ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 23, 2018

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 Aurora Heights Management Ltd., Garry Will, and Ronald Henschel with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue Enforcement Order No. EO-2016/03-RDNSR under the *Water Act* to Aurora Heights Management Ltd., Garry Will, and Ronald Henschel.

Cite as: *Aurora Heights Management Ltd. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (23 November 2018), Appeal Nos. 16-049-051-ID1 (A.E.A.B.).

PRELIMINARY MOTIONS HEARING BEFORE:	Mr. Alex MacWilliam, Board Chair; Dr. Nick Tywoniuk, Board Member; and Ms. Anjum Mullick, Board Member.
Board Staff:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Mr. Andrew Bachelder, Board Counsel; and Ms. Valerie Myrmo, Registrar of Appeals.
SUBMISSIONS BY:	
Appellants:	Aurora Heights Management Ltd., Mr. Garry Will, and Mr. Ronald Henschel, represented by Ms. Gayle Langford, Langford Law Office.
Director:	Mr. Todd Aasen, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Michelle Williamson and Ms. Barbara Harnum, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

This decision relates to preliminary motions raised with respect to Enforcement Order No. WA-EO-2016/03-RDNSR (the EO), issued by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (AEP), to Aurora Heights Management Ltd., Mr. Garry Will, and Mr. Ronald Henschel (the Appellants) for the infilling of wetlands in the Town of Blackfalds.

The Appellants appealed the EO to the Environmental Appeals Board (the Board) and requested a stay of the EO.

The Board requested and received written submissions, and held an oral preliminary motions hearing to hear arguments on the following:

1. Should the Board maintain the stay with respect to the EO;
2. Any document production motions regarding the EO appeals;
3. The intervener application of the Town of Blackfalds (the Town) in the EO appeals; and
4. Whether the EO appeals (EAB Appeal Nos. 16-049, 16-050, and 16-051) should be consolidated with the approval application appeal (EAB 16-045).

After reviewing the evidence and considering the arguments submitted by the Appellants and AEP, the Board found there was insufficient evidence irreparable harm to the Appellants would occur if the stay was denied. Therefore, the Board denied the request for a continuation of the stay and lifted the temporary stay. Requests for documents not included in the Director's Record can be made through the Board or to the Director. The Board will continue to process the appeals and will make its determination on the preliminary motions relating to the involvement of the Town after comments have been received and reviewed in the ordinary course of the appeal process. If a mediation is held or if the matter proceeds to a hearing, the Board decided EAB Appeal No. 16-045 will be heard separately from EAB Appeal Nos. 16-049, 16-050, and 16-051. However, as the information from a mediation or hearing in one appeal could be duplicative of the other appeal, the Board will allow the parties to adopt the evidence from the first hearing or mediation for use in the second hearing or mediation. The Board will use the same Board member for both mediations, and the Board will use the same Board members for both hearings.

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I. INTRODUCTION

[1] This decision relates to preliminary motions raised with respect to Enforcement Order No. WA-EO-2016/03-RDNSR (the "EO") issued under the *Water Act*, R.S.A. 2000, c. W-5, by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director") to Aurora Heights Management Ltd. ("Aurora"), Mr. Garry Will, and Mr. Ronald Henschel (collectively, the "Appellants") for infilling of wetlands on lands located at SE 34-39-27 W4M and SW 35-39-27 W4M (the ''Lands") in the Town of Blackfalds (the "Town").

[2] The Appellants appealed the EO to the Environmental Appeals Board (the "Board") and requested the Board grant a stay of the EO. The Appellants also requested the Town be made a party to the appeals.

[3] The Board requested and received written submissions and held an oral preliminary motions hearing to hear arguments on the following:

1. Should the Board maintain the stay with respect to the EO;
2. Any document production motions regarding the EO appeals;
3. The intervener application of the Town in the EO appeals; and
4. Whether the EO appeals (EAB Appeal Nos. 16-049, 16-050, and 16-051) should be consolidated with the approval application appeal (EAB Appeal No. 16-045).[1]

II. BACKGROUND

[4] On January 15, 2014, the Appellants submitted an application for an approval under the *Water Act*, R.S.A. 2000, c. W-3, to construct a stormwater pond and remove a wetland. The application was for work on the Lands, which are within the boundaries of the Town.

[5] On December 16, 2016, the Director issued the EO, alleging the Appellants deposited a substantial amount of soil in the eastern portion of the wetland. The EO contained

[1] In EAB Appeal No. 16-045, the Appellant, Aurora Heights Management Ltd., alleged the Director failed to process a *Water Act* approval application, which the Appellant argued amounted to a deemed refusal. The appeal involves the same lands as EAB Appeal Nos. 16-049-051. In that appeal, the Board accepted the Appellant's argument that the approval application was deemed to be refused. The Board will proceed to schedule a mediation and, if necessary, a hearing in that appeal. See: *Aurora Heights Management Ltd.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (9 November 2018), Appeal No. 16-045-1D1 (A.E.A.B.).

multiple terms, including the requirement for the Appellants to submit a remedial plan to the Director, to remove the soils placed in the wetland and restore the wetland to its original size.

[6] On December 17, 2016, the Appellants submitted Notices of Appeal to the Board appealing the EO and requesting a stay of the EO.

[7] On December 23, 2016, in response to the Board's inquiry, the Director advised he would not consent to a stay of the EO, stating the proposed date of the remedial work was intentionally selected to occur during a time of year that would be the least damaging to the wetlands.

[8] On December 23, 2016, the Board acknowledged the position of the Director with respect to the stay and requested the Appellants submit a stay application.

[9] On January 9, 2017, the Appellants submitted an application to stay the EO until the hearing of the appeals was complete, and the Minister made her decision.

[10] On January 30, 2017, the Board granted a temporary stay of the EO and requested written submissions from the Director and the Appellants (collectively, the "Parties") regarding the issue of the stay application.

[11] On November 14, 2017, having received initial submissions, the Board set a date for a preliminary motions hearing. On November 29, 2017, the Board received supplemental submissions from the Parties regarding the application for a stay.

[12] On December 5, 2017, a preliminary motions hearing was held in Edmonton to address the following:

1. Should the Board maintain the stay with respect to the EO;
2. Any document production motions regarding the EO appeals;
3. The intervener application of the Town in the EO appeals; and
4. Whether the EO appeals (EAB Appeal Nos. 16-049, 16-050, and 16-051) should be consolidated with the approval application appeal (EAB Appeal No. 16-045).

[13] The Board asked the Parties to respond to the following questions with respect to the stay in their oral submissions at the preliminary motions hearing:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay? and
4. Would the overall public interest warrant a stay?

III. STAY

A. Submissions

1. Appellants

[14] The Appellants submitted there were serious legal and factual issues to be determined by the Board, and these issues impacted the Appellants, the Town, and adjacent landowners. The issues the Appellants identified included:

1. Are Ronald Henschel and Gary Will "directing minds" for the purpose of determining corporate director liability?
2. Are the actions the Director alleges the Appellants have committed tied to the Administrative Penalty No. WA-16-APRDNSA-16/03 issued by the Director for the unauthorized infilling of the wetland, and if so, does the *Kienapple Principle*[2] against multiple convictions apply?
3. Was the correct wetland policy applied in this case? [3]
4. Should the Board give consideration to the authority of the *Municipal Government Act*, R.S.A. 2000, c. M-26, and the relationship between the Town and the EO?
5. Are the timelines in the EO reasonable?

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[2] The Kienapple Principle was explained in *R.* v. *Wigman* (1987), 33 C.C.C. (3d) 97 at 103, as follows:

> "Multiple convictions are only precluded under the Kienapple principle (named after *R.* v. *Kienapple* (1974), [1975] 1 S.C.R. 729) if they arise from the same 'cause', 'manner', or 'delict', and if there is sufficient proximity between the offences charged."

[3] There are two wetland policies the Appellants allege may have been considered:

Wetland Management in the Settled Area of Alberta: An Interim Policy (1993), Alberta Environment and Parks (the "1993 Wetland Policy"); and *Alberta Wetland Policy* (2013), Alberta Environment and Parks (the "2013 Wetland Policy"). See Appellants' Stay Rebuttal Submission, February 16, 2017.

6. Does the Approvals Branch of Alberta Environment and Parks ("AEP") have the required authority and expertise to assess wetland impacts and alternatives?

7. What consideration should be paid to the Town's needs and opinions? and

8. Should EAB Appeal No. 16-045 and EAB Appeal Nos. 16-049, 16-050, and 16-051 be heard together?

[15] On the issue of whether the Appellants would suffer irreparable harm if the stay is refused, the Appellants stated the Courts have held irreparable injury must be of such a nature that no fair and reasonable redress may be had.

[16] The Appellants submitted if the application for a stay is denied by the Board, and later the Board finds the EO is of no force and effect, it would need to be determined whether there is a remedy against the Crown or the Director for costs that would have been incurred.

[17] In response to the third part of the test, whether the overall public interest warranted a stay, the Appellants submitted there are three issues which are relevant to considering the public interest:

(a) Is there an urgency to undertake the work in the EO because there will be further damage to the environment or adjacent properties if the stay is granted?

(b) Is the public interest as represented by the Town adversely affected by the stay?

(c) Is the public interest best served by having the wetlands and stormwater in urban settings managed through the AEP approvals process?

[18] The Appellants submitted it had been over two years since the wetland was partially infilled and based on the findings in a report from the Appellant's consultant, Stantec Consulting Ltd. ("Stantec"),[4] the risk of wetland flooding is less than it had been in its natural state. The Appellants argued this was proof there was no urgency that prevented a stay from being issued.

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4 The Appellants submitted a report dated January 9, 2017 from Stantec to Aurora regarding Aurora Heights Enforcement Order No. 2016/03-RDNSR-Issues Relating to Aurora Heights Management Ltd. Ability to Comply (the "Stantec Report"). The Stantec Report was filed as Appendix E of Aurora's Stay Application dated January 9, 2017.

[19] The Appellants stated there are a number of environmental concerns regarding the work proposed in the EO, and the work cannot reasonably be completed when the ground is frozen.

[20] The Appellants submitted in order to comply with the EO they would need to redesign the site plan, submit the amended plan to the Town for public consultation, and apply for rezoning of the land subject to the Town's Area Structure Plan. The Appellants noted the process could take six to eight months, and there was no certainty the Town's approval would be granted. The Appellants requested the Board provide direction with respect to what process should be undertaken if the Town refuses the amended plan, making it impossible for the Appellants to legally comply with the EO.

[21] The Appellants claimed the Town did not support the Director's remediation direction, and the direction was contrary to the Town's greater stormwater and wetlands plan.

[22] The Appellants submitted the Director should review and make recommendations for wetland management in consultation with municipalities and experts in water management.

[23] The Appellants stated the requirement for restoration of the vegetation and annual monitoring for two years as set out in the EO effectively means they are not permitted to apply for approvals related to the Lands until two years after the completion of the remediation.

[24] The Appellants submitted the balance of convenience favoured the stay, but if the stay was not granted, the Appellants requested an extension of the due dates in the EO. The Appellants requested the first timeline of the remediation plan be extended by six to eight months and an extension of the compliance timeline by 12 months after the submission of the remediation plan.

2. Director

[25] The Director submitted there were contraventions to the *Water Act*, and the EO was issued to address those contraventions, indicating serious issues to be heard by the Board.

[26] The Director stated the serious issues included:

1. Unauthorized works constructed without a *Water Act* approval;
2. Environmental impacts on the wetland as a result of the infilling; and
3. The 2013 Wetland Policy requirement that restoration occurs as outlined in the EO.

[27] On the issue of whether the Appellants would suffer irreparable harm if the stay is refused, the Director submitted the Board previously found it is the nature of the harm, not its magnitude, that is relevant for determining irreparable harm, and the harm must not be quantifiable monetarily. The Director also submitted the Board previously held the Appellant must show the risk of irreparable harm is real and not merely conjecture.

[28] The Director argued the Appellants did not prove there was a real risk of irreparable harm, or that reasonable redress would not be available. The Director stated the Appellants only provided general statements and concerns, and they did not demonstrate the development would be worse if the wetland was restored. The Director said the development might be more attractive to purchasers with the wetland in place.

[29] The Director explained 3.8 hectares of Class IV semi-permanent wetlands have been lost to the Appellants' unauthorized infilling. The Director said the ecological value of these wetlands cannot be quantified, and as long as the infilled portion remains, the ecology of the wetland would continue to suffer further degradation. The Director submitted further delay in the implementation of the EO would make the restoration less likely to succeed and potentially more expensive.

[30] The Director stated "if the Appellants did have to comply with the EO, and it were later overturned, the Appellants have potential remedies against the Director, by way of claiming damages civilly, or in any award of costs they may claim if they were successful on the appeal of the order to the Board, or the courts."[5] The Director noted while there are legal and procedural requirements to be met in order to take civil action against the Crown, "this should not mean that a stay application should always be denied on the basis that it *might be* more difficult to recover against the Crown."[6] (Emphasis in original.)

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5 Director's submission, dated February 9, 2017, at para. 23.

6 Director's submission, dated February 9, 2017, at para. 23.

[31] The Director submitted the question of whether the Town would have remedies against the Director was irrelevant as to whether a stay of the EO should be granted, as was the question of whether a Director might take additional enforcement actions after the Board's decision on the EO was made.

[32] The Director argued questions relating to the validity of the EO and any associated jurisdictional issues may have been applicable in a hearing on the merits but were not grounds for establishing irreparable harm.

[33] The Director noted the Appellants did not bring forward any evidence of financial or other damages the Appellants would suffer if a stay was not granted. The Director stated the Appellants' arguments were mere conjecture about damage, which is not sufficient to satisfy the stay test.

[34] With regard to the issue of whether the overall public interest warranted a stay, the Director stated the Board would have to balance the environmental impacts of the infill and the broader public interest, versus the benefits to be gained by the Appellants, and any inconvenience the Appellants may suffer, if the stay were not granted.

[35] The Director submitted whether the work identified in the EO complies with the Town's interest is not a consideration in the stay application.

[36] The Director stated he is under a statutory obligation to protect the public interest, which he does by exercising his authority to issue decisions pursuant to the *Water Act*. The Director submitted he satisfied the public interest component of the stay test by making such decisions.

[37] The Director noted the timelines in the EO were based on estimates provided by AEP staff with expertise in wetlands and aquatic ecology. The work outlined in the EO was designed to occur over the winter to reduce damage to the wetlands. The Director submitted the Appellants disagreed with the timelines because the Appellants disputed whether the remediation work should be done over the winter months. The Director said objections about the timelines are moot as the deadlines listed in the EO were now past. The Director stated he could consider extending the timelines, but the Appellants would have to request an extension and provide appropriate rationale. The Director said he would consider input from the Appellants when

establishing new dates for the EO.

[38] The Director submitted the Board does not have jurisdiction to unilaterally amend the deadlines in the EO on a stay application, and only following a hearing can the Board make a recommendation to the Minister that the terms and conditions of the EO be confirmed, reversed, or varied. The Director stated providing the Appellants with direction for dealing with the Town is outside the jurisdiction of the Board.

[39] The Director said it had been two and a half years since the contravention was first noted which made it more imperative the restoration be done during the winter season. The Director stated further delays would exacerbate the damage to the local environment, which supported the position the stay should not be granted.

[40] The Director suggested the delay in time between the Director first observing the filled wetland and the issuance of the EO could be a result of the Director's efforts to have the Lands voluntarily remediated, and not necessarily an indication of a lack of urgency.

[41] The Director noted the interim stay had been in place for ten months, and it was granted because the Director indicated he would not voluntarily consent to a stay.

[42] The Director cited the case of *R.* v. *Handel Transport (Northern) Ltd*., 2017 ABPC 97, which held remediation should be addressed promptly. Although the case referred to a matter under the *Environmental Protection and Enhancement Act* ("EPEA"), R.S.A. 2000, c. E-12, the Director argued it applied equally to *Water Act* matters as the powers delegated to the Director are essentially the same between the two Acts.

[43] The Director stated the Appellants' interests were based on private economic considerations, which should not outweigh public interests.

[44] The Director submitted the administrative penalty issued in this case is not a relevant consideration in this branch of the stay test. The Director stated none of the requirements in the EO are related to the administrative penalty process, but instead are focused on restoring the wetland to its pre-disturbance condition.

[45] The Director submitted a landowner's right to enjoy their property is not an unfettered right and is subject to compliance with the law.

[46] The Director argued the size of the wetland should be a matter for a hearing on the merits, not a matter to be heard in a stay application.

[47] The Director submitted the 3.45 hectare Class IV semi-permanent wetland that had been filled was not ecologically insignificant. The Director noted the infill represents only 1.1 to 2.2 percent of the total developable area in the future Aurora Heights community, a further reason for the Board not to grant the stay.

[48] The Director submitted the Appellants' continued non-compliance with the EO, along with continued damage to the wetlands, were factors, which should weigh in favour of not issuing a stay.

3. Appellants' Rebuttal

[49] In rebuttal, the Appellants submitted the 2013 *Wetland Policy* and previous policies did not require restoration be carried out for development within urban settings for lower valued wetlands.

[50] The Appellants noted both their consultants, Stantec and CPP Environmental, found there would not be less damage done by infilling during the winter months and advised some components of the work could only be done in non-frost conditions. The Appellants explained the Stantec Report stated construction could not take place during freezing conditions, and soil should be moved during the growing season to ensure proper establishment of the vegetation occurs.

[51] The Appellants submitted the *Provincial Wetland Restoration/Compensation Guide* states it is possible to restore wetlands that have been drained for 40 years or more.[7]

[52] The Appellants argued some damages are quantifiable, but some damage, such as damage to the Appellants' reputation relating to the project, cannot be measured by monetary compensation.

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[7] The Appellants noted the *Provincial Wetland Restoration/Compensation Guide* (February 2007) at page 2 states:

> "It is possible to restore wetlands that have been drained for 40 years or more back to almost fully functioning wetlands."

[53] The Appellants argued the case the Director relied on, *1370996 Alberta Ltd.* v. *Director, South Saskatchewan Region, Alberta Environment and Parks* (14 October 2015), Appeal No. 15-020-ID1 (A.E.A.B.), is distinguishable from the case at hand, because in *1370996 Alberta Ltd*. there was a release of a toxic substance, a potential for re-release of that substance, and potential impact on people and fish. The Appellants submitted in the case at hand, there is no evidence of ongoing risk to the environment from the infill and no risk to adjacent properties.

[54] The Appellants stated the infilling of the wetlands was the subject of an approval application for which they believed an approval was forthcoming.

[55] The Appellants noted the timelines in the EO did not take into account any other approvals necessary to complete the work.

[56] The Appellants submitted two and a half years had passed between the time the Director first observed the extraction and the time the EO was issued, and if the infill was of such urgency and was as damaging to the environment as the Director claimed, the EO should have been issued sooner.

[57] The Appellants stated there was no urgency or adverse risk to the environment or adjacent landowners. The Appellants argued the timelines for the remediation set out in the EO would result in a poorly planned project with untoward and unsustainable effects.

[58] The Appellants noted the significant change in the definition of wetlands between Stantec's 2014 assessment under the *1993 Wetland Policy*,[8] and CPP Environmental's assessment under the more recent 2013 *Wetland Policy*.[9] The Appellants submitted that questions regarding which policy should have been used, and the classification of the wetland, are matters that should be determined in a hearing.

[59] The Appellants said the EO had expired and was of no force and effect, and the Board has the authority to amend the timelines in the EO unilaterally.

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[8] According to the Appellants, the 1993 Wetland Policy at page 3, defines wetlands as:

"permanently shallow water and land-water margins."

[9] Further, according to the Appellants, the 2013 Wetland Policy at page 4, defines wetlands as:

"land saturated with water long enough to promote formation of water altered soils, growth of water tolerant vegetation, and various kinds of biological activity that are adapted to the wet environment."

B. Analysis

[60] The Board is empowered to grant a stay pursuant to section 97 of EPEA. This section provides, in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[61] The Board's test for a stay, as stated in its previous decisions of P*ryzbylski*[10] and *Stelter,*[11] is adapted from the Supreme Court of Canada case of *RJR MacDonald Inc.* v. *Canada (Attorney General).*[12] The steps in the test, as stated in *RJR MacDonald Inc.*, are:

> "First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."[13]

[62] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate, through the evidence submitted, there is some basis on which to present an argument. The Appellants submitted there are serious legal and factual issues to be tried. The Director agreed the issues that underlie the EO and the appeal are serious. The Board is satisfied the Appellants have met the serious concern part of the test for a stay.

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[10] *Pryzbylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd*. (6 June 1997), Appeal No. 96-070 (A.E.A.B.).

[11] *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: GMB Property Rental Ltd. (14 May 1998), Appeal No. 97-051 (A.E.A.B.).

[12] *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311. In *RJR MacDonald Inc.* the Court adopted the test as first stated in *American Cyanamid v. Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a stay should be assessed using the same three steps. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 and *RJR MacDonald Inc*. at paragraph 41.

[13] *RJR MacDonald Inc*. v. *Canada (Attorney General)* at paragraph 43.

[63] The second step in the test requires the applicant seeking the stay to prove that it would suffer irreparable harm if the stay is not granted.[14] Irreparable harm will occur when the applicant would be adversely affected to the extent the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable, meaning the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other.

[64] The applicant must show there is a real risk harm will occur. It cannot be mere conjecture.[15] Damage that may be suffered by third parties can also be taken into consideration.[16]

[65] The Appellants submitted that if the stay is denied, and then it is later found the EO is of no force and effect, they will be faced with unnecessary expenses. The Director submitted the Appellants did not prove there is a real risk of irreparable harm, or that reasonable redress would not be available.

[66] While the Appellants have provided limited information on the costs, it appears compensation for any costs incurred could be satisfied in monetary terms. The Appellants did raise possible damage to their reputations as a result of the EO but did not provide any information that exceeded mere speculation. The Appellants have not provided sufficient evidence to indicate irreparable harm would result to the Appellants if the stay was not granted. The Board finds the Appellants have not proven they would suffer irreparable harm. Therefore, the Appellants did not meet the second step of the stay test.

[67] All steps of the stay test must be met before a stay will be granted. Since the Board has found the Appellants will not be irreparably harmed if a stay is not granted, the second step of the stay test has not been met, and the Board is not required to consider the remaining steps of the stay test, specifically the balance of convenience and the public interest.

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14 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110.

15 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

16 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*. at paragraph 78.

IV. DOCUMENT PRODUCTION

A. Submissions

1. Appellants

[68] The Appellants alleged there had not been full disclosure of documents from the Director. The Appellants believed meetings between AEP approvals and compliance staff were not included in the Director's Record. The Appellants also submitted notes from site visits, interviews, and meetings between the Appellants and AEP staff had not been disclosed by the Director.

[69] The Appellants stated the failure of the Director to fully disclose all documents prevents them from advancing a fulsome defence and deprives the Board of important evidence so it can make its recommendations to the Minister.

[70] The Appellants requested the Board order the Director to provide full and complete disclosure of all documents relating to the investigation and compliance matter, including details about site visits.

2. Director

[71] The Director had no submissions regarding the issue of document disclosure.

B. Analysis

[72] At the hearing, the Appellants claimed the Director had not provided full disclosure of documents regarding the EO and raised a motion requesting the Board order the Director to do so. The Board notes the Director has provided the Director's Record in relation to the EO appeals. Any requests for specific documents not contained in the Director's Record can be sent through the Board or to the Director.

[73] The Board expects the Director to provide all the documents that were before him, whether he chose to consider the documents or not. The Record also must include all relevant policies and directives, again whether he chose to consider them or not.

V. TOWN'S INTERVENER APPLICATION

A. Submissions

1. Appellants

[74] The Appellants proposed the Board consider whether the Town should be allowed to be an intervener at the hearing of the appeals. The Appellants supported the Town's application for intervener status for the following reasons:

(a) The project is closely tied to the Town's greater stormwater management plan;

(b) The Town has legislated authority within its urban boundaries;

(c) The Town has the expertise to advise the Board on the Town's authority under the *Municipal Government Act*; and

(d) If the EO requires changes that are not in compliance with the Town's Area Structure Plan, those changes must be approved by Town council.

[75] The Appellants stated the Director's comments that the Town's interests were not relevant and the Town's approval is not required to comply with the EO, were based on conjecture. The Appellants argued the *Municipal Government Act* provides authority to municipalities to govern development in urban settings.

[76] The Appellants noted the expansion of the wetlands as set out in the EO would take place outside the current wetland boundary and would require a development permit under the Town's Land Use Bylaw.

[77] The Appellants submitted the Director's proposed remediation plans were not supported by the Town or Stantec and would have an adverse effect on the Town's planning process and ability to balance sustainable wetland management with economic growth.

[78] The Appellants submitted two letters to the Board from the Chief Administrative Officer of the Town, which set out the Town's opposition to the Director's remediation plan. The letters stated the Director's remediation plan was contrary to the Town's approved Area Structure Plan and the Town's stormwater drainage and wetlands management plans for the area. The Appellants developed plans for a temporary water diversion that, along with the Town's greater stormwater management plan, were provided to the Director in May 2015.

[79] As the Lands are located within the urban limits of the Town, the Appellants submitted the Lands are subject to the Town's approved Area Structure Plan and subsequent rezoning for the approved residential development plans. The Appellants argued the Lands and development plans were part of the Town's ultimate stormwater management plan.

[80] The Appellants requested the Town's interests be formally recognized and suggested the Town's authority for the approval of the Area Structure Plan, pursuant to the *Municipal Government Act*, should be considered by the Board.

[81] The Appellants submitted the *Water Act* and the *Municipal Government Act* should be interpreted together because the legislative authority is interrelated. The Appellants stated that as a result of this connection between the legislation, the Director should have considered the legislated authority of the Town when it issued the EO.

[82] The Appellants questioned the Director's jurisdiction with respect to areas that do not fit clearly within the definition of a wetland and questioned the authority of the Director over unnatural water features. The Appellants also submitted the Director exceeded legislative authority when he issued the EO by assuming authority over areas that were under the authority of the Town.

[83] The Appellants noted the EO will result in the loss of 33 lots and will adversely impact the Town.

[84] The Appellants stated the Director did not consider the interests of the individuals, the corporation, the Town, the adjacent landowners, or the public interest in sustainable wetlands in urban settings when issuing the EO.

[85] The Appellants submitted they should not be held responsible for the cost of re-engineering the site, and the Town should not have to go through the amending approval process until jurisdiction over the area is clearly defined.

[86] The Appellants submitted the Town is an interested and impacted third party, and its interests should be taken into account as public interests. The Appellants stated the public interest of the Town should be balanced with the Director's public interest in protecting wetlands.

2. Director

[87] The Director objected to the Town being granted "full rights" with respect to the appeals. The Director stated the Town's only role is under the *Municipal Government Act*, and its inclusion would not assist in the matter of the EO issued under the *Water Act*. The Director noted matters regarding municipal governance and land planning were not in the jurisdiction of the Board. The Director stated any participation by the Town should be limited to a brief written statement.

[88] The Director noted the EO is not subject to the Town's approval.

[89] The Director submitted the decision to issue the EO was guided by the *Water Act*, the 2013 *Wetland Policy*, the *Wetland Assessment Directive*,[17] and the *Wetland Mitigation Directive*.[18] The Director submitted the *Municipal Government Act* does not supersede these policies.

B. Analysis

[90] The question of the role of the Town in the appeal process cannot be determined until the issues for the hearing are set. As a result, the Board will determine the role of the Town in the appeal process once the issues for the hearing have been set, and the Town files an application to intervene and comments are received from the Parties.

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17 *Alberta Wetlands Assessment and Impact Report Directive* (June 2017), Alberta Environment and Parks.

18 *Alberta Wetland Mitigation Directive* (February 2017), Alberta Environment and Parks.

VI. CONSOLIDATION OF APPEALS

A. Submissions

1. Appellants

[91] The Appellants stated these appeals are related to another appeal before the Board, EAB Appeal No. 16-045, submitted under the *Water Act* by Aurora. In that appeal, Aurora alleged the Director refused a *Water Act* approval application related to the Lands. The Appellants requested the appeal of the *Water Act* approval application be dealt with concurrently with the appeal of the EO.

[92] The Appellants submitted the Director's handling of the investigation, unauthorized requests, disregard for the Town's process for approval within an urban setting, and the issuing of the EO with strict deadlines when the Director knew the Appellants' office was closed for two weeks, collectively constituted an abuse of power. The Appellants stated this process created unnecessary delays and expenses for the Appellants.

[93] The Appellants submitted attempts to hold two separate hearings for the appeals of the EO and the *Water Act* approval application would create procedural disadvantages for the Appellants. The Appellants explained their reasonable expectation the *Water Act* approval application would be issued increased the need for procedural fairness by the Board. The Appellants stated holding the appeals separately would prolong the matter and add to costs.

[94] The Appellants requested the Board order the Director to cancel the EO and close the matter.

2. Director

[95] The Director stated the appeals of the EO and the appeal of the *Water Act* approval application should not be consolidated into one hearing as the EO and the approval application are separate matters and need to be heard independently.

[96] The Director submitted the Director responsible for the approval application and the Director responsible for the compliance matter have such different responsibilities that consolidation would be impossible.

[97] The Director acknowledged that while section 3 of the *Environmental Appeal Board Regulation*,[19] Alta. Reg. 114/93, grants the Board authority to consolidate appeals of the same decision, in this situation, the Board was being asked by the Appellants to consolidate appeals of different decisions, which was beyond the Board's authority.

B. Analysis

[98] Under section 3 of the *Environmental Appeal Board Regulation*, the Board may combine notices of appeal where the Board receives more than one notice of appeal in respect of a decision. In this case, these three appeals relate to an enforcement order. The other appeal currently before the Board filed by Aurora relates to an application for an approval. These are two separate matters and do not relate to the same decision. As a result, the Board does not have the legislative authority to combine the approval application appeal (EAB Appeal No. 16-045) with the appeals of the EO (EAB Appeal Nos. 16-049, 16-050, and 16-051). These appeals could only be combined with the consent of the Parties. Therefore, the approval application appeal will be heard separately from the EO appeals. However, as the information from one appeal could be duplicative of the other appeal, the Board will allow the Parties to adopt the evidence from the first hearing or mediation, for use in the second hearing or mediation. The Board will use the same Board member for both mediations, and the Board will use the same Board members for both hearings.

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[19] Section 3 of the *Environmental Appeal Board Regulation*, provides as follows:

"Where the Board receives more than one notice of appeal in respect of a decision, it may combine the notices of appeal for the purposes of dealing with them under this Regulation."

VII. DECISION

[99] The Board denies the Appellants' request for a stay and lifts the temporary stay previously granted. The Board will continue to process the appeals and will make its determination relating to the involvement of the Town after the issues for the hearing have been set, and the Town files an application to intervene and comments are received from the Parties. The appeal of the *Water Act* approval application (EAB Appeal No. 16-045) will be heard separately from the appeals of the EO (EAB Appeal Nos. 16-049, 050, and 051).

Dated on November 23, 2018, at Edmonton, Alberta.

"*original signed by*"
Alex MacWilliam
Board Chair

"*original signed by*"
Dr. Nick Tywoniuk
Board Member

"*original signed by*"
Anjum Mullick
Board Member