
ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – December 13, 2022

IN THE MATTER OF sections 121, and 123, of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211 and 228 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 decision of the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Forestry, Parks and Tourism, to amend a disposition issued under the *Public Lands Act* and the variation under the *Public Lands Act* of a term or condition of a disposition, specifically the dispositions are Surface Material Leases 000002 and 000033.

Cite as: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Forestry, Parks and Tourism* (13 December 2022), Appeal No. 21-0003-ID5 (A.P.L.A.B.), 2022 ABPLAB 12.

BEFORE:

Mr. Gordon McClure, Appeals Co-ordinator and Board Chair, Dr. Nick Tywoniuk, Board Member, and Ms. Barbara Johnston, Board Member.

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, Forestry, Parks and Tourism, represented by Mr. Larry Nelson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

This is the Public Lands Appeal Board's (the Board) decision regarding a preliminary motion by Syncrude Canada Ltd. (Syncrude) evidence not in the Department's Record or the Director's File in the hearing of its appeal of the decision by the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Forestry, Parks and Tourism (the Director), to require Syncrude to pay royalties on surface materials extracted (sand and gravel) from its oil sands operations. Syncrude claimed the Director's predecessors had agreed to exempt Syncrude from paying royalties on the surface materials when they were used for certain purposes.

Syncrude has requested the affidavit of one of their employees and attached exhibits be admitted as evidence in the hearing.

The Board determined the following:

- the Affidavit and the Exhibits are admitted as evidence in the hearing;
- the Director will be provided an opportunity to submit written questions to Syncrude regarding the Affidavit and Exhibits;
- the Board will determine the weight to assign the Affidavit and Exhibits as part of its deliberations in the hearing; and
- Syncrude and the Director may address the question of weight in their written submissions for the hearing.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board’s panel (the “Board”) appointed to hear the preliminary motion by Syncrude Canada Ltd. (“Syncrude”) to admit the “Affidavit of Isabelle Shelvey on Behalf of Syncrude Canada Ltd.” (the “Affidavit”) and its Exhibits A, B, C, and D (the “Exhibits”), as evidence for the hearing of Appeal No. 21-0003 (the “Appeal”).

[2] The Board decided the following:

- the Affidavit and the Exhibits are admitted as evidence in the hearing;
- the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Forestry, Parks and Tourism (the “Director”),¹ will be provided an opportunity to submit written questions to Syncrude regarding the Affidavit and Exhibits;
- the Board will determine the weight to assign the Affidavit and Exhibits as part of its deliberations in the hearing; and
- Syncrude and the Director (collectively the “Parties”) may address the question of weight in their written submissions for the hearing.

II. BACKGROUND

[3] On May 26, 2021, the Director advised Syncrude it was required to pay royalties on surface materials extracted from two Surface Material Leases held by Syncrude (the “Decision”), SML 000002 and SML 00003 (the “SMLs”). Syncrude claimed Environment and Protected Areas’ (“FPT”) predecessors had agreed to exempt Syncrude from paying royalties on surface materials extracted from the SMLs when Syncrude used the surface materials for certain purposes (the “Royalty Exemptions”). On June 14, 2021, Syncrude appealed the Decision by filing a Notice of Appeal with the Board.

[4] On June 16, 2021, as per the Board’s usual process, the Board wrote to the Parties acknowledging the receipt of the Notice of Appeal and requesting the Director provide:

“... all records (and electronic media) in the Department’s possession in relation to Surface Material Leases 000002 and 000033 and Mineral Surface

¹ On October 23, 2022, responsibility for Public Lands was moved from Alberta Environment and Parks to Forestry, Parks and Tourism.

Leases 352 and 973220, including policy documents, guidelines, and directives, along with an index”² (the “Department’s Record”).³

[5] On June 25, 2021, the Director requested the Board dismiss Syncrude’s Notice of Appeal for being filed after the legislated deadlines. The Director did not respond to the Board’s request for the Department’s Record.

[6] On June 30, 2021, the Director requested the Board dismiss Syncrude’s Notice of Appeal for not being within the Board’s jurisdiction.

[7] After considering submissions from the Parties, the Board made decisions on both motions. On September 3, 2021, the Board decided Syncrude had filed the Notice of Appeal within the legislated timelines,⁴ and on January 14, 2022, the Board determined it had jurisdiction to hear the Appeal.⁵

[8] On January 16, 2022, the Board requested again that the Director provide the Department’s Record. The Director responded on January 21, 2022, that “...the Director

² The Board’s letter, June 16, 2021.

³ 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...” The Board notes the term “director’s file” does not appear anywhere else in the legislation.

Section 209(m) of PLAR states “‘record’ means record as defined in the *Freedom of Information and Protection of Privacy Act*...” Section 1(q) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, states:

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

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

⁴ *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.

⁵ *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (14 January 2022), Appeal No. 21-0003-ID2 (A.P.L.A.B.), 2022 ABPLAB 1.

anticipates being able to provide the Director's Record to the Board on March 18, 2022.”⁶ On January 25, 2022, Syncrude wrote to the Board and expressed concern that the provision of the Director's Record by March 18, 2022, “... may adversely affect the Board's ability to conduct a fair hearing within the timelines...” under PLAR.⁷

[9] On January 27, 2022, the Board wrote to the Parties and noted the Board initially requested the Department's Record on June 16, 2021. The Board also noted the Act required an order regarding the Appeal to be issued within one year from the date the Notice of Appeal was filed,⁸ which in this appeal was June 14, 2022. The Board stated that if the Department's Record was provided by March 18, 2022 there would only be 88 days for the appeal process to be completed, which would be insufficient time for a thorough review of the Department's Record and the completion of the appeal process. The Board requested the Director provide the Department's Record by February 28, 2022.

[10] The Director responded on February 3, 2022, stating:

“The Director has been compiling the records for the Appeal, and has previously provided a number of records as part of the preliminary matters. However, given the history of the Dispositions, there are thousands of additional pages of materials regarding the management of the Dispositions generally. These additional materials were not considered by the Director in making the decision and are of doubtful relevance in relation to the merits of the Appeal. However, since the Board has requested *all* materials relating to the Dispositions that are in the Department's possession, these additional materials would need to be retrieved, reviewed, compiled and indexed. The Director and his staff will be hard pressed to complete this even by March 18.”⁹

The Director noted that the “director's file” consisted of the records of the Department that the Director considered in making the Decision. The Director proposed that the Director's file could

⁶ Director's letter, June 25, 2021.

⁷ Syncrude's letter, January 25, 2022.

⁸ 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...”

⁹ Director's letter, February 3, 2022.

be provided by February 16, 2022, and if Syncrude had any concerns that relevant records were missing the Director would make a targeted search for those additional records.

[11] On February 7, 2022, Syncrude responded to the Director's proposal, and stated:

“The Director has never objected to providing the complete Director's Record and, in fact, agreed to provide the entire record by March 18, 2022. When the Board advised that disclosure by that date would not allow enough time to complete the appeal, the Director offered to only disclose the records he considered when making the decision ('Director's File'). Appeals before the Board are not based on the 'Director's file.' Rather, they are based on the Director's 'record.’”¹⁰

Syncrude indicated it had several concerns regarding “partial disclosure” from the Director.

Syncrude stated:

“There is a risk that partial disclosure by the Director will omit relevant documents. The Director has indicated that he did not believe he was amending a disposition when issuing May 2021 letter decision ('Decision'). If the Director did not appreciate the nature of his decision and the impacts on Syncrude's dispositions, it is reasonably foreseeable that the Director may not have considered all records in [FPT]'s possession that are relevant to such a decision. In addition, records related to how [FPT] and its predecessors administered the surface material and surface material royalty provisions of Syncrude's dispositions could provide important context to inform the Board's recommendations, even if they were not considered by the Director.”¹¹

[12] On February 17, 2022, the Board advised the Parties it had determined the following:

“The complete Department's record, and not a subsection of the Department's record, is required for the Board to make an informed recommendation to the Minister.

The dates suggested by the Director for providing the Department's record would require the Board to implement an abbreviated hearing schedule that may negatively impact procedural fairness for Syncrude and the Director.”¹²

¹⁰ Syncrude's letter, February 7, 2022.

¹¹ Syncrude's letter, February 7, 2022.

¹² The Board's letter, February 17, 2022.

[13] The Board found it could not resolve the appeal within the one-year period set by set by section 236(1)(b) of PLAR, without jeopardizing procedural fairness. Therefore, the Board determined it would be appropriate to extend the appeal beyond the one-year time-period, as per section 236(4) of PLAR.¹³

[14] On February 22, 2022, the Board requested the Director provide the Department's Record by March 18, 2022.

[15] On February 23, 2022, the Board provided a proposed hearing schedule to the Parties and requested comment. The proposed schedule included dates for the provision of affidavits. On February 28, 2022, the Director wrote to the Board and noted:

“As stated in section 120 of the Public Lands Act, appeals are to ‘be based on the decision and the record of the decision-maker.’ As such, there are limited circumstances in which materials outside the Director’s Record may be considered by the Board. These situations were recently set out by the Board as follows:

‘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 second situation is where an appellant can provide records that should have been included in the Director’s File, but [were] omitted.’

Evidence not in the Director’s File must also follow the Board’s process for submitting evidence.”¹⁴

The Director stated that as the Director’s Record had yet to be provided, it was premature to speculate whether additional materials would be necessary for the Appeal, and the Board’s established process should be followed if additional materials were requested to be admitted.

[16] On April 22, 2022, Syncrude advised the Board “... the Parties have agreed on a proposed hearing process for the Board’s consideration.” Syncrude proposed creating a

¹³ Section 236(4) of PLAR states: “Despite sections 221(1)(a) and (b) and 233(3), an appeal to which subsection (3) applies must proceed or be continued under this Part as if the applicable time period under subsection (1)(a), (b) or (c) had not expired.”

¹⁴ Director’s letter, February 28, 2022.

compendium of evidentiary records it intended to rely on in the hearing (the “Compendium”). Syncrude stated that the complete evidentiary record would consist of the Director’s file, any additional Syncrude affidavit evidence and records admitted by the Board, the Compendium, and responses to questions filed by the Parties.

[17] On April 22, 2022, the Director responded to Syncrude’s letter of the same date and stated:

“We have discussed the hearing process for the written hearing with the Appellant’s counsel and have had an opportunity to review the letter he sent to the Board of today’s date. We are in agreement with the process as proposed by the Appellant, provided that if additional evidence from the Appellant is admitted as evidence for the Appeal (including from the Syncrude Compendium), then the Director reserves the right to refer to and rely on further materials contained in Department’s Record for the purposes of clarifying, rebutting or otherwise responding to the additional evidence from the Appellant.”¹⁵

[18] On May 4, 2022, the Board wrote to the Parties and set out the hearing process, which incorporated the Parties’ proposed schedule, including a provision for Syncrude to file a motion to admit additional evidence and an opportunity for the Director to respond.

[19] On August 2, 2022, Syncrude provided the Board with a Notice of Motion - Request to Admit Additional Evidence. The motion requested the Board admit the Affidavit and its Exhibits. On August 12, 2022, the Director responded to the Notice of Motion, and on August 12, 2022, Syncrude filed a rebuttal with the Board. On September 22, 2022, the Board’s panel met to consider the Parties’ written submissions and decide on the Notice of Motion.

III. SUBMISSIONS

A. Syncrude

[20] Syncrude requested the Board admit the Affidavit as evidence in the hearing. Syncrude noted that section 120 of the Act required an appeal to be based on the decision and record of the decision-maker. However, Syncrude submitted the Board could admit additional

¹⁵ Director’s letter, April 22, 2022.

evidence if that evidence met the requirements set by the Board in *1657492 Alberta et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks*.¹⁶

[21] Syncrude also referred to the decision of the Board in *Smoking Diesel Contracting Ltd. and Trent Zelman v. Director* (“*Smoking Diesel*”),¹⁷ where the Board found that an affidavit sworn by an appellant to an appeal was admissible. Syncrude submitted that the Affidavit was a sworn statement by its corporate representative and was therefore relevant and admissible. Syncrude stated the information in the Affidavit is “rationally connected to the Appeal Record in that it provides details, clarifies, or helps the Board understand the evidence found in the Appeal Record.”¹⁸

[22] Syncrude submitted the Affidavit provided background information about its operations and its use of surface materials in the mining process, which was an important context and relevant and material to the Board’s understanding of the issues in the Appeal. Syncrude stated the Affidavit provided information regarding Syncrude’s historical reliance on the Royalty Exemptions and the acceptance of the Royalty Exemptions by FPT.

[23] Syncrude stated that Exhibits A and B of the Affidavit are email exchanges with FPT representatives. Exhibit A is a letter sent by a Syncrude representative to an FPT auditor answering a question from the FPT auditor about why Syncrude was claiming an exemption for sand and other material. Exhibit B included correspondence between a Syncrude representative and an FPT auditor concerning a surface material audit. Syncrude stated that in the email exchange Syncrude’s representative explained why it was exempt from royalties on certain surface materials and referenced the Royalty Exemptions. Syncrude submitted the Affidavit and Exhibits A and B were relevant and material to demonstrating FPT’s historical practice of allowing and accepting the Royalty Exemptions.

¹⁶ *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.), 2018 ABPLAB 25, at paragraphs 146 and 147.

¹⁷ *Smoking Diesel Contracting Ltd. and Trent Zelman v. Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (30 June 2021), Appeal No. 20-0024-ID1 (A.P.L.A.B.), 2021 ABPLAB 12.

¹⁸ Syncrude Notice of Motion, August 2, 2022, at paragraph 10.

[24] Syncrude stated the Affidavit addressed FPT's process that existed before the Director issued the Decision. Syncrude noted Exhibit C included email correspondence between Syncrude and FPT raising Syncrude's concerns with FPT's invoices in December 2020. Syncrude noted that the Department's Record contained references to correspondence and a meeting between Syncrude and FPT, which included the Director. The Director's responses to information requests from Syncrude addressed meetings between Syncrude and FPT that occurred before the Decision was issued.

[25] Syncrude submitted the information provided in Exhibit C clarified and completed information provided in the Department's Record, particularly regarding a March 30, 2021 meeting between FPT and Syncrude to discuss the Royalty Exemptions (the "Meeting"). Syncrude noted the Decision referenced the Meeting and the Director responded to questions posed by Syncrude in this hearing process regarding the Meeting. Syncrude stated that as a matter of fairness, it should be permitted to present evidence on the Meeting discussions.

[26] Syncrude stated Exhibit D to the Affidavit was a letter sent to the Director from Syncrude following the Meeting. The letter set out Syncrude's position that it was entitled to the Royalty Exemptions. Syncrude noted the letter was "expressly referenced in the opening line of the Decision."¹⁹ Syncrude submitted the letter in Exhibit D was relevant to the process the Director followed when making the Decision.

[27] Syncrude stated the Decision focused on barring Syncrude's claim the Royalty Exemptions retroactive to the beginning of the 2019 reporting period by requiring Syncrude pay the invoices referred to in the Decision. However, Syncrude submitted the Decision has a larger scope. Syncrude stated:

"Actions by and correspondence from [FPT] prior to the Decision demonstrate that [FPT] intends to apply the Decision retroactive to a date earlier than that expressly indicated in the Decision (i.e. prior to January 1, 2019). The result is that the adverse effects of the Decision on Syncrude's

¹⁹ Syncrude Notice of Motion, August 2, 2022, at paragraph 18.

rights are more significant than the millions of dollars expressly demanded by [FPT] in the Decision for the 2019 and 2020 reporting years.”²⁰

Syncrude said the Affidavit provided “... essential clarification on the scope of the Decision and the consequences of the Decision to Syncrude.”²¹

B. Director

[28] The Director submitted the Affidavit should not be admitted, but agreed to the inclusion of the Compendium as evidence. The Director stated that under the Act and PLAR, appeals before the Board are on the record, which the Director said meant only those records of the Department that are considered by the Director in making the decision.

[29] The Director stated:

“While there may be limited circumstances in which additional materials may be considered by a panel hearing an appeal, section 228(b) of the Regulation requires the parties to agree on such additional evidence. In this case, the Director does not agree to the inclusion of the Affidavit.

Since the Affidavit is not part of the of the record and the Director does not agree to its inclusion as evidence for the Appeal under section 228(b) of the Regulation,²² the Director submits that the panel hearing this Appeal must refuse to admit and consider the Affidavit for the Appeal.”²³

[30] The Director noted the Compendium included materials from Parts 3 and 4 of the Department’s Record, which were not materials considered by the Director in making the Decision, and the Compendium was not part of the record under section 120 of the Act. However, the Director stated he did not object to including the Compendium and agreed it could be admitted as evidence in the Appeal.

²⁰ Syncrude Notice of Motion, August 2, 2022, at paragraph 20.

²¹ Syncrude Notice of Motion, August 2, 2022, at paragraph 19.

²² Section 228(b) of PLAR states:

“A panel hearing an appeal may...

(b) admit any evidence agreed to by the parties...”

²³ Director’s Response Submission, August 12, 2022, at page 1.

C. Syncrude’s Rebuttal

[31] Syncrude stated the Director ignored previous decisions from the Board regarding admitting additional evidence in certain circumstances. Syncrude stated:

“Allowing one party to the Appeal to unilaterally veto the admission of evidence that is relevant to the issues identified by the Board would be unfair to Syncrude and inconsistent with the Board’s mandate to provide the best possible advice to the Minister.”²⁴

[32] Syncrude submitted the Board should consider the Notice of Motion based on the criteria established in past decisions. Syncrude stated the Affidavit was relevant to the Appeal and requested the Board admit it into evidence.

IV. ANALYSIS

[33] The Board follows a two-part process regarding evidence that is not part of the Department’s Record. The Board must first decide whether the evidence is admissible. If the Board determines the evidence is admissible, then the Board considers the weight that should be given to the evidence. The party applying to admit the evidence has the onus to prove that the evidence is admissible and that it should be assigned a particular weight.

A. Admissibility

[34] The Board has the responsibility under the Act and PLAR to provide a report and recommendations to the Minister of the department the director is assigned to. In this appeal, the Director is assigned to Forestry, Parks and Tourism (“FPT”). The Board has undertaken to provide the best possible advice to the Minister on appeals. This involves a thorough consideration of the legislation, the submissions of the parties, and the relevant evidence contained in the Department’s Record.

[35] Section 120 of the Act states: “An appeal under this Act must be based on the decision and the record of the decision-maker.” FPT, as a department, is the ultimate decision-

²⁴ Syncrude’s Rebuttal Submission, August 19, 2022.

maker for public lands dispositions, with the Director making decisions on behalf of FPT. The Director is appointed to the position by FPT, and FPT can change the appointment.

[36] The Department's Record is the full record relating to a public lands disposition, in this situation, the Syncrude SMLs and the Royalty Exemptions. The Department's Record is not a static collection of records. New records created by the disposition holder, FPT, or other involved parties will be added to the Department's Record.

[37] The Director's File (referred to by the Director as the "Director's Record") is a subset of the Department's Record and is defined in section 209(f) of PLAR 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." However, this definition is the only place the term "director's file" appears in the legislation. As prescribed by the Act, the Director, when making a decision on behalf of FPT, considers records from the Department's Record. Information or documents gathered by the Director in the Director's File during the decision-making process become part of the Department's Record.

[38] As an appeal is based on the decision and the Department's Record, it is essential to procedural fairness that the Department's Record is complete for the following reasons:

- (a) If relevant records are missing from the Director's File or the Department's Record, then the decision could be based on irrelevant considerations (incorrect facts). In such a situation, the decision could be void.
- (b) An appellant has the right to know the case against them. If the record is incomplete then an appellant may not have the necessary evidence to present their case fully and fairly to the Board.²⁵
- (c) If relevant records are missing from the Department's Record or the Director's File, the Board may not have sufficient information and evidence to provide recommendations to the Minister.
- (d) If the record is incomplete, it may undermine public confidence in the appeals system and the credibility of FPT. A complete record shows

²⁵ See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 30.

transparency and increases public confidence in the appeals system and the FPT.²⁶

For these reasons, the Board may consider admitting relevant evidence that:

- (a) may be missing from the Department's Record or the Director's File; or
- (b) evidence that is not part of the Department's Record or the Director's File, but would assist the Board in understanding the context of an appeal.

[39] The Board may admit evidence not in the Department's Record if the evidence:

- (a) is rationally connected to the Department's Record;
- (b) provides detail and clarification that assists the Board in understanding the Department's Record; and
- (c) is relevant to the scope of the appeal.²⁷

[40] To be rationally connected to the Department's Record, the evidence must be related to a specific record in the Department's Record. The stronger the connection, the more likely the evidence will be admissible. The evidence must provide detail or clarification of an existing record in the Department's Record, assist the Board in understanding the existing record, and be relevant to the issues in the appeal.

[41] In *Smoking Diesel*, the Board commented on the admissibility of an affidavit from an appellant. The Board stated:

“An affidavit from an appellant is no different from an appellant providing testimony at a hearing, particularly as section 229 of [PLAR],²⁸ allows oral

²⁶ In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, the Supreme Court of Canada stated at paragraph 95:

“That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.”

²⁷ *Smoking Diesel Contracting Ltd. and Trent Zelman v. Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (30 June 2021), Appeal No. 20-0024- ID1 (A.P.L.A.B.), 2021 ABPLAB 12, at paragraph 22.

²⁸ Section 229 of PLAR states:

“A panel hearing an appeal

questioning at a hearing and written questioning where the hearing is by written submissions. The Director, in a hearing, may present arguments or evidence to refute [the appellant's] statements, or to argue the Board should not consider those statements.”²⁹

[42] Syncrude submitted the Affidavit provides historical context for the Appeal. If the hearing were an oral hearing, Syncrude would be able to present the historical context in testimony and the Director would be able to test that testimony by examination. In a written hearing, Syncrude can only provide such context through its written submissions or an affidavit.

[43] The Board finds the information in the Affidavit to be related to the records in the Department's Record. The Affidavit referred to a March 23, 1979 letter from the Alberta Ministry of Energy and Natural Resources (a predecessor of FPT and Alberta Energy) that Syncrude alleged set out circumstances where Syncrude could use certain surface materials without paying a royalty. This letter is in the Department's Record and the Director's File.³⁰ The Affidavit refers to the May 31, 2000 letter from FPT's predecessor, Alberta Environment, providing guidance on when Syncrude would not be required to pay royalties. This letter also is in the Department's Record and the Director's File.³¹

[44] The Affidavit provided an overview of Syncrude's project operations, its surface materials use, and a history of the Royalty Exemptions. The Board finds the overview and history helpful in understanding the large and somewhat disordered Department's Record.

[45] The Affidavit's purpose was to provide information and context on the Royalty Exemptions, which is well within the scope of the appeal.

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- (a) must give each party an opportunity to direct questions to other parties in attendance at an oral hearing, and
 - (b) may give each party an opportunity to direct written questions to other parties where the appeal is heard on the basis of written submissions.”

²⁹ *Smoking Diesel Contracting Ltd. and Trent Zelman v. Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (30 June 2021), Appeal No. 20-0024- ID1 (A.P.L.A.B.), 2021 ABPLAB 12, at paragraph 47.

³⁰ Director's File, at Tab 25.

³¹ Director's File, at Tab 26.

[46] The Board finds the Affidavit meets the test to be admitted as evidence in the hearing.

[47] The Board considered the admissibility of each of the Exhibits. Exhibit A consists of an email from FPT to Syncrude regarding the Royalty Exemptions and Syncrude's response. Exhibit B contains an email exchange between Syncrude and FPT that included the provision by Syncrude of one of the documents Syncrude relied on for its Royalty Exemption. Exhibit C comprises emails between FPT and Syncrude regarding the invoices FPT sent to Syncrude that caused Syncrude to file its Notice of Appeal. Exhibit D is a letter from Syncrude to the Director in response to the invoices. The Board finds the Exhibits are rationally connected to the Department's Record, provide detail and clarification that assists the Board in understanding the Department's Record, and are relevant to the scope of the Appeal.

[48] The Director objected to the Affidavit and the Exhibits on the grounds that they are not part of the "record," which the Director interprets as the Director's File. In this appeal, the Board specifically requested the Department's Record, which is a more fulsome record consisting of the Director's File and other records relevant to the Appeal. On February 11, 2022, legal counsel for the Director wrote to the Board and stated the Director, "advises that he would be able to provide the Record, with all of the materials requested by the Board..." The Director distinguished between the Director's File, "containing all records considered in making the decision and relevant to the Appeal," and the Department's "larger Record," consisting of "all the materials requested by the Board..."³² The Board notes the Director agreed to admit the Compendium, which the Director acknowledged included records the Director did not consider when making the Decision.

[49] The Department's Record, the Compendium, and the Exhibits contain records not in the Director's File, but which are relevant to the Appeal. Additionally, FPT either generated or contributed to those records. The Board finds the Director's opposition to admitting the Affidavit and Exhibits as evidence in the hearing to be inconsistent with the Director's prior agreement to admit the Department's Record and the Compendium.

³² Director's Letter, February 11, 2022.

[50] The Board notes that Exhibits A, B, and C, are email exchanges where FPT either initiated communication with Syncrude or responded to emails from Syncrude. These emails are not included in the Director's File or the Department's Record provided by the Director. Exhibit D is a letter sent by Syncrude to the Director explaining why Syncrude should be permitted to continue its reliance on the Royalty Exemptions. Although there is no record of the Director responding to the letter, there has been no indication from the Director that he did not receive the letter. The Director did not take the opportunity to explain in his written submission why these records were not part of the Director's File or the Department's Record.

[51] The Board finds the Exhibits are relevant, missing records that should have been included in the Director's File or the Department's Record but were not. As noted, appeals before the Board are based on the decision and record of the decision-maker. To preserve procedural fairness in an appeal the Board considers it essential for the record to be thorough and complete.

[52] The Board finds the Affidavit and the Exhibits are related to multiple records in the Department's Record, provide detail and clarification that assists the Board in understanding the Department's Record, and are relevant to the scope of the Appeal. Therefore, the Board admits the Affidavit and the Exhibits as evidence in the hearing.

B. Weight

[53] Consistent with the Board's usual practice, the weight to assign to the Affidavit and the Exhibits will be determined once the Board has considered the evidence in the context of the Parties' submissions. The Board will determine the weight to assign the Affidavit and Exhibits as part of the Board's deliberations on the Appeal. The Parties may address the weight the Board should assign to the Affidavit and Exhibits in their written submissions for the hearing.

[54] Although the Director and Syncrude have already exchanged questions under section 229(b) of PLAR, procedural fairness requires that the Director have the opportunity to examine Syncrude on the Affidavit and Exhibits. The Board will provide a schedule for the Director to direct written questions to Syncrude on the Affidavit and Exhibits.

V. DECISION

[55] In determining whether to grant Syncrude's preliminary motion to admit the Affidavit and Exhibits as evidence in the hearing, the Board has considered the relevant legislation, caselaw, and the Parties' written submissions, and has decided the following:

- the Affidavit and the Exhibits are admitted as evidence in the hearing of the Appeal;
- the Director will be provided an opportunity to submit written questions regarding the Affidavit and Exhibits to Syncrude;
- the Board will determine the weight to assign the Affidavit and Exhibits as part of its deliberations in the hearing; and
- the Parties may address the question of weight in their written submissions for the hearing.

Dated on December 13, 2022, at Edmonton, Alberta.

"original signed by"
Gordon McClure
Appeals Co-ordinator and Chair

"original signed by"
Dr. Nick Tywoniuk
Board Member

"original signed by"
Barbara Johnston
Board Member