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# ALBERTA PUBLIC LANDS APPEAL BOARD

## Decision

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Date of Decision – February 22, 2023

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

**-and-**

**IN THE MATTER OF** an appeal filed by 1753368 Alberta Ltd., of the decision by the Director, Northeast Lands Manager, Forestry, Parks and Tourism, to refuse an application for SML 180043 from 1753368 Alberta Ltd.

Cite as: *1753368 Alberta Ltd. v. Director, Northeast Lands Manager, Forestry, Parks and Tourism* (22 February 2023), Appeal No. 22-0008-ID1 (A.P.L.A.B), 2023 ABPLAB 2.

**BEFORE:**

Mr. Gordon McClure, Board Chair; Dr. Brenda Ballachy, Board Member; and Mr. Kurtis Averill, Board Member.

**SUBMISSIONS BY:**

**Appellants:** Ms. Tracy Kolody and Ms. Cindy Duchesne, of 1753368 Alberta Ltd.

**Director:** Mr. Darrell Kentner, Director, Northeast Lands Manager, Forestry, Parks and Tourism.

## EXECUTIVE SUMMARY

In 2018, 1753368 Alberta Ltd. (the Appellant), applied to Alberta Environment and Parks (AEP)\* for a sand and gravel Surface Material Lease (the SML). Eight days after the Appellant submitted the SML application, AEP updated its standard conditions to increase the buffer between the boundary of a surface material lease and a Sharp-tailed Grouse lek\*\* from 500 meters to 1600 meters.

In July 2022, AEP refused the Appellant's SML application for the following reasons:

- a Sharp-tailed Grouse lek was discovered within 1600 meters of the SML boundaries; and
- the Appellant had not complied with some of the requirements of a Supplemental Information Request provided by AEP.

The Appellant appealed the refusal to the Public Lands Appeal Board (the Board).

The Board scheduled a hearing of the appeal by written submissions and provided an opportunity for the parties to make any preliminary motions before the hearing. As appeals before the Board are based on the decision and the record of the decision-maker, the Appellant responded with a list of records they wanted to include as evidence for the hearing. The Board requested and received written submissions on the Appellant's preliminary motion, and after reviewing the submissions, the case law, and the legislation, issued the decision.

The Board divided the records into four categories:

1. Records already in the Director's File;
2. Records the parties agreed to admit;
3. Records the Board admitted and will assign appropriate weight; and
4. Records the Board will not admit.

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\* In October 2022, Forestry, Parks and Tourism succeeded AEP as the department responsible for public lands.

\*\* A "lek" is defined as "an assembly area where animals (such as the prairie chicken) carry on display and courtship behavior." <[www.merriam-webster.com/dictionary/lek](http://www.merriam-webster.com/dictionary/lek)>.

The Board admitted the following records as evidence in the hearing:

1. records already in the Director's File;
2. records the Parties agreed to admit; and
3. records the Board will admit and assign appropriate weight.

The Board found the remaining records did not meet the Board's criteria for admitting evidence and refused the Appellant's application to admit them.

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## I. INTRODUCTION

[1] This is the Public Lands Appeal Board’s (the “Board”) decision regarding a preliminary motion made by 1753368 Alberta Ltd. (the “Appellant”). The Appellant filed a Notice of Appeal with the Board, under section 121(1) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”),<sup>1</sup> and section 211(c) of the *Public Lands Administration Regulation*, A.R. 187/2011 (“PLAR”).<sup>2</sup> The Appellant appealed the decision of the Northeast Lands Manager, Forestry, Parks and Tourism (the “Director”), to refuse the Appellant’s application for a sand and gravel Surface Material Lease SML 180043 (the “SML”). The Appellant applied to the Board to admit certain documents in the hearing of the appeal.

## II. BACKGROUND

[2] On November 14, 2018, the Appellants applied to Alberta Environment and Parks (“AEP”)<sup>3</sup> for the SML, located at SW 26-62-6-W4 and NW 26-62-6-W4 (the “Lands”), northeast of the City of Cold Lake in the Municipal District of Bonnyville. The Appellant had previously held Surface Material Exploration Licence SME 160087 (the “SME”), which encompassed the Lands.

[3] At the time the SML application was made, AEP’s Master Schedule of Standards and Conditions (“MSSC”)<sup>4</sup> required a 500-meter buffer around a Sharp-tailed Grouse lek.<sup>5</sup> On November 22, 2018, AEP updated the MSSC,<sup>6</sup> superseding the 2017 MSSC. Condition 1642-

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<sup>1</sup> Section 121(1) of the Act states: “A notice of appeal of a prescribed decision may be submitted to an appeal body by a prescribed person in accordance with the regulations.”

<sup>2</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>3</sup> On October 24, 2022, responsibility for public lands was transferred to Forestry, Parks and Tourism.

<sup>4</sup> The Master Schedule of Standards and Conditions identifies conditions that apply to dispositions approved under the *Public Land Act*.

<sup>5</sup> Master Schedule of Standards and Conditions, June 28, 2017, <[open.alberta.ca/publications/master-schedule-of-standards-and-conditions](http://open.alberta.ca/publications/master-schedule-of-standards-and-conditions)>, Condition 1351-AS, at page 51.

<sup>6</sup> Master Schedule of Standards and Conditions, November 2018, <[open.alberta.ca/publications/master-schedule-of-standards-and-conditions](http://open.alberta.ca/publications/master-schedule-of-standards-and-conditions)>.

AS of the 2018 MSSC stated: “The Disposition Holder must not conduct any activities within 1600 meters of the perimeter of any known or identified active sharp-tailed grouse lek sites.”<sup>7</sup>

[4] On January 9, 2019, AEP determined the SML application was complete and advised the Appellant that AEP had “one year to reach a merit decision for issuance or refusal of the formal application. The applicant will be notified of the merit decision in writing within that time period.”<sup>8</sup>

[5] On November 1, 2019, the Appellant submitted a Conservation Operation Reclamation Plan (“CORP”)<sup>9</sup> to AEP.

[6] On March 12, 2020, AEP sent the Appellant a Supplemental Information Request (“SIR”). The SIR required the Appellant to provide the following:

1. a more fulsome mitigation plan for potential effects to wildlife and species of management concern;
2. a wildlife survey in accordance with the Alberta Sensitive Species Inventory Guidelines, particularly as the Lands were within a Sharp-tailed Grouse Survey Zone;
3. a proposal addressing nesting raptors, active nests and habitat which complied with Environment Canada recommendations regarding migratory birds, and met the requirements of the MSSC;<sup>10</sup>
4. a more detailed final closure plan addressing mitigation for the loss and fragmentation of wildlife habitat and wildlife displacement during the life of the sand and gravel operations;
5. details on potential end pit water bodies;

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<sup>7</sup> Master Schedule of Standards and Conditions, November 2018, <[open.alberta.ca/publications/master-schedule-of-standards-and-conditions](http://open.alberta.ca/publications/master-schedule-of-standards-and-conditions)>, at page 149.

<sup>8</sup> Director’s File, at Tab 2.

<sup>9</sup> A Conservation Operation and Reclamation Plan contains “... information on how the volume of aggregate removed from the site will be measured and how reclamation will progress during the term of the proposed disposition and appropriate level of security.” *Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land*, AEP Public Land Management 2017 No. 3, at page 5, <<https://open.alberta.ca/publications/aep-public-land-management-2017-no-3>>.

<sup>10</sup> Master Schedule of Standards and Conditions, December 2018, <[open.alberta.ca/publications/master-schedule-of-standards-and-conditions](http://open.alberta.ca/publications/master-schedule-of-standards-and-conditions)>.

6. mitigation plans for any on-site extraction activities such as crushing, screening, and asphalt production;
7. a vegetation assessment of the Lands;
8. a soil assessment of the Lands;
9. air photos or topographical maps describing features of the Lands;
10. confirmation that the Appellant will follow the “Guide to Water Act Authorizations Required for Dugouts, Borrow Pits and other types of Pits/Excavations”<sup>11</sup> document;
11. provision of average pit depth and extraction setback;
12. provision of the estimated topsoil and subsoil replacement depths and estimated topsoil and subsoil replacement volumes;
13. correction of a discrepancy in the reclamation topics in the application;
14. sequential timelines for the activities and approximate size for each mining phase;
15. response to AEP’s questions regarding reclamation plans; and
16. submission of a brief strategy proposing a reclamation monitoring plan.<sup>12</sup>

[7] On April 12, 2021, the Appellant wrote to AEP and expressed concerns with some of the SIR requirements, particularly with the requirement for a Sharp-tailed Grouse survey. On April 30, 2021, AEP responded that a Sharp-tailed Grouse survey must be completed and submitted, and on May 26, 2022, the Appellant complied and forwarded the survey to AEP.

[8] On July 13, 2022, the Director wrote to the Appellant and advised the SML application was refused for failing to “meet all of the departmental requirements for issuance of the formal disposition” (the “Decision”).<sup>13</sup> The Director provided the following reasons for refusing the application:

1. the Sharp-tailed Grouse survey found a Sharp-tailed Grouse lek within 1600 meters of the Appellant’s SML. The 1600 meters included the entire SML boundary and rendered it a no-activity zone. The mitigation proposed by the Appellant did not align with the MSSC; and

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<sup>11</sup> Guide to Water Act Authorizations Required for Dugouts, Borrow Pits and other types of Pits/Excavations <[open.alberta.ca/publications/guide-to-water-act-authorizations-required-for-excavations](https://open.alberta.ca/publications/guide-to-water-act-authorizations-required-for-excavations)>.

<sup>12</sup> Director’s File, at Tab 4.

<sup>13</sup> Director’s File, at Tab 1.



2. points 4 to 16 of the SIR had not been resolved.

[9] On July 26, 2022, the Appellant filed a Notice of Appeal with the Board, appealing the Decision to refuse the SML application.

[10] On July 29, 2022, the Board acknowledged receipt of the Notice of Appeal and requested the Department's Record from the Director, which the Board noted consisted of:

1. the Director's decision;
2. the Director's file as defined in section 209(f) of PLAR;<sup>14</sup>
3. all related records in the Department's possession as defined under section 209(m) of PLAR;<sup>15</sup>
4. all related policy documents, guidelines, and directives available to the Director when the decision was made; and
5. an index.<sup>16</sup>

[11] On September 22, 2022, the Director provided the Board with the Director's File,<sup>17</sup> which the Board distributed to the Appellant. The Director did not provide the Department's Record.

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<sup>14</sup> Section 209(f) of PLAR states: "'director's file', in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision..." The Board notes this definition is the only place "director's file" appears in PLAR or the Act.

<sup>15</sup> Section 120 of the Act states "[a]n appeal under this Act must be based on the decision and the record of the decision-maker." To determine what the decision and the record of the decision-maker is the Board looks to the definitions in PLAR. Section 209(f) of PLAR defines "director's file" as "in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision..." The Board notes the term "director's file" does not appear anywhere else in the legislation.

Section 209(m) of PLAR states "'record" means record as defined in the *Freedom of Information and Protection of Privacy Act*..."

Section 1(q) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, states:

"'record' means a record of information in any form and includes notes, images, audiovisual recordings, x rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records..."

Based on these definitions, the Board considers the "Department's Record" to consist of the director's file, along with the department's records related to the SML, which is any of the information as defined in section 1(q) of the *Freedom of Information and Protection of Privacy Act*.

<sup>16</sup> Board's Letter, July 29, 2022.

<sup>17</sup> As previously noted, section 209(f) of PLAR states: "'director's file', in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision..."

[12] The Board held a mediation between the Appellant and the Director (collectively, the “Parties”) via video conference, on October 25, 2022. The Parties did not reach an agreement.

[13] On October 28, 2022, the Board wrote to the Parties and advised it would schedule a hearing of the appeal by written submissions, and requested the Parties raise any preliminary issues for the Board to decide before the hearing.

[14] On November 17, 2022, the Appellant provided documents for the Board to consider, including documents the Appellant stated the Director did not have when making the Decision. The Board responded by setting a schedule for filing written submissions regarding the Appellant’s motion to admit the documents as evidence in the hearing.

[15] On January 10, 2023, after receiving the Parties’ written submissions, the panel assigned by the Board to hear the appeal met to decide the Appellant’s motion.

### **III. DISCUSSION**

[16] The Board follows a two-part process when it receives a request to admit evidence that is not part of the Department’s Record:

1. the Board must decide whether the evidence is admissible; and
2. if the evidence is admissible, then the Board considers the weight that should be given to the evidence.

The party applying to admit the evidence has the onus to prove that the evidence is admissible and what weight the Board should give the evidence.

#### **A. Admissibility and Weight**

[17] Under the Act and PLAR, the Board has the responsibility to provide a report and recommendation to the Minister of Forestry, Parks and Tourism (the “Minister”). To provide the best possible advice to the Minister, the Board undertakes a thorough consideration of the legislation, the Parties’ submissions, and the relevant evidence contained in the Department’s Record.

[18] Section 120 of the Act states: “An appeal under this Act must be based on the decision and the record of the decision-maker.” As a department, FPT is the ultimate decision-maker for public lands dispositions, with the Director making decisions on behalf of FPT. The Director is appointed to the position and FPT can change the appointment.

[19] The Department’s Record is the full record relating to a public lands disposition or application, in this situation, the application for the SML.

[20] The Director’s File (referred to by the Director as the “Director’s Record”) is a subset of the Department’s Record and is defined in section 209(f) of PLAR as, “in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision.” However, the Board notes this definition is the only place the term “director’s file” appears in the legislation. As required by the Act, the Director, when making a decision on behalf of FPT, considers records from the Department’s Record. Any information or records gathered by the Director in the Director’s File during the decision-making process become part of the Department’s Record.

[21] As the Act requires the appeal to be based on the decision and the Department’s Record, it is essential to procedural fairness that the Department’s Record is complete for the following reasons:

- (a) Relevant records missing from the Department’s Record or the Director’s File could result in a director making a decision without all the relevant facts. The decision could be based on irrelevant considerations (incorrect facts), making the decision invalid.
- (b) If the record is incomplete, an appellant may not have the necessary evidence to present their case fully and fairly to the Board, which could be a breach of the procedural fairness right for an appellant to know the case against them.<sup>18</sup>
- (c) Relevant records missing from the Department’s Record or the Director’s File may cause the Board to have insufficient information and evidence to provide recommendations to the Minister.

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<sup>18</sup> See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 30.

- (d) Incomplete records may undermine public confidence in the appeals system and the credibility of FPT. A complete record shows transparency and serves to increase public confidence in the appeals system, the FPT, and government as a whole.<sup>19</sup>

[22] For the above reasons the Board may consider admitting relevant evidence that may be missing from the Department's Record or the Director's File, or evidence that is not part of the Department's Record or Director's File but would help the Board understand the context of an appeal. The Board may consider admitting such evidence if it meets the following criteria:

- (a) The evidence is rationally connected to the Department's Record. This means that the evidence is connected or related to a specific record in the Department's Record. The stronger the connection, the more likely the evidence will be admissible.
- (b) The evidence provides detail and clarification of an existing record in the Department's Record that assists the Board in understanding the Department's Record and the context of the appeal.<sup>20</sup>
- (c) The evidence is relevant to the scope of the appeal. Not all evidence is of equal value in an appeal. To be relevant, evidence must address the issues of the appeal. Evidence that is relevant only to a peripheral issue, or repetitive of records already in the Department's Record, is not of value to the Board's deliberations.<sup>21</sup> The Board will consider evidence that is relevant to the issues the Board must determine in making its report and recommendations to the Minister.<sup>22</sup>

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<sup>19</sup> In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, the Supreme Court of Canada stated at paragraph 95:

“That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.”

<sup>20</sup> See: Lorne Sossin, *Practice and Procedure Before Administrative Tribunals*, (Toronto: Thomson Reuters Canada, 2023), at §38:170.

<sup>21</sup> See: Sarah Blake, *Administrative Law in Canada*, 6<sup>th</sup> ed. (Toronto: LexisNexis Canada Inc., 2017), at § 2.165.

<sup>22</sup> *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, at paragraph 22.

[23] The Courts have held that refusing to hear relevant and admissible evidence is a breach of the rules of procedural fairness.<sup>23</sup> The Board notes that the value of evidence a party seeks to have admitted may not be obvious without the context provided by testimony and presentation in a hearing. Therefore, if the evidence meets the Board's criteria, the Board follows the counsel provided in *Administrative Law in Canada*: "When in doubt as to relevance, evidence may be admitted, leaving its probative value to be decided later."<sup>24</sup>

[24] The Board will consider the probative value,<sup>25</sup> or weight,<sup>26</sup> of admissible evidence in its deliberations after it has considered the evidence in the context of the hearing. The admitted documents are assigned numbers and will be referred to in the hearing by the corresponding number.

## **B. Documents Sought to be Admitted**

[25] The Appellant requested the Board admit the documents listed below as evidence in the hearing. The Board notes that the Director, with a few exceptions, did not object to including records that involved AEP or FTP staff. The Board will admit such records, as they are part of the Department's Record and would have been provided to the Board had the Director fully complied with the Board's July 29, 2022, request for the complete Department's Record. The Director also did not object to records already included on the Director's File or records that are AEP or FTP public documents. As the Parties agree on these records, the Board will admit them as evidence in the hearing. The admissible records are listed below.

### *(a) Records already in the Director's File*

1. Letter from Director re: Notice of Merit Decision, July 13, 2022, at Tab 1.
2. Surface Disposition Application for SML, November 14, 2018, at Tab 2.1;

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<sup>23</sup> *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471, at paragraph 51.

<sup>24</sup> Sarah Blake, *Administrative Law in Canada*, 6<sup>th</sup> ed. (Toronto: LexisNexis Canada Inc., 2017), at §2.165.

<sup>25</sup> Probative is defined as "... tending to prove an issue..." in *(R. v. McIntyre)* (1993), 1993 CarswellOnt 2789 (Ont. C.A.), at paragraph 4.

<sup>26</sup> "Weight" is defined as "the persuasiveness of some evidence in comparison with other evidence." *Weight*, *Black's Law Dictionary* (11<sup>th</sup> ed. 2019).

3. Completeness Review Decision - Acceptance Letter from AEP, January 9, 2019, at Tab 2.1;
4. Email exchange re: SIR for SML, March 12-13, 2020, at Tab 4.1;
5. SIR, March 13, 2020, at Tab 4.3;
6. Email from AEP, re: SIR, February 11, 2021, at Tab 4.3;
7. Letter from AEP requesting security deposit and land survey, June 24, 2020, at Tab 4.6;
8. Email from Appellants to AEP Minister re: concerns with SML, February 16, 2021, at Tab 4.6;
9. AEP internal emails re: SML Amendment, April 9, 2021, at Tab 4.11;
10. Email exchange re: follow-up to phone call, April 12-26, 2021, at Tab 4.17;
11. AEP email re: follow-up to phone call, April 30, 2021, at Tab 4.17;
12. Email exchange, re: SML application status, June 22-24, 2022, at Tab 4.19;
13. Basin Environmental Ltd. Project Overview image, February 8, 2022, at Tab 5.3;
14. Basin Environmental Ltd. Sharp-tailed Grouse Survey, May 25, 2022, at Tab 5.3;
15. Email from Appellant re: Sharp-tailed Grouse Survey Report, May 26, 2022, at Tab 5.3;
16. Master Schedule of Standards and Conditions, AEP, April 12, 2021, at Tab 6.1;
17. Lower Athabasca Regional Plan 2012-2022, at Tab 6.2;
18. Cold Lake Sub-Regional Plan, April 2022, at Tab 6.3;
19. Guideline for Acquiring Surface Dispositions on Public Land, 2008 Edition, SRD [AEP], at Tab 6.4;
20. Sensitive Species Inventory Guideline, ESRD [AEP], April 2013, at Tab 6.5.

(b) *Records the Parties agreed to admit*

1. Master Schedule of Standards and Conditions, AEP, June 28, 2017;
2. Master Schedule of Standards and Conditions, AEP, November 22, 2018;
3. *Public Lands Act*, R.S.A. 2000, c. P-40;
4. Public Lands Administration Regulation, 187/2011;
5. Letter from AEP requesting CORP, August 20, 2019;

6. Email from AEP Agrologist, March 7, 2019;
7. Email from AEP advising the Surface Disposition Application for SML was received, November 15, 2018;
8. Email from Appellant re: merit decision follow-up, January 27, 2020;
9. Email from Appellant re: follow-up phone call, February 11, 2020;
10. Email exchange re: follow-up phone call, February 11, 2020;
11. Email exchange re: follow-up phone call, March 2, 2020;
12. Email exchange re: follow-up phone call, March 5, 2020;
13. Email exchange re: SIR, March 14, 2020;
14. Email exchange re: Freedom of Information request, June 10, 2020;
15. Email exchange re: Land Survey Plan, July 7, 2020;
16. Appellant email to AEP re: security deposit sent, July 8, 2020;
17. Email exchange re: hybrid survey, July 13, 2020;
18. Email exchange re: deposit, July 16, 2020;
19. Email exchange re: extension, July 17, 2020;
20. Email exchange re: land survey, August 5-10, 2020;
21. Email exchange re: land survey, October 9-13, 2020;
22. Email exchange re: land survey deficiency, October 26, 2020;
23. Email exchange re: land survey deficiency, November 17-24, 2020;
24. Email exchange re: revision, December 4 and 20, 2020;
25. Email exchange re: land surveys, December 23, 2020, and January 18, 2021;
26. Email exchange re: land survey, January 20, 2021;
27. Letter from AEP re: plan deficiencies, March 18, 2021;
28. Email exchange re: SML Amendment, March 19, 2021,
29. AEP email re: follow up answers to phone call, May 6, 2021;
30. Email re: request for documentation; May 7, 2021;
31. Email exchange re: Sharp-tailed Grouse Survey, June 8, 2021; and
32. Email exchange re: Sharp-tailed Grouse Survey and consultants, June 11-29, 2021.

[26] The Parties did not agree on the admissibility of the remaining documents. The Board reviewed the admissibility of the disputed documents below, summarized the Parties' comments and provided the Board's decision and reasons.

(c) *Records the Board will admit and assign appropriate weight*

1. Email exchange between Appellant and Basin Environmental Ltd., February 11 – April 12, 2022; and
2. Email exchange between Appellant and Basin Environmental Ltd. re: Sharp-tailed Grouse Survey, May 19, 2022 – May 25, 2022.

[27] The emails relate to the Sharp-tailed Grouse Survey. The Appellant submitted that the emails were relevant to the appeal. The Appellant stated the Director's File referred to an internal AEP email dated May 27, 2022,<sup>27</sup> that noted a Sharp-tailed Grouse lek was found beyond the 500-meter boundary and questioned whether the survey was acceptable. The Appellant argued the Director should not have considered findings outside the survey boundary.

[28] The Director submitted the record was correspondence between the Appellant and their contractor, did not include FPT, was not part of the Director's File and not relevant to the Decision and, therefore, should not be admitted as evidence.

[29] The Board notes the emails do not include AEP, FPT, or the Director, and were not before the Director when he made the Decision. However, the emails relate to the Sharp-tailed Grouse Survey, which was central to the Director's Decision, and the Appellant has argued the emails are connected to a specific record in the Director's File. This suggests to the Board the emails may be rationally connected to the Department's Record and may provide detail and clarification of the records in the Director's File. The Board finds the emails are within the scope of the appeal. The Board will admit the email exchanges between Appellant and Basin Environmental Ltd., February 11 – April 12, 2022, and May 19, 2022 – May 25, 2022, and will determine the weight to assign the emails during its deliberations after the hearing.

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<sup>27</sup> Director's File, at Tab 5.3.



3. Photo of SML site, May 19, 2022.

[30] The Appellant submitted the photo was relevant to the appeal as it showed the landscape and provided “perspective to the distance that the Biologist traveled outside the 500 [meter] boundary to find the lek in question.”<sup>28</sup> The Appellant argued the biologist could not have seen the lek without going outside the survey boundary, which the Appellant stated was reason for AEP to reject the finding of the lek. The Director noted the photo was correspondence between the Appellant and their contractor, did not include FTP, was not part of the Director’s File, and was not relevant to the Decision.

[31] The Board finds that the photo is not directly connected to a record in the Department’s Record, however, it may assist the Board in understanding the Department’s Record by providing context to the Appellant’s arguments and the Director’s Decision. The Board will admit the photo as evidence in the hearing and assign the appropriate weight in its deliberations.

4. Email from AEP to the Appellant, March 18, 2021.

[32] This email advises the Appellant that AEP changed the staff member assigned to the SML application. The Appellant did not provide reasons why this email should be admitted as evidence in the hearing. The Director stated the email was not relevant to the Decision.

[33] The Board finds the email does not meet the criteria for admittance as evidence, however, it is a part of the Department’s Record and should have been included in the records provided by the Director. The Board will admit the email from AEP to the Appellant, March 18, 2021, and assign appropriate weight in the Board’s deliberations after the hearing.

5. Emails from the Appellant to AEP, March 18 to March 30, 2021.

[34] The Appellant did not provide reasons for admitting this record as evidence in the hearing. The Director stated it was internal departmental discussions regarding the status of the SIR and was not relevant to the Decision.

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<sup>28</sup> Appellant’s Rebuttal Submission, January 3, 2023, at page 5.

[35] The emails consist of the Appellant's request for an update on the SML application status. They are not internal departmental discussions. The Board finds the emails do not meet the criteria for admittance as evidence, however, they are part of the Department's Record, and should have been included in the records provided by the Director. The Board will admit the emails from the Appellant to AEP, March 18 – March 30, 2021, and assign appropriate weight in the Board's deliberations after the hearing.

(d) *Records the Board will not admit*

1. Appellant's Brief Summary – Basin Environmental Ltd. Sharp-tailed Grouse Survey Contractor (the "Brief Summary").

[36] The Brief Summary is a timeline of the Appellant's interactions with the consultant hired to conduct the Sharp-tailed Grouse survey. The Appellant did not provide reasons why the Brief Summary should be admitted as evidence. The Director submitted the Brief Summary was a new timeline, was not part of the Director's file, and was not considered when making the Decision. The Director opposed admitting it as evidence.

[37] The Brief Summary was not available to the Director when making the Decision. It is not rationally connected to any specific document in the Department's Record, it does not provide detail and clarification of an existing record in the Department's Record, and, as unsubstantiated evidence, is not relevant to the issues on appeal. The information in the Brief Summary may be relevant to the Appellant's arguments at the hearing. As it is a document prepared by the Appellant, it would be more appropriately included as part of the Appellant's arguments at the hearing. The Board will not admit the Brief Summary as evidence for the hearing.

2. Invoice #22-0360 from Basin Environmental Ltd. to the Appellant, May 12, 2022 ("Invoice");
3. Payment Confirmation from Basin Environmental Ltd. to the Appellant, May 16, 2022 ("Payment"); and
4. Sharp-tailed Grouse Survey Costs Assessment from Basis Environmental Ltd. to the Appellant, February 22, 2021(plus copy) ("Assessment").

[38] The Invoice, Payment, and Assessment are documents from Basin Environmental

that relate to the cost of the Sharp-tailed Grouse Survey. The Appellant did not address the admissibility of these documents in their written submissions. The Director submitted the Invoice, the Payment, and the Assessment were between the Appellant and their contractor, did not involve the Director or the department, was not part of the Director's File, and were not relevant to the Decision.

[39] The Board finds the cost of the Sharp-tailed Grouse Survey is irrelevant to the issues of the appeal. The Invoice, Payment, and Assessment are not rationally connected to the Department's Record, and they do not provide detail and clarification of an existing record in the Department's Record. The Board will not admit the Invoice, Payment, and Assessment as evidence in the hearing.

5. Email exchange between AEP and Appellant, January 25 to March 12, 2018; and
6. Email exchange between the Appellant and their consultant, March 6 to March 13, 2018.

[40] The Appellant requested the Board admit as evidence the email exchange between AEP and Appellant, January 25 to March 12, 2018, and the email exchange between the Appellant and their consultant, March 6 to March 13, 2018. The Appellant submitted the two email exchanges are related to each other. The Appellant stated the May 12, 2018 email from AEP meant:

“... the SML application that followed SME 160087 would be following the old procedures and that AEP would accept the SML Application without the CORP thereby following the old rules. This is relevant because it forms the basis for our SML Application process.”<sup>29</sup>

[41] The Director argued the emails related to the “... SME disposition backlog files, not the disposition being applied for.”<sup>30</sup>

[42] The Board finds both email exchanges relate to the SME, which is not a subject of the appeal. Therefore, the email exchanges are not rationally connected to the Department's

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<sup>29</sup> Appellant's Rebuttal Submission, January 3, 2023, at page 5.

<sup>30</sup> Director's Response Submission, December 19, 2022, at line 32.

Record, do not provide detail and clarification of an existing record in the Department's Record, and are not relevant to the scope of the appeal. The Board will not admit the email exchange between AEP and Appellant, January 25 to March 12, 2018, and will not admit the email exchange between the Appellant and their consultant, March 6 – March 13, 2018.

7. Email exchange between Appellant and Advisor to the Minister, April 27, 2021.

[43] The Appellant requested the Board admit an email they wrote to an advisor to the Minister. The Appellant stated:

“Although this email is with other government employees within AEP, it speaks to the inefficient handling of our SML Application by AEP throughout. The string of emails in this document go back to February 16, 2021, and include AEP employees that are part of this whole process. We reached out to them for help with concerns and for guidance. It specifically references our concern about the Sharp-Tailed Grouse Survey being asked of us at the end of our Application process and not at the beginning when AEP should have demanded it providing that that was the process they were using.”<sup>31</sup>

[44] The Director submitted the email exchange was not relevant to the Decision and was an email with a government employee not involved with the approval process.

[45] The Board finds the email exchange is not evidence relevant to the scope of the appeal. The email is a document created by the Appellant as argument for its position. Argument is not evidence. The points made by the Appellant in the emails are more appropriate for the Appellant's written submissions. The Board will not admit the email exchange between Appellant and the Advisor to the Minister, April 27, 2021, as evidence in the hearing.

8. Detailed SML Timeline of Events (the “Timeline”); and
9. Summary of items for appeal consideration (the “Summary”).

[46] The Timeline is a chronology of the SML application process. The Summary is a detailed listing of some of the records the Appellant is seeking to have admitted as evidence for the hearing. The Appellant stated:

“This Timeline encompasses all correspondence and conversation throughout our Application process. This document allows the Appeal Board a snapshot of the process in its entirety. It is relevant as it shows disjointed decisions and lack of procedural fairness by the Department. It also shows our willingness throughout to comply and follow the directions given by AEP staff.”<sup>32</sup>

[47] The Appellant submitted the Summary was relevant to the appeal, the SML application process, and the Decision.

[48] The Director stated the Timeline was not a document that would be in the Director’s File. The Director submitted the Appellant did not provide the Summary to the Director before the Decision, it was not part of the Director’s File, and was not relevant to the Decision.

[49] Similar to the Brief Summary, the Timeline and the Summary are documents the Appellant created for the purposes of the hearing and are more appropriately part of the Appellant’s written arguments. The Board will not admit the Timeline and the Summary as evidence for the hearing.

10. Request by the Appellant for Documentation, May 7, 2021.

[50] The Appellant emailed Alberta Energy Regulator (“AER”) and requested copies of several dispositions. AER replied that the Appellant would need to contact AEP as the dispositions were under the jurisdiction of AEP. The Appellant responded they were referred to the AER by AEP.

[51] The Appellant submitted the emails demonstrated there was confusion between AEP and AER regarding who could provide them with other Sharp-tailed Grouse surveys. The Director did not comment on these emails.

[52] The Board finds the emails are not rationally connected to the Department’s Record and do not provide the Board with context for the appeal. Whether or not there was

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<sup>31</sup> Appellant’s Rebuttal Submission, January 3, 2023, at page 6.

<sup>32</sup> Appellant’s Rebuttal Submission, January 3, 2023, at page 7.

confusion between AEP and AER on who could provide the Appellant with surveys conducted in other applications is not relevant to the issues the Board must determine in the appeal. The Board will not admit the request by the Appellant for documentation, May 7, 2021, as evidence in the hearing.

#### **IV. CONCLUSION**

[53] The Board will admit the following documents as evidence in the hearing:

*Documents already in the Director's File*

1. Letter from Director re: Notice of Merit Decision, July 13, 2022, at Tab 1.
2. Surface Disposition Application for SML, November 14, 2018, at Tab 2.1;
3. Completeness Review Decision - Acceptance Letter from AEP, January 9, 2019, at Tab 2.1;
4. Email exchange re: SIR for SML, March 12-13, 2020, at Tab 4.1;
5. SIR, March 13, 2020, at Tab 4.3;
6. Email from AEP, re: SIR, February 11, 2021, at Tab 4.3;
7. Letter from AEP requesting security deposit and land survey, June 24, 2020, at Tab 4.6;
8. Email from Appellants to AEP Minister re: concerns with SML, February 16, 2021, at Tab 4.6;
9. AEP internal emails re: SML Amendment, April 9, 2021, at Tab 4.11;
10. Email exchange re: follow-up to phone call, April 12-26, 2021, at Tab 4.17;
11. AEP email re: follow-up to phone call, April 30, 2021, at Tab 4.17;
12. Email exchange, re: SML application status, June 22-24, 2022, at Tab 4.19;
13. Basin Environmental Ltd. Project Overview image, February 8, 2022, at Tab 5.3;
14. Basin Environmental Ltd. Sharp-tailed Grouse Survey, May 25, 2022, at Tab 5.3;
15. Email from Appellant re: Sharp-tailed Grouse Survey Report, May 26, 2022, at Tab 5.3;
16. Master Schedule of Standards and Conditions, AEP, April 12, 2021, at Tab 6.1;

17. Lower Athabasca Regional Plan 2012-2022, at Tab 6.2;
18. Cold Lake Sub-Regional Plan, April 2022, at Tab 6.3;
19. Guideline for Acquiring Surface Dispositions on Public Land, 2008 Edition, SRD [AEP], at Tab 6.4;
20. Sensitive Species Inventory Guideline, ESRD [AEP], April 2013, at Tab 6.5.

*Records the Parties agreed to admit*

1. Master Schedule of Standards and Conditions, AEP, June 28, 2017;
2. Master Schedule of Standards and Conditions, AEP, November 22, 2018;
3. Public Lands Act, R.S.A. 2000, c. P-40;
4. Public Lands Administration Regulation, 187/2011;
5. Letter from AEP requesting CORP, August 20, 2019;
6. Email from AEP Agrologist, March 7, 2019;
7. Email from AEP advising the Surface Disposition Application for SML was received, November 15, 2018;
8. Email from Appellant re: merit decision follow-up, January 27, 2020;
9. Email from Appellant, re: follow-up phone call, February 11, 2020;
10. Email exchange re: follow-up phone call, February 11, 2020;
11. Email exchange re: follow-up phone call, March 2, 2020;
12. Email exchange re: follow-up phone call, March 5, 2020;
13. Email exchange re: SIR, March 14, 2020;
14. Email exchange re: Freedom of Information request, June 10, 2020;
15. Email exchange re: Land Survey Plan, July 7, 2020;
16. Appellant email to AEP re: security deposit sent, July 8, 2020;
17. Email exchange re: hybrid survey, July 13, 2020;
18. Email exchange re: deposit, July 16, 2020;
19. Email exchange re: extension, July 17, 2020;
20. Email exchange re: land survey, August 5-10, 2020;
21. Email exchange re: land survey, October 9-13, 2020;
22. Email exchange re: land survey deficiency, October 26, 2020;
23. Email exchange re: land survey deficiency, November 17-24, 2020;
24. Email exchange re: revision, December 4 and 20, 2020;

25. Email exchange re: land surveys, December 23, 2020, and January 18, 2021;
26. Email exchange re: land survey, January 20, 2021;
27. Letter from AEP re: plan deficiencies, March 18, 2021;
28. Email exchange re: SML Amendment, March 19, 2021,
29. AEP email re: follow up answers to phone call, May 6, 2021;
30. Email re: request for documentation; May 7, 2021;
31. Email exchange re: Sharp-tailed Grouse Survey, June 8, 2021; and
32. Email exchange re: Sharp-tailed Grouse Survey and consultants June 11-29, 2021.

*Records the Board will admit and assign appropriate weight*

1. Email exchange between Appellant and Basin Environmental Ltd., February 11 – April 12, 2022;
2. Email exchange between Appellant and Basin Environmental Ltd. re: Sharp-tailed Grouse Survey, May 19, 2022 – May 25, 2022;
3. Photo of SML site, May 19, 2022; and
4. Email from AEP to the Appellant, March 18, 2021.

[54] The Board finds the following documents do not meet the Board's criteria and the Board will not admit them as evidence in the hearing:

*Records the Board will not admit*

1. Appellant's Brief Summary – Basin Environmental Ltd. Sharp-tailed Grouse Survey Contractor;
2. Invoice #22-0360 from Basin Environmental Ltd. to the Appellant, May 12, 2022;
3. Payment Confirmation from Basin Environmental Ltd. to the Appellant, May 16, 2022;
4. Sharp-tailed Grouse Survey Costs Assessment from Basis Environmental Ltd. to the Appellant, February 22, 2021(plus copy);
5. Email exchange between AEP and Appellant, January 25 to March 12, 2018;
6. Email exchange between the Appellant and their consultant, March 6 to March 13, 2018;



7. Email exchange between Appellant and Advisor to the Minister, April 27, 2021;
8. Detailed SML Timeline of Events;
9. Summary of items for appeal consideration; and
10. Request by the Appellant for Documentation, May 7, 2021.

Dated on February 22, 2023, at Edmonton, Alberta.

“original signed by”  
Gordon McClure  
Appeals Co-ordinator and Chair

“original signed by”  
Dr. Brenda Ballachey  
Board Member

“original signed by”  
Kurtis Averill  
Board Member