ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report & Recommendations – December 16, 2021

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

-and-

IN THE MATTER OF an appeal filed by the Gordeyville and Area Community Members Group, with respect to the decision of the Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks, to issue Department Miscellaneous Lease DML 200008 to the Saddle Hills Target Sports Association.

Cite as: *Gordeyville and Area Community Members Group* v. *Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks,* re: *Saddle Hills Target Sports Association* (16 December 2021), Appeal No. 20-0025-R (A.P.L.A.B.), 2021 ABPLAB 24.

BEFORE:	Mr. Gordon McClure, Board Chair; Dr. Nick Tywoniuk, Board Member; and Mr. Chris Powter, Board Member.
Board Staff:	Mr. Andrew Bachelder, Board Legal Counsel, and Ms. Denise Black, Board Secretary.

SUBMISSIONS BY:

Appellant:	Gordeyville and Area Community Members Group (GACM), represented by Mr. Bill McElhanney, Ackroyd Law LLP.
Director:	Ms. Ramona Quaale, Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks, represented by Mr. Larry Nelson, Alberta Justice and Solicitor General.
Disposition Holder:	Saddle Hills Target Sports Association, represented by Mr. Mike Davison.

EXECUTIVE SUMMARY

The Saddle Hills Target Sports Association (the Disposition Holder) applied for a Department Miscellaneous Lease (DML) for a shooting range, in the County of Grande Prairie, No. 1. The Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks (the Director) issued the DML to the Disposition Holder.

The Gordeyville and Area Community Members Group (the GACM), representing approximately 410 residents in the area of the DML, filed a Notice of Appeal with the Public Lands Appeal Board (the Board) appealing the Director's decision to issue the DML. The GACM said the Director, in making the decision to issue the DML to the Disposition Holder, erred in the determination of a material fact on the face of the record and erred in law. The Board scheduled a hearing by written submissions with oral closing arguments held by video conference.

In the written submissions the GACM argued the record was incomplete and that the Board should make an adverse inference based on documentation the GACM stated was missing from the record.

After reviewing the record, and considering the written submissions and oral closing arguments of the GACM, the Disposition Holder, and the Director, the Board found the Director erred in the determination of a material fact on the face of the record by not including a condition in the DML requiring the Disposition Holder to submit a noise mitigation plan. In the other aspects of the appeal, the Board found the Director did not err in the determination of a material fact on the face of the record and did not err in law. The Board found the documentation the GACM stated was missing was not present because the Director exercised her discretion to determine it was not required, or it was not material to the Director's decision. The Board determined there was insufficient evidence to show the record was incomplete, therefore, the Board denied the GACM's request for the Board to make an adverse inference in this appeal.

The Board recommended the Minister of Environment and Parks:

(a) confirm the Director did not err in the determination of a material fact on the face of the record, with the exception of not including as a condition in the DML requiring the Disposition Holder to submit a noise mitigation

plan acceptable to the Director;

(b) confirm the Director did not err in law; and

(c) order the conditions of DML be varied by adding to the Conditions Addendum the following:

"The Disposition Holder must submit a noise mitigation plan to the Department for review and approval, prior to any clearing, construction or development of the Disposition. The noise mitigation plan shall identify how the Disposition Holder intends to reduce the noise disturbances that could potentially occur as a result of the activity."

TABLE OF CONTENTS

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"), for PLAB Appeal No. 20-0025. The appeal was filed by the Gordeyville and Area Community Members Group (the "GACM"), appealing the decision of the Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks (the "Director") to issue Department Miscellaneous Lease DML 200008 (the "DML") to the Saddle Hills Target Sports Association (the "Disposition Holder") for the operation of a shooting range.

II. DECISION

[2] After considering the record provided by the Director, the *Public Lands Act*, RSA 2000, c. P-40 (the "Act"), the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 ("PLAR"), relevant case law, and the submissions from the GACM, the Director, and the Disposition Holder (collectively, the "Parties"), the Board provides this summary of the relevant facts and arguments in the appeal along with its recommendations to the Minister. The Board recommends the Minister vary the conditions of the DML by adding to the Conditions Addendum the following:

> "The Disposition Holder must submit a noise mitigation plan to the Department for review and approval, prior to any clearing, construction or development of the Disposition. The noise mitigation plan shall identify how the Disposition Holder intends to reduce the noise disturbances that could potentially occur as a result of the activity."

The Director's decision to issue the remainder of the disposition should be confirmed.

III. BACKGROUND

[3] The Disposition Holder is a non-profit organization of recreational "sport shooting enthusiasts."[1] In December 2018, individuals representing the Disposition Holder

[1] Disposition Holder's Response Submission, November 3, 2021, at paragraph 1(a).

contacted Alberta Environment and Parks ("AEP") to discuss a shooting range on public land.[2] A location was identified and public consultations was held on August 7, 2019.[3] On September 25, 2019, the Disposition Holder advised that the location was not appropriate.[4] On November 13, 2019, the Disposition Holder identified a new location for the shooting range approximately eight miles west of the previous location. AEP determined additional public consultation was not required for the new location.[5]

[4] The Disposition Holder applied to AEP on February 13, 2020, for the DML to operate a shooting range located on public lands at SW 10-75-6-W6M, SW 3-75-6-W6M, SE 3-75-6-W6M, NW 3-75-6-W6M, and NE 3-75-6-W6M (the "Lands"), north of the City of Grande Prairie, in the County of Grande Prairie No 1 (the "County"). The Director issued the DML on January 22, 2021. The Director incorporated the Landscape Analysis Tool Report (the "LAT Report"), which the Disposition Holder had prepared for the DML application, into the conditions of the DML. The DML also included conditions from the Master Schedule of Standards and Conditions ("MSSC") and *ad hoc* conditions added by the Director to address concerns raised by AEP technical staff.[6]

[5] On February 11, 2021, the Board received a Notice of Appeal from the GACM, alleging the Director, in issuing the DML, erred in the determination of a material fact on the face of the record and erred in law. The GACM said it had approximately 410 members who lived close to the proposed shooting range, of which 150 of those members could be considered directly and adversely affected by the DML. The GACM stated:

> "GACM has expressed a number of concerns to [AEP]. Some of these concerns include, *inter alia:*
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> - Noise Pollution
> - Safety (Traffic, stray bullets)
> - Environmental Degradation

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2 Director's File, at Tab 12.

3 Director's File, at Tab 13.

4 Director's File, at Tab 14.

5 Director's File, at Tab 15.

6 Director's File, at Tab 1.

- Wildlife Habitat and Migration
- Potential Diminution of Property Values
- Access."[7]

[6] The GACM requested the Board stay the DML, review the DML to determine if the decision to issue it was appropriate, and hold a hearing on the matter, if necessary.[8]

[7] In a letter to the GACM and the Director, dated February 18, 2021, the Board explained it could only grant a stay to a person directly and adversely affected by the decision being appealed. The Board requested the GACM answer questions regarding the stay request and the following question regarding the question of directly and adversely affected status of the GACM: "Is the Gordeyville and Area Community Members Group adversely affected by the DML? In other words, how are the impacts under the DML directly and adversely affecting the Gordeyville and Area Community Members Group?"[9]

[8] The Board also requested the Director provide the record of the decision-maker (the "Record"), which includes the following:

(a) the Director's decision;

(b) the Director's File as defined in section 209(f) of PLAR;

(c) all related records in AEP's possession as defined under section 209(m) of PLAR;

(d) all related policy documents, guidelines, and directives available to the Director when the decision was made; and

(e) an index. [10]

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7 GACM's letter, February 11, 2021, at pages 1 to 2.

8 GACM's Notice of Appeal, Supplemental Letter, February 11, 2021, at page 3.

9 Board's letter, February 18, 2021, at page 3.

10 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..." This definition indicates the records of the Department are more than just those considered by the Director in making the decision. The Board considers the Director's File to be a subset of the records of the Department. 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:

[9] On February 25, 2021, the GACM responded to the Board that "all of the individuals who are members of Gordeyville are directly and adversely affected by virtue of any number of different scenarios.…"[11]

[10] On February 26, 2021, the Director wrote to the Board and noted the GACM said only 150 of its 410 members were directly and adversely affected, which likely meant the GACM did not have standing to appeal the Director's decision to issue the DML. The Director requested the Board "consider the question of GACM's standing and whether the Appeal is properly before the Board."[12] The Board regarded the Director's letter to be a motion to dismiss the GACM's Notice of Appeal.

[11] The Director provided the Director's File on March 19, 2021, and the Board provided it to the other parties on the same day.

[12] The Board set a schedule for the Parties to provide written submissions on the motion to dismiss. The Parties provided their submissions between March 25 and April 22, 2021. On April 23, 2021, the Director objected that the GACM's rebuttal submission contained references to issues that should have been included in the GACM's initial submission. The Director requested the opportunity to respond to those issues.

[13] On June 23, 2021, the Board issued its decision on the Director's preliminary motion to dismiss the GACM's Notice of Appeal. The Board found there was a reasonable probability the noise levels from the shooting range on the DML would directly and adversely affect sixty-two members of the GACM.[13] The Board found the GACM had standing under

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> "'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 record of the decision-maker, or the "Record", to be the Director's File, along with records of AEP, which may be in any of the formats as defined in section 1(q) of *the Freedom of Information and Protection of Privacy Act*.

11 GACM's letter, February 25, 2021, at page 6.

12 Director's letter, February 26, 2021, at page 1.

13 Section 212(1)(b) of PLAR states:

"The following persons have standing to appeal a prescribed decision…

section 212(1)(b) of PLAR[14] to represent those members directly and adversely affected by the DML and those members who are interested parties.[15] The Board denied the Director's motion to dismiss the GACM's Notice of Appeal.

[14] Also on June 23, 2021, the Board issued its decision on the Director's objection to the GACM's rebuttal submission.[16] The Board found the GACM introduced new evidence in the rebuttal submission, and it would be procedurally unfair to the Director and the Disposition Holder for the Board to consider such evidence. The Board did not consider the paragraphs containing the new evidence.

[15] The Board attempted to schedule a mediation meeting with the Parties. However, based on discussion with the Parties, the Board concluded there was no merit to a mediation in this case. The Board scheduled a hearing by written submission with oral closing arguments to be made by videoconference on November 17, 2021. The Board received written submissions from the Parties between October 8 and November 12, 2021.

[16] On October 12, 2021, the Disposition Holder objected to additional materials included in the GACM's initial submission (the "New Materials"). On October 13, 2021, the Director also objected to the New Materials. On October 18, 2021, the GACM responded to the objections. On October 20, 2021, the Board issued its decision on the New Materials and determined Exhibits 3, 4, and 5 of the GACM's initial submission were inadmissible. The Board's reasons for its decision are included in this Report and Recommendations.

[17] On November 16, 2021, the day before the oral closing arguments, the Director advised she would be seeking permission to refer to LAT Report for Easement 0000055FC ("LAT

(b) a person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision."

[14] See: *Gordeyville and Area Community Members Group* v. *Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks* (23 June 2021) Appeal No. 20-0025-ID1 (A.P.L.A.B.), 2021 ABPLAB 9.

[15] The Board defined "Interested Parties" as those members of the GACM who are not directly and adversely affected by the DML but were represented by the GACM in the appeal.

[16] See: *Gordeyville and Area Community Members Group* v. *Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks* (23 June 2021) Appeal No. 20-0025-ID2 (A.P.L.A.B.), 2021 ABPLAB 9.

55") during the closing arguments. The Director indicated LAT 55 would provide the Board with an example of a LAT report in which a wildlife survey was recommended. The Board responded on the same date that it would address the Director's request at the hearing and provide the Parties with an opportunity to comment.

[18] On November 17, 2021, the Board heard the Parties' oral closing arguments. As a preliminary matter, the Board heard comments from the Parties regarding the Director's request to refer to LAT 55 during its closing arguments. The Board determined that although LAT 55 was not likely to be prejudicial to the GACM, the lateness of the request prevented the GACM from reviewing the document thoroughly. The Board also noted the Director indicated she could proceed without LAT 55 if necessary. The Board found LAT 55 to be inadmissible.

[19] After the oral closing arguments, the Board's Panel met to consider the evidence and make its recommendations to the Minister.

IV. ISSUES

[20] The Board identified the following issues to be determined in hearing:

1. What is the appropriate standard of review in this appeal?
2. Did the Director who issued the DML to the Disposition Holder err in the determination of a material fact on the face of the record?
3. Did the Director who issued the DML to the Disposition Holder err in law?

V. STANDARD OF REVIEW

[21] As stated, the first issue to be decided is "What is the appropriate standard of review in this appeal?"

[22] When a court or an administrative tribunal reviews a decision made by a lower court or decision-maker, it applies a particular legal approach to analyzing the decision, called the "standard of review." There are two standards of review applicable to tribunals in Canada, "reasonableness" and "correctness." A reasonableness standard involves the reviewing tribunal giving a greater degree of deference to the decision-maker's decision. The reviewing tribunal

looks to see if the decision was reasonable. There may be more than one reasonable decisions that could have been reached.[17] The correctness standard involves the reviewing tribunal giving less deference to the decision of the decision-maker. The tribunal determines if the decision-maker made the correct decision, and if not, it can substitute its own decision.[18]

[23] In previous appeals,[19] the Board conducted a detailed analysis of the standard of review for appeals under the Act and PLAR and found the standard of review is correctness. As there is a general consistency to the appeals the Board considers, the Board's determination of the standard of review will usually be the same. However, the Board must consider all arguments put forward by the parties to determine if there is reason to reassess its standard of review analysis.

i. Submissions

[24] The Director requested the Board reconsider the standard of review for the appeal and based her submissions on four cases from the Court of Appeal of Alberta: *Newton* v. *Criminal Trial Lawyers' Association* ("*Newton*"),[20] *Yee* v. *Chartered Professional Accountants of Alberta* ("*Yee*"),[21] *Moffat* v. *Edmonton (City) Police Service* ("*Moffat*")[22] and *Conlin* v. *Edmonton (City) Police Service*.[23]

[25] The Director provided two reasons why the Board should reconsider the standard of review applied to past appeals. The Director's first reason is that unlike in the past appeals the appellant in this Appeal is not the holder of the disposition but a third-party (the GACM) granted standing as a person directly and adversely affected by the Director's decision to issue the DML. The Director submitted the role of the GACM as a third-party to the appeal is "broadly similar"

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

18 *Leung* v. *Canada (Citizenship and Immigration)*, 2017 FC 636, at paragraph 19.

19 *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (31 July 2020), Appeal Nos. 19-0005-0006-R (A.P.L.A.B.), 2020 ABPLAB 12, and *CRC Open Camp & Catering Ltd. et al.* v. *Director, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks*, (15 April 2021), Appeal No. 20-0003-R (A.P.L.A.B.), 2021 ABPLAB 3.

20 *Newton* v. *Criminal Trial Lawyers' Association*, 2010 ABCA 399.

21 *Yee* v. *Chartered Professional Accountants of Alberta*, 2020 ABCA 98.

22 *Moffat* v. *Edmonton (City) Police Service*, 2021 ABCA 183.

23 *Conlin* v. *Edmonton (City) Police Service*, 2021 ABCA 287.

to the "third-party" complainant's role considered by Court of Appeal of Alberta in *Newton*. The Director quoted from *Newton* as follows:

> "An important aspect of the appeal structure in this case is the granting of a right of appeal to the complainant. The complainant can obviously initiate a complaint, but thereafter is not given a role to play in the investigation or prosecution of the matter. But after the decision is rendered, the complainant has a right of appeal to the [Law Enforcement Review Board ('LERB')].
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> …The complainant is not given standing at the initial hearing.... Throughout the investigation and the hearing before the presiding officer the only role of the complainant would be as a witness. It is the presenting officer who has the conduct of the prosecution. However, once the presiding officer has rendered his decision, section 48(2) of the [*Police Act*] gives the complainant the right to appeal the outcome to the [LERB]. The complainant thereby becomes a party to the proceedings late in the day, at the appellate level. <u>This unusual feature of the appeal régime is relevant to setting the standard of review that the [LERB] should apply to the decision of the presiding officer.</u>"[24] [Emphasis is the Director's.]

[26] The Director stated that under the Act and PLAR, a directly and adversely affected third-party is without standing or the right to participate in the Director's decision-making process and only becomes a party after the decision is made.

[27] The Director submitted that applying a standard of correctness to appeals before the Board is potentially procedurally unfair to the applicant for a disposition as it would require the applicant to "go through the application process twice," first to convince a director to issue the disposition, and again in an appeal before the Board. In an appeal before the Board, a third-party who had no role in the initial decision, could "second guess" the Director's discretion granted by the Legislature. The Director said such an approach would be inconsistent with the legislation. The Director stated: "… if the Legislature had intended a standard of correctness for appeals initiated by third parties it would have provided third parties a direct role in the decision-making process, but instead only gave the third parties a right of appeal."[25]

[28] The Director's second reason why the Board should reconsider its standard of review for this appeal is that the role of the Board in the appeal process suggests a standard of

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24 *Newton* v. *Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paragraph 44.

25 Director's Response Submission, November 3, 2021, at paragraph 20.

reasonableness. The Director submitted that there are broad similarities between the Minister's role as the final decision-maker under the Act and the Appeal Tribunal role under the *Regulated Accounting Professions Act* ("RAPA")[26] and the LERB's role under the *Police Act*.[27] The Director stated:

> "In particular, the Director notes the similarities between the Minister's powers in section 124(3) of the Act and the powers in section 112 of the *RAPA* and section 20(2)(a) of the *Police Act*. In all cases the final decision-maker of the appeal has the authority to
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> (a) confirm the decision,
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> (b) reverse the decision or allow the appeal,
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> (c) vary the decision, and
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> (d) make other decisions (the Act), orders (the *RAPA*) or action (the *Police Act*) that the final decision maker determines is appropriate."[28]

[29] The Director concluded the Board should apply a standard of reasonableness and grant deference to the Director on issues of fact and on inferences from those facts unless the Board has an articulable reason for disagreeing with the Director. On questions of law, the Director submitted the Board and the Director are "equally well-positioned"[29] to make determinations based on the Act and the Regulation, but the Board "should still have regard for determinations of law made by the Director."[30]

[30] The GACM submitted the appropriate standard of review for the appeal is correctness. The GACM stated, "… the Director's analysis of the applicable standard of review is flawed and does not provide a reasonable justification for departing from the standard of review of correctness that the Board has consistently applied to appeals before it."[31] The GACM noted most of the Director's arguments on the standard of review were argued in previous appeals before the Board and that the Board had determined the standard of review was correctness in those appeals.

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26 *Regulated Accounting Profession Act*, R.S.A. 2000, c. R-12.

27 *Police Act*, R. S. A. 2000, c. P-17.

28 Director's Response Submission, November 3, 2021, at paragraph 47.

29 Director's Response Submission, November 3, 2021, at paragraph 62.

30 Director's Response Submission, November 3, 2021, at paragraph 62.

[31] The GACM stated there was "significant dissimilarity between the role of the complainant under the *Police Act* and the role of GACM under the *Public Lands Act* and its regulation."[32] The GACM said the legislative scheme was different, as under the *Police Act*, a complaint from the complainant initiates an investigation by the tribunal of the first instance that makes a decision. That decision can be appealed to the LERB. In this appeal, the GACM stated its position is as an appellant, not a complainant, and the GACM did not initiate the proceeding before the Director.[33]

[32] The GACM noted that in *Newton* the complainant's role during the investigation and the hearing is that of a witness. In contrast, under the Act and PLAR, the members of the GACM were not witnesses during the Director's consideration of the Disposition Holder's application and a hearing was not held prior to the Director making the decision.

[33] The GACM submitted a standard of correctness ensures fairness for the Disposition Holder and "ensures that the Minister, who is the ultimate decision-maker, is provided the best possible advice upon which the Minister can decide to confirm, vary, or reverse the decision of the Director considering that the Minister does not hear evidence from the parties."[34]

[34] The GACM noted the Director relied on *Newton* to support its position that a standard of correctness would result in unfairness to the Disposition Holder. The GACM stated the Director took *Newton* out of context, as paragraph 71 in *Newton*, which the Director referred to, was the Court's response to the Criminal Trial Lawyers Association's ("CLTA") argument that a *de novo* hearing was required and the CTLA should be permitted an enhanced prosecutorial role at the appeal stage. The GACM said the Court determined that "an enhanced role and a *de novo* hearing will create unfairness.[35] The GACM is not advancing a similar argument as the [CTLA]."[36]

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31 GACM's Rebuttal Submission, November 12, 2021, at paragraph 5.

32 GACM's Rebuttal Submission, November 12, 2021, at paragraph 10.

33 GACM's Rebuttal Submission, November 12, 2021, at paragraph 10.

34 GACM's Rebuttal Submission, November 12, 2021, at paragraph 12.

35 The Board assumes the GACM is referring to paragraph 70 of *Newton*, which states:

[35] The GACM disagreed with the Director's argument that a different standard of review applies to appeals filed by directly and adversely affected parties. The GACM noted section 212 of the PLAR[37] did not distinguish between directly and adversely affected persons and those to whom a decision was given. The GACM stated: "Both those to whom the decision was given and the directly and adversely affected persons have a right to appeal the decision of the Director to the Board and the Board applies the same standard of review regardless of their status."[38] The GACM observed that section 212(2) of the PLAR accords the same status of "prescribed person for the purposes of section 121 of the Act" on both classes of appellants, which the GACM argued "further confirms that the same standard of review is applicable to both classes."[39]

[36] The GACM stated that in previous appeals the Board considered the Director's arguments regarding the roles of the Director, the Board, and the Minister, including a review and analysis of the factors in *Yee*. The GACM submitted the Board's role as an advisor to the Minister on appeals before the Board is substantially dissimilar from the tribunals in *Yee*, *Newton*, and *Moffat*, where the tribunals were the final decision-makers. The GACM noted the Board does not have the authority to confirm, vary, or reverse the Director's decision, unlike the tribunals in the cases cited by the Director.

[37] The GACM also noted the Minister's role in appeals under the Act is different

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> "The Board reasoned in part that since the complainant did not have standing at the initial hearing, it must be afforded a full *de novo* appeal. But to turn an absence of standing into a right to standing is inconsistent with the scheme of the *Act*, and indeed turns it on its head. If the Legislature had wanted to give the complainant full standing at the initial hearing it would have done so; but it only gave the complainant a right of appeal. There is no statutory wording that would support substituting the complainant for the presenting officer once the matter reaches the appeal level."

36 GACM's Rebuttal Submission, November 12, 2021, at paragraph 14.

37 Section 212(1) and (2) of PLAR states:

> "(1) The following persons have standing to appeal a prescribed decision:
>
> (a) a person to whom the decision was given;
>
> (b) a person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision.
>
> (2) A person referred to in subsection (1)(a) or (b) is a prescribed person for the purposes of section 121 of the Act."

38 GACM's Rebuttal Submission, November 12, 2021, at paragraph 15.

39 GACM's Rebuttal Submission, November 12, 2021, at paragraph 15.

from the appeal tribunals referred to in the Director's cases. The GACM stated:

> "… while the Minister can confirm, vary or reverse the decision of the Director, the Minister does not hear appeals. Instead, the Minister relies on the recommendations of the Board who hears the submissions of the parties and reviews the Director's decision for correctness. The appeal tribunals under the *Police Act* and RAPA hear the evidence and make the decision. This, again, is a unique distinction from the role of the Minister and that of the appeal tribunals under those legislation."[40]

[38] The GACM acknowledged the Board is not bound by its previous decisions, however, the GACM noted the Supreme Court of Canada in *Vavilov* remarked on the need and desirability for general consistency of decisions. The GACM submitted the Board should adopt the Court's guidance "and apply a correctness standard that is consistent with the Board's prior decision."[41]

[39] The Disposition Holder did not make representations on the standard of review.

ii. Analysis

[40] In *Dunsmuir* v. *New Brunswick*, the Supreme Court of Canada held that it was unnecessary to do an extensive analysis of the standard of review in every case if the analysis had already been completed. The Court wrote:

> "An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard. This simply means that the analysis required is already deemed to have been performed and need not be repeated."[42]

The Board will consider aspects of the Parties' arguments on the standard of review that the Board has not considered previously. For the remainder of the Board's standard of review analysis, the Board will rely on its past decisions.[43]

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40 GACM's Rebuttal Submission, November 12, 2021, at paragraph 26.

41 GACM's Rebuttal Submission, November 12, 2021, at paragraph 32.

42 *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 57.

43 *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (31 July 2020), Appeal Nos. 19-0005-0006-R (A.P.L.A.B.), 2020 ABPLAB 12; and

[41] The Director submitted the GACM's status as a directly and adversely affected third-party to the appeal requires a standard of review of reasonableness. The GACM argued the Act and PLAR did not distinguish between the rights of applicants for a disposition and appellants who are directly and adversely affected.

[42] Sections 212(1) and (2) of PLAR state:

> "(1) The following persons have standing to appeal a prescribed decision:
>
> (a) a person to whom the decision was given;
>
> (b) a person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision.
>
> (2) A person referred to in subsection (1)(a) or (b) is a prescribed person for the purposes of section 121 of the Act."

Section 121(1) of the Act states that a "prescribed person" may appeal to the Board "in accordance with the regulations."[44]

[43] The Director stated that if the Legislature had intended a standard of correctness to be applied to appeals initiated by third-parties, it would have provided them with a role in the decision-making process. The Board finds this to be a dubious assumption. The legislation makes no distinction between the rights of appellants, regardless of whether they are applicants for a disposition, a disposition holder, or a third-party that is directly and adversely affected.

[44] The Director submitted the role of a complainant under the *Police Act*, and the role of the GACM under the Act are "broadly similar." The Court of Appeal of Alberta in *Moffat* warned that legislative appeal schemes are not "one size fits all." The Court stated:

> "… determining an internal standard of review is primarily a question of interpreting the relevant legislative regime to discern the respective roles given to the first instance decision-maker and the appellate administrative tribunal. The answer will always depend on the particular legislative regime at issue."[45]

CRC Open Camp & Catering Ltd. et al. v. *Director, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks*, (15 April 2021), Appeal No. 20-0003-R (A.P.L.A.B.), 2021 ABPLAB 3.

[44] Section 121(1) of the Act states: "A notice of appeal of a prescribed decision may be submitted to an appeal body by a prescribed person in accordance with the regulations."

[45] *Moffat* v. *Edmonton (City) Police Service*, 2021 ABCA 183, at paragraph 54.

[45] The "particular legislative regime at issue" in appeals before the Board is the Act and PLAR. The Board compared the appeal process under the Act and PLAR to the appeal process under the *Police Act* and found the appeal process is not "broadly similar." The role of a complainant under the *Police Act* is very different from an appellant who is directly and adversely affected under the Act. A complainant under the *Police Act* initiates the investigation process and is involved from the beginning of the appeal. A complainant under the *Police Act* can be a witness, an agent, or any person.[46] Under the *Police Act* there is no requirement for the complainant to be directly and adversely affected. Under the Act and PLAR, an appellant who has not received the decision may only appeal if they are directly and adversely affected. It is unlikely the Director would contact a third-party, and any contact between the Director and a third-party does not initiate the appeal. The third-party appellant under the Act does not have the right to participate and only has input if a director permits it. In most cases, the first opportunity the third-party appellant has to participate in the appeal process is when the disposition is granted to the applicant, and only then can the third-party appellant initiate an appeal.

[46] The role of the third-party under the Act is a significant reason why the Board considers the standard of review to be correctness. A third-party appellant often provides a different viewpoint of the decision being appealed and may raise concerns a director was not necessarily aware of when dealing only with the applicant for a disposition. As the appeal is usually the first opportunity the third-party has to provide its perspective of the record, it is necessary that the Board apply the correctness standard of review to ensure the director was correct in reaching the decision.

[47] The different subject matter of a complaint under the *Police Act* and an appeal under the Act is also an important consideration when comparing the legislation and considering the standard of review. A complaint under the *Police Act* often involves fundamental rights and freedoms in society, and, therefore, it is important for the complainant to have a substantial role in the appeal process at the initial stage of the complaint. While it can have significant impacts on people and businesses, an appeal under the Act is not as crucial to the peaceful operation of

[46] Section 42.1(3) of the *Police Act*, R. S. A. 2000, c. P-17, states: "Any person may make a complaint in respect of a policy or service of a police service."

communities. Therefore, the appeal rights of a third-party appellant can be less substantial at the initial stages of an application for a disposition, but more substantial as the appeal progresses.

[48] The Board finds the Act and PLAR do not differentiate between an appeal by a third-party appellant and an appeal by an applicant for a disposition. The Board also finds the role of a complainant under the *Police Act* is not "broadly similar" to the role of a third-party appellant under the Act. The Board finds nothing in the Director's arguments on third-party appellants that causes the Board to reconsider its standard of review analysis.

[49] The Director argued the *RAPA* and the *Police Act* are broadly similar because the deciding tribunal has similar powers in considering an appeal as the Minister does in appeals under the Act and PLAR. The Director submitted the Board should focus more on the similarities than the differences in the legislation.

[50] The Board has reviewed the legislation and finds that while there are similarities, the differences are significant. In the *Police Act* and in *RAPA*, the appeals tribunal hears the appeal and make the final decision. In appeals under the Act and PLAR, the Board hears the appeal, but the Minister makes the final decision after receiving the report and recommendations from the Board. The Board considers this to be the most significant difference in the examples provided by the Director.

[51] The Director noted the tribunals under RAPA and the *Police Act* have similar powers to the Minister as listed under section 124(3) of the Act.[47] The Board finds a more suitable comparison would be with the appeal provisions of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). In EPEA, the Environmental Appeals Board ("EAB") hears appeals and makes a report and recommendations to the Minister, who may, under section 100(1) of EPEA:

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[47] Section 124(3) of the Act states:

"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."

> "(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,
>
> (b) make any direction that the Minister considers appropriate as to the forfeiture or return of any security provided under section 97(3)(b), and
>
> (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."

[52] The Minister's decision powers with respect to appeals in EPEA are identical to the Minister's decision powers in the Act. The Minister's role in the Act and EPEA is substantially different from the role of the appeals tribunals in the cases provided by the Director. The Minister does not make the decision on an appeal in isolation. In making the decision the Minister must consider not only the report and recommendations, but also a multitude of other aspects and interests.

[53] The Alberta Court of Queen's Bench has considered judicial reviews of the Minister's decision-making role under EPEA's appeal process. In *Legal Oil and Gas Ltd.* v. *Alberta (Minister of Environment)*, the Court found the Minister had to consider opposing interests and policy matters when making a decision on an appeal. The Court stated:

> "… the provisions of the Act cast a broad net. Competing interests abound. The Act designates the Minister as the final decision-maker as there are policy considerations involved in determining whether to uphold an EPO. The Board's expertise and the Minister's sensitivity to policy issues militates in favour of a high degree of deference."[48]

[54] In *McCain Foods (Canada)* v. *Alberta (Environmental Appeal Board)*, the Court found the Minister was responsible for weighing various interests in making decisions on appeals. The Court said:

> "It is my conclusion that it was fully contemplated by the Legislature that the implementation of this Act would require a balancing of the often competing interests of business development and protection of the environment. That task seems clearly to have been delegated by the Legislature to the Minister on the advice and recommendations of the Board."[49]

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48 *Legal Oil and Gas Ltd*. v. *Alberta (Minister of Environment)*, 2000 ABQB 388, at paragraph 31.

49 *McCain Foods (Canada)* v. *Alberta (Environmental Appeal Board)*, 2001 ABQB 701, at paragraph 3.

While the Court is referring to appeals to the EAB, the similarities in the appeal processes makes this statement equally applicable to the Minister's role in appeals under the Act and PLAR.

[55] In *McColl-Frontenac Inc*. v. *Alberta (Minister of Environment),*[50] the Court used wording from *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*[51] ("Pushpanathan") when considering a judicial review of the Minster's decision in an appeal to the EAB. The Court noted:

> "… that the exercise of ministerial discretion and decision-making generally involves polycentric[52] considerations, that is they 'require the simultaneous consideration of numerous interests and the promulgation of solutions which concurrently balance benefits and costs for many different parties…'"[53]

[56] Under the Act and PLAR the Legislature has appointed the Minister as the final decision-maker of appeals before the Board. The Minister must consider a multitude of interests, policies, and additional information not necessarily available to the Board.[54] While the tribunals cited by the Director must also consider various factors, the role of the Minister in the appeals process is unique and significantly more polycentric. There is nothing in the RAPA or the Police Act to suggest the LERB and the Appeal Tribunal have the type of polycentric role similar to that of the Minister. The LERB and the Appeal Tribunal under RAPA are creatures of pure statute. The Minister is not. The Minister must operate within the parameters set by the legislation, but he is not limited in the scope of his considerations when making the decision on an appeal.

[57] As the Legislature tasked the Board with the responsibility to provide expert advice to the Minister, and as the Minister does not conduct the hearing of appeals but relies on

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50 *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment)* , 2003 ABQB 303.

51 *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982.

52 "A polycentric issue is one which involves a large number of interlocking and interacting interests and considerations." P. Cane, *An Introduction to Administrative Law*, 3rd ed. (Oxford, U.K.: Oxford University Press, 1996), at page 35.

53 *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment),* 2003 ABQB 303, at paragraph 19.

54 See: *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 - 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, at paragraph 6.

the Board's report and recommendations in making the final decision, the Board considers the appropriate standard of review for appeals before it is correctness.

[58] The Board finds the *RAPA* and the *Police Act* are substantially different in the Minister's role in the appeal process. Therefore, the Board will continue to apply the standard of correctness to appeals before it.

VI. NEW MATERIALS

[59] The Board stated in its preliminary decision that it would provide reasons for refusing to admit the New Materials. The New Materials submitted with the GACM's initial submission were:

(a) Cliff Wallis, "Environmental Considerations for the Proposed Saddle Hills Target Sports Association Shooting Range SW 3-75-6-W6 (Saddle Hills, Webster Area) Department Miscellaneous Lease DML 200008, Public Lands Appeal Board File PLAB 20-0025" (the "Wallis Report");

(b) James Farquharson, FDI Acoustics "Review of Gordeyville - Saddle Hills Target Sports Association DML 200008," dated October 8, 2021 (the "FDI Report"); and

(c) HarrisonBowker LLP's, "Preliminary Analysis of the proposed Saddle Hills Target Sports Association shooting range and property values," dated October 1, 2021 (the "HarrisonBowker Report").

i. Submissions

[60] In its initial submissions, the GACM noted the Board had previously held that although appeals before it are not hearings *de novo*,[55] the Board may hear evidence not in the Director's File if it is rationally connected to evidence found in the Director's File. The evidence must provide details, clarification, or help the Board understand the evidence in the Director's File.[56] The GACM submitted the New Evidence met the Board's criteria for the admittance of evidence not in the Director's File.

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[55] A hearing *de novo* is "a new hearing of a matter, conducted as if the original hearing had not taken place." *Hearing de novo, Black's Law Dictionary* (11th ed. 2019).

[56] See: *CRC Open Camp &Catering Ltd. et al.* v. *Director, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks*, (15 Apri12021), Appeal No. 20-0003-R (A.P.L.A.B.), 2021 ABPLAB 3.

[61] The GACM stated the Wallis Report was necessary because the Director decided to issue the DML without information from AEP's Wetland and Fish and Wildlife specialists. The GACM said the Wallis Report filled in a gap in the Director's File that should have been filled by the Wetland and Fish and Wildlife specialists. The GACM submitted the Wallis Report was rationally connected to the LAT Report.

[62] The GACM said the FDI Report reviewed the information on noise submitted by the Disposition Holder as part of its earlier submissions to the Board. The GACM submitted the FDI Report was rationally connected to the Director's File.

[63] The GACM said the HarrisonBowker Report was provided in response to the information submitted by the Disposition Holder on the shooting range's impact on property values. The GACM stated the HarrisonBowker Report was relevant and rationally connected to the Director's File.

[64] The Disposition Holder objected to the New Materials for being filed late in the appeal process despite the GACM having some of the information as early as 2020. The Disposition Holder said including the New Materials in the GACM's initial submission did not provide sufficient time to review and respond to the reports.

[65] The Disposition Holder submitted noise, traffic, and land values are within the County's jurisdiction, not the Director's. The Disposition Holder stated it submitted a sound survey to illustrate the level of "due diligence and responsibility"[57] it has applied to the project.

[66] The Director noted that the Board's September 7, 2021 letter required the Parties to comment on the issues and hearing procedures by September 9, 2021. The Director submitted the Board should strike the New Materials for the GACM's failure to submit a motion to admit the New Materials before the September 9, 2021 deadline. The Director stated GACM's delay in submitting the New Materials before the hearing is prejudicial to the Director and the Disposition Holder as it did not provide a reasonable opportunity for response. The Director noted the New Materials are expert reports specifically prepared on behalf of the GACM for the hearing, which are subject to additional rules and procedures.

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[57] Saddle Hills Target Sports Association letter to the Board, October 12, 2021.

ii. Analysis

[67] The Board finds the New Materials are inadmissible for three reasons:

(a) the New Materials were submitted outside of the Board's instructions regarding applications and motions;

(b) admitting the New Materials would breach procedural fairness for the Disposition Holder and the Director; and

(c) the New Materials do not meet the Board's criteria for admitting evidence that is not contained in the Director's File.

[68] In a letter dated September 7, 2021, the Board provided an opportunity for the Parties to comment on the hearing's issues and procedures and provide any preliminary motions the Parties may wish to bring forth. The Board wrote:

> "The deadline for the parties to provide comments on the issues and the procedures for the hearing, and provide any preliminary motions has been extended to **4:30 pm on September 9, 2021. Please ensure that all comments and motions are provided in full by this deadline.**"[58] [Emphasis in the original.]

[69] Rule 3.1(a) of the Board's *Interim Appeals Procedure Rules For Complex Appeals* (the "Rules") states:

> "If a party fails to comply with the Rules or with an order of the Board, a panel may:
>
> (a) Limit or bar the presentation of evidence where a party has disregarded a Rule or Board decision concerning the exchange of evidence."[59]

[70] A party must apply to the Board to admit new evidence. Rule 14.1 of the Rules states: "A panel may allow submission of reports or other material in addition to that forwarded under these Rules."[60] This rule indicates reports and other material would require approval from the Board to be admitted as evidence.

[71] The GACM did not make a motion to admit the evidence before the Board's deadline of September 9, 2021, or at any other time before the hearing. The Board set a

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58 Letter from the Board, September 7, 2021.

59 Public Lands Appeal Board, *Interim Appeals Procedure Rules For Complex Appeals*, at page 7.

60 Public Lands Appeal Board, *Interim Appeals Procedure Rules For Complex Appeals*, at page 12.

preliminary motion deadline to avoid the situation of a party introducing evidence not in the Director's File in its hearing submissions. The deadline for preliminary motions creates certainty for the Parties and helps the Board meet its legislated time frames.

[72] A deadline also preserves procedural fairness for all parties by ensuring there is sufficient time for the parties to review and respond to motions to admit new evidence. Rule 14.2 states:

> "Where a panel finds that a party or other person has not had a fair opportunity to review material submitted under this Rule, it may grant an adjournment or make any other order it deems appropriate to ensure a fair and expedient resolution of the appeal."[61]

[73] The GACM stated the following in its response to the Director and Disposition Holder's objection to the New Materials:

> "Any prejudice that the Director may suffer at the hearing has been reduced by the introduction of the new materials at this time. Should the Director require additional time to submit its comments on the new materials in advance of the hearing, the Director may request additional time. The GACM notes that the Director has, as an alternative, requested additional time to review and submit its submissions on the new materials. The GACM does not oppose the request for additional time to review the new materials and submit comments as part of the Director's written submissions. The GACM requests that the GACM be given opportunity to respond to any information submitted by the Director."[62]

[74] The Board has the responsibility to control the timeliness and schedule of the appeal process, not the parties. To avoid breaching procedural fairness, the Board would have to provide the Director and Disposition Holder appropriate time to review the New Materials, which consisted of three reports from expert witnesses. A proper analysis and response may require the Director and Disposition Holder to consult their own expert witnesses. Additionally, the GACM requested the opportunity to respond to any information submitted by the Director. To provide the appropriate time to accomplish these reviews and responses, the Board would have to postpone the hearing for a significant amount of time.

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

62 Letter from the GACM, October 18, 2021, at page 2.

[75] Section 236(1)(b) of PLAR states:

> "An order under section 124 of the Act must be made in respect of an appeal…
>
> (b) within one year after the day the notice of appeal is served on the appeals co-ordinator, in the case of a complex appeal…"

[76] An appeal before the Board must be resolved within one year of the date of the Notice of Appeal, which the GACM filed on February 11, 2021. The Board has 30 days after a hearing is completed to provide its Report and Recommendations to the Minister.[63] The Minister must have sufficient time to review the documentation and decide on an appeal. This appeal had already necessitated delays due to motions and the unavailability of counsel. Further delay could jeopardize the ability of the Board to provide the Minister with sufficient time to review the appeal and render his decision.

[77] As an adjournment of the hearing to ensure procedural fairness was not appropriate, the late submission of the New Materials by GACM would not provide the Director and the Disposition Holder adequate time to review and respond to the expert reports.

[78] The Board found the New Materials did not meet the criteria for admitting evidence that is not contained in the Director's File. The Act requires that appeals before the Board are based on the record and the decision of the decision-maker.[64] The Board does not have access to the Department's Record, and must request it from the Director. The Director typically provides the Director's File, which is a subset of the Record that should consist of relevant information considered by the Director in making the decision that is being appealed.

[79] The Act gives the Board the responsibility to provide recommendations to the Minister on appeals before the Board.[65] The Board has undertaken to provide the best possible

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[63] Section 124(1) of the Act states: "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."

[64] Section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker."

[65] Section 124(1) states: "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."

advice to the Minister on appeals, which involves a careful consideration of the legislation, the submissions of the parties, and the evidence contained in the record.

[80] The Board, appellants, and the Minister rely on the Director to ensure the Director's File is complete when provided for an appeal. The Board has found that in some cases, there is evidence that is not in the Director's File but should be. When the Director's File is incomplete, there are at least four possible outcomes:

(a) the appellant may make a request to the Board to ask the Director to provide further documents;

(b) an appellant may ask the Board to make an adverse inference on the missing documentation;

(c) the Board may find the record is incomplete and, as an appeal is based on the decision and record of the decision-maker, the Board may find the incomplete record resulted in an error of material fact on the face of the record, an error in law, or the decision-maker may have exceeded their jurisdiction; or

(d) in some limited circumstances, the Board may admit documentation provided by an appellant.

[81] The Board has identified two situations where it will consider admitting records provided by an appellant. The first situation is where the records are rationally connected to the evidence found in the Director's File. For a record to be rationally connected to the Director's File, the record must have a connection to a specific record in the Director's File or the Record of the Department. The stronger the connection, the more likely the record would be admissible. The record must provide detail or clarification of an existing record in the Director's File or the Record of the Department that would assist the Board in understanding the Director's File.[66]

[82] The second situation is where an appellant can provide records that should have been included in the Director's File, but omitted. For example, the Board may consider admitting an email or letter from an appellant to AEP if the Board determines it should have been a part of the Director's File and is relevant to the Appeal.

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[66] See: *1657492 Alberta et al.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks* (14 August 2018), Appeal Nos. 17-0022, 0025-0027, and 0045-R (A.P.L.A.B.), at paragraph 147.

[83] Evidence not in the Director's File must also follow the Board's process for submitting evidence.

[84] The Board will examine the record that is requested to be admitted to determine its relevance. There are degrees of relevance. The more important the information is to the scope of the appeal, the more likely the record should have been included in the Director's File for the Director's consideration.

[85] The GACM argued New Materials:

(a) are rationally connected to the Director's File;

(b) provide detail and clarification that assists the Board in understanding the Director's File;

(c) are relevant to the scope of the appeal; and

(d) fill a gap in the Director's File caused by the Director's failure to obtain information from Wetland and Fish and Wildlife specialists before issuing the DML.

[86] The Board finds the Wallis Report is not rationally connected to the Director's File as the Director is not required by legislation or policy to obtain information from Wetland or Fish and Wildlife specialists before deciding to issue a disposition. The referrals sent by AEP staff to these specialists are not binding on the Director's discretion. As the information that could have been obtained from the specialists was not required to be included in the Director's File, the Wallis Report is not relevant to the scope of the Appeal and does not fill in a gap to make the Director's File complete. Therefore, the Board finds the Wallis Report is inadmissible as evidence in the Appeal.

[87] The Board finds the FDI Report is inadmissible as it was not filed on time. If the Board were to admit an expert report without sufficient time for the Parties to respond it would breach the duty of procedural fairness.

[88] The Board finds the HarrisonBowker Report is not rationally connected to the Director's File as property values are outside of the scope of the Appeal and beyond the Director's jurisdiction. The Board acknowledges that the Disposition Holder submitted unsolicited evidence on February 19, 2021, entitled "Gun Clubs and Real Estate," however, the

Board did not consider this evidence in its stay decision or its Report and Recommendations to the Minister. The Board finds the HarrisonBowker Report is inadmissible as evidence in the appeal.

[89] The Board finds the New Materials are not appropriately before it for the reasons outlined above, and therefore the New Materials are inadmissible as evidence in the hearing.

VI. ANALYSIS

[90] The GACM submitted the Director made multiple errors in the determination of a material fact on the face of the record and errors in law. The Board has reviewed the Parties' written submissions and considered the Parties' oral closing arguments. The Board will summarize each issue and provide its analysis below.

A. Error in Material Fact on the Face of the Record

(a) Economic Analysis

[91] The GACM submitted the Director erred by determining the shooting range would be used for training by law enforcement authorities and would provide an economic benefit to the area. The GACM also stated the determination that real estate values would rise from having the DML nearby was an error. The GACM submitted there was no evidence, particularly an economic analysis, on which to base the determinations.

[92] The Director acknowledged AEP did not conduct an economic analysis of the shooting range but argued AEP staff may make "common sense inferences based on the facts in the record and their knowledge of the proposed activity."[67] The Director submitted it was not unreasonable to conclude the shooting range would draw clients from across the country and provide some economic benefit.

[93] The Disposition Holder made no submissions on this matter.

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[67] Director's Response Submission, November 3, 2021, at paragraph 86.

[94] The Board finds that two questions are important in analyzing whether the Director erred in this matter:

(1) Is the economic and real estate benefits argument material to the appeal? and

(2) What weight did the Director place on the economic and real estate benefits argument when making the decision?

[95] Black's Law Dictionary defines "material fact" as "a fact that is significant or essential to the issue or matter at hand; a fact that makes a difference in the result to be reached in a given case."[68] The AEP website lists some factors the Director may consider when assessing the merits of a disposition application:

- whether the land use is acceptable and in the best interest for that land base;
- if the proposed disposition is in compliance with Alberta land management regional plans (if applicable);
- whether the proposed disposition does not impact or conflict with any existing land uses or stakeholders; and
- if the disturbance limits of applicable disturbance standards are being met.[69]

[96] The Director had to decide whether the Lands were suitable and sustainable for the activity applied for by the Disposition Holder taking into account the factors listed above. The Board finds the question of whether the shooting range would bring economic and real estate benefits to the community are minor issues in the overall picture of whether the Lands are suitable and sustainable for the shooting range, and are therefore not material to the Appeal.

[97] The Merit Rationale prepared by AEP technical staff for the Director's consideration mentions possible economic benefits of the DML. The Merit Rationale states the DML "[m]ay possibly be a way to attract more people to Grande Prairie and the surrounding area while providing the community a source of economic benefit."[70] The Disposition Holder in its

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68 *Material Fact*, Black's Law Dictionary (11th ed. 2019).

69 Alberta Environment and Parks, online: https://www.alberta.ca/formal-disposition-application-administration.aspx

70 Director's File, at Tab 9.

public consultation information emailed to several GACM members, produced a graph showing real estate values around the Wapiti Shooting Club increased since 2004.[71] These mentions of possible economic and real estate benefits do not appear to be anything more than peripheral speculation secondary to the main issues listed above.

[98] The GACM provided the Board with no submissions of the weight, if any, the Director placed on either the possible economic benefits or the increase in real estate values. Without evidence to the contrary, the Board finds the Director placed little to no weight on these tangential matters, and therefore the Director did not err in the determination of a material fact on the face of the record.

(b) RCMP Safety Templates and Guidelines

[99] The RCMP's "Range Design and Construction Guidelines" (the "Guidelines") described safety area templates as follows:

> "Safety area templates are drawings that represent the ground area designed to contain overshoot bullets and ricochets generated from a *single shooter's firing point*, under conditions which are considered to be representative of normal range use. Each template will show the parameters (e.g. calibre and bullet design, environmental conditions, etc.) for which it was designed."[72]

[100] The GACM said the Director erred by failing to request the Disposition Holder include RCMP safety area templates in their disposition application. The GACM also said there was no evidence in the Director's File to show the Director considered the RCMP Guidelines regarding warning signage or mapping the safety template area. The failure to include the RCMP templates and guidelines resulted in the lack of consideration of the environmental impacts of the DML, which is an omission that makes the Director's File incomplete.

[101] The Disposition Holder stated that all registered shooting facility design requirements are strictly regulated by the RCMP and are routinely inspected for compliance. The Disposition Holder submitted the shooting range's design included safety measures such as:

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71 Director's File, at Tab 22.

72 Range Design and Construction Guidelines (RCMP, Ottawa: 2007), at page 20.

> "… physical barriers (i.e. berms), raised back stops behind each target location, bench mounted equipment which tightly controls the direction which a firearm is pointed, administrative controls (including, but not limited to) Range Safety Officers (RSO), signage, and posted procedures."[73]

The Disposition Holder said the shooting range would have "zero impact outside our DML boundary or we risk losing our license to operate."[74]

[102] The Director stated she has no jurisdiction to consider the application under any other legislation or regulatory process, including federal regulation regarding shooting ranges and municipal bylaws.[75]

[103] The Board's mandate is to hear appeals of "prescribed decisions"[76] listed in PLAR[77] and make a report and recommendations to the Minister. The Board cannot consider matters that are not an appeal of a prescribed decision. Some of the errors the GACM has alleged the Director made are in areas where the Director does not have jurisdiction to make decisions, and therefore are not prescribed decisions. The Board cannot consider those matters unless the Director has exceeded jurisdiction, which is not the situation in this appeal.

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73 Director's Response Submission, November 3, 2021, at paragraph V(e).

74 Director's Response Submission, November 3, 2021, at paragraph V(g).

75 Director's Response Submission, November 3, 2021, at paragraph 82.

76 Section 209(l) of PLAR defines "prescribed decision" as "a decision prescribed in section 211."

77 Section 211 of PLAR lists some of the decisions that can be appealed to the Board:

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

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

[104] The Board finds the Director does not have jurisdiction over RCMP safety templates and Guidelines. The GACM argued the Director erred in the determination of a material fact on the face of the record by not requiring the Disposition Holder to include the RCMP safety area template in their DML application, and in not considering the RCMP Guidelines regarding warning signs and mapping. However, the Director's authority over shooting ranges is limited to those that are located on public lands, and then only to the impact the shooting range could have on the public lands. The Director does not regulate the activities on the shooting ranges and it is not within the discretion of the Director to review or judge the RCMP's Guidelines.

[105] The Board notes condition 009 of the DML states: "The Disposition Holder must obtain federal, provincial, municipal, and other permits and approvals, as applicable, with respect to activities that may take place on the Lands." This would include compliance with the RCMP Guidelines to receive approval to operate the shooting range. Therefore, the Director considered this issue to the extent that she could.

[106] The Board finds the absence of the RCMP Guidelines from the terms and conditions of the DML is not an error in the determination of a material fact on the face of the record.

(c) Public Consultation

[107] The GACM alleged the Director erred in material fact on the face of the record by deciding public consultation for the DML was not required because the Disposition Holder had held public consultations for the previously proposed location of the shooting range. The decision to not require public consultation meant there was no evidence on the face of the record of concerns raised at the previous public consultations and the Disposition Holder's proposals to address those concerns.

[108] The Disposition Holder submitted public consultation was not required by AEP, but the Disposition Holder chose to consult the community anyway, although restrictions imposed due to the COVID-19 pandemic limited the public nature of the consultations. The Disposition Holder noted it met with several members of the GACM, who the Board determined

was directly and adversely affected. The Disposition Holder said it also emailed an information package to every person who attended the meeting and posted that information on its Facebook page which received 24,700 community views.[78]

[109] The Director noted AEP may ask applicants for dispositions to hold a public consultation, but it is not required under the Act or PLAR.

[110] The Board notes there is no requirement in the Act or PLAR to hold public consultations when applying for a disposition. Despite not being required to do so, the Disposition Holder conducted public consultations for the previous proposed location for the shooting range, and identified issues of concern in the community. In the Merit Rationale, AEP technical staff noted:

> "After consideration the Department determined that based on the newly proposed site of the activity there are no obvious issues that would trigger the need for additional public consultation prior to the application being made that were not already addressed in the first round of public consultation."[79]

[111] Although the Director is not required by the legislation to require the Disposition Holder to hold public consultations, it is important that the concerns of the community are heard. The Board has received the submissions from the GACM, which represented approximately 410 members of the community. The GACM had the opportunity in this appeal to raise any issues of concern not addressed in the public consultations for the previous site. The Board is satisfied the GACM membership have been able to let their concerns be known.

[112] As there is no legislative obligation for the Director to require the Disposition Holder to conduct public consultations, the Board finds the Director did not err in the determination of a material fact on the face of the record by not requiring the Disposition Holder to hold public consultations before issuing the DML.

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78 Disposition Holder's Response Submission, November 3, 2021, at paragraph III(g).

79 Director's File, at Tab 9.

(d) Referrals to Wetland Specialist and Wildlife Biologist

[113] The GACM submitted that according to the evidence in the Director's File, the Director erred in the determination of a material fact on the face of the record by failing to make referrals or undertake follow up communications to AEP's Wetland Specialist and Wildlife Biologist. There is no evidence in the Director's File that such referrals were made or any follow-up was conducted. The information the Wetland Specialist and Wildlife Biologist could have provided may have impacted the Director's decision to issue the DML.

[114] The Director noted AEP referrals are done within an internal system and do not generate a separate record unless there is a response. The standard practice is to wait twenty days for a response to a referral. The Director stated the Lands Officer who made the referrals indicated in the Merit Rationale that the referrals were sent and no response had been received. The Director said, "there is nothing on which to base an allegation that the Lands Officer would have misled the Director in the Merit Rationale."[80]

[115] The Director noted she is a designated director under the Act with the legislative authority to make the decision on the disposition application, and the Wetland Specialist and the Wildlife Biologist do not have that authority. The Director stated that the LAT Report did not identify any wetland concerns or sensitive wildlife features.

[116] The Disposition Holder did not provide submissions on this issue.

[117] The Board observes that the Director's File shows AEP's Land Officer made referrals to the AEP Wetland Specialist and the Wildlife Biologist on July 20, 2020, but a response had not been received as of January 20, 2021. While it was good practice for the Lands Officer to submit the referrals, there is no requirement in the Act or PLAR that the Director must consult the Wetland Specialist and the Wildlife Biologist before making the decision.

[118] Referrals are also not required under AEP policy. The AEP website states the following under the title, "Formal Disposition Application Administration,": "Once an

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[80] Director's Response Submission, November 3, 2021, at paragraph 101.

application submission has been accepted, the next step is to assess whether a referral is required within or outside the department as applications may require additional input."[81] In this matter, AEP technical staff and the Director determined the referrals were either not needed or the lack of response meant there were no concerns. It was not unreasonable for the Director to presume that if the Wetland Specialist or the Wildlife Biologist had any concerns with the application, they would have communicated those concerns to the Director.

[119] The Board finds the Director did not err in proceeding with the decision to issue the DML without the discretionary input of the Wetland Specialist and Wildlife Biologist.

(e) Wildlife Survey and Wetland Inspection

[120] The GACM stated the Director erred in the determination of a material fact on the face of the record by determining that a wildlife survey was not needed for the DML despite the LAT Report requiring wildlife surveys to be completed. The GACM noted the LAT Report identified the Lands as being in a Special Access Zone/Area which required a wildlife survey.

[121] The Director noted the LAT Report is a policy tool that provides general information regarding public lands. The Director stated:

> "A LAT Report assists applicants and Department staff by identifying known issues and concerns that could impact whether a proposed activity is appropriate for the public lands being considered, including potential issues relating to land management (including special land features), vegetation and wildlife concerns, waterbodies and reclamation requirements."[82]

[122] The Director said an applicant generates a LAT report for a formal disposition, which then assists AEP technical staff and the Director as the application is reviewed by highlighting specific features or aspects of the public lands. Not everything in a LAT report is applicable for the activity being applied for in the disposition application. The Director noted the use of a LAT report is not required under legislation, but it is part of AEP policy, and as such, it is not binding on the Director.

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[81] Alberta Environment and Parks, online: <https://www.alberta.ca/formal-disposition-application-administration.aspx>.

[123] The Director submitted she reviewed the Merit Rationale provided by AEP technical staff and conducted her own review of the application, the LAT Report, and other materials considered by AEP technical staff. The Director's review determined the proposed use of the Lands was appropriate and issued the DML to the Disposition Holder.

[124] The Director stated the LAT Report indicated there were no sensitive wildlife features on the Lands, and it was therefore reasonable for AEP technical staff to recommend a wildlife survey not be required. The Director noted the LAT Report generated conditions which are recommended for inclusion in the DML, but they are not conditions that must be met before the disposition can be issued.[83]

[125] The Disposition Holder did not make submissions on this issue.

[126] The Board notes the Director's jurisdiction and decision-making authority are subject to the Act and PLAR. If the Director does not follow the legislation, the Director loses jurisdiction to make the decision.

[127] Policy also plays an important role in guiding the Director, but the Director must not allow policy to dictate decisions. The Court of Appeal of Alberta stated:

> "Procedural fairness demands that administrative decision-makers do not fetter their discretion by adopting inflexible policies or rules, as the very existence of discretion implies that it can and should be exercised differently in different cases. A decision maker who always exercises its discretion in a particular way improperly limits the ambit of its power. Adopting a policy of only acting on the recommendation of a third-party also constitutes fettering discretion. A decision maker that fetters its discretion by failing to exercise the discretion the legislature conferred upon it commits a jurisdictional error."[84]

In making a decision, the Director must keep an open mind on all aspects of the matter and base the decision on the merits of each application.[85]

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82 Director's Response Submission, November 3, 2021, at paragraph 69.

83 Director's Response Submission, November 3, 2021, at paragraph 113.

84 *Lac La Biche (County)* v. *Lac La Biche (County) (Subdivision and Development Appeal Board),* 2014 ABCA 305 (Alta. C.A.), at paragraph 11.

85 Macaulay, Robert W, and James L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2021), at section 9:10.

[128] A LAT report is a policy-level document the applicant uses to shape the disposition application to mitigate potential concerns on the Lands. The LAT report is described on AEP's website as:

> "… a web-enabled geo-spatial mapping tool that identifies base and sensitive landscape features and how they interact with a proposed land location and activity being considered on Alberta Government Public Land. It provides users the ability to view and map their proposed project and generate a LAT report required for all Alberta public land disposition applications."[86]

[129] The Director may use a LAT report to determine the appropriate conditions for the DML. It is important to note that the conditions in a LAT report are not pre-conditions that must be met before the disposition is issued. The LAT report conditions may be required at various times during the disposition's term.

[130] The GACM submitted a Wildlife Survey was required before the DML could be issued. However, the Board notes condition 53-1503 of the LAT Report states, "when Wildlife Surveys are required, the Disposition Holder must submit results from the Wildlife Survey to the Fisheries and Wildlife Management Information System (FWMIS)."[87] [Emphasis is the Board's.]. There is no evidence the Director required a Wildlife Survey to be completed by the Disposition Holder. As a policy document, the LAT Report is used at the discretion of the Director when issuing the DML.

[131] The Board finds the Director did not err in the determination of a material fact on the face of the record by not requiring a wildlife survey to be conducted.

(f) Reclamation Plan

[132] The GACM submitted the Director erred by not requiring the Disposition Holder to submit a reclamation plan before issuing the DML, contrary to the MSSC. The GACM noted condition 1864 of the MSSC dated December 2018, stated:

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86 LAT Overview, online: <https://www.alberta.ca/lat-overview.aspx>.

87 Director's File, at Tab 1.

> "The Disposition Holder must re-vegetate activities, associated facilities and clearings to vegetative species compatible and consistent with the adjacent vegetation type (i.e., when the features are reseeded, reclaimed or partially restored)."

[133] The Director said that conditions generated by the LAT Report are not conditions that must be met before the DML is issued but are recommendations for possible inclusion in the DML. The Director noted section 028 of the DML stated the Disposition Holder must comply with the terms of the LAT Report, which incorporated condition 1864 as a condition.

[134] The Disposition Holder did not make submissions on this issue.

[135] The Board notes the LAT Report refers to the responsibility of the Disposition Holder to reclaim the Lands.[88] Section 21(1)(f) of PLAR also lists reclamation of the Lands as the Disposition Holder's responsibility: "The holder of a formal disposition… must, on the expiry, cancellation, surrender or abandonment of the formal disposition, reclaim the subject land to an equivalent land capability…"

[136] The Act, PLAR, and the LAT Report do not require the Disposition Holder to submit a plan for reclamation before being issued the DML. The Director could use her discretion to make a reclamation plan a pre-condition of the DML, but chose not to. No compelling evidence has been presented to the Board to demonstrate why the Director exercised her discretion incorrectly.

[137] The Board finds the Director did not err in the determination of a material fact on the face of the record by not requiring the Disposition Holder to submit a reclamation plan before the DML was issued.

(g) Site Visit

[138] The GACM alleged the Director erred by not requiring the Disposition Holder to conduct a site visit to confirm the presence of surface water features on the Lands.

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[88] Director's File, at Tab 1.

[139] The Director noted a field investigation of the Lands was conducted by AEP technical staff which found two non-permanent waterbodies. A small wetland area also exists on the Lands. The Director determined a site visit by the Disposition Holder was not required as the LAT Report and the field investigation did not identify any wetland concerns.

[140] The Disposition Holder did not provide submissions on this issue.

[141] The Board notes there is no requirement in the legislation or the LAT Report that the Director must require the Disposition Holder to conduct a site visit and report on the surface water features. Condition 009 of the DML states, "the Disposition Holder must obtain federal, provincial, municipal, and other permits and approvals, as applicable, with respect to activities that may take place on the Lands."[89] Condition 009 would require the Disposition Holder to obtain and comply with approvals under the *Water Act* regarding any wetlands on the Lands.

[142] Additionally, section 21(1)(c) of PLAR states:

> "The holder of a formal disposition…
>
> (c) must comply with the Act, its regulations, all other applicable enactments of Alberta and Canada, any applicable municipal by-laws and the terms and conditions of the formal disposition or other disposition to which the authorization relates."

The wording, "… all other applicable enactments of Alberta…" would include the requirements under the *Water Act* to obtain any permits or approvals. A site visit *may* be involved in a *Water Act* application, but that would be a decision beyond the scope of the Director's jurisdiction.

[143] The Board finds the Director appropriately exercised the discretion granted by legislation and did not err in this matter.

(h) Noise

[144] The GACM submitted the Director erred by not requesting information from the Disposition Holder regarding its mitigation strategy for noise from the shooting range. The sound testing document developed by the Disposition Holder and provided to the Board was not

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89 Director's File, at Tab 1.

submitted to the Director and is not part of the Director's File. The GACM stated, "the [Disposition Holder's] sound testing report is irrelevant having been submitted to the Board and the GACM after the Director issued the DML; as such, the Board should not include it as part of the evidence being considered for the hearing."[90]

[145] The Disposition Holder stated that even though it was not required to conduct a sound survey as part of its DML application, it created a "sound exposure baseline" to understand what sound mitigation measures it could implement as part of the shooting range design.[91]

[146] The Director argued that noise concerns are not within the Director's jurisdiction. The Director stated:

> "The purpose of the issuing the DML is to provide the Association with the necessary permissions to conduct the proposed activity on public lands with respect to the Act and the Regulation *only* – it does not grant any permissions or approvals that may be needed under any other legislation, including federally or municipally." [Emphasis is the Director's.]

[147] The Director said the Disposition Holder must obtain the necessary approvals for its operations from other regulatory or government bodies.

[148] The Board notes the Director's File contains evidence that noise concerns from the shooting range was one of the most prevalent concerns raised by the GACM before the Director issued the DML. Notes to the file from AEP technical staff document the concerns raised by local residents regarding sound from the shooting range. The Disposition Holder shared a noise mitigation plan as part of its public consultations, but the terms and conditions of the DML do not require the Disposition Holder to provide such a plan to the Director.

[149] The Director's File contains a note from AEP technical staff dated November 13, 2019, which stated: "Many concerns related to sound and safety would be addressed in any

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90 GACM's Initial Submission, October 8, 2021, at paragraph 44.

91 Disposition Holder's Response Submission, November 3, 2021, at paragraph VI(c).

approvals by the Firearms office issuance of approval to operate a shooting range."[92] It appears from the evidence on the Director's File that AEP technical staff, and subsequently the Director, were content to leave the issue of noise from the shooting range to the Chief Firearms Office ("CFO").[93]

[150] The Board notes that the CFO has responsibility for regulating shooting ranges, but it does not have jurisdiction over noise generated by the shooting activity. The CFO only makes recommendations to shooting ranges on noise reduction strategies. Noise issues are the joint responsibility of AEP and municipalities, in this case, the County of Grande Prairie.

[151] The County's jurisdiction is found in section the Municipal Government Act, RSA 2000, c. M-26 (the "MGA"). Sections 7(a) and (c) of the MGA state:

> "A council may pass bylaws for municipal purposes respecting the following matters:
>
> (a) the safety, health and welfare of people and the protection of people and property…
>
> (c) nuisances…"

Section 8 of the MGA states:

> "Without restricting section 7, a council may in a bylaw passed under this Division
>
> (a) regulate or prohibit…
>
> (c) provide for a system of licences, permits or approvals, including any or all of the following:…
>
> (iii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval has been granted;
>
> (iv) providing that terms and conditions may be imposed on any licence, permit or approval, the nature of the terms and conditions and who may impose them;
>
> (v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them…"

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92 Director's File, at Tab 15.

93 The Chief Firearms Office administers the federal Canadian Firearms Program in Alberta.

The MGA grants significant powers to municipalities to regulate noise if a municipality chooses to do so.

[152] The County has enacted bylaws to regulate noise. Sections 7.2 and 7.3 of Bylaw No. 3098 state:

> "7.2 No Person shall permit, suffer or allow Property, real or personal which he owns, occupies or controls, to be used in a manner such that there emanates any unreasonably loud, raucous or unusual noise which annoys, disturbs, injures, endangers or detracts from the comfort, repose, health, peace or safety of any other Person.
>
> 7.3 Factors for determining whether a sound is unreasonably loud, raucous or unusual include, but are not limited to, the following:
>
> (a) proximity of the sound to sleeping facilities, whether residential or commercial;
>
> (b) the time of day or night the sound occurs;
>
> (c) the duration and volume of the sound; and
>
> (d) whether the sound is recurrent, intermittent or constant."[94]

[153] While the County does not have authority over public lands in Alberta, the Disposition Holder must comply with applicable County Bylaws, as the Board has noted already.

[154] AEP also has jurisdiction to address noise issues from the shooting range. Section 3(1) of the Act states that the Minister may establish a disturbance standard for dispositions on public lands.[95] Section (1)(i)(ix) of PLAR includes noise in the definition of "disturbance." Section 1(i)(ix) states:

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[94] Bylaw No. 3098 of the County of Grande Prairie No. 1, online: < https://www.countygp.ab.ca/Modules/bylaws/Bylaw/Download/43bd4b6a-48f1-4cae-b81c-7203df01e35f>.

[95] Section 3(1) states:

"The Minister may establish disturbance standards setting the maximum acceptable footprint that a class or combination of

(a) activities,

(b) uses,

(c) dispositions, or

(d) ancillary facilities

may have on public land or a class of public land."

> "… in respect of public land, means human activity that moves or removes one or more of the following features of the public land or that alters or results in the alteration of the state of one or more of those features from the state in which it existed before the human activity occurred, and includes any change in the intensity, frequency or nature of the human activity:…
>
> (ix) ambient sound volumes…"

[155] The Board is aware that a disturbance standard for noise from shooting ranges has not yet been established and the Director does not have the authority to make disturbance standards. However, the lack of a specific disturbance standard for shooting ranges does not prevent the Director from establishing acceptable noise levels for this particular DML. Section 10(2) of PLAR states: "The director may issue a formal disposition subject to any terms and conditions the director considers appropriate."

[156] In a situation where significant concerns were raised by the GACM and documented in the Director's File, the Director should have exercised her discretion to include a condition in the DML requiring the Disposition Holder to submit a noise mitigation plan acceptable to the Director. While this omission from the DML is an error in the determination of a material fact on the face of the record, it is a correctable one that only requires the DML to be amended.

[157] The Board is not aware of any specialized training or skill held by the Director with regard to noise levels. The Board does not intend to burden the Director or AEP technical staff with having to determine acceptable noise levels without the necessary abilities. But as noise is an area the Director has jurisdiction over and an issue of significant concern for the GACM, the Board believes the Director can take reasonable actions within her scope of jurisdiction and abilities.[96]

[158] Therefore, the Board recommends the DML be amended to require the Disposition Holder to provide a noise mitigation plan to the Director that meets the requirements of the County. The Director may review the noise mitigation plan and determine if plan is

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[96] The Board notes that AEP provides planning guidance to gravel pit operators regarding noise from associated activities: < https://open.alberta.ca/publications/pits>.

acceptable for the DML. The Board also encourages AEP to periodically investigate the noise situation around the DML and be prepared to address concerns raised by any directly and adversely affected members of the public.

B. Error in Law

(a) DML was issued prematurely

[159] The GACM submitted the Director issued the DML without requiring the Disposition Holder to obtain all the necessary permits and approvals. The GACM stated, "Premature issuance of the DML before all the regulatory requirements are fulfilled is an error of law that justifies a cancellation of the DML."[97]

[160] The Director did not specifically respond to this issue. The Disposition Holder did not provide submissions on this issue.

[161] The Board addressed this matter as part of its analysis of whether the Director erred in a material fact on the face of the record. The Board notes that section 009 of the DML "The Disposition Holder must obtain federal, provincial, municipal, and other permits and approvals, as applicable, with respect to activities that may take place on the Lands." Further, section 21(1)(c) of PLAR states:

> "The holder of a formal disposition…
>
> (c) must comply with the Act, its regulations, all other applicable enactments of Alberta and Canada, any applicable municipal by-laws and the terms and conditions of the formal disposition or other disposition to which the authorization relates."

[162] Neither the DML nor the legislation provides that the Disposition Holder obtain other necessary approvals and permits as a prerequisite to the Director issuing the DML. The Disposition Holder must obtain the necessary approvals and permits before proceeding with the relevant activities on Lands. The Director did not err in law by recognizing this fact and providing for it in the DML.

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97 GACM's Initial Submission, October 8, 2021, at paragraph 45.

(b) Failure to follow the LAT Report

[163] The GACM submitted the Director erred in law by failing to follow the LAT Report and issuing the DML before all the regulatory requirements were fulfilled. The GACM stated that the LAT Report required the Disposition Holder "to conduct site visits, groundtruthing and wildlife surveys."[98] However, the Director failed to make these actions a pre-condition to issuing the DML.

[164] The GACM noted Halsbury's Laws of Canada, referencing the Supreme Court of Canada in *Housen* v. *Nikolaisen*,[99] stated: "Errors attributable to the application of an incorrect standard, a failure to consider a required element of a legal test, and similar errors in principle serve as examples of extricable errors of law."[100]

[165] The Director stated the LAT Report is a discretionary policy guide, and the Director, as the statutory decision-maker, is not bound by the LAT Report or other policy. The Director submitted her use of the LAT Report was not an error in law.

[166] The Disposition Holder did not make any submissions on this issue.

[167] The Board notes the GACM's reference to *Housen* v. *Nikolaisen* is correct, but inapplicable to the Director's use of the LAT Report. The Director applied the LAT Report correctly, did not fail to consider a required element of a legal test, and did not make an extricable error of law in doing so.

[168] Despite the GACM's assertions, the LAT Report does not require the Disposition Holder to conduct site visits, groundtruthing, or wildlife surveys. The Board has already determined the LAT Report is policy and the Director may use it as a guide to determine the conditions of the DML, but is not bound by it.

[169] The Board finds the Director did not err in law in not requiring the Disposition

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98 GACM's Initial Submission, October 8, 2021, at paragraph 46.

99 *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235 at paragraph 22.

100 GACM's Initial Submission, October 8, 2021, at paragraph 47.

Holder to conduct site visits, groundtruthing, or wildlife surveys, as such actions are in the Director's discretion. The GACM has not provided sufficient reasons why the Director's use of the LAT Report is incorrect, and therefore an error in law.

(c) Compliance with LAT Report and Regulatory Obligations

[170] The GACM submitted the Director erred in law by failing to ensure that the shooting range can comply with the requirements in the LAT Report and other regulatory obligations. The GACM stated the Director did not request the Disposition Holder provide evidence on how it would comply with the various conditions in the LAT Report.

[171] The Director stated it was reasonable to accept that the Disposition Holder would comply with the terms and conditions of the DML. Pre-judging the Disposition Holder's ability to comply with the LAT Report and other requirements would be an improper consideration and would be a reviewable error.

[172] The Disposition Holder did not make submissions on this matter.

[173] The Board notes that the Act and PLAR do not require the Disposition Holder to provide evidence it can comply with the relevant conditions. The legislation provides a process for AEP to take compliance action if a disposition holder breaches the Act or PLAR, or the terms and conditions of the disposition. Section 56(1) of the Act states that:

> "A person who…
> (m) as the holder of a disposition, wilfully contravenes a provision of the disposition,
> (n) as the holder of a disposition, contravenes a provision of the disposition…
> is guilty of an offence."

[174] The Director's responsibility is to ensure the disposition is appropriate for the public land. The Director does not have responsibility for ensuring compliance under the legislation. The responsibility for compliance is delegated to different AEP directors who investigate contraventions of the legislation and terms and conditions of dispositions and determine if an appropriate penalty or sanction is needed.

[175] The Director would be exceeding her jurisdiction if she required the Disposition Holder to provide evidence of ability to comply with the terms and conditions of the DML. The Board finds the Director did not err in law in this matter.

(d) Impact on Waterbodies and Bed and Shores

[176] The GACM stated the Director erred in law by not requiring the Disposition Holder to provide information on how the clearing of vegetation would impact watercourses and the bed and shores of waterbodies located on the Lands. The GACM said vegetation would be cleared in the shooting range construction, which can lead to erosion of the bed and shores of waterbodies in the Lands. The GACM noted section 54(1)(f) of the Act prohibited "the creation of any condition on public land which is likely to result in soil erosion."

[177] The Director submitted the GACM did not consider section 54(2) of the Act, which states:

> "A person lawfully carrying out any activity on public land in accordance with
>
> (a) the terms and conditions of a disposition or authorization issued under this Act, and
>
> (b) any other applicable Acts and regulations
>
> shall not, by reason of that fact alone, be considered to have contravened this section." [Emphasis is the Director's.]

[178] The Director said the Act contemplated disposition holders will be able to conduct activities that would change or impact public land. The Director also stated:

> "Further, since the [Disposition Holder] must still go through a rezoning hearing and obtain a development permit from the County of Grande Prairie, the DML includes an *ad hoc* condition requiring the [Disposition Holder] to submit its construction plan to the Department for approval prior to the [Disposition Holder] commencing any clearing, construction or development on the Lands."[101]

[179] The Disposition Holder made no submissions on the issue.

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[101] Director's Response Submission, November 3, 2021, at paragraph 138.

[180] The Board refers to its previous analysis that the Act and PLAR do not require the Disposition Holder to provide evidence it can comply with the relevant conditions. The Disposition Holder will have to comply with the legislation and the DML conditions, which includes ensuring erosion does not occur beyond an acceptable level. AEP will review the construction plan submitted by the Disposition Holder and determine if erosion issues are adequately addressed.

[181] The Board finds the Director did not err in law by not requiring the Disposition Holder to provide information on how the clearing of vegetation would impact watercourses and the bed and shores of waterbodies located on the Lands.

(e) Revegetation and Reclamation

[182] The GACM submitted the Director erred in law by not including a condition in the DML requiring revegetation or reclamation of the Lands.

[183] The Director and the Disposition Holder made no submissions on the issue.

[184] The Board notes condition 028 of the DML states:

> "For greater certainty, the Disposition Holder must comply with the terms of the attached indices, supplements, addendums and schedules, including:
>
> a) Landscape Analysis Tool Report…"

[185] The LAT Report, which the Disposition Holder must comply with, addresses revegetation and reclamation.[102] For example, condition 1364 of the LAT Report states: "The Disposition Holder must reclaim the Lands to the pre-disturbance land use type (forested, grassland, cultivated, mineral wetland and peatlands) unless otherwise authorized in writing by the Regulatory Body."[103]

[186] As there are conditions related to reclamation and revegetation in the DML, the Board finds the Director did not err in law.

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102 Director's File, at Tab 1.

103 Director's File, at Tab 1.

(f) Misinterpretation of the Status of the Watercourses

[187] The GACM stated the Director erred in law by misinterpreting the status of the two watercourses identified by AEP staff during a site visit. The misinterpretation resulted in a failure to request the necessary information to ensure the watercourses were protected.

[188] The Director denied she erred in law in her interpretation of the status of the watercourses. The Director stated the AEP staff member's conclusions regarding the watercourses were based on the field investigation, and there is nothing in the record to disprove his conclusions. The Director quoted from the field investigation notes as follows:

> "It is common for dispositions to overlap such watercourse and the public lands disposition does not provide any rights that are contrary to the Water Act or [EPEA]. In this case, any concern related to deleterious materials being deposited in run-off are already covered by regulations set under EPEA. Any water course crossings or other impact to the watercourses are covered under the Water Act."[104] [Emphasis is the Director's.]

[189] The Disposition Holder made no submissions on this matter.

[190] The Board notes that the protection of watercourses is not the responsibility of the Director. The fact that the DML was issued does not mean the watercourses are not protected. The Disposition Holder will have to obtain the necessary permits and approvals under the *Water Act* and EPEA to address the watercourses located on the Lands.

[191] As watercourses are beyond the Director's jurisdiction, and as the Disposition Holder must comply with other relevant legislation, the Board finds the Director did not err in law in interpreting the status of the watercourses.

(g) Fees

[192] The GACM stated the Director erred in law by issuing the DML without the payment by the Disposition Holder of the required fees.

[193] The Disposition Holder acknowledged it had not paid any fees but noted, "AEP's

conditional approval is contingent upon receiving those funds prior to accessing the land for ground disturbance (construction)."[105]

[194] The Director did not have a specific response to this matter.

[195] The Board notes condition 006 of the DML states, "the Disposition Holder must pay all fees, rents, charges, security and other amounts payable under the Act and Regulations."[106] Section 21(1)(b) of PLAR lists the following as a duty of a disposition holder:

> "The holder of a formal disposition…
>
> (b) must pay promptly and regularly any rent, rate, royalty, charge or fee that is payable by the holder under the formal disposition, the Act or this Regulation…"

[196] While the DML does not state when the fees are payable, section 21(1)(b) of PLAR requires fees to be paid "promptly and regularly." The Board presumes that any fees are due before the construction on the shooting range occurs. The Board finds the Director did not commit an error of law by not having the Disposition Holder pay the fees in advance.

(h) Federal Permits

[197] The GACM argued the Director erred in law by issuing the DML before the required federal permits were obtained by the Disposition Holder.

[198] The Director and the Disposition Holder did not specifically address this matter.

[199] The Board notes that section 21(1)(c) of PLAR states:

> "The holder of a formal disposition…
>
> (c) must comply with the Act, its regulations, all other applicable enactments of Alberta and Canada, any applicable municipal by-laws and the terms and conditions of the formal disposition or other disposition to which the authorization relates."

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104 Director's Response Submission, November 3, 2021, at paragraph 119.

105 Disposition Holder's Response Submission, November 3, 2021, at paragraph IV(a).

106 Director's File, at Tab 1.

[200] The Board has already determined that the Director did not err in law by not requiring the Disposition Holder to have all permits and approvals in place before issuing the DML. The Disposition Holder must have the necessary federal permits before construction on the shooting range may proceed.

(i) Trapper

[201] The GACM alleged the Director erred in law by issuing the DML without any evidence in the Director's File showing the Disposition Holder contacted the registered trapper on the Lands as required in the DML.

[202] The Disposition Holder stated trappers and Indigenous groups were contacted in September, 2019.[107] The Director did not specifically address this issue.

[203] Whether the registered trapper is contacted or not is a matter between the trapper, the Disposition Holder, and the Director. The GACM does not represent the trapper before the Board. The Board finds the Director did not err in law in issuing the DML without evidence in the Director's File of the registered trapper being contacted by the Disposition Holder.

(j) Insurance

[204] The GACM stated the Director erred in law by issuing the DML without evidence in the Director's File that the Disposition Holder has complied with the requirement in the DML to meet insurance standards.

[205] The Director and the Disposition Holder did not specifically address this matter.

[206] This matter is the same as other matters in this appeal where the Disposition Holder cannot begin construction without complying with the relevant conditions in the DML. The Board finds the Director did not err in law by issuing the DML without evidence the Disposition Holder has complied with the insurance condition. The Disposition Holder must have insurance in place before construction can start on the Lands.

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[107] Disposition Holder's Response Submission, November 3, 2021, at paragraph II(f).

C. Incomplete Record and Adverse Inference

[207] The GACM stated the decisions and actions by the Director in issuing the DML were not supported by credible and independent evidence in the Director's File, which is a significant omission and renders the Director's File incomplete.[108] The GACM stated, "the Director's [File] is incomplete and warrants an adverse inference regarding the missing documentation."

[208] The Director submitted the Director's File was complete and contained all records of the Department that were considered in making the decision. The Director noted the deficiencies in the Director's File alleged by the GACM did not identify any missing record, therefore, the Board should reject the GACM's request for the Board to draw an adverse inference.

[209] The term "adverse inference" means a situation where a party to an Appeal asks the Board to reach a conclusion on missing or silent evidence on an issue. The leading statement on adverse inference is from Wigmore's *Evidence in Trials at Common Law, 1979*:

> "The failure to bring before the tribunal some circumstances, documents or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstance, which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."[109]

[210] An adverse inference is discretionary and dependent on the circumstances. The Court in *Howard* v. *Sandau* approved a list of circumstances it considered when determining if an adverse inference should be taken:

(a) Is there a legitimate explanation for the failure to produce the evidence?

(b) Is the evidence material to the outcome of the case?

(c) Is the evidence the only or best evidence on the matter available?

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[108] GACM's Initial Submission, October 8, 2021, at paragraphs 30 to 31.

[109] John Henry Wigmore, Evidence in Trials at Common Law, Chadbourn Revision (1979), Vol 2, at page 192.

(d) Does the party that withheld the evidence have exclusive control of the evidence?[110]

[211] As the GACM is the party seeking the adverse inference, it bears the onus of proof to convince the Board such an inference would be appropriate.

[212] In this Appeal the GACM asks the Board to draw an adverse inference based on what the GACM submits is an incomplete Director's File. The GACM argues the Director's File is incomplete because it lacks documentation that could have been present if the Director had required wildlife surveys, RCMP safety templates, referral responses from the Wetland Specialist and the Wildlife Biologist, and other documents the GACM submitted should be in the Director's File.

[213] The first part of the *Howard* v. *Sandau* test for determining whether to take an adverse inference is whether there is a legitimate explanation for the "missing" documents. The Board finds the documents the GACM suggests are missing from the Director's file were either not present because the Director exercised her discretion to determine they were not required, or they were not material to the Director's decision. The Board finds there is insufficient evidence to show the Director's File is incomplete, therefore, the Board denies the GACM's request for the Board to make an adverse inference in this Appeal.

VII. CONCLUSION

[214] The Board finds that in issuing the DML, the Director:

(a) did not err in the determination of a material fact on the face of the record, with the exception of not including as a condition in the DML requiring the Disposition Holder to submit a noise mitigation plan acceptable to the Director; and

(b) did not err in law.

[215] The Board finds the GACM did not meet the onus of proving the Director's File was incomplete, and therefore the Board will not make an adverse inference.

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110 *Howard* v. *Sandau*, 2008 ABQB 34, at paragraph 44.

VIII. RECOMMENDATIONS

[216] The Board recommends the Minister:

(a) confirm the Director did not err in the determination of a material fact on the face of the record, with the exception of not including as a condition in the DML requiring the Disposition Holder to submit a noise mitigation plan acceptable to the Director;

(b) confirm the Director did not err in law; and

(c) order the conditions of DML be varied by adding to the Conditions Addendum the following:

"The Disposition Holder must submit a noise mitigation plan to the Department for review and approval, prior to any clearing, construction or development of the Disposition. The noise mitigation plan shall identify how the Disposition Holder intends to reduce the noise disturbances that could potentially occur as a result of the activity."

IX. COSTS

[217] The Board notes the GACM stated it would be asking for costs. The Board will establish a process for a costs application after the Minister makes his decision.

Dated on December 16, 2021, at Edmonton, Alberta.

"*original signed by*"
Gordon McClure
Board Chair

"*original signed by*"
Nick Tywoniuk
Board Member

"*original signed by*"
Chris Powter
Board Member

ALBERTA
ENVIRONMENT AND PARKS

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

Ministerial Order
02 /2022

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. 20-0025

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. 20-0025.

Dated at the City of Edmonton, Province of Alberta, this 7 day of Feb, 2022.

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. 20-0025

With respect to the decision of the Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks (the "Director") to issue under the *Public Lands Act,* R.S.A. 2000, c. P-40, Department Miscellaneous Lease DML 200008 (the "DML") to the Saddle Hills Target Sports Association (the "Disposition Holder"), I, Jason Nixon, Minister of Environment and Parks, in accordance with section 124(3) of the *Public Lands Act*, order that the Director's decision to issue the DML to the Disposition Holder is confirmed.

Reasons of the Minister of Alberta Environment and Parks

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

Public Lands Appeal Board Appeal No. 20-0025

February 9, 2022

INTRODUCTION

[1] These are the reasons for my decision in Ministerial Order 02/2022. My decision deals with Appeal No. 20-0025, filed with the Public Lands Appeal Board (the "Board") by the Gordeyville and Area Community Members Group (the "Appellant"). The Appellant appealed Department Miscellaneous Lease 200008 (the DML) issued by Alberta Environment and Parks ("AEP") under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act"). The DML was issued to the Saddle Hills Target Sports Association for the construction and operation of a shooting range on public land in the County of Grande No. 1.

[2] While I am not required to give reasons,[1] I believe it would be helpful for everyone involved in this matter to understand the reasons for my decision. This is, in part, because my decision does not accept the recommendations of the Board.

[3] Following receipt of the appeal, the Board held a hearing and prepared a report, which includes the Board's recommendations (the "Report").[2] The Report was provided to me on December 17, 2021. The Board's entire appeal file has been available for me to review. The Report and the Board's file form the basis of my decision and these reasons. I am authorized to make this decision under section 124(3) of the Act, 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 make any further order that the Minister considers necessary for the purpose of carrying out the decision."

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1 See: *Fenske* v. *Alberta (Minister of Environment)*, 2002 ABCA 135 at paragraph 24 to 27.

2 *Gordeyville and Area Community Members Group* v. *Director Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks*, re: *Saddle Hill Target Sports Association* (16 December 2021), Appeal No. 20-0025-R (A.E.A.B.), 2021 ABPLAB 24.

This provision gives me broad powers to decide how to address appeals filed with the Board. The Court of Queen's Bench in *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment)*, 2003 ABQB 303 at paragraph 19, quoted the Supreme Court of Canada and described the powers of the Minister, stating:

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

The Court of Queen's Bench was discussing my powers under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, but I believe this discussion applies equally to my powers under the Act.

DISCUSSION

[4] Taking into account the competing interests in this matter, I am exercising my powers under section 124(3) of Act to confirm the decision of the Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks, to issue Department Miscellaneous Lease 200008.

[5] I have rejected the recommendation of the Board to add a requirement to the DML to submit a noise reduction plan to AEP for review and approval, prior to any clearing, construction or development of the DML. In my view, the management of noise is best left to recommendations from Alberta's Chief Firearms Office and the RCMP. Further, in my view, if it is desirable to manage noise coming from the DML, the County of Grande Prairie No. 1 has the ability to address this. As noted in the Board's Report and Recommendations, at paragraphs 151 to 154, the County has jurisdiction over noise and has already passed a Bylaw to address noise. In my view, it would be inappropriate to have two different authorities regulate this issue.

Jason Nixon
Minister of Environment
and Parks