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# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – February 7, 2022

**IN THE MATTER OF** sections 91, 92, 95, and 101 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 Yvon and Lea Lapointe with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2019/09-LAR to Yvon and Lea Lapointe, and appeals filed by Donald Lapierre and 645639 Alberta Ltd. with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2019/08-LAR to Donald Lapierre and 645639 Alberta Ltd.

Cite as: Reconsideration Decision: *Lapointe et al. v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (7 February 2022), Appeal Nos. 19-043 and 19-046-047-RD (A.E.A.B.), 2022 ABEAB 7.

**BEFORE:**

Ms. Meg Barker, Acting Board Chair.

**SUBMISSION BY:**

**Appellants:** Mr. Donald Lapierre and 645639 Alberta Ltd., represented by Mr. Ken Haluschak, Bryan & Company LLP.

**OTHER PARTIES:**

**Appellants:** Mr. Yvon and Ms. Lea Lapointe, represented by Ms. Nicole Melnyk.

**Director:** Mr. Simon Tatlow, Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Erika Gerlock and Mr. Paul Maas, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued enforcement orders under the *Water Act* to Mr. Donald Lapierre and 645639 Alberta Ltd. (Lapierres) and to Mr. Yvon and Ms. Lea Lapointe (Lapointes). The Lapierres' enforcement order was issued for maintaining a drainage ditch on their lands that was concentrating surface flow and directing it north towards the Lapointes' land. The enforcement order required the Lapierres to render the drainage ditch ineffective and restore the natural surface drainage patterns.

The Lapointes were issued an enforcement order requiring them to restore the natural surface drainage patterns on their property that existed before the alleged unauthorized activities. The Lapierres' and Lapointes' appeals were heard simultaneously as the matters were interconnected.

A hearing was held, and the Board determined the enforcement orders were properly issued.

The Minister accepted the Board's recommendations to vary the enforcement orders by clarifying the work needed to be done and by extending the dates for the Lapointes and Lapierres to submit a plan to AEP and to complete the work.

The Lapierres requested a reconsideration of parts of the Board's Report and Recommendations on the basis the Board erred in its interpretation and application of the law and it made unreasonable errors of fact.

After a review of the Lapierres' submission and the Report and Recommendations, the Board found the Lapierres did not provide a *prima facie* basis for a reconsideration of the Board's Report and Recommendations. The Board found no error in applying the law nor any unreasonable finding of fact. The Board found the Lapierres were dissatisfied with the recommendations and attempting to reargue their appeal.

The Board denied the reconsideration request.

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## I. INTRODUCTION

[1] On October 2, 2019, the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the “Director”) issued Enforcement Order No. WA-EO-2019/19-09-LAR (the “Lapointe Order”) to Mr. Yvon Lapointe and Ms. Lea Lapointe (the “Lapointes”) under the *Water Act*, R.S.A. 2000, c. W-3. The Lapointe Order required the restoration of the natural surface drainage patterns on their property. The Lapointe Order also required a remedial plan be developed and provided to the Director by November 21, 2019. The work under the Lapointe Order was to be completed by January 23, 2020.

[2] On October 9, 2019, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Lapointes appealing the Director’s decision to issue the Lapointe Order and requesting a stay.

[3] On October 17, 2019, the Board wrote to the Lapointes and the Director acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal and the Lapointes’ stay application.

[4] On October 18, 2019, the Director issued *Water Act* Enforcement Order No. WA-EO-2019/19-08-LAR (the “Lapierre Order”) to Mr. Donald Lapierre and 645639 Alberta Ltd. (the “Lapierres”). The Lapierre Order required the Lapierres to render the ditch on their properties ineffective in order to restore the natural surface drainage patterns. The Lapierre Order also required a remedial plan to be developed and provided to the Director by November 21, 2019. The work under the Lapierre Order was to be completed by January 23, 2020.

[5] On October 25, 2019, the Board received Notices of Appeal from the Lapierres appealing the Director’s decision to issue the Lapierre Order and requesting a stay. The Notice of Appeal indicated the Lapierre Order was inextricably connected to the Lapointe Order.

[6] On November 3, 2019, the Board wrote to the Lapierres and the Director acknowledging receipt of the Notices of Appeal and notifying the Director of the appeal and stay application.

[7] On November 20, 2019, the Board advised the Lapointes, Lapierres, and the Director (collectively, the “Parties”) the appeals would be joined.

[8] The hearing was held by video conference on March 21 and 22, 2021. The issues heard by the Board were:

1. Were the Orders properly issued?
2. Are the terms and conditions in the Orders appropriate?

[9] On June 7, 2021, the Board provided its Report and Recommendations and the Ministerial Order to the Parties.<sup>1</sup> The Minister of Environment and Parks varied the Enforcement Orders based on the Board’s recommendations.

[10] On September 13, 2021, the Lapierres reserved their right to request a reconsideration of the Report and Recommendations pending further discussions with the Lapointes.

[11] On October 15, 2021, the Lapierres submitted a request for reconsideration of the Report and Recommendations and provided additional comments on October 20, 2021.

[12] On December 21, 2021, the Board notified the Parties that the Board denied the request for reconsideration, with reasons to follow. These are the Board’s reasons.

## **II. SUBMISSION**

[13] The Lapierres requested the Board reconsider parts of its Report and Recommendations on the basis the Board erred in the interpretation and application of the law and made unreasonable error of fact.

[14] The Lapierres referred to paragraphs 7 and 258 in the Report and Recommendations where the Board found the Lapierres must manage an additional volume of water. They said this was not in accordance with the principles of the *Water Act*, which is concerned with flow rates, not volume.

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<sup>1</sup> See: *Lapointe et al. v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (26 April 2021), Appeal Nos. 19-043 and 19-046-047-R (A.E.A.B.), 2021 ABEAB 8.

[15] The Lapierras noted the Director, the Board, and the Lapierras all appeared to agree the *Water Act* does not require the Lapierras to manage or store any of the pre-development, naturally occurring snowmelt from the NE section of 13-61-6-W4M (“NE-13”), estimated to be 3.5-5L/s/ha. The Lapierras referred to paragraph 255 of the Report and Recommendations where, according to the Lapierras, the Board required the Lapierras to control the snowmelt runoff from NE-13 to a maximum flow rate of 4L/s/ha, which constitutes an error of law or misunderstanding of the evidence provided by their consultant. The Lapierras stated the naturally occurring runoff rate from NE-13 is in addition to the pre-development runoff rate from Lot 1 and Lot B.

[16] With respect to paragraph 280 of the Report and Recommendations, the Lapierras questioned whether they only needed to manage the incremental, post-development flow rates off Lots 1 and B and exclude water from NE-13.

[17] The Lapierras asked for clarification of the Board’s use of “flow rate” and “volume” in paragraphs 254 to 262 of the Report and Recommendations. The Lapierras asked how they can manage the incremental volume on a year-to-year basis without managing the extreme 1:100-year event. They stated their consultant could provide a solution to the flow rate, not volume, as it appears in the recommendations.

### **III. BASIS FOR RECONSIDERATION**

[18] The legislative authority giving the Board jurisdiction to reconsider a decision is section 101 of EPEA, which provides: “Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.”

[19] The Board has stated in previous decisions that its power to reconsider “...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.”<sup>2</sup> The power to reconsider is the exception to the general rule that decisions of the

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<sup>2</sup> *Whitefish Lake First Nation Request for Reconsideration, re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (September 28, 2000), Appeal No. 99-009-RD (A.E.A.B.); Reconsideration Request: *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment* (14 June 2002), Appeal No. 01-074-RD (A.E.A.B.).

Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for parties to reargue the same issues a second time.

[20] When a reconsideration request is filed, there are two steps in the process. The first step in the process is to determine whether there are grounds sufficient to warrant a reconsideration. If the Board has been provided with sufficient new evidence that was not reasonably available at the time of the hearing or the parties demonstrated there has been an error in law, then the Board will proceed to the second step, the actual reconsideration of its decision.

[21] What is currently before the Board is the first step in the reconsideration process: Are there sufficient grounds to warrant a reconsideration of the Board's Report and Recommendations?

[22] The Supreme Court of Canada in *Palmer v. The Queen* [1980] 1 S.C.R. 759 at page 775, outlined the following regarding the admittance of new evidence into a trial:

- “(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial....
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.”

[23] Although these principles were stated in the context of a criminal case, the general principles apply when considering a request to provide new evidence before the Board, such as when a party is requesting a reconsideration of the Board's decision.

[24] The onus is on the party making the request to demonstrate to the Board there are exceptional and compelling reasons to reconsider the decision.<sup>3</sup> The factors the Board will consider include: the public interest; delays; the need for finality; whether there was a substantial

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<sup>3</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (April 17, 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

error of law that would change the result; and whether there is new evidence not reasonably available at the time of the previous decision.<sup>4</sup>

[25] The party requesting the reconsideration must differentiate between two types of new evidence. Evidence acquired since the decision was made, but was available at the time of the hearing, is not relevant for the purposes of reconsideration. However, information that was not available at the time the decision was made or was not practically obtainable by the parties, would be relevant for purposes of reconsideration.<sup>5</sup>

[26] A substantial error of law may be a sufficient ground for reconsideration. Such an error may sometimes be revealed by new decisions from the Courts. Generally, a party's failure to cite an existing authority will not be a ground to reopen a matter, but new decisions not reasonably available for the original proceedings can provide an exception. To justify the reconsideration the decision in question must demonstrate an error of law that, once corrected, would change the original result. The evidence does not have to, on the grounds of probability, result in a change of the original decision, but there must be a reasonable possibility the decision could be altered.<sup>6</sup>

[27] In *Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)* 2009 ABCA 258 (Alta. C.A.) at paragraph 11, the Alberta Court of Appeal noted a court should be reluctant to re-open a decision, stating:

“[T]he Courts should be sparing in their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held back. If parties are not forced to prove fully their whole case once and for all, then endless wrangling and never-ending rehearings will result.”

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<sup>4</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (April 17, 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

<sup>5</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

<sup>6</sup> Request for Reconsideration: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection re: Laidlaw Environmental Services (Ryley) Ltd.* (April 7, 1998), Appeal No. 96-059 (A.E.A.B.).

[28] A reconsideration is not an opportunity for a party to have a second chance to present arguments.

#### **IV. ANALYSIS**

[29] The grounds on which the Lapierras requested a reconsideration were the Board erred in law by misinterpreting and incorrectly applying the legislation, and the Board made unreasonable findings of fact. However, the basis of the reconsideration request seems to be the Lapierras are seeking clarification on certain aspects of the Board's Report and Recommendations.

[30] The Lapierras sought clarification of the Board's use of "volume" and "rate of flow" in the Report and Recommendations. The Board acknowledges the interchanging of the phrases may have created some confusion.

[31] In writing the Report and Recommendations, the Board endeavoured to explain the evidence, the context of the situation that formed the basis of the appeals, and its analysis in plain language. In doing so, the Board used the term "volume" in a general fashion to mean "amount."

[32] The term "rate of flow" was used to explain the amount of water that passes through an area in a specific amount of time and was estimated data provided by the Parties. The term "volume" referred to the increased amount of water flowing over the lands that will impact the rate of flow exiting the lands. The Lapierras are required to maintain the rate of flow exiting their properties and, to do so, requires them to manage the increased amount of surface water on their properties due to the development on their properties.

[33] By using "volume" in its Report and Recommendations, the Board has not misinterpreted or incorrectly applied the *Water Act*. The Board's recommendations require the Lapierras to manage the surface water flow from the Lapierras' lands to a maximum rate of 4L/s/ha. It does not require the Lapierras to manage a certain volume of water exiting the properties.

[34] The Lapierras were unsure whether the Board required the Lapierras to manage only post-development flow rates from Lot 1 and Lot B and not NE-13. As stated in paragraphs 254 and 255, the Board accepted the estimated total flow rate of the natural surface water from NE-13 and the predevelopment of Lot 1 and Lot B to be 4L/s/ha based on submissions from the Director's consultant and agreement from the Lapointes' consultant.

[35] The increased amount of runoff that is no longer absorbed into the ground due to the development on Lot 1 and Lot B must be managed by the Lapierras in order to maintain a maximum flow rate of 4L/s/ha exiting their properties onto the Lapointes' land. To be clear, the maximum flow rate of 4L/s/ha includes both the post-development flow from Lot 1 and Lot B and the natural surface water flow from NE-13.

[36] The Lapierras stated their consultant could provide a solution to the flow rate. If the solution is relevant and feasible to achieve the required outcomes, it can be incorporated into the remedial plan and provided to the Director for review. It is not new evidence that was not available at the time of the hearing. It appears the Lapierras are attempting to use the reconsideration provision as a means to submit additional data to reargue the appeal. That is not the intent of the reconsideration provision of EPEA.

[37] The Board heard and considered all of the evidence, arguments, and submissions provided by all the Parties and their consultants. The Board placed weight on the evidence based on relevance and reliability. A party who is unhappy with the results of a hearing cannot request a reconsideration in an attempt to achieve a different result.

[38] The Board finds the Lapierras did not meet their onus of demonstrating, on a *prima facie* basis, there were legal or factual errors made by the Board to warrant a reconsideration of the Report and Recommendations.

[39] The Lapierras did not provide any arguments or information to convince the Board its recommendations should be reconsidered. As stated, the Board is reluctant to allow a reconsideration unless the applicant can meet the onus of demonstrating there was an error in law or misinterpretation of the facts. The Lapierras have not met the onus of demonstrating there were exceptional circumstances that would warrant the Board exercising its discretion to grant a

reconsideration of its Report and Recommendations. Further, the Board believes the public interest will not be served by granting the reconsideration request. Therefore, the Board denies the reconsideration request.

**V. DECISION**

[40] For the foregoing reasons and pursuant to section 101 of the *Environmental Protection and Enhancement Act*, the Board denies the reconsideration request filed by Mr. Donald Lapierre and 645639 Alberta Ltd.

Dated on February 7, 2022, at Edmonton, Alberta.

“original signed by”  
Ms. Meg Barker  
Acting Board Chair