ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – June 5, 2020

IN THE MATTER OF sections 121, 122, 123, and 124 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211, 213, 225, 228, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by North East Bulk Transportation Services Ltd., with respect to the decision of the Director, Aggregate Assessments and Continuations, Alberta Environment and Parks, to refuse to issue an amendment to Surface Material Lease SML 020035.

Cite as: *North East Bulk Transportation Services Ltd.* v. *Director, Aggregate Assessments and Continuations, Alberta Environment and Parks* (5 June 2020), Appeal No. 19-0004-R (A.P.L.A.B.), 2020 ABPLAB 9

WRITTEN HEARING BEFORE: Mr. Gordon McClure, Chair; Dr. Brenda Ballachey, Panel Member; and Mr. Tim Goos, Panel Member.

SUBMISSIONS BY:

Appellant: North East Bulk Transportation Services Ltd., represented by Ms. Amanda Avery, TrueNorth Environmental Land Services Ltd.

Director: Ms. Joanne Sweeney, Director, Aggregate Assessments and Continuations, Alberta Environment and Parks, represented by Ms. Shannon Keehn, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued a ten-year Surface Material Lease (SML) in 2003 to North East Bulk Transportation Services Ltd. (the Appellant) on public lands that were subject to a Protective Notation (PNT), along the Mooselake River in the Municipal District of Bonnyville. The PNT was held by Alberta Tourism and Parks (the Parks Division) for a future recreational area. Towards the expiry of the SML, the Appellant applied to amend the SML's boundaries to include public lands across the Mooselake River. The proposed area was also within the PNT.

The Appellant negotiated with the Parks Division to have the PNT cleared so the SML amendment application could be approved. The Parks Division decided not to clear the PNT as the public lands were intended for a new provincial recreation area, which the Parks Division planned to become part of the Moose Lake Provincial Park.

The Appellant requested the Director make a decision on the SML amendment application. The Director decided to uphold the intent of the PNT and refused to issue the amended SML. The Director also stated in her decision the proposed boundary would not be contiguous with the current SML.

The Appellant appealed the Director's decision to the Public Lands Appeal Board (the Board).

The Board held a mediation meeting between the Appellant and the Director (the Parties), but they could not reach an agreement.

The Board held a hearing by written submissions on the following issues:

1. Did the Director, who made the decision to refuse Amendment Application No. SML 020035, err in the determination of a material fact on the face of the record?
2. Did the Director, who made the decision to refuse Amendment Application No. SML 020035 err in law?
3. Did the Director not comply with a regional plan approved under the *Alberta Land Stewardship Act*?
4. Does the Director in this matter have the authority to remove the PNT? The Appellant raised this issue prior to the receipt by the Board of written submissions from the Parties.

After reviewing the evidence and considering the written submissions from the Appellant and the

Director, the Board determined the following:

1. the Director did not err in the determination of a material fact on the face of the record;
2. the Director did not err in law;
3. the Director complied with the Lower Athabasca Regional Plan, which was applicable to the area; and
4. the Director does not have the authority to remove the PNT. However, she can make decisions that do not follow the restrictions in the PNT.

The Board recommended the Minister confirm the Director's decision to refuse the application to amend the Surface Material Lease.

The Board also expressed concern that it took six and a half years for AEP to make a decision on the Appellant's application to change the SML's boundaries. The Board said it was regrettable AEP's delays may have cost the Appellant tens of thousands of dollars. The Board is aware of an initiative within AEP to clear up the backlog of applications, and trusts the initiative will result in more timely decisions.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the "Board") to the Minister of Environment and Parks (the "Minister"), regarding an appeal filed by North East Bulk Transportation Services Ltd. (the "Appellant"), of the decision of the Director, Aggregate Assessments and Continuations, Alberta Environment and Parks (the "Director"), to refuse to issue an amendment to Surface Material Lease SML 020035 (the "SML").

II. BACKGROUND

[2] On May 8, 2003, Alberta Environment and Parks ("AEP") issued the SML to the Appellant. The SML consisted of two separate parcels contained within public lands, legally described as NE 27 and SE 34-61-7 W4M (the "Lands"), located on the east bank of the Mooselake River, and north of Moose Lake Provincial Park. The SML was issued under the *Public Lands Act,* R.S.A. 2000, c. P-40 (the "Act").

[3] The Lands were subject to Protective Notation 000001 (the "PNT"). The PNT was registered on the lands on January 5, 2000. The PNT was held by AEP for the purpose of a "Provincial Recreation Area" and restricted all surface dispositions within the PNT area, except for oil and gas activities.[1]

[4] On December 19, 2012 (the "Amendment Application Date"), the Appellant applied to AEP to amend the SML (the "Amendment Application") by adding public lands from a separate parcel of land located on the west bank of the Mooselake River, and legally described as NE 34-61-7 W4M (the "Added Lands"). The Added Lands were subject to the PNT.

[5] On May 21, 2013, AEP advised the Appellant there were deficiencies in the Amendment Application that needed to be addressed before AEP could continue with the

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[1] AEP's website describes Protective Notations as follows:

"Protective notations are instruments used through the Public Lands Act to identify a management intention regarding certain public land by government departments or legal entities. Notations indicate that the holder of the notation wants to be consulted before any commitment or disposition is placed on the land." See: <ww.alberta.ca/reservations-notations.aspx>.

Amendment Application review. Between December 10, 2015, and August 31, 2016, AEP and the Appellant communicated regarding the Amendment Application's deficiencies.

[6] On February 29, 2018, the Appellant submitted a revised Conservation and Reclamation Business Plan ("CRBP") to AEP in response to the deficiencies.

[7] In email correspondence from June 28, 2018 to July 30, 2018, the Public Lands Officer for AEP advised the Appellant of AEP's concerns regarding the 80 acre guideline policy.[2]

[8] On September 13, 2018, the Appellant received a Supplemental Information Request from AEP requesting the following information:

(a) mitigation plans if erosion of sediment occurred along the river bank;

(b) plans for a survey of the possible presence of sensitive wildlife species Sharp-tailed grouse; and

(c) how the Appellant planned to address the PNT prohibition on surface dispositions other than for oil and gas.

[9] On September 24, 2018, the Appellant provided AEP with a response to the Supplemental Information Request. The Appellant stated the SML was granted with the PNT already in place, aggregate operations in the Added Lands would be only during the winter months, and the Added Lands were isolated from the main recreational area and would have a minimal impact on recreational activities.

[10] On September 27, 2018, the Public Lands Officer advised the Appellant to consult with the Parks Division of AEP ("Parks Division") to determine if they had concerns about the location of the Added Lands within the PNT. On October 5, 2018, the Appellant emailed the Regional Land Use Officer ("Parks Officer") with the Parks Division to request he consent to the Amendment Application despite the prohibitions in the PNT ("PNT Clearance").

[11] On October 9, 2018, the Parks Officer explained to the Appellant that the Added

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2 The "80-Acre Rule" is taken from the Alberta Aggregate (Sand and Gravel) Allocation Policy for Commercial Use of Public Land. The rule prohibits an applicant from obtaining a surface material disposition over 80 acres without a public bid process.

Lands were identified as having provincial recreation area potential and the PNT restricted surface dispositions other than those for oil and gas operations. The Parks Officer stated that as the Amendment Application was for a sand and gravel operation, the Parks Division would not agree to a PNT Clearance.

[12] On October 10, 2018, the Appellant asked the Parks Officer to refer the request for a PNT Clearance to the Parks Officer's supervisor for reconsideration. On October 18, 2018, the Parks Officer advised the Appellant his supervisor agreed with the decision not to provide a PNT Clearance. The Parks Officer stated, in making the decision, he considered the need to protect the watershed, the proximity to the Mooselake River, the location within a key wildlife biodiversity zone, and the area's intactness. The Parks Officer said the Amendment Application was incompatible with the recreational intent of the PNT.

[13] On November 1, 2018, the Appellant met with Parks Division staff on the Added Lands to conduct a site visit. On November 6, 2018, the Parks Officer advised the Appellant the Amendment Application had been considered again, and the Parks Division was maintaining its position to deny PNT Clearance.

[14] On November 7, 2018, the Appellant requested AEP proceed to make its decision on the Amendment Application based on the documentation the Appellant had already submitted in previous correspondence and the Amendment Application. Between December 3, 2018 and January 24, 2019, AEP conducted an internal review of the Amendment Application.

[15] On July 2, 2019, the Director advised the Appellant the amendment to the SML would not be issued (the "Decision"). The following reasons were provided:

> "1. The amendment to add land on NE 34-061-07 W4M overlaps with protective notation (PNT000001) [the PNT]. It identifies a restriction of 'no surface dispositions' with exemption of oil and gas activities. The department has identified that sand and gravel operations are not compatible within the boundaries of the PNT, because of future plans for the expansion of Moose Lake Provincial Park.

2. The added lands are also not contiguous with existing SML 020035 boundary."[3]

[16] On July 17, 2019, the Board received a Notice of Appeal from the Appellant appealing the Decision of the Director not to issue the Amendment Application. The Appellant alleged the Director erred in the determination of a material fact on the face of the record, erred in law, and did not comply with a regional plan approved under the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 ("ALSA").

[17] On July 19, 2019, the Board wrote to the Appellant and the Director (collectively the "Parties") and acknowledged receipt of the Notice of Appeal and requested the Director to provide AEP's records related to the Decision (the "Department's Record").[4]

[18] On September 10, 2019, the Director provided the Department's Record to the Board, and a copy was provided to the Appellant on September 19, 2019. On November 5, 2019, the Director provided documents that were missing from the original record.[5] On November 20, 2019, the Director submitted an additional ten documents not included in the original record (the "Supplemental Department's Record").

[19] The Board held a mediation meeting on November 21, 2019, with the Parties, in Edmonton. The Parties did not reach an agreement.

[20] A written hearing was held on March 9, 2020, with written submissions received

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3 Department's Record, at tab 1.

4 Section 120 of the Act states "[a]n appeal under this Act must be based on the decision and the record of the decision-maker." To determine what the decision and the record of the decision-maker is, the Board looks to the definitions in PLAR. Section 209(f) of PLAR defines "director's file" as "in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision..." Section 209(m) of PLAR states "'record' means record as defined in the *Freedom of Information and Protection of Privacy Act*..." Section 1(q) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, states:

> "'record' means a record of information in any form and includes notes, images, audiovisual recordings, x rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records..."

Based on these definitions, the Board considers the "Department's Record" to be the director's file, along with records of AEP, which is any of the information as defined in section 1(q) of *the Freedom of Information and Protection of Privacy Act.*

5 The original Department's Record was missing a sketch from tab 18 and three attachments from tab 23.

from the Parties. On March 24, 2020, after considering the submissions, the Board noted the Appellant raised issues related to the documents the Director relied on in making the Decision which were not included in the Department's Record. To ensure procedural fairness for both Parties, the Board requested the Parties provide written responses to additional questions the Board had related to the documents not included in the Department's Record. The Board's additional questions asked on March 24, 2020 were:

(a) In making her decision, is the Director able to rely on documents not submitted as part of the [Department's] Record? and

(b) Is the Director limited to considering the policies in effect when the Appellant submitted its Amendment Application, or is the Director able to consider policy documents that came into effect after the application was submitted?

[21] The Parties provided their responses between April 8 and 22, 2020. The Board reconvened on May 8, 2020, to consider the responses to the additional questions and to make its recommendations to the Minister. The Board concluded its deliberations on the same day.

III. ISSUES

[22] The Board set the following three issues for the written hearing:

1. Did the Director, who made the decision to refuse Amendment Application No. SML 020035, err in the determination of a material fact on the face of the record?
2. Did the Director, who made the decision to refuse Amendment Application No. SML 020035 err in law?
3. Did the Director not comply with a regional plan approved under the *Alberta Land Stewardship Act*?
4. The Appellant raised a fourth issue prior to the receipt by the Board of the written submissions from the Parties: does the Director in this matter have authority to remove the PNT?[6]

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6 Appellant's letter, January 20, 2020.

IV. SUBMISSIONS

[23] The Board reviewed all the submissions from the Parties on the issues and summarized them as follows.

A. Appellant

[24] The Appellant stated the restrictions in the PNT had remained the same since its approval on January 5, 2000. The Appellant said the existence of the PNT required the Appellant to undertake an extensive process to obtain initial approval for the SML. The Appellant noted the SML was approved by AEP despite the PNT's restrictions. The Appellant submitted the Director, in making the Decision, failed to consider the precedent AEP created by approving the SML within the PNT boundaries.

[25] The Appellant said it filed the Amendment Application with AEP after being led to believe the PNT did not prohibit sand and gravel development. The Appellant stated its understanding was the PNT required consultation with the PNT holder on mitigation measures.

[26] The Appellant observed that AEP's Reservation/Notations website[7] stated notations, such as the PNT, are used to identify a management intention regarding public land by government departments. The Appellant noted the website stated the placement of a notation does not:

(a) remove the land manager from its role;

(b) dictate the parameters of land use in a disposition; or

(c) prevent a disposition from being placed on a particular portion of land.

[27] The Appellant stated the PNT is listed on AEP's system[8] as "Provincial Recreation Area Potential" and "Restriction code 4 - No Surface Disposition" with the exception of oil and gas. The Appellant noted the PNT contained the following statement: "No surface

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[7] *Reservations/Notations*, Alberta Environment and Parks, Government of Alberta, (2020), the Director's submissions, at tab 4. Online: <http://www.ablerta.ca/reservations-notations.aspx>.

[8] The PNT is listed on AEP's GLIMPS (Geographic Land Management Planning System) which provides surface data for public lands.

dispositions of any kind are permitted due to the stated purpose code… All applications to be referred to Tourism, Parks and Recreation."

[28] The Appellant observed the *Public Lands Reservation Information Guide*[9] does not define a "Restriction code 4" as being a prohibition. The Appellant submitted the Reservation/Notation Program allows the AEP Land Manager to use discretion and refer applicants for dispositions within the PNT to "Tourism, Parks and Recreation."[10]

[29] The Appellant stated AEP's *Public Lands Reservation Information Guide*[11] implied that applications for dispositions within the PNT would be reviewed based on merit, and Land Managers could exercise discretion in their decision-making. The Appellant submitted the PNT's restriction on surface dispositions is a mechanism to ensure AEP's Lands Division refers applications to the Parks Division, which is the holder of the PNT. The Appellant said the purpose of the referral is to solicit comments from the Parks Division to enable the Director to make a considered, merit-based decision.

[30] The Appellant stated that in *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks* ("*Inshore*"),[12] the Board found the director fettered her discretion by treating a PNT as binding and, in so doing, failed to consider the individual merits of the application.

[31] The Appellant submitted the Parks Division did not consider the merits of the entire application, including the CRBP, despite the Appellant's substantial efforts to accommodate Parks Division's concerns. The Appellant noted sand and gravel development currently exists within the PNT.

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9 *Public Lands Reservation Information Guide,* Alberta Environment and Parks, Government of Alberta (January 1, 2006), Director's submission, February 20, 2020, at tab 4. Online: <https://open.alberta.ca/publications/public-lands-reservation-information-guide>.

10 Parks Division was transferred from Alberta Tourism, Parks and Recreation, to Alberta Environment and Parks, on May 24, 2015.

11 *Public Lands Reservation Information Guide*, Government of Alberta, Sustainable Resource Development (2006), at Department's Record Tab 4. Online: <https://open.alberta.ca/publications/public-lands-reservation-information-guide>.

12 *Inshore Developments Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (14 December 2018), Appeal No. 16-0023-R2 (A.P.L.A.B.).

[32] The Appellant stated it did not receive a response to its November 7, 2018 letter to Lands Division requesting AEP continue with the Amendment Application review. The Appellant submitted the Director erred in a material fact by not considering the points raised in the letter and responding before the Decision was issued.

[33] The Appellant said the Department's Record did not include documents or policy that were relied on by the Director to determine the Added Lands were not contiguous with the SML boundary. The Appellant submitted the lack of documentation demonstrated the Director had no basis for the Decision and, therefore, the Director erred in the determination of a material fact. The Appellant stated it was unaware of any legislation, policy, or guideline that supported the Decision.

[34] The Appellant said the Decision failed to recognize the Appellant's good land stewardship by denying the Application Amendment and preventing the renewal of the SML.[13]

[35] The Appellant submitted the Director erred in law by not complying with sections 9(5), (6), and (7) of the *Public Lands Administration Regulation*, A.R. 187/2011 ("PLAR"), which provide:

> "(5) The director
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> (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
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> (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."

The Appellant stated it filed its Amendment Application on December 19, 2012, but did not

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[13] The Board notes the SML had an expiry date of May 7, 2013. The Board is not aware of any renewal of the SML and assumes the Appellant is occupying the Lands as an overholding tenant under section 20(3) of PLAR. The Board takes no position on the current status of the SML.

receive a notice of acceptance or rejection within 30 days as required under PLAR.

[36] The Appellant stated the Director based the Decision on the same information available to the Director when the Amendment Application was initially requested. The Appellant submitted if the Director had used the information to refuse to issue the amendment to the SML years earlier, the Appellant would have saved tens of thousands of dollars on the application process.

[37] The Appellant referenced the Alberta Ombudsman's Administrative Fairness Guidebook[14] to show the Director had breached a duty to act fairly in the following ways:

(a) the Director did not provide adequate reasons that demonstrated a rational connection between the evidence and the conclusions reached by the Director, and the Director did not give a clear explanation how she applied legislation or policy to the facts relevant to the Amendment Application;

(b) for over six years the Director created legitimate expectations that if the Appellant continued to satisfactorily respond to all of AEP's requests concerning the Amendment Application, the Director would either approve the application or provide valid, merit-based reasons for the refusal; and

(c) the Director made an unreasonable decision by not considering the Appellant's arguments and evidence and basing the Decision on information available when the Amendment Application was first submitted, rather than on the merits of the application.

[38] The Appellant submitted the Decision did not comply with the Lower Athabasca Regional Plan ("LARP").[15] The Appellant noted the government's intention was for LARP to guide land management strategies by identifying potential tourism and recreation areas. The Appellant said the lands within the PNT are not identified as a conservation area, which does not support the Director's decision to prohibit further development in the PNT.

[39] The Appellant stated the Cold Lake Subregional Integrated Resource Plan ("Cold

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[14] *Administrative Fairness Guidelines*, Alberta Ombudsman, Government of Alberta (2019), Appellant's submission, February 5, 2020, at tab 20. Online: <https://www.ombudsman.ab.ca/determining-fairness/administrative-fairness-guidelines>.

[15] *Lower Athabasca Regional Plan* (2012-2022), Government of Alberta (2015). Online: <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/Pages/default.aspx>.

Lake Plan"),[16] which includes the PNT lands in its planning area, supported aggregate development to align with conservation objectives. The Appellant submitted the Director did not comply with the Cold Lake Plan when making the Decision.

[40] The Appellant stated sections 11(1) and (2) of ALSA[17] require AEP to provide notice to the Appellant regarding any objective or policy that may impact its rights in the area. The Appellant said it has not received any notice or been consulted regarding the proposed revisions of LARP to include the PNT as part of Moose Lake Provincial Park.

[41] The Appellant argued that since the PNT came into effect on January 5, 2000, there has been no progress towards designating the area covered by the PNT as a park.

[42] The Appellant requested the Board recommend the Minister order the Amendment Application be approved for a minimum of 10 years.

B. Director

[43] The Director submitted making a decision different from a past decision is not an error of fact. The Director noted that being bound by a past decision would fetter the Director's

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16 Cold Lake Subregional Integrated Resource Plan, Alberta Environment and Parks, Government of Alberta (1996), Appellant's submission, February 5, 2020, at tab 21. Online: <https://open.alberta.ca/publications/1789188>.

17 Sections 11(1) and (2) of ALSA state:

> (1) For the purpose of achieving or maintaining an objective or a policy of a regional plan, a regional plan may, by express reference to a statutory consent or type or class of statutory consent, affect, amend or rescind the statutory consent or the terms or conditions of the statutory consent.
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> (2) Before a regional plan includes a provision described in subsection (1), a Designated Minister must
>
> (a) give reasonable notice to the holder of the statutory consent of the objective or policy in the regional plan that the express reference under subsection (1) is intended to achieve or maintain,
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> (b) provide an opportunity for the holder of the statutory consent to propose an alternative means or measures of achieving or maintaining the policy or objective without an express reference referred to in subsection (1), including, if appropriate, within a regulatory negotiation process referred to in section 9(2)(j), and
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> (c) give reasonable notice to the holder of the statutory consent of any proposed compensation and the mechanism by which compensation will be determined under any applicable enactment in respect of any effect on or amendment or rescission of the statutory consent.

discretion, which would be a breach of administrative law principles.

[44] The Director stated the Moose Lake Recreation Area was in the early planning stages when the SML was issued in 2003. The Director said it would have been reasonable to conclude that a gravel operation with a 10-year term would be completed before the official establishment of the recreation area. The Director submitted the SML and the Amendment Application were at the centre of her Decision.

[45] The Director said considering the PNT when making the Decision was not an error. The Director stated AEP uses Protective Notations to establish a land-use or conservation objective for particular lands and help ensure consistent land-use decision-making.

[46] The Director noted the "Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Lands" (the "Aggregate Directive") states allocation decisions must consider cumulative impacts.[18] The Director submitted it is important to the Government of Alberta to maintain the lands covered by the PNT in an intact state and reduce fragmentation and cumulative impacts of gravel extraction operations.

[47] The Director submitted the Appellant did not receive any promises or assurances regarding the Amendment Application. The Director noted AEP policy requires the review and consideration of various aspects of an application for a disposition before a PNT's effect on an application is determined.

[48] The Director stated the Department's Record indicated:

(a) the Director considered the various aspects and numerous implications of the Amendment Application;

(b) the Director considered the input of the AEP Senior Wildlife Biologist and AEP Parks Division Regional Land Use Officer; and

(c) AEP considered and responded to the entirety of the Appellant's application.

[49] The Director submitted the PNT did not bind her, and she did not ignore the

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[18] *Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Lands*, Alberta Environment and Parks, Government of Alberta (September 1, 2017), Director's submission, February 20, 2020, at tab 3. Online: <https://open.alberta.ca/publications/aep-public-land-management-2017-no-3>.

multi-faceted information collected during the application process. The Director stated that in making the Decision, she gave careful consideration to the following:

(a) guidance and policy documents;

(b) the PNT;

(c) environmental and land management concerns; and

(d) the policy regarding the non-contiguous nature of the proposed pit.

[50] The Director submitted that the Added Lands the Amendment Application sought to include in the SML would be a separate, stand-alone pit, not an amendment to an existing pit. The Director noted the Added Lands were in a different area, with a different access point across the Mooselake River from the SML. The Director stated the purpose for amending a Surface Material Lease is not to authorize completely new disturbances or new pits.

[51] The Director said decisions made on other applications are not binding on her current and future decisions. The Director stated she must consider each application individually, and Surface Material Leases issued in the past with non-continuous boundaries do not influence her decision. The Director submitted she reviewed the applicable policies and the facts contained in the Amendment Application and did not err in any of the facts regarding the issue of the Lands being non-contiguous.

[52] The Director submitted that when PLAR came into force,[19] section 9(6) of PLAR contained a new provision requiring the Director to register a notice of acceptance or rejection within 30 days after receiving the application.[20] The Director said that because AEP had not yet implemented a process for registering notices by the date of the Appellant's Amendment Application, no notice was registered. The Director noted that when an application is rejected under 9(6), the applicant must be notified of the rejection in writing as soon as possible. However, the Director pointed out there is no requirement for the Director to notify an applicant of a notice of acceptance.

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19 Section 246 of PLAR states: "This Regulation comes into force on September 12, 2011."

20 Section 9(6) of PLAR provides: "The director must register a notice of the acceptance or rejection of an application under this section within 30 days after receiving the application."

[53] The Director submitted, although AEP missed the administrative step of registering a notice, the Director gave proper consideration on the merits and the entirety of the Amendment Application. The Director stated the lack of notice is not an error in law impacting the Decision.

[54] The Director submitted the duty to act fairly refers to procedural fairness,[21] which the Director met by taking the following actions:

(a) reviewing the Amendment Application;

(b) requesting, receiving and considering supplemental information;

(c) requesting, receiving and considering advice from AEP subject-matter experts and disclosing that information to the Appellant for comment before making the Decision; and

(d) publically making available and considering all policies that applied to the Decision.

[55] The Director submitted the Appellant acknowledged the numerous letters, emails and meetings that took place between AEP and the Appellant. The Director stated the procedure was to ensure procedural fairness in the Director's decision-making responsibilities. The Director said just because the Appellant believes the Decision is unfair does not mean the Director did not meet the duty to act fairly in making the Decision.

[56] The Director argued there is no evidence the Director is responsible for creating any legitimate expectations that the disposition would be issued. The Director stated she followed proper procedures in engaging the Appellant in the application, the information gathering process, and consideration of the Amendment Application. The Director stated nothing in any of the correspondence between AEP and the Appellant indicates that the Appellant was misled or promised a particular result if the Appellant provided the information requested.

[57] The Director submitted there was no foundation to the Appellant's claim that the Director breached the duty to act fairly by not providing sufficient reasons for the Decision. The Director stated the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship & Immigration)*, allowed that where a decision-maker's reasons may not be sufficient, an officer's

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[21] David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6th ed. (Toronto: Thompson Reuter Canada Limited, 2014) at pages 253-254.

notes can be accepted as sufficient reasons for a decision. The Court stated:

> "In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken by inference, to be the reason for the decision. Accepting documents such as these notes as sufficient reason is part of the flexibility that is necessary …when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for the decision."[22]

[58] The Director said AEP provided the Appellant with its concerns regarding the proposed activity, its location, environmental and land management issues and the non-contiguous nature of the Lands. The Director noted this information was provided before the Director issued the Decision, was summarized by the Director in the Decision, and was available in the Department's Record. The Director submitted the reasons for the Decision were written, transparent, intelligible, justified, and based on the Department's Record.

[59] The Director stated that when reviewing whether the Director's decision is reasonable, the focus must be on whether the Decision viewed as a whole in the context of the record, is reasonable.[23] The Director submitted the Board should only determine whether the decision being reviewed "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[24]

[60] The Director referred to the test used by the Alberta Court of Appeal in *Edmonton School District No. 7* v. *Dorval* ("*Dorval*"), for determining whether an administrative decision is reasonable. The Director noted the Court said an administrative decision is reasonable if it is:

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22 *Baker* v. *Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699, at paragraph 44.

23 *Olineck* v. *Alberta (Environmental Appeals Board)*, 2017 ABQB 311, at paragraph 43.

24 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 47.

(a) justifiable, transparent and intelligible;

(b) falls within the range of possible acceptable outcomes that are defensive in respect of the facts and law;

(c) can stand up to a somewhat probing examination; and

(d) shows a line of analysis that could lead the decision-maker to its conclusion.[25]

The Director submitted the Decision meets the criteria set out in *Dorval*.

[61] The Director said LARP is undergoing an amendment process. The Director stated lands subject to a Protective Notation in the area of Moose Lake, including those covered by the Appellant's Amendment Application, are to be included in the amendment process. The Director submitted the purpose of including the Added Lands is to connect the Added Lands to the Moose Lake Provincial Park and support the key wildlife biodiversity zone.

[62] The Director noted there is a section entitled "Surface Materials" in LARP that acknowledges the importance of surface materials extraction. The Director stated the section indicates approvals will be managed through the management framework of the Aggregate Directive. The Director said proposed surface material activity needs to meet "Outcome 3" of LARP, which states, "Landscapes are managed to maintain ecosystem function and biodiversity."[26] The Director submitted the management framework that governs surface material allocation decisions, the Decision, and LARP, are not in conflict.

[63] The Director stated she does not have the authority to cancel or amend the PNT from the Lands. The Director said the AEP Team Lead, Approvals and Disposition Services, holds that authority.

[64] The Director submitted the Board should recommend to the Minister the Director's Decision be confirmed.

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25 *Edmonton School District No. 7* v. *Dorval*, 2016 ABCA 8, at paragraph 39.

26 *Lower Athabasca Regional Plan* (2012-2022), Government of Alberta (2015), online: <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/Pages/default.aspx>, at page 42.

C. Appellant's Rebuttal

[65] The Appellant submitted the SML, approved on May 8, 2003, did not have contiguous boundaries. The Appellant stated it had winter access to the Added Lands through Department Licence of Occupation DLO 043630, which runs across the Mooselake River and connects the SML to the Added Lands.

[66] The Appellant said the Director's submission that operational challenges in 2012 created difficulties in processing applications does not dismiss the Appellant's rights and expectations as an applicant under PLAR.

[67] The Appellant argued the Director's claim she considered all of the information obtained during the Amendment Application review process did not explain how the Director considered the merits of the Amendment Application.

[68] The Appellant submitted the Director applied the PNT to her Decision as if it were binding, which fettered her discretion.

[69] The Appellant stated the Aggregate Directive was not part of the Department's Record and, therefore, was not subject to the Director's Decision. The Appellant noted the Aggregate Directive was released on September 1, 2017, five years after the Amendment Application was filed with the Director.

[70] The Appellant said AEP's "Pre-Application Requirements for Formal Dispositions" (the "Pre-Application Requirements")[27] policy was not included in the Department's Record, yet the Director still relied on it in her submissions. The Appellant observed that the Director stated in her submissions the Appellant failed to provide information required under the Pre-Application Requirements which resulted in an incomplete application. The Appellant noted the Pre-Application Requirements was released on November 1, 2019, after the issuance of the Decision. The Appellant argued it was unreasonable for the Director to hold the Appellant to future standards.

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[27] *Pre-Application Requirements for Formal Dispositions*, Environment and Parks, Government of Alberta (1 November, 2019), Director's submissions, February 20, 2020, at tab 5. Online: <https://open.alberta.ca/publications/pre-application-requirements-for-formal-dispositions>.

[71] The Appellant submitted the public website for "Disposition Management Post-Issuance",[28] which the Director referenced in her submissions, was not included in the Department's Record and, therefore, not part of the Decision.

[72] The Appellant noted the policy documents that the Director refers to but are not part of the Department's Record do not address the issue of a non-contiguous lease, or require the Director to refuse to issue an application that is subject to a PNT restriction.

[73] The Appellant stated the Director failed to provide clear and concise policy that guided the decision-making process. The Appellant said the Director's submission that "amendments are not intended to authorize completely new disturbances or stand-alone pits" is not found in the Aggregate Directive.

[74] The Appellant submitted the Director's failure to make a timely decision adversely affected the Appellant's business. The Appellant said that if the Director had made a decision within a reasonable time period, instead of taking six and a half years to issue the Decision, the Appellant could have made different business decisions in its interests.

D. Appellant's response to the Board's Questions

[75] The Appellant stated the Department's Record is the main component of a hearing. The Appellant said it must examine all the information the Director used in making the Decision. The Appellant noted the Director said she relied on the Department's Record in making the Decision. However, the Appellant said the Aggregate Directive, the Pre-Application Requirements, and the Disposition Management Post-Issuance from the AEP website (collectively, the "Added Policies"), were not included in the Department's Record.[29]

[76] The Appellant stated that in *Inshore*, the Board found it could consider evidence other than the Department's Record if the evidence "is rationally connected to evidence found in

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28 "Disposition Management Post-Issuance", Alberta Environment and Parks, Government of Alberta (2020), Director's submission, February 20, 2020, at tab 6. Online: <www.alberta.ca/disposition-management-post-issuance.aspx>.

29 The Director filed the Added Policies with the Director's submissions, February 20, 2020.

the [Department's] Record, meaning evidence that provides details, clarifies, or assists the Board in understanding the evidence found in the [Department's] Record."[30] The Appellant submitted the Added Policies, introduced by the Director in her submissions to the Board, did not meet the *Inshore* test. The Appellant said the Added Policies provided minimal detail, clarification, and assistance in understanding the evidence in the Department's Record. The Appellant stated none of the Added Policies contained information to justify the Decision. The Appellant noted the Added Policies did not address a refusal of dispositions due to PNT restrictions or for having non-contiguous boundaries.

[77] The Appellant submitted it was unreasonable for the Amendment Application to be decided based on future standards. The Appellant said it assumed the standards in place at the time of the Amendment Application Date would be the standards the Director used to make the Decision. The Appellant stated six and a half years to make a merit-based decision is an unreasonable amount of time, especially considering the Decision contained no rationale, and the Department's Record did not contain evidence to show how the Director made the Decision.

[78] The Appellant noted the Aggregate Directive came into effect on September 1, 2017, nearly five years after the Amendment Application Date. The Appellant stated the Aggregate Directive did not indicate it superseded the 2006 Aggregate Sand and Gravel Allocation Policy. The Appellant observed the Department's Record did not include the 2006 Aggregate Sand and Gravel Allocation Policy.

[79] The Appellant said the Pre-Application Requirements document was dated November 2019, nearly seven years after the Amendment Application Date and five months after the Decision. The Appellant stated the earliest version of the Pre-Application Requirements is from 2014, which is still years after the Amendment Application Date.

[80] The Appellant observed the Director included the Disposition Management Post-Issuance website in the Director's response on February 20, 2020, eight months after the Decision and eight years after the Amendment Application Date. The Appellant stated the

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30 *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks* (14 December 2018), Appeal No. 16-0023-R2 (A.P.L.A.B.), at paragraph 100.

website included links to policies, guidelines, and publications dated after the Amendment Application Date and not included in the Department's Record. The Appellant argued that none of the documents provided on the website are relevant to the appeal or provide any clarity to the Department's Record.

E. Director's Response to the Board's Questions

[81] The Director submitted policies do not have to be included in the Department's Record for the Director to rely upon them. The Director stated she could rely on the Added Polices due to their relevancy to:

(a) the application process for a surface materials disposition;
(b) the requirements for a complete application; and
(c) the statutory decision that the Director is required to make.

The Director stated it would not be a reasonable exercise of her discretion if she failed to consider the Added Policies when making the Decision.

[82] The Director acknowledged it would have been preferable to include the Added Policies in the Department's Record. However, the Director stated the Added Polices are still relevant to the Director's decision-making process. The Director noted the Added Policies are publically available on the Government of Alberta's website.

[83] The Director stated AEP has the authority to make non-binding policy statements to assist in the decision-making process and the exercise of discretion. The Director said the courts have found a decision-maker, like the AEP, can adopt non-binding guidelines or policies without express statutory authority.

[84] The Director submitted any decision on the Amendment Application must consider the Added Polices for that decision to be reasonable.

[85] The Director stated it was not reasonable or responsible to decide something based on outdated information and policies, particularly if new evidence and revised understandings of a decision's implications exist. The Director submitted that using updated policies in making decisions has benefits such as providing greater clarity and detail in the

decision, more flexibility to meet changing circumstances, better responses to changing technical information, and the efficient use of resources.

[86] The Director said that if she was confined to apply outdated policies when more current ones are available, she would not be making the best decision possible, and may make a decision that is not compatible with future plans for an area, may put the environment at risk and might be in opposition to contemporary knowledge.

[87] The Director noted she referred to the following policies in the submissions for the appeal:

(a) Public Lands Reservation Information Guide (January 2006), Director's Response Submission February 20, 2020, Appendix 4;

(b) Guidelines for Acquiring Surface Material Disposition on Public Lands (2008), Director's Record, Tab 25;

(c) Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land (September 1, 2017), Director's Response Submission, February 20, 2020, Appendix 3;

(d) Pre-Application Requirements for Formal Dispositions (November 1, 2019), Director's Response Submission February 20, 2020, Appendix 5; and

(e) Disposition Management Post-Issuance (GOA Website) (Printed on February 20, 2020), Director's Response Submission February 20, 2020, Appendix 6.

[88] The Director acknowledged the Aggregate Directive, the Pre-Application Requirements, and the Disposition Management Post-Issuance website were dated after the Amendment Application Date, however, the Director stated these policies were updated and revised from policies that contained similar principles and procedures. The Director submitted:

(a) the Aggregate Directive is merely a clarification of content and intent of the 2006 Aggregate Sand and Gravel Allocation Policy;

(b) the Pre-Application Requirements are a summary of the processes already outlined in the Public Lands Reservation Information Guide (January 2006); and

(c) the Disposition Management Post-Issuance website summarized processes that have been in place before the Amendment Application Date.

[89] The Director noted the Supreme Court of Canada commented on the value of

policies and regular updates of those policies. The Director stated that in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, the Court said the applicable policy was "...great assistance to the Court in determining whether reasons ... are supportable. They ... are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section [of the applicable Convention]."[31]

[90] The Director said revised and current policies create a decision-making framework for the exercise of discretion. The Director submitted she applied the framework to the Decision. The Director stated the Board should consider the entirety of the framework, including all the policies in place at the time of the Decision.

[91] The Director referred to the Supreme Court of Canada's decision in *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, where the Court criticized the customs department for failing to update a policy. The Director quoted the Court as follows:

> "The failure of Customs to keep the document updated is deplorable public administration, because use of the defective guide led to erroneous decisions that imposed an unnecessary administrative burden and cost on importers and Custom officers alike."[32]

[92] The Director submitted that to make the best possible statutory decision, she responsibly considered the most current policies available. The Director stated her approach to the Decision provides the necessary flexibility to respond to changing environmental circumstances and evolving technical information, and it supports the efficient use of resources.

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31 *Baker* v. *Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699, at paragraph 72.

32 *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, 2007 SCC 2, at paragraph 85.

V. STANDARD OF REVIEW

[93] In reviewing the Decision, the Board must determine the proper standard of review to apply, reasonableness or correctness. A reasonableness standard of review requires greater deference to the Director's Decision,[33] while a standard of correctness necessitates less deference. A standard of correctness requires the Board to determine whether the Decision is correct and whether the procedural process followed in making the Decision was fair.[34] The Director stated the Board should focus on whether the Decision as a whole in the context of the record is reasonable.[35] The Director also said the Board should only determine whether the Decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[36] The Director advocated for the standard of review to be reasonableness. The Appellant did not comment on the standard of review.

[94] The Board appreciated the Director's efforts to assist the Board in determining the proper standard of review. The Director provided the cases of *Olineck v. Alberta (Environmental Appeals Board)*,[37] *Dunsmuir* v. *New Brunswick*,[38] and *Dorval*, as cases that support the application of a standard of reasonableness.

[95] The Board reviewed the cases the Director provided and found these cases can be distinguished, as they do not deal with legislative frameworks similar to those under which the Director and the Board operate. The cases cited by the Director involved court reviews of tribunal decisions, not a tribunal's (the Board) review of a decision of a designated statutory authority (the Director). Additionally, none of the cases provided by the Director involve a legislated responsibility requiring the reviewing tribunal to make a recommendation to a minister

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33 *Eastern Irrigation District* v. *Irrigation Council Appeal Panel*, 2019 ABQB 809, at paragraph 36.

34 *Azizian* v. *Canada (Minister of Citizenship and Immigration)*, 2017 FC 379, at paragraph 18.

35 *Olineck v. Alberta (Environmental Appeals Board)*, 2017 ABQB 311, at para 43.

36 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 47.

37 *Olineck v. Alberta (Environmental Appeals Board)*, 2017 ABQB 311.

38 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9.

regarding a decision under review.[39] The same can be said for the recent Supreme Court of Canada case, *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*,[40] which involved a court review of a tribunal decision.

[96] Noted administrative law expert, Ms. Sara Blake, wrote in *Administrative Law in Canada* that there is a significant difference between a standard of review analysis by a court reviewing a tribunal decision, and the standard of review analysis of a tribunal (such as the Board) reviewing a designated statutory authority's decision (such as the Director):

> "If the appeal is to another tribunal, it is a mistake to adopt a standard of review that has been established by the court of judicial review of tribunal decisions or for appeal to an appellate court from judges' decisions because the contexts and purposes are inapplicable to the context where one statutory tribunal reviews a decision of another."[41]

Ms. Blake proceeds to emphasize the importance of a legislative review to determine the intended roles of the tribunal and designated statutory authority, and the degree of deference to provide.

[97] The Saskatchewan Court of Appeal in *City Centre Equities Inc.* v. *Regina (City)*, also emphasized the importance of an analysis of the legislation in determining the standard of review:

> "In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill."[42]

[98] In previous appeals, the Board has completed a detailed analysis of the standard

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39 Section 124(1), (2), and (3) of the *Public Lands* Act provides:

> "(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.
>
> (2) The report may recommend confirmation, reversal or variance of the decision appealed.
>
> (3) On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision."

40 *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65.

41 Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017) at paragraph 6.29.

42 *City Centre Equities Inc.* v. *Regina (City)*, 2018 SKCA 43, at paragraph 59.

of review for appeals under the Act and PLAR, and has determined the standard of correctness is appropriate for appeals before it.[43] The most important factor when considering the Board's role in the appeal process is that the Board does not make the final decision in appeals before it (other than on some procedural matters). The Board's role is to provide the Minister with the best possible advice. The Minister takes this advice into account in making his decision, which is the final decision on the appeal. The Minister's decision may reflect a broader range of factors than those considered by the Director.

[99] The Act provides a statutory right of appeal of certain decisions made by the Director. The Board was established to hear those appeals and provide recommendations to the Minister. In appeals before the Board, there are three legislative purposes to consider:

(a) section 10(1) of PLAR authorizes the Director to issue or refuse to issue a formal disposition;[44]

(b) section 211(c) of PLAR,[45] authorizes the Board to hear appeals of the Director's refusal to issue a disposition under the Act; and

(c) section 124 of the Act states the Board must submit a report to the Minister. This section makes the Minister the final decision-maker on appealed decisions.[46]

[100] When the Board hears an appeal, it must recommend to the Minister to confirm, reverse, or vary, a decision made by an AEP decision-maker. In doing so, it is essential the Board determine if the decision is correct. The Board has a duty to provide the Minister with the

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43 See: *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks* (14 December 2018), Appeal No. 16-0023-R2 (A.P.L.A.B.).

44 Section 10(1) of PLAR provides: "The director may issue or refuse to issue a formal disposition applied for under section 9."

45 Section 211(c) of PLAR states: "The following decisions are prescribed as decisions from which an appeal is available: … a refusal to issue a disposition or to renew or amend a disposition applied for under the Act…."

46 Section 124(1), (2), and (3) of the *Public Lands* Act provides:

"(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.

(2) The report may recommend confirmation, reversal or variance of the decision appealed.

(3) On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision."

best possible advice and recommendations. For these reasons, the Board will apply the correctness standard of review to the Director's Decision.

VI. ANALYSIS

A. Issue 1: Did the Director, who made the decision to refuse Amendment Application No. SML 020035, err in the determination of a material fact on the face of the record?

[101] The Appellant submitted the Director erred in the determination of a material fact on the face of the record by failing to consider the precedent set when, in 2003, AEP approved the SML within the boundaries of the PNT. The Appellant stated the Director's approval of the SML led the Appellant to assume the PNT was not a prohibition on development. The Director responded that making a decision different from a past decision is not an error of fact. The Director stated the Moose Lake Recreation Area was in its early planning stages when AEP issued the SML to the Appellant in 2003. The Director submitted it was reasonable for AEP to expect the Appellant's gravel operation on the SML would be completed within the 10-year period of the lease, and before the establishment of the recreation area.

[102] A precedent has the same meaning as the legal principle of *stare decisis*. The Supreme Court of Canada defined *stare decisis* as, "'[a] court must follow earlier judicial decisions when the same points arise again in litigation', unless or until such decisions are revisited or overruled by a higher court."[47]

[103] A review of PLAR indicates the Director has discretionary decision-making authority and is not bound by precedent. Section 10(1) of PLAR states, "[t]he director may issue or refuse to issue a formal disposition...." Discretion, as it applies to the Director, may be defined as "action taken in light of reason as applied to all facts and with view to rights of all parties to action while having regard for what is right and equitable under all circumstances and law."[48]

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47 *Kelly (Trustee of)* c. *Québec (Régie des rentes)*, 2013 SCC 46, at paragraph 63.

48 Henry Campbell Black et al., *Black's Law Dictionary*, 6 ed (West Publishing, 1990: St. Paul, U.S.A.) at page 466.

[104] When the Director makes a decision regarding a disposition, she must consider the facts, rights, and circumstances of the parties involved and the disposition. A disposition is not static. The circumstances under which a disposition was issued are likely to change over the years. Conditions that were relevant when the original disposition was issued may not be appropriate later as new policies are developed and implemented. The public land the disposition is on, the status of the disposition holder, and purpose intended by the disposition are all subject to change. The Director must consider each amendment application anew, or risk making an error that would cause the Director to make an invalid decision.

[105] The Board finds the issuance of the SML on public lands subject to the PNT did not create a precedent, and that past decisions do not bind the Director. The Moose Lake Recreation Area was in its initial planning stages when AEP issued the SML in 2003. It was reasonable for AEP to assume the completion of a ten-year gravel lease would occur before the boundaries of the recreation area were determined. When the Director decided the Amendment Application, she was well within her jurisdiction to consider the present facts and circumstances, which were no longer the same as when the SML was first issued. If the Director had "rubber-stamped" the Amendment Application without a thorough consideration of the current facts and circumstances, the Director would have committed an abuse of her decision-making authority and fettered her discretion.

[106] The Board finds the Director's responsibility to consider the current circumstances of each application means the existence of dispositions that have non-contiguous boundaries does not bind the Director to always approve applications for similar dispositions. The Director must consider the merits of each application, taking into account legislation, policy, and circumstances involving the application.

[107] The Appellant stated the Director's decision to issue the SML despite the PNT on the Lands caused the Appellant to assume that the PNT was not a prohibition on development. The Appellant is correct in its assumption. A Protective Notation (PNT) is described by AEP guidelines as follows:

> "Notations are instruments used through the Public Lands Act to identify a management intention regarding certain public land by government departments

> or legal entities. Notations indicate that the holder of the notation wants to be consulted before any commitment or disposition is placed on the land.
>
> A notation does **not**:
>
> - Dictate the parameters of land use in a disposition
> - Negate a disposition from being placed on a particular portion of land"[49]

The guidelines for PNTs are clear that a disposition may still be granted on public lands even if that type of disposition is restricted by a PNT.

[108] When determining the merits of the Amendment Application, the Board accepts that the Director considered the PNT as part of her decision-making process and decided not to issue the amendment. The Board finds the Director acted within her jurisdiction to consider the Amendment Application in the context of the current facts and circumstances. The Director did not fetter her discretion by deciding the PNT was a significant factor in making the Decision and, in doing so, did not commit an error of material fact on the face of the record.

[109] The Appellant stated the Director made an error in material fact on the face of the record by failing to provide documentation or policy documents in the Department's Record to support the Decision. Particularly, the Appellant referred to the Director basing part of the Decision on the Lands and the Added Lands not being contiguous. The Director submitted that all the documents she relied on are publicly available. The Director said that while it would have been preferable to include all the documents in the Department's Record, the Director can rely on updated policies to make the Decision.

[110] Section 120 of the Act states an appeal before the Board is based on the decision and the record of the decision-maker. The Board's recommendations to the Minister must be based on the evidence found in the record provided by the Director. As the decision-maker and record keeper, the Director and AEP have a duty to act fairly, which includes being thorough in providing all the records the Director relied on in making the Decision, including the full Department's Record. The Board finds it inappropriate for the Director to rely on records and

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[49] *Reservations/Notations*, Alberta Environment and Parks, Government of Alberta, (2020), the Director's submissions, at tab 4. Online: <http://www.ablerta.ca/reservations-notations.aspx>.

policies she did not include or refer to in the Department's Record. Such actions undermine public confidence in the transparency and fairness of the government.

[111] Efficiency in record-keeping is essential for timely and fulsome production of the Department's Record. Complying with this basic requirement need not be cumbersome. An electronic copy or link to the legislation, record, or policy is sufficient in most situations.[50] An exception would be where individual records are referenced, such as a Geographic Land Management Planning System (GLIMPS) report.

[112] The Board reviewed the Added Policies the Director referred to in the submissions and found they were updated versions of policies in place when the Amendment Application was first submitted. The Board found the Added Policies did not substantially alter the policies and facts relied on by the Director in making the Decision. Although the Added Policies were not included in the Department's Record, the Board finds the Director did not err in a material fact on the face of the record by relying on them. Had the Added Policies impacted the Decision, the Board may have reached a different conclusion.

[113] The Appellant alleged the Director made an error in material fact on the face of the record by failing to consider the merits of the Amendment Application in the Decision. Specifically, the Appellant stated the Director did not consider the letter from the Appellant's consultant dated November 7, 2018, and respond before making the Decision. The Director submitted she considered all the relevant documentation and information, including the November 7, 2018 letter. The Director noted the letter requested AEP proceed with a decision on the Amendment Application, which the Director proceeded to do.

[114] The Board finds acknowledging receipt of correspondence is a best-practice that benefits both the recipient and the sender of the communication. Acknowledgement of receipt "provides documentation that you have received the letter, order, or complaint from the other

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50 Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017) at paragraph 2.123.

party."[51] Had AEP acknowledged receipt of the November 7, 2018 letter from the Appellant, the Appellant would have been assured the letter was received and would be considered, and there would have been clarity regarding the Appellant's request for a decision on the Amendment Application.

[115] While AEP did not acknowledge receipt of the November 7, 2018 letter, and the Director did not specifically mention the letter in the Decision, the Merit Rationale in the Department's Record contained the basic contents of the letter. The Merit Rationale indicated the Appellant communicated with the Parks Division and provided information on the Appellant's mitigation plans. The Merit Rationale also stated the Parks Division chose not to give PNT Clearance. The Board finds the Department's Record shows the Director considered the November 7, 2018 letter when making the Decision, and did not err in a material fact on the face of the record.

B. Issue 2: Did the Director, who made the decision to refuse Amendment Application No. SML 020035 err in law?

[116] The Appellant said the Director erred in law by failing to follow PLAR sections 9(5), (6), and (7), which state:

> "(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."

[117] The Amendment Application was filed by the Appellant on December 19, 2012.

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51 See <https://www.thoughtco.com/business-letter-writing-letters-of-acknowledgment-1210167>.

The Appellant did not receive notice of the Decision until July 2, 2019. The Appellant did not receive a notice of acceptance or rejection within 30 days as required under PLAR. The Director explained that when PLAR came into force, AEP did not have a process for registering notices.[52] The Director argued that even though AEP did not register the notice as required, the mistake did not impact the Decision.

[118] The Board is concerned AEP was not prepared for the implementation of PLAR. The Board is aware AEP has since adopted policies and procedures to address the requirements in section 9(6), but cannot comment on whether those policies and procedures have been successful.

[119] Section 15(1) of PLAR states that if AEP fails to register a notice under section 9(6) the application is deemed to have been rejected.[53] Section 15(4) allows for an appeal to the Board of a deemed rejection.[54] The Appellant had the option to appeal the deemed rejection but did not file an appeal with the Board on those grounds.

[120] Section 9 of PLAR addresses the first part of a two-part review of an application. The first part is a technical review to determine if the application meets the procedural and administrative requirements. The second part is a review of the merits of the application. For the Amendment Application to have progressed to a decision on the merits, it must have been accepted at the technical review.

[121] The Board finds there is not sufficient evidence to demonstrate AEP failed to comply with section 9(5) of PLAR. The Appellant argued the Director should have used the evidence before her to reject the Amendment Application when it was first submitted for technical review. However, the Board finds there was relevant information that only became available on the review of the merits, such as information arising from consultation with the Parks Division regarding the PNT. The Director was correct to continue to a merit review of the

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52 Section 246 of PLAR states: "This Regulation comes into force on September 12, 2011."

53 Section 15(1) of PLAR provides: "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."

54 Section 15(4) of PLAR states: "A deemed rejection under this section is appealable under Part 10."

Amendment Application.

[122] Although the Director admits AEP failed to register notice of acceptance of the Application Amendment under section 9(6) of PLAR, the Board finds there is not sufficient evidence to demonstrate the lack of registration adversely impacted the Appellant or contributed to the Decision.

[123] The Board notes section 9(7) of PLAR required the Director to provide notice to the Appellant only if AEP rejected the Amendment Application. As AEP accepted the Amendment Application in the technical review, the Director had no legal obligation to give notice to the Appellant. The Board finds the Director complied with section 9(7) of PLAR.

[124] The Appellant submitted the Director erred in law by breaching the duty to act fairly. The Director stated the Appellant's disagreement with the Decision does not mean the duty to act fairly was breached.

[125] The duty to act fairly, often referred to as procedural fairness, is a basic principle of administrative law. The Supreme Court of Canada has found public authorities owe a duty to act fairly:

> "This court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."[55]

[126] AEP is a public body with legislated powers and must exercise those powers according to the principles of administrative law.[56] The Director's responsibility is to ensure there is an appropriate level of procedural fairness within the decision-making process. The courts have held:

> "The basic objective of the duty to act fairly is to ensure that an individual is provided with a sufficient degree of participation necessary to bring to the attention of the decision-maker any fact or argument of which a fair-minded

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55 *Cardinal* v. *Kent Institution*, [1985] 2 S.C.R. 643, at paragraph 14.

56 *Knight* v. *Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 26.

> decision-maker would need to be informed in order to reach a rational conclusion."[57]

[127] The intent of the duty to act fairly is not to create "procedural perfection" but to attain an appropriate balance between the need for fairness, efficiency, and predictability of outcome.[58] If the balance is incorrect, the decision-maker has breached the duty to act fairly. If the breach is significant, the decision-maker's actions may be void. However, not every breach of procedural fairness will render a decision void. Minor procedural technicalities or errors that are immaterial to a decision or did not affect the outcome will generally not be fatal to the decision.[59]

[128] The duty to act fairly includes the principles of a*udi alteram partem*, which means "hear the other side." This principle generally refers to the right of the individual to know the case being made against them and be allowed to respond to the decision-maker.[60] The Appellant submitted the Director acted unfairly by not providing adequate reasons in the Decision, not meeting the Appellant's legitimate expectations, and making an unreasonable decision by not considering the Appellant's arguments and evidence. The Board will consider these issues under the *audi alteram partem* principle of procedural fairness.

[129] The Appellant stated the Director did not provide sufficient reasons in the Decision to demonstrate a rational connection between the evidence and the conclusions reached by the Director. The Appellant also said the Director did not explain how she applied legislation or policy to the facts relevant to the Amendment Application.

[130] The Director provided reasons for the Decision in the Decision itself and the Department's Record. Reasons need to sufficient, but they do not have to be flawless. Reasons must be viewed in the context of the facts and evidence. The Alberta Court of Appeal has stated the test for adequacy of reasons is whether the reasons show why or how or on what evidence the

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57 *Kindler* v. *Canada (Minister of Justice)*, [1987] 2 F.C. 145, at paragraph 18.

58 *Knight* v. *Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 53.

59 See: *Manyfingers* v. *Calgary (City) Police Service*, 2005 ABCA 183.

60 David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6th ed. (Toronto: Thompson Reuter Canada Limited, 2014) at page 259.

delegate based the conclusion.[61] In the context of this appeal, the test the Board will apply is: "Did the Director's reasons show why and how the Decision was reached based on the evidence?"

[131] The Director wrote in the Decision the reasons for refusing the Amendment Application were:

> "1. The amendment to add land on NE 34-061-07-W4M overlaps with protective notation (PNT000001). It identifies a restriction of 'no surface dispositions' with the exemption of oil and gas activities. The department has identified that sand and gravel operations are not compatible within the boundaries of the PNT, because of future plans for the expansion of Moose Lake Provincial Park.
>
> 2. The added lands are also not contiguous with the existing SML 020035 boundary."[62]

[132] The Director's first reason for the refusal of the Amendment Application was that sand and gravel operations are not compatible with the future expansion plans for Moose Lake Provincial Park. Although the Decision did not elaborate on the reason, the Department's Record does. As previously noted, an appeal before the Board is based on the decision-maker's decision and the record. The evidence in the Department's Record is that AEP informed the Appellant that for the Amendment Application to be approved, there must be PNT Clearance from the Parks Division. The Appellant attempted to convince the Parks Division that the gravel operation would be appropriate, but the Parks Division would not provide PNT Clearance. The Board finds the reason given by the Director that the "department has identified that sand and gravel operations are not compatible within the boundaries of the PNT" to be clear and connected with the evidence provided in the Department's Record. The reason is sufficient for the Appellant and the Board to understand the rationale underlying the Decision.

[133] The Director's second reason listed in the Decision is that the Added Lands are not contiguous with the existing SML. The Director submitted the Department's Record contained "ample information" that the subject-matter experts within AEP viewed the sand and gravel operation as "problematic given the stated environmental and land management concerns and the non-contiguous nature of the lands." The Director stated the views of AEP's experts

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61 *BP Canada Energy Co.* v. *Alberta (Energy & Utilities Board)*, 2003 ABCA 285, at paragraph 22.

62 Department's Record, at tab 1.

were "concisely summarized by the Director" in the Decision.[63]

[134] The Board's review of the Department's Record found no mention of any AEP concerns with the non-contiguous nature of the Amendment Application. The Merit Rationale does not mention contiguous boundaries, and it is not raised as a concern until the Decision letter, where it appears as a one-sentence reason. The Director's argument that the proposed gravel operation on the Added Lands is a stand-alone pit only appears in the Director's submissions provided after the Appellant appealed the Decision. The Board finds the Director's reason for refusing the Amendment Application because the Added Lands were not contiguous with the existing SML boundary is not supported by the evidence in the Decision, the Department's Record, or the Added Policies.

[135] The Board's finding that the second reason provided by the Director in the Decision is inadequate does not necessarily void the entire Decision. The Supreme Court of Canada has said a decision-maker is not required to make an explicit finding on each element leading to the conclusion.[64] The Court has also held that even if a reason may be deficient, the decision can still be valid if other reasons and evidence support it.[65]

[136] The Board finds the first reason provided by the Director in the Decision is sufficient to render the second reason immaterial to the outcome of the Decision. If the first reason were the only reason in the Decision, the Decision would still be valid.

[137] The Board notes a more comprehensive Decision letter may have answered some of the Appellant's questions and resolved some of the issues, negating any need to raise them in the appeal. The Board recognizes the Director does not have a legal duty to provide reasons for every argument or point raised by the Appellant, but there is significant value in communicating the reasoning behind the Decision. In the Supreme Court of Canada decision *Baker* v. *Canada*,[66] Madame Justice L'Heureux-Dubé noted some of the benefits of providing reasons, including:

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63 Director's submission, February 20, 2020, at paragraph 67.

64 *N.L.N.U* v. *Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 16.

65 *See: Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; and *Sussman* v. *College of Psychologists (Alberta)*, 2010 ABCA 300.

66 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

- ensure fair and transparent decision-making;
- reduce arbitrary or capricious decisions;
- afford parties the opportunity to assess the question of appeal;
- foster better decision-making by ensuring that issues and reasoning are well articulated and therefore more carefully thought out;
- allow the parties to see the applicable issues have been carefully considered; and
- those affected may be more likely to feel they were treated fairly and appropriately.[67]

[138] Although the Board would have preferred to see the reasons for the Director's decision more fully indicated in the Decision, the Board finds the first reason to be adequate to show why and how the Director reached the Decision based on the evidence.

[139] The Appellant submitted that the Director breached the duty to be fair by creating legitimate expectations that it did not meet. The Board notes the Supreme Court of Canada has stated the doctrine of legitimate expectations:

> "... looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants ... a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken."[68]

It is important to note that legitimate expectations are generally limited to procedural matters.

[140] The test for legitimate expectations, as it would apply to this appeal, is that the Director must have made a promise to the Appellant to follow a certain procedure, and the Appellant must have relied and acted on that promise. As noted above, the promise must be "clear, unambiguous, and unqualified."

[141] The Appellant stated the promise was that if the Appellant responded satisfactorily to AEP's requests regarding the Amendment Application, the Director would either

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67 Jones, David Phillip, Q.C., and Anne S. de Villars, *Principles of Administrative Law*, 6th ed. (Toronto: Thomson Reuters, 2014), at page 387.

68 *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, at paragraph 131.

approve the application or provide valid, merit-based reasons for the refusal. The Director stated there is no evidence in the Department's Record to indicate the Appellant was misled or promised a particular result if the Appellant provided the information requested.

[142] The Appellant referred to AEP correspondence as evidence to support the claim of legitimate expectations. The Board examined the correspondence in the Department's Record and found the letters and emails explained to the Appellant that before the Amendment Application could be reviewed, certain forms, plans, and fees were required. In a separate email from the Lands Officer to the Appellant, the Lands Officer wrote that the Appellant could amend the SML to include the Added Lands once the Appellant applied for a reclamation certificate for the Lands and an inspection by AEP occurred.

[143] Based on the evidence provided, the Board is unable to conclude the Director made "clear, unambiguous, and unqualified" promises beyond normal procedural functions. A statement from AEP that an action required by legislation and policy must be completed before additional actions can be contemplated would only be significant if the Appellant complied and the Director departed from the normal course of action. That is not the case in this appeal. The Appellant complied with the requests for information from AEP, and received what was promised – a decision with valid, merit-based reasons. The Board finds no evidence to support the Appellant's claim that the Director breached the duty to act fairly by creating legitimate expectations.

[144] The Appellant submitted the Director breached the duty to act fairly by making an unreasonable decision. The Appellant argued the Director based the Decision on information available when the Amendment Application was first submitted in 2013, rather than on the merits of the information provided with the Amendment Application and after at the request of AEP.

[145] The Board has already addressed the issues of the Decision's reasons and the Director's reliance on the Added Policies. The Director provided an opportunity for the Appellant to have input into the Decision as shown by the extensive correspondence on the Department's Record. The Appellant requested the Director make a decision based on the information already provided to the Director. The Director did so. Additionally, if the Board

had found any procedural deficiencies in AEP's actions, the opportunity for the Appellant to appeal the Decision mitigates all but the most egregious acts of unfairness. The Board finds the evidence is not sufficient to support the Appellant's claim the Director acted unfairly.

[146] The Board is concerned about the length of time AEP took to make the Decision. The Board will address these concerns at the end of this report.

C. Issue 3: Did the Director not comply with a regional plan approved under the *Alberta Land Stewardship Act*?

[147] The Appellant submitted the Decision did not comply with LARP, a regional plan approved under ALSA. The Appellant stated the Director's reliance on the PNT to refuse to issue the amendment to the SML is not justified as LARP did not identify the PNT lands as a conservation area protected from development. The Appellant further submitted the Director did not comply with the Cold Lake Plan or give notice to the Appellant under sections 11(1) and (2) of ALSA.[69] The Director said the PNT lands would be part of the LARP amendment process. The Director stated the Decision is in harmony with LARP.

[148] LARP does not fetter the Director's responsibility to make decisions regarding applications for dispositions on public land, and it does not provide for automatic approval of

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[69] Sections 11(1) and (2) of ALSA state:

(1) For the purpose of achieving or maintaining an objective or a policy of a regional plan, a regional plan may, by express reference to a statutory consent or type or class of statutory consent, affect, amend or rescind the statutory consent or the terms or conditions of the statutory consent.

(2) Before a regional plan includes a provision described in subsection (1), a Designated Minister must

(a) give reasonable notice to the holder of the statutory consent of the objective or policy in the regional plan that the express reference under subsection (1) is intended to achieve or maintain,

(b) provide an opportunity for the holder of the statutory consent to propose an alternative means or measures of achieving or maintaining the policy or objective without an express reference referred to in subsection (1), including, if appropriate, within a regulatory negotiation process referred to in section 9(2)(j), and

(c) give reasonable notice to the holder of the statutory consent of any proposed compensation and the mechanism by which compensation will be determined under any applicable enactment in respect of any effect on or amendment or rescission of the statutory consent.

every resource development. Guided by consideration of LARP objectives, the Director must still exercise discretion in determining what areas are appropriate for certain types of dispositions. LARP states, "[D]evelopment decisions on Crown lands will have to be in alignment with the regional plan to achieve the regional outcomes established in the plan."[70] The Board notes LARP contains "Outcome 3" as one of its objectives. Outcome 3 states landscapes "are managed to maintain ecosystem function and biodiversity."[71]

[149] In an email to the Appellant, dated November 6, 2018, the Parks Officer explained LARP was being amended, and the Parks Division would include the Added Lands as an addition to the Moose Lake Provincial Park as part of the amendments. The Board, in reviewing the information from the Parks Division, which was in the Department's Record, along with Outcome 3 of LARP, finds the Director was correct to make the Decision with the PNT as a substantial reason. The Board finds the Director's Decision complied with LARP.

[150] The Cold Lake Plan stated in its Preface:

> "It is intended to be a guide for resource managers, industry and the public with responsibilities or interests in the area, rather than a regulatory mechanism… The plan is sufficiently flexible so that all future proposals for land use and development may be considered. No legitimate proposals will be categorically rejected."[72]

The Cold Lake Plan is not mandatory, and like LARP, it does not fetter the Director's discretion to make decisions regarding dispositions. The Board finds the Amendment Application was considered and not categorically rejected.

[151] The Appellant submitted the Director did not provide notice as required under sections 11(1) and (2) of ALSA. Sections 11(1) and (2) require notice to be provided to the holder of a "statutory consent" when an objective or policy of a regional plan will "affect, amend or rescind the statutory consent or the terms or conditions of the statutory consent." Statutory consent

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[70] Lower Athabasca Regional Plan (2012-2022), Government of Alberta. Online: <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/Pages/default.aspx>, at page 4.

[71] Lower Athabasca Regional Plan (2012-2022), Government of Alberta. Online: <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/Pages/default.aspx>, at page 42.

[72] Cold Lake Subregional Integrated Resource Plan, Alberta Environment and Parks, 1996, Appellant's submission, February 5, 2020, at tab 21. Online: <https://open.alberta.ca/publications/1789188>, at page 3.

is defined in section 2(aa) of ALSA as "... a permit, licence, registration, approval, authorization, disposition, certificate, allocation, agreement or instrument issued under or authorized by an enactment or regulatory instrument." The Board finds there was no need for the Director to provide notice as the Appellant's statutory consent (the SML) was not affected, amended or rescinded by any objective or policy in LARP. The Amendment Application was not a statutory consent as defined by ALSA, as no right was granted to the Appellant. The Board finds the Director did not fail to comply with LARP by not giving notice under sections 11(1) and (2) of ALSA.

D. Issue 4: Does the Director in this matter have authority to remove the PNT?

[152] The Appellant did not directly address this issue. The Director submitted she did not have the authority to cancel or amend the PNT, but stated the AEP's Team Lead, Approvals and Disposition Services, held that authority.

[153] The Board finds the Director did not have the authority to cancel or amend the PNT. However, the Director may make decisions that do not follow the restrictions in the PNT.

VII. DECISION

[154] Section 124 of the Act states:

> "(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.
>
> (2) The report may recommend confirmation, reversal or variance of the decision appealed.
>
> (3) On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision."

[155] In making its Report and Recommendations to the Minister, the Board has considered the Department's Record, the Parties' submissions, and the relevant legislation. After careful consideration, the Board finds as follows:

Issue 1: Did the Director, who made the decision to refuse Amendment Application No. SML 020035, err in the determination of a material fact on the face of the record?"

The Board finds the Director did not err in the determination of a material fact on the face of the record.

Issue 2: Did the Director, who made the decision to refuse Amendment Application No. SML 020035, err in law?

The Board finds the Director did not err in law.

Issue 3: Did the Director not comply with a regional plan approved under the *Alberta Land Stewardship Act*?

The Board finds the Director complied with the Lower Athabasca Regional Plan, which was applicable to the area.

Issue 4: Does the Director in this matter have authority to remove the PNT?

The Board finds the Director does not have the authority to remove the PNT. However, she can make decisions that do not follow the restrictions in the PNT.

VIII. RECOMMENDATION

[156] The Board recommends the Minister confirm the Director's July 2, 2019 decision not to issue Surface Material Lease Amendment Application No. SML 020035.

[157] With respect to section 125(4) of the *Public Lands Act*, the Board recommends copies of the Report and Recommendations, and the decision of the Minister, be sent to the following persons:

a. Ms. Amanda Avery, TrueNorth Environmental Land Services Ltd., representing North East Bulk Transportation Services Ltd.; and

b. Ms. Shannon Keehn, Alberta Justice and Solicitor General, representing Ms. Joanne Sweeney, Director, Aggregate Assessments and Continuations, Alberta Environment and Parks.

IX. ADDITIONAL COMMENTS

[158] The Board is concerned with the length of time it took for the Director to make a decision on the Amendment Application. The Appellant submitted the Amendment Application

to AEP on December 19, 2012, and the Director issued the Decision on July 2, 2019, more than six and a half years later. During this period, policy and standards changed and, although the changes were not drastic enough to impact the Decision, the changes appear to have caused confusion on which policies were applicable.

[159] The Appellant submitted delays in the approval process resulted in spending "tens of thousands of dollars on additional survey and environmental assessment."[73] It is not the Board's responsibility to advise AEP on policy, and the Board is not attempting to do so here. The Board is expressing the frustration evident in the Appellant's submissions at the inordinate amount of time it took to process an amendment to a disposition. Based on the Appellant's submissions, the Appellant would have preferred a quick rejection rather than a drawn out, expensive exercise in futility. The Director's Decision was correct, but the Appellant has suffered more than just the loss of opportunity.

[160] The Board is aware AEP is undertaking an initiative to process the backlog of applications. The Board trusts this initiative will result in more timely decisions.

Dated on June 5, 2020, at Edmonton, Alberta.

"original signed by"

Gordon McClure
Board Chair

"original signed by"

Brenda Ballachey
Panel Member

"original signed by"

Tim Goos
Panel Member

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73 Appellant's submission, February 5, 2020, at paragraph 57.

Reasons of the Minister of Environment and Parks

Under the *Public Lands Act*, R.S.A. 2000, c. P-40

Public Lands Appeal Board Appeal No. 19-0004

August 20, 2020

Introduction

[1] These are the reasons for my decision in Ministerial Order 44/2020. My decision deals with Appeal 19-0004, filed with the Public Lands Appeal Board (the "Board") by North East Bulk Transportation Services Ltd. (the "Appellant"). In this appeal, the Appellant is challenging the decision of the Director, Aggregate Assessments and Continuations, Alberta Environment and Parks (the "Director"), to refuse to issue an amendment to Surface Material Lease SML 020035 (the "SML")[1] under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "*PLA*"). The main reason for the Director's decision to refuse to issue the amendment to the SML is that there is a protective notation (a "PNT") on the lands in question, which reserves the lands "...because of future plans for the expansion of Moose Lake Provincial Park."

[2] While I am not required to give reasons when I make a decision by way of a Ministerial Order under the *PLA*,[2] I believe it would be helpful for everyone involved in this appeal to understand the reasons for my decision. Further, I am providing my reasons, in part, because I am not accepting the recommendation of the Board or the decision made by the Director. I have decided to vary the decision made by the Director as detailed in these reasons and as indicated in the Ministerial Order.

Discussion

[3] Following receipt of the appeal, the Board held a written hearing and prepared a report,[3] which includes the Board's recommendation. The Board provided me with the Report, and it forms the basis of my decision and these reasons. I am authorized to make this decision under section 124(3) of the *PLA*, which provides:

> "On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and

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1 The SML is located north of Moose Lake Provincial Park, northwest of Bonnyville, Alberta.

2 See: *Fenske* v. *Alberta (Minister of Environment)*, 2000 ABCA 135, at paragraph 24 to 27.

3 *North East Bulk Transportation Services Ltd.* v. *Director, Aggregate Assessments and Continuations, Alberta Environment and Parks* (5 June 2020), Appeal No. 19-0004-R (A.P.L.A.B.), 2020 ABPLAB 9 (the "Report").

make any further order that the Minister considers necessary for the purposes of carrying out the decision."

[4] After reviewing the Report, I understand the Director's decision to deny the amendment to the SML and the Board's conclusion that the Director was correct in making this decision. As stated, at the core of the Director's decision was the existence of a PNT that set aside lands for the expansion of Moose Lake Provincial Park. Further, the Director had a concern that the additional lands to be included in the SML were not contiguous with the existing portion of the SML, and in fact, were on the other side of the river.

[5] In reviewing the Director's decision, the Board concluded that the Director's decision was correct and that the Director:

1. did not err in the determination of a material fact;
2. did not err in law;
3. complied with the Lower Athabasca Regional Plan; and
4. had the authority not to follow the restrictions in a PNT, but exercised her discretion not to do so.

The Board recommended that the Director's decision be confirmed.

[6] I want to be clear that I believe that both the Director and the Board came to the correct decisions based on the information that was before them. However, as is discussed by the Court of Queen's Bench in *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment and Parks),* I have the benefit of seeing the matter before the Board from a broader perspective.[4] Based on this broader perspective, I have decided to vary the Director's decision and order:

1. the Director to amend SML 020035 as requested by the Appellant, subject to the standard terms and conditions;
2. SML 020035 be issued for a term of 10 years; and
3. SML 020035 be subject to any changes in the Lower Athabasca Regional Plan.

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[4] The Court of Queen's Bench in *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment and Parks)*, 2003 ABQB 303, at paragraph 19, quoted the Supreme Court of Canada I describing the powers of the Minister in this circumstance, stating:

> "... [T]he exercise of ministerial discretion and decision-making generally involves polycentric considerations, that is the 'require simultaneous considerations of numerous interests and the promulgation of solutions which concurrently balance benefits and costs for many different parties,' .... *Pushpanathan* v. *Canada (Minister or Citizenship and Immigration)*, ..." 1998 SCR 778 at paragraph 36.

[7] My reasons for making this decision are as follows. First, I am concerned with the length of time the PNT has been in place without a review or consideration of its original purpose, which may mean it is precluding viable uses of public lands. The previous approval of sand and gravel dispositions within the PNT suggest such a use may be accommodated with proper planning.

[8] The PNT was placed on these lands in 2000 and does not appear to have been revisited since. I am concerned that having a PNT in place for such a long time, without revisiting the on-going need for the PNT on a regular basis, does not provide effective management of the lands. I note the Board's finding that the Director has the authority not to follow the PNT, and agree that in making decisions of this nature, it is important for the Director to turn her mind to the current appropriateness of the PNT.

[9] Second, with respect to this specific PNT, I am aware that there are no immediate plans (i.e. plans within the next ten years) to expand Moose Lake Provincial Park to include these lands. Therefore, in my view, it is appropriate to grant the amendment to the SML for a ten year period. The work under this SML, including the reclamation, should be completed well before the lands will be considered for inclusion in Moose Lake Provincial Park.

[10] The reclamation of the lands should return the SML to a state suitable for use as a Provincial Park afterwards. Further, I am satisfied that the sand and gravel can be harvested in a manner that will meet ecological and wildlife constraints through appropriate planning.

[11] Finally, this SML will provide for much-needed sand and gravel in the area. There is a significant shortage of sand and gravel in north-east Alberta, and it is becoming a limiting factor in the economy. In my view, a consideration of the impact on the economy is an important factor that the Director should take into consideration in making her decision whether to grant SMLs of this nature.

[12] In the current circumstances, it is possible to balance the competing interests of extracting a much-needed resource with the potential uses of these lands. Appropriate terms and conditions can be placed on the SML, which will require the reclamation to be completed within the ten-year term of the disposition.

Jason Nixon
Minister of Environment and Parks

ALBERTA
ENVIRONMENT AND PARKS

Office of the Minister
Government House Leader
MLA, Rimbey-Rocky Mountain House-Sundre

Ministerial Order
44/2020

Public Lands Act,
R.S.A. 2000, c. P-40

and

Public Lands Administration Regulation,
Alta. Reg. 187/2011

Order Respecting Public Lands Appeal Board
Appeal No. 19-0004

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being an Order Respecting Public Lands Appeal Board Appeal No. 19-0004.

Dated at the City of Edmonton, Province of Alberta, this 20 day of August, 2020.

Jason Nixon
Minister

323 Legislature Building, 10800 97 Avenue, Edmonton, Alberta AB Canada Telephone 780-427-2391 Fax 780-422-6259

Appendix

Order Respecting Public Lands Appeal Board Appeal No. 19-0004

With respect to the decision of the Director, Aggregate Assessments and Continuations, Alberta Environment and Parks, to refuse to issue an amendment to Surface Material Lease SML 020035 under the Public Lands Act, R.S.A. 2000, c. P-40, I, Jason Nixon, Minister of Environment and Parks, order that:

1. The decision of the Director to refuse to issue the amendment to SML 020035 is varied.
2. The Director shall issue the amendment to SML 020035, and the accompanying amendments to DLO 043630 and DLO 030086 as required, with appropriate terms and conditions.
3. The Director shall issue SML 020035 with a term of 10 years.
4. At any time during the term of SML 020035, the Director may amend the conditions in order ensure compliance with the Lower Athabasca Regional Plan.