

ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision: July 12, 2019

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

-and-

IN THE MATTER OF an appeal filed by JH Drilling Inc. with respect to the deemed rejection by the Director, Provincial Approvals Section, Alberta Environment and Parks, of an application for access to LOC 941422, LOC 941427, LOC 800875, LOC 941421, LOC 952469, LOC 941384, and LOC 941380 held by Sequoia Resources Corporation, and LOC 911069 held by Athabasca Oil Corporation.

Cite as: *JH Drilling Inc. v. Director, Provincial Approvals Section, Alberta Environment and Parks, re: Sequoia Resources Corporation* (12 July 2019), Appeal No. 18-0012-D (A.P.L.A.B.), 2019 A.P.L.A.B 15.

BEFORE:

Ms. Marian Fluker, Board Member.¹

SUBMISSIONS BY:

Applicant: JH Drilling Inc., represented by Ms. Alberta Devi.

Director: Ms. Corinne Kristensen, Director, Provincial Approvals Section, Alberta Environment and Parks, represented by Mr. Larry Nelson, Alberta Justice and Solicitor General.

¹ Ms. Fluker was Acting Chair of the Public Lands Appeal Board at the time the appeal was filed.

EXECUTIVE SUMMARY

JH Drilling Inc. (the Applicant) is the holder of a Surface Material Lease (SML) for a sand and gravel operation. To access the SML, the Applicant needed to use a road, which was subject to several Licences of Occupation (LOCs) held by Sequoia Resources Corporation (Sequoia). Sequoia advised the Applicant it was involved in bankruptcy proceedings and its trustee did not have the personnel or capacity to enter into road use agreements. Sequoia informed the Applicant that all requests for access should be made to the Alberta Energy Regulator (AER).

The Applicant contacted Alberta Environment and Parks (AEP) and stated it would like to apply for a road use agreement. AEP advised the Applicant to contact the local AEP regional office and apply for a temporary field authorization (TFA).

The Applicant filed a Notice of Appeal with the Public Lands Appeal Board (the Board), alleging AEP had not made a decision regarding its application within the 30-day time limit prescribed in the legislation and, therefore, the TFA application was deemed rejected. A deemed rejection is the way by which an applicant can file an appeal with the Board, which then in turn allows the Board to make a recommendation to the Minister of Environment and Parks to make a Road Use Order.

AEP stated it had not received an application for a TFA from the Applicant and, as AEP was not the regulator responsible for the LOCs, the Board did not have jurisdiction to hear the appeal. The Board requested written submissions from the Applicant and AEP regarding the question of jurisdiction. After reviewing the submissions and the relevant legislation, the Board determined the Applicant's Notice of Appeal was not properly before the Board as the Applicant had not filed a TFA application form as required by AEP. The Board dismissed the appeal.

The Board also considered the question of whether the AER or the Board has jurisdiction in appeals when the AER issues an LOC and a party requests an overlapping disposition under the jurisdiction of AEP. The Board determined that, in the interests of natural justice, and to deal with potential gaps in the legislation, the Board may hear appeals where the AER issues an LOC and an applicant, engaged in an activity under the jurisdiction of AEP, applies for an overlapping disposition. As a result, in this case, the Applicant is free to reapply to AEP for an overlapping disposition on the

licences of occupation that it required to access its SML. If AEP does not make a decision within the required time on these applications or AEP rejects these applications, the Applicant may have a right of appeal to the Board.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the “Board”), arising from an application by the Director, Provincial Approvals Section, Alberta Environment and Parks (the “Director”), requesting the Board dismiss the Notice of Appeal filed by JH Drilling Inc. (the “Applicant”). The Director submitted the Board does not have jurisdiction to hear the appeal as it is not properly before the Board under section 211 of the *Public Lands Administration Regulation*, AR 187/2011 (“PLAR”).²

II. BACKGROUND

[2] The Applicant is the holder of Surface Material Lease 100048 (the “SML”), located on public lands south of Fort McMurray, in the Municipal District of Wood Buffalo. To access the SML, the Applicant sought the use of a road referred to as the “Waddell Road.” The Waddell Road is subject to the following Licences of Occupation (“LOC”) held by Sequoia Resources Corporation (“Sequoia”), and which the Applicant would like to access to reach the SML: LOC 941422, LOC 941427, LOC 800875, LOC 941421, LOC 952469, LOC 941384, and LOC 941380.³ The

² Section 211 of PLAR provides:

“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.”

³ The Applicant was informed by Canadian Natural Resources Ltd. a suspected typing error had occurred with LOC 941380, which should be corrected to LOC 941386. The Applicant did not change the LOC numbers in the Notice of Appeal or indicate a correction was required.

Applicant would also like to access LOC 911069, which is held by Athabasca Oil Corporation.⁴

[3] On March 23, 2018, Sequoia filed for bankruptcy, and PricewaterhouseCoopers Inc. (the “Trustee”) was appointed as the bankruptcy trustee. On June 19, 2018, Sequoia advised the Applicant the Trustee did not have the personnel or capacity to accept road use agreements or third-party agreements and advised the Applicant to contact the Alberta Energy Regulator (“AER”), which was responsible for the Sequoia LOCs.⁵

[4] On August 9, 2018, the Applicant emailed the Director and the Board, advising the Applicant would like to apply for a road use agreement.

[5] On August 18, 2018, the Director directed the Applicant to contact the local office of Alberta Environment and Parks (“AEP”) and request a Temporary Field Authorization (“TFA”).

[6] On August 21, 2018, the Applicant sent an email to the AEP office in Fort McMurray, requesting a TFA to “use the road.” On August 23, 2018, AEP responded and provided the Applicant with information as to where to submit the TFA application, and requested the Applicant provide proof with the TFA application that the corporation holding the LOC is no longer operating.

[7] On August 28, 2018, the Applicant responded to AEP and advised it could not provide proof the holder of the LOC was no longer operating as the Trustee would not deal with the Applicant.

[8] On August 31, 2018, the Applicant filed a Notice of Appeal with the Board, alleging its application for a road use agreement was deemed to have been rejected under section 15 of PLAR,⁶ as the Director failed to make a decision within the 30-day time limit. In the Notice of

⁴ The Sequoia LOCs and the LOC held by Athabasca Oil Corporation will be referred to collectively as the “LOCs.”

⁵ Jurisdiction under the *Public Lands Act*, R.S.A. 2000, c. P-40, is split between the AER and AEP pursuant to the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3. The AER is responsible for the regulation of energy related activities under the *Public Lands Act*, such as issuing licences of occupation to access oil and gas wells. AEP is responsible for the regulation of non-energy related activities under the *Public Lands Act*, such as issuing licences of occupation to access sand and gravel pits.

⁶ Section 15 of PLAR provides:

“(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.

Appeal, the Applicant requested a road use agreement from the Trustee.

[9] On September 14, 2018, the Board notified the Director of the Notice of Appeal and advised if the Director did not contact the Board by September 21, 2018, the Board would process the appeal as a deemed rejection. No response was received from the Director.

[10] On October 2, 2018, the Board requested the Director's record for the matter under appeal.

[11] On October 4, 2018, the Director explained there was no record of the Applicant making any application for a disposition that could form the basis of a deemed rejection. The Director also stated the matter was under the jurisdiction of the AER and not AEP. Therefore, the Director argued the Board did not have jurisdiction to hear the appeal.

[12] On October 12, 2018, the Board requested written submissions from the Applicant and the Director (the "Parties") on the question of the Board's jurisdiction to hear the appeal. The submissions were received between November 7 and December 5, 2018.

III. VALIDITY OF THE APPEAL

A. Submissions

1. Applicant

[13] The Applicant submitted it had approached Sequoia to obtain a road use agreement to access the SML by way of the Waddell Road. The Applicant said Sequoia advised it could not enter into a road use agreement due to bankruptcy.

[14] The Applicant stated it had tried to contact the Trustee, but received no response.

(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."

[15] The Applicant explained it needed to extract the resources from the SML and was unable to use the Waddell Road without the road use agreement.

2. Director

[16] The Director submitted no decision had been made in this matter that can be appealed under section 211 of PLAR.

[17] The Director noted the LOCs the Applicant requested access to were issued by the AER. The Director explained that, as AEP is not the regulator for the LOCs, it does not have records relating to the LOCs. The Director also submitted it does not have jurisdiction to amend terms and conditions of the LOCs and does not have a “director” to make any decisions regarding the LOCs.

[18] The Director stated the Applicant indicated in its Notice of Appeal and related materials that it was seeking a road use agreement, but it had not applied for a TFA under the *Public Lands Act*.

[19] The Director argued the appeal should be dealt with under the AER’s appeal process.

3. Applicant’s Rebuttal

[20] The Applicant submitted the Board has jurisdiction under the “deemed rejection” provision of PLAR.

[21] The Applicant stated it was not asking the Director to grant a road use agreement, but instead was asking for the Director to contact the Trustee to remind it to respond to the Applicant’s requests. The Applicant hoped if the Director contacted the Trustee, the Trustee or Sequoia would participate in a mediation meeting.

B. Analysis

[22] Section 98 of PLAR⁷ states a commercial user requiring the use of the road in a

⁷ Section 98 of PLAR provides:

licensed area may use the road only by agreement with the license holder or in accordance with an order of the Minister under section 124(3) of the *Public Lands Act* on appeal to the Board.⁸ The Applicant is a commercial user and therefore requires authorization to use the Waddell Road, which is a licenced area.

[23] The Board found the submissions from the Applicant and the Director provided little assistance in determining whether there was a valid appeal.

[24] The Applicant submitted it has not been able to negotiate an agreement to use the LOCs held by Sequoia due to Sequoia's bankruptcy and the refusal of the Trustee to communicate with the Applicant.⁹

[25] In the Applicant's August 9, 2018 email to AEP, it seemed the Applicant was requesting a disposition to facilitate access to the SML. The Director, in her response on August 18, 2018, required the Applicant to apply for a TFA.

[26] Section 9(1)(a) of PLAR¹⁰ requires an application for a formal disposition to be made in the form acceptable to the director, and section 11(1)(a) of PLAR¹¹ requires an application for an authorization to be made in the form acceptable to the director. The Director required the Applicant apply for a TFA, which is an authorization under section 11 of PLAR. In order to

"A commercial user that requires use of a road in a licensed area for the purposes of the commercial user's commercial or business undertaking may use the road only

- (a) by agreement with the holder of the licence, whether reached in mediation under Part 10 or otherwise, or
- (b) in the absence of an agreement with the holder of the licence, in accordance with an order under section 124(3) of the Act on an appeal under Part 10."

⁸ Section 124(3) of the Act provides:

"On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision."

⁹ The Board notes there is no indication the Applicant attempted to negotiate an agreement with the Athabasca Oil Company, which holds LOC 911069, which the Applicant would like to use to access the SML.

¹⁰ Section 9(1)(a) of PLAR provides:

"An application to the director for a formal disposition
(a) must be made in a form acceptable to the director...."

¹¹ Section 11(1)(a) of PLAR states:

"An application to the director or an officer for an authorization
(a) must be made in a form and manner acceptable to the director or the officer to whom it is made...."

comply with the Director's instructions, the Applicant was required to fill out the TFA application form and file it with AEP.

[27] The Board found the Applicant did not fill out and file a TFA application form as instructed by the Director. As no application was made in a form acceptable to the Director, no application for an authorization was made. Therefore, section 15(1) of PLAR cannot apply as there was no application before the Director that could be deemed to have been rejected. Without a deemed rejection under section 15 of PLAR, the Notice of Appeal did not meet the requirements of section 211(e) of PLAR.¹² The Board notes if the Director had not responded to the August 9, 2018 email from the Applicant and advised the Applicant to apply for a TFA, the Board's finding might have been different.

[28] Given the appeal does not meet the requirements of section 211 of PLAR, the Board must dismiss the appeal.

IV. JURISDICTION

[29] On January 17, 2019, the Board requested the AER review the submissions of the Parties and respond to the question of jurisdiction. The AER responded on January 22, 2019. The Board forwarded the AER's response to the Director and Applicant and requested written submissions from the Parties. While a determination of this jurisdictional question is not necessary to deal with this appeal, given the finding set out above, the Board nonetheless considers it appropriate to provide the following observations in the event this question arises in the future.

A. Submissions

1. AER

[30] The AER stated it does not have jurisdiction to hear appeals and issue orders with respect to commercial road use disputes.

¹² Section 211(e) of PLAR provides:
"The following decisions are prescribed as decisions from which an appeal is available: ...
(e) a deemed rejection under section 15(1)...."

[31] The AER noted the LOCs in question are part of a legal action commenced by the Trustee against Perpetual Energy Inc. in the Court of Queen's Bench, and as such, are unlikely to be assigned at this time.

[32] The AER stated an application by the Applicant to AEP for a TFA is likely the only tenable solution under the circumstances.

[33] The AER referred to the *Joint Procedures for Issuing Road Use Authorizations under TFA for Insolvent Companies* (the "Joint Procedures Policy"), agreed to by the AER and AEP. The AER explained that under the Joint Procedures Policy, regardless of who issued the LOC, AEP, as the regulator of the Applicant's operations, had jurisdiction to consider the Applicant's request for access to the Waddell Road and issue any appropriate authorizations.

[34] In a letter dated January 22, 2019, the AER stated:

"Pursuant to the attached *Joint Procedures for Issuing Road Use Authorizations under TFA for Insolvent Companies*, agreed to by the AER and Alberta Environment and Parks (AEP), AEP is responsible for issuing authorizations for clients under its jurisdiction, regardless of whether the LOC in question was issued by the AER or the insolvent holder is or was regulated by the AER. Accordingly, as JH Drilling's operations are under AEP's regulatory authority, AEP has jurisdiction to consider JH Drilling's request and issue any authorizations that may be appropriate to provide it with the access it seeks."¹³

2. Applicant

[35] The Applicant submitted the Board has full jurisdiction to grant road use access for the LOCs held by Sequoia. The Applicant requested the LOCs be cancelled and reissued, or transferred, to the Applicant, along with existing security deposits. The Applicant also requested to speak to costs against Sequoia or the Trustee as the Applicant had been seeking access to the Waddell Road since 2012.

3. Director

[36] The Director stated she was aware of the Joint Procedures Policy, but as the Applicant had not applied for a TFA, the policy did not apply. The Director stated if the Applicant

¹³ Letter from Alberta Energy Regulator, dated January 22, 2019.

wished to pursue a road use agreement, it must negotiate with the holders of the LOCs. If negotiations are unsuccessful, the Director suggested the Applicant ask the AER to hear the road use dispute as the AER is the regulatory body with jurisdiction over the LOCs under the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3.

[37] The Director submitted if the Applicant wished to have the LOCs cancelled or transferred, it may request the AER to make such changes.

[38] The Director stated that if the Applicant wished to obtain a disposition, such as a TFA or other disposition, to access the SML, it may submit an application for the disposition to AEP. The application must be in the form and manner required under the *Public Lands Act*, PLAR, or other applicable policy or requirement, and AEP would consider the application as it would any other application.

B. Analysis

[39] The Board considered the question of whether the AER or the Board had jurisdiction in this matter. Upon reviewing the applicable legislation, it appears there is a gap in the *Specified Enactments (Jurisdiction) Regulation*, AR 201/2013, by not including road use appeals as part of the jurisdiction of the AER. This gap impacts commercial operators seeking to access an LOC issued by the AER under section 98 of PLAR. The AER confirmed in a letter to the Board dated February 22, 2019, that it does not have jurisdiction to consider commercial road use disputes. The letter reads:

“... the Alberta Energy Regulator (AER) shares the Board’s understanding that the AER was not granted jurisdiction to hear appeals and issue orders with respect to commercial road use disputes.”¹⁴

[40] It would be against the principles of natural justice if commercial operators could not enter into a road use agreement for a LOC held by an AER-regulated entity because the AER did not have jurisdiction and AEP refused to take jurisdiction. Such an interpretation could also result in a negative impact to public lands as it may result in more linear disturbances on public land, in the form of roadways, than are necessary.

¹⁴ Letter from the Alberta Energy Regulator, dated February 22, 2019.

[41] Based on the Joint Procedures Policy and the interpretation of the *Specified Enactments (Jurisdiction) Regulation*, the Board would likely accept jurisdiction in appeals in circumstances where the AER issued a disposition and an applicant, engaged in an activity under the jurisdiction of AEP, sought a road use agreement under section 98(b) of PLAR.


[42] In situations such as the Applicant's, where an LOC was issued by the AER to a disposition holder that subsequently became insolvent, an operator engaged in commercial activities regulated by AEP would need to apply for a TFA or other overlapping disposition. AEP would have to decide to refuse to issue the TFA or overlapping disposition, or make no decision (resulting in a deemed rejection), in order for an applicant to have a right of appeal to the Board. If an appeal arose from such circumstances the Board may assume jurisdiction under the Joint Procedures Policy.

V. DECISION

[43] As the Applicant's Notice of Appeal does not meet the requirements of section 211(e) of PLAR, the Board determines the matter is not validly before the Board and dismisses the Applicant's appeal.

[44] Notwithstanding this decision, it is the Board's understanding that nothing prevents the Applicant from filing a proper application with the Director for a TFA or an overlapping disposition on the LOCs to which it requires access. If the Director then refuses to grant the application or the Director does not respond within the required timeline resulting in a deemed rejection, the Applicant may then have an appeal to the Board.

Dated on July 12, 2019, at Edmonton, Alberta.


Marian Fluker
Board Member¹⁵

¹⁵ Ms. Fluker was Acting Chair of the Public Lands Appeal Board at the time the appeal was filed.