

ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – January 14, 2022

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

-and-

IN THE MATTER OF an appeal filed by Syncrude Canada Ltd., with respect to the decision of the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks, to amend a disposition issued under the *Public Lands Act* and the variation under the *Public Lands Act* of a term or condition of a disposition, specifically the dispositions are Surface Material Leases 000002 and 000033.

Cite as: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (14 January 2022), Appeal No. 21-0003-ID2 (A.P.L.A.B.), 2022 ABPLAB 1.

BEFORE:

Mr. Gordon McClure, Appeals Co-ordinator
and Board Chair.

SUBMISSIONS BY:

Appellant: Syncrude Canada Ltd., represented by Mr. Dan
Collins, Dentons Canada LLP.

Director: Mr. Brendan Hemens, Director, Public Lands
Disposition Management Section, Land Policy
and Programs Branch, Lands Division, Alberta
Environment and Parks, represented by Mr.
Larry Nelson, Alberta Justice and Solicitor
General.

EXECUTIVE SUMMARY

Syncrude Canada Ltd. (Syncrude) owns and operates the Mildred Lake oil sands mine and upgrader and the Aurora oil sands mine both of which are north of Fort McMurray.

The Mildred Lake and Aurora facilities are governed by surface material leases (SMLs) issued by Alberta Environment and Parks (AEP) and mineral surface leases (MSLs) issued by the Alberta Energy Regulator. The SML amendments are effectively incorporated into the MSLs as the “Surface Material Provisions.”

The SMLs and the Surface Material Provisions contain terms and conditions governing Syncrude’s use of sand and gravel within the SMLs, which include the requirement to pay royalties on the sand and gravel extracted from the SMLs. Syncrude received two letters from AEP exempting them from paying royalties on the sand and gravel extracted from the SMLs under certain conditions.

Following an audit conducted by the Auditor General, it was determined that the exemption granted to Syncrude was not being properly applied. As a result, AEP issued several invoices to Syncrude in the amount of \$4,350,146.71 (the Invoices), charging Syncrude for royalties related to sand and gravel extracted from the SMLs during 2019 and 2020, for which Syncrude did not remit a royalty. On May 26, 2021, the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks (the Director) issued a letter to Syncrude advising that notwithstanding the exemptions, the Invoices were correct and the additional royalties were payable.

Syncrude appealed the Director’s letter to the Public Lands Appeal Board (the Board) on June 14, 2021. The Director wrote to the Board on July 29, 2021 submitting the appeal was not properly before the Board and not within the jurisdiction of the Board. The Board requested and received written submissions on whether the Notice of Appeal and the matter under appeal was within the Board’s jurisdiction.

The Board found the Director's decision that the Invoices were correct and the additional royalties were payable, varied the conditions of the SMLs, which is an appealable matter under PLAR and within the Board's jurisdiction.

The Board will proceed with the appeal on whether the Director had the jurisdiction to vary the SMLs held by Syncrude. The Board denies the Director's motion to dismiss the Notice of Appeal filed by Syncrude for being outside the Board's jurisdiction.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the “Board”) on a preliminary motion by the Director to dismiss the Notice of Appeal filed by Syncrude Canada Ltd. (“Syncrude”) for being outside the Board’s jurisdiction. The Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks (the “Director”) issued a decision requiring Syncrude to pay royalties on sand and gravel Syncrude obtained from leases on public lands. Syncrude argued its use of the sand and gravel was exempt from the royalty charges.

[2] Syncrude appealed the Director’s decision to the Board. The Director argued the Notice of Appeal was not properly before the Board and requested the Board dismiss the appeal.

II. DECISION

[3] The Board found the Director made a decision that was appealable under section 211(d) of the *Public Lands Administration Regulation*, A.R. 187/2011 (“PLAR”),¹ and Syncrude’s Notice of Appeal was properly before the Board. The Director’s motion to dismiss the Notice of Appeal is denied.

III. BACKGROUND

[4] Syncrude is the holder of the following dispositions issued under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”), and PLAR:

- (a) Mineral Surface Lease 352 (“MSL 352”);
- (b) Mineral Surface Lease 973220 (“Aurora MSL”);
- (c) Surface Material Lease 000002 (“SML 02”), and
- (d) Surface Material Lease 000033 (“SML 33”).

¹ Section 211(d) of PLAR provides:

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

(d) the imposition or variation under the Act of a term or condition of a disposition...”

[5] Alberta Environment and Parks (“AEP”) was the regulatory authority responsible for administering the MSLs and SMLs until the *Responsible Energy Development Act*, R.S.A. 2012, c. R-17.3 (“REDA”), was proclaimed on June 17, 2013. After the proclamation of REDA, the MSLs were managed by the Alberta Energy Regulator (“AER”) and the SMLs were managed by AEP.

[6] Syncrude operates the Mildred Lake mine and upgrader on MSL 352 and the Aurora Mine on the Aurora MSL, both of which are north of the urban service area of Fort McMurray, in the Regional Municipality of Wood Buffalo. MSL 352 and the Aurora MSL each contain terms and conditions governing Syncrude’s use of sand and gravel within the leased area (the “Surface Material Provisions”). The Surface Material Provisions effectively incorporate the SMLs into the MSLs. Syncrude submitted the Surface Material Provisions were amended by letters from AEP’s predecessors in 1979 and 2000, to allow Syncrude to use sand and gravel for certain purposes without having to pay royalties (the “Royalty Exemption Letters”).²

[7] A letter to Syncrude from AEP’s predecessor, Alberta Energy and Natural Resources, dated March 23, 1979, exempted from royalty payments certain uses of surface materials extracted from MSL 352. A letter dated May 31, 2000, to Syncrude from Alberta Environment, did essentially the same thing for the Aurora MSL.³

[8] In 2019 the Auditor General released a report (the “AG Report”)⁴ that determined AEP had improperly granted exemptions from royalty payments to oil sand operators for surface material leases.

[9] On June 24, 2019, the Director sent a letter to Syncrude that stated:

“In order to claim royalty exemption on material used for public works, the leaseholder must ensure the material was provided free of charge, and is

(a) required by the government; or

² Syncrude’s Initial Submission, July 16, 2021, at paragraph 3.

³ Syncrude’s Initial Submission, July 16, 2021, at Tab 2.

⁴ *Management of Sand and Gravel Follow-up*, Report of the Auditor General, November 2019, online: <<https://www.AG.ab.ca/reports/alberta-environment-and-parks-management-of-sand-and-gravel-pits-followup-nov-2019>>.

- (b) used in the construction or maintenance of a public work owned by the government, city, or municipality.

The leaseholder must ensure Public Works Confirmation letters are submitted with all annual returns reporting royalty exempt public works volumes.”⁵

[10] At the end of 2019, Syncrude submitted its 2019 Annual Returns for the SMLs (the “SML Returns”) and claimed royalty exemption for the sand and gravel, as it had done in the past. AEP rejected the SML Returns for not including letters as evidence the sand and gravel from the SMLs were used for public works (the “Public Works Confirmation Letters”), as required by the Director’s June 24, 2019, letter.

[11] On March 20, 2020, Syncrude sent a letter to AEP explaining its exemption from royalty payments for the surface materials was because of the Royalty Exemption Letters. Syncrude requested AEP accept its letter as “confirmation that the [surface materials] are royalty exempt.”⁶

[12] On December 22, 2020, AEP issued invoices to Syncrude which recalculated the royalty amount payable for 2019 based on the total volume of surface materials removed. Each of the invoices had an explanatory note stating the surface materials would be subject to a commercial charge as Syncrude had not submitted the Public Works Confirmation Letters.⁷

[13] Throughout early 2021, AEP and Syncrude continued to communicate and discuss the royalty payment and the royalty exemption applied to the SMLs.

[14] On May 26, 2021, the Director wrote to Syncrude (the “May 2021 Letter”)⁸ and:

- (a) advised Syncrude of the requirements for claiming royalty exemption for the SMLs;
- (b) indicated the amounts payable in the invoices were correct; and
- (c) confirmed a royalty exemption was not applicable for the SMLs.

⁵ June 24, 2019 letter from AEP, paragraphs 2 and 3.

⁶ Syncrude’s Submission, July 16, 2021, at Appendix 2, at pages 6 and 7.

⁷ Director’s Submission, July 29, 2021, at paragraph 16.

⁸ Director’s Submission, July 29, 2021, at paragraph 18.

[15] On June 14, 2021, Syncrude filed a Notice of Appeal with the Board, seeking to reverse the Director's decision. Syncrude stated the Director's decision (the May 2021 Letter) was appealable under section 211 (a) and (d) of PLAR.⁹

[16] On July 29, 2021, the Director filed a motion requesting the Board dismiss Syncrude's appeal (the "Preliminary Motion") on the basis the MSLs are not within AEP's or the Board's jurisdiction. On September 8, 2021, the Board established a schedule to receive written submissions on the Preliminary Motion from Syncrude and the Director (collectively, the "Parties"). Submissions were received from the Parties between September 23 and October 15, 2021.

IV. ISSUES

[17] The following issues were raised in the Parties' submissions on the Preliminary Motion:

- (a) Did the Director make an appealable decision in the May 2021 Letter? and
- (b) If the answer to (a) is "yes", does the REDA remove the Board's jurisdiction to hear such an appeal?

V. ANALYSIS

[18] The Board notes the merits of the Royalty Exemption Letters are not a matter under consideration in this decision. The Director's motion is only related to the jurisdiction of the Board. The Board has reviewed and considered the Parties' submissions and evidence and has provided a summary below.

⁹ Sections 211(a) and (d) of PLAR provide:

"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...
- (d) the imposition or variation under the Act of a term or condition of a disposition..."

A. Did the Director in the May 2021 Letter make an appealable decision?

(i) Submissions

[19] Syncrude submitted section 211 of PLAR prescribed the decisions that may be appealed and noted sections 211(a) and (d) of PLAR were expressly referenced in its Notice of Appeal¹⁰ and its June 14, 2021 Supplemental Submission.¹¹

[20] Syncrude submitted the administrative law text, *Practice and Procedure Before Administrative Tribunals*, provided important guidance relevant to the Board's task of determining if the Director made an appealable decision in the May 2021 Letter:

“Every time an agency elects to do something (or to do nothing) it has made a decision. Decisions are the things the agency resolves to do, or not to do, to allow or not to allow. Every question before an agency results in a decision, even if that decision is to do nothing. A decision is the ‘what’ an agency decides to do. Thus, allowing a person to intervene in a proceeding, refusing an adjournment, assigning particular members to a proceeding, refusing an application, initiating a prosecution, issuing an order, allowing a person to have an interpreter, deciding to re-open a matter; these are all decisions. A decision is what the agency has decided it will do with respect to a request, an application, an investigation, or other circumstances, which puts it in a position to act... It is not the name of a document which determines what it is. It is what the document does that determines its nature.”¹²

[Emphasis is Syncrude's.]

[21] Syncrude submitted the Board's past decisions in *Gionet Holdings Corporation v. Director, Provincial Approvals Section, Alberta Environment and Parks*¹³ and *E Construction Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks*,¹⁴ endorsed the approach put forward in *Practice and Procedure Before Administrative Tribunals*. Syncrude stated:

“Consistent with its past decisions and the guidance from [*Practice and Procedure Before Administrative Tribunals*], when deciding this Jurisdiction

¹⁰ Syncrude's Notice of Appeal, June 14, 2021, Part D, section 15.

¹¹ Syncrude's Supplemental Submission, June 14, 2021, at paragraph 12.

¹² Robert Macaulay, James Sprague & Lorne Sossin, “*Practice and Procedure Before Administrative Tribunals*” (Toronto: Thomson Reuters Canada Limited, 2021), at §28.1.

¹³ *Gionet Holdings Corporation v. Director, Provincial Approvals Section, Alberta Environment and Parks* (13 April 2018), Appeal No. 17-0001-D (A.P.L.A.B.), 2018 ABPLAB 1.

¹⁴ *E Construction Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (October 9 2018), Appeal No. 17-0043-D (A.P.L.A.B.), 2018 ABPLAB 30.

Motion, the Board should consider the substance and legal effect of the decision Syncrude is appealing. The substance and legal effect of that decision must then be compared to the list of prescribed decisions set out in section 211 of the PLAR in order to determine the Board's jurisdiction to hear this Appeal.”¹⁵

[22] Syncrude submitted that to understand the May 2021 Letter it is important to understand the AG Report. Syncrude noted the AG Report stated:

“Between 2009 and 2018, AEP did not charge royalties to some oil sands operators for the sand they mined and used on-site although the legislation required royalties to be paid. The unauthorized exemptions started when AEP implemented a policy that contradicted legislation, and continued undetected for nine years.”¹⁶

[Emphasis is Syncrude’s.]

[23] Syncrude submitted the AG Report is significant as it demonstrated the Auditor General was not referring to the Royalty Exemption provisions of the Surface Material Provisions of the MSLs issued in 1979 and 2000 respectively, but rather AEP’s decision in 2009 to implement a specific policy. Syncrude stated the Royalty Exemptions were independent of the 2009 policy reviewed by the AG Report.

[24] Syncrude stated:

“Prior to the May 2021 Letter, the Royalty Exemption provisions of Syncrude MSLs were valid, in force, and provided Syncrude with substantial rights and benefits. They had never been set aside by any regulatory authority with jurisdiction over Syncrude MSLs. When confronted with that reality, the Director needed to make a further decision about the Royalty Exemption provisions of Syncrude MSLs. Specifically, in order to insist that Syncrude pay the amounts referenced in the Invoices, the Director needed to make a decision expressly denying Syncrude the ability to rely on the Royalty Exemption provisions of Syncrude MSLs.”¹⁷

¹⁵ Syncrude’s Initial Submission, September 23, 2021, at paragraph 21.

¹⁶ Office of the Auditor General of Alberta, “Management of Sand and Gravel Pits Follow up”, November 2019, online: <https://www.AG.ab.ca/wpcontent/uploads/2020/05/Environment_Sand_and_Gravel_Pits_Followup_Nov2019_GlImxXZ.pdf>.

¹⁷ Syncrude’s Initial Submission, September 23, 2021, at paragraph 32.

[25] Syncrude submitted the Director made a decision that denied Syncrude the ability to claim the benefit of the royalty exemption provisions of the MSL and communicated that decision in the May 2021 Letter.

[26] Syncrude stated the fact that May 2021 Letter did not use the terms “amend” or “vary” is irrelevant to the Board’s jurisdiction. The Board should focus on the rights asserted by Syncrude and the effect of the May 2021 Letter on those rights. Syncrude argued the substance and effect of the Director’s decision was to amend or vary the terms of the MSLs and remove Syncrude’s ability to claim Royalty Exemptions as if the Director had issued a formal decision. Syncrude noted a decision amending or varying the terms of a disposition is a prescribed decision under section 211 that may be appealed.

[27] Syncrude stated that whether the Board has jurisdiction to hear the appeal is completely independent of whether the Director had jurisdiction. Syncrude noted, “section 213 of PLAR allows parties to appeal decisions of a director to the Board on the grounds that the decision exceeded the director’s jurisdiction or authority.”¹⁸

[28] The Director submitted the May 2021 Letter does not contain a decision by the Director that can be appealed to the Board. The Director stated the May 2021 Letter informed Syncrude of the requirements for claiming royalty exemption, confirmed an exemption was not applicable for the SMLs, and the amounts detailed in the invoices AEP sent to Syncrude were correct.

[29] The Director submitted the May 2021 Letter did not amend or vary the MSLs or the Royalty Exemptions. The Director stated:

¹⁸ Section 213(a) 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.”
Syncrude’s Initial Submission, September 23, 2021, at paragraph 46.

“While the Confirmation Letter does refer to the MSLs, it is only for the purpose of responding to previous arguments made by the Appellant regarding the Disputed Exemption by confirming that the terms and conditions of the MSLs do not supersede the legislative obligation to pay royalties under the SMLs.”¹⁹

[30] The Director submitted it was important to note AEP was relying on section 114 of PLAR²⁰ and the SML Royalty Terms for its authority to issue the invoices and collect royalties. The Director pointed out AEP was not relying on the MSLs.

[31] The Director stated Syncrude’s authorization to remove surface materials from public lands derives from the SMLs and not the MSLs. The Director noted the terms of the SML and MSL do not supersede, amend or vary each other’s terms.

[32] The Director stated the decision on royalties is not a decision prescribed by section 211 of PLAR that is appealable to the Board. The Director submitted the decision on royalties is the proper application of section 114 of PLAR and did not amend, vary or change the SMLs. The Director stated he does not have the authority to alter or vary the statutory requirement for a SML holder to pay the royalty amount determined by the Minister.

[33] The Director noted section 114 of PLAR requires SML disposition holders to “remit... the royalty on all surface material removed during the preceding 12-month period, at the rates prescribed by the Minister,” which is further reflected within the terms and conditions of the SMLs.

(ii) Analysis

[34] The Board previously found the May 2021 Letter to be a decision letter.²¹ The question before the Board is whether the decision in the May 2021 Letter is appealable under PLAR. In analyzing this question, the Board is not making a merit decision on whether Syncrude is exempt from royalty payments on the SMLs.

¹⁹ Director’s Response Submissions, October 7, 2021, at paragraph 33.

²⁰ Section 114 of PLAR states: “An operator must remit with the return filed under section 113(1) the royalty on all surface material removed during the preceding 12-month period, at the rates prescribed by the Minister.”

²¹ *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (3 September 2021), Appeal No. 21-0003-ID1 (A.P.L.A.B.), 2021 ABPLAB 18, at paragraph 76.

[35] There are two types of dispositions involved in this appeal, Mineral Surface Leases and Surface Material Leases. The Board has no jurisdiction to hear appeals based on the MSLs as MSLs are under the jurisdiction of AER.

[36] The Royalty Exemptions related to SML 000002 and SML 000033 are contained within two letters from AEP to Syncrude dated May 31, 2000, for MSL 973220 and March 23, 1979, for MSL 352. The Royalty Exemptions relieved Syncrude from royalty payments for the surface materials extracted from the MSLs under certain specified conditions.

[37] Although the Royalty Exemptions are contained in the letters related to the specific MSLs, it is clear the SML conditions are attached to the SMLs. There are three SML conditions related to royalties in both SMLs:

Condition 1:

“The Disposition Holder must pay the royalties, specified by [PLAR] in force at the time the surface materials are removed, taxes and other charges that may be assessed against the land.”

Condition 5:

“Provided that the Disposition Holder establishes to the satisfaction of the Regulatory Body that the surface materials removed under this Disposition were supplied free of charge and used by the Government of Alberta or used in the construction or maintenance of a public work owned by the province or a municipality in Alberta, no royalty is payable.

To qualify for royalty exemption, the Disposition Holder must provide documented proof that the surface materials were used for construction and maintenance of a public work.”

Condition 8:

“The purpose of this authority is for Surface Materials extraction on lands under related disposition indicated. If the related disposition is terminated, this authority will also be terminated at the same time. Related Disposition: MSL 352” [or MSL 973220 for SML 02]

[38] These conditions establish that the MSLs and SMLs are inextricably linked. The SMLs would not exist without the MSLs.

[39] Syncrude argued the substance and effect of the May 2021 Letter was to amend or vary the terms of the MSLs contained in the Royalty Exemption Letters. The Board does not

have the jurisdiction to consider variations to the MSLs, but it does have jurisdiction to consider certain decisions related to the SMLs.

[40] Section 211 of PLAR establishes prescribed decisions that may be appealed. Section 211(d) states:

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

- (d) the imposition or variation under the Act of a term or condition of a disposition...”

[41] The Royalty Exemption letters set the royalty rate for certain uses of the surface materials extracted from the MSLs. The Board finds that the effect of the May 2021 Letter is to vary the royalty rate that had been set previously by the Royalty Exemption Letters. Condition 3021 of the SMLs states that the Disposition Holder, in this case, Syncrude, must pay the royalties specified by PLAR. Section 114 of PLAR states the rate that must be paid is prescribed by the Minister. Syncrude had a royalty agreement, which set the amount Syncrude would pay for surface materials under certain conditions. The Director varied the SMLs by requiring royalty payments at a different amount set by the Royalty Exemption Letters. Whether the Director was correct in doing so is a matter to be determined in a hearing. For the purposes of this preliminary motion decision, the Board finds the May 2021 Letter is an appealable decision under section 211(d) of PLAR.

B. Does REDA remove the Board’s jurisdiction to hear such an appeal?

(i) Submissions

[42] Syncrude submitted the key to understanding the AER’s jurisdiction under the Act and PLAR is section 24 of REDA, which states:

“Subject to sections 21 and 25 and except to the extent that the regulations provide otherwise,

- (a) all powers, duties and functions of officials set out in a specified enactment are to be carried out by the Regulator instead of the officials to the extent that those powers, duties and functions are to be carried out in respect of energy resource activities,
- (b) all powers, duties and functions of a department, the Government or the Crown set out in a specified enactment are to be carried out by the

Regulator instead of the department, Government or Crown to the extent that those powers, duties and functions are to be carried out in respect of energy resource activities,

- (c) the administration of provisions of a specified enactment relating to the carrying out of a power, duty or function in respect of energy resource activities is to be carried out by the Regulator,
- (d) the Regulator shall act in accordance with the specified enactment in the carrying out of the powers, duties and functions referred to in clauses (a), (b) and (c) and
- (e) a reference in a specified enactment to an official, a department, the Government or the Crown in relation to the carrying out of a power, duty or function in respect of energy resource activities is a reference to the Regulator.”

[43] Syncrude submitted section 24 of REDA does not apply to the Board as an independent, quasi-judicial, statutory tribunal, tasked with hearing appeals of decisions made by AEP officers and directors. Syncrude stated, “nothing in section 24 of REDA affects the Board’s jurisdiction to hear this Appeal.”²²

[44] Syncrude stated section 25 of REDA²³ does not affect the Board’s jurisdiction as, “section 25 of REDA is simply the procedural companion to the grant of substantive jurisdiction in section 24.” Syncrude stated section 25 of REDA “clarifies *how* the AER is supposed to conduct proceedings under specified enactments when exercising the jurisdiction conferred to it in section 24.”²⁴ [Emphasis is Syncrude’s.]

[45] Syncrude submitted a decision may be appealed to the AER only in accordance with the regulatory appeal provisions of REDA which defined the term “appealable decision” in section 36(a)(iii) of REDA as follows:

²² Syncrude’s Initial Submission, September 23, 2021, at paragraph 59.

²³ Section 25 of REDA states:

“Except to the extent that the regulations provide otherwise, an application, decision or other matter under a specified enactment in respect of an energy resource activity must be considered, heard, reviewed or appealed, as the case may be, in accordance with this Act and the regulations and rules instead of in accordance with the specified enactment.”

“(a) ‘appealable decision’ means...

- (iii) a decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 121 of the *Public Lands Act*, if that decision was made without a hearing...”

[46] Syncrude stated that only decisions of the AER can be brought before an appeal panel. Syncrude noted that this appeal is of a decision of the Director, and therefore, the regulatory appeal provisions in REDA are not applicable.

[47] The Director submitted the MSLs are dispositions issued in respect of an energy resource activity, and are therefore under the jurisdiction of AER.

[48] The Director stated a reading of REDA as a whole shows the legislature intended AER have a broader jurisdiction than Syncrude suggested. Specifically, the Director commented on AER’s mandate in section 2 of REDA and the transfer of jurisdiction for the specified enactments in sections 24 and 25 of REDA as follows:

- “(a) section 2(1)(b)(i) states that the Regulator’s mandate includes “the disposition and management of public lands”,
- (b) under section 2(2)(b), the Regulator is to carry out its mandate through the exercise of the powers, duties and functions under the specified enactments including, “without limitation” the power to consider “other matters” under the Act and PLAR;
- (c) unlike sections 24(a) and (b) of REDA, section 24(c) of REDA is not just in relation to an “official”, but transfers to the Regulator the “administration of provisions of a specified enactment”; and
- (d) section 25 states that “an application, decision or other matter” under a specified enactment must be consider under REDA and its regulations.”²⁵

[49] The Director stated that whether a matter is appealable to the AER is not relevant to the Board’s jurisdiction. The Director said it was “within the legislature’s authority to limit which matters are subject to REDA’s regulatory appeals process.”²⁶

[50] The Director noted Syncrude consistently asserted the appeal was of the Director’s decision as it related to the MSLs, and not the SMLs. The Director submitted the

²⁴ Syncrude’s Initial Submission, September 23, 2021, at paragraph 64

²⁵ Director’s Response Submission, October 7, 2021, at paragraph 30.

Director's decision was solely in relation to payment of royalties for the SMLs.

[51] The Director stated, "the legislature did not even grant the Minister discretion to exempt an SML holder from the obligation to pay royalties; rather, the Minister's power is limited to setting the royalty rates..."²⁷ The Director said the rates were set in the *Public Lands Fees, Rents and other Amounts Payable Order*.²⁸

[52] The Director submitted that even if the Board had jurisdiction to consider matters related to the MSLs, payment of royalties for the SMLs is a statutory requirement under section 114 of PLAR and is outside the Board's jurisdiction.

[53] In its rebuttal submissions, Syncrude submitted the Director implied section 2 of REDA, which sets out the AER's mandate to "regulate the disposition and management of public lands," does not affect the Board's jurisdiction to hear this appeal. Syncrude stated: "Hearing this Appeal does not require the Board to 'regulate' the disposition and management of public lands. It simply requires the Board to review a decision made by the Director and to make a recommendation to the Minister..."²⁹

[54] Syncrude stated the Director misinterpreted REDA, submitting "The fundamental question for the Board to consider is a narrow one: which body – the AER or the Board – is responsible for reviewing the specific decision made by the Director in the May 2021 Letter."³⁰

[55] Syncrude submitted that when a Director's decision strays beyond his jurisdiction, the Board retains jurisdiction to hear appeals and the Director has conflated the Director's lack of jurisdiction with the Board's jurisdiction to determine whether the Director exceeded his jurisdiction.

(ii) Analysis

[56] The Board finds the May 2021 Letter had the effect of varying the Royalty

²⁶ Director's Response Submission, October 7, 2021, at paragraph 40.

²⁷ Director's Response Submission, October 7, 2021, at paragraph 52.

²⁸ <<https://open.alberta.ca/publications/aep-ministerial-order-01-2020>>.

²⁹ Syncrude's Rebuttal Submission, October 15, 2021, at paragraph 50.

³⁰ Syncrude's Rebuttal Submission, October 15, 2021, at paragraph 17.

Exemption Letters and royalty provisions of the SMLs. The Board notes the Director made a decision regarding the SMLs, and therefore, considered them to be within his jurisdiction.

[57] While the Board agrees royalty decisions are not appealable under PLAR, varying the terms of a disposition is specified as a prescribed decision under section 211(d) of PLAR that can be appealed to the Board. The Board finds the Director's May 2011 Letter was a decision that varied the SMLs held by Syncrude. The Board has the authority under PLAR to determine if the Director's decision to vary the SMLs was within the Director's jurisdiction. REDA does not affect the Board's jurisdiction in this area. However, the Board cannot consider whether the decision to vary the royalty payment amount was correct, as decisions regarding royalties are not within the Board's jurisdiction.

[58] The Board is prepared to proceed with the appeal on the issue of whether the Director had the jurisdiction to make the decision that varied the SMLs. As questions of jurisdiction can be a broad matter, the grounds of appeal may include whether the Director made a material error of fact on the face of the record, made an error of law, and whether the Director exceeded his jurisdiction or authority, however, each ground of appeal must be relevant to the issue of the Director's jurisdiction.

VI. DECISION

[59] The Board finds the Director's decision in the May 2011 Letter varied the SMLs and is an appealable matter under section 211(d) of PLAR. The Board denies the Director's motion to dismiss the Notice of Appeal filed by Syncrude for being outside the Board's jurisdiction.

Dated on January 14, 2022, at Edmonton, Alberta.



Gordon McClure
Appeals Co-ordinator
and Board Chair