
ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – June 22, 2023

IN THE MATTER OF sections 121, 122, 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 1753368 Alberta Ltd., of the decision by the Director, Northeast Lands Manager, Forestry and Parks, to refuse an application for SML 180043 from 1753368 Alberta Ltd.

Cite as: *1753368 Alberta Ltd. v. Director, Northeast Lands Manager, Forestry and Parks* (22 June 2023), Appeal No. 22-0008-R (A.P.L.A.B), 2023 ABPLAB 10.

BEFORE:

Dr. Brenda Ballachey, Panel Chair; and Mr. Kurtis Averill, Panel Member.*

SUBMISSIONS BY:

Appellant: Ms. Tracy Kolody and Ms. Cindy Duchesne, of 1753368 Alberta Ltd.

Director: Mr. Darrell Kentner, Director, Northeast Lands Manager, Forestry and Parks.

* Mr. Gordon McClure, the Board Chair, was originally assigned to his panel, but did not take part in making this Report and Recommendations. Dr. Ballachey and Mr. Averill constitute the quorum for this panel.

EXECUTIVE SUMMARY

In 2018, 1753368 Alberta Ltd. (the Appellant), applied to Alberta Environment and Parks (in 2022, Alberta Forestry and Parks succeeded Alberta Environment and Parks as the department responsible for public lands. Alberta Environment and Parks and Alberta Forestry and Parks are collectively, the Department) for a sand and gravel Surface Material Lease (the SML) under the *Public Lands Act* (the Act) and the *Public Lands Administration Regulation* (PLAR). After the Appellant submitted the SML application, the Department increased the required buffer between the boundary of a surface material lease and a Sharp-tailed Grouse lek* from 500 meters to 1600 meters.

In July 2022, the Director for the Department refused the Appellant's SML application for the following reasons:

- a Sharp-tailed Grouse lek was discovered within 1600 meters of the SML boundaries; and
- the Appellant had not complied with some of the requirements of a Supplemental Information Request provided by AEP.

The Appellant appealed the refusal to the Public Lands Appeal Board (the Board).

The Board scheduled a hearing of the appeal by written submissions and provided an opportunity for the parties to make any preliminary motions before the hearing. The Appellant responded with a list of records they wanted to have included as evidence for the hearing. The Board requested and received written submissions on the Appellant's preliminary motion. The Board decided to admit records that were agreed upon by the parties, and other records the Board would assign weight to at the hearing.

The Board identified the issues for the hearing as follows:

1. What is the appropriate weight the Board should assign to the Appellant's documents admitted by the Board in its February 22, 2023 decision?
2. Did the Director, who made the decision to refuse an application for SML 180043, err in the determination of a material fact on the face of the record or err in law by:
 - (a) not complying with section 9(5)(a) of PLAR;
 - (b) not complying with section 9(5)(b) of PLAR;

* A "lek" is defined as "an assembly area where animals (such as the prairie chicken) carry on display and courtship behavior." <www.merriam-webster.com/dictionary/lek>.

- (c) not complying section 10(4) of PLAR;
 - (d) not complying with section 9(6) of PLAR; and
 - (e) breaching the duty to act fairly?
3. Did the Director, who made the decision to refuse an application for SML 180043, exceed his jurisdiction or legal authority by allowing the application to proceed?
 4. Did the Director, who made the decision to refuse an Application for SML 180043, not comply with a regional plan approved under the Alberta Land Stewardship Act by failing to comply with the Cold Lake Regional Plan and the Lower Athabasca Regional Plan?
 5. Is the Director's decision expressly subject to appeal under section 15 of PLAR or section 59.2(3) of the *Public Lands Act*?

After reviewing the parties' written submissions, the Director's File, and the relevant legislation and case law, the Board made the following findings on the issues for the hearing:

1. What is the appropriate weight the Board should assign to the Appellant's documents admitted by the Board in its February 22, 2023 decision?

The Board assigned low weight to each of the documents it considered as the documents were not relevant to the issues or contained information already available in the Director's File.

2. Did the Director, who made the decision to refuse an application for SML 180043, err in the determination of a material fact on the face of the record or err in law by:

- (a) not complying with section 9(5)(a) of PLAR?

The Board found the Director made a procedural mistake in not complying with section 9(5)(a) of PLAR by accepting the application when it did not include the Grouse Survey as required. However, the Board found the Director's mistakes were not fatal to the decision for two reasons: (1) the mistake did not impact the decision because the Director corrected the mistake by requesting the Grouse Survey later in the approval process, and (2) the Appellant failed to meet the onus to comply with the requirements for a disposition application.

- (b) not complying with section 9(5)(b) of PLAR?

The Board found the Director did not err in the determination of a material fact on the face of the record or err in law by failing to consider section 9(5)(b) of PLAR, which requires the Director to consider the merits of a disposition application. The Board found the Director appropriately considered the merits of the Appellant's application.

(c) not complying section 9(6) of PLAR?

The Board found the Director erred in law by failing to comply with section 9(6) of PLAR which required the Director to register acceptance or rejection of the Application within 30 days of receipt of the application. Section 15 of PLAR states the Appellant may appeal non-compliance with section 9(6) as a deemed rejection. However, the Appellant's active participation in the regulatory approval process after the 30 day-period expired nullified the deemed rejection ground for appeal.

(d) not complying with section 10(4) of PLAR?

The Board found the Director erred in law by failing to comply with section 10(4) of PLAR which required the Director to make a merit review decision within one year of the completeness review decision. However, although failure by the Director to meet a statutory deadline may be an error in law, it is not a matter that is appealable to the Board and, therefore, the Board is unable to consider it as a ground of appeal.

(e) breaching the duty to act fairly?

The Board found the Director did not breach the duty to act fairly. The Board found:

- i. the Director did not create legitimate expectations;
- ii. the Director was not at fault for any failure to provide the Appellant with Sharp-tailed Grouse surveys or studies as requested in the Appellant's freedom of information application;
- iii. the Director was not required to advise the Appellant of any change in the Department's Master Schedule of Standards and Conditions (MSSC) in 2018 and again in 2021;
- iv. the Director appropriately considered the Appellant's mitigation strategies.
- v. the Director has no duty to ensure the standards and conditions are the same for the Alberta Energy Regulator and the Department;
- vi. the years that it took to review the application and the correspondence that was provided was unfortunate, but not a breach of administrative fairness; and
- vii. the Director did not fetter his discretion by applying the MSSC to the decision.

3. Did the Director, who made the decision to refuse an Application for SML 180043, exceed his jurisdiction or legal authority by allowing the application to proceed when it did not comply with the guidelines?

The Board found the Director's jurisdiction in this matter was set out in the legislation and the Director did not exceed his jurisdiction or authority in making the decision.

4. Did the Director, who made the decision to refuse an application for SML 180043, not comply with a regional plan approved under the *Alberta Land Stewardship Act* by failing to comply with the Cold Lake Regional Plan and the Lower Athabasca Regional Plan?

The Board found the Director's Decision complied with the Cold Lake Regional Plan and the Lower Athabasca Regional Plan.

5. Is the Director's decision expressly subject to appeal under section 15 of the *Public Lands Administration Regulation* or Section 59.2(3) of the *Public Lands Act*?

The Board found that while the decision was expressly subject to an appeal under section 15 of PLAR, the Appellant waived the right to appeal the decision as a deemed rejection by continuing to participate in the regulatory approval process and not appealing a deemed rejection until after the Director's decision was issued.

The Board recommended the Minister confirm the Director's decision to refuse the Appellant's application for SML 180043 and dismiss the Appellant's appeal.

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I. INTRODUCTION

[1] This is the Public Lands Appeal Board’s (the “Board”) report and recommendations to the Minister of Forestry and Parks regarding an appeal by 1753368 Alberta Ltd. (the “Appellant”). The Appellant filed a Notice of Appeal with the Board, as per section 121(1) of the Public Lands Act, R.S.A. 2000, c. P-40 (the “Act”),¹ and section 211(c) of the Public Lands Administration Regulation, A.R. 187/2011 (“PLAR”).² The Appellant appealed the decision of the Northeast Lands Manager, Forestry, Parks and Tourism (the “Director”), to refuse the Appellant’s application for a sand and gravel Surface Material Lease SML 180043 (the “SML”).

II. BACKGROUND

[2] On November 14, 2018, the Appellant applied to Alberta Environment and Parks³ (“the Department”) for the SML (the “Application”), located at SW and NW 26-62-6-W4 (the “Lands”), northeast of the Town of Bonnyville in the Municipal District of Bonnyville. The Appellant had previously held Surface Material Exploration Licence SME 160087 (the “SME”) for the same area. As part of the application, a Landscape Analysis Tool Report (the “LAT Report”) was generated that provided terms and conditions from the Master Schedule of Standards and Conditions (“MSSC”), June 28, 2017 (“MSSC 2017”).⁴ The LAT Report included Condition 1351-AS, which states: “The disposition holder shall not conduct any

¹ 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.”

² Section 211(c) of PLAR states:
“The following decisions are prescribed as decisions from which an appeal is available: ...
(c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act...”

³ On October 24, 2022, responsibility for public lands was transferred to Alberta Forestry and Parks. The Board will refer to AEP and Alberta Forestry and Parks as (the “Department”).

⁴ Master Schedule of Standards and Conditions, June 8, 2017, <open.alberta.ca/publications/master-schedule-of-standards-and-conditions>.

activities within 500 meters of the perimeter of any known or identified active sharp-tailed grouse lek sites.”⁵

[3] On November 22, 2018, the Department updated MSSC 2017, replacing it with MSSC, November 2018 (“MSSC 2018”).⁶ Condition 1642-AS of the new MSSC 2018 stated: “The Disposition Holder must not conduct any activities within 1600 meters of the perimeter of any known or identified active sharp-tailed grouse lek sites.”⁷

[4] On January 9, 2019, the Department determined the SML application was complete and advised the Appellant the Department had “one year to reach a merit decision for issuance or refusal of the formal application. The applicant will be notified of the merit decision in writing within that time period.”⁸

[5] On November 1, 2019, the Appellant submitted a Conservation Operation Reclamation Plan (“CORP”) to the Director.

[6] On March 12, 2020, the Department sent the Appellant a Supplemental Information Request (“SIR”). The SIR required the Appellant to provide the following:

1. a more fulsome mitigation plan for potential effects to wildlife and species of management concern;
2. a wildlife survey in accordance with the Alberta Sensitive Species Inventory Guidelines, particularly as the Lands were within a Sharp-tailed Grouse Survey Zone;
3. a proposal addressing nesting raptors, active nests and habitat which complied with Environment Canada recommendations regarding migratory birds, and met the requirements of the MSSC 2018;⁹

⁵ Master Schedule of Standards and Conditions, June 8, 2017, <open.alberta.ca/publications/master-schedule-of-standards-and-conditions>, at page 51.

⁶ Master Schedule of Standards and Conditions, November 2018, <open.alberta.ca/publications/master-schedule-of-standards-and-conditions>.

⁷ Master Schedule of Standards and Conditions, November 2018, <open.alberta.ca/publications/master-schedule-of-standards-and-conditions>, at page 149.

⁸ Director’s File, at Tab 2.

⁹ Master Schedule of Standards and Conditions, <open.alberta.ca/publications/master-schedule-of-standards-and-conditions>.

4. a more detailed final closure plan addressing mitigation for the loss and fragmentation of wildlife habitat and wildlife displacement during the life of the sand and gravel operations;
5. details on potential end pit water bodies;
6. mitigation plans for any on-site extraction activities such as crushing, screening, and asphalt production;
7. a vegetation assessment of the Lands;
8. a soil assessment of the Lands;
9. air photos or topographical maps describing features of the Lands;
10. confirmation that the Appellant will follow the “Guide to Water Act Authorizations Required for Dugouts, Borrow Pits and other types of Pits/Excavations”¹⁰ document;
11. provision of average pit depth and extraction setback;
12. provision of the estimated topsoil and subsoil replacement depths and estimated topsoil and subsoil replacement volumes;
13. correction of a discrepancy in the reclamation topics in the application;
14. sequential timelines for the activities and approximate size for each mining phase;
15. response to the Department’s questions regarding reclamation plans; and
16. submission of a brief strategy proposing a reclamation monitoring plan.¹¹

[7] On June 24, 2020, the Department wrote to the Appellants and stated a security deposit and a plan of survey for the lease boundaries were required before the disposition could be issued.

[8] On April 12, 2021, the Appellant wrote to the Department and expressed concerns with some of the SIR requirements, particularly with the requirement for a Sharp-tailed Grouse survey (the “Grouse Survey”). On April 30, 2021, the Department responded that a Grouse Survey must be completed and submitted. On May 26, 2022, the Appellant provided the Grouse Survey to the Department.

¹⁰ Guide to Water Act Authorizations Required for Dugouts, Borrow Pits and other types of Pits/Excavations <open.alberta.ca/publications/guide-to-water-act-authorizations-required-for-excavations>.

¹¹ Director’s File, at Tab 4.

[9] On July 13, 2022, the Director wrote to the Appellant and advised that the SML application was refused for failing to “meet all of the departmental requirements for issuance of the formal disposition” (the “Decision”).¹² The Director provided the following reasons for refusing the Application:

1. the Grouse Survey found a Sharp-tailed Grouse lek within 1600 meters of the Appellant’s SML. The 1600 meters included the entire SML boundary and rendered it a no-activity zone. The mitigation proposed by the Appellant did not align with the MSSC, April 2021 (“MSSC April 2021”); and
2. points 4 to 16 of the SIR had not been resolved.

[10] On July 26, 2022, the Appellant filed a Notice of Appeal with the Board, appealing the Decision to refuse the SML application. The Appellant listed the following grounds for appeal:

The Director or Officer who made the decision:

- erred in the determination of a material fact on the face of the record,
- erred in law,
- exceeded the Director's or Officer's jurisdiction or legal authority,
- did not comply with a regional plan approved under the *Alberta Land Stewardship Act*, or
- the decision is expressly subject to appeal under Section 15 of the Public Lands Administration Regulation or Section 59.2(3) of the Public Lands Act (this is for appealing a deemed rejection because of the failure of a Director or Officer to approve or refuse an application for a disposition, authorization, or approval within a 30-day time limit unless an extension was approved).

[11] Under the heading “what do you want from this appeal?” The Appellant stated the following:

- reversal of the decision to refuse our application; therefore, approve our SML;
- our SML to be assessed/processed using the guidelines that were in place at the time our SME was accepted/approved - January 31, 2017;
- additional time to complete our CORP;

¹² Director’s File, at Tab 1.

- or full compensation for all costs incurred after our SME was accepted.”¹³

[12] On July 29, 2022, the Board acknowledged receipt of the Notice of Appeal and requested the Department’s Record from the Director, which the Board noted consisted of:

- “1. The Director’s decision;
2. The Director’s file as defined in section 209(f) of PLAR;¹⁴
3. All related records in the Department’s possession as defined under section 209(m) of PLAR;¹⁵
4. All related policy documents, guidelines, and directives available to the Director when the decision was made; and
5. An index.”¹⁶

[13] On September 22, 2022, the Director provided the Director’s File,¹⁷ which the Board distributed to the Parties.

[14] The Board held a mediation between the Appellant and the Director (collectively, the “Parties”) via video conference, on October 25, 2022. The Parties did not reach an agreement.

¹³ Appellant’s Notice of Appeal, July 26, 2022.

¹⁴ Section 209(f) of PLAR states: “‘director’s file’, 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 this definition is the only place “director’s file” appears in PLAR or the Act.

¹⁵ 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 the department’s records related to the SML, which is any of the information as defined in section 1(q) of the *Freedom of Information and Protection of Privacy Act*.

¹⁶ The Board’s Letter, July 29, 2022.

¹⁷ As previously noted, section 209(f) of PLAR states: “‘director’s file’, 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...”

[15] On October 28, 2022, the Board wrote to the Parties and advised it would schedule a hearing of the Appeal by written submissions, and requested the Parties raise any preliminary issues for the Board to decide before the hearing.

[16] On November 17, 2022, the Appellant provided documents it wished for the Board to consider, including documents the Appellant stated the Director did not have when making the Decision. The Board scheduled written submissions for the Appellant's motion to admit the documents as evidence in the hearing.

[17] On February 22, 2023, after considering the Parties' submissions, the Board decided to admit the following records as evidence in the hearing:

1. records already in the Director's File;
2. records the Parties agreed to admit; and
3. records the Board would admit and assign appropriate weight at the hearing.

The Board refused to admit as evidence records introduced by the Appellant that did not fit in these categories.¹⁸

[18] After providing an opportunity for the Parties to comment on the issues, the Board scheduled a hearing by written submissions and received submissions from the Parties between April 4 and May 11, 2023.

[19] The panel appointed by the Board to hear the Appeal met on May 15, 2023, and again on May 24, 2023, and made its report and recommendations to the Minister.

III. ISSUES

[20] The Board set six issues to be addressed at the written submissions hearing:

1. Did the Director who made the decision to refuse the Application for SML 180043 err in the determination of a material fact on the face of the record?

¹⁸ *1753368 Alberta Ltd. v. Director, Northeast Lands Manager, Forestry, Parks and Tourism* (22 February 2023), Appeal No. 22-0008-ID1 (A.P.L.A.B), 2023 ABPLAB 2.

2. Did the Director who made the decision to refuse the Application for SML 180043 err in law?
3. Did the Director who made the decision to refuse the Application for SML 180043 exceed his jurisdiction or legal authority?
4. Did the Director who made the decision to refuse the Application for SML 180043, not comply with a regional plan approved under the *Alberta Land Stewardship Act*?
5. Is the Director's decision expressly subject to appeal under Section 15 of the Public Lands Administration Regulation or Section 59.2(3) of the Public Lands Act? and
6. What is the appropriate weight the Board should assign to the Appellant's documents admitted by the Board in its February 22, 2023 decision?

[21] The Board notes the Appellant raised several issues in their submissions. The Appellant's arguments combined alleged errors of fact and errors of law by the Director, therefore, the Board, after reviewing the issues, has categorized them as follows:

1. What is the appropriate weight the Board should assign to the Appellant's Documents admitted by the Board in its February 22, 2023, decision?
2. Did the Director, who made the decision to refuse an Application for SML 180043, err in the determination of a material fact on the face of the record or err in law by:
 - (a) not complying with section 9(5)(a) of PLAR;
 - (b) not complying with section 9(5)(b) of PLAR;
 - (c) not complying section 9(6) of PLAR;
 - (d) not complying with section 10(4) of PLAR; and
 - (e) breaching the duty to act fairly?
3. Did the Director, who made the decision to refuse an Application for SML 180043, exceed his jurisdiction or legal authority by allowing the application to proceed?
4. Did the Director, who made the decision to refuse an Application for SML 180043, not comply with a regional plan approved under the *Alberta Land Stewardship Act* by failing to comply with the Cold Lake Regional Plan ("CLRPP") and the Lower Athabasca Regional Plan ("LARP").
5. Is the Director's decision expressly subject to appeal under section 15 of PLAR or section 59.2(3) of *the Public Lands Act*?

IV. LEGISLATION AND POLICY

[22] To best understand the Appeal and the Board's decision it is important to understand the regulatory review process followed by the Department when a disposition application is received for sand and gravel. The process is outlined in the the Department document entitled, "Process for the Issuance and Maintenance of Applications and Dispositions for Surface Material (Excluding Peat) Operations on Public Land" ("Process for Surface Material Dispositions").¹⁹

[23] The first step is called a "Completeness Review." The Completeness Review consists of two separate reviews, the Technical Review, which ensures the proposed sketch or survey plan meets the required standards, and the Administrative Review, where regulatory staff assess the application documents "... to ensure content meets regulatory standards and that the correct documents and information have been provided accurately."²⁰

[24] An application for a SML must include, among other documents, a LAT Report, a Conservation and Reclamation Business Plan or Conservation Operation Reclamation Plan, and any required application supplements.²¹ Application supplements provide regulatory staff with information regarding the proposed development of the SML in relation to the standards and conditions identified by the LAT Report and the MSSC. Application supplements are considered "...part of the disposition document, [and] they are subject to Department inspection and compliance review."²²

¹⁹ "Process for the Issuance and Maintenance of Applications and Dispositions for Surface Material (Excluding Peat) Operations on Public Land", <<https://open.alberta.ca/publications/process-for-issuance-and-maintenance-for-surface-material-excluding-peat-operations-on-public-land>>."

²⁰ "Process for the Issuance and Maintenance of Applications and Dispositions for Surface Material (Excluding Peat) Operations on Public Land", <<https://open.alberta.ca/publications/process-for-issuance-and-maintenance-for-surface-material-excluding-peat-operations-on-public-land>>, at page 10.

²¹ "Process for the Issuance and Maintenance of Applications and Dispositions for Surface Material (Excluding Peat) Operations on Public Land", <<https://open.alberta.ca/publications/process-for-issuance-and-maintenance-for-surface-material-excluding-peat-operations-on-public-land>>, at page 10.

²² "Process for the Issuance and Maintenance of Applications and Dispositions for Surface Material (Excluding Peat) Operations on Public Land", <<https://open.alberta.ca/publications/process-for-issuance-and-maintenance-for-surface-material-excluding-peat-operations-on-public-land>>, at page 6.

[25] Section 11(5) of PLAR provides a director 30 days to accept or reject the application,²³ although the time may be extended by a further 90 days.²⁴ At the conclusion of the Completeness Review, section 11(4) of PLAR states that if the application does not meet the requirements, the Director "... must reject the application..."²⁵

[26] If the application meets the requirements in the Completeness Review it proceeds to the second step of the application review process, the Merit Review. In a Merit Review, regulatory staff consider multiple factors including whether:

- the proposed activity is acceptable and in the best interest for the land base;
- the proposed activity is in compliance with any applicable regional plans;
- the proposed activity does not impact or conflict with existing land uses or stakeholders;
- applicable certain standards are met.²⁶

[27] The Process for Surface Material Dispositions document states that the Department:

"...will evaluate the application and any proposed mitigation strategies identified in consultation with other Department/Agency divisions and referral agencies. This enables discussion between industry and regulatory staff regarding the proposed mitigation strategies and how to best minimize impacts to landscape sensitivities. The regulatory [staff] must determine if any mitigation strategies identified in the Mitigation Supplement will be accepted or refused."²⁷

[28] Regulatory staff provide a merit rationale recommendation to the director, and the applicant is notified of the decision. The director has one year from the end of the Completeness

²³ Section 11(5) of PLAR states: "The director or officer must register a notice of the acceptance or rejection of an application under this section within 30 days after receiving the application."

²⁴ Section 15(2) of PLAR states: "The director may, by written notice to the applicant, extend the 30-day period referred to in subsection (1) for a further period not exceeding 90 days if the director considers it appropriate to do so in the circumstances."

²⁵ Section 11(4) of PLAR states: "The director or officer must register a notice of the acceptance or rejection of an application under this section within 30 days after receiving the application."

²⁶ "Process for the Issuance and Maintenance of Applications and Dispositions for Surface Material (Excluding Peat) Operations on Public Land", <<https://open.alberta.ca/publications/process-for-issuance-and-maintenance-for-surface-material-excluding-peat-operations-on-public-land>>, at page 8.

²⁷ "Process for the Issuance and Maintenance of Applications and Dispositions for Surface Material (Excluding Peat) Operations on Public Land", <<https://open.alberta.ca/publications/process-for-issuance-and-maintenance-for-surface-material-excluding-peat-operations-on-public-land>>, at page 8.

Review to register a notice of issuance or refusal to issue the disposition.²⁸ If the director, based on the merit review and the input from the regulatory staff, decides to issue the disposition, the disposition is issued with terms and conditions from the MSSC, or other terms and conditions chosen by the director. Section 10(2) of PLAR states: “The director may issue a formal disposition subject to any terms and conditions the director considers appropriate.” If the decision is to refuse to issue the disposition, the applicant may request written reasons for the decision.²⁹

V. STANDARD OF REVIEW

[29] In previous appeals, the Board has determined the appropriate Standard of Review to be applied to appeals before it is correctness. In this Appeal, the Board has reviewed the Standard of Review and has considered the role of the Director and the Department, the role of the Board to advise the Minister, and the role of the Minister as the final decision-maker.³⁰ The Board finds nothing significantly unique in this Appeal to warrant a different Standard of Review from previous appeals. The Board finds the appropriate Standard of Review for this Appeal is correctness.

VI. ANALYSIS

A. **Issue 1: What is the appropriate weight the Board should assign to the Appellant’s Documents admitted by the Board in its February 22, 2023 decision?**

[30] The Board identified the following documents which it would admit and assign weight to in the hearing:

1. Email exchange between Appellant and Basin Environmental Ltd., February 11 – April 12, 2022;

²⁸ Section 10 (4) of PLAR states: “The director must register a notice of the issuance or refusal to issue within one year after registering a notice under section 9(6).”

²⁹ Section 10 (5) of PLAR states: “Where the director refuses to issue a formal disposition to an applicant, the applicant may submit a written request to the director requesting written reasons for the decision.”

³⁰ *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, at paragraph 130.

2. Email exchange between Appellant and Basin Environmental Ltd. re: Sharp-tailed Grouse Survey, May 19, 2022 – May 25, 2022;
3. Photo of SML site, May 19, 2022; and
4. Email from the Department to the Appellant, March 18, 2021.³¹

[31] The Board finds the email exchanges between the Appellant and Basin Environmental Ltd., February 11 – April 12, 2022, and May 19, 2022 – May 25, 2022, and the photo of the SML site, May 19, 2022, to be of low value to the Board in its deliberations for the following reasons:

- (a) the emails and the photo documenting the finding of the lek 700 meters from the boundary of the SML, is information available in the Director's File;³²
- (b) the emails and the photo were not available to the Director when the Decision was made; and
- (c) the Appellant has not provided sufficient reasons why the emails and the photo should be relevant to the Board.

[32] The email from the Department to the Appellant, March 18, 2021, advises the Appellant that the Department has changed the staff member assigned to the Application. The Board finds the email is not relevant to the Appeal and is of lesser value to the Board.

B. Issue 2: Did the Director, who made the decision to refuse an Application for SML 180043, err in the determination of a material fact on the face of the record or err in law by:

- (a) not complying with section 9(5)(a) of PLAR?
- (b) not complying with section 9(5)(b) of PLAR?
- (c) not complying section 9(6) of PLAR?
- (d) not complying with section 10(4) of PLAR? And
- (e) breaching the duty to act fairly?

³¹ *1753368 Alberta Ltd. v. Director, Northeast Lands Manager, Forestry, Parks and Tourism* (22 February 2023), Appeal No. 22-0008-ID1 (A.P.L.A.B), 2023 ABPLAB 2, at paragraph 53.

³² Director's File, at Tab 5.1, Sharp-tailed Grouse Survey, at page 2.

(a) ***Did the Director err by not complying with section 9(5)(a) of PLAR?***

[33] Section 9(5)(a) of PLAR states:

“The director

- (a) must reject an application if it does not meet the requirements of this section or if the applicant is served with a notice under subsection (2) and does not comply with that subsection...”

(i) *Submissions*

[34] The Appellant submitted the Director erred by failing to comply with section 9(5)(a) of PLAR, by not requiring the Appellant to provide the Grouse Survey in the Completeness Review stage. The Appellant stated the Application was incomplete and should have been rejected before the Director asked for the CORP and conducted the Merit Review. Had the Director rejected the Application for not having a Grouse Survey, the Appellant said they would have had the opportunity to determine if spending “...tens of thousands of dollars on this project was appropriate.”³³

[35] The Appellant noted the Public Lands Formal Disposition Application Process (February 16, 2018) stated:

“When the [LAT] report identifies that a Sensitive Species survey is required, these must be completed prior to proceeding with an application and submitted as part of the disposition application. If the requirement for a Sensitive Species survey is identified within the [LAT] report, the Electronic Disposition System (EDS) will not allow an application to be submitted without the Sensitive Species survey being attached.”³⁴

[Emphasis is the Appellant’s.]

[36] The Appellant submitted:

“It was the Director’s responsibility to ensure that this obligation was met or completed. Had we been held to this requirement in November 2018, we would

³³ Appellant’ Initial Submission, April 3, 2023, at paragraph 42.

³⁴ Public Lands Formal Disposition Application Process (February 16, 2018), <open.alberta.ca/publications/public-lands-formal-disposition-application-process>, at page 10.

have conducted the Sharp-tailed Grouse Survey and satisfied the MSSC 2017 conditions 1351-AS or been refused our application.”³⁵

[37] The Director submitted that a Completeness Review assesses “... at a high level...” if the required information is provided. The Director stated the Completeness Review does not include a determination of whether additional detail required by the LAT Report is included, which is part of the Merit Review.³⁶

[38] The Director said the Appellant submitted the Application prematurely, as they had not collected all the required information for the Application.³⁷ The Director submitted the onus was on the Appellant to provide proper information in the Application.

(ii) *Analysis*

[39] The Appellant seems to be arguing the Director erred by not rejecting the Application due to the Appellant’s error. The Board finds the Public Lands Formal Disposition Application Process (February 16, 2018) is very clear in stating that a Sensitive Species survey is required in an application if identified in the LAT Report. If the application does not contain the required survey, then, according to the Department’s application process, the application should be rejected.

[40] The Director’s explanation that the Completeness Review takes a high-level view of the Application, and an applicant is given the opportunity to provide further information during the Merit Review, is in the Board’s view, flexible, practical and reasonable. This allows further discussion between an applicant and the Department on the proposed project and what mitigation may be required. But, as flexible, practical and reasonable as it may be, it does not align with the process as described in Public Lands Formal Disposition Application Process (February 16, 2018). This may be confusing to applicants who assume the process will be followed as outlined. According to the documented regulatory approval process, the Director should have

³⁵ Appellant’s Initial Submission, April 3, 2023, at paragraph 40.

³⁶ Director’s Response Submission, April 25, 2023, at paragraph 51.

³⁷ Director’s Response Submission, April 25, 2023, at paragraph 47.

rejected the Application in the Completeness Review stage for not including the Grouse Survey in the Application.

[41] However, the Director's failure to reject the Application is a minor procedural misstep stemming from the Appellant's failure to include the Grouse Survey in the Application and the Department and Director's desire to provide opportunity for an applicant to correct errors in the process so their application can be given a thorough review. Such a procedural mistake is not a fatal error for two reasons:

- (1) The mistake did not affect the decision. The Director corrected the procedural mistake by requiring the Appellant to provide the Grouse Survey later in the approval process, and had the Grouse Survey available when the decision was made.
- (2) It is the Appellant's responsibility to meet the requirements for the disposition application.³⁸ This obligation is fundamental to the approval process. The Director cannot be held responsible for errors directly related to the Appellant's failure to submit a complete application unless an error by the Director is egregious. The Director is not responsible for an incomplete application that is not discovered, nor is the Director responsible for determining that an incomplete application may still proceed to the Merit Review.

[42] While it is unfortunate for the Appellant that their Application proceeded further in the process and was ultimately rejected, the responsibility for any errors stemming from the Appellant's failure to meet the basic obligation to provide a correct Application remains with the Appellant.

(b) *Did the Director err by failing to consider section 9(5)(b) of PLAR?*

[43] Section 9(5) of PLAR states:

“The director

- (a) must reject an application if it does not meet the requirements of this section or if the applicant is served with a notice under subsection (2) and does not comply with that subsection, and

³⁸ See: *Law Society of Upper Canada v. Evans*, 2008 CarswellOnt 4043, at paragraph 46.

- (b) in any other case, must accept the application and proceed to consider it on its merits.”

(i) *Submissions*

[44] The Appellant submitted the director erred by not considering the merits of the Application as required by section 9(5)(b) of PLAR.

[45] The Appellant stated the Director erred by considering the results from the Appellant’s Grouse Survey in the Director’s Merit Review. The Appellant stated the Grouse Survey did not follow the 2013 Sensitive Species Inventory Guidelines (the “Guidelines”)³⁹ as required. The Guidelines stated a survey for a Sharp-tailed Grouse must cover “... the proposed development area plus the setback distance for sharp-tailed grouse leks, 500 [meters] ... added onto the edge of the disturbance boundary.”⁴⁰ The Appellant noted the wildlife biologist, retained by the Appellant, found the lek approximately 700 meters from the SML boundary. Had the Appellant’s wildlife biologist adhered to the Guidelines the lek would not have been identified in the Grouse Survey. The Appellant submitted Department staff recognized the error and questioned whether the Grouse Survey was valid.⁴¹

[46] The Appellant stated the Director did not prove the sensitivity of the Sharp-tailed Grouse to justify the refusal of the Application. The Appellant noted that the lek was in an area that had been highly disturbed with industrial operations surrounding it. The Appellant identified the following activities around the grouse lek:

- an active oil and gas pad site approximate 500 meters from the lek;
- a reclaimed oil and gas pad site approximate 500 meters east of the lek;
- a transmission line approximately 60 m west of the lek with towers approximately hundred and 20 meters and 150 meters away;
- an access road approximately 120 meters south of the lek;

³⁹ Director’s File, at Tab 6.5.

⁴⁰ Director’s File, at Tab 6.5, at paragraph 11.3.2.2.

⁴¹ Appellant’s Initial Submission, April 3, 2023, at paragraph 58.

- Range Road 462 approximately 850 meters west of the lek; and
- a reclaimed gravel pit approximately 1000 meters northwest of the lek.

Given the high level of industrial activity surrounding the lek, the Appellant questioned the sensitivity of the Sharp-tailed Grouse in the Application area.

[47] The Appellant noted that the website for General Status of Species in Canada lists the Sharp-tailed Grouse in Alberta as “Apparently Secure.”⁴²

[48] The Appellant observed that the standards and conditions in MSSC 2018 and MSSC April 2021 are different for activities that are regulated by the Alberta Energy Regulator (AER) compared to those regulated by the Department. The Appellant stated the AER requires only a 500 meters setback from a lek for an oil pad, whereas the Department requires 1600 meters. The Appellant submitted that the discrepancy is evidence that the Department has not proven the sensitivity of the Sharp-tailed Grouse justifies the refusal of the Application.

[49] The Appellant stated the gravel operation would not permanently impact the Sharp-tailed Grouse’s habitat, and that the development, once completed, would create additional habitat. The Appellant submitted its mitigation strategies addressed any disturbances to the lek, and that they were willing to make appropriate adjustments to coexist with the Sharp-tailed Grouse.

[50] The Appellant submitted the reasons the Director provided in the Decision are not merit-based, but rather are based on changing standards, and alleged the Director did not consider the relevance of the LAT Report and MSSC 2017. The Appellant stated AEPA changed the criteria and standards for surface material development without notifying them and did not provide any rationale for applying the new conditions to the Application. The Appellant noted the Application’s LAT Report was generated before the changes to MSSC 2017, and MSSC 2017 should be the effective standards and conditions for the Application. Specifically, the Appellant specified the following MSSC 2017 conditions generated by the LAT Report should be applicable:

⁴² <search.wildspecies.ca/#/en/species-profile/Sharp-tailed%20Grouse?code=GS001101&year=2020.>

“1350-AS: Activities that occur between October 31 and March 15 can occur without a sharp-tailed grouse survey.

1351-AS: The disposition holder shall not construct any activities within 500 m of the perimeter of any known or identified active sharp-tailed grouse lek sites.

1352-AS: The disposition holder shall not conduct any activities within 100 meters from the perimeter of an active sharp-tailed grouse lek.”⁴³

[51] The Director noted MSSC 2017 was superseded in late November 2018, after the Appellant provided their initial application documents, but before they provided the information required in the LAT Report. The Director stated the updated MSSC 2018 included science-based conditions that the Department determined were required to manage species at risk, including the Sharp-tailed Grouse. The Director said updates to the MSSC are published on the Government of Alberta website.

[52] The Director stated section 10(2) of PLAR authorizes the Director to apply whatever conditions the Director considers appropriate.⁴⁴ The Director submitted it was appropriate to apply the conditions based on MSSC April 2021, which were in place at the time of the Decision and when the Appellant provided the Sharp-tailed Grouse information required for the review. The Director noted the Appellant did not initially provide all the information required for the Director to decide on the impact of the project on the Sharp-tailed Grouse.

[53] The Director stated:

“A standard process by the department for all applications and renewals is to apply the most recent conditions provided in the most recent version of the MSSC. The application for SML180043 was not singled out or treated differently than any other application the department reviews.”⁴⁵

[54] The Director submitted that the conditions produced by a LAT Report are not necessarily the final conditions. The Director noted the LAT Report provided in the Application contains the following wording:

⁴³ Appellant’s Initial Submissions, April 3, 2023, at paragraph 47.

⁴⁴ Section 10 (2) of PLAR states: “The director may issue a formal disposition subject to any terms and conditions the director considers appropriate.”

⁴⁵ Directors Response Submission, April 25, 2023, at paragraph 29.

“NOTE: Be aware that the submission of a LAT Report as part of an application submission does not infer approval of the activity. The standards and conditions identified within the LAT Report may be subject to change based on regulatory review.”⁴⁶

[55] The Director submitted the Appellant’s mitigation proposals did not align with the MSSC April 2021 and, according to the Director’s assessment, were not adequate to meet the desired outcomes and best management practices for Sharp-tailed Grouse. The Director stated his assessment was based on advice from Department subject matter experts. The Director noted that the proposed gravel pit was in a forested area, and it would have to be reclaimed to a forested area. Additionally, the Appellant’s proposed change of end land-use would not meet the Department’s standards.⁴⁷

[56] The Director acknowledged that there is a high level of disturbance already in the area where the lek was found. The Director stated:

“There is concern that cumulative effects of additional disturbance in the area will cause the grouse to abandon the location. The type and amount of disturbance are a consideration when the department establishes standards for setbacks and writes these standards into updates in the MSSC. If this sensitive species is thriving at this location the department would like to maintain it as thriving.”⁴⁸

[57] The Director indicated that he had no role in any determination of the Sharp-tailed Grouse’s status as a species at risk, and that he relied on the Department’s subject matter experts to assist him in making such determinations.

(ii) *Analysis*

[58] A decision based on the merits is defined as: “A judgment based on the evidence rather than on technical or procedural grounds.”⁴⁹ This definition is very applicable to the regulatory process undertaken by the Department when considering an application for a disposition.

⁴⁶ Director’s File, at Tab 2.

⁴⁷ Director’s Response Submission, April 25, 2023, at paragraph 75.

⁴⁸ Director’s Response Submission, April 25, 2023, at paragraph 73.

⁴⁹ *Decision on the merits*, *Black’s Law Dictionary* (11th ed. 2019).

[59] The Appellant stated that the Director erred by accepting the Grouse Survey, which was contrary to the 2013 Guidelines. The Board finds the Director did not err in accepting the Grouse Survey. Under section 10(2) of PLAR the Director has the statutory authority to apply whatever conditions the Director deems appropriate. The Board accepts the Director's submission that it is standard practice to apply the most recent MSSC conditions, and the Board finds it was appropriate for the Director to apply the MSSC conditions that were applicable at the time of the Decision.

[60] Policy, rules, and guidelines must be flexible according to the changing needs of government. The Department may change its policies at any time.⁵⁰ The Appellant had no substantive rights arising from the Application. Without an express exemption, there is no right to have the policy at the time of an application maintained until the application is granted. The Courts have stated:

“Equally fatal to the applicants' application is the concept implicit in its position that once a government program is announced and a person applies under it, the government is precluded from making any changes to the program for those persons who have submitted applications even though those applications have not yet been considered or approved. Such a concept is untenable in relation to government programs. It would also be unworkable given the many different considerations that apply to government programs and the ever present prospect that those considerations may change over time. Government programs, after all, represent government policy and reflect government priorities. Those policies and priorities will inevitably change over time.”⁵¹

The Court went on to quote from the Supreme Court of Canada decision in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*:

“No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.”⁵²

⁵⁰ Sara Blake, at paragraph 3.5.

⁵¹ *Skypower CL 1 LP v. Ontario (Minister of Energy)*, 2012 ONSC 4979, at paragraph 83.

⁵² *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at paragraph 15.

Although the quote from the Supreme Court of Canada in *Gustavson* is related to tax law, it is applicable to this Appeal, as the Appellant faces the same risk that policy may be changed and their Application affected.

[61] The Board notes that even if there had not been delays in the Merit Review, contributed to by both Parties, the MSSC 2017 condition requiring a 500-meter buffer between a lek and a gravel pit was changed only a few days after the Application was submitted, and the new condition requiring a 1,600-meter buffer would have been applicable in a more timely review.

[62] Additionally, the Board found it significant that the notice on the LAT Report warned it may be subject to change based on regulatory review. This notice should have served to advise the Appellant to take steps to be aware of any changes to the regulatory approval system, such as changes to the MSSC. The Board finds no evidence that the Appellant made any efforts to keep up to date on changes that might affect their Application.

[63] The Appellant stated the Director did not prove the Sharp-tailed Grouse was threatened, especially given the industrial activity in the area. While the Board notes there is a high degree of disturbance around the lek, the onus is not on the Director to prove his concerns regarding cumulative effects are valid. The Director must give reasons to support the Decision, which he did, but the onus is on the Appellant to provide contrary evidence if they dispute the Director's reasons. Noted administrative law expert, Ms. Sara Blake, stated: "An applicant has the onus of proving entitlement to the permit of the relief claimed. An exemption must be approved by the party that claims to be within it."⁵³ The Environmental Appeals Board (the "EAB") stated in *Fenske and Janus v. Director*: "The onus is on an appellant to provide sufficient evidence to demonstrate to the EAB that a Director's decision should be reversed or varied."⁵⁴ The Board finds the Appellant did not provide sufficient evidence to demonstrate the Director erred in his consideration of whether the Sharp-tailed Grouse was threatened by the

⁵³ Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Canada, 2017) at paragraph 2.195.

⁵⁴ *Fenske and Janus v. Director, Central Regional Services, Alberta Environment re: Beaver Regional Waste Management Services Commission* (19 May 2006), Appeal Nos. 05-044 & 05-047-R (EAB) at paragraph 41.

cumulative effect of further activity that would result from approval of the Appellant's Application.

[64] The Director found the mitigation proposal from the Appellant was insufficient. The Board found no evidence to counter the Director's findings.

[65] The Board finds the Director did not err in material fact on the face of the record or err in law by failing to consider section 9(5)(b) of PLAR. The Board finds the director appropriately considered the merits of the Appellant's Application.

(c) ***Did the Director err by not complying with section 9(6) of PLAR?***

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

(i) *Submissions*

[67] The Appellant noted the Application was submitted to the Department on November 14, 2018. The Appellant received a letter on January 9, 2019, stating:

"After a review of the application, the department has concluded that your application meets all of the requirements outlined in the completeness criteria for applications in accordance with Section 9(1) of the Public Lands Administration Regulation (PLAR). The director has made the decision to accept the application in accordance with Section 9(6) of PLAR and the decision has been registered in the departmental system on January 9, 2019."⁵⁵

[68] The Appellant submitted the Director erred in law by not registering the acceptance of the Application within the 30 days specified in section 9(6) of PLAR. The Appellant stated the Application should have been deemed rejected.⁵⁶

[69] The Director acknowledged the Application was not registered in time, and a letter extending the registration time was not found on the file. The Director noted that, although late,

⁵⁵ Director's File, at Tab 2.1.

⁵⁶ Appellant's Initial Submission, April 3, 2023, at paragraph 39.

the acceptance of the Application was registered. The Director also noted the Appellant did not appeal to the Board on the grounds of a deemed rejection, but instead "... continued to respond to the department's supplementary information requests, continued to ask for time extensions to respond to the SIRs, and continued to request a decision on the application from the director."⁵⁷

(ii) *Analysis*

[70] Breaches of section 9(6) are addressed in section 15 of PLAR, which states:

"(1) Subject to this section, an application under section 9, 11 or 13 is deemed to have been rejected if the director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.

- (a) The director may, by written notice to the applicant, extend the 30-day period referred to in subsection (1) for a further period not exceeding 90 days if the director considers it appropriate to do so in the circumstances.
- (b) If an applicant requires regulatory approval for a development on land that is the subject of a disposition for which the applicant has applied, the director may, by written notice to the applicant, extend the period referred to in subsection (1) for an indefinite period pending the outcome of any proceedings related to the regulatory approval.
- (c) A deemed rejection under this section is appealable under Part 10."

[71] The Board's understanding of the purpose of section 15 is to allow an applicant to receive a timely decision on an application by deeming the application to be rejected if a director fails to approve or reject it as complete within 30 days (or more if a director extends the time). If the application is deemed rejected, the applicant may appeal to the Board and potentially have the Minister confirm, reverse, or vary the deemed rejection.

[72] The Director acknowledged the acceptance of the Application was done after the 30-day timeframe was expired and there was no letter on file extending the period. The Board's options are to recommend the Minister either confirm, reverse, or vary the Director's deemed decision to reject the Application. However, as both Parties continued with the regulatory

⁵⁷ Director's Response Submission, April 25, 2023, at paragraph 40.

approval process after the January 9, 2019, Completeness Review decision, the use of deemed rejection of the Application is mute. By continuing to participate in the regulatory approval process after the Director's failure to provide a decision after the 30-day timeframe, and by delaying their seeking relief offered in section 15 of PLAR, the Appellant acquiesced to the process and waived their right to appeal the matter as a deemed rejection.⁵⁸

[73] Therefore, the Board finds that while the Director breached section 9(6) of PLAR, the Appellant's active participation in the regulatory approval process renders the deemed rejection ground void.

(d) *Did the Director err by not complying with section 10(4) of PLAR?*

[74] Section 10(4) of PLAR states: "The director must register a notice of the issuance or refusal to issue within one year after registering a notice under section 9(6)."

(i) *Submissions*

[75] The Appellant stated they contacted the Department on January 27, 2020, after the one-year anniversary of the January 9, 2019, Completeness Decision, to receive an update on the status of the Application. The Appellant said they did not receive any communication from the Department until March 5, 2020.

[76] The Director acknowledged not meeting the one-year deadline. The Director again noted the Appellant continued to actively participate in the regulatory approvals process.

(ii) *Analysis*

[77] Section 10(4) of PLAR is similar to section 9(6) in that 10(4) refers to a timeline to complete a decision, in this case, a Merit Review decision. Unlike section 9(6), there is no deemed rejection provision for section 10(4), or any legislated consequence for the Director failing to meet the timing requirements. Although failure by the Director to meet a statutory

⁵⁸ *Skypower CL I LP v. Ontario (Minister of Energy)* 2012 ONSC 4979, at paragraph 72.

deadline may be an error in law, it is not a matter that is appealable to the Board⁵⁹ and, therefore, the Board is unable to consider it as a ground of appeal.

(e) ***Did the Director err by breaching the duty to act fairly?***

(i) *Discussion*

[78] The duty to act fairly, often referred to as procedural fairness, is a fundamental principle of administrative law. The Courts have held:

“The basic objective of the duty to act fairly is to ensure that an individual is provided with a sufficient degree of participation necessary to bring to the attention of the decision-maker any fact or argument of which a fair-minded decision-maker would need to be informed in order to reach a rational conclusion.”⁶⁰

[79] Procedural fairness consists of two basis rights: the right to know the case against them, and the right to present their case.⁶¹ Other aspects of procedural fairness stem from these two rights.

⁵⁹ Section 211 of PLAR lists decisions that can be appealable 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.”

⁶⁰ *Kindler v. Canada (Minister of Justice)*, [1987] 2 F.C. 145, at paragraph 18.

⁶¹ *Charkaoui, Re.* (2007), [2007] 1 S.C.R. 350, at paragraph 29.

[80] The intent of procedural fairness is not to achieve “procedural perfection” but to attain an appropriate balance between the need for fairness, efficiency, and predictability of the outcome.⁶² If the balance is incorrect, the decision-maker has breached the duty to act fairly. A significant breach may render the decision-maker’s actions void. However, minor procedural technicalities or errors that are immaterial to the decision, or did not affect the outcome, will generally not be fatal to a decision.⁶³

[81] The Board has found in past decisions that the Director has a duty to act fairly.⁶⁴ It is important to note that when the Board reviews the duty of the Director to act fairly, it is not determining whether the Director was reasonable or correct, but rather whether the Director met the level of fairness required by law.⁶⁵ The degree of procedural fairness owed “... is to be decided in the specific context of each case.”⁶⁶

[82] There is a sliding scale of procedural fairness based on the seriousness of the matter and its impact on persons involved. For example, a decision-maker determining whether an immigrant should be deported is required to provide significantly more procedural fairness than a decision-maker deciding on an application for a permit because the deportation decision deals with a person’s substantive rights, such as security of the person.

[83] The leading case on procedural fairness is the Supreme Court of Canada decision, *Baker v. Canada (Minister of Citizenship and Immigration)* (“*Baker*”).⁶⁷ In *Baker*, the Court listed factors to be considered when deciding the degree of procedural fairness required. These factors are:

- (a) the nature of the decision being made and the process followed in making the decision;

⁶² *Knight v. Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 53.

⁶³ See: *Manyfingers v. Calgary (City) Police Service*, 2005 ABCA 183.

⁶⁴ See: *Normandeau v. Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks*, re: *Stanley Jensen* (19 October 2022), Appeal No. 21-0008-R (A.P.L.A.B.), 2022 ABPLAB 10.

⁶⁵ *Institute of Chartered Accountants of Alberta v. Barry*, 2016 ABCA 354, at paragraph 5.

⁶⁶ *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at paragraph 50.

⁶⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 S.C.C. 699.

- (b) the nature of the statutory scheme and the terms of the statute under which the body operates;
- (c) the importance of the decision to the individuals affected;
- (d) the legitimate expectations of the person(s) affected by the decision; and
- (e) the agency or administrator's choice of procedure.

[84] The Board has undertaken a thorough analysis of the *Baker* factors in previous decisions⁶⁸ and will rely on its previous analysis but will also consider the individual facts and circumstances of this Appeal in determining the level of procedural fairness owed. A lower level of procedural fairness does not mean the Director can make a decision without being fair. The Director must always act in a fair manner. A higher level of procedural fairness requires the Director to ensure the Appellant's rights to know the case against them and to have an opportunity to respond are met.

- (a) The nature of the decision being made and the process followed in making the decision.

[85] The more a decision is judicial in nature, the greater the degree of procedural fairness is required. A decision that is more legislative in nature requires less procedural fairness. The Board finds that the nature of the Decision is mostly a legislative decision, but the Director exercised his discretion in determining which terms and conditions were appropriate to apply. The level of procedural fairness owed is moderate.

- (b) The nature of the statutory scheme and the terms of the statute under which the body operates.

[86] The existence of an appeals system lessens the level of procedural fairness the Director must provide to the Appellant as the Appellant may appeal to the Board if they believe they were not treated in a procedurally fair manner. This suggests that the level of procedural fairness owed is lesser on the sliding scale.

⁶⁸ *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.

(c) The importance of the decision to the individuals affected.

[87] A decision that has an impact on an individual's substantive rights requires a much greater degree of procedural fairness. The Board finds that, while the Decision impacted the Appellant financially, it did not negatively impact their substantive rights. Therefore, the level of procedural fairness owed by the Director is lesser.

(d) The legitimate expectations of the person affected by the decision.

[88] The doctrine of legitimate expectations is based on the principle that procedural fairness must take into account the promises and regular practices of the decision-maker. The Board will consider the Appellant's specific allegation that the Director breached the duty to act fairly with regards to legitimate expectations further in this Report and Recommendations, but generally, the level of procedural fairness owed depends on whether the expectation was valid and the seriousness of the reliance placed on the expectation.

(e) The agency or administrator's choice of procedure.

[89] The more statutory discretion granted to the Director to create procedure, the more procedural fairness is owed. Although the Director had significant statutory discretion on which terms and conditions were appropriate, the department's policies and guidelines were a significant factor in the Decision. The Board finds the degree of procedural fairness owed in this category is moderate.

[90] The Board's application of the *Baker* factors suggests that the duty to act fairly owed by the Director to the Appellant is in the lesser to mid-range area. The Board interprets this to mean that the Director can satisfy the duty to act fairly by following existing policies that ensure the Appellant has an opportunity to present evidence and argument.

[91] The Appellant submitted the Director reached the duty to act fairly in the following instances:

1. The Director did not follow through on legitimate expectations.
2. The Director failed to provide the Appellant with any sharp tailed grouse surveys or studies as requested in the Appellant's freedom of information application.

3. The Department changed the criteria and standards for surface material leases in 2018 and again in 2021 without formally advising the Appellant.
 4. The Director had a duty to act fairly to consider the Appellant's mitigation strategies.
 5. The standards and conditions differ for AER and the Department. Fairness requires the standards to be the same.
 6. The years that it took to review the Application and the correspondence was unnecessary and led to a breach of administrative fairness.
 7. The Director treated the MSSC as binding, which fettered the discretion granted in the Act and prevented him from considering the individual merits of the Application.
1. The Director did not follow through on legitimate expectations.
- (i) *Submissions*

The Appellant submitted the Department and the Director created legitimate expectations in the June 24, 2020 letter from the Department. The letter stated, in part:

“A review of your file indicates that the department has not received the following items required before a disposition may be issued:

- Security deposit on 33.90 acres at the rate of \$1,0000/acre (\$33,900). This deposit is to ensure reclamation of the site when the disposition is cancelled, if required.
- A plan of survey for the lease boundaries. This plan must be prepared by an Alberta Land Surveyor in accordance with the *Surveys Act* and the *Land Surveyors Act*. The plan must be submitted digitally.”⁶⁹

[92] The Appellant stated they called the letter writer, who the Appellant said confirmed the security deposit and the plan of survey were all that was outstanding for the Application. The Appellant also sent a follow-up email on July 8, 2020, that stated:

“Further to our telephone conversation yesterday. I would like to confirm the following: - The deposit of \$33,900 for reclamation has been mailed to you by express post today. - We are in the process of securing a surveyor for lease boundaries as requested in your letter dated June 24/20. We hope to have this completed within the time frame requested. We will follow up with you if we need an extension as we discussed. As you confirmed, these are the last two items

⁶⁹ Director's File, at Tab 4.1.

required to satisfy all requirements for final approval of this SML. Please contact me if you have any questions or comments.”

The Department did not respond to the Appellant’s July 8, 2020, email.

[93] The Director submitted the June 24, 2020, and July 8, 2020, letters from the Provincial Approval Section erroneously advised the Appellant that the security deposit and the plan of survey for lease boundaries were the only outstanding items. The Director noted the Department corrected the error in an email on April 12, 2021, which advised the Appellant the SIR was still required.

(ii) *Analysis*

[94] The issue for the Board to determine is whether legitimate expectations were created by representations of the Department in relation to the June 24, 2020 letter. The doctrine of legitimate expectation is an extension of the rules of procedural fairness and natural justice, and:

“... is based on the principle that the ‘circumstances’ affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.”⁷⁰

[95] Legitimate expectation was defined by the Supreme Court of Canada as follows:

“Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.”⁷¹

The Court stated that legitimate expectations may arise when:

- (a) A public authority makes a promise,
- (b) That promise is to follow a certain procedure,
- (c) In respect to an interested person, and

⁷⁰ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 S.C.C. 699, at paragraph 26.

⁷¹ *Mavi v. Canada (Attorney General)*, [2011] S.C.R. 504, at paragraph 68.

(d) The interested person relied and acted upon that promise.⁷²

[96] The June 24, 2020, letter is from a public authority (an employee of the Department), but it does not make any specific promise to follow a certain procedure. It simply identifies that the security deposit and the plan of survey are required before a disposition can be issued. The Appellant's follow-up phone call to the letter writer is not sufficient evidence of a "clear, unambiguous and unqualified" promise of procedures to be followed. Additionally, the Department later clarified that the SIR was still outstanding and required before a disposition could be issued.

[97] It appears to the Board that at the time of the June 24, 2020 letter, the Edmonton office and the field office were not communicating well and were unaware of what each office was doing. Certainly, communication from the Department to the Appellant could have been significantly better. The Board understands the Department's caseload, the pandemic, and other issues may have impacted the Department's communications ability, but the result is that the Appellant was left in confusion and frustration at the conflicting information and directions they were given. Nevertheless, the Board finds the June 24, 2020, letter and the Appellant's follow-up phone call do not constitute a promise and therefore, do not create a legitimate expectation.

2. The Director failed to provide the Appellant with any sharp tailed grouse surveys or studies as requested in the Appellant's freedom of information application.

(i) *Submissions*

[98] The Appellant submitted the failure of the Director to provide the Appellant with any Sharp-tailed Grouse surveys or studies, despite the Appellant's freedom of information request, was a breach of the Director's duty to act fairly. The Director stated freedom of information requests are the responsibility of a different section in the Department.

⁷² See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

(ii) *Analysis*

[99] The Board finds the Director did not owe a duty to act fairly to provide the requested surveys and studies as it was not the Director's area of responsibility. The Director acted correctly in letting the appropriate section deal with the freedom of information request.

[100] The Board heard and acknowledges the Appellant's frustration in trying to obtain the documentation and that the Appellant felt they were shuffled between government offices with only limited success in obtaining survey information.

3. The Department changed the criteria and standards for surface material leases in 2018 and again in 2021 without formally advising the Appellant.

(i) *Submissions*

[101] The Appellant submitted the Department breached the duty to act fairly by changing the MSSC in 2018 and 2021 without providing formal notice. The Appellant stated there was no apparent rationale for applying the new conditions to their Application as the Application's LAT Report was generated before the changes to the MSSC.

[102] The Director stated that updates to the MSSC are published on the Government of Alberta website. The Director noted the LAT Report generated for the Application contained a warning that conditions can change based on regulatory review.

(ii) *Analysis*

[103] The MSSC is updated as the Department becomes aware of improved science and in response to changing circumstances. In this case, MSSC 2017 was updated to increase the buffer between a gravel pit and a lek from 500 meters to 1,600 meters, only days after the Application was submitted. The Board has already established the Director may choose the appropriate conditions for a disposition, but did the duty to act fairly require the Director to advise the Appellant of the change in the MSSC?

[104] The Board notes the LAT Report contained the following wording:

“NOTE: Be aware that the submission of a LAT Report as part of an application submission does not infer approval of the activity. The standards and conditions identified within the LAT Report may be subject to change based on regulatory review.”⁷³

The Appellant was warned that the conditions could change as the Application was reviewed.

[105] From the note in the LAT Report, it appears the Department took the view that it was an applicant’s responsibility to be educated on the regulatory requirements and any changes that might occur during the approval process. The Director stated that updated versions of the MSSC were posted on the Department’s website. Advising each applicant of changes to the MSSC would require substantial resources, which it was unlikely the Department had access to, given that the Department was dealing with a backlog of applications, which included the Appellant’s Application.

[106] The policy was available to the Appellant if they had done some basic searches on the Government of Alberta website. The Board finds notifying the Appellant of changes to the MSSC was not a procedural fairness duty owed by the Director. The Director did not err by failing to notify the Appellant of changes to the Department’s policies.

4. The Director had a duty to act fairly to consider the Appellant’s mitigation strategies.

(i) *Submissions*

[107] The Appellant stated the Director acted unfairly by not considering the Appellant’s mitigation strategies. The Appellant listed the following as their mitigation strategies:

- a. No high disturbance activities such as vegetation clearing or aggregate extraction/stockpiling, should be conducted from 15 March to 15 June.
- b. A natural treed buffer should remain between the lek site and the proposed development.
- c. Once the site has been developed, operational activities between 15 March and 15 June should only be conducted between 10:00 a.m. and 4:00 p.m.

⁷³ Director’s File, at Tab 2.

- d. A wildlife sweep should be conducted a maximum of 10 days prior to commencement of Project clearing activities, as per the MSSC.
- e. Clearing activities should be scheduled to avoid the general nesting period for migratory birds (i.e. 19 April to 29 August). If activities cannot be scheduled to avoid the general nesting period, pre-disturbance nest searches should be conducted by an experienced wildlife biologist and species-appropriate setback buffers should be established around active nests. This mitigation is specific to active nests, and does not apply to the restricted activity period (i.e. 15 March to 15 June) for the lek.”⁷⁴

[108] The Director stated he found the proposed mitigations did not align with the Department’s MSSC and were inadequate for the outcomes and best management practices for the Sharp-tailed Grouse.

[109] The Director stated in the Decision, “The mitigation provided does not align with the Master Schedule of Standards and Conditions 1741-AS.”⁷⁵ There was no other reference in the Decision to mitigation.⁷⁶

(ii) *Analysis*

[110] The Supreme Court of Canada has emphasized the importance of a decision-maker providing reasons to support the decision. In *Canada v. Vavilov*, the Court stated, “... the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it.”⁷⁷ While the Director does not have to provide detailed analysis of every aspect of the Decision, the Director does have to provide sufficient reasons to demonstrate the rationale for the Decision.

[111] The Board finds the reason provided for the Director’s rejection of the Appellant’s mitigation strategies lacks substance. The Appellant deserved to have a better explanation

⁷⁴ Appellant’s Initial Submissions, April 3, 2023, at paragraph 61.

⁷⁵ Director’s File, at Tab 1.

⁷⁶ MSSC 1741-AS states: “The Disposition Holder must not conduct any activities within 1600 meters of the permitter of any known or identified active sharp-tailed grouse lek sites.” Director’s File, at Tab 6.1.

⁷⁷ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65, at paragraph 95.

provided. However, in this situation, the lack of substance in the reason is not serious enough to render the Decision void.

[112] The Director referred to MSSC April 2021, Condition 1741-AS as the reason for refusing the mitigation strategies. The 1,600-meter buffer required by Condition 1741-AS means that any mitigation by the Appellant would be inadequate. Each mitigation strategy proposed by the Appellant requires activity within the 1,600-meter buffer, which is specifically prohibited. Although the Director could have explained this better in the Decision, upon reviewing Condition 1741-AS, the reason the Director refused the Appellant's mitigation strategies is clear.

[113] The Board finds the Director considered the Appellant's mitigation strategies and did not breach the duty to act fairly.

5. The standards and conditions differ for the AER and the Department.

(i) *Submissions*

[114] The Appellant submitted there were two sets of rules; one for AER and one for the Department. The Appellant noted sand and gravel development is more controlled than oil and gas and that disturbances can all have an effect on sensitive species. The Appellant argued if the sharp-tailed Grouse was sensitive, the buffer required between the lek and any development should be equal for oil and gas and sand and gravel.⁷⁸

[115] The Director stated it was appropriate to apply the standard conditions to the Application.

(ii) *Analysis*

[116] The Board has no jurisdiction over AER policies and cannot review whether the MSSC polices should be the same for different activities. Therefore, the Board cannot find the Director breached the duty to act fairly.

⁷⁸ Appellant's Rebuttal Submission, May 11, 2023, at paragraph 26.

6. The years that it took to review the Application and the correspondence was unnecessary and led to a breach of administrative fairness.

(i) *Submissions*

[117] The Appellant stated: “Multiple years of application review and correspondence was unnecessary and led to concerns of breach of administrative fairness.”⁷⁹

[118] The Director submitted the Application did not provide the information necessary for the Director to make a decision. The Director stated:

“The [Appellant] failed to provide a sharp-tail grouse survey with their application even though they knew, or ought to have known, that the survey was required. The survey was listed as a requirement in the LAT submitted by the [Appellant] with their initial application, however the sharp-tail grouse survey was not submitted to the department until 3.5 years later.”⁸⁰

[119] The Director stated the Appellant requested, and the Director granted, extensions to provide the information requested in the SIR. The Department granted the extensions in an attempt to work with the Appellant and be fair by providing the time requested to collect the SIR information.

(ii) *Analysis*

[120] As mentioned earlier, section 10(4) of PLAR provides one year from date of the Completeness Review for the Director to make a Merit Review decision. The Director exceeded the one-year period by almost three years. The Board notes the pandemic and the backlog of cases contributed to the delay, as did actions or inactions by both the Department and the Appellant.

[121] When considering whether there was a breach of the duty to act fairly from the delay in making a decision on the Appellant’s Application, the Board has adapted the abuse of process test provided by the Supreme Court of Canada. The Court held that delay can lead to an abuse of process if the fairness of the hearing, in this case the Director’s decision-making process, is

⁷⁹ Appellant’s Initial Submission, April 3, 2023, at paragraph 66.

⁸⁰ Director’s Response Submission, April 25, 2023, at paragraph 49.

compromised. To be compromised the delay must impair the Appellant's ability to present their case and evidence in favour of the Application. The Board finds no evidence that any delay from the Department or Director compromised the decision-making process, in fact, it appears to the Board that some of the delay was to afford the Appellant the opportunity to provide missing information to the Director so a decision could be made.

[122] If the decision-making process has not been compromised, a delay may still be an abuse of process if:

- (a) the delay is inordinate; and
- (b) the delay causes significant prejudice to the Appellant; and
- (c) the delay is manifestly unfair to the Appellant or brings the administration of the decision-making process into disrepute.⁸¹

[123] Although better communication from both Parties would have helped speed the process along, the Board finds there was not an inordinate delay in the time it took for the Director to make the Decision, the Appellant was not significantly prejudiced by the delay, the delay was not manifestly unfair to the Appellant, and the administration of the decision-making process was not brought into disrepute.

[124] The Board finds the Director did not breach the duty to act fairly in the time it took to review the Application and make the Decision.

7. The Director treated MSSC as binding, which fettered the discretion granted in the Act and prevented him from considering the individual merits of the Application.

(i) *Submissions*

[125] The Appellant submitted the Director fettered his discretion by considering the MSSC as binding on his decision-making. The Director responded that implementing standard policy and procedure is not fettering.

⁸¹ *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at paragraph 115.

(ii) *Analysis*

[126] The Board already found the Director had the authority to choose which standards and conditions were appropriate for the Application. The Board also found the Director considered the merits of the Application. 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.”⁸²

[127] The Board finds that although the Director refused to change or alter the Decision, he considered the merits of the Application and determined the most current MSSC conditions were applicable. The result of those conditions was that the Application was not appropriate for that location and the Director refused it. If the Director had not considered the merits of the Application and had simply cited policy as the reason, the Board may have found the Director relied on policy to the extent that he fettered his discretion. The application of the most current MSSC conditions and the resulting refusal of the Application was not a fettering of the Director’s discretion in making the Decision.

[128] The Board finds the Director did not fetter his discretion in applying the most current MSSC to the Application and did not breach the duty to act fairly.

Conclusion on Duty to Act Fairly

[129] The Board’s analysis of the *Baker* factors showed that the Director owed the Appellant a duty to act fairly on the lesser to moderate level. As stated earlier, a lesser duty to act fairly does not mean the Director can be unfair in his decision-making; the Director must still provide for a fair and unbiased decision-making process; but the rights afforded to a lower level of procedural fairness are not as demanding as a higher level.

⁸² *Lac La Biche (County) v. Lac La Biche (County) (Subdivision and Development Appeal Board)*, 2014 ABCA 305 (Alta. C.A.), at paragraph 11.

[130] The Board finds the Director met the appropriate level of procedural fairness in this Appeal, and did not breach the duty to act fairly.

C. Issue 3: Did the Director, who made the decision to refuse an Application for SML 180043, exceed his jurisdiction or legal authority by allowing the application to proceed?

(i) Submissions

[131] The Appellant submitted the Director exceeded his jurisdiction or legal authority by accepting the Grouse Survey when it did not comply with the Guidelines. The Director argued he was within his jurisdiction and legal authority to not apply the Guidelines to the Application.

(ii) Analysis

[132] The Board has already addressed the acceptance of the Grouse Survey and found that the Director did not err in the determination of a material fact on the face of the record and did not err in law because the Director was authorized under section 10(2) of PLAR⁸³ to apply any terms and conditions to the Application that he felt were appropriate.

[133] The Board finds the Director's jurisdiction in this matter is clearly set out in the legislation and the Director did not exceed his jurisdiction or authority in making the Decision.

D. Issue 4: Did the Director, who made the decision to refuse an Application for SML 180043, not comply with a regional plan approved under the Alberta Land Stewardship Act by failing to comply with the Cold Lake Regional Plan ("CLRP") and the Lower Athabasca Regional Plan ("LARP").

(i) Submissions

[134] The Appellant submitted the Director did not comply with the CLRP or the LARP. The Appellant noted the CLRP stated: "In the Cold Lake Subregion, surface material

⁸³ Section 10(2) of PLAR states: "The director may issue a formal disposition subject to any terms and conditions the director considers appropriate."

operations including sand, gravel and borrow, have a relatively small disturbance footprint compared to other industrial land uses.”⁸⁴ The Appellant also noted the LARP stated:

“Surface materials are an essential component for development and maintenance of infrastructure throughout the region and province. Maintaining opportunities for surface materials resource extraction supports the increasing need for surface materials products to keep pace with the region and provinces population growth. Maintaining opportunities for the development of these resources is critical to the success of surface materials industries.”⁸⁵

[135] The Appellant submitted the regional plans indicate surface materials are extremely important to the region and strategic to proposed developments in the area. The Appellant stated their Application was in agreement with the regional plans.

[136] The Director submitted the LARP sets out broad land management principles. The Director noted that while the LARP refers to surface materials development on public lands, it does not direct the Department to issue specific dispositions. The Director argued the Appellant did not provide any evidence to demonstrate the Director did not comply with a regional plan.

(ii) *Analysis*

[137] One of the purposes of LARP is to provide “... guidance to provincial and local decision-makers regarding land-use management for the region.”⁸⁶ The LARP states: “... the Alberta government committed to manage the cumulative effects of development on air, water, land and biodiversity at the regional level.”⁸⁷ The CLRP identifies “... ecological values and natural systems as key values when making resource development and management decisions.”⁸⁸

[138] The Board finds the CLRP and LARP do not require the Director to issue specific dispositions, but they do require the Director to consider a disposition’s cumulative effect on a

84 Appellant’s Initial Submission, April 3, 2023, at paragraph 64.

85 Appellant’s Initial Submission, April 3, 2023, at paragraph 65.

86 Director’s File, at Tab 6.2, Lower Athabasca Regional Plan, 2012 – 2022, at page 3.

87 Director’s File, at Tab 6.2, Lower Athabasca Regional Plan, 2012 – 2022, at page 3.

88 Director’s File, at Tab 6.3, Cold Lake Sub-regional Plan, at page 8.

regional basis. The Director indicated cumulative effect of development around the lek was a key factor in the Decision.⁸⁹

[139] The Board finds the Director's Decision complies with the CLRP and the LARP.

E. Issue 5: Is the Director's decision expressly subject to appeal under Section 15 of the Public Lands Administration Regulation or Section 59.2(3) of the Public Lands Act?⁹⁰

[140] Section 15 of PLAR⁹¹ requires the Director to register a notice of acceptance or rejection of the Application within 30 days as provided by section 9(6). The legislation also allows for an extension of 90 days if the Director considers it appropriate. If the timeline expires without a notice of acceptance or rejection, the application is considered "deemed rejected" and is appealable to the Board.

[141] The Board addressed this matter under Issue 1(c), "Did the Director err by not complying with section 9(6) of PLAR." The Board found the Director did not register a decision accepting the Application as complete within 30 days of its receipt, and there was no indication of an extension on the file. Therefore, the Director's decision is expressly subject to an appeal under section 15.

[142] The relief the Appellant can receive under section 15 is to appeal the deemed rejection. However, the Board found the Appellant continued to participate in the regulatory

⁸⁹ Director's Response Submission, at paragraph 73.

⁹⁰ Section 59.2(3) of the Act refers to a stop order and is not applicable to this Appeal. The section states: "A person who receives a notice referred to in subsection (2) may appeal to an appeal body in accordance with the regulations."

⁹¹ Section 15 of PLAR states:

- "(1) Subject to this section, an application under section 9, 11 or 13 is deemed to have been rejected if the director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.
- (2) The director may, by written notice to the applicant, extend the 30-day period referred to in subsection (1) for a further period not exceeding 90 days if the director considers it appropriate to do so in the circumstances.
- (3) If an applicant requires regulatory approval for a development on land that is the subject of a disposition for which the applicant has applied, the director may, by written notice to the applicant, extend the period referred to in subsection (1) for an indefinite period pending the outcome of any proceedings related to the regulatory approval.
- (4) A deemed rejection under this section is appealable under Part 10."

approval process and delayed appealing the deemed rejection until after the Director made the Decision. The Board finds the Appellant waived their right to appeal the Decision as a deemed rejection.⁹²

VII. CONCLUSION

[143] The Board acknowledges the Appellant's work and money invested in the Application, and the Appellant's frustration at the length of time the regulatory approval process took, the mixed messages provided by the Department, and ultimate rejection by the Director. The Board notes communication failures from both the Department and the Appellant led to much of the confusion around the Application. It would have been ideal if the Department had refused the Application in the Completeness Review stage, however, the Appellant did not deliver the Grouse Survey until later in the approval process and did not meet their onus to provide a complete application. Ultimately, any procedural mistakes by the Director and the Department had no impact on the outcome. The existence of the Sharp-tailed Grouse lek was the determining factor, and the Director acted appropriately to refuse an application that could not comply with the MSSC terms and conditions at the time of the Decision.

[144] The Board's findings on each issue of the hearing are as follows:

1. The Board assigned low weight to each of the documents it considered as the documents were not relevant to the issues or contained information already available in the Director's File.
2. Did the Director, who made the decision to refuse an Application for SML 180043, err in the determination of a material fact on the face of the record or err in law by:
 - (a) Not complying with section 9(5)(a) of PLAR?

[145] The Board finds the Director made a procedural mistake in not complying with section 9(5)(a) of PLAR by accepting the Application when it did not include the Grouse Survey as required. However, the Board found the Director's mistakes were not fatal to the Decision for two reasons: (1) the mistake did not impact the Decision because the Director corrected the

⁹² *Skypower CL I LP v. Ontario (Minister of Energy)* 2012 ONSC 4979, at paragraph 72.

mistake by requesting the Grouse Survey later in the approval process, and (2) the Appellant failed to meet the onus to comply with the requirements for a disposition application.

(b) Not complying with section 9(5)(b) of PLAR?

[146] The Board finds the Director did not err in the determination of a material fact on the face of the record or err in law by failing to consider section 9(5)(b) of PLAR, which requires the Director to consider the merits of a disposition application. The Board finds the Director appropriately considered the merits of the Appellant's Application.

(c) Not complying section 9(6) of PLAR?

[147] The Board finds the Director erred in law by failing to comply with section 9(6) of PLAR which required the Director to register acceptance or rejection of the Application within 30 days of receipt of the Application. Section 15 of PLAR states the Appellant may appeal non-compliance with section 9(6) as a deemed rejection. However, the Appellant's active participation in the regulatory approval process after the 30 day-period expired nullified the deemed rejection ground for appeal.

(d) not complying with section 10(4) of PLAR?

[148] The Board finds the Director erred in law by failing to comply with section 10(4) of PLAR which required the Director to make a Merit Review decision within one year of the Completeness Review decision. However, although failure by the Director to meet a statutory deadline may be an error in law, it is not a matter that is appealable to the Board⁹³ and, therefore, the Board is unable to consider it as a ground of appeal.

⁹³ Section 211 of PLAR lists decisions that can be appealable 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;

- (e) breaching the duty to act fairly?

[149] The Board finds the Director did not breach the duty to act fairly. The Board found:

- i. the Director did not create legitimate expectations;
- ii. the Director was not at fault for any failure to provide the Appellant with Sharp-tailed Grouse surveys or studies as requested in the Appellant's freedom of information application;
- iii. the Director was not required to advise the Appellant of any change in the MSSC in 2018 and again in 2021;
- iv. the Director appropriately considered the Appellant's mitigation strategies.
- v. the Director has no duty to ensure the standards and conditions are the same for AER and the Department;
- vi. the years that it took to review the Application and the correspondence that was provided was unfortunate, but not a breach of administrative fairness; and
- vii. the Director was not fettered by the way he used the MSSC in making the Decision.

3. Did the Director, who made the decision to refuse an Application for SML 180043, exceed his jurisdiction or legal authority by allowing the application to proceed when it did not comply with the Guidelines?

[150] The Board finds the Director's jurisdiction in this matter was set out in the legislation and the Director did not exceed his jurisdiction or authority in making the Decision.

4. Did the Director, who made the decision to refuse an Application for SML 180043, not comply with a regional plan approved under the *Alberta Land Stewardship Act* by failing to comply with the Cold Lake Regional Plan and the Lower Athabasca Regional Plan?

[151] The Board found the Director's Decision complied with the CLRP and the LARP.

-
- (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."

5. Is the Director's decision expressly subject to appeal under Section 15 of the *Public Lands Administration Regulation* or Section 59.2(3) of the *Public Lands Act*?

[152] The Board found that while the Decision was expressly subject to appeal under section 15 of PLAR, the Appellant waived the right to appeal the Decision as a deemed rejection by continuing to participate in the regulatory approval process and not appealing a deemed rejection until after the Director's Decision was issued.

VIII. RECOMMENDATION

[153] The Board recommends the Minister confirm the Director's Decision to refuse the Appellant's application for SML 180043 and dismiss PLAB appeal number 22-0008.

IX. OBITER

[154] The Appellant noted the Director and the Department did not refuse the Application at the Completeness Review stage despite the Application not complying with the Process for Surface Material Dispositions and the Guidelines.

[155] The Board suggests the Department review its regulatory approval guidance documents to ensure they match the actual approval process as followed by the Department. This would help resolve confusion and frustration from applicants and contribute to greater efficiency for both applicants and the Department.

Dated on June 22, 2023, at Edmonton, Alberta.

"original signed by"
Dr. Brenda Ballachey
Board Member and Panel Chair

"original signed by"
Kurtis Averill
Board Member



ALBERTA

Forestry and Parks

*Office of the Minister
MLA, Central Peace - Notley*

Ministerial Order 56/2023

*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. 22-0008

I, Todd Loewen, Minister of Forestry 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. 22-0008.

Dated at the City of Edmonton, Province of Alberta, this 26 day of July, 2023.

Honourable Todd Loewen
Minister

Appendix

Order Respecting Public Lands Appeal Board Appeal No. 22-0008

With respect to the decision of the Director, Northeast Lands Manager, Forestry and Parks (the "Director"), to refuse an application from 1753368 Alberta Ltd. under the *Public Lands Act*, R.S.A. 2000, c. P-40, for SML 180043, I, Todd Loewen, Minister of Forestry and Parks, in accordance with section 124(3) of the *Public Lands Act*, order that:

1. The decision of the Director to refuse the application for SML 180043 is varied.
2. The Director shall issue SML 180043 to 1753368 Alberta Ltd. with appropriate terms and conditions, including the following:
 - a. A wildlife sweep shall be conducted to a radius of 500 metres a maximum of 10 days prior to commencement of the clearing activities, and if any sharp-tailed grouse are found using a lek site in this area, clearing activities shall be postponed until it is determined by an experienced wildlife biologist that the lek site is no longer being actively used;
 - b. Clearing activities shall be conducted to avoid the general nesting period for migratory birds, specifically April 19 to August 29. If activities cannot be conducted to avoid the general nesting period, a pre-disturbance nest search should be conducted by an experienced wildlife biologist and species-appropriate setback buffers should be established around active nests, subject to the written approval of the Director. This mitigation is specific to active nests and does not apply to the restricted activity period (March 15 to June 15) for the lek sites.
 - c. No high disturbance activities such as vegetation clearing or aggregate extraction/stockpiling, shall be conducted from March 15 to June 15;
 - d. A natural treed buffer should remain between any known or identified active sharp-tailed grouse lek sites and the development; and
 - e. Once the site has been developed, operational activities between March 15 and June 15 shall only be conducted between 10:00 a.m. and 4:00 p.m.

Where there is an operational conflict between the terms and conditions included in the Department's Master Schedule of Standards and Conditions, the terms and conditions included in this Ministerial Order shall prevail.