

ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations: October 15, 2020

IN THE MATTER OF sections 121, 122, and 124, of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections, 211, 212, 213, 226, 227, and 235 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 decision of the Director, Regional Compliance, Peace Region, Regulatory Assurance Division, Alberta Environment and Parks, to issue Administrative Penalty No. PLA-19/13-AP-PR-19/13 to JH Drilling Inc.

Cite as: *JH Drilling Inc. v. Director, Regional Compliance, Peace Region, Regulatory Assurance Division, Alberta Environment and Parks* (15 October 2020), Appeal No. 19-0247-R (A.P.L.A.B.), 2020 ABPLAB 17.

BEFORE:

Mr. Gordon McClure, Board Chair.

PARTIES:

Appellant: Mr. John Harms, JH Drilling Inc.

Director: Mr. Owen Cook, Director, Regional
Compliance, Peace Region, Regulatory
Assurance Division, Alberta Environment and
Parks.

EXECUTIVE SUMMARY

JH Drilling Inc. (the Appellant) is the holder of a Surface Material Lease (SML) issued by Alberta Environment and Parks. The Director, Regional Compliance, Peace Region, Regulatory Assurance Division, Alberta Environment and Parks (the Director), issued Administrative Penalty No. PLA-19/13-AP-PR-19/13 (the Administrative Penalty) to the Appellant for alleged subletting of the SML without authorization.

The Appellant appealed the issuance of the Administrative Penalty to the Public Lands Appeal Board (the Board).

The amount of the Administrative Penalty assessed by the Director was \$31,000.00. In setting the amount of the Administrative Penalty, the Director calculated a base penalty of \$10,000.00, plus an additional \$21,000.00 for factors that varied the assessment, including the proceeds (economic benefit) from subletting the SML.

An initial mediation meeting was held on April 15, 2020, which did not result in a resolution of the appeal. A second mediation meeting was later held on August 19, 2020, and a resolution was reached whereby the parties asked the Board to recommend to the Minister of Environment and Parks that the Administrative Penalty issued to the Appellant be reduced to \$14,676.00. The Board accepted the mediated agreement and recommended the Minister vary the Administrative Penalty accordingly.

TABLE OF CONTENTS

I. INTRODUCTION	1
II. BACKGROUND	1
III. DISCUSSION	5
IV. RECOMMENDATIONS	6
V. APPENDIX	7

I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the “Board”) to the Minister of Environment and Parks (the “Minister”), arising from a mediation of an appeal filed by Mr. John Harms on behalf of JH Drilling Inc. (the “Appellant”).

II. BACKGROUND

[2] On July 30, 2012, Alberta Environment and Parks (“AEP”) issued a Surface Material Lease SML 070028 (the “SML”) under the *Public Lands Act*, R.S.A. 2000, c. P-40 (“PLA”) to the Appellant for a sand and gravel operation.

[3] The Appellant is alleged to have entered into an agreement entitled “Assignment of SML #070028 and Royalty Agreement” (the “Agreement”) with another company on January 27, 2014, to work and remove surface materials. The Agreement contained several conditions for payment to the Appellant including an annual payment of \$20,000.00 and an ongoing payment based on tonnes of surface material removed from the SML, with a minimum payment of \$120,000.00 per year.¹

[4] On December 3, 2019, the Director issued Administrative Penalty No. PLA-19/13-AP-PR-19/13 (the “Administrative Penalty”) to the Appellant for alleged contraventions of sections 43(1) and 54.01(5) of the PLA.² The Administrative Penalty was in the amount of \$31,000.00, which consisted of \$10,000.00 as a base penalty, plus an additional \$21,000.00 for factors that varied the assessment, including the proceeds (economic benefit) from subletting the

¹ Assignment of SML #070028 and Royalty Lease Agreement, January 27, 2014, Director’s Record, at Tab 48.

² Section 43(1) of the Act states: “The holder shall not mortgage, assign, transfer or sublet the land contained in the holder’s disposition, or any part of it, without the written consent of the director.”

Section 54.01(5) of the Act states:

“No person shall provide or receive money or other consideration for the purpose of gaining or allowing access to, passage on or over or use of public land unless

- (a) the person receiving the money or other consideration is the holder of a disposition or authorization under section 20 and is entitled at law to receive money or other consideration for that purpose, and
- (b) the access, passage or use is in respect of public land that is the subject of the disposition or authorization.”

SML. Pursuant to section 59.4(4)³ of the PLA, the Director included \$20,000.00 for proceeds derived from the use of public land in contravention of the PLA and the *Public Lands Administration Regulation*, AR 187/2011 (“PLAR”)⁴ In the Administrative Penalty, the Director alleged the Appellant had contracted with Barsi Enterprises Ltd. to remove the surface materials in exchange for payment to the Appellant. The Director stated the Agreement amounted to an unauthorized assignment of the SML.

[5] On December 17, 2019, the Appellant filed a Notice of Appeal with the Board appealing the Administrative Penalty. The Appellant stated that by issuing the Administrative Penalty, the Director erred in the determination of a material fact, erred in law, and exceeded the Director’s jurisdiction or legal authority. On the same date, the Board wrote to the Appellant and the Director (collectively the “Parties”), providing the Director with a copy of the Notice of Appeal, and requesting the Director provide a copy of the Department’s records (all documents and all electronic media) (the “Department’s Record”) that were reviewed and that were available when making the decision, including policy documents and the records within the compliance group relating to the appeal, along with an index of the records.

[6] The Director provided the Department’s Record on January 31, 2020 and a copy was subsequently provided to the Appellant.

[7] In a letter dated February 26, 2020, the Board scheduled a mediation meeting for April 15, 2020. On April 7, 2020, the Appellant provided the Board and the Director with a mediation brief (the “Mediation Brief”) that was labelled “Without Prejudice.”

[8] The mediation meeting was held via video conference on April 15, 2020, but did not result in a resolution to the appeal.

² Section 59.4(4) of the Act provides:

“A notice of administrative penalty under this section may require one or more of the following:

- (a) payment of the penalty determined by the director under section 59.3;
- (b) any person who in the director’s opinion is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of this Act or the regulations to provide an accounting of the proceeds believed by the director to have been received by that person;
- (c) payment by a person referred to in clause (b) of any proceeds referred to in that clause, or an amount equivalent to the value of the proceeds if the person has converted the proceeds.”

⁴ *Public Lands Administration Regulation*, Alta. Reg. 187/2011.

[9] On May 25, 2020, the Appellant wrote to the Board and listed eleven categories of disclosure it sought from the Director and advised it may seek further disclosure of records.

[10] On May 27, 2020, the Board wrote to the Parties and stated:

“The Board notes the Appellant has indicated he may be seeking additional disclosure. As the Board’s appeal process is constrained by legislative timeframes, the Board requires all disclosure requests to be submitted by 4:30 pm on May 29, 2020. The request must include an explanation of why the documents already requested, and any further documents requested, are relevant to the hearing of the Administrative Penalty.”

The letter also requested the Director comment on the disclosure request, advise if he was able to provide the documents, and provide an estimate of when the documents could be made available to the Board.

[11] On May 29, 2020, the Appellant provided a list of fifteen additional disclosure categories it sought from the Director. The Board requested the Director provide comments on the disclosure request by June 5, 2020. On June 5, 2020, the Director responded to the Appellant’s disclosure request and among other comments, stated he would provide certain documents by July 31, 2020. On June 14, 2020 the Appellant requested that he be permitted to make further disclosure requests for documents not in the Department’s Record.

[12] On June 17, 2020, the Board wrote to the Parties and noted the Appellant’s disclosure request referred to grounds of appeal not included in the Appellant’s Notice of Appeal filed on December 17, 2019. The Board noted the Appellant appeared to reference the Appellant’s Mediation Brief provided on April 7, 2020. The Board explained documents submitted for the mediation are confidential, and the Board cannot consider any references to the Mediation Brief unless the Appellant waived confidentially.

[13] On June 21, 2020, the Appellant advised the Board he did not wish to waive the confidentiality of the Mediation Brief.

[14] On June 24, 2020, the Board acknowledged: the Appellant’s letters dated April 21, 2020 providing a draft list of questions based on the grounds of appeal; a letter dated April 27, 2020 at 12:03 pm, asking about the procedure for interviewing AEP staff and a Stay of Proceedings until the Court of Queen’s Bench has decided action 1503-13709 (an action

unrelated to the appeal before the Board); a letter dated April 27, 2020 at 12:04 pm, asking to view several Board files; and the Director's e-mail dated April 29, 2020, attaching his April 28, 2020 letter requesting a written hearing, opposing the Appellant's request for a Stay of Proceedings, and attaching a procedure card for court action 1503-13709; and the Appellant's June 14, 2020, 8:28 am email regarding disclosure.

[15] On July 20, 2020, the Board responded to the Appellant's correspondence acknowledged by the Board on June 24, 2020, and also responded to the Appellant's letter dated June 21, 2020, advising they do not wish to waive the confidentiality of the mediation brief; a letter dated July 10, 2020 requesting a letter from Appeal PLAB 12-0015 dated October 22, 2013, requesting further disclosure, and stating they are preparing a summary of the appeal grounds; a letter dated July 12, 2020 summarizing their grounds for appeal in support of the Appellant's disclosure request; and a letter dated July 13, 2020 seeking additional disclosure and reiterating their requests in previous correspondence. In the Board's July 20, 2020 letter, the Board stated it would issue a decision responding to the Appellant's disclosure requests, it would not permit a stay of proceedings, and responded to procedural questions with respect to a hearing.

[16] On July 24, 2020, the Board issued decision on the disclosure matter, in which the Board ordered the Director to provide certain records as they relate to the SML from the date of the issuance of the SML to the Appellant until the date the Administrative Penalty was issued. The documents were to be provided by July 31, 2020.⁵

[17] The Appellant and the Director continued their discussions regarding a resolution and exchanged emails regarding a proposed resolution of the appeal. On July 24, 2020, the Board acknowledged receipt of emails exchanged between the Parties and asked that they provide dates they were available for a mediation meeting. On July 30, 2020, the Board advised that the mediation meeting would be held via video conference on August 19, 2020.

[18] On July 29, 2020, the Board advised the Parties that a written hearing was being scheduled because of the legislated time limit of one year to hear an appeal, and set a process for

⁵ See *JH Drilling Inc. v. Director, Regional Compliance, Peace Region, Alberta Environment and Parks* (24 July 2020), Appeal No. 19-0247-ID1 (A.P.L.A.B.), 2020 ABPLAB 11, for the disclosure that was ordered by the Board.

receiving submissions to start on August 31, 2020 and end on October 28, 2020.

[19] On August 6, 2020, the Appellant wrote to the Board regarding disclosure requests. The Board stated on August 10, 2020 it did not have any outstanding disclosure requests of the Appellant and it would not entertain any further disclosure requests without significant justification and only after the disclosure documents that were expected from the Director were reviewed by the Appellant.

[20] In an email dated August 18, 2020, to the Board, the Appellant requested a stay of proceedings, stating that it is "... urgent so that [the Appellant] can prepare good and complete submissions on the many grounds of appeal that were already detailed earlier." In a letter dated August 18, 2020, the Board indicated that it would not be possible to stay the proceedings, as section 236 of the PLAR⁶ requires that a decision on an appeal must be made within one year from the date the appeal was filed; the appellant was advised that as the appeal was filed on December 17, 2019, the appeal must be decided by December 18, 2020.

[21] The Board received an email dated August 17, 2020 from the Appellant advising he had filed a judicial review of the Board's July 20, 2020 letter and July 24, 2020 decision.

[22] A mediation meeting was held on August 19, 2020, via video conference, that resulted in a resolution of the appeal.

[23] On August 20, 2020, the Board informed the Parties the hearing was cancelled and the Director did not need to provide the disclosure documents.

III. DISCUSSION

[24] The mediated agreement resulted in the Parties asking the Board to recommend to the Minister that the Administrative Penalty issued to the Appellant be reduced from \$31,000.00 to \$14,676.00.

[25] The Parties also agreed to additional terms set out in the attached agreement (Appendix), which do not require any action from the Minister.

⁶ Section 236(1)(b) of PLAR, requires the Board to complete a hearing within one year from receipt of a Notice of Appeal. In order to stay within the one year period and in response to the Covid-19 Pandemic, with agreement from the Parties, the Board scheduled a written hearing of the appeal.

IV. RECOMMENDATIONS

[26] In accordance with section 124(3) of the PLA,⁷ the Board recommends the Minister of Environment and Parks order that Administrative Penalty PLA-19/13-AP-PR-19/13 be varied by reducing the penalty from \$31,000.00 to \$14,676.00.

[27] With respect to section 124(4) of the PLA,⁸ the Board recommends that copies of this Report and Recommendations and any decision by the Minister regarding this appeal is to be provided to:

1. Mr. John Harms, JH Drilling Inc.; and
2. Mr. Owen, Cook, Director, Regional Compliance, Peace Region, Alberta Environment and Parks.

Dated on October 15, 2020, at Edmonton, Alberta.

“original signed by”
Gordon McClure
Board Chair

⁷ Section 124(3) of the *Public Lands Act* provides:

⁸ Section 124(4) of the Act states: “The Minister shall immediately give notice of any decision made under this section to the appeal body, and the appeal body shall immediately, on receipt of the notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the appeal body and to all the persons who the appeal body considers should receive notice of the decision.”

V. APPENDIX



PUBLIC DOCUMENT

RESOLUTION PUBLIC LANDS APPEAL BOARD PLAB File No. 19-0247

In the matter of the mediation of the appeal filed by JH Drilling Inc. (Appellant) in relation to the December 3, 2019 decision of the Director, Peace Region, Operations Division, Alberta Environment and Parks (Director), to issue Administrative Penalty No. PLA-19/13-AP-PR-19/13, under the *Public Lands Act*, R.S.A. 2000, c. P-40, and the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 to JH Drilling Inc. in relation to the Surface Material Lease SML 070028 located in Northern Sunrise County.

All participants to the appeal have agreed to the following terms and conditions:

1. The Appellant shall pay \$14,676.00 by cheque payable to the Government of Alberta within 30 days of the date of the Minister's Order in this matter. Payment is to be made to the Regulatory Approvals Centre, Fifth Floor, South Petroleum Plaza, 9915 – 108th Street, Edmonton AB T5K 2G8.
2. The Parties recognize that the "Barsi contract" (an agreement between the Appellant and Barsi Enterprises Ltd. ("Barsi")) is in litigation as between the Appellant and Barsi, and the Appellant is free to continue the litigation with Barsi.
3. The Administrative Penalty does not prohibit the Appellant from submitting a complete assignment application form to apply to register an assignment of SML 070028 through Alberta Environment and Parks' established assignment process. This requires the applicants not to be indebted to the crown and includes the management of the security deposit and payment of the applicable fees.
4. With respect to future monies, the Appellant is permitted to produce and sell aggregate from the SML in accordance with the disposition and the legislation. In addition, the Appellant is permitted to assign the SML in accordance with the disposition and the legislation.
5. If the Appellant assigns the SML to another operator, with the consent of Alberta Environment and Parks, the Appellant will not be subject to any further penalties related to the SML.
6. There shall not be any further penalties assessed with respect to the matters addressed by this administrative penalty.

7. THAT in consideration of the foregoing, the Appellant withdraws their Notice of Appeal in PLAB Appeal No. 19-0247.

RESOLUTION AGREED TO BY:

John Harms for JH Drilling Inc. Date: 2020/08/19
John Harms
for JH Drilling Inc.

Owen Cook Date: 2020/08/19
Owen Cook, Director
Peace Region, Operations Division
Alberta Environment and Parks



ALBERTA
ENVIRONMENT AND PARKS

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

**MINISTERIAL ORDER
55 /2020**

*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. 19-0247**

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being the Order Respecting Public Lands Appeal Board Appeal No. 19-0247.

DATED at the City of Edmonton, in the Province of Alberta, this 20 day of oct., 2020.



Jason Nixon
Minister

APPENDIX

Order Respecting Public Lands Appeal Board Appeal No. 19-0247

With respect to the December 3, 2019, decision of the Director, Peace Region, Regional Assurance Division, Alberta Environment and Parks (the "Director"), to issue under the *Public Lands Act*, R.S.A. 2000, c. P-40, Administrative Penalty No. PLA-19/13-AP-PR-19/13 to JH Drilling Inc., I, Jason Nixon, Minister of Environment and Parks, order that:

1. The decision of the Director to issue Administrative Penalty No. PLA-19/13-AP-PR-19/13 is varied as follows:
 - a. The amount of the Administrative Penalty is varied from \$31,000.00 to \$14,676.00;
 - b. The Appellant shall submit payment for the Administrative Penalty within 30 days of the date of this Order; and
 - c. No interest is payable on the Administrative Penalty until 30 days after the date of this Order.