



ALBERTA
ENVIRONMENT AND PARKS

*Office of the Minister
MLA, Lethbridge-West*

ENVIRONMENT AND PARKS

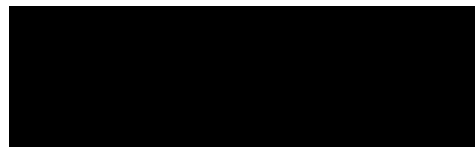
Public Lands Act
RSA 2000, c. P-40

MINISTERIAL ORDER
46/2015

**Order Respecting Public Lands Appeal Board
Appeal No. 15-0010**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix A, being an Order Respecting Public Lands Appeal Board Appeal No. 15-0010.

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. 15-0010

With respect to Public Lands Appeal Board Appeal No. 15-0010, I, Shannon Phillips, Minister of Environment and Parks, order as follows:

1. That the application for Surface Material Lease (SML) 140078 is rejected as incomplete.
2. That Public Lands Appeal Board Appeal No. 15-0010 is dismissed.

ALBERTA
PUBLIC LANDS APPEAL BOARD
REPORT

October 28, 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 15-0010

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 Surface Material Lease 140078 (“SML 140078”) the (“SML”) was submitted by JH Drilling Inc. (the “Appellant”) and accepted electronically on November 1, 2014 with an amended application submitted on April 2, 2015.

The Director made a completeness decision rejecting the application for SML 140078 on May 26, 2015. The Appellant submitted a Notice of Appeal to the Public Lands Appeal Board (the “PLAB”) dated June 18, 2015 and received by the Board on June 19, 2015. The Notice of Appeal identified the grounds for the appeal were, that 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 a regional plan approved under the *Alberta Land Stewardship Act*.

A hearing by written submission was held on October 27, 2015. The Board found, the Appellant made no substantial submissions on the grounds of appeal that the director or officer who made the decision: erred in the determination of a material fact on the face of the record; erred in law; exceeded the director’s or officer’s jurisdiction or authority; or did not comply with a regional plan approved under the *Alberta Land Stewardship Act* in rejecting SML140078.

The Panel recommended that the Minister up hold the Director’s decision rejecting the application and find the application was incomplete and dismiss the appeal.

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I BACKGROUND

- [3] The Appellant submitted an Application for a Surface Material Lease (SML) to the Department. The application was dated November 1, 2014. An amended application was submitted on April 2, 2015.
- [4] The 30 day review period for making a completeness decision was extended as per legislation for the initial application (November 26, 2014) and the amended application (April 7, 2015).
- [5] On May 26, 2015 an application completeness decision rejecting SML 140078 was made by the Director and a letter was sent stating the application was rejected as:
- a. No statutory declaration was provided;
 - b. No site information form was provided;
 - c. The test hole location plan to match test hole data was not provided;
 - d. Access to the area in N1/2 and S1/2 33-85-6- W4M was not identified; and
 - e. The proposed SML has double coverage with MSL 112987, MSL 122181, MSL 120005, MSL 120944, MSL 120945, MSL 122177 and 122181.
- [6] The Appellant submitted a Notice of Appeal to the Public Lands Appeal Board on June 18, 2015 and received by the Board on June 19, 2015.
- [7] The Notice of Appeal alleged Director who made the decision erred in the determination of a material fact on the face of the record, erred in law, exceeded the director's jurisdiction or authority and did not comply with an *ALSA* regional plan.
- [8] A hearing by written submission was held on October 27, 2015.

II APPLICABLE LEGISLATION

[9] Alberta Environment and Parks administers land throughout the province of Alberta under the Public Lands Administration Regulation (PLAR) and the *Public Lands Act* (PLA).

[10] 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.

[11] Under sections 1(1)(e), (f) and (o) of PLAR there are three types of disposition: formal dispositions, authorizations and approvals. A Surface Material Lease is a disposition under section 20 of the *PLA* and section 1(1)(f) of PLAR.

[12] Section 9 of PLAR states:

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, subject to any waiver under subsection (3), be accompanied with all applicable fees and other charges prescribed under section 9.1 of the Act,

(d) must, if the application is for a disposition under section 5 authorizing the construction or occupation of an ancillary facility, be accompanied with a statement in a form acceptable to the director certifying the matters referred to in section 5(3)(c),

(e) 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,

(f) 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

(g) 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.

(3) The director may waive the application of clause (1)(c) for any particular application and instead issue an invoice to the applicant for payment of any applicable fees or charges under section 9.1 of the Act, which invoice may be enforced as a debt owing to the Crown.

(4) Subsection (1)(e) does not apply to an application for renewal under section 18.

(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.

[13] Section 10 of PLAR states:

10(1) The director may issue or refuse to issue a formal disposition applied for under section 9.

(2) The director may issue a formal disposition subject to any terms and conditions the director considers appropriate.

(3) The terms and conditions of a formal disposition may be more stringent, but may not be less stringent, than applicable terms and conditions provided for in the Act and regulations.

(4) The director must register a notice of the issuance or refusal to issue within one year after registering a notice under section 9(6).

(5) Where the director refuses to issue a formal disposition to an applicant, the applicant may submit a written request to the director requesting written reasons for the decision.

(6) Written reasons requested under subsection (5) must be provided to the applicant within 12 days after receipt of the request.

[14] Section 15 states:

The grounds for appeals under section 213 of PLAR states that:

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).

III ISSUES

[15] The issues to be heard were, did the Director in deciding that the Appellant's application for Surface Material Lease:

- i. Err in the determination of a material fact on the face of the record,
- ii. Err in law,
- iii. Exceeded the director's or officer's jurisdiction or legal authority, or
- iv. not comply with an *ALSA* regional plan.

IV SUBMISSIONS

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

APPELLANT

[16] The Appellant submitted that the Director didn't consider an application for SML 080053 previously applied for on the same lands as SML 140078. The Appellant submitted that

the Director erred in the determination of facts by overlooking the history of the previous Appellant's SML080053 application.

- [17] The Appellant submitted that SML 140078 has the issue of double coverage with various MSLS on the Appellant's SML. The Government of Alberta has allowed multiple MSLS on the same lands.
- [18] The Appellant submitted that the issue of double coverage is a merit issue and the SML should not be rejected or refused at the Completeness Review which is basically technical and does not address legal issues and land issues like double coverage for which JHD has filed in Queen's Bench. The other technical issues have been addressed and the requested documents are already in the full control of the Alberta Department of Justice. This includes Statutory Declaration, Exploration Report, Site Information Form.
- [19] The Appellant submitted that by erring in the determination of facts, the Director did err in law by denying the Appellant the right to have the lands back. The Appellant further submitted that breaking of fiduciary obligations is also an error in law. The Appellant requested the Board to refer to the lawsuit and the Notice for listing of further causes of legal action noting that JHD filed a writ in Court of Queen's Bench, dated September 21, 2015. JHD urged the Director and the board to consider the arguments, reasons and facts in the writ as relevant background.
- [20] The Appellant submitted that JHD has given formal notice to the Crown under *Proceedings Against the Crown Act*.

DIRECTOR

- [21] The Director submitted that the Appellant's Notice of Appeal identified a number of desired outcomes many of which are outside the Director's and the Board's jurisdiction.

The Director provided a table identifying the relief requested and the Director's position on the same.

- [22] The Director submitted that the Appellant's written submission of September 28, 2015 refers to a previous SML application related to some or all of the same public lands. The application for SML 080053 predated the coming into force of PLAR. The pre-PLAR application for SML 080053 was denied, and the Appellant has pursued administrative appeals through the previous process used by the Department. The application for SML 140078 was a new application. The application for SML 080053 was not before the Director. Material filed on a prior application is not moved to subsequent applications. The Director made a completeness decision on the application for SML140078.
- [23] The Appellant's application for SML 140078 makes no mention of the pre-PLAR application for SML 080053. The application form for SML 140078, in the "remarks" section, identifies four First Nation Consultation (FNC) numbers from 2014. The four FNC numbers from 2014 further confirms that the application for SML 140078 was a separate and distinct application being considered by the Director and not a continuation of the previous pre-PLAR application for SML 080053.
- [24] The Director submitted that the Department administers public land throughout the province under the Public Lands Act (PLA) and the Public Lands Administration Regulation (PLAR) and that application for authorization and formal dispositions must be made in accordance with the PLA and PLAR.
- [25] The Director submitted that the Department has a two stage decision making process: application completeness and merit decision. At the completeness stage, an application is either accepted or rejected. An appeal of an application rejection is not about reviewing the application on its merits or the review of a merit decision. An appeal of an application rejection, as in the present matter, is about whether the application for the disposition was complete.

- [26] The Director submitted that there are two industry specific public land use policies relevant to this matter; the Alberta Aggregate (Sand and Gravel) Allocation Policy for Commercial Use on Public Land (AAA2006) and the Guidelines for Acquiring Surface Material Dispositions on Public Land (Guidelines). The AAA2006 and Guidelines do not supersede or override the legislation, Lower Athabasca Regional Plan, or other policies, nor usurp a Director's exercise of discretion.
- [27] There is no entitlement to a disposition, nor is there a guarantee a disposition will be issued just because an application has been submitted.
- [28] In general, applications are handled on a first come first serve basis against other applications of the same type. The Department uses an integrated land management approach. There is no legislative bar to competing applications for dispositions on the same area of public land. Where they are compatible, overlapping dispositions may be issued and multiple land use activities can proceed on the same land at the same time.
- [29] The Appellant has submitted applications, and in the case of the application for SML 140078, an incomplete application. An application for an SML is not the same as being the holder of the disposition. An application does not prevent, nor bar other applications from being submitted and considered. Public land is not managed for only one industry or one applicant.

Alleged Errors in Material Fact and Law

- [30] The Director submitted that the Director did not err in the determination of a material fact.
- [31] The Director submitted that the application before the Director was the application for SML 140078, not the Appellant's pre-PLAR application for SML 080053. It would have been an error for the Director to consider a previous application that was not before her and that had already been the subject of consideration and decisions by other statutory decision makers. Similarly, it would be an error for the Board to consider the pre-PLAR

application for SML 080053 or the Appellant's decisions to pursue administrative review or commence civil litigation in relation to the pre-PLAR application.

[32] The Director stated that the Appellant's submission contains errors in fact, including the statements:

- "there have been various MSLs on the Appellant's SML"; and
- "denying the Appellant the right to have the lands back"

The Appellant does not hold an SML on the lands in question; and the Appellant does not have rights to the public land in question.

[33] The Director submitted that the following statement in the Appellant's submission is misleading at best, and potentially bordering on professional misconduct. The Appellant stated:

"the other technical issues have been addressed and the requested documents are already in the full control of the Alberta Department of Justice, filed. This includes Stat Dec, exploration report, SIF."

Alberta Justice does not receive disposition applications or make disposition decisions (accept/reject; issue/refuse). Alberta Justice does not have "full control" of the requested documents. A complete SML application requires a statutory declaration, test data, and site information form – these documents were not submitted with the application for SML 140078. To date, a statutory declaration and site information form have not been provided in relation to the application for SML 140078. Further, only incomplete test hole data was provided.

[34] The Director stated that:

- “There is no fiduciary duty, obligation, or relationship between the Appellant and the Director or the Department. Submitting an application for a public lands disposition does not create a fiduciary relationship.”

Fiduciary duty is defined in Black’s Law Dictionary as:

A duty of utmost good faith, trust, confidence and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer’s client or a shareholder);

Black’s Dictionary, 7th ed., *sub verbo* “duty”

Further, the Director submitted that “The Director and Department do not have an obligation of loyalty to the Appellant. To the contrary, the Director and Department should not be holding the Appellant’s interests higher than all other public land interests, users and applicants.

- [35] The Director submitted that proper consideration was given to whether the application was complete and rejected the application for SML 140078.

V FINDINGS OF FACT

- [36] The Appellant submitted an application for a Surface Material Lease 140078 on November 1, 2014 and submitted an amended application on April 2, 2015.

- [37] The review period for making a completeness decision was extended as per legislation for the initial application (November 26, 2014) and the amended application (April 7, 2015).

- [38] On May 26, 2015 an application decision rejecting SML 140078 was made.

- [39] The application was rejected as:

- a. No statutory declaration was provided;

- b. No site information form was provided;
- c. The test hole location plan to match test hole data was not provided;
- d. Access to the area in N1/2 and s1/2 33-85-6-W4M was not identified; and
- e. The proposed SML had double coverage with MSL 112987, MSL 122181, MSL 120005, MSL 120944, MSL 120945, MSL 122177 and 122181.

- [40] The application for SML 140078 submitted did not have a statutory declaration, the site information form, or test hole location plan attached.
- [41] SML 140078 has double coverage with MSL 112987, MSL 122181, MSL 120005, MSL 120944, MSL 120945, MSL 122177 and 122181.
- [42] The Appellant does not hold an SML on the lands in question.
- [43] The application for SML 140078 was a separate and distinct application and not a continuation of a previous application.
- [44] The Alberta Aggregate Allocation Policy for Commercial Use on Public Land (AAA 2006) and the Guidelines for Acquiring Surface Material Dispositions on Public Land do not supersede or override the legislation.
- [45] Under the legislation, an application for disposition does not guarantee, nor entitle the applicant to a disposition.
- [46] Alberta Justice does not receive disposition applications or make disposition decisions.
- [47] Matters under the *Proceedings Against the Crown Act* are not within the jurisdiction of the Public Lands Appeal Board.

VI ANALYSIS

[48] Section 9(1)(a)(b)(e)(f) of PLAR requires an application be made in form acceptable to the director and must contain an accurate description, acceptable to the director, of the land to which the application relates, and if the land is subject to a disposition must be accompanied with a statement of consent, in a form acceptable to the director, that is signed by the disposition holder or timber holders and must be accompanied with a statement, in the form acceptable to the director. Section 9(1) gives great discretion to the Director surrounding the form and content of the application. The application was incomplete in regards to the stated requirements for an application to be considered complete by the Director. Under section 9(5) of PLAR the Director must reject application that does not meet the requirements. The Director was correct in rejecting the application.

[49] The application for SML 140078 was not in a form, nor did it contain an accurate description acceptable to the Director as the application did not have a statutory declaration, the site information form, or test hole location plan attached.

[50] On May 26, 2015 the Director made a decision rejecting the application for SML 140078 as it did not have a statutory declaration, the site information form, or test hole location plan attached. Section 9(5)(a) of PLAR states:

The director 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,

The Director acted in accordance with the regulation as per section 9(5)(a) of PLAR when she rejected the Appellant's application for SML 140078 as it was incomplete.

[51] The Appellant submitted that the Director erred in the determination material facts by overlooking the history of the Appellant's previous application for SML 080053. The

Appellant's application for SML 140078 makes no mention of the previous application. The Appellant did not submit previous historical information from previous applications. The Board finds the onus is upon the Appellant to ensure any information he believes is relevant to the application is before the Director at the time of application.

- [52] The Director noted that the Appellant identified four First Nation Consultation (FNC) numbers from the year 2014, in the "remarks" section of the application for SML 140078 indicating that the application was separate and distinct from the previous application for SML 080053 which would have had FNC numbers from 2008 if the application was a continuation of SML 080053. The Board finds that the application with the attached FNC numbers from 2014 was a new application and not a continuation of a previous application that had been previously decided.
- [53] The Director must consider each application with fresh eyes, unbiased by previous applications to ensure the application is complete and at later stages of consideration is with merit. To consider an application using previous application information that had already been subject to consideration and decision would be an error of fact on the face of the record.
- [54] The Appellant has stated that "There have been various MSLs on the Appellant's SML." and "...the Director did err in law by denying the Appellant the right to have the lands back." The Board finds the Appellant did not have an SML. The Appellant had an incomplete application for an SML before the Director, further the Board finds the Appellant had no established right to the lands in question. Statements within the Appellant's submission are misleading and without basis and are an error in fact and could be characterized as frivolous.
- [55] The Appellant's submission that there is a fiduciary obligation in regards to an application for a disposition is incorrect. The mere action of submitting an application for a public lands disposition does not create a fiduciary relationship. The Director and the Department have an obligation to hold the greater public interest above all other interests.

The Director and the Department do not have an obligation to place the Appellant's interests above public land interests, users or those of other applicants by virtue of the Appellant making an application for a disposition. Section 10 (1) of PLAR gives the Director discretion to issue or refuse to issue a formal disposition applied for under section 9 of PLAR. As well, section 9 provides the Director the ability to determine the nature and form of an application for a formal disposition, as well, section 9(5)(a) requires the Director to reject an application if it does not meet the requirements of section 9 of PLAR. It is clear that the legislation envisioned the Director having the information before her when deciding to issue or refuse a disposition and that the Director had the ability to exercise that discretion. There is no fiduciary duty or obligation to issue a disposition created.

VII RECOMMENDATION FOR DECISION

- [1] The Panel recommends that the Minister find the application was incomplete.
- [2] The Panel further recommends the Minister find the appeal on the grounds that allege the Director erred in determination of material fact on the face of the record, erred in law or exceeded the Director's jurisdiction or legal authority are without basis and the dismiss the appeal.



Gordon McClure, Panel Chair