



ALBERTA

ENVIRONMENT AND PARKS

*Office of the Minister
MLA, Lethbridge-West*

ALBERTA ENVIRONMENT AND PARKS

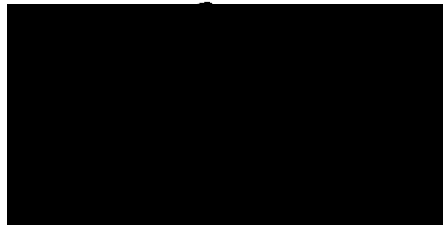
Public Lands Act
R.S.A. 2000, c. P-40
Public Land Administration Regulation
A.R. 187/2011

MINISTERIAL ORDER
18/2015

**ORDER RESPECTING PUBLIC LANDS APPEAL BOARD
APPEAL NO. 14-0029**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to s.124 of the *Public Lands Act*, make the order in the attached Appendix, being an Order respecting Public Lands Appeal Board Appeal No. 14-0029.

DATED at the City of Edmonton, in the Province of Alberta, this 15th day of December, 2015.



Shannon Phillips
Minister

APPENDIX A

**ORDER RESPECTING PUBLIC LANDS APPEAL BOARD
APPEAL NO. 14-0029**

With respect to Public Lands Appeal Board Appeal No. 14-0029, I, Shannon Phillips, Minister of Environment and Parks, order that:

1. The application for SML 130119 is a deemed rejection.
2. The application is deficient and therefore rejected.
3. Appeal No. 14-0029 is dismissed.

ALBERTA
PUBLIC LANDS APPEAL BOARD
REPORT

June 18, 2015

IN THE MATTER OF sections 120, 121, 122 and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 15, 211, 213, 228 and 235 of the Public Lands Administration Regulation, A.R. 187/2011;

- and -

IN THE MATTER OF an appeal filed by JH Drilling Ltd. under section 211 of the Public Lands Administration Regulation.

Cite as: JH Drilling Ltd. v. Director, Environment and Parks, Appeal No. PLAB 14-0029

Panel Members

Gordon McClure, Panel Chair

Appearances

Andrew R. Bachelder on behalf of the Public Lands Appeal Board

Alison Altmiks on behalf of the Director

John Harms on behalf of the Appellant

EXECUTIVE SUMMARY

The application for SML 130119 was submitted by JH Drilling Inc. (the “Appellant”) on December 4, 2013. A series of deficiencies were identified and application amendments were made from January 9, 2014 through July 3, 2014. On July 9, 2014 correspondence was sent to the Appellant indicating that the application was accepted as complete and would be proceeding to be reviewed on the merits. On November 12, 2014 the Director (“Director”) sent the Appellant a letter indicating that the amended application had been received and that before further review of the application, a consent to withdrawal from the holder of GRL 800423 was required within 30 days of the date of the letter or the amended application would be removed from the records of the department.

On November 28, 2014 the Appellant filed a Notice of Appeal with the Public Lands Appeal Board alleging that the application was deemed rejected under section 15 of the Public Lands Administration Regulation and that the Director who made the decision erred in determination of material fact, law and exceeded jurisdiction. Where the Board has received multiple grounds of appeal, the determination of the deemed rejection must be conducted prior to consideration of the other grounds of appeal as a decision on a deemed rejection may have effect on the other grounds of appeal and their consideration.

A hearing by written submission was held on June 10, 2015. The Panel found the application was deemed rejected on January 5, 2014, as the department did not issue a notice of acceptance or rejection within 30 days as required under the regulation. The Panel found the application was deficient and lacked the consent of the existing disposition holder. Furthermore, the Panel found the application amendments made after January 5, 2014 were moot as the application was deemed rejected.

It was recommended that the Minister find the application deemed rejected, find the application deficient and dismiss the appeal.

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I BACKGROUND

- [1] The application for SML 130119 was submitted by JH Drilling Inc. (the “Appellant”) on December 4, 2013.
- [2] Section 15 states:
- 1) Subject to this section, an application under section 9, 11, or 13 is deemed to have been rejected if the Director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.
 - 2) (2) The Director may, by written notice to the applicant, extend the 30-day period referred to in subsection (1) for a further period not exceeding 90 days if the Director considers it appropriate to do so in the circumstances.
- [3] No notice of acceptance or rejection of the application within the 30 days was made, nor was there an extension of the time.
- [4] On January 9, 2014 correspondence was sent to the Appellant regarding sketch deficiencies. A series of deficiencies were identified and application amendments were made from January 9, 2014 through July 3, 2014.
- [5] On July 9, 2014 correspondence was sent to the Appellant indicating that the application was accepted as complete and would be proceeding to be reviewed on the merits.
- [6] On November 12, 2014 the Director (“Director”) for the Provincial Operations Section of Environment and Sustainable Resource Development sent the Appellant a letter indicating that the amended application had been received and that before further review of the application, a consent to withdrawal from the holder of GRL 800423 was required within 30 days of the date of the letter or the amended application would be removed from the records of the department.

- [7] On November 28, 2014 the Appellant filed a Notice of Appeal with the Public Lands Appeal Board alleging that the Director who made the decision:
- a. Erred in the determination of a material fact;
 - b. Erred in law;
 - c. Exceeded the Director's or officer's jurisdiction or legal authority; or
 - d. The decision is expressly subject to appeal under section 15 of the Public Lands Administration Regulation as the application was a deemed rejection as the Director failed to approve or refuse an application for a disposition, authorization, or approval within a 30-day time limit or within an approved period of extension.
- [8] On December 4, 2014 the Public Lands Appeal Board acknowledged receipt of the Notice of Appeal from the Appellant dated November 28, 2014 and received by the Board on December 1, 2014. At that time the Director's records were requested and dates of availability were requested.
- [9] On January 13, 2015 the Director wrote the Board requesting the Board dismiss the Notice of Appeal.
- [10] On February 12, 2015 the Board wrote the parties regarding the issue of deemed rejection identified within the Notice of Appeal and not addressed in the submissions. The Board requested submissions on the issue of the deemed rejection for February 23, 2015. The Board noted that as the alleged deemed rejection occurred prior to any decision under appeal, the Board must determine if there has been a deemed rejection before the other issues could be addressed.
- [11] The Board wrote the parties providing a date for rebuttal submissions and setting a hearing date of June 10, 2015 for a hearing by written submission.
- [12] A hearing by written submission was held on June 10, 2015.

II REPROCEDURAL BACKGROUND

- [13] A Notice of Appeal dated November 28, 2014 was received by the Public Lands Appeal Board.
- [14] The Notice of Appeal received was in regard to SML130119, a matter that was currently under appeal. The Board responded to the Appellant noting that the Board could not have two open appeals on the same matter. The Board requested the Appellant provided direction as to their intent.
- [15] The Appellant confirmed that they were withdrawing their previously initiated appeal, conditional upon the Board opening a file based on the new Notice of Appeal submitted on November 28, 2014.
- [16] On December 4, 2014 the Board acknowledged receipt of the Notice of Appeal, assigned appeal number PLAB 14-0029 and notified the Director, while requesting the Director's Record and dates of availability for the Appellant and the Director.
- [17] On January 13, 2015 the Director wrote the Board requesting the Board dismiss the Notice of Appeal by JH Drilling dated November 28, 2014 as frivolous, vexatious or without merit, or in the alternative, premature. At that time the Director also advised the Board that GRL 800423 was a potentially interested party.
- [18] The Appellant responded to the Board regarding the Director's application for dismissal by email on January 13, 2014.
- [19] The Board wrote to the Appellant and the Director on January 14, 2015 inviting the Appellant to respond to the Director's application by written submission and providing dates for rebuttal. The issues parties were to address in their submissions were:
- i. Is the Notice of Appeal frivolous, vexatious, or without merit? And
 - ii. Is the Notice of Appeal premature?

Submissions from the Director were received on January 28, 2015.

- [20] The Board requested an indexed copy of the Director's Record on January 14, 2015, which was received by the Board on January 21, 2015 and distributed to the parties.
- [21] On February 12, 2015 the Board wrote the parties regarding the issue of deemed rejection identified within the Notice of Appeal and not addressed in the submissions. The Board requested submissions on the issue of the deemed rejection for February 23, 2015, noting that as the alleged deemed rejection occurred prior to any decision under appeal, the Board must determine if there has been a deemed rejection before the other issues could be addressed. Submissions were received from the Appellant and the Director.
- [22] On May 28, 2015 the Board wrote the parties providing June 9, 2015 as the receipt date for rebuttal submissions on the question of whether a deemed rejection occurred and setting a hearing date of June 10, 2015 for a hearing by written submission. Rebuttal submissions were received from both parties.
- [23] A hearing by written submission was held on June 10, 2015.

III ISSUES

- [24] Was the application deemed rejected?

IV SUBMISSIONS

The Director Record and all submissions made by the parties were considered. Summations of the arguments are made below.

APPELLANT

- [25] The Appellant submitted in the affirmative that there was a deemed rejection as per section 15(1) of the Public Lands Administration Regulation.

DIRECTOR

- [26] The Director submitted that the application for SML 130119 was first submitted on December 4, 2013 and that deficiencies were identified. On January 9, 2014 correspondence was sent to the Appellant regarding sketch deficiencies, and no notice of acceptance or rejection of the application within the 30 days was made, nor was there an extension of the time.
- [27] On February 4, 2014 the recommendation at the field level was that the application should be rejected unless the Appellant could obtain consent from the existing disposition holders, in particular GRL 800423.
- [28] Amended applications were submitted on February 5 and 12, 2014. Deficiencies were noted and correspondence was sent to the applicant on May 22, 2014.
- [29] In the intervening period, the Appellant also applied to have GRL 800423 cancelled under *Public Lands Act* section 82(1)(a).
- [30] An amended application was submitted on May 29, 2014. Again deficiencies were noted and the Appellant was notified. Further amended applications were submitted on June 26 and July 3, 2014.
- [31] On July 9, 2014 correspondence was sent to the Appellant indicating that the application was accepted as complete and would be proceeding to be reviewed on the merits. The Director noted errors in the correspondence referencing Public Lands Administration

Regulation sections 11 and 12, which are applicable to authorizations, whereas the correct applicable sections are Public Lands Administration Regulation sections 9 and 10. It was further noted that the requirements for a formal disposition differs from that of an authorization in that Public Lands Administration Regulation section 9(1)(e) requires an applicant to provide consent from an existing disposition holder and that consent was not, and has not to date, been provided.

[32] The Director submitted that appeal of a deemed rejection of an application is a question of the timeliness of the application completeness decision, which should be limited to the same remedies that would arise on an appeal of an actual rejection decision.

[33] The Director further submitted an interpretation that failure to register notice of a completeness decision results in the Director losing all authority to make a completeness decision on a merit decision, which exacerbates the underlying issue of timely decision-making by the Director that the deemed rejection provision was intended to address. The Director submitted that a deemed rejection appeal should not proceed where the deemed rejection has been rendered moot by a Director's completeness or merit decision.

V FINDINGS OF FACT

[34] The *Public Lands Act* provides:

Appeal on the record

120 An appeal under this Act must be based on the decision and the record of the decision-maker.

[35] The Public Lands Administration Regulation provides:

Application for formal disposition

- 9(1) An application to the Director for a formal disposition
 - (a) must be made in a form acceptable to the Director,
 - (b) must contain an accurate description, acceptable to the Director, of the land to which the application relates,
 - (c) must, if the application relates to public land that is already the subject of a disposition under the Act or a timber disposition, be accompanied with a statement of consent, in a form acceptable to the Director, that is signed by the disposition holder or timber disposition holder,
 - (d) must be accompanied with a statement, in a form acceptable to the Director, in which the applicant certifies that all proposed developments on the land to which the application relates will comply with all applicable disturbance limits, and
 - (e) must be accompanied with any other documentation required under Part 3.
- (2) Within 30 days after service of a notice from the Director requiring it, an applicant for a disposition must deliver to the Director
 - (a) security in an amount and form acceptable to the Director for the performance of some or all of the applicant's obligations under the Act, the regulations and the disposition applied for, and
 - (b) any relevant information the Director requests for the purposes of considering the application.

- (5) The Director
 - (a) must reject an application if it does not meet the requirements of this section or if the applicant is served with a notice under subsection (2) and does not comply with that subsection, and
 - (b) in any other case, must accept the application and proceed to consider it on its merits.
- (6) The Director must register a notice of the acceptance or rejection of an application under this section within 30 days after receiving the application.
- (7) Where an application is rejected under this section, the Director must notify the applicant of the rejection in writing as soon as possible.

Deemed rejection

- 15(1) Subject to this section, an application under section 9, 11 or 13 is deemed to have been rejected if the Director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.
- (2) The Director may, by written notice to the applicant, extend the 30-day period referred to in subsection (1) for a further period not exceeding 90 days if the Director considers it appropriate to do so in the circumstances.
- (3) If an applicant requires regulatory approval for a development on land that is the subject of a disposition for which the applicant has applied, the Director may, by written notice to the applicant, extend the period referred to in subsection (1) for an indefinite period pending the outcome of any proceedings related to the regulatory approval.

(4) A deemed rejection under this section is appealable under Part 10.

Grounds for appeals

213 A decision is appealable only on the grounds that

(a) the Director or officer who made the decision

(i) erred in the determination of a material fact on the face of the record,

(ii) erred in law,

(iii) exceeded the Director's or officer's jurisdiction or authority, or

(iv) did not comply with an ALSA regional plan,

or

(b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4).

[36] An appeal of a deemed rejection is appealable under Part 10 of Public Lands Administration Regulation.

[37] The application for SML 130119 was first submitted on December 4, 2013 and deficiencies were identified. On January 9, 2014 correspondence was sent to the Appellant regarding sketch deficiencies and no notice of acceptance or rejection of the application within the 30 days was made; nor was there an extension of the time period. The application was deemed rejected on January 5, 2014.

[38] The application submitted had many deficiencies for which amendments were required.

[39] The application required consent from the existing disposition holder as per Public Lands Administration Regulation sections 9 and 10. Public Lands Administration Regulation section 9(1)(e) requires an applicant to provide consent from an existing disposition holder and that consent was not, and has not been provided.

VI ANALYSIS

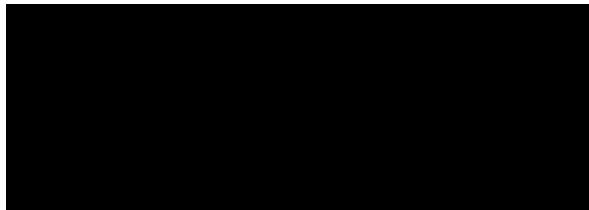
- [40] Where the Board has received multiple grounds of appeal that includes an appeal of the deemed rejection, the determination of the deemed rejection must be conducted prior to consideration of the other grounds of appeal as a decision on a deemed rejection may have effect on the other grounds of appeal and their consideration.
- [41] The Board finds the application was deemed rejected on January 5, 2014. The department did not issue a notice of acceptance or rejection within 30 days as required under the regulation and instead chose to accept amendments until July 3, 2014, a seven month period after the initial receipt of the application. No notice of extension of the application period was registered.
- [42] The department and the applicant have made submissions that the application was deemed rejected. **The application should be found to be deemed rejected.**
- [43] An amended application is not a new application. Amendments made to an application may fall within the regulated timeframes of section 15 of Public Lands Administration Regulation but do not reset, nor extend the regulated timeframes of section 15.
- [44] The department chose to treat the application deemed rejected under Public Lands Administration Regulation as an active application, though it was for all intent and purposes deemed rejected on January 5, 2014. The Board could not accept, nor consider amendments made to the application made after January 5, 2014 as in reviewing the record, no extension by written notice was made by the Director. The Director should not have requested nor accepted amendments to the application after January 5, 2014 without a written extension as per section 15(2) of Public Lands Administration Regulation. Had the department extended the period for the maximum of 90-days as allowed under section 15(2) of Public Lands Administration Regulation, the facts of this case are that the application would have contravened section 15 of Public Lands Administration Regulation, resulting in the application being deemed rejected.

- [45] The application amendments made after January 5, 2014 were moot as the application was deemed rejected. A deemed rejection is a deemed decision by the Director and accordingly that decision – i.e. to reject the application – is subject to appeal.
- [46] Because the Application was rejected (via deemed rejection), the Director’s subsequent purported assessment on the merits was without jurisdiction. Essentially, no decision on the merits has been made at this time.
- [47] The Appellant’s appeal of the deemed rejection in this case requires the Board to decide whether the rejection of the Application was proper. The Board may confirm or reverse the rejection, or send the matter back to the Director to follow the statutory process and assess for completeness, subject to directions from the Board.
- [48] The Board finds that it is able to make a determination on completeness. The Board finds that the conduct of the Director and the Appellant shows that the application was incomplete and should not have been accepted by the Director. The application made on December 4, 2013 and deemed rejected on January 5, 2014 was deficient. The application lacked the required consent from the existing disposition holder as per Public Lands Administration Regulation section 9(1)(e). **The application is deficient and should be rejected.**

VII RECOMMENDATION FOR DECISION

[49] The Panel recommends that the Minister find the application was deemed rejected.

[50] The Panel recommends the Minister find the application deficient, reject the application and dismiss the appeal.



Gordon McClure, Panel Chair