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ALBERTA  
PUBLIC LANDS APPEAL BOARD

Decision

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Date of Decision – October 9, 2018

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

-and-

**IN THE MATTER OF** an appeal filed by E Construction Ltd. with respect to the decision by the Director, Provincial Approvals Section, Alberta Environment and Parks, to refuse Application No. ALR 170020 for an aggregate land review request.

Cite as: *E Construction Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (October 9 2018), Appeal No. 17-0043-D (A.P.L.A.B.).

**BEFORE:**

Ms. Marian Fluker, Acting Appeals Co-ordinator.

**SUBMISSIONS BY:**

**Appellant:** E Construction Ltd.

**Director:** Ms. Joanne Sweeney, Surface Materials Specialist, Approvals and Disposition Services Unit, Alberta Environment and Parks, represented by Mr. Larry Nelson, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) refused an aggregate land review request application by E Construction Ltd. (E Construction).

E Construction appealed the decision to the Public Lands Appeal Board (Board) on the basis AEP erred in the determination of a material fact on the face of the record.

The Board received a motion from AEP to dismiss the appeal because the decision was not an appealable decision.

The Board received submissions from E Construction and AEP on whether the decision was appealable. Based on the submissions received and a review of the applicable legislation, the Board found the land review resulted in AEP refusing a disposition to E Construction. Refusal of a disposition is appealable under section 211 of the *Public Lands Administration Regulation*.

Therefore, the Board found the appeal was within its jurisdiction and properly before the Board.

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## I. BACKGROUND

[1] On March 2, 2018, E Construction Ltd. (the “Appellant” or “E Construction”) filed a Notice of Appeal with the Public Lands Appeal Board (the “Board”) appealing the refusal of Aggregate Review Request ALR 170020 (the “Review Request”) by the Director, Approvals and Disposition Services Unit, Alberta Environment and Parks (the “Director”). The Appellant alleged the Director erred in the determination of a material fact on the face of the record.

[2] On March 6, 2018, the Board acknowledged receipt of the Notice of Appeal and asked the Director to provide the documents upon which her decision was based (the “Record”).

[3] On April 11, 2018, the Director requested the appeal be dismissed as being outside the Board’s jurisdiction. The Director stated the Review Request was not an appealable decision under the legislation.

[4] On April 13, 2018, the Board set the schedule to receive submissions on the Director’s request to dismiss the appeal.

[5] On May 4, 2018, the Director provided the Record, and on May 11, 2018, a copy of the Record was provided to the Appellant.

[6] Between May 31, 2018, and June 18, 2018, the Board received the Appellant’s and Director’s submissions on the Director’s request to dismiss the appeal.

[7] After reviewing the submissions from the Appellant and Director (collectively, the “Parties”), the Board asked the Parties to provide answers to the following questions in order to better understand the Review Request process:

1. What sections in the *Public Lands Act* and the *Public Lands Administration Regulation* authorize the Aggregate Land Review Request Process (“ALRRP”)?
2. What is the intent of the ALRRP?
3. How is the ALRRP different from a Surface Material Exploration (“SME”) permit?
4. What information would be provided as part of the ALRRP?

5. How does this compare to the information required for an application for an SME?

[8] On June 26 and 27, 2018, the Board received responses to the questions from the Appellant and Director, respectively.

## **II. SUBMISSIONS**

### **A. Appellant**

[9] The Appellant argued the justification of the refusal was open to interpretation and some of the assumptions in the Director's decision cannot be qualified at this preliminary stage. The Appellant stated the current ALRRP lacks the ability to challenge a refusal.

[10] The Appellant explained the ALRRP came into effect on September 15, 2017, and there was no provision allowing decisions made under the process to be appealable under the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 ("PLAR"). The Appellant stated with the ALRRP required at the initial stage of the aggregate approval process, there is no appeal mechanism available to industry for aggregate operations on public lands.

[11] The Appellant explained the refusal of an ALRRP precludes the ability to obtain an SME or SML and does not allow industry an opportunity to provide further input to address any concerns with the application. The Appellant stated having the appeal process limited to later in the process, results in disposition applications becoming redundant as the proponent cannot clear the initial ALRRP.

[12] The Appellant said some of the ALRRP refusals appear to be the result of Alberta Environment and Parks ("AEP") field staff misinterpreting the intent of the application. The Appellant stated the ALRRP application is simple and abbreviated and cannot address many of the concerns brought forward by field staff in a way that would have been provided in a more detailed SME or Surface Materials Lease ("SML") application.

[13] The Appellant believed industry requires the opportunity to appeal the restrictions or reasoning of an ALRRP refusal to ensure the implications to industry and the government are fair and equitable.

[14] The Appellant recommended the ALRRP be modified to include appeal provisions under PLAR.

**B. Director**

[15] The Director submitted the Notice of Appeal did not reveal a decision prescribed by section 211 of PLAR as one that is appealable.<sup>1</sup> The Director explained the decision being appealed relates to a request made by the Appellant for the Director to consider whether certain lands were appropriate for conducting aggregate operations. The Director said the decision was made under the ALRRP.

[16] The Director stated the decision made was not a rejection of an application for a disposition or a refusal to issue a disposition since the Appellant had only made a request for a review of the lands to determine whether they were suitable for an aggregate operation. The Director said this was not a decision prescribed in section 211 of PLAR and, therefore, was not appealable.

[17] The Director explained a review request allows members of the public to initiate a review to determine if the public land in question is suitable to be allocated for an aggregate

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<sup>1</sup> Section 211 of PLAR provides:

“The following decisions are prescribed as decisions from which an appeal is available:

- (a) the issuance, renewal, amendment or suspension of a disposition issued under the Act;
- (b) the rejection of an application under the Act for a disposition,
- (c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act;
- (d) the imposition or variation under the Act of a term or condition of a disposition;
- (e) a deemed rejection under section 15(1);
- (f) an order under section 35(1) to vacate vacant public land;
- (g) a refusal under section 43(1) of the Act;
- (h) an enforcement order, a stop order or an administrative penalty;
- (i) a removal under section 69(2)(f)(iii) of the Act;
- (j) an order under section 182;
- (k) a refusal to admit, or a requirement to remove, a pet animal under section 194(2);
- (l) an order under section 201(b) to vacate a public land recreation area;
- (m) an order under section 204(1) to vacate a campsite;
- (n) an order under section 205.”

operation, and the review will determine the method allocation whether it be by the tender process, public pit process, or the under and over 80 acre process. The Director explained the review process is a tool allowing the public to suggest lands for AEP to review for a potential aggregate operation. The Director said without the review request, AEP would have insufficient information to make allocation and use decisions, and AEP might not be able to adequately deal with allocation and use decisions except for areas which AEP has already reviewed for other purposes.

[18] The Director noted the Appellant appeared to agree with her position that the Board does not have jurisdiction to consider the appeal.

[19] The Director did not agree with the Appellant implying the decision was not appealable since the Appellant has the option to judicially review the decision to refuse the Review Request if it believes the decision was made in error.

[20] The Director requested the Board dismiss the appeal as being outside the Board's jurisdiction.

**C. Appellant's Rebuttal**

[21] The Appellant understood there was no appeal process for ALRRPs and was aware it had the option to seek judicial review, which it considered a "heavy-handed" approach that is time consuming and expensive for the Parties.

[22] The Appellant noted the appeal process for the sand and gravel industry has been in place for years to the benefit of industry and government. The Appellant stated it was unfortunate the fair and efficient process was abandoned for the ALRRP. The Appellant believed there should be a means for industry to discuss conditions placed on a refusal letter.

**D. Responses to Questions**

[23] The following are the Parties' responses to these questions asked by the Board:

1. What sections in the *Public Lands Act* and the *Public Lands Administration Regulation* authorize the Aggregate Land Review Request Process (ALRRP)?
2. What is the intent of the ALRRP?



3. How is the ALRRP different from a Surface Material Exploration (SME) permit?
4. What information would be provided as part of the ALRRP?
5. How does this compare to the information required for an application for an SME?

1. Appellant

[24] The Appellant did not provide a response to the first question.

[25] The Appellant said the intent of the ALRRP is to provide AEP the opportunity to determine if an aggregate development proposal in a specific area is an acceptable land use. The Appellant explained the ALRRP submission can include lands up to 640 acres and identifies protective or consultative notations that may affect how the land is managed. The Appellant said the process expedites the Surface Material Exploration approval process if the ALRRP found it to be an acceptable use for the specific lands.

[26] The Appellant explained the ALRRP is generic and does not require a field component, as its purpose is to determine broad land use management goals over a large area. The SME process requires site specific details where actual testing and operations on the land take place. The Appellant noted SME applications can relate to a maximum of 320 acres.

[27] The Appellant explained the information required for the ALRRP includes land description, location sketch, and flood plain requirements. The Appellant noted the requirements for an SME application includes:

1. a SME sketch plan indicating access, test hole locations, and watercourses;
2. a landscape analysis tool;
3. a land standing report;
4. First Nation assessment form;
5. occupant consents;
6. caribou plans, if required; and
7. historical resources report, if required.

2. Director

[28] The Director stated the Review Requests are not described in the *Public Lands Act*, R.S.A. 2000, c. P-40 ("PLA") or PLAR, are not dispositions, and do not grant rights or interest to public lands. The Director noted there are a number of administrative tools used by AEP in administrating the PLA and PLAR. The Director said the Review Request assists in meeting the objectives and purposes of the PLA including:

1. regulating the allocation and use of public lands;
2. providing a legislative and regulatory framework to deal with the growing demand for renewable and non-renewable resources on public lands;
3. balancing resource development, recreation use, and access to public lands; and
4. meeting environmental performance through conservation and stewardship outcomes.

[29] The Director explained the Review Request is used to prioritize the management of public lands when AEP does not have sufficient information to make allocation and use decisions regarding potential aggregate operations. The Director said it allows the public to trigger a review of specified public lands which they are potentially interested for conducting aggregate operations, and the review assists in allocating the AEP's limited resources to areas of immediate interest. The Director stated the Review Request leads to better and more efficient processes when considering applications for aggregate dispositions by:

1. determining whether specific public lands are suitable for aggregate operations;
2. reducing resources an applicant must expend on applying for an aggregate disposition for public lands deemed not suitable for aggregate operations;
3. reducing resources AEP must expend when reviewing applications determined not to be suitable for aggregate operations; and
4. reducing time needed to review and process aggregate disposition applications through the better allocation of AEP resources.

[30] The Director explained an SME is a disposition allowing the holder to perform exploratory investigations on the specified public lands to:

1. determine the quality and depth of aggregate materials and the viability of any potential aggregate operation; and

2. prepare and support an SML application if warranted.

[31] The Director noted the SME application fee is \$525.00, whereas there is no fee to submit a Review Request.

[32] The Director stated the Review Request requires AEP, at its costs, to conduct an initial review to determine whether the specified public lands are suitable for aggregate operations. The Director said it allows a person to ask AEP whether a disposition would be refused on the basis of non-aggregate related criteria prior to having to pay for an SME application and potentially exploratory investigation costs.

[33] The Director noted the person making the Review Request does not receive any rights to the public lands and is not permitted to enter or occupy the lands for any purpose.

[34] The Director explained the Review Request also evaluates the suitability of the lands for aggregate operations by considering issues such as:

1. potential impacts to fish and wildlife, including habitat;
2. potential impacts to water resources;
3. Department of Transportation and local municipal requirements for public works;
4. potential competing uses for the specified public lands;
5. cumulative impacts to the specified public lands and general vicinity; and
6. access to the specified public lands.

[35] The Director explained the specified public lands would not be considered for other aggregate related uses while the Review Request is conducted. The Director stated this "right" is not specific to the person requesting the Review Request and benefits anyone who is potentially interested in the specific lands for aggregate operations. The Director said that even if the Review Request determines the land is suitable for aggregate operations, the Review Request also determines the appropriate method of allocation, and the person who made the Review Request does not receive any advantage of priority in obtaining an aggregate disposition for those lands.

[36] The Director identified the following information as required for the Review Request:

1. name of the person making the request and contact information;
2. land descriptions for the public lands to be reviewed;
3. a general sketch of the location to be reviewed;
4. a landscape analysis tool report for the location; and
5. whether the specified public lands fall within a 1:100 year floodplain.

[37] The Director explained the following information is required when submitting an SME application:

1. applicant's name and contact information;
2. sketch plan of the proposed exploration site boundary;
3. information and statutory declaration regarding the size of the applicant's proposed aggregate operation and any affiliated aggregate operations within a six mile radius of the specified public lands;
4. locations of any proposed test holes;
5. a landscape analysis tool report;
6. a land standing report;
7. consents from overlapping disposition holders;
8. a First Nation Adequacy decision;
9. security deposit for the holder's reclamation obligations (calculated at \$1,500.00 per 80 acres); and
10. the application fee of \$525.00.

### **III. ANALYSIS**

[38] The issue before the Board is whether the Director's decision to refuse the Review Request is appealable under section 211 of PLAR. The Board's jurisdiction to hear matters is limited to those decisions made by AEP that are identified under section 211 of PLAR. The Board recognizes the Director has the authority to make many more different types of decisions under the legislation that are not appealable to the Board.

[39] The ALRRP is a requirement of the process in seeking a disposition for aggregate removal. It is not legislatively required, but was developed by AEP and has been implemented as a process requirement.

[40] The Board is concerned that one of the consequences of the ALRRP is that it may, with an unfavourable review, lead to the elimination of the ability of the applicant to challenge the review itself through the appeal process or, alternatively, to file an application for an SME.

[41] The ALRRP appears to prevent a person from filing an application for an SME, which could potentially give the applicant a right or interest in public lands, until after the ALRRP review is completed and the Director determines there are no land use barriers to filing for a disposition.<sup>2</sup> Adding the ALRRP into the review process has added an extra step into the process in making the determination of whether an SME should be granted. Under the review, the Director has two options: (1) inform the applicant the SME may be granted as there are no obvious barriers, based on the limited information provided, to granting an SME; or (2) inform the applicant an SME would not be granted even if the complete application was filed. If the review process does not result in the refusal of the application, the applicant is still required to provide a complete SME application, with no guarantees the application will result in an SME being granted. After the complete application is filed, and based on the additional information provided, the Director may still refuse to issue the SME, which is an appealable decision.

[42] If an application is denied under the ALRRP, which is a “screening” step, the ultimate result is the SME is refused, which the Director argued is not an appealable decision. In the Board’s view, if the granting of an SME is denied at the ALRRP stage instead of through a full SME application, the SME is denied, regardless of when it occurred. Therefore, since it is a refusal to issue an SME, the decision is appealable under section 211 of PLAR.

[43] The Director cites advantages to the system as limiting the amount of information an applicant is required to prepare prior to submitting the request, and there are no filing costs associated with the request application. The Board is uncertain whether AEP contacted industry to determine whether implementing the ALRRP would be supported by industry given one of the outcomes could be the elimination of the appeal rights under the legislation. It appears from the Appellant’s comments, industry may be willing to expend the costs associated with completing a complete application if the appeal rights are preserved. Although it is unclear from the submissions provided as to whether the ALRRP is a requirement in the SME application process,

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<sup>2</sup> Pursuant to section 1(e)(ii) of the PLA, this is a disposition because it is a “right or privilege in respect of land of the Crown that is not an estate or interest in land....”

it seems reasonable the ALRRP should be optional. If an applicant wants the Director to conduct only a cursory evaluation under the review process they can, but if they want the Director to assess a complete application and bear the costs associated with such an application while preserving their appeal right, they should be able to do so without first complying with the ALRRP.

[44] The Director, and also the Appellant, noted the information provided in the ALRRP is limited and general in nature. The Board questions how a decision regarding the proper land use can be based on the limited information provided in the ALRRP application. The proper use of public lands is important to all Albertans, and it is important to grant dispositions for public lands in an appropriate manner that balances all interests. The Board acknowledges that AEP has a daunting task to balance all of these interests, and decisions must be made using the best information available. Making major land use decisions based on minimal, broad information may not result in the best balance of interests. If decisions have been made previously regarding land use of specific public lands, there should be a database available to the public in order to determine if an application for a specific use should even be filed for review. This would minimize the need of the ALRRP.


[45] The Board appreciates the Director, by implementing the ALRRP, was attempting to streamline the application process. However, the ALRRP is circumventing a right identified in the legislation. The Director does not have the authority to take actions that removes that right. Although simplifying the process is usually a benefit to all concerned, it should not come at the cost of removing the legislated right to appeal.

[46] The Board finds the Director has refused to issue the SME to the Appellant, which is an appealable decision under section 211 of PLAR. Therefore, the appeal is properly before the Board.

**IV. CONCLUSION**

[47] The Board finds the Notice of Appeal is within the Board's jurisdiction, and the Board will hear the appeal.

Dated on October 9, 2018, at Edmonton, Alberta.

  
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Marian Fluker  
Acting Appeals Co-ordinator