, the Board finds, for reasons discussed below, the Administrative Penalty should be varied by lowering the amount assessed.

1. Due Diligence

[73] Due diligence is a defence that can be used for some offences.<sup>13</sup> The Director said he considered whether due diligence applied prior to issuing the Administrative Penalty and found it was not applicable given the circumstances of this case. Due diligence for the purposes of this offence requires the Appellants to provide evidence that establishes, on the balance of probabilities as opposed to beyond a reasonable doubt, that they took all reasonable steps to prevent conducting the activity in question without the requisite *Water Act* approval.

[74] The Appellants in this case are educated and well-versed in project approval requirements when developing and starting projects, although they may not have had experience in projects adjacent to or in water bodies or water courses. They were aware different approvals

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(b) make any further order the Board considers necessary for the purposes of carrying out the decision....”

<sup>13</sup> See: Section 3 of the *Water (Offences and Penalties) Regulation*:

“A person shall not be convicted of an offence referred to in section 2(1) or (2) if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its

were required for different projects and it is incumbent on them to determine all approval requirements. The Board notes the Appellants expressed confusion as to which regulatory agency was responsible for different aspects of the work adjacent to and in a water body. The Board is aware that, from 2010 until April 29, 2013, all contact between the Appellants and their consultants and the Alberta Government was with Public Lands (SRD), who did not provide specific instruction to the Appellants that the primary approval agency at the time was AEW. The Appellants also had contacted the federal Department of Fisheries and Oceans. The Appellants relied on a May 21, 2013 letter from SRD to support their argument that they had the right to conduct work on their property, providing they did not enter the actual water body. This letter was intended to clarify the Appellants remained owners of the lands up to the pre-flood boundary (prior to avulsion occurring). It stated “the courts have determined that a riparian owner who has lost land to such an event has a right to rebuild his land to its pre-event boundary...”<sup>14</sup> The letter concluded with the reminder: “Regardless of whether Crown bed and shore is affected by the erosion control works, all the other approvals are still required ... approvals under the Water Act, the Federal government’s Fisheries Act, etc.”<sup>15</sup> A reasonable, prudent person would have made further inquiries to determine whether and what additional approvals were required prior to conducting the activity.

[75] The Board also notes, however, that by early May 2013, AEW was in direct contact with the Appellants and their consultant and the requirement for an approval under the *Water Act* had been explicitly stated.

[76] The Appellants did not bring any evidence forward to demonstrate they took every step a reasonably prudent person would have taken before starting the activity. The Appellants had retained a consultant who should have been able to provide the Appellants with information regarding all regulatory approval requirements. According to the Director, the consultant told the Appellants that an approval was required. The Appellants acknowledged they were ultimately responsible for the project and decided to proceed with the work without an approval. These actions of the Appellants do not support the defence of due diligence, and no

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commission.”

<sup>14</sup> Director’s Record, Tab 32, May 21, 2013 Letter from Jake Bureyko, from what is now AEP.

<sup>15</sup> Director’s Record, Tab 32, May 21, 2013 letter from Jake Bureyko, from what is now AEP.

evidence was submitted by the Appellants to demonstrate they were duly diligent. Accordingly, the Appellants are not able to avail themselves of the protection provided by section 3 of the *Regulation*.

2. Officially Induced Error

[77] The Appellants did not bring evidence forward that would support the defence of officially induced error. In order for the defence to apply, the Appellants must demonstrate all of the following steps:

1. that an error of law or mixed law and fact was made;
2. the person who committed the act considered the legal consequences of his or her actions;
3. the advice obtained came from an appropriate official;
4. the advice was reasonable;
5. the advice was erroneous; and
6. the person relied on the advice in committing the act.

[78] The advice obtained from AEP staff in this case was not erroneous. An approval was required to conduct an activity adjacent to a water body regardless of its location on public or private land. All of the communications to the Appellants from AEP, SRD, and the Department of Fisheries and Oceans stated an approval was, in all likelihood, required for the project. The description of what can be done on a landowner's property that has been affected by an avulsion was correct.

[79] The Appellants did not provide the evidence needed to show there was an officially induced error. The Appellants chose not to follow the advice provided and chose instead to rely on their interpretation of a landowner's rights, ignoring the requirements of the *Water Act*.

3. Fairness

[80] The Board reviewed the steps taken by the Director prior to issuing the Administrative Penalty and determined the process was procedurally fair.

[81] According to the Record and the evidence provided, the Director clearly indicated to the Appellants that they were being investigated for non-compliance with the *Water Act*. The

Director reviewed all the information available to him, including investigator's reports and evidence provided by other witnesses. The Appellants were given the opportunity to review the information in front of the Director and to respond to the Preliminary Assessment of Administrative Penalty document at a meeting held on August 3, 2016, with the Director prior to the issuance of the Administrative Penalty on August 31, 2016. The outcome of the meeting was a \$500.00 increase to the Administrative Penalty.

[82] At the hearing, the Appellants stated they had no issue with the process. They understood the reasoning behind the Director's decision, but they still disagreed with the interpretation on the applicability of the *Water Act* when it comes to their understanding of landowner's rights.

[83] The Board found the procedure followed by the Director was fair as the Appellants knew the case against them and were given the opportunity to respond to the information used as the basis for the Director's decision to issue the Administrative Penalty.

#### 4. Summary

[84] The Board finds the Administrative Penalty was properly issued. The Appellants did not provide evidence to show they were duly diligent and they did not provide evidence to prove there was an officially induced error. Finally, the Director's process was fair to the Appellants.

### **B. Amount of the Administrative Penalty**

[85] As noted in the Compliance Assurance Framework issued by AEP, administrative penalties are issued to penalize the offender and to deter future non-compliance of the offender and others. The penalty is issued to reinforce an appropriate change in behaviour.<sup>16</sup>

[86] As stated in the Alberta Court of Appeal decision, *R. v. Terroco Industries Limited*:<sup>17</sup>

“The penalty imposed should also have a deterrent effect on others in the industry who may risk offending .... The starting point for sentencing a corporate offender

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<sup>16</sup> See: Alberta Environment, *Alberta Environment – Compliance Assurance Framework* (2005).

<sup>17</sup> See: *R. v. Terroco Industries Limited*, 2005 ABCA 141.

must be such that the fine imposed appears to be more than a licensing fee for illegal activity or the cost of doing business.”<sup>18</sup>

1. Base Penalty

[87] When determining the administrative penalty that will be assessed, the Director refers to the Base Penalty Table included in the *Regulation*.<sup>19</sup> In using this table, the Director looks at the type of contravention being investigated and the potential for an adverse effect. These two parameters are assessed as to whether each is minor, moderate, or major. Based on this assessment, the Director has a starting point to calculate the penalty based on the table in section 5 of the *Regulation*.

[88] In this case, the Director issued the Administrative Penalty in respect to one count and assessed it as a moderate type of contravention with a moderate potential for an adverse effect. Based on the table in section 5 of the *Regulation*, the base penalty was assessed at \$2,500.00. The Director stated it was assessed as a moderate type of contravention because the Appellants conducted an activity without an approval, but an approval could have been obtained for the activity had the Appellants applied for an approval.

[89] As stated, it is clear an activity occurred. The Appellants were disturbing the bank and bed of Lees Creek. Although the Appellants argued the work was only being done on their private land, the definition of activity includes the bed, bank, and shore of a water body or water course. The bed, bank, and shore do not have to be owned by the Crown to fall within the definition. Further, pictures presented at the hearing show erosion control fences at the edge of Lees Creek on the bank adjacent to the bed. (See: Appendix A). Water was present in the work area between the bank and bed, clearly indicating work was in progress on the bank. Based on

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<sup>18</sup> *R. v. Terroco Industries Limited*, 2005 ABCA 141, at paragraph 60.

<sup>19</sup> Section 5(1) of the *Water (Offences and Penalties) Regulation* states:

“Subject to subsections (2), (3) and (4), the amount of an administrative penalty for each contravention that occurs or continues is the amount set out in the Base Penalty Table but that amount may be increased or decreased by the Director in accordance with subsection (2):

	Type of Contravention			
		Major	Moderate	Minor
Potential for Adverse Effect	Major	\$5000	\$3500	\$2500
	Moderate	\$3500	\$2500	\$1500
	Minor	\$2500	\$1500	\$1000

the definition of an activity in section 1(1)(b) of the *Water Act* and given the Appellants were conducting the activity without an approval, the offence did occur. As discussed, one of the cornerstones of the regulatory process is the requirement of applying for and obtaining the requisite approvals for specific projects. This allows the Director to review the project to determine if there will be any negative effects on the environment and the steps that can be taken to ensure any such effects are properly mitigated. The approval process provides guidance to a project proponent to ensure environmental impacts are minimized and to know what actions need to be taken to comply with the regulation.

[90] The Board accepts classifying the offence as a moderate type of offence given the importance of obtaining an approval prior to starting an activity and recognizing an approval could have been obtained for the project had the Appellants submitted an application. The Board notes an approval was issued after the date of the offence.

[91] The Director assessed the potential for an adverse effect as moderate because the Appellants were operating during a RAP, there was a potential for sediments to enter the water body, and a species at risk were known to be in Lees Creek.

[92] The Appellants explained their intent was to place material on their property to prevent potential erosion from future flood events. The Appellants took necessary steps to limit the risk of sediment entering Lees Creek by placing erosion control barriers at the edge of the work area on their property and by properly compacting the clay material being used to reconstruct the bank. The work was done in a manner that required little adjustment when an approval was subsequently obtained for the project.

[93] In assessing impacts, there does not have to be actual impacts. The issue is whether there are “potential” impacts. The Director is not looking at mitigation strategies being undertaken. It is the actual “doing” of the offence that is considered by the Director, and in this case, the offence is conducting an activity without an approval.

[94] The Director considered the potential for an adverse effect as moderate, but the Board believes the potential for an adverse effect was minor for the following reasons:

- (i) the bank material prior to placement of the clay material was comprised of loam and silt as well as the contents of an old garbage dump, all much more highly erodible than compacted clay;
- (ii) the main channel of the creek was approximately 40 metres from the location of the work;
- (iii) no flowing water appeared in the area abutting the construction so the presence of fish was unlikely;
- (iv) the likelihood of a high flow event within the period in which the work was undertaken was highly unlikely; and
- (v) the work area was quite small, about 147 metres long by five metres wide.

[95] The work was done in an environmentally appropriate manner by retaining consultants with experience working in water courses and installing erosion control fences, and there was little likelihood fish were present in the construction area at the time. However, the Appellants did conduct an activity within the RAP without an approval. While the potential to negatively impact the aquatic environment was remote, the Director could not be certain the work would be conducted in an environmentally responsible manner without the assurance of specific conditions that would normally be found in a *Water Act* approval.

[96] Therefore, the Board adjusts the base penalty to minor potential for an adverse effect and moderate for the type of offence. Based on the table in section 3(1) of the *Regulation*, the base penalty is reduced from \$2,500.00 to \$1,500.00.

## 2. Adjustment Factors

[97] The *Regulation* lists the factors the Director can consider to reduce or increase the base penalty. In determining if adjustments should be made to the base penalty, the Director considered the following Adjustment Factors:

- (a) the importance to the regulatory scheme of compliance with the provision;
- (b) the degree of wilfulness or negligence in the contravention;
- (c) whether or not there was any mitigation relating to the contravention;
- (d) whether or not steps have been taken to prevent recurrence of the contravention;
- (e) whether or not the person who receives the notice of the administrative penalty has a history of non-compliance;

- (f) whether or not the person who receives the notice of the administrative penalty has derived any economic benefit from the contravention;
- (g) any other factors that, in the opinion of the Director, are relevant.

[98] In this case, the Director assessed an additional penalty of \$1,500.00 under Adjustment Factor (a) and \$1,000.00 under Adjustment Factor (b). Section 5(4) of the *Regulation* imposes a limit of \$5,000.00 for each count.<sup>20</sup>

[99] Adjustment Factor (a) was assessed at \$1500.00 because the activity was being done during a RAP, the Director was not able to review the proposed project before the activity started, and there was a potential impact on the aquatic environment and, in this case, a species at risk (Rocky Mountain Sculpin).

[100] The RAP for Lees Creek extends from September 1 to August 15, leaving only a two week period in which any work in the creek could be completed without possibly more stringent requirements in place. The Appellants conducted the activity on September 18, 2016, 18 days into the RAP. The RAP is in place for a specific reason for a specified period of time. The Director does not set the RAP but rather, it is fish experts who determine the periods of time when fish or their habitat are most susceptible to environmental impacts. Neither the Board nor the Director has the authority to question the existence of the RAP. Photographs of the area showed very little water (no flowing water) in Lees Creek in the area where the work was being done, but this does not preclude the fact the RAP was contravened.

[101] The RAP applies to a specific stream regardless of whether fish species are present at a particular time or location or not. Even though there may not have been enough water in the creek at the time to support fish, the RAP applies and work cannot be done in Lees Creek during the RAP without specific conditions in place to ensure protection of the aquatic environment. It is the Director's obligation to ensure the RAP for specific water courses is followed to protect fish species, usually by including conditions in the approval. If the Appellants had received an approval before starting the work, they would have been aware of the

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<sup>20</sup> Section 5(4) of the *Water (Offences and Penalties) Regulation* provides:

“In accordance with section 169(3)(f) of the Act, the maximum administrative penalty that may be charged in respect of each contravention is \$5000.”

RAP relevant to Lees Creek. It was even more critical to adhere to the RAP in this waterbody given the existence of a species at risk.

[102] The Appellants stated the work was well removed from the water and water flow of Lees Creek. Photographs provided at the hearing showed non-flowing water in the area where the Appellants were working. While the Appellants were working potentially in the bed of Lees Creek, this work was located within the boundary of the Appellants' private lands. While respecting the RAP is very important, in the circumstances of this case, it was highly unlikely fish or fish habitat could be impacted. Therefore, the Board reduces Adjustment Factor (a) from \$1,500.00 to \$500.00.

[103] The Director added \$1,000.00 to the Administrative Penalty under Adjustment Factor (b). The Director found the Appellants were aware that a *Water Act* approval was required, and they continued work on the site even after they were told to stop.

[104] According to witness statements provided as part of the investigation, work on the site continued after the EPO issued the stop work order (WMO). In response to questions from the Board at the hearing, the Appellants stated that work needed to be continued at the site, after they were told to stop, in order to ensure the site was appropriately compacted, such that a significant rain event would not result in erosion of clay sediment material into Lees Creek. In the Board's view this was a mitigative action that was intended to protect Lees Creek from unexpected weather events and unintended erosion of sediment. The Board recognizes this as not only a prudent step but a necessary step to take. It was unfortunate the reasoning for the contractor's actions was not communicated by the Appellants to the EPO, but the departure of the EPO prior to the completion of the work may have played a role in this lack of communication and subsequent misunderstanding.

[105] The Appellants were told on numerous occasions that an approval was required, but they chose not to heed the advice, believing their landowner rights surpassed the legislative requirement of applying for and obtaining an approval. The Director cited one reason for imposing the \$1,000.00 additional penalty under Adjustment Factor (b) for continuing to work after the stop work order was issued. By this time, the EPO was aware of the reasons for the contractor continuing work on that occasion, but whether that information was conveyed to the

Director is unknown. The contractor's reasons for resuming work were defensible and protective of the environment and should not have been interpreted as an act of defiance.

[106] These considerations warrant an Adjustment Factor being added to the base penalty. However, given the work done after the WMO was issued was a prudent step to prevent possible erosion and to protect the aquatic environment, the Board reduces the penalty amount for Adjustment Factor (b) from \$1,000.00 to \$500.00.

### 3. Summary

[107] Therefore, the Board reduces the penalty amounts for Adjustment Factors (a) and (b) to \$500.00 each. The remaining factors remain at neutral.

[108] Based on the above, the Administrative Penalty is varied as follows:

Base Penalty: \$1,500.00

Adjustment Factor (a): \$500.00

Adjustment Factor (b): \$500.00

Total Administrative Penalty: \$2,500.00

## **VI. CONCLUSION**

[109] Based on the submissions and evidence provided, the Board varies the Administrative Penalty.

[110] The Board determines the Administrative Penalty is varied as follows:

Base Penalty: \$1,500.00

Adjustment Factor (a): \$500.00

Adjustment Factor (b): \$500.00

Total Administrative Penalty: \$2,500.00

[111] Pursuant to section 98 of EPEA, a copy of this decision is to be provided to:

1. Mr. Gordon Atkins and Creekworks Ltd.; and
2. Ms. Jade Vo, Alberta Justice and Solicitor General, on behalf of the Director, South Saskatchewan Region, Alberta Environment and Parks.

## VII. ORDER OF THE BOARD

[112] In accordance with section 98(2) of EPEA, the Board has the authority to confirm, reverse or vary the decision of the Director.<sup>21</sup> With respect to the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks to issue Administrative Penalty No. 16/02-AP-SSR-16/04 to Mr. Gordon Atkins and Creekworks Ltd. for contravention of section 36(1) of the *Water Act*, the Board orders the decision to issue the Administrative Penalty be varied as follows:

1. That the administrative penalty total \$2,500.00.
2. That the administrative penalty described above is payable in accordance with the legislation.

Dated on March 17, 2017, at Edmonton, Alberta.

- original signed -

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Alex MacWilliam  
Board Chair

- original signed -

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Jim Barlishen  
Board Member

- original signed -

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Meg Barker  
Board Member

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<sup>21</sup> Section 98(2) of the Act provides:

“In its decision, the Board may (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make ....”

Appendix A

Exhibit 2 – PowerPoint – Director’s Direct Evidence

