



# PUBLIC LANDS APPEAL BOARD

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2020 ABPLAB 22

November 20, 2020

**Via E-Mail**

To Distribution List

Dear Ladies and Gentlemen:

**Re: Decision\* Deemed Refusals: SML 140090, SML 140091, SML 140092, SML 120101, and SML 150053/Our File Nos. PLAB 20-0006 – 20-0010**

This is the Public Lands Appeal Board's (the "Board") decision on the motion by the Director, Public Lands Disposition Management, Lands Division, Lands Policy and Disposition Management, Alberta Environment and Parks (the "Director"), to dismiss the above noted appeals. This decision was made by Gordon McClure, Board Chair, and Board members Tamara Bews and Chidinma Thompson.

On August 6, and 7, 2020, the Board received the following Notices of Appeal:

- Mr. Walter Badry Jr. and Mr. Jim Waswuita appealed the refusal of their application for Surface Material Lease ("SML") SML 140090 (PLAB 20-0006);
- Mr. Jason Badry and Mr. Dakota Kirk appealed the refusal of their application for SML 140091 (PLAB 20-0007);
- Mr. John Kozma and Mr. Justyn Badry appealed the refusal of their application for SML 140092 (PLAB 20-0008);
- Ms. Llana Lefebvre and Mr. Donnie Badry appealed the refusal of their application for SML 120101 (PLAB 20-0009); and
- Mr. Scott Badry and Ms. Donna Lefebvre, appealed the refusal of their application for SML 150053 (PLAB 20-0010) (collectively, the "Appellants").

The Board acknowledged receipt of the Notices of Appeals on August 10, 2020, and requested the Director provide the Department's Record related to the appeals. On August 20, 2020, the Director requested the Board dismiss the appeals as the Director had not made an appealable decision and the appeals had not been deemed rejected under section 15(1) of the *Public Lands Administration Regulation* ("PLAR").

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\* Badry et al. v. Director, Public Lands Disposition Management, Lands Division, Lands Policy and Disposition Management, Alberta Environment and Parks (20 November 2020), Appeal Nos. 20-0006-0010-DL1 (A.P.L.A.B.), 2020 ABPLAB 22.

The Board requested the Appellants and the Director (collectively, the "Parties") provide written submissions for the Board to determine whether the appeals should be dismissed. The Parties provided the submissions between September 14, 2020, and October 5, 2020. The Board met on October 26, 2020, to consider the submissions and make the decision on the Director's motion.

## Background

In December 2014, the Appellants, along with other persons, applied to Alberta Environment and Parks ("AEP") for thirteen separate SMLs in Smoky Lake County. The Director refused to grant the SMLs, and the Appellants appealed the Director's decision to the Board in May 2016. The Board arranged for a mediation meeting on December 6, 2016. The parties reached an agreement in mediation where five of the applications would be submitted to the Director for consideration (the "Applications").

The Appellants wrote to the Board on May 1, 2020 stating:

- after the mediation the Appellants submitted their Applications by July 31, 2017, as required by AEP;
- in June 2019, the Appellants met with the Director who advised the Appellants she would make the decision on the Applications within 30-90 days;
- when a decision was not made after 90 days, the Appellants called and emailed the Director;
- the Director assigned the file to an AEP staff member to review and make the decision;
- the AEP staff member told the Appellants she would make decision by the third week in March, 2020; and
- when March 2020, passed without a decision, the Appellants wrote to the Board and requested assistance in moving the file forward.

The Board forwarded the Appellants' letter to the Director. The Director responded with a letter dated June 4, 2020, which stated:

"I understand that you are interested in the status of the above-noted applications. I can confirm that the Department continues to review the applications as per the usual process. The Department did not commit to issuing dispositions, but rather told you that the decisions would be made on the file.

I'm sure you have heard through the Alberta Sand and Gravel Association that the Department has initiated a backlog-elimination project and I can confirm the above-noted files are included in the project, which is to conclude by July 31, 2020."<sup>1</sup>

When the Appellants did not receive a response by July 31, 2020, they filed the Notices of Appeal with the Board.

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<sup>1</sup> Director's letter, June 4, 2020.



## Submissions

### *Appellants*

The Appellants noted they had participated in a mediation meeting scheduled by the Board in 2016, and reached an agreement with AEP. The Appellants stated AEP has not kept their commitments regarding the Applications, and AEP told them the Applications were already refused. The Appellants submitted the delays in approving the Applications have ruined their business plans, revenues, service abilities to clients, and is a hardship to hundreds of people employed in Alberta. The Appellants stated AEP's commitment to proceed with the usual review process as of October 30, 2020, is a fair process for moving forward with these Applications.

The Appellants indicated they would like to proceed with the review process as outlined by AEP, and request the appeals be kept open for 90 days after the Director makes the decision on October 30, 2020.

### *Director*

The Director stated she wrote to the Appellants on June 4, 2020, and provided an update on the status of the Applications. The Director submitted section 15(1) of PLAR<sup>2</sup> had no applicability to these applications as there was no "deemed rejection" under that section.

The Director stated the Applications were in AEP's review process when the Appellants filed their Notices of Appeal. The Director said that on August 10, 2020, AEP had written each of the Appellants with a Supplemental Information Request to address deficiencies found in the Applications. The Director stated that on September 10, 2020, AEP was contacted by the Appellants' new consultant, Green Plan Ltd., who requested an extension to review the applications and address the deficiencies.

The Director said AEP will not make any decisions on the applications until after October 30, 2020, because of the extension requests.

## Analysis

The Board has reviewed the submissions of the Parties, the *Public Lands Act*, and PLAR. The Board notes the appeals are not a deemed rejection under section 15(1) of PLAR. However, the Board finds the Director did not follow the legislation as required, which is equivalent to a deemed refusal of the Applications.

The application process for a formal disposition, such as a SML, can be summarized as follows:

- (a) the application is provided to AEP for a "completeness" or "technical" review;
- (b) under section 9(6) of PLAR,<sup>3</sup> the Director must register a notice accepting or rejecting the application based on factors such as whether the

<sup>2</sup> Section 15(1) of PLAR states:

"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."

<sup>3</sup> Section 9(6) of PLAR provides:

"The director must register a notice of the acceptance or rejection of an application under this section within 30 days after receiving the application."



- application is filled out properly, and whether the necessary information required at this stage of the process is included;
- (c) under section 15 of PLAR, the Director can extend the time to review the application by up to 90 days; and
  - (d) if the application is accepted as complete, section 10(4) of PLAR requires the Director to make a decision whether to issue or refuse to issue the disposition applied for within one year of registering a notice of acceptance.

The Board does not have the Department's Record to review, but, as the Applications proceeded to the merit review, the Board assumes the Director accepted the Applications as complete.

Section 10(4) of PLAR provides as follows: "The director must register a notice of the issuance or refusal to issue within one year after registering a notice under section 9(6)." The Board notes there are no consequences in PLAR for failure to comply with section 10(4).

An application where the Director has not made a decision is unable to proceed. Despite the Appellants' repeated attempts to obtain a decision from the Director, the Applications remained in an undetermined state. The Appellants' filing of the Notices of Appeal moved the Applications from stasis into a situation where the Board must determine what the Director decided.

In the Director's June 4, 2020 letter, the Director confirmed the Applications were included in AEP's backlog-elimination project, which would be completed by July 31, 2020. It is reasonable for the Appellants to assume the Director would make a decision by the end of July. On July 31, 2020, the Director had two options: (1) the Director could notify the Appellants that the Applications were refused and not issue the dispositions; or (2) the Director could issue the dispositions. The Director chose neither of these options. AEP chose not to contact the Appellants until after the Director's self-imposed deadline of July 31, 2020, had expired. AEP provided the Appellants with the Supplemental Information Requests on August 10, 2020, the same day the Board forwarded the Notices of Appeal to the Director. AEP could have requested further information at any time over the three years the Applications had been with AEP before the Supplemental Information Requests were made.

## **Decision**

The Board finds the Director failed to comply with section 10(4) of PLAR by not registering a notice of the issuance or refusal to issue the SMLs within one year after registering a notice under section 9(6) of PLAR. It is against the express intent of the legislation, that the Applications should remain in limbo beyond the timeframe specified in PLAR. By not making a decision within the timeframe specified by section 10(4) of PLAR, the Director is deemed to have refused the Applications. By appealing the Director's failure to make a decision as required under section 10(4) of PLAR, the question of refusal of the Applications is raised before the Board. It is apparent the Director has not made a decision to issue the dispositions within the prescribed timeframe, therefore, the lack of a decision is an action that is equivalent to a refusal to issue the dispositions. If the Appellants had not raised the matter to the Board the status of the Applications would remain unresolved.

Additionally, the Appellants could reasonably point to the instances where the Director, or the Director's delegate, had committed to making a decision, but did not do so. Each of those instances, which were beyond the timeframe in section 10(4) of PLAR, could also be considered a deemed refusal.



A refusal to issue a disposition is appealable under section 211(c) of PLAR.<sup>4</sup> The Board finds there is an appealable issue and denies the Director's motion to dismiss the Notices of Appeal. The Board has decided it has jurisdiction to hear the appeals.

The Board acknowledges the Parties are moving forward with the review process for the Applications. The Board encourages the Parties to continue their negotiations and participation in the Applications' merit review process. The Board will not proceed immediately with the appeals, holding the appeals in abeyance until one of the Parties requests the appeals proceed or the Board determines it is necessary to proceed with the appeals. The Board notes appeals before it are subject to the one-year deadline specified by section 236(1)(b) of PLAR.<sup>5</sup>

The Board requests the Parties provide an update to the Board on the status of the Applications by **November 27, 2020**.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6207, by e-mail at PLAB@gov.ab.ca, or by fax at 780-427-4693.

Yours truly,



Gordon McClure  
Chair and Appeals Coordinator

Any information requested by the Public Lands Appeal Board is necessary to allow the Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of these appeals. The information you provide will be considered a public record.

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<sup>4</sup> 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..."

<sup>5</sup> Section 236(1)(b) of PLAR states

"An order under section 124 of the Act must be made in respect of an appeal...

- (b) within one year after the day the notice of appeal is served on the appeals co-ordinator, in the case of a complex appeal..."

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### Appellants 20-0008

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