2021 ABPLAB 18 **Appeal No. 21-0003-ID1**

ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – September 3, 2021

IN THE MATTER OF sections 121 and 123 of the *Public Lands* Act, R.S.A. 2000, c. P-40, and sections 211, 212, 213, and 216 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Syncrude Canada Ltd., with respect to the May 26, 2021 decision of the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks, to amend SML 000002 and SML 000033.

Cite as: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (3 September 2021), Appeal No. 21-0003-ID1 (A.P.L.A.B.), 2021 ABPLAB 18.

Classification: Public

BEFORE:		Mr. Gordon McClure, Appeals Co-ordinator and Board Chair
SUBMISSIONS BY:		
	Appellant:	Syncrude Canada Ltd., represented by Mr. Dan Collins, Dentons Canada LLP
	Director:	Mr. Brendan Hemens, Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks, represented by Mr. Larry Nelson, Environmental Law Section, Alberta Justice and Solicitor General

EXECUTIVE SUMMARY

Syncrude Canada Ltd. (the "Appellant") operates the Mildred Lake mine and upgrader ("MSL 352") and the Aurora Mine oil sands mining operations (the "Aurora MSL") north of Fort McMurray. MSL 352 and the Aurora MSL (collectively the "MSLs") contain terms and conditions governing the Appellant's use of sand and gravel within the leased area. Alberta Environment and Parks ("AEP"), which was responsible for administering the MSLs until the *Responsible Energy Development Act* transferred responsibilities for the MSLs to the Alberta Energy Regulator, issued letters amending the terms and conditions of the MSLs.

AEP then issued invoices to the Appellant for $4,350,146.71 for additional royalties related to sand or gravel used by the Appellant during 2019 and 2020. However, the invoices were not paid. On May 26, 2021, the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks (the "Director") issued a letter to the Appellant advising that, notwithstanding the provisions of the MSLs, the invoices were correct and the additional royalty charges were payable.

The Appellant appealed the Director's letter to the Public Lands Appeal Board (the "Board") on June 14, 2021. On June 25, 2021, the Director advised the Board that the decision requesting the royalty payment was in the first instance made on June 24, 2019, and the Notice of Appeal was submitted outside the timeframe specified in the legislation.

Submissions were received from the Director and the Appellant regarding when the decision was made and whether it was contrary to the public interest to extend the legislated timeframe. Decisions regarding the acceptance, rejection of a Notice of Appeal or the extension of the legislated timeframe for filing a Notice of Appeal are made by the Board's Appeals Co-ordinator under section 217 of the Public Lands Administration Regulation. The Appeals Co-ordinator found the decision was made in the Director's May 26, 2021 letter and the Notice of Appeal was filed within the legislated timeframe.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. ISSUES 5

IV. DECISION 18

Classification: Public

I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board's Appeals Co-ordinator (the "Appeals Co-ordinator") regarding the alleged late filing of a Notice of Appeal by Syncrude Canada Ltd. (the "Appellant"). The Appellant appealed a letter dated May 26, 2021, issued by the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks (the "Director") regarding invoices for additional sand and gravel royalties that are said to be owing. The Appellant filed the Notice of Appeal with the Board on June 14, 2021, serving the Appeal Co-ordinator.

[2] Alberta Environment and Parks ("AEP") issued several invoices to the Appellant for a total of $4,350,146.71 for additional royalties related to sand or gravel used during 2019 and 2020 (the "Invoices"). The Invoices were not paid. On May 26, 2021, the Director issued a letter to the Appellant advising that, notwithstanding the provisions of the Mineral Surface Leases ("MSLs") held by the Appellant, the Invoices were correct, and the additional royalty charges were payable.

[3] Appeals before the Board are initiated by the Appeals Co-ordinator's receipt of a Notice of Appeal form from an appellant. For the Board to accept a Notice of Appeal, it must be received by the Appeals Co-ordinator within the time set out in section 217(1) of the *Public Lands Administration Regulation*, AR 187/2011 ("PLAR"), which provides:

> "A notice of appeal must be served on the appeals co-ordinator within
>
> (a) 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to, or
>
> (b) 45 days after the date the decision was made,
>
> whichever elapses first."

[4] The Director requested the Notice of Appeal be dismissed for being filed late. The Director submitted that the Notice of Appeal should be rejected as the decision had been made previously and was outside the legislated timeframe for the acceptance of a Notice of Appeal. The Director stated the letter that the Appellant was seeking to appeal was not a decision but rather a letter clarifying AEP's position regarding the decision communicated to the Appellant as early as June 24, 2019.

[5] The Appeals Co-ordinator must determine if and when a decision was made and if the Notice of Appeal associated with the decision was filed within the legislated timeframes of section 217(1) of PLAR. Further, the Appeals Co-ordinator may extend the time for an appellant to file a Notice of Appeal if it is not against the public interest. The appeal may proceed if the Appeals Co-ordinator determines it would not be against the public interest to extend the time to file the Notice of Appeal. However, if the Appeals Co-ordinator decides not to extend the time limit, the appeal must be dismissed.

II. BACKGROUND

[6] The Appellant operates the Mildred Lake mine and upgrader ("MSL 352") and the Aurora Mine oil sands mining operations (the "Aurora MSL") north of Fort McMurray. MSL 352 and the Aurora MSL (collectively the "MSLs") contain terms and conditions governing the Appellant's use of sand and gravel within the leased area (the "Surface Material Provisions") under Surface Material Leases ("SMLs").

[7] Before the proclamation of the *Responsible Energy Development Act,* S.A. 2012, c. R-17.3 ("REDA") on June 17, 2013, AEP was the regulatory authority responsible for administering the MSLs and SMLs and issued letters amending the Surface Material Provisions of the MSLs. After the proclamation of REDA, MSLs were managed by the Alberta Energy Regulator (the "AER"), and SMLs were managed by AEP under the *Public Lands Act,* R.S.A. 2000, c. P-40 (the "Act").

[8] The Appellant is the holder of the following dispositions issued under the Act and PLAR.

a) Mineral Surface Lease 352;

b) Mineral Surface Lease 973220 (the Aurora MSL);

c) Surface Material Lease 000002 ("SML 02"), and

d) Surface Material Lease 000033 ("SML 33" and together with SML 02, the "SMLs").

[9] Section 114 of the PLAR states that the holder of a surface material lease "must remit … the royalty on all surface material removed during the preceding 12-month period, at the

rates prescribed by the Minister."[1] This obligation is further reflected in the terms and conditions of the SMLs (the "SML Royalty Terms").

[10] An audit conducted by the Auditor General in 2019 (the "OAG Audit")[2] determined that between 2009 and 2018, AEP improperly granted exemptions from royalty payments for surface materials extracted from public lands to oil sand operators contrary to PLAR. AEP submitted that the effect of the OAG Audit was that starting in 2019, it would properly apply section 114 of PLAR and the SML Royalty Terms.

[11] On June 24, 2019, the Senior Manager, Assessment and Communications, sent a letter to the Appellant notifying it that:

> "In order to claim royalty exemption on material used for public works, the leaseholder must ensure the material was provided free of charge, and is
>
> a) required by the government; or
>
> b) used in the construction or maintenance of a public work owned by the government, city, or municipality.
>
> The leaseholder must ensure Public Works Confirmation letters are submitted with all annual returns reporting royalty exempt public works volumes."[3]

[12] At the end of 2019, the Appellant submitted its 2019 Annual Returns to AEP for the SMLs (the "Returns"). AEP rejected the Returns since the Returns did not include Public Works Confirmation Letters for the surface materials the Appellant claimed as exempt from royalties.

[13] On March 20, 2020, the Appellant sent a letter to AEP, which asserted its exemption from royalty payments for the surface materials was because of agreements relating to the MSLs and requested AEP accept its letter as "confirmation that the [surface materials] are royalty exempt."[4]

[14] On December 22, 2020, AEP issued Invoices for the recalculated royalty payable for 2019 using the total volume of surface materials removed as reported. Each invoice had an

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1 Public Lands Administration Regulation, AR 187/2011, Section 114.

2 Director's Submission, dated July 29, 2021, at Tab 8, "Management of Sand and Gravel Follow-up," Report of the Auditor General, November 2019.

3 Director's Submission, dated July 29, 2021, at Tab 9, June 24, 2019 Letter from AEP, paragraph 2 and 3.

4 Appellant's Submission, dated July 16, 2021, at Appendix 2, at page 6 and 7.

explanatory note stating, "The public works will be charge[d] as commercial as a confirmation letter was not sent to confirm the public works."[5]

[15] AEP and the Appellant continued to communicate and discuss the royalty payment and the royalties exemption applied to the SMLs throughout early 2021.

[16] On May 26, 2021, the Director "… informed the Appellant regarding the requirements for claiming the royalty exemption under the SMLs, and confirmed the Disputed Exemption was not applicable and amounts payable as set out in the Invoices were correct."[6]

[17] On June 14, 2021, the Appellant filed a Notice of Appeal and a request for a stay with the Board seeking to reverse the Director's decision. The Board wrote to the Appellant and Director (collectively the "Parties") acknowledging the appeal. The Board also requested further information from the Appellant on their stay request, provided a copy of the appeal to the Director, and requested that the Director advise when he would provide a copy of the records related to the decision under appeal (the "Director's Record").

[18] On June 24, 2021, the Appellant responded to the Board's request for further information on their stay request. On July 9, 2021, the Board granted an interim stay pending the Director's motion to dismiss the appeal. Should the Appellant be found to have a valid appeal, the interim stay will remain in force until submissions on the stay are received from the Director and Appellant, and a decision on the stay application is rendered.

[19] On June 25, 2021, the Director filed a motion requesting the Board's Appeals Co-ordinator dismiss the appeal on the basis that the Notice of Appeal was filed outside the timelines established under section 217 of the PLAR. By letter dated June 28, 2021, the Appeals Co-ordinator established a process to receive submissions on the motion from the Parties.

[20] Submissions were received from the Appellant on July 16 and August 5, 2021, and from the Director on July 29, 2021.

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[5] Director's Submission, dated July 29, 2021, at paragraph 16.

[6] Director's Submission, dated July 29, 2021, at paragraph 18.

III. ISSUES

[21] The issues before the Board's Appeals Co-ordinator are whether the appeal was filed within the timeframes established under section 217(1) of PLAR, and if there was a delay in filing the Notice of Appeal, would it be against the public interest for the Appeals Co-ordinator to extend the period for service of the Appellant's Notice of Appeal under section 217(2) of PLAR.[7]

[22] The Appellant submitted:

> "Specifically, the motion raises the following issues for the Appeals Co-ordinator's consideration:
>
> - Did the letter from [AEP] to the [Appellant] dated June 24, 2019 (the 'June 2019 Letter') contain a decision by the Director regarding the Appellant's MSLs and the Royalty Exemptions?
> - Did the invoices issued by [AEP] to [the Appellant] in December 2020 (the 'December 2020 Invoices') or February 2021 (the 'February 2021 Invoices') provide the Appellant with notice that the Director had made a decision regarding the Appellant's MSLs and the Royalty Exemptions?
> - Did the letter issued by the Director to [the Appellant] dated May 26, 2021 (the 'May 2021 Letter') provide [the Appellant] with notice that the Director had made a decision regarding [the Appellant's] MSLs and the Royalty Exemptions?
> - If the Director's decision regarding [the Appellant's] MSLs and the Royalty Exemptions was made prior to May 26, 2021 and effectively communicated to [the Appellant], should the Appeals Co-ordinator nevertheless exercise discretion to extend the deadline for [the Appellant] to file the Notice of Appeal?"[8]

[23] The question of whether changes to royalty exemptions affecting an MSL are an appealable matter is not a matter under consideration in this decision. The motion raised is only

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[7] Section 217(1) of PLAR provides:

> "A notice of appeal must be served on the appeals co-ordinator within
>
> (a) 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to, or
>
> (b) 45 days after the date the decision was made,
>
> whichever elapses first."

Section 217(2) of PLAR provides: "The appeals co-ordinator may, either before or after the expiry of a period described in subsection (1)(a) or (b), extend the time for service of a notice of appeal if, in the opinion of the appeals co-ordinator, it is not contrary to the public interest to do so."

[8] Appellant's Submission, July 16, 2021, at paragraph 6.

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regarding the time limit under section 217 of PLAR to file a Notice of Appeal.

[24] The submissions and evidence presented by the Parties have been reviewed and considered.

Was the Notice of Appeal filed within the timeframes established under section 217 of PLAR?

Director's Submission

[25] The Director stated, "[a]lthough the Appellant in the Limitation Submission [(the July 16, 2021 submission)] sets out the common law rules for determining limitation periods for administrative decisions, the Appellant failed to consider the wording of the limitation period specified in PLAR, which takes precedence. (See Sara Blake, "Administrative Law in Canada," 5th ed. (Markham: LexisNexis Canada Ltd., 2011) at page 34.)"[9]

[26] The Director submitted section 217(1) of PLAR states:

> "A notice of appeal must be served on the appeals co-ordinator within
>
> (a) 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to, or
>
> (b) 45 days after the date the decision was made,
>
> whichever elapses first." (Emphasis added by the Director.)

[27] The Director stated, "the Appellant failed to consider the words 'whichever elapses first', which indicates that notice of a decision is not required to start the ultimate 45 day limitation period set out in section 217(1)(b) of [PLAR]."[10]

Appellant's Submission

[28] The Appellant submitted the time limits set out in section 217(1) of PLAR began when the Director made the actual decision about the Appellant's MSLs and the royalty exemptions and communicated that decision to the Appellant.

[29] It was noted that "… it is imperative that, where possible, the decision be in writing for the appeal or review to be practically feasible."[11]

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[9] Director's Submission, dated July 29, 2021, at paragraph 46.

[10] Director's Submission, dated July 29, 2021, at paragraph 48.

[30] The Appellant submitted guidance on how administrative decision-makers should formulate their decisions quoting from Practice and Procedure Before Administrative Tribunals, Macaulay, Sprague and Sossin ("Macaulay"), which states:

> "Any decision issued by an agency must be clear as to exactly what the agency has decided. If anyone is required to act on the basis of that decision it must be sufficiently clear and unambiguous that the person can know exactly what it is he or she is to do. An ambiguous decision likely cannot be enforced.
>
> A decision document should indicate the agency from which it issues, the names of the particular decision-maker(s), identify the proceedings, say exactly what the decision was, clearly set out any terms or conditions which may have been attached to the decision, be dated and signed by either the decision-makers or an individual authorized by the decision-makers to sign on their behalf evidencing the fact of the decision which they made."[12] (Emphasis by the Appellant.)

[31] The Appellant noted the courts have commented and provided guidance as to whether a decision has been made, noting the courts in *Dass* v. *Canada* (Minister of Employment & Immigration), which states:

> "I see no reason to depart from the normal requirements of administrative law that a decision is taken to have been made when notice of that decision is given to the parties affected with some measure of formality. Judicial review cannot be sought of decisions until they have been formulated and communicated to the parties affected. Why should the courts take it upon themselves to examine the interdepartmental and intradepartmental correspondence to determine if and when a decision, though never communicated, was indeed taken? ... I, therefore, think it inappropriate for the Court to go through the file and determine for itself that at a certain point all requirements had been met for landing and, therefore a decision to grant landing must be taken to have been at that time. Instead, it appears to me that the appropriate procedure, and one which is normally followed, is that when a favourable decision has been made to Grant landing a written Record of Landing, signed by an Immigration Officer as authorized by subsection 14(2) of the Act, is delivered to the applicant."[13] (Emphasis added by the Appellant, citations omitted.)

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[11] Robert Macaulay, James Sprague & Lorne Sossin, "Practice and Procedure Before Administrative Tribunals,"(Toronto: Thomson Reuters Canada Limited, 2021) at §28.24 —Format of Decisions.

[12] Robert Macaulay, James Sprague & Lorne Sossin, "Practice and Procedure Before Administrative Tribunals" (Toronto: Thomson Reuters Canada Limited, 2021) at §28.24 —Format of Decisions.

[13] [1996] 2 FC 410, 1996 FCA 4029, at paragraph 17.

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[32] The Appellant stated that "Alberta courts have adopted and applied this guidance in the administrative law context when considering whether a decision is judicially reviewable."[14]

[33] The Appellant further stated,

> "Similarly, in *Economical Mutual Insurance Co*. v. *British Columbia (Information and Privacy Commissioner* ('Economical'), [(See, for example, Blais v. Alberta (Minister of Municipal Affairs), 2018 ABQB 71, at paragraphs 42 to 45.)] the British Columbia Supreme Court was asked to consider whether, among other things, an administrative decision maker's reasons were sufficiently clear so as to be a 'reasonable' decision. In doing so, the Court explained:
>
>> 'The ability of Economical to carry out the Orders is a matter of no small import. Pursuant to s. 56 of the Act, it is an offence subject to a fine of not more than $100,000 to fail to comply with an order. In *Gurtins* v. *Panton-Goyert*, 2008 BCCA 196 (B.C.C.A.), the court stressed the importance of clarity in court orders. It said at para. 15:
>>
>>> The rule of law requires that court orders be obeyed. Accordingly, it is of paramount importance that persons who are subject to court orders be able to readily determine their obligations and responsibilities. <u>They do this by having regard to what is on the face of the formal order setting out what they are required to do or refrain from doing. As stated in Arlidge, Eady & Smith on Contempt (London: Sweet & Maxwell, 2005) (at para. 12- 55), '[a]n order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation.'</u>
>
> <u>Those comments apply with equal force to orders made by an administrative tribunal.... [Emphasis in original.]"</u>[15]

[34] The Appellant submitted that the administrative law principles of the requirement for notice of a decision apply equally to decisions of the Director. The Appeals Co-ordinator must consider when a decision about the Appellant's MSLs and the royalty exemptions was formulated and communicated to the Appellant with a sufficient level of clarity and the appropriate measure of formality.

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[14] Appellant's Submission, dated July 16, 2021, at paragraph 12.

[15] Appellant's Submission, dated July 16, 2021, at paragraph 14.

Classification: Public

Analysis

[35] Section 217(1) of the PLAR establishes the timeframe within which a Notice of Appeal must be served on the Appeals Co-ordinator. Key to section 217(1) is a decision being made, which the Appellant then objects to by filing a notice of appeal.

[36] What constitutes a decision in comparison to other actions that may take place is also key to the function of section 217 of PLAR, as it is easy to envision there are times that general information is being provided or a summary of a previous decision is provided, which must be distinguished from a decision so as to provide an efficient and effective application of the legislation.

[37] The Appeals Co-ordinator agrees with the Macaulay position that any decision issued:

- must be clear as to what the agency exactly decided; and
- must be sufficiently clear and unambiguous as to what is to be done.

[38] The Appeals Co-ordinator further agrees, any decision document must:

- indicate the agency which issued the decision;
- name the decision-maker;
- identify the proceeding and say exactly what the decision was;
- clearly set out any terms or conditions attached to the decision; and
- be signed by a decision-maker or delegate.

When a document is not sufficiently clear and unambiguous as to what was decided and what is to be done, it is questionable if a decision has been made and communicated to the affected party.

[39] The Appeals Co-ordinator agrees that a decision must be formally communicated to a party with sufficient clarity that the decision and the obligations or responsibilities arising from the decision can be understood. As the Court observed in *Gurtins* v. *Panton-Goyert*, "[an] order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation."[16] (Emphasis added by the Appellant).

[16] Appellant's Submission, dated July 16, 2021, at paragraph 14.

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[40] Only where a decision is sufficiently clear and unambiguous as to what was decided and what is to be done, and steps are taken to communicate this to a party, has a decision been made. Once a decision has been made, the legislated timeframes of PLAR apply to the decision.

Did the letter from AEP to the Appellant dated June 24, 2019, contain a decision?

Director's Submission

[41] The Director stated:

> "To the extent that a decision was made to amend or vary the terms of the Dispositions regarding royalties (which is not admitted), it occurred on June 24, 2019, when AEP sent the June 24, 2019 letter to the Appellant. That means that 721 days elapsed between the time the alleged decision was made by [AEP] and the date the Notice of Appeal was served on the appeals co-ordinator."[17]

[42] The Director stated:

> "[O]n June 24, 2019, the Senior Manager, Assessment and Communications, sent a letter to the Appellant (the 'Royalty Letter') notifying it of the Royalty Decision as follows:
>
>> 'In order to claim royalty exemption on material used for public works, the leaseholder must ensure the material was provided free of charge, and is
>>
>> a) required by the government; or
>>
>> b) used in the construction or maintenance of a public work owned by the government, city, or municipality.
>>
>> The leaseholder must ensure Public Works Confirmation letters are submitted with all annual returns reporting royalty exempt public works volumes.'"[18]

Appellant's Submission

[43] The Appellant submitted, despite being addressed to the Appellant, the AEP June 24, 2019 letter

> "…reads like a generic notice or reminder to all surface material leaseholders summarizing the requirements of section 114 of the PLAR, and AEP's long-

[17] Director's Letter to the Board, dated June 25, 2021, at paragraph 3.

[18] Director's Submission, dated July 29, 2021, at paragraph 11.

> standing practice for verifying royalty exemptions applicable to quantities of surface material used for 'public works' ... [and] a government employee expressing an opinion with respect to the interpretation of a regulation and certain administrative requirements is not a 'decision.'"[19]

[44] The Appellant submitted AEP's June 24, 2019 letter did not convey any new information to the Appellant. The general requirement to pay surface material royalties existed when the exemptions were granted, and since "[d]espite this, the Appellant has always been able to claim the benefit of the Royalty Exemptions without objection from AEP."[20]

[45] The Appellant submitted that it had enjoyed substantial benefits for decades and expected to continue to enjoy this benefit. The letter effectively amended or varied the Appellant's MSLs and royalty exemptions and did not give the Appellant any notice that the Director was exercising authority or discretion to deny the Appellant the benefit of the royalty exemptions.

[46] The Appellant stated,

> "[B]ased on [the Appellant's] experience with AEP and its predecessors, it would be unprecedented for AEP to take such a significant step without first discussing the matter with [the Appellant] directly and receiving input from [the Appellant]. At a minimum, and consistent with the guidance provided by Macaulay, Sprague, and Sossin above, [the Appellant] would reasonably expect the decision document to expressly reference the [the Appellant's] MSLs and the Royalty Exemptions, identify the Director's authority for making the decision in question, provide the rationale of such decision and make a clear and unequivocal statement advising that [Appellant] would no longer be able to rely on the Exemptions. The [June 24,] 2019 Letter does not satisfy any of those criteria."[21]

[47] The Appellant submitted there was a lack of context to lead the Appellant to believe a decision was imminent or AEP's June 24, 2019 letter contained a decision about the Appellant's MSLs or the royalty exemptions with no meetings or prior correspondence on the issue. Further, AEP's June 24, 2019 letter does not reference the Appellant's MSLs or the royalty exemptions relied upon by the Appellant. The letter does not purport to be a final decision of the Director, refer to any appeal rights pursuant to PLAR, and is not signed by the Director or someone acting on behalf of the Director.

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19 Appellant's Submission, dated July 16, 2021, at paragraph 21.

20 Appellant's Submission, dated July 16, 2021, at paragraph 22.

Classification: Public

Analysis

[48] The Appellant had been provided with the SML royalty exemption for the MSLs they possessed (whether correctly or not is not a matter of consideration of this motion). The royalty exemption was granted and existed in a time when there was a general requirement to pay royalties on surface materials.

[49] The Appellant submitted they reported the exempted materials under the Public Works Exemption because the electronic reporting tool developed did not provide for another type of exemption, and they had done so for a number of years without objection.

[50] The Director stated, "…[AEP] allowed oil sands operators to claim the Unauthorized Exemption by using the 'public works' exemption for royalties even where it was known that the surface materials were not being used for public works."[22]

[51] The Director submitted that as a result of the 2019 OAG Audit, AEP decided it would begin to properly apply section 114 of PLAR and would no longer allow the use of the unauthorized exemption, and on June 24, 2019, issued a letter titled "Annual Return Requirements and Clarification." The letter does not refer to the exemption the Appellant held being found to be an unauthorized exemption, nor does it provide notice of a change of practice for the exemption granted and enjoyed by the Appellant. The letter addresses the claiming of material for public works as exempt. The letter does not speak to the exemption granted for the MSLs at all.

[52] AEP's June 24, 2019 letter is not clear as to how the exempted materials are to be reported or how the MSLs exemption in regards to the SMLs have changed or are impacted. The letter, in regards to the MSL exemption, is not clear or unambiguous. It speaks to the public works exemptions and not to the fact that AEP is no longer able to honour an exemption as it has been deemed by the OAG Audit to be unauthorized.

[53] AEP's June 24, 2019 letter is not clear and only references one aspect of the exemption, the SML, and not the MSLs to which the exemption is granted. The lack of explicit

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[21] Appellant's Submission, dated July 16, 2021, at paragraph 24.

[22] Director's Submission, dated July 29, 2021, at paragraph 9.

language does not provide a rationale nor decision regarding the status of the MSLs. It is not a decision on the MSLs' SML exemptions.

Did the Invoices issued by AEP provide the Appellant with notice that the Director had made a decision?

Director's Submission

[54] The Director stated AEP followed up on the June 24, 2019 letter by invoicing the Appellant for the disputed royalty amounts with Statement No. 0005107494 (for SML 02) and Statement No. 0005107508 (for SML 33), both dated December 22, 2020. These invoices include an explanatory note stating, "The public works will be charged as commercial as a confirmation letter was not sent to confirm the public work." Therefore, even if the date of the alleged decision was the date AEP sent the invoices for the disputed royalty amounts, it would still mean that 174 days elapsed between the time AEP made the alleged decision and the date the Notice of Appeal was served on the Appeals Co-ordinator noting "at least 106 days elapsed between the date the Appellant acknowledges it was aware of the alleged decision and the date the Notice of Appeal was served on the Appeals Co-ordinator."[23]

[55] The Director submitted the Appellant's 2019 Annual Returns for the SMLs were rejected as they did not include Public Works Confirmation letters exempting royalties.

[56] The Director stated,

> "…[F]ollowing the rejection of the SML Returns, [AEP] followed up with the Appellant to again remind them of the requirements for claiming an exemption under the SMLs, including in the following:
>
> a) an email dated February 6, 2020, which stated 'Public works cannot be claimed unless there is a confirmation letter from a Government body indicated the material was used for public works'…; and
>
> b) a letter dated March 17, 2020, which reminded the Appellant that its SML Annual Returns for 2019 were outstanding for the SMLs since the Public Works Confirmation letters had still not be provided…."[24]

[57] The Director submitted that the Appellant, in response to the March 17, 2020 letter, sent a letter asserting its exemption from royalties due to the MSL agreements. As the

[23] Director's June 25, 2021 letter, at paragraphs 4 and 5.

[24] Director's Submission, dated July 29, 2021, at paragraph 13.

Appellant did not provide Public Works Confirmation letters required for the exemption, AEP recalculated the 2019 royalty payable and issued invoices dated December 22, 2020, for each of the SMLs.

Appellant's Submission

[58] The Appellant submitted the Invoices clearly do not contain or provide notice of a decision about the MSLs and the royalty exemptions.

[59] The Appellant submitted section 113 of PLAR[25] requires operators to use a standard electronic form when filing their annual returns that only contemplates one type of royalty exemption: surface material used for public works.

[60] The Appellant stated,

> "There is no way for an operator to use the standard annual return electronic form to account for surface material used while claiming a different (i.e. non-public works) exemption…. Because of this deficiency in the annual return form, the Appellant has historically reported the volumes of surface material which it uses pursuant to the exemptions in the [Appellant's] MSLs in the 'public works' section of the annual return form. This allows [the Appellant] to properly account to AEP for the volumes of surface material used while also benefiting from the Royalty Exemptions in the [Appellant's] MSLs."[26]

The Appellant submitted AEP knows of the practice and never expressed dissatisfaction or concern.

[61] The Appellant submitted the Invoices show royalty charges corresponding to the amounts that were claimed pursuant to the royalty exemptions, and AEP was invoicing what

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25 Section 113(1) of PLAR states:

"An operator must annually,

(a) on or before the date prescribed by the director in a directive issued for the purposes of this section, or

(b) if no directive is issued under clause (a) in respect of a particular year, within 30 days after the end of the anniversary month of the lease,

file with the director a surface materials return in a form acceptable to the director that states the quantity of surface material removed in the preceding 12-month period from the land under the lease."

26 Director's Submission, dated July 29, 2021, at paragraph 35.

Classification: Public

should have been royalty exempt. The Appellant stated, "[it] reasonably suspected that the Invoices were issued due to an administrative error or oversight by AEP."[27]

[62] The Appellant submitted the generic administrative invoices failed to formulate a decision, communicate it clearly and unambiguously so as to allow the Appellant to understand that a formal decision to eliminate the royalty exemption had been made.

[63] The Appellant submitted there is no indication of the Director's intention to vary or amend the Appellant's MSL or the royalty exemptions, and it would be unfair and unreasonable to treat the Invoices as constituting notice. The Appellant assumed the Invoices were issued in error and took steps to clarify, which culminated in the "May 2021 Letter setting out the Director's decision to effectively amend or vary the Royalty Exemptions."[28]

Analysis

[64] The Invoices issued by AEP are not, in and of themselves, a decision letter but a statement of account. The reasons provided for the issuance of the Invoices do not address the change in the exemption status or the rationale for the change.

[65] There is no indication the Appellant was provided notice of a change in their exemption status at the time of the issuance of the Invoices or in the prior letter sent by AEP on June 24, 2019. When AEP's June 24, 2019 letter and the Invoices are considered in their entirety, they do not address the reasons for a change in the royalty exemption AEP and the Appellant had agreed to or that the exemption agreement is not still in place. There is no reason to believe at this time the agreement was not in place. The Invoices alone or with AEP's June 24, 2019 letter are not clear or unambiguous in that they do not address the underlying issue of the exemption agreed to by the Parties at the core of the exemptions being claimed.

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[27] Appellant's Submission, dated July 16, 2021, at paragraph 40.

[28] Appellant's Submission, dated July 16, 2021, at paragraph 44.

Classification: Public

Did the Director's May 26, 2021 letter provide the Appellant with notice that the Director had made a decision regarding the Appellant's MSLs and the royalty exemptions?

Director's Submission

[66] The Director stated, "throughout early 2021, AEP and the Appellant at various times had communications and discussions regarding the royalty payment under the SMLs and the Appellant's claim that the Disputed Exemption applies to the calculation of royalties under the SMLs."[29] In a letter dated May 26, 2021, the Director again informed the Appellant of the requirements for claiming the royalty exemption under the SMLs and confirmed the disputed exemption was not applicable and the amounts payable as set out in the Invoices were correct.[30]

Appellant's Submission

[67] The Appellant submitted that following the March 30, 2021 video conference meeting with AEP personnel and the Director to discuss the Appellant's concerns with the AEP's Invoices, the Appellant obtained and reviewed a copy of the OAG Audit regarding the issue of surface material royalty payments and exemptions upon which the Director relied and the Appellant concluded there had been a misunderstanding and that the Invoices had been issued in error.

[68] The Appellant wrote to the Director on April 19, 2021, explaining the royalty exemption application and the process for reporting sand and gravel for which a royalty exemption is applied and that the appropriate exemption was included in the 2019 annual report filing. The letter disputed the Invoices, ignoring the royalty exemptions.

[69] On May 26, 2021, the Director wrote to the Appellant, delivering the letter to the Appellant's Manager, Regulatory Affairs. The letter:

> "… expressly referenced [the Appellant's] MSLs and the Royalty Exemptions granted to [the Appellant]. It also conveys a clear, unequivocal decision by the Director that [the Appellant] would no longer be able to rely on the Royalty Exemptions. Further, the Director expressly states in the May 2021 Letter that the invoices issued are 'correct,' that [the Appellant's] partial payment is 'insufficient,' and that [the Appellant's] account was now in arrears. The Director

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29 Director's Submission, dated July 29, 2021, at paragraph 17.

30 Director's Submission, dated July 29, 2021, at paragraph 18.

> concluded the May 2021 Letter by informing [the Appellant] that AEP 'looks forward to [the Appellant's] prompt payment.' The May 2021 Letter therefore clearly conveys a 'final' decision by the Director."[31]

[70] The Appellant submitted the Director's position that AEP's May 26, 2021 Letter does not contain a decision and was provided to "clarify" and provide "further support" for AEP's position is unsupportable on the facts, stating, "A careful review of the entire May 2021 Letter shows that the Director went beyond simply reiterating the positions outlined in the June 2019 Letter."[32]

[71] The Appellant submitted AEP's May 26, 2021 Letter reiterated the substance of their June 24, 2019 Letter but went further in expressly referencing the Appellant's MSLs, the royalty exemptions, and the OAG Audit before concluding the Invoices were correct and must be paid. None of those items were addressed in AEP's June 24, 2019 Letter. The May 26, 2021 Letter outlines a fresh decision by the Director concerning the Appellant's MSLs and the royalty exemptions.

[72] The Appellant stated:

> "When the May 2021 Letter is reviewed in its entirety and considered in light of the June 2019 Letter, the Meeting and [the Appellant's] April 2021 Letter, it is clear that the May 2021 Letter reflects a new decision by the Director that can be reviewed by the Board. Indeed, it is the only instance since June 2019 where the Director conveyed an actual decision concerning [the Appellant's] MSLs and the Royalty Exemptions to [the Appellant]."[33]

[73] The Appellant submitted the Notice of Appeal was filed on June 14, 2021, 19 days after AEP's May 26, 2021 Letter was received, which is within the 20-day limitation period prescribed under section 217 of PLAR.

Analysis

[74] AEP's May 26, 2021 Letter purports to clarify AEP's position in regards to the AEP's June 24, 2019 Letter. Though the letter asserts the same information was provided, a review of the June 24, 2019 Letter from AEP shows that the information provided in the May 26, 2021 Letter in regards to the OAG Audit was absent.

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31 Appellant's Submission, dated July 16, 2021, at paragraph 57.

32 Appellant's Submission, dated July 16, 2021, at paragraph 61.

33 Appellant's Submission, dated July 16, 2021, at paragraph 64.

Classification: Public

[75] Further, AEP's decision in regards to the OAG Audit findings was absent from the June 24, 2019 Letter.

[76] AEP's May 26, 2021 Letter contains new information. This information is clear and unambiguous. The letter provides what has been noted as a requirement of a decision when it is communicated to an affected party. The May 26, 2021 letter is not a letter of confirmation. It is a decision letter.

[77] The date of AEP's May 26, 2021 Letter is 19 days from the date the Notice of Appeal was received by the Appeals Co-ordinator. The Notice of Appeal was received within the legislated timeframes established under section 217(1)(a) of PLAR, which states:

> 217(1) A notice of appeal must be served on the appeals co-ordinator within
>
> (a) 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to, or
>
> (b) 45 days after the date the decision was made,
>
> whichever elapses first.

[78] The Notice of Appeal was received within the legislated timeframes established.

Should the Appeals Co-ordinator exercise the discretion to extend the deadline for the Appellant to file the Notice of Appeal?

Analysis

[79] As the Notice of Appeal was found to be received within the legislated timeframes, a determination as to whether it is in the public interest to extend the time for service is not required.

IV. DECISION

[80] The Board's Appeals Co-ordinator finds AEP's June 24, 2019 Letter to the Appellant and the December 2020 and February 2021 Invoices were not decisions. The May 26, 2021 Letter from the Director was a decision letter. The Appeals Co-ordinator received the Notice of Appeal on June 14, 2021, 19 days after the decision letter was received by the Appellant, which is within the legislated timeframe established under section 217 of the PLAR.

Classification: Public

Dated on September 3, 2021, at Edmonton, Alberta.

-original signed-__________________
Gordon McClure
Appeals Co-ordinator and Board Chair

Classification: Public