ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – June 25, 2021

IN THE MATTER OF sections 121, 122, 123 and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211 212, 213, 225, and 228 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Graymont Western Canada Inc., with respect to the decision of the Director, Land Coordination North-East Division, Alberta Environment and Parks, to refuse to issue Surface Materials Lease SML 070025.

Cite as: *Graymont Western Canada Inc.* v. *Director, Land Coordination North-East Division, Alberta Environment and Parks* (25 June 2021), Appeal No. 20-0016-R (A.P.L.A.B.), 2021 ABPLAB 11.

WRITTEN HEARING BEFORE:	Mr. Gordon McClure, Chair, Board Member; and, Dr. Brenda Ballachey Board Member, Mr. Kurtis Averill.
Board Staff:	Mr. Andrew Bachelder, Board Legal Counsel.
SUBMISSIONS BY:	
Appellant:	Graymont Western Canada Inc., represented by Ms. Jessica Sabell, Lehigh Hanson Materials Ltd.
Director:	Mr. Osman Hamid, Director, Land Coordination North-East Division, Alberta Environment and Parks.
Interested Party:	Mr. Edmund Steven Price.

EXECUTIVE SUMMARY

In 2019, Graymont Western Canada Inc. (the Appellant) submitted an amendment application for Surface Material Lease (SML) SML 070025 (SML07) to extract gravel from a location adjacent to another SML and overlapping a Department Mineral Lease (the DMS), which were both held by the Appellant. The DMS was for a limestone quarry and the adjacent SML was to extract surface material from the DMS area before the limestone could be removed. SML07 was for part of the DMS not covered by the adjacent SML and an additional area along the Athabasca River. The Appellant had submitted previous amendment applications for SML07 in 2015 and 2016. The Director, Land Coordination North-East Division, Alberta Environment and Parks (the Director) decided to refuse to issue SML07 for the several reasons, including:

- the amended application did not maintain the 250 metre setback from the Athabasca River, required by the terms of the DMS;
- the DMS approval did not apply to the area covered by SML07;
- SML07 is entirely within the Athabasca River's active floodplain, which had flooded four times in the past seven years, and SML07 would be an unacceptable risk to water quality, soil stability, fish habitat, and migration of the Athabasca river channel; and
- SML07 is not aligned with the Alberta Aggregate Allocation Directive for Commercial Use on Public Land (2017).

The Appellant filed a Notice of Appeal with the Public Lands Appeal Board (the Board) alleging the Director, in deciding to not issue the amended application for SML07, erred in the determination of a material fact on the face of the record.

The Board held a written hearing, and after reviewing the Director's Record and the written submissions of the parties, the Board found the Director had not erred.

The Board recommended the Minister of Environment and Parks confirm the Director's decision to refuse to issue SML07.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the "Board") to the Minister, Environment and Parks (the "Minister"), regarding an appeal by Graymont Western Canada Inc. (the "Appellant" or "Graymont") of the decision by the Director, Land Coordination North-East Division, Alberta Environment and Parks (the "Director"), to refuse to issue Surface Materials Lease SML 070025 ("SML07") to the Appellant. The purpose of the SML was for the operation of a gravel pit on public lands located at SW-31-90-9-W4M and SE-30-90-9-W4M, north of the Urban Service Area of Fort McMurray in the Regional Municipality of Wood Buffalo.

II. DECISION

[2] The Board recommends the Minister confirm the Director's decision to refuse to issue the SML to the Appellant.

III. BACKGROUND

[3] In the early 2000s, the Appellant held Metallic and Industrial Minerals Permit 9304030970 ("MAIM") for the exploration for limestone. The Appellant applied for various separate Surface Material Leases ("SMLs") within the boundaries of the MAIM. The SMLs would allow the Appellant to extract surface materials, such as gravel, which lay over the limestone deposits. The intention was for the gravel to be removed and utilized before the limestone was mined, otherwise the gravel resource would be wasted.

[4] On July 25, 2007, the Appellant applied for SML07, which covered part of the MAIM and included a portion up to the Athabasca River. On August 22, 2007, Alberta Environment and Parks ("AEP") consolidated five of the Appellant's SML applications into one Surface Material Lease, SML 050015 ("SML05"). To grant SML05, AEP exempted the Appellant from the "80 Acre Rule" under the Alberta Aggregate (Sand and Gravel) Allocation

Policy for Commercial Use on Public Land (2006) ("Aggregate Allocation Policy (2006)").[1] SML07 was not one of the consolidated SMLs.

[5] The Appellant amended the application for SML07 on September 5, 2008.

[6] On June 8, 2010, the Appellant applied to the Natural Resources Conservation Board ("NRCB") and AEP for an approval to construct, operate, and reclaim a limestone quarry (the "Quarry") based on the MAIM boundaries. As part of the application, the Appellant filed an Environmental Impact Assessment ("EIA") for the NRCB and AEP to review. The NRCB granted its approval of the Quarry on February 25, 2014.

[7] On March 10, 2015, AEP issued Approval 231302-00-00 (the "DMS") to the Appellant authorizing access to public lands for the purpose of constructing, operating and reclaiming the Quarry. One of the terms of the DMS was that the Appellant must leave a 250 metre setback of undisturbed vegetation between the Quarry and the top west bank of the Athabasca River.

[8] On February 23, 2015, the Appellant submitted an amendment for its SML07 application to remove portions of SML07 that overlapped with the DMS and the expanded SML05. The new boundary covered a narrow strip along the Athabasca River adjacent to the DMS. On May 16, 2016 and on December 7, 2016, the Appellant submitted further amendments to its SML07 application.

[9] On March 28, 2019, AEP advised the Appellant that the most recent application amendment was deficient and requested an updated plan, which the Appellant provided on April 29, 2019.

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[1] The 80 Acre Rule refers to the Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land ("Allocation Directive (2017)") and the Alberta Aggregate (Sand and Gravel) Allocation Policy for Commercial Use on Public Land ("Aggregate Allocation Policy (2006)"), which allow for an applicant to apply for a SML that is 80 acres or less, without having to submit to a public bid process. To avoid the public bid process, the applicant may not have a total of more than 80 acres within a six mile radius.

[10] On August 4, 2020, AEP produced a Merit Rationale recommending the Director refuse to issue SML07.

[11] On August 24, 2020, the Director issued a Notice of Merit of Decision refusing to issue SML07. The Director stated:

> "Please note that the refusal to issue a disposition is based on the following reason/s:
>
> - [SML07] is not approved, nor are any of the subsequent amendment applications. [SML05] was only approved for the collection of royalties and was superseded by [the DMS].
> - The applicant committed to a 250m setback requirement as outlined in EPEA approval 231302-00-00 (sec 3.3.1) for [the DMS]. The department continues to work towards maintaining this buffer, at a minimum, to preserve the ecological integrity and water quality of the Athabasca River.
> - [SML07] resides entirely within the 250m buffer area, which is not consistent with what the applicant has previously committed to in recent approvals for similar operations in the same location.
> - The EPEA approval for [the DMS] does not apply to the area covered by [SML07] as [SML07] is within the 250m buffer. This buffer is identified as being maintained as per the EPEA approval requirement. Maintaining the 250m buffer would have been a mitigation strategy that would have contributed to the merit decision resulting in the EPEA approval.
> - The Letter of Authority for [the DMS] indicates the applicant committed to [the DMS] superseding [SML07], which should have resulted in the applicant canceling the [SML07] application.
> - [SML07] is entirely within the Athabasca River's active floodplain, this area has flooded most recently in 2013, 2016, 2018, and 2020. This activity will result in unacceptable risk of degradation of water quality, soil stability, fish habitat, and migration of the Athabasca river channel.
> - [SML07] is not aligned with the Alberta Aggregate Allocation Directive for Commercial Use on Public Land (2017) ("Allocation Directive (2017)"). The [SML07] amendment application was submitted in 2019.
> - [SML07] is adjacent to [SML05], which covers an area over 760 acres, almost ten times the permitted size of 80 acres for a single disposition holder within an area covering a six-mile radius.
> - [The DMS] is within the 1:100 year floodplain and partially within the 1:20 year floodplain. [SML07] would be within the 1:20 year floodplain. This location has flooded four different times in the past seven years, and

excavating any closer to the Athabasca River's active channel presents an unacceptable risk to compound the severity and increase the occurrences of flooding events.

- The Lower Athabasca Regional Plan (2012) highlights the significance of aquatic ecosystems and calls for both watershed-based landscape management and for strategies to minimize land disturbances in the Athabasca river corridor north of Fort McMurray.
- The 1997 Fort McMurray-Athabasca Oil Sands Subregional Integrated Resource Plan (IRP) recognized these concerns and provided that developments that propose to encroach on the river valley will be scrutinized.
- The Federal Fisheries Act in Section 34.4 prohibits killing fish by means other than fishing, and Section 35 prevents the harmful alteration of fish habitat. The proposal to expand mining activities closer to the main river channel and reduce the existing riparian buffer raises an unacceptable risk to fish. Current operations within [the DMS] have already provided examples of the difficulties in not contravening the Federal Fisheries Act in this location.
- There is already an existing oxbow channel along the east edge of the site indicating the historical pattern of flooding in this area. The main river used to flow through that location. There is an unacceptable risk the oxbow would be impacted by additional vegetation removal and surface material extraction.
- The Water Act recognizes that protection of the aquatic environment is essential to sustainable water management. The Strategy for the Protection of the Aquatic Environment, included with the Framework for Water Management Planning, is required by the Water Act (Part 2) and confirms the government's commitment to maintaining, restoring, or enhancing current aquatic conditions environment."[2]

[12] On October 21, 2020, the Board received a Notice of Appeal from Parson Creek Aggregates ("PCA"), appealing the Director's decision, along with a letter explaining that PCA was a joint venture of Graymont and Lehigh Hanson Materials Limited. PCA acknowledged its Notice of Appeal was filed after the timelines set in the legislation, and requested an extension of time to file the appeal. PCA stated AEP sent the Notice of Merit Decision to the wrong location. At the request of the Board, PCA provided further comments regarding the late filing.

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[2] Director's Record, at Tab 1.1.

[13] On November 18, 2020, the Director was provided an opportunity to comment on the late filing and requested the Board dismiss the Notice of Appeal for being filed late and for lacking standing under section 212(2) of the *Public Lands Administration Regulation*, A.R. 187/2011 ("PLAR"). The Director said that Graymont was the applicant for SML07 and AEP was only required to communicate decisions directly to the applicant. The Director noted that the Notice of Merit Decision was sent to Graymont on August 24, 2020, at the address indicated in the AEP database. The Director submitted that PCA was not the applicant and should not have standing as an appellant in the matter.

[14] On November 25, 2020, the Appellant responded to the Director's comments and said that the Notice of Merit Decision was sent to the Appellant's Calgary office and not to the contact address noted in the application. The Appellant explained Graymont owned the material and mineral rights to the project, while Lehigh was the managing and operating partner, and that Graymont had been authorized by Lehigh to file the appeal on its behalf. The Appellant stated that when Graymont's agent filed the Notice of Appeal, PCA was mistakenly listed as the appellant.

[15] On December 2, 2020, the Board requested the Appellant file an amended Notice of Appeal properly identifying Graymont as the Appellant. The Board also determined it was not contrary to the public interest to extend the time for service of the Notice of Appeal.[3] The Appellant provided a revised Notice of Appeal to the Board on December 9, 2020.

[16] On January 5, 2021, the Director requested a hearing by written submissions. On January 28, 2021, the Appellant indicated it agreed with the Director's request.

[17] On January 15, 2021, the Board contacted four parties identified by the Director as being potentially interested parties:

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[3] See: *Parsons Creek Aggregates* v. *Director, Lands Delivery and Coordination Division, Northeast District-North Region, Alberta Environment and Parks* (2 December 2020), Appeal No. 20-0016-DL1 (A.P.L.A.B.), 2020 ABPLAB 23.

(a) Alberta Transportation,

(b) Mr. Edmund Steven Price, a trapper with traplines in the area;

(c) Northland Forest Products Ltd.; and

(d) Alberta Pacific Industries.

Alberta Transportation and Mr. Price contacted the Board and requested to participate. After receiving comments from the Appellant and the Director (collectively, the "Parties"), the Board decided to allow written submissions from Alberta Transportation and Mr. Price on the issue set for the appeal. The Board received submissions from Alberta Transportation and Mr. Price, but allowed a further oral submission from Mr. Price as he was more comfortable speaking to his concerns. Mr. Price gave his oral submission by phone on March 29, 2021, and a copy of an audio recording was provided to the Parties.

[18] The Director's Record was provided by the Director on February 8, 2021, and forwarded to the Appellant by the Board on February 10, 2021.

[19] The Board received written submissions from the Parties as follows:

(a) Appellant's Initial Written Submission on April 9, 2021;

(b) Director's Response Submission on May 7, 2021; and

(c) Appellant's Rebuttal Submission on June 4, 2021.

The Board granted a two week extension to the Director to provide his Response Submission and a two week extension to the Appellant to provide a Rebuttal Submission.

[20] The panel appointed by the Board for the hearing met on June 7, 2021 to review the written submissions and make its report and recommendations to the Minister.

IV. ISSUES

[21] The Board set the following issue for the hearing:

> Did the Director who made the decision to refuse the amendment application for SML07 err in the determination of a material fact on the face of the record?

[22] To determine this question, the Board reviewed the Parties' submissions, the submissions of the interested parties, the Director's Record, the legislation, and the relevant caselaw. In the Board's review, the Board noted three precise issues, which are the relevant questions that must be answered for the Board to decide the broarder issue. These precise issues were raised by the Parties in their submissions:

Issue 1:	Did the Director err by considering the DMS in making his decision?
Issue 2:	Did the Director err in applying the Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land 2017 ("Allocation Directive 2017") to the application for SML07?
Issue 3:	Is the Director's Record incomplete?

Submissions of Alberta Transportation and Mr. Price

[23] Alberta Transportation and Mr. Price made submissions that were general in nature regarding the decision.

[24] On January 15, 2021, Alberta Transportation provided an email as their submission. Alberta Transportation said it did not support SML07 as proposed, and that any AEP approvals granted should include compliance with the *Highways Development and Protection Act*, S.A. 2004, c. H-8.5.

[25] In Mr. Price's oral statement, given on March 29, 2021, Mr. Price said he operated Trapline 1719 Fort McMurray. He stated that the Appellant's operations are located on his trapline. Mr. Price said the Appellant's operations have already had a negative impact on the wildlife in the area, and the proposal for SML07 would make it worse. Mr. Price noted moose, otter, wolf, coyote, lynx, fisher, martin and mule deer populations have significantly decreased in the area. He stated that the shore of the river should be preserved to protect wildlife diversity. Mr. Price submitted future development near the river should not be allowed.

1. Did the Director err by considering the DMS in making his decision?

(i) Submissions

[26] The Appellant submitted the Director's decision was based almost entirely on the DMS Letter of Authority and the Environmental Field Report ("EFR"). The EFR was filed along with the application for the DMS. The EFR contained the following statement in relation to SML07: "This SML has a 60 [metre] buffer along the Athabasca River. It is PCA's understanding that the PCA Limestone Project and this associated DMS will supersede this SML."[4] The Appellant wrote:

> "The Director did not take into consideration the background and history to [SML07] contained in the Record and incorrectly interpreted the word 'supersede' in the context of a different and distinct application submitted 5 years earlier for entirely different operations (a limestone quarry as opposed to sand and gravel operations)."[5]

[27] The Appellant said the Director mistakenly assumed the statement meant the Appellant was committed to the same set back for SML07 as the required in the DMS, and that the Appellant agreed the DMS would supersede SML07. The Appellant stated it was intended that there would be no unnecessary overlap between the DMS and SML07 and that SML07 would proceed only in areas that were not covered by SML05. The Appellant said there was never any intention of the DMS replacing SML07.

[28] The Appellant stated that between 2015 and 2019 there was no suggestion from AEP that the application for SML07 should be cancelled or not proceed. The Appellant noted that a year after the DMS was granted, AEP accepted the Appellant's amendment applications to remove any lands covered by the DMS and advised that the application was being reviewed by AEP. The Appellant stated:

> "It was only after the application had been under review for 3 and a half years that somebody brought the statement in the EFR forward for the first time and suggested that this statement applied to [SML07]. At that point the statement was put forward as a commitment by Graymont to do something other than what had

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4 Director's Record, at Tab 3.3.

5 Appellant's Initial Submission, April 9, 2021, at paragraph 38.

> been put forward in the amendment application. On the basis of this information a decision was made the same day, without anything further, to refuse Graymont's application. The other grounds for the refusal were then backfilled by AEP in order to solidify the refusal."[6]

[29] The Appellant stated the Director's Response Submission contained a reason for refusing to issue SML07 that was not in the Director's decision letter. The Appellant noted the Director wrote: "[AEP] is not able to approve the Appellant's 2019 application to amend [SML07] under the Public Lands Act, as it would be in contravention of the Appellant's EPEA 231302-00-00 approval."[7] The Appellant said the Board should not consider this "new reason in considering the Appeal. If the Decision had included this reason, this would have provided a clear basis for an appeal on an error of law."[8]

[30] With regards to Mr. Price's comments, the Appellant stated:

> "Graymont operates in accordance with the Wildlife Mitigation and Monitoring plan approved by AEP, but is prepared as part of any consideration of the merits of the Application, to expand its monitoring/wildlife program and to carry out additional study on the wildlife use of the corridor as part of that process."[9]

[31] The Director submitted the Appellant's application for SML07 was considered on its own merits, taking into account adjacent approvals such as the DMS and the requirement that the Appellant had to leave a 250 metre setback of undisturbed vegetation between the quarry and the Athabasca River. The Director also stated he considered other environmental factors, which he said were mitigated by the conditions in the DMS.

[32] The Director also acknowledged that AEP had previously authorized exempting the Appellant from the 80 Acre Rule.[10] However, the Director stated that the exemption was for the DMS and overlapping SML05, and it did not mean that the permission would be

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6 Appellant's Initial Submission, April 9, 2021, at paragraph 45.

7 Director's Response Submission, May 7, 2021, at paragraph 44.

8 Appellant's Rebuttal Submission, June 4, 2021, at paragraph 12.

9 Appellant's Initial Submission, April 9, 2021, at paragraph 49.

10 The 80 Acre Rule refers to the Allocation Directive (2017) and the Aggregate Allocation Policy (2006), which allow for an applicant to apply for a SML that is 80 acres or less, without having to submit to a public bid process. The applicant may not have SMLs totaling more than 80 acres within a six mile radius.

automatically granted for future applications or amendments. The Director submitted that "All past considerations and commitments, perceived or actual, were adequately addressed upon the approval of [the DMS/SML05]."[11]

[33] The Director stated past amendment applications were not relevant in his deliberations:

> "Information that occurred during past application reviews that were submitted prior to the 2019 amendment application of [SML07] had no relevance to the merit review and refusal decision of the Appellant's submitted 2019 application to amend [SML07]. The Appellant's 2019 amendment application for [SML07] is considered a new application and my refusal decision is based on the merit review of the applicable information within the Appellant's submitted 2019 amendment application of [SML07]."[12]

[34] The Director said that if he had approved the application for SML07, the Appellant would have been in direct contravention of the terms and conditions of the DMS.

(ii) Analysis

[35] A decision to issue a disposition is not made in a vacuum without taking into account several different factors and interests. The disposition is not issued in isolation because it has an impact on the public lands around it. The Allocation Directive (2017) contains the following principles that guide the Director's decisions:

> "1. Allocation decisions must align with regional and sub-regional plans, and/or locally developed land allocation strategies that are consistent with such plans and this Directive.
>
> 2. Allocation decisions must respect and integrate with other relevant land management policies, identified areas of sensitivity, and registered interests within the Crown Land Registry (e.g., Protective Notations, sensitive fish and wildlife zones, etc.).
>
> 3. Allocation decisions must consider cumulative impacts.
>
> 4. Allocation decisions will be made in the public interest."[13]

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11 Director's Response Submission, May 7, 2021, at paragraph 101.

12 Director's Response Submission, May 7, 2021, at paragraph 70.

13 Director's Record, at Tab 4.5.

[36] The Director is required to consider other relevant land management policies. The Director must also consider cumulative impacts, which means taking into account other dispositions and their impact on the public lands, such as the DMS.

[37] The Board notes the Appellant submitted the Director misinterpreted the word "supersede" in the DMS Letter of Authority, and that the word was used in the context of the DMS application. The statement in the DMS said: "This SML has a 60 [metre] buffer along the Athabasca River. It is PCA's understanding that the PCA Limestone Project and this associated DMS will supersede this SML."[14] The Appellant argued it intended that there would be no unnecessary overlap between the DMS and SML07, and that SML07 would proceed only in areas that were not covered by SML05. The Appellant said there was never any intention of the DMS replacing SML07.

[38] The Merriam-Webster Dictionary defines "supersede" as: "to cause to be set aside; to force out of use as inferior; to take the place or position of; to displace in favor of another."[15] A plain reading of the statement in the DMS indicates the DMS will "cause to be set aside," "force out of use," "take the place of," and "displace" SML07. Despite the Appellant's argument that it was never the intent that the DMS would supersede SML07, the Board finds the wording clearly states otherwise.

[39] The DMS was a significant factor in the Director's decision-making process, but it was not the only factor. The Director's reasons include concerns regarding SML07's location in an active floodplain, the potential for an "unacceptable risk of degradation of water quality, soil stability, fish habitat, and migration of the Athabasca river channel," and the finding that SML07 did not align with the Allocation Directive (2017). The Director considered multiple factors when making the decision.

[40] Section 14(2) of PLAR provides substantial discretion to the Director to prescribe the terms and conditions for an approval the Director considers appropriate, and section 14(3)

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14 Director's Record, at Tab 3.3.

15 <https://www.merriam-webster.com/dictionary/supersede>.

allows those terms and conditions to be more rigorous than the terms and conditions provided for in the *Public Lands Act* and PLAR.[16] It follows that the Director would have equal discretion in determining what considerations are relevant when considering an application for an approval, subject to the principles of procedural fairness. If the application is not going to meet the terms and conditions the Director would prescribe, then the Director may reject the application. In this appeal, the Director considered the DMS and other factors to be relevant and, as the Appellant's 2019 amendment application did not meet the requirements of those factors, the Director refused to issue SML07.

[41] The Appellant suggested the Director had only made his decision after an AEP employee noted the setback requirement in the DMS. The Appellant alleged the Director then "backfilled" the decision with other grounds to strengthen the decision. The Board finds the Appellant's suggestion to be highly speculative and not based on evidence.

[42] The Appellant stated AEP did not object to the proposed boundaries for SML07 when the previous amendment applications were submitted. The Appellant argued AEP's silence meant it "accepted" the previous SML07 amendment applications. The Board finds this argument baseless. While it is true that AEP took an excessive amount of time to make its decision, the inclusion of a condition in an amendment application by an applicant does not mean the Director will accept that condition. If anything, an undue amount of time to make a decision suggests a deemed refusal of the application.

[43] The Board notes that none of the previous amendment applications were accepted by the Director. The Director may not have specifically stated opposition to the proposed boundaries in the previous amendment applications, however this is not an indication of acceptance. The Appellant's applications for SML07 may have contained a 60 meter buffer

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[16] Sections 14(2) and (3) of PLAR state:

"(2) The Minister or the director may issue an approval subject to any terms and conditions the Minister or the director considers appropriate.

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

between SML07's gravel operations and the Athabasca River, but the Director never approved the lesser buffer. An application is not considered accepted until the disposition is issued.

[44] The Board rejects the Appellant's argument that the Director raised a new issue in the written submission. The statement by the Director that he could not approve SML07 because it would be in contravention of the DMS is not a new reason, but rather a logical conclusion based on the DMS requirement for a 250 metre setback. The Board finds the Director was correct in noting that if SML07 was granted it would be in breach of the DMS' terms and conditions.

[45] The Board finds the Director did not err in considering the DMS as part of his overall consideration of the merits of the SML07 application.

2. Did the Director err in applying the Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land 2017 ("Allocation Directive 2017") to the application for SML07?

(i) Submissions

[46] The Appellant submitted the Director erred in finding the SML07 application was subject to the Allocation Directive (2017) for two reasons:

(a) the SML07 application was submitted in 2015, before the Allocation Directive (2017) was active; and

(b) the Appellant states it was assured by AEP that the SML07 application would be considered under the old Aggregate Allocation Policy (2006) after the Allocation Directive (2017) came into effect.

[47] The Appellant stated: "the fact that AEP repeatedly requested new drawings does not mean that the amendment application should be treated as having only been made in 2017 after that Directive came into effect.…"[17] The Appellant said it "had been advised that this SML, as it related to activities on the land as far back as 2015, would not be subject to new allocation directives."[18]

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17 Appellant's Initial Submission, April 9, 2021, at paragraph 47.

18 Appellant's Initial Submission, April 9, 2021, at paragraph 47.

[48] The Director acknowledged AEP provided an exemption to the Appellant of the 80 Acre Rule for the DMS and SML05. However, the Director stated the exemption was only for those dispositions, and did "not mean that this permission would automatically be granted for the Appellant's submitted 2019 application for amendment for [SML07], or any other future applications by the Appellant or otherwise."[19] The Director said there were no expectations in AEP "that the Appellant would receive sand and gravel extraction allowances in excess of over the 80-acre specification in perpetuity."[20]

(ii) Analysis

[49] An amendment to an application for a disposition provides new information for the Director to consider. It would be unfair to the Appellant for its application to be considered based on outdated or incorrect information in a previous application. For this reason, previous applications are considered void when an amended application is submitted. The Appellant submitted new amendment applications in 2015, 2016, and 2019. The 2019 application is the only one the Director should have considered, as the previous applications were void. Under section 9(5)(a) of PLAR the Director likely would have been correct to reject the Appellant's previous amendment applications that did not meet the requirements under the legislation.[21] The 2019 amendment application was subject to the rules and policies in place when it was submitted. The previous amendment applications are void and do not preserve the Appellant's place in time. The Board finds the Director appropriately applied the Allocation Directive (2017) to the 2019 amendment application.

[50] The Board notes the 80 Acre Rule was included in the Aggregate Allocation Policy (2006). The Board has already noted the legislation allows significant discretion for the Director to determine relevant terms and conditions, and consequently, the Director may

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19 Director's Response Submission, May 7, 2021, at paragraph 101.

20 Director's Response Submission, May 7, 2021, at paragraph 27.

21 Section 9(5)(a) of PLAR states:

"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

consider relevant factors in arriving at those terms and conditions. The Allocation Directive (2017) provides more clarity of what factors the Director is to consider when determining whether to issue a disposition, but the Director had the legislative authority to consider those factors before the Allocation Directive (2017) became effective. It is unlikely applying the Aggregate Allocation Policy (2006) to the Appellant's amendment application instead of the Allocation Directive (2017) Directive would have changed the Director's decision.

[51] The Board finds the Appellant provided insufficient evidence to demonstrate AEP committed to considering the SML07 application under the Aggregate Allocation Policy (2006) after the Allocation Directive (2017) came into effect. AEP met their commitments to provide exemptions when the DMS and SML05 were issued and the Appellant provided insufficient evidence to demonstrate that AEP committed to the same exemptions for SML07 as for the DMS and SML05.

3. Is the Director's Record incomplete?

(i) Submissions

[52] The Appellant noted several records which were not included in the Director's Record:

(a) internal AEP notes quoted from a 2019 email indicating AEP decided to delay decisions on SML07 until a decision on the EIA was made by the NRCB;[22]

(b) a full copy of the Appellant's detailed response dated February 6, 2012, opposing the decision to wait for the NRCB decision before proceeding with the sand and gravel applications;[23]

(c) no documented response to the Appellant's February 6, 2012 letter, and no records from 2007 to 2016;[24]

(d) no record of the December, 2015 amendment application for SML07;[25]

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subsection."

22 Appellant's Initial Submission, April 9, 2021, at paragraph 12.

23 Appellant's Initial Submission, April 9, 2021, at paragraph 13.

24 Appellant's Initial Submission, April 9, 2021, at paragraph 14.

25 Appellant's Initial Submission, April 9, 2021, at paragraph 19.

(e) no record of the May 16, 2016 amendment application for SML07;[26]

(f) no record of the December 7, 2016 amendment application for SML07;[27]

(g) a letter dated November 28, 2016, which AEP later indicated had been sent in error;[28]

(h) no records from December 19, 2016 to 2019;[29] and

(i) a letter dated March 28, 2019, from AEP to the Appellant stating the 2016 amendment application was deficient and requesting an updated plan.[30]

[53] The Appellant stated:

> "…it is clear that not all relevant material has been included in the Record… the Decision was not founded on transparent and complete evidence and in basing the Decision on statements without a clear evidentiary foundation, the Director has erred in the determination of a material fact on the face of the record."[31]

[54] The Director submitted the documents the Appellant alleged were missing from the Director's Record were not part of his determination and, therefore, were not included in the Director's Record and were not part of the merit decision. The Director confirmed that there are gaps in in the Director's Record, however, the Director stated those gaps were when AEP was conducting a completeness review on the application.

(ii) Analysis

[55] The Board takes allegations of incomplete records very seriously. Section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker." The Board, the Appellant, and the Minister, rely on the Director to provide all relevant information the Director and AEP considered in making the decision under appeal.

[56] The rules of natural justice may have been breached if the Director failed to provide the relevant information, or did not consider relevant evidence. The Supreme Court of

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26 Appellant's Initial Submission, April 9, 2021, at paragraph 20.

27 Appellant's Initial Submission, April 9, 2021, at paragraph 22.

28 Appellant's Initial Submission, April 9, 2021, at paragraph 22.

29 Appellant's Initial Submission, April 9, 2021, at paragraph 23.

30 Appellant's Initial Submission, April 9, 2021, at paragraph 24.

31 Appellant's Rebuttal Submission, June 4, 2021, at paragraph 19.

Canada stated in *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*:

> "Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence."[32]

[57] Any evidence before the Board "…must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."[33] Additionally, Rule 14.1 of the Board's *Interim Appeals Procedure Rules for Complex Appeals* states:

> "If a party makes a request for an order for disclosure, the request must:
>
> (a) Identify as precisely as possible the information or material required and the issue(s) to which it relates, and
>
> (b) Provide details explaining how the disclosure requested may be relevant to the issue(s) to be considered by the panel."[34]

[58] The Board has considered the Appellant's allegations that the Director's Record was incomplete. The Appellant's allegations and the Board's comments follow below:

> (a) internal AEP notes quoted from a 2019 email indicating AEP decided to delay decisions on SML07 until a decision on the EIA was made by the NRCB;
>
> The Appellant did not provide a sufficient explanation on why these internal AEP notes are relevant to the appeal. The Director has acknowledged that AEP chose to delay decisions on SML07 until the NRCB made its decision regarding the EIA. Without a reason why these notes are relevant it appears the Appellant is simply fishing for information it does not know is present.
>
> (b) a full copy of the Appellant's detailed response dated February 6, 2012, opposing the decision to wait for the NRCB decision before proceeding with the sand and gravel applications;

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[32] *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471, at paragraph 51.

[33] *C. (R.) v. McDougall*, 2008 SCC 53, at paragraph 46.

[34] Public Lands Appeal Board, *Interim Appeals Procedure Rules for Complex Appeals*, at page 12.

The Appellant did not provide a sufficient explanation on why this record is relevant to the appeal. AEP's decision to wait for the NRCB's review of the EIA to finish before proceeding with the Appellant's application is not under appeal.

(c) no documented response to the Appellant's February 6, 2012 letter, and no records from 2007 to 2016;

The Appellant did not provide a sufficient explanation as to why they believed this gap in the record was significant or identify what specific records were missing.

(d) no record of the December, 2015 amendment application for SML07;[35]

(e) no record of the May 16, 2016 amendment application for SML07;[36]

(f) no record of the December 7, 2016 amendment application for SML07;

The Board has noted the previous amendment applications are void. The Appellant has not provided a sufficient explanation on why the previous amendment applications are relevant to the appeal.

(g) a letter dated November 28, 2016, which AEP later indicated had been sent in error;

The Appellant did not provide a sufficient explanation on why this letter was relevant to the appeal.

(h) no records from December 19, 2016 to 2019; and

The Appellant did not provide a sufficient explanation as to why they it believed this gap in the record was significant or identify what specific records were missing.

(i) a letter dated March 28, 2019, from AEP to the Appellant stating the 2016 amendment application was deficient and requesting an updated plan.

The Board noted amendment applications prior to the 2019 amendment application are void. The Appellant did not provide a sufficient explanation as to how this letter is relevant to the appeal.

[59] The Board finds the Appellant did not identify the records it alleged were missing from the Director's Record and did not provide a sufficient explanation for why the records may be relevant.

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35 Appellant's Initial Submission, April 9, 2021, at paragraph 19.

36 Appellant's Initial Submission, April 9, 2021, at paragraph 20.

[60] The Board notes the Appellant received a copy of the Director's Record on February 12, 2021. It would have been more appropriate for the Appellant to raise its concerns regarding the Director's Record shortly after receiving it, rather than wait until written submissions are made for the hearing.

[61] The Board finds the Appellant did not prove on a balance of probabilities the Director's Record was incomplete.

V. CONCLUSION

[62] On the precise issues considered by the Board in this appeal, the Board finds:

1. The Director did not err by considering the DMS in making his decision;
2. The Director did not err in applying the Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land 2017 to the application for SML07; and
3. The Appellant did not prove the Director's Record was incomplete.

[63] Based on its consideration of the above precise issues, the Board finds the Director did not err in the determination of a material fact on the face of the record when he made the decision to refuse to issue SML07.

VI. RECOMMENDATION

[64] The Board recommends the Minister confirm the Director's decision to refuse to issue Surface Materials Lease SML 070025.

Dated on June 25, 2021, at Edmonton, Alberta.

"*original signed by*"
Gordon McClure
Board Chair

"*original signed by*"
Brenda Ballachey
Board Member

"*original signed by*"
Kurtis Averill
Board Member

ALBERTA
ENVIRONMENT AND PARKS

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

Ministerial Order
70/2021

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. 20-0016

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. 20-0016.

Dated at the City of Edmonton, Province of Alberta, this 22 day of July, 2021.

Jason Nixon
Minister

323 Legislature Building, 10800 97 Avenue, Edmonton, Alberta T5K 2B6 Canada Telephone 780-427-2391

Appendix

Order Respecting Public Lands Appeal Board Appeal No. 20-0016

With respect to the August 24, 2020, decision of the Director, Land Coordination North-East Division, Alberta Environment and Parks (the "Director"), to refuse to issue Surface Material Lease 070025 to Graymont Western Canada Inc., pursuant to section 10(1) of the *Public Lands Administration Regulation*, A.R. 187/2011, I, Jason Nixon, Minister of Environment and Parks, in accordance with section 124(3) of the *Public Lands Act*, R.S.A. 2000, c. P-40, order that:

1. The decision of the Director to refuse to issue Surface Material Lease SML 070025 is confirmed.