

ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – July 27, 2021

IN THE MATTER OF sections 121, 122, 123, and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 212, 213, 216, 225, 228 and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF appeals filed by JH Drilling Inc., with respect to the September 24, 2020 decision of the Director, Lands Coordination and Delivery North, Alberta Environment and Parks, to refuse to issue Surface Material Lease SML 130074 to JH Drilling Inc.

Cite as: *JH Drilling Inc. v. Director, Lands Coordination and Delivery North, Alberta Environment and Parks* (27 July 2021), Appeal Nos. 20-0013 and 20-0015-R (A.P.L.A.B.), 2021 ABPLAB 13.

WRITTEN HEARING BEFORE:

Mr. Gordon McClure, Chair;
Ms. Meg Barker, Board Member; and
Dr. Nick Tywoniuk, Board Member.

Board Staff: Mr. Andrew Bachelder, Board Legal Counsel.

SUBMISSIONS BY:

Appellant: JH Drilling Inc., represented by Mr. John Harms.

Director: Mr. Darrell Kentner, Director, Lands Coordination and Delivery North, Alberta Environment and Parks, represented by Ms. Alison Altmiks, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

In 2013, JH Drilling Inc. (the Appellant) applied for a Surface Material Lease (SML) on public lands located in the Regional Municipality of Wood Buffalo. In 2020, the Director, Lands Management, Alberta Environment and Parks (the Director) advised JH Drilling the SML application had been refused. JH Drilling appealed the Director's decision to the Public Lands Appeal Board (the Board). The Board held a hearing by written submissions.

The Board found the SML application had been deemed rejected as incomplete because the Director did not comply with the legislated timelines. The deemed rejection meant the Director had no jurisdiction or authority to proceed to a review of the merits of the SML application. The Director's decision to refuse to issue the SML to the Appellant was an error in law and was void. The Director also based his decision on erroneous facts.

The Board recommended the Minister:

- (a) confirm that the Merit Decision was void;
- (b) reverse the deemed rejection of the application for SML 130074;
- (c) order that the Appellant's application for SML 1300734 be deemed administratively complete and ready to proceed to the Merit Review stage;
- (d) order that the Director:
 - (i) provide the Appellant with a list of deficiencies in the application for SML 130074;
 - (ii) provide the Appellant with 30 days to respond to the deficiencies, with an extension of time at the discretion of the Director; and
 - (iii) proceed with the Merit Review as per Alberta Environment and Parks' usual practice, including registering the notice of the issuance or refusal to issue within one year after the date of the Minister's Order regarding this appeal.

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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”), in the hearing of JH Drilling, Inc.’s (the “Appellant” or “JHD”) appeal of the decision by the Director, Lands Coordination and Delivery North, Alberta Environment and Parks (the “Director”), to refuse to issue Surface Material Lease SML 130074 (the “SML”) to the Appellant. The Director’s decision (the “Merit Decision”) was made under the *Public Lands Act*, R.S.A. 2000, c. P-40 and the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 (“PLAR”).

II. BACKGROUND

[2] On August 17, 2013, the Appellant applied to Alberta Environment and Parks (“AEP”) for the SML to extract gravel from public lands located at SE 9-81-13 W4M, in the Regional Municipality of Wood Buffalo. AEP wrote to the Appellant on August 30, 2013, and advised that the SML application required test data, fees, and a new plan that corrected mapping and survey deficiencies. On September 25, 2013, the Appellant provided an amended application to address the deficiencies. On October 23, 2013, AEP advised the Appellant that the SML application still contained deficiencies in mapping and surveys, and AEP could not review the application until the Appellant corrected the deficiencies. The Appellant submitted another amendment to remedy the deficiencies on November 4, 2013.

[3] On March 3, 2014, the Appellant wrote to AEP and advised it had received AEP approval for its First Nations Consultation requirement.¹

[4] On April 14, 2014, AEP advised the Appellant that the application was still deficient and required an approved Caribou Protection Plan and a Conservation and Reclamation Business Plan (“CRBP”). The Appellant responded on April 16, 2014, and stated the SML should be exempted from a Caribou Protection Plan due to the highly disturbed conditions in the surrounding area. On an unidentified date between April 16, 2014 and May 12, 2015, AEP

¹ Director’s Record, at Tab 15.

received a CRBP from the Appellant. On May 12, 2015, AEP wrote to the Appellant and informed it the CRBP did not meet AEP's standards. AEP identified the following information was missing or insufficient in the CRBP:

- “• Analysis of biophysical/land use conditions that may be affected by the project and a description of proposed mitigation measures;
- Sequential plans for site development, operation and reclamation of the pit;
- Biophysical land-use drawing;
- Site development and operations drawing;
- Phase development drawing;
- Reclamation/closure drawing;
- Pre-development cross section drawing;
- Post-development cross-section drawing;
- Exploration data: soil logs, sieve analysis, lab reports.”²

AEP gave the Appellant 30 days to submit the required information.

[5] On June 10, 2015, the Appellant provided AEP with an amended CRBP that the Appellant asserted met the deficiencies outlined in AEP's letter of May 12, 2015. On June 30, 2015, AEP acknowledged receipt of the amended CRPB and advised the Appellant certain fees had to be paid, written consent from other disposition holders on the lands was required, and a survey plan needed to be submitted.

[6] On July 14, 2015, the Appellant wrote to AEP and stated: “We received your letter of June 30, 2015, and we don't think it is fair. Could we have a meeting with you to discuss this?”³ AEP wrote to the Appellant on July 15, 2015, and provided further explanation and information regarding the requirements listed in AEP's June 30, 2015 letter.

[7] On April 4, 2017, as part of its CRBP review, AEP provided the Appellant with a request for further information on how the Appellant would resolve AEP's concerns on the following matters:

² Director's Record, at Tab 22.

³ Director's Record, at Tab 29.

- safety and noise issues caused by access to the SML through another disposition that is adjacent to a camp;
- a proposed camp within the SML;
- the lack of a Caribou Protection Plan;
- noise and air quality;
- topsoil storage and reclamation;
- unexpected occurrences, such as spills, erosion, and slope failure; and
- the lack of a road use agreement with other disposition holders ensuring access to the SML.⁴

[8] On April 5, 2017, the Appellant provided AEP with a Caribou Protection Plan,⁵ and on May 5, 2017, the Appellant responded to the information request.⁶ On June 28, 2017, a third amended version of the CRBP was submitted by the Appellant to AEP.⁷

[9] In a Merit Rationale dated July 20, 2017, AEP staff recommended the SML be refused due to the inadequate CRBP and the lack of information provided by the Appellant.

[10] On August 4, 2020, AEP employee Ms. Brenda Huxley wrote to the Appellant and advised the following information had not been received:

- (a) security deposit;
- (b) consent from two disposition holders where the SML overlapped;
- (c) First Nations Consultation adequacy approval; and
- (d) corrections to the Appellant's CRBP.

The Appellant was given 30 days to respond to AEP's letter.⁸

[11] On September 24, 2020, the Director advised the Appellant the application for the SML was refused as it did not meet all the requirements for issuance of a disposition (the "Merit Decision").⁹

⁴ Director's Record, at Tab 39.

⁵ Director's Record, at Tab 66.

⁶ Director's Record, at Tab 48.

⁷ Director's Record, at Tab 50.

⁸ Director's Record, at Tab 55. Note: there is a question whether this letter was received by the Appellant.

[12] The Appellant filed a Notice of Appeal with the Board on October 3, 2020, alleging as grounds of appeal that the Director, in refusing to issue the SML to the Appellant:

- erred in the determination of a material fact on the face of the record,
- erred in law;
- exceeded the Director’s jurisdiction or authority; and
- did not comply with an *Alberta Land Stewardship Act* regional plan.

[13] On October 19, 2020, the Board received a Notice of Appeal from the Appellant appealing a September 29, 2020 email from the Director regarding the SML. The Board noted the two appeals were of the same matter and SML, and claimed the same grounds of appeal. The Board combined both Notices of Appeal under one appeal number, PLAB 20-0013.

[14] The Board received the Director’s Record from the Director on December 7, 2020, and provided it to the Appellant on December 8, 2020.

[15] The Board scheduled a mediation meeting on February 2, 2021, by videoconference, but the Appellant and the Director (the “Parties”) did not reach an agreement.

[16] The Board held a preliminary motions hearing by videoconference on April 15 and 21, 2021 to address the Parties’ preliminary motions. The Board also dealt with a motion from the Director on the issue of confidentiality of discussions from a mediation meeting. The Board determined it would not allow the discussions from the mediation meeting to be brought forward into the hearing.¹⁰

[17] The Board scheduled a hearing by written submissions and received submissions from the Parties between June 2 and June 28, 2021. The Board panel convened on June 29, 2021, to prepare its recommendations to the Minister.

⁹ Director’s Record, at Tab 61.

¹⁰ See: *JH Drilling Inc. v. Director, Lands Coordination and Delivery North, Alberta Environment and Parks* (14 May 2021), Appeal No. 20-0013-ID2 (A.P.L.A.B.), 2021 ABPLAB 5.

III. ISSUES

[18] The Board identified the following issues to be determined in the appeal:

- (a) Did the Director, in refusing to issue the SML to the Appellant:
 - err in the determination of a material fact on the face of the record;
 - err in law;
 - exceed the Director's jurisdiction or authority; or
 - fail to comply with an *Alberta Land Stewardship Act* regional plan.
- (b) What is the appropriate remedy if the Board finds the Director erred in making the decision not to issue the SML to the Appellant?

[19] The Appellant raised several additional arguments (the "Additional Arguments"), which the Board finds are encompassed in the issues listed above or arguments the Board had already dismissed in the preliminary motions hearing. The Additional Arguments pertained to the Appellant's request that the Board:

- (a) order AEP to provide its analysis of the Appellant's greenhouse gas emissions reduction plan;
- (b) order AEP to provide AEP's full analysis of the Appellant's Caribou Protection Plans;
- (c) recognize the use and meaning of certain words in the Alberta Aggregate (Sand and Gravel) Allocation Policy for Commercial Use on Public Land ("Allocation Policy (2006)");
- (d) decide whether the Allocation Policy (2006) as "an offer;"
- (e) determine the Director's role and authority;
- (f) comment on the "timeliness covenant" in the Allocation Policy (2006);
- (g) recognize the word "equitable" and its two meanings in regards to the Allocation Policy (2006); and
- (h) consider additional evidence the Appellant included in its rebuttal submission.

[20] The Board notes the Appellant did not provide coherent arguments on most of the Additional Arguments, and in some instances, only included irrelevant facts or just a title. The Board requires at least some argument and discussion of the facts and law to make a determination on an argument. As a result, the Board was only able to consider some of the Additional Arguments raised by the Appellant.

[21] In making its recommendations on the appeal, the Board reviewed all the Parties' submissions, the Director's Record, along with relevant caselaw, legislation, and commentary. The Board will address the Additional Arguments below before proceeding with the main issues in the appeal.

A. Appellant's Additional Arguments

(a) Greenhouse Gas Emissions Reduction

[22] The Appellant made submissions regarding the SML's potential for the reduction of greenhouse gasses. The Appellant requested the Director respond with a written analysis of the environmental reasons. The Director submitted greenhouse gases are not an application requirement or reason for refusal.

[23] The Board finds greenhouse gas emissions are not a requirement of a disposition application and not required for an application to be decided on its merits. The Director may request additional information to assist in making the decision on the application, however, in this matter, the Director did not do so. The Board finds it is within the Director's discretion to determine if greenhouse gas emissions are a relevant factor in deciding the SML's merit. The Board finds the Director exercised his discretion appropriately on this matter.

(b) Caribou Protection Plan

[24] The Appellant submitted they had filed annual Caribou Protection Plans since the project began with no feedback from AEP. The Appellant requested the Board order AEP to provide a full analysis for each year.

[25] The Director submitted that a search of AEP's records related to the SML application and Caribou Protection Plans did not identify any Caribou Protection Plan other than what is found in the Director's Record under Tab 66, which appears to have been provided to AEP on April 5, 2017. The Director stated that AEP no longer requires Caribou Protection Plans as the requirements for caribou protection are now addressed in the disposition terms and conditions.

[26] As a Caribou Protection Plan is no longer a requirement of the SML application, the Board rejects the Appellant's request for a full analysis from AEP.

(c) *Various words*

[27] The Appellant stated it sought recognition by the Board of the words "commercial," "comprehensive," "timely," and "fair" as they appear on the AEP website and in the Allocation Policy (2006). The Appellant submitted the words implied contractual, fiduciary, legal, or proprietary rights.

[28] The Director submitted the Allocation Policy (2006) existed as one of many policies related to aggregate allocation on public land.

[29] The language of the policy must be read as a whole and within the context of the legislation. The Board finds that the words "commercial," "comprehensive," "timely," and "fair" as they appear on the AEP website and in the Allocation Policy (2006) do not create any special duties, relationships, or fiduciary, legal, contractual or proprietary obligations.

(d) *Allocation Policy (2006) as an "Offer"*

[30] The Appellant requested the Board decide and declare that the Allocation Policy (2006) is an offer, which the Appellant accepted, creating an agreement or contract. The Appellant submitted that Justice Fagnan, in *JH Drilling Inc. v. Public Lands Appeal Board et al.*,¹¹ stated that legislation supersedes a policy if there is a demonstrable conflict, but only to the extent of the conflict.¹² The Appellant requested assurances that the promises in the Allocation Policy (2006) will continue.

[31] The Director stated that the Allocation Policy (2006) is a policy as stated in its title. The Director notes that Justice Fagnan, after dismissing JHD's judicial review, briefly commented about JHD's arguments concerning the Allocation Policy (2006), stating:

¹¹ *JH Drilling Inc. v. Public Lands Appeal Board and Government of Alberta, Director of Alberta Environment and Parks, Minister of Alberta Environment and Parks, Government of Alberta, Her Majesty the Queen in Right of Alberta*, ABQB, Action No.: 1703-05479, at page 2.

¹² Appellant's Initial Submissions, June 2, 2021, at page 4.

“It bears noting that neither the Director, nor the Board, has the ability to change legislation or policy, nor do they have jurisdiction to address many of the legal claims which JHD wished to raise in this proceeding.”¹³

[32] The Board finds the Allocation Policy (2006) is a policy document and is not a contract. The Board does not have the ability to change legislation, nor does it have the jurisdiction to address the legal claims the Appellant is attempting to make.

(e) *Wrongful Delegation*

[33] The Appellant questioned the Director’s role under the legislation and requested the Board confirm the Director’s “credentials.”

[34] The Director submitted the legislation allowed for the designation of directors under section 5 of the *Public Lands Act* and noted that at the time the SML decision was made, the Director was an Approvals Manager, which is a designated director under Ministerial Order 44/2019.¹⁴

[35] The Board finds the Director, as Approvals Manager, was designated as a director under Ministerial Order 44/2019 and had authority to make a decision on issuing dispositions such as the SML.

(f) *Timeliness and the Allocation Policy (2006)*

[36] The Appellant submitted the Director must show conflict with the legislation in order to reject the “timeliness covenant” in the Allocation Policy (2006). The Appellant stated: “...unless the [Director] can show the conflict, he cannot reject the [Allocation Policy (2006)] or its promises.”¹⁵

[37] The Director stated the Director is the decision-maker for the issuance of the SML, and noted the Allocation Policy (2006) is not an appealable decision, nor is it the subject

¹³ *JH Drilling Inc. v. Public Lands Appeal Board and Government of Alberta, Director of Alberta Environment and Parks, Minister of Alberta Environment and Parks, Government of Alberta, Her Majesty the Queen in Right of Alberta*, ABQB, Action No.: 1703-05479, at page 12.

¹⁴ Director’s Response Submission, June 21, 2021, at Appendix D.

¹⁵ Appellant’s Rebuttal Submission, June 28, 2021, at page 108.

of the appeal. The Director submitted the only issue remaining for the Board to consider is what remedy to apply to the appeal.

[38] The Board finds no evidence the Director has rejected the “timeliness covenant” in the Allocation Policy (2006). Timeliness is certainly an issue, but the lateness of the Director’s decision is not a rejection of the requirement. The Board addresses this issue further in this Report and Recommendations.

(g) *Equitable and Viable*

[39] The Appellant requested the Board recognize the word “equitable” and its two meanings in regards to the Allocation Policy (2006) policy. The Appellant also requested the Board consider the word “viable” in this appeal. The Director submitted the definition is not necessary to determine the appeal itself.

[40] The Board finds it is unnecessary to define “equitable” or “viable” as they appear in the Allocation Policy (2006). The appeal is of the Director’s decision not to issue the SML, not an appeal of the Allocation Policy (2006).

(h) *New Evidence*

[41] The Board set its written hearing procedures for the Parties to provide submissions which allowed for an initial submission from the Appellant, followed by a response submission from the Director and, as the Appellant has the onus of proof in the appeal, a rebuttal submission from the Appellant. The Appellant’s rebuttal submission, filed with the Board on June 28, 2021, included new evidence not on the Director’s Record. The Appellant did not include the new evidence in its initial submission on June 2, 2021, and did not apply to have the new evidence admitted.

[42] Appeals before the Board are based on the decision and record of the decision-maker.¹⁶ The Board may permit evidence that is not in the Director’s Record if that evidence is rationally connected to the Director’s Record, provides detail and clarification that assists the

¹⁶ Section 120 of the *Public Lands Act* states: “An appeal under this Act must be based on the decision and the record of the decision-maker.”

Board in understanding the Director's Record, and is relevant to the scope of the appeal.¹⁷ A party must apply to the Board to admit new evidence not in the Director's Record. The Appellant did not make sufficient argument to demonstrate the new evidence met any of the above criteria and did not make any application to admit the evidence.

[43] The Board will not consider the Appellant's new evidence as it is not properly before the Board.

B. Legislation and Procedure

[44] AEP's process for reviewing applications for a formal disposition is fundamental to this appeal. Applications for a formal disposition, such as the SML, are reviewed in two stages. The first stage is referred to as a Completeness Review, which includes both a Technical Review and an Administrative Review. The Technical Review determines if the technical information in the application (land and boundary surveys and plans) meets the standards set out in legislation and policy. The Administrative Review ensures the correct documents are included in the application and contain complete and accurate information. The merits of the documents in the application are not considered at this stage. Sections 9(6) and (7) of PLAR provide the director with 30 days to finish the Completeness Review and register a notice of the acceptance or rejection of the application. If the application is rejected, the director must notify the applicant as soon as possible.¹⁸ The director may extend the time to finish the Completeness Review by an additional 90 days, and must advise the applicant of any extension.¹⁹ If AEP fails

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

¹⁸ Sections 9(6) and (7) of PLAR state:

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

(7) Where an application is rejected under this section, the director must notify the applicant of the rejection in writing as soon as possible.”

¹⁹ Section 15(2) of PLAR provides:

“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.”

to make the completeness decision within the timelines set under PLAR, the application is deemed to be rejected²⁰ and is appealable to the Board.²¹

[45] If the Completeness Review determines the application is incomplete, the director may reject the application or request further information to assist in the review. A decision to reject the application is appealable to the Board under section 211(b) of PLAR.²² The Completeness Review seeks to ensure the application meets minimal requirements. An application can be found complete even if there are flaws in the documents, as the director may request further information to assist in the next stage of review.

[46] If the application for a formal disposition is found complete, it is accepted and proceeds to the second stage, which is the Merit Review conducted by the director and AEP staff. The Merit Review considers multiple factors, including:

- (a) if the proposed land use is acceptable and in the best interest of the land base;
- (b) if the proposed disposition complies with regional plans;
- (c) if there is a conflict with any existing land use or stakeholders;
- (d) any applicable disturbance standards; and
- (e) whether mitigation strategies are required.²³

[47] Additional information may still be requested during the Merit Review. AEP staff complete the Merit Review and provide the director with a recommendation, also known as a Merit Rationale. The director is required to review the application and any additional information and to make a decision on the merits of the application, or merit decision. The merit decision will determine whether to issue the formal disposition. The Director may request

²⁰ 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.”

²¹ Section 15(4) of PLAR states: “A deemed rejection under this section is appealable under Part 10.”

²² Section 211(b) of PLAR states:

“The following decisions are prescribed as decisions from which an appeal is available...

(b) the rejection of an application under the Act for a disposition...”

²³ Formal Disposition Application Administration, <https://www.alberta.ca/formal-disposition-application-administration.aspx>.

further information if needed. The director's merit decision is appealable to the Board under sections 211(a), (c), or (d) of PLAR.²⁴

C. Did the Director err?

[48] Did the Director in refusing to issue the SML to the Appellant, err in the determination of material fact on the face of the record, err in law, exceed the Director's jurisdiction or authority, or did not comply with an *Alberta Land Stewardship Act* regional plan?

(i) Submissions

[49] In the Appellant's initial submission, the Appellant requested the Board consider the appealable errors listed in the Director's response submission²⁵ to the Appellant's preliminary motions. The Appellant submitted the Director admitted AEP made a number of errors, which included the following:

- (a) the Director's September 24, 2020, decision letter and memorandum to the file regarding the Director's Merit Decision incorrectly referred to a letter dated June 29, 2020, when in fact, the letter was dated August 4, 2020;
- (b) there were several errors in the August 4, 2020 correspondence;
- (c) the August 4, 2020 letter did not articulate deficiencies with the CRBP and did not allow the Appellant a meaningful opportunity to address them;
- (d) the Director's Record shows the August 4, 2020 letter was addressed solely to a postal mailing address with no indication it was being delivered by email;
- (e) the Director's conclusion that the Appellant had an opportunity to address deficiencies in the SML application, and had failed to do so, is an error in the determination of a material fact on the face of the record; and

²⁴ Section 211(a), (c), and (d) of PLAR state:

"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; ...
- (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;...."

²⁵ The Director listed the appealable errors in the Director's Response Submission, June 21, 2021, at paragraphs 29 to 50.

- (f) the Director agreed that the Completeness and Merit Decision were not made within the statutory timelines in PLAR.²⁶

[50] The Appellant submitted it did not receive AEP's August 4, 2020 letter.

[51] The Director acknowledged the following errors were made in processing the SML application:

- (a) the Director's Merit Decision referred to a letter dated June 29, 2020, when the letter to the Appellant was dated August 4, 2020;
- (b) the Appellant identified several errors in the August 4, 2020 letter;
- (c) the Appellant could not address the deficiencies in the CRBP as the August 4, 2020 letter did not list them;
- (d) the August 4, 2020 letter was addressed to a mailing address without indicating it was being delivered by email; and
- (e) the Director erred in finding the Appellant was sent a letter on June 29, 2020 giving the Appellant 30 days to address the CRBP deficiencies.²⁷

[52] The Director acknowledged he committed an error in the determination of a material fact on the face of the record when the Director concluded the Appellant had an opportunity to address the deficiencies and had failed to do so.

[53] The Director also acknowledged a breach of procedural fairness occurred when:

- (a) AEP took more than three years after the Merit Rationale to provide the Appellant with the Merit Decision to refuse to issue the SML; and
- (b) AEP did not make the Appellant aware of the deficiencies in the SML application and did not provide a meaningful opportunity for the Appellant to address them.

The Director submitted a breach of procedural fairness is an error in law.

[54] The Director stated the evidence in the Director's Record confirms a completeness decision was not made and communicated to the Appellant within the timelines set under PLAR. The Director noted the Board had previously found where a completeness decision was not made within the legislated timelines and a deemed rejection occurred, the Director's authority to make a Merit Decision ceases. The Director submitted:

²⁶ Director's Response Submission, June 21, 2021, at paragraph 14.

“Based on the Board’s interpretation, the Director would not have the authority to make a merit decision on the application for SML 130074 and the Director will have exceeded his jurisdiction by proceeding to make a merit decision.”²⁸

(ii) *Analysis*

1. Error in the determination of fact on the face of the Record

[55] The Board’s review of the Director’s Record indicates there was confusion within AEP on the status of the SML application and what steps had been taken by AEP staff. Before August 4, 2020, the last communication from AEP to the Appellant appears to be a brief email from AEP staff dated April 24, 2017, inquiring if the Appellant had gathered further information as previously requested. On May 5, 2017, the Appellant responded to AEP’s request for further information. There is no indication AEP replied to the Appellant’s May 5, 2017 letter.

[56] The Board notes internal emails contained in the Director’s Record show AEP was operating under incorrect facts. In an email dated July 17, 2020, an AEP staff member asked if the Appellant was sent a letter giving the Appellant 30 days to provide information missing from the CRBP.²⁹ Another AEP staff member responded that the letter had been sent to the Appellant on June 29, 2020. The Director acknowledged there is no evidence a June 29, 2020 letter had been sent to the Appellant.³⁰ The Board finds no evidence in the Director’s Record a June 29, 2020, letter existed.

[57] On August 4, 2020, AEP wrote to the Appellant and advised of several outstanding requirements for the SML application and provided the Appellant with 30 days to respond or the application would be refused. As noted by both the Appellant and the Director, the August 4, 2020 letter contained several errors and did not inform the Appellant of the specific deficiencies in the CRBP, resulting in the Appellant being denied a meaningful opportunity to address the deficiencies. Further, the August 4, 2020 letter was addressed to a

²⁷ Director’s Response Submission, June 21, 2021, at paragraphs 29 to 50.

²⁸ Director’s Response Submission, June 21, 2021, at paragraph 41.

²⁹ Director’s Record, at Tab 54.

³⁰ Director’s Response Submissions, June 21, 2021, at paragraph 34.

mailing address with no indication it was being delivered by email. The Appellant stated it never received the August 4, 2020 letter.

[58] The Director's Record shows the Director conducted a File Review of the SML application on July 23, 2020.³¹ In the File Review, the Director stated that on June 29, 2020, the Appellant was sent a letter giving the Appellant 30 days to respond to the CRBP deficiencies or AEP would cancel the disposition. The Director also noted AEP had not received a plan from the Appellant addressing the deficiencies.

[59] The Director concluded the Appellant had not responded to the June 29, 2020 letter. However, the June 29, 2020 letter did not exist, and the Director received incorrect information. In the Director's September 24, 2020 Notice of Merit Decision letter to the Appellant, the Director cites the non-existent June 29, 2020 letter as the reason for the refusal to issue the SML:

“Please note that the refusal to issue this disposition is based on the following reason(s):

- 30 day letter from Provincial Approvals was sent June 29, 2020 to request that CRBP [deficiencies] be addressed using the CRBP template or disposition would be canceled. - A plan addressing the [deficiencies] has not been received.”³²

[60] The Board finds the Director may have made a technical mistake in the Notice of Merit Decision by referring to the non-existent June 29, 2020 letter instead of the August 4, 2020 letter, but the Board must make its decision based on the record and the decision of the decision-maker. The Board finds the Director's mistaken determination that the Appellant had been provided with an opportunity to respond to the CRBP deficiencies was an error in the determination of a material fact on the face of the record. Further, this error was sufficiently significant that the Director's Merit Decision cannot be supported.

³¹ Director's Record at Tab 65.

³² Appellant's Notice of Appeal, Attachment 1.

2. Error in Law; Exceeding Jurisdiction and Authority

[61] The chronology of the SML application from the Director's Record, and the Director's submissions, identifies that the Director did not follow AEP's decision-making procedure for formal dispositions. Specifically, the Director did not register a notice within 30 days of the application being made or extended, as required under section 9(6) of PLAR.³³ By not registering the decision within 30 days or extending the 30-day deadline, the application for the SML was deemed rejected. If an application for a disposition is rejected, there is no jurisdiction for the application to continue and no further decisions on the application can be made. Despite the deemed rejection, the Director proceeded to decide on the merits of the SML application. The Director made the Merit Decision without proper authority or jurisdiction. Making a decision without jurisdiction or authority is an error in law.

[62] The Board finds the SML was deemed rejected, and the Director lacked the authority and jurisdiction to make any subsequent decisions regarding the SML and, therefore, erred in law. The Board also finds the Director exceeded his jurisdiction and authority by proceeding with the Merit Review and making the Merit Decision when the SML application was deemed rejected.

[63] The Appellant listed as one of its grounds of appeal that the Director did not comply with a regional plan under the *Alberta Land Stewardship Act*. As the Appellant did not make any submissions on this ground, the Board declines to make a finding on this issue.

D. Remedy

[64] What is the appropriate remedy if the Board finds the Director erred in making the decision not to issue the SML to the Appellant?

³³ 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*

[65] The Appellant proposed that the appropriate remedy would be for the Board to recommend the SML be granted to the Appellant.

[66] The Director submitted the proper remedy would be:

- (a) return the application to the merits stage of review;
- (b) have the Director provide the Appellant with a letter identifying deficiencies that must be addressed in order for the Merit Review to be completed; and
- (c) give the Director six months to review the application and decide on the merits of the SML application.

[67] The Appellant disagreed with the Director's proposed remedy of reinstating the SML application. The Appellant wanted the Board to consider the issue of fairness, and reinstating the SML application would prevent that issue from being addressed. The Appellant referred to Justice Fagnan's decision in *JH Drilling Inc. v. Public Lands Appeal Board et al.*,³⁴ and stated:

“... what the Appellant is asking for, as a remedy from the Board, simple acknowledgement of what the Court of Queen's Bench has already said, and further, recognition of Mr. Justice Berger, of the Alberta Court of Appeal, as quoted by Madam Justice Fagnan in her Decision, about arguable contractual, proprietary and equitable rights, arising from the very many years that the Appellant has worked on this Mariana Gravel Project.”³⁵

[68] The Appellant submitted that without the Board's acknowledgement of Justice Fagnan's comments regarding the supremacy of legislation over policy, “to the extent of the conflict... reinstatement of the SML is empty.”³⁶

³⁴ *JH Drilling Inc. v. Public Lands Appeal Board and Government of Alberta, Director of Alberta Environment and Parks, Minister of Alberta Environment and Parks, Government of Alberta, Her Majesty the Queen in Right of Alberta*, ABQB, Action No.: 1703-05479.

³⁵ Appellant's Rebuttal Submission, June 28, 2021, at page 8.

³⁶ Appellant's Rebuttal Submission, June 28, 2021, at pages 7 and 8.

(ii) *Analysis*

[69] The Board notes that while the Appellant did not specifically argue the SML application was deemed rejected, the Appellant listed as grounds of appeal in its Notice of Appeal filed with the Board that the Director:

- (a) erred in the determination of a material fact on the face of the record;
- (b) erred in law; and
- (c) exceeded the Director's jurisdiction and authority.³⁷

The Appellant made arguments related to these grounds of appeal.

[70] The Board finds a deemed rejection existed and resulted in the erroneous decision the Appellant has appealed. Having found the Director erred by making the Merit Decision, the Board must determine the appropriate remedy.

[71] The Appellant argued the Director did not apply the Allocation Policy (2006) appropriately or at all, resulting in a lack of fairness. The Appellant opposed the Director's suggested remedy of reinstating the SML application for consideration in the Merit Review stage because the Appellant wanted the Board to consider fairness in the Allocation Policy (2006). The Appellant used Justice Fagnan's comments in *JH Drilling Inc. v. Public Lands Appeal Board et al.* to further its arguments that the Board should comment on the issue of fairness and make specific findings on the Allocation Policy (2006). The Board finds the Appellant has misinterpreted Justice Fagnan's remarks. Justice Fagnan's decision was in the context of a judicial review sought by the Appellant of the Minister's decision in PLAB Appeal No. 15-

³⁷ Section 213 of PLAR states:

"A decision is appealable only on the grounds that

- (a) the director or officer who made the decision
 - (i) erred in the determination of a material fact on the face of the record,
 - (ii) erred in law,
 - (iii) exceeded the director's or officer's jurisdiction or authority, or
 - (iv) did not comply with an ALSA regional plan,

or

- (b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4)."

0027.³⁸ Near the beginning of her comments, Justice Fagnan stated:

“Although JHD is unhappy with the *Public Lands Act* and Public Lands Administration Regulation insofar as they affected the application of the [Allocation Policy (2006)], this is a judicial review, not a formal challenge to the legislation.”³⁹

The same situation applies in this appeal. The appeal is of the Director’s decision not to issue the SML to the Appellant. It is not an appeal of the legislation or policy. As confirmed by Justice Fagnan, the Board does not have the jurisdiction to change legislation or policy. The Board may only hear appeals that are specifically listed in PLAR and make recommendations to the Minister.

[72] Justice Fagnan referred to the Board’s position that legislation is superior to policy:

“The Board acknowledged incongruities between the Public Lands Administration Regulation and [Allocation Policy (2006)], and determined that the [Allocation Policy (2006)] and Guideline are subordinate to the legislation and where there is a conflict between them, the legislation prevails, and it did not err in that conclusion.”⁴⁰

Justice Fagnan stated the legislation prevails where there is a conflict with policy; the Justice did not say, as interpreted by the Appellant, that the Director must prove there is a conflict between the legislation and the policy for the Director not to follow the Allocation Policy (2006). The Board finds the Appellant submitted no evidence that the Director or AEP intentionally chose not to follow the Allocation Policy (2006).

[73] Justice Fagnan also noted the Allocation Policy (2006) had been updated. This suggests to the Board that the Allocation Policy (2006) was superseded by the Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land (2017), even though the Allocation Policy (2006) still exists on the AEP website.

³⁸ See: *JH Drilling Ltd. v. Alberta (Environment and Parks)*, 2015 APLAB 15-0027.

³⁹ *JH Drilling Inc. v. Public Lands Appeal Board and Government of Alberta, Director of Alberta Environment and Parks, Minister of Alberta Environment and Parks, Government of Alberta, Her Majesty the Queen in Right of Alberta*, ABQB, Action No.: 1703-05479, at page 2.

⁴⁰ *JH Drilling Inc. v. Public Lands Appeal Board and Government of Alberta, Director of Alberta Environment and Parks, Minister of Alberta Environment and Parks, Government of Alberta, Her Majesty the Queen in Right of Alberta*, ABQB, Action No.: 1703-05479, at page 9.

[74] Equally relevant to this appeal is the Court of Appeal of Alberta decision in *J.H. Drilling Inc. v. Alberta (Natural Resources Conservation Board)* (“*JHD v. NRCB*”).⁴¹ In *JHD v. NRCB* the Appellant sought leave from the Court to appeal a decision by the Natural Resources Conservation Board. Justice Slatter in *JHD v. NRCB*, stated:

“[JH Drilling] seeks various declarations on the status and effect of the Alberta Aggregate (Sand and Gravel) Allocation Policy. It seeks declarations as to whether the Policy creates legal rights or entitlements, whether it creates fiduciary duties, or whether it at least creates expectations of fairness. [JH Drilling] seeks declarations about whether its efforts to date in exploring and applying for a licence to extract the gravel create legally enforceable rights. It argues that it has interests similar to those in a ‘farmout’ agreement.

To the extent that these arguments relate to whether the applicant is ‘directly affected’, they have already been discussed. Otherwise, they all concern issues beyond the jurisdiction of the [NRCB]. The [NRCB] did not render a decision on any of these issues. In the present context the mandate of this Court is only to hear appeals from decisions of the [NRCB]. The final proposed ground of appeal does not disclose any issue upon which leave could be granted.”⁴²

The Board notes that Justice Fagnan favourably quoted the above passage in her decision.⁴³

[75] The Board may hear arguments on whether the Director has correctly applied legislation and policy, but it does not, as noted above, have the jurisdiction to make changes to legislation or policy. The Board has reviewed the Appellant’s arguments and finds the Appellant has not made clear, coherent arguments linking the Allocation Policy (2006) to the Director’s decision not to issue the SML to the Appellant. The Board finds the Appellant’s arguments on the Allocation Policy (2006) are beyond the jurisdiction of the Board and beyond the scope of this appeal. The Board rejects the Appellant’s proposed remedy of granting it the SML based on the Director’s alleged failure to follow the Allocation Policy (2006).

[76] The Director found the SML application was complete and proceeded to the Merit Review and made the Merit Decision. The Board’s finding that the SML application was

⁴¹ *JH Drilling Inc. v. Alberta (Natural Resources Conservation Board)*, 2014 ABCA 378.

⁴² *JH Drilling Inc. v. Alberta (Natural Resources Conservation Board)*, 2014 ABCA 378, at paragraphs 22 and 23.

⁴³ *JH Drilling Inc. v. Public Lands Appeal Board and Government of Alberta, Director of Alberta Environment and Parks, Minister of Alberta Environment and Parks, Government of Alberta, Her Majesty the Queen in Right of Alberta*, ABQB, Action No.: 1703-05479, at pages 11 and 12.

deemed rejected means the Director made the Merit Decision without jurisdiction or authority, and that decision is void. The Board may only recommend the Minister confirm, reverse, or vary the Director's decision. The Board would exceed its own jurisdiction if it were to make a recommendation to the Minister regarding the Merit Decision, as the Board may only hear appeals of decisions made by the Director, and the Director's decision is void. If the Minister reversed the deemed rejection decision, the SML application would be considered complete and the Director could proceed with a Merit Review. The Board notes the Director has already (albeit without authority) refused the SML application on its merits, but both the Appellant and the Director agreed the Appellant should be made aware of any deficiencies in the SML application and provided an opportunity to respond. Providing the Appellant with an opportunity to address the deficiencies identified by the Director would preserve the Appellant's rights to procedural fairness and allow the Merit Review to be conducted afresh.

[77] The Board notes the Director has proposed a six month period for the Appellant to submit any additional information required for the Merit Review and for the Director to make the decision. Section 10(4) of PLAR⁴⁴ states the Director must decide whether to issue or refuse to issue the disposition within one year after registering the Completeness Review decision. The Board sees no reason to depart from the legislative requirements.

[78] Section 9(2)(b) of PLAR states:

“Within 30 days after service of a notice from the director requiring it, an applicant for a disposition must deliver to the director...

(b) any relevant information the director requests for the purposes of considering the application.”

The Board considers 30 days sufficient for the Appellant to respond to the deficiencies identified by the Director in the SML application. However, as the SML application is proceeding to the Merit Review, the Director may extend the time for the Appellant to respond at the Director's discretion. The Board notes the Director's usual practice to provide additional time if it is reasonable to do so.

⁴⁴ Section 10(4) of PLAR provides: “The director must register a notice of the issuance or refusal to issue within one year after registering a notice under section 9(6).”

- [79] The Board finds the appropriate remedy would be to:
- (a) return the SML application to the Merit Review stage;
 - (b) require the Director to provide the Appellant with a letter identifying deficiencies in the SML application and provide the Appellant with a minimum of 30 days to respond; and
 - (c) require the Director to proceed with the Merit Review as per the legislation and AEP's usual practice.

IV. RECOMMENDATIONS

[80] When the Board provides its Report and Recommendations to the Minister, it must comply with section 124 of the *Public Lands Act*, which states:

- “(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.
- (2) The report may recommend confirmation, reversal or variance of the decision appealed.
- (3) 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.”

[81] In this appeal, the Board has considered the Director's Record, the Parties' submissions, and the relevant legislation. The Board recommends the Minister:

- (a) order the Director's decision to refuse the application for SML 130074 was void;
- (b) reverse the deemed rejection of the application for SML 130074 and reinstate the application;
- (c) order the Appellant's application for SML 1300734 be deemed technically and administratively complete and ready to proceed to the Merit Review stage;
- (d) order the Director:
 - (i) provide the Appellant with a list of deficiencies found in the application for SML 130074;
 - (ii) provide the Appellant with 30 days to respond to the deficiencies, with an extension of time at the discretion of the Director; and

- (iii) proceed with the Merit Review as per AEP's usual practice, including registering the notice of the issuance or refusal to issue within one year after the date of the Minister's Order in this appeal.

Dated on July 27, 2021, at Edmonton, Alberta.

"original signed by"
Gordon McClure
Board Chair

"original signed by"
Meg Barker
Board Member

"original signed by"
Nick Tywoniuk
Board Member



ALBERTA
ENVIRONMENT AND PARKS

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

Ministerial Order 75 /2021

*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 Nos. 20-0013 and 20-0015

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 an Order Respecting Public Lands Appeal Board Appeal Nos. 20-0013 and 20-0015.

Dated at the City of Edmonton, in the Province of Alberta, this 8 day of Sept, 2021.



Jason Nixon
Minister

Appendix

Order Respecting Public Lands Appeal Board Appeal Nos. 20-0013 and 20-0015

With respect to the September 24, 2020 decision of the Director, Land Coordination North-East Division, Alberta Environment and Parks (the "Director"), to refuse to issue Surface Material Lease ("SML") 130074 to JH Drilling Inc., pursuant to section 10(1) of the *Public Lands Administration Regulation*, I, Jason Nixon, Minister of Environment and Parks, in accordance with section 124(3) of the *Public Lands Act*, order that:

1. the Director's decision to refuse the application for SML 130074 is void;
2. the deemed rejection of the application for SML 130074 is reversed and the application is reinstated;
3. the application for SML 1300734 is deemed technically and administratively complete, and shall proceed to the Merit Review stage; and
4. the Director shall:
 - (a) provide JH Drilling Inc. with a list of deficiencies found in the application for SML 130074,
 - (b) provide JH Drilling Inc. with 30 days to respond to the deficiencies, with an extension of time at the discretion of the Director, and
 - (c) proceed with the Merit Review as per Alberta Environment and Parks' usual practice, including registering the notice of the issuance or refusal to issue within one year after the date of this Ministerial Order.