

ALBERTA
PUBLIC LANDS APPEAL BOARD
REPORT

May 24, 2017

IN THE MATTER OF sections 119(d), 121, and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 15, 211(c), 213, 228 and 235 of the Public Lands Administration Regulation, A.R. 187/2011;

- and -

IN THE MATTER OF an appeal filed by Cecil Lorne Andersen under section 211 of the Public Lands Administration Regulation.

Cite as: *Andersen v. Director, Alberta (Environment and Parks)*, 2017 APLAB 16-0036

Panel Members

Mr. Gordon McClure, Board Chair;

Ms. A.J. Fox, Panel Member; and

Mr. Chris Powter, Panel Member.

Appearances

Andrew Bachelder, Legal Counsel to the Public Lands Appeal Board;

Denise Black, Board Assistant to the Public Lands Appeal Board;

Alison Altmiks, Legal Counsel to the Director;

Corrine Kristensen, Director, Senior Manager, Environmental Assessment, Approvals and Dispositions, Provincial Approvals Section;

David Kirkup, Land Management Specialist, Alberta Environment and Parks;

Chiara Feder, Biologist, Alberta Environment and Parks; and

Cecil Lorne Andersen, Appellant.

EXECUTIVE SUMMARY

The Appellant applied for Surface Material Disposition (“SML”) 140082 on November 12, 2014. The lands identified under the application for SML 140082 are approximately 11.55 acres in size. The application identified an existing Grazing Lease (GRL 880273); two Protective Notations (PNT 130235 and PNT 700252); the location of the land within a key wildlife and biodiversity area; ungulate winter range considerations; the presence of an intermittent waterbody; a water table at approximately 1-2 metres depth and proposed gravel extraction below the water table.

The Director made a merit decision refusing the application for SML 140082 on November 9, 2016. On November 22, 2016 the Board received the Appellant’s Notice of Appeal. The hearing held on April 24, 2017 considered the issues:

1. Did the Director err in the determination of a material fact on the face of the record; and/or
2. Is the decision is expressly subject to appeal under PLAR s. 15?
3. An additional question of procedural fairness was raised by the Appellant in regard to how he was notified by Brazeau County of a Land Management Specialist’s recommendation to the Director regarding the application for SML 140082.

The Board, having fully considered the both the written and oral submissions of the Director and the Appellant, the record upon which the Director made the decision, and the evidence entered into the record, concluded that there is no apparent error in material fact on the face of the record. The Appellant withdrew the allegation of deemed rejection during the hearing, citing a misunderstanding of the legislation.

The Board found the communication of the recommendation of the Land Management Specialist to Brazeau County, which led to the Appellant becoming aware of the recommendation to the Director, was an error in procedural justice in regard to the perceptions of fairness of outcomes. However, the Board found that there was no evidence that this error affected the Director's decision, and would not warrant altering the Director's decision.

The Board, having not found a substantive error in procedural fairness or natural justice or an error of material fact on the face of the record, upheld the Director's decision.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	I
I BACKGROUND.....	1
II ISSUES.....	4
III SUBMISSIONS	4
Appellant.....	4
Director	7
IV LEGISLATION.....	9
Public Lands Administration Regulation	9
V ANALYSIS.....	12
VI DECISION.....	14
VII OBSERVATIONS.....	15
VIII RECOMMENDATION.....	16

I BACKGROUND

- [1] The Appellant applied for Surface Material Disposition (“SML”) 140082 on November 12, 2014. The application was acknowledged as received by the Approvals and Dispositions Services Unit by letter to the Appellant on November 26, 2014.
- [2] The lands identified under the application for SML 140082 are approximately 11.55 acres in size, located in the North Saskatchewan Land Use Region.
- [3] The application identified an existing Grazing Lease (GRL 880273); two Protective Notations (PNT 130235 and PNT 700252); the location of the land within a key wildlife and biodiversity area; ungulate winter range considerations; the presence of an intermittent waterbody; a water table at approximately 1-2 metres depth and proposed gravel extraction below the water table.

Director’s Record, Tab 1, SML Site Information Form

- [4] On December 9, 2014 the Appellant was informed that after a review of the application, the Director accepted the application as complete and the decision concerning completeness had been registered in the departmental system on December 9, 2014. The letter went on to inform the Appellant that the application was subject to a merit review and the department had one year for the issuance or refusal of the authorization. The one year mark would be December 10, 2015.
- [5] The Appellant followed up with both Alberta Environment and Parks (AEP) Disposition Services and with AEP field staff throughout 2015 and 2016 as to the status of his application.
- [6] The disposition boundary for SML 140082 was approved in principle on February 23, 2016, with a revised sketch plan. An amended application was requested on March 4, 2016 for the revised boundary.

Director’s Record, Tabs 25 and 27

[7] The amended application was submitted on April 5, 2016. The completeness review period for the amended application was extended on April 6, 2016, as per section 15(2) of the Public Lands Administration Regulation (PLAR), which allows for a further period not exceeding 90 days. On May 16, 2016 the amended application was accepted as complete.

Director's Record, Tabs 30, 32, 33, 34, 39

[8] On June 14, 2016 a Conservation and Reclamation Business Plan ("CRBP") was submitted by the Appellant to the Department field staff, and a review of the amended Application for SML 140082 was commenced. An amended CRBP was submitted on August 12, 2016.

Director's Record, Tabs 45, 46, 60

[9] On July 14, 2016 a survey plan was submitted by the Appellant to replace the sketch plan submitted on April 5, 2016. The boundaries of the survey plan were the same as the sketch plan.

Director's Record, Tabs 49 – 52

[10] On August 12, 2016 the Appellant was invoiced by the Department for the amended Application for SML 140082. The invoice was paid by the Appellant on August 22, 2016 and received by the Department on August 24, 2016.

Director's Record, Tabs 63 and 64

[11] Throughout August and September 2016 the Department reviewed the CRBP. A recommendation of refusal was completed on September 26, 2016 and provided to the Director on September 29, 2016.

Director's Record, Tabs 66 – 72

[12] The Director made a merit decision refusing the application for SML 140082 on November 9, 2016. The Director's letter refusing to issue a disposition noted the following reasons:

“1. The application is proposed to be located within a Key Wildlife Biodiversity Zone ("KWBZ") which the cumulative effects is seen

by the modified landscape which has significantly compromised the integrity and the ecological functions of the KWBZ and the wildlife corridor.

2. Due to previous developments and a water course the proposed project will be eliminating an island of forested area.
3. In this area and in adjacent portions of this KWBZ, the habitat has and will be completely obliterated and changed.
4. With the creation of several end pit waterbodies the forest and wildlife corridors/habitat has become severely fragmented and completely compromised. The reclamation of the habitat to what was there prior cannot be achieved with the creation of an additional end pit waterbody. Creation of an additional end pit waterbody will result in physically creating a barrier to wildlife movements and compromising several different ecological functions.
5. The application eliminates the opportunity the area to be utilized as pasture in the near future and even after reclamation.”

Director's Record, Tabs 78

[13] On November 22, 2016 the Board received the Appellant's Notice of Appeal alleging:

1. The Director erred in the determination of a material fact; and
2. The decision is expressly subject to appeal under PLAR s. 15.

[14] Mediation was held on February 2, 2017. The matter was unable to be resolved in mediation. Upon notice that the mediation was unable to resolve the matter, the Board scheduled a hearing.

[15] The hearing was held on April 24, 2017.

II ISSUES

[16] The issues established in the Notice of Appeal were:

1. Did the Director, in making the decision to refuse the Appellant's application for SML 140082, err in the determination of a material fact?; and,
2. Did the Director fail to approve or refuse the application for SML 140082 within the 30-day time limit (subject to extensions), making the decision subject to appeal under Section 15 of the Public Lands Administration Regulation or Section 59.2(3) of the *Public Lands Act* as a "deemed rejection"?

III SUBMISSIONS

APPELLANT

Err in the Determination of a Material Fact on the Face of the Record

[17] The Appellant stated in oral argument and again in written submissions that "as a licensed professional outfitter and guide for more than 20 years, I'm well aware of the habits and habitats of the wildlife on this flat." Noting further in the submission that "as an occupant of this river flat for 37 years and a keen observer of wildlife and their habitats, I'm well aware of the travel corridors that are used by these animals."

Appellant Submissions, para. 1 and 4

[18] Additionally, the Appellant submitted that:

"While you cannot mine gravel without changing the current land use or status, not all change is bad for all species. Because of the end pit lakes, we now have one of the largest resident goose

hatcheries in the North Saskatchewan River valley. Trumpeter Swans, various breeds of ducks and the transient goose population have come to depend on these areas for secure resting sites for both spring and fall migrations. These too are “biodiverse species”... For the migratory birds, end pit lakes, clear shores and secure nesting sites are critical. For the ungulates, food sources, browse, grazing and in winter predominately my feed yards constitute critical habitat. They also require adequate secure resting sites. These are the large undeveloped areas to the north and west of the SMLs.”

Appellant Submissions, para. 1

[19] The Appellant submitted further:

“[w]hile the whole general area has been designated as a Key Wildlife Biodiversity Zone, not all of this area is or has been used extensively by the wildlife of concern, primarily the ungulates.”
“...[T]he primary travel corridor is the crest of the river hill. The secondary corridor is the base of the river hill. The third and much less important is adjacent to the river itself. This particular corridor is being enhanced by the reclamation completed on SML 080023. There is already a significant establishment of browse species on the North and East portions of this SML which is adjacent to this corridor. These corridors are primarily used in the winter months, with the coming of spring and the loss of snow, the majority of the ungulates move out of the valley and disperse on the agriculture lands on top. I do not be leave the development of these 13 acres will have any significant impact on the viability of the deer herds or their current travel patterns with in this ecosystem.”

Appellant Submissions, para.4

[20] The Appellant submitted,

“Brazeau County in their assessment believe this is an appropriate development in an appropriate location. There has been no public objections to this application. In Brazeau County, the only gravel source in the river valley. We must have gravel for our roads, for pavement, for bridges and for our houses.”

Appellant Submissions, para.2

[21] The Appellant stated during oral argument and again in written submissions,

“I believe this development is consistent with the previous SML’s and will have very minimal impact on the wildlife and will in fact improve the habitat in a relatively short time.”

Appellant Submissions, para.7

Question of Procedure and Process

[22] The Appellant submitted

“[t]here is also the concern that the notification of refusal of this SML was sent to the County of Brazeau prior to myself or my representative being notified by the director. I believe this an inappropriate action by the department.”

Appellant Submissions, para.6

Deemed Rejection

[23] The Appellant submitted in his written submissions that under Section 15 of the Public Lands Administration Regulation or Section 59.2(3) of the *Public Lands Act*, the director failed to approve or refuse the application for SML 140082 within the 30 day time limit, noting a request for a 90 day extension was granted on November 26, 2014. To the Appellant’s knowledge no further extensions were requested or granted until April 6, 2016. The Appellant stated,

“[t]his is some 16 months, far exceeding any 90 day extension.”

Appellant Submissions, para.5

- [24] However, during the Appellant’s presentation of oral arguments, the Appellant withdrew the allegation of deemed rejection, citing a misunderstanding of the legislation.

DIRECTOR

Err in the Determination of a Material Fact on the Face of the Record

- [25] The Director submitted that,

“the Appellant’s submission, appears to suggest that the alleged error in determining a material fact on the face of the record is whether or not the area is winter ungulate habitat.”

Director’s Submission, para. 1

- [26] The Director also submitted that,

“[t]here is no dispute that the land is located within a Key Wildlife and Biodiversity Zone (KWBZ)... and that the KWBZ extends along the river, KWBZs typically occur along major river valleys.”

Director’s Submission, para. 31 and 32

- [27] The Director further submitted that KWBZs are a combination of key winter ungulate habitat and corridors making up the ungulate ranges and providing a higher potential for biodiversity.

- [28] Additionally, the Director submitted,

“[t]he Appellant’s CRBP and the Appellant’s written submission support a conclusion that ungulates are using the lands... The Appellant’s submission describes three corridors, with the “third and much less important is adjacent to the river itself”.”

Yet, the Appellant's submission goes on to confirm the stated purpose of the KWBZ:

“these corridors are primarily used in the winter months, with the coming of spring and the loss of snow, the majority of the ungulates move out of the valley and disperse on the agriculture lands on top.”

Director's Submission, para.36 and 37

[29] The Director submitted in oral argument during the hearing and in written submissions,

“[t]he ecological function of this land has changed in response to the loss of the surrounding habitat... The amount of disturbance from previous development increases the importance of, and need to protect, the remnants as there is reduced connectivity in the valley which is key for winter ungulate habitat... The remaining parcel of forested habitat is now even more critical because it is the only forested patch of suitable habitat in the area.”

Director's Submission, para.38, 40, 41

Question of Procedure and Process

[30] The Director submitted,

“Brazeau County is responsible for exercising regulatory functions within its municipal mandate. Brazeau County is not responsible for land use decisions under the *Public Lands Act*.”... This resulted in the Department communicating a summary of the field recommendation to Brazeau County prior to a decision being made and prior to communication of the recommendation or a decision to the Appellant.

Director's Submission, para.50, 52

[31] The Director noted that,

“[t]hrough communication with Brazeau County regarding the municipal applications the Appellant learned of the recommendation to refuse the SML. This was unfortunate; it would have been preferable for the Appellant to learn of the field recommendation through communication with the Department.”

Director’s Submission, para.53

[32] The Land Management Specialist during testimony expressed regret that the Appellant found out about recommendations related to the status of the SML application from Brazeau County prior to the Director’s decision. The officer apologized to the Appellant for this event having taken place and noted that the Appellant should not have been informed of the recommendation by the county.

IV LEGISLATION

PUBLIC LANDS ADMINISTRATION REGULATION

[33] Section 9 of the PLAR states:

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, 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 standards, 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.

[34] Section 15 pertains to deemed rejection states:

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.

[35] At the merit review stage, a disposition is either issued or refused. Section 10 of the Public Lands Administration Regulation states:

Issuance of formal disposition

- 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.

V ANALYSIS

Err in the Determination of a Material Fact on the Face of the Record

[36] The Appellant's Site Information Form found within the Director's record identifies that approximately 11.55 acres of land that comprise the application for SML 140082 are located within Grazing Lease 880273 (the "GRL"). There are two Protective Notations ("PNT"s) placed upon the land; those being PNT 130235 and PNT 700252. The land for

SML 140082 is located within a Key Wildlife Biodiversity Zone (“KWBZ”) and there are ungulate winter range considerations. This is not in dispute.

- [37] Maps and aerial photographs show that there is a series of pit end lakes in the area from previous gravel extraction operations. The Appellant’s Site Information Form establishes the water table within the land that comprises the application for SML 140082 at a depth of 1-2 metres. The Director and Appellant both agreed that aggregate extraction would result in creation of an pit end lake at the end of life of the disposition. Again this is not in dispute.
- [38] The arguments before the Board focus primarily upon the KWBZ and the movement of ungulates through the KWBZ; the impact of SML 140082 upon the KWBZ; the inability to return the land to its previous state; and the impact of the creation of an additional end pit lake in an area already impacted by a series of end pit lakes. The question before the Board is whether the Director, in making her decision, erred in a material fact on the face of the record regarding the movement of ungulates through the KWBZ and the impact of SML 140082 upon the land contained within the KWBZ.
- [39] The Director who made the decision, and the officers who made recommendations to the Director, argued that the ungulates, which prior to any development would have moved freely across the whole of the KWBZ, are now, due to end pit lakes, restricted to moving within tracts of land identified as corridors and sheltering and gathering in other tracts of land identified as forest islands.
- [40] The Appellant provided submissions and photographic evidence showing that the ungulates currently moved primarily through two identifiable corridors within the KWBZ and to a lesser extent through the proposed site for SML 140082. The Appellant acknowledged during cross examination that the end pit lakes impeded the movement of the ungulates though they may offer other species important habitat.
- [41] The Appellant submitted that no onsite assessment of the SML was conducted by provincial staff. This was confirmed by the Director during cross examination. However, the Director did identify that information from many sources, aside from direct

observation and a reliance upon departmental policies, was used to arrive at the decision. This information was drawn from sources such as the Data Spatial Processing Tool, Landscape Analysis Tool, Land Standing Reports and Geographic Information System information gathered by field officers.

- [42] The Appellant did not identify a specific error of material fact on the record. Rather, it may be characterized that the Appellant, having similar information and considerable on-the-ground experience, drew an alternate conclusion. This is not to say that the Director erred, but, given the information available at the time, came to a different conclusion in deciding to refuse the application. In this case there is no apparent significant error or breach of natural justice or procedural fairness. The Director's decision should be upheld.

Deemed Rejection

The Appellant withdrew the allegation of deemed rejection, noting a misunderstanding of the legislation during the presentation of oral arguments. As the Appellant withdrew this ground for appeal, no further analysis is required and the Board need not consider this ground of appeal.

VI DECISION

Error of Material Fact on the Face of the Record

- [43] Neither party disputes that the land for SML 140082 is located within a Key Wildlife Biodiversity Zone and there are ungulate winter range considerations and the extraction of aggregate proposed in the application for SML 140082 would result in the creation of an end pit lake at the end of life of the disposition. In dispute between the Appellant and the Director is the impact of the proposed SML upon the movement and sheltering of wildlife in the KWBZ, a key winter ungulate habitat and corridors making up the

ungulate ranges that provided a high potential for biodiversity. The Board, having fully considered both the written and oral submissions of the Director and the Appellant, the record upon which the Director made the decision, and the evidence entered into the record, has concluded that there is no apparent error in material fact on the face of the record.

Question of Procedure and Process

- [44] The Board found the communication of the recommendation of the Land Management Specialist to Brazeau County, which led to the Appellant becoming aware of the recommendation to the Director, was an error in procedural justice in regard to the perceptions of fairness of outcomes. However, the Board found that there was no evidence that this error affected the Director's decision, and would not warrant altering the Director's decision.
- [45] The Board, having not found a substantive error in procedural fairness or natural justice or an error of material fact on the face of the record, upholds the Director's decision.

Deemed Rejection

- [46] The Appellant withdrew the ground of appeal in the hearing, thus no decision will be rendered on this ground.

VII OBSERVATIONS

- [47] The communication of recommendations made to the Director to outside parties prior to the Director's decision could have the potential effect of affecting or fettering the Director's decision. Recognizing that Department and the municipality must share information for efficient and effective decision making, formal procedures around

communication of information and confidentiality of information would assist in maintaining the perception of fairness.

[48] Further, the Board notes that there may be benefit to the Department and stakeholders of acknowledging, by some means, an indication of significant impediments to further development in order to dissuade future applicants from unnecessarily expending resources in regard to the lands associated with this appeal.

VIII RECOMMENDATION

[49] The Board recommends the Director's decision to refuse to issue SML 140082 be upheld and the appeal be dismissed.

_____ *(original signed by)* _____

Gordon McClure, Chair

_____ *(original signed by)* _____

AJ Fox, Panel Member

_____ *(original signed by)* _____

Chris Powter, Panel Member



ALBERTA
ENVIRONMENT AND PARKS

*Office of the Minister
Minister Responsible for the Climate Change Office
MLA, Lethbridge-West*

ALBERTA ENVIRONMENT AND PARKS

*Public Lands Act
RSA 2000, c. P-40*

**MINISTERIAL ORDER
28/2017**

**ORDER RESPECTING PUBLIC LANDS APPEAL BOARD
APPEAL NO. 16-0036**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being the Order Respecting Public Lands Appeal Board Appeal no. 16-0036.

DATED at the City of Edmonton, in the Province of Alberta, this 2nd day of August, 2017.

Shannon Phillips
Minister

APPENDIX

ORDER RESPECTING PUBLIC LANDS APPEAL BOARD APPEAL NO. 16-0036

With respect to Public Lands Appeal Board Appeal No. 16-0036, I, Shannon Phillips, Minister of Alberta Environment and Parks, order as follows:

1. The Director's refusal to issue SML 140082 to Mr. Cecil Andersen is confirmed.
2. The appeal is dismissed without costs.