



ALBERTA
ENVIRONMENT AND PARKS

*Office of the Minister
MLA, Lethbridge-West*

ENVIRONMENT AND PARKS

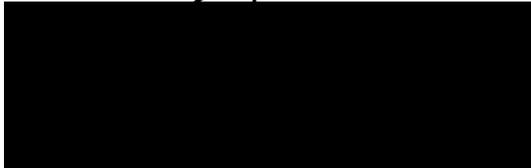
Public Lands Act
RSA 2000, c. P-40

MINISTERIAL ORDER
13/2016

**Order Respecting Public Lands Appeal Board
Appeal No. 15-0028**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix A, being an Order Respecting Public Lands Appeal Board Appeal No. 15-0028.

DATED at the City of Edmonton, in the Province of Alberta, this 12th day of May, 2016.


Shannon Phillips
Minister

Appendix A

Order Respecting Public Lands Appeal Board Appeal No. 15-0028

With respect to Public Lands Appeal Board Appeal No. 15-0028, I, Shannon Phillips, Minister of Environment and Parks, order that:

1. The Director's decision to refuse the Appellant's application for SML 1500987 be confirmed and the appeal PLAB 15-0028 be dismissed without costs.
2. That Environment and Sustainable Resource Development do the following:
 - a. Develop a "decision tree process" to assist the public in understanding the Department's approach to dispositions where key policies regarding wildlife and critical habitat must be considered, and that this decision tree be made available to the public;
 - b. That the Department develop a checklist or template for decision letters that enhances the transparency and understanding of the decision to the applicant.

ALBERTA
PUBLIC LANDS APPEAL BOARD
REPORT

February 26, 2016

IN THE MATTER OF sections 121 and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 15, 211, 213, 228 and 235 of the Public Lands Administration Regulation, A.R. 187/2011;

- and -

IN THE MATTER OF an appeal filed by George Krahn under section 211 of the Public Lands Administration Regulation.

Cite as: Krahn v. Director, Alberta Environment and Parks, APLAB 15-0028.

Panel Members

Mr. Gordon McClure, Panel Chair

Appearances

Andrew R. Bachelder on behalf of the Public Lands Appeal Board

Vivienne Ball on behalf of the Director

Normand Menard on behalf of the Respondent

EXECUTIVE SUMMARY

Upland Environmental Ltd., submitted an application for Surface Material Exploration lease (“SME”) 150098 on behalf of the Appellant, George Krahn, on June 1, 2015. The application was refused by the Director, Environment and Parks (the “Department”) and the Appellant was informed of this by letter dated September 10, 2015. The main reasons in the letter given for the refusal was that the proposed SME was located in the Nipisi Caribou Range and had the potential to increase disturbance and cause a deletion of caribou habitat; and that it was not a suitable location for an extraction operation and therefore not suitable for exploration. The Appellant filed a Notice of Appeal with the Public Lands Appeal Board dated September 24, 2015 alleging that the Director erred in the determination of a material fact. A hearing by written submission was held on February 16, 2016.

The Board established the following issues for the hearing:

Did the Director, in making the decision to deny the application by the Appellant for SME 150098 err in the determination of a material fact?

The Panel considered all the issues raised by the parties and found that, although the Department and the Director were not transparent and made mistakes in the decision-making process, ultimately, the correct decision was made by the Director. The Panel recommended that the Minister dismiss the appeal, PLAB 15-0028, without costs. The Panel also recommended that the Minister direct the Department to implement the following recommendations:

1. That the Department develop a “decision tree” for release to the public.
2. That the Department develop a checklist or template for decision letters that are more informative to the applicant.

TABLE OF CONTENTS

EXECUTIVE SUMMARYI

I BACKGROUND 1

II ISSUES..... 2

III ANALYSIS AND DECISION 2

ISSUE 1:.....2

IV RECOMMENDATIONS..... 6

RECOMMENDATION 1.....6

RECOMMENDATION 2.....6

I BACKGROUND

- [1] Upland Environmental Ltd. (“Upland”), submitted an application for Surface Material Exploration lease (“SME”) 150098 on behalf of the Appellant, George Krahn, (“Krahn”) to Environment and Parks (“AEP”) on June 1, 2015 and stamped received by the department on June 2, 2015. The 30 day application completeness review period was extended by 90 days on June 4, 2015 by AEP. On June 1, 2015 the SME Application Plan was submitted. The Technical Services Section reviewing the application identified on June 5, 2015 that the map needed to be submitted electronically through the Electronic Disposition System (“EDS”). On June 9, 2015 the map was submitted.
- [2] The application was referred to AEP’s Land Use office in Slave Lake. On August 24, 2015 the Operations Team Lead for the Upper Athabasca Region, North district emailed Environment and Parks, Operations Division, Provincial Approvals Section, identifying that the SME referral had been reviewed, the location was identified within key caribou range (zone) and that an SML would not be granted within this zone. On August 25, 2015 the Director began her final review of the file for SME-150098 and requested the referral responses so that they could be incorporated into the file. The referral responses were received on September 3, 2015. The Director’s final review was completed on September 9, 2015 and on September 10, 2015 the Director informed the Appellant of the Authorization Application Refusal.
- [3] On September 24, 2015 the Appellant filed a Notice of Appeal with the Public Lands Appeal Board alleging the Director who made the decision erred in the determination of a material fact. In a letter dated December 10, 2015 the Board noted that the Director chose not to participate in mediation and the matter would proceed to a written hearing. The Board set the hearing date for February 10, 2016 along with due dates for submissions. The hearing date was rescheduled to February 16, 2015 and heard on February 16, 2015 by written submission.

II ISSUES

[4] The Board established the following issues for the hearing:

Did the Director, in making the decision to refuse the application by the Appellant for SME 150098:

1. Err in the determination of a material fact on the face of the record.

[5] The Panel considered the submissions and issues as presented by the parties, and also the issues as set by the Board in making the recommendation to the Minister.

III ANALYSIS AND DECISION

ISSUE 1:

Did the Director, in making the decision to refuse the application by the Appellant for SME 150098 err in the determination of a material fact on the face of the record?

Appellant

[6] The Appellant submitted that the Director erred in the determination of a material fact by deciding that development within the Nipisi caribou range would negatively impact the caribou herd, asserting that the location for exploration and gravel extraction is suitable and should be considered for the for the following reasons:

- i. The area chosen is a continuation of the proposed development directly adjacent to the south that would facilitate access and avoid further disturbance in the Caribou Zone.

- ii. Isolation of this non-renewable resource is not necessarily in the best interest of the province in that:
 - 1. The pit could likely yield very high volumes, therefore minimizing the need to disturb vast amounts of land; and
 - 2. Concentrating gravel extraction in one area has significant impact on reduced fragmentation through shared infrastructure such as access roads.
- iii. “Historically, projects within a caribou zone are managed, not refused. A comprehensive caribou plan can be effective in minimizing impact to the caribou and still providing a means for extracting a highly needed non-renewable resource.”

[7] The Appellant submitted that Alberta Environment and Parks (“AEP”) should consider alternate options to the decision of refusal. The Appellant further submitted that “A non-renewable resource such as aggregate must be highly considered and through sound management planning, a solution can be reached in order to minimize impact to the caribou and ensure their sustainability without isolating a viable non-renewable resource.”

Director

[8] The Director submitted that she did not err in the determination of a material fact when she refused to issue the SME to the Appellant.

[9] The Director submitted that the Director’s Authority is of a discretionary nature and that section 12(1) of PLAR that “the director may issue or refuse to issue the authorization.” The discretionary nature of the Director’s authority to make decisions about applications for surface materials is reinforced in AEP’s public document *Guidelines For Acquiring Surface Material Dispositions on Public Land* (“Guidelines”). In different places in the

document, AEP advises applicants for SMEs that not all SME applications will be approved and that even if a SME is issued, there is no guarantee that approval for development will be automatically given.

[10] It was submitted that the Director is guided by AEP's responsibilities in administrating the Guidelines, in which it states that AEP must:

“review applications and make a decision based on the best interests of the public, other affected users and the environment.”

[11] The Director submitted the application submitted on behalf of the Appellant was reviewed “according to the procedure established by AEP. Considered the program specific information obtained through the internal referral process, and considered and applied the applicable policies...”

[12] The Director submitted that AEP wildlife management staff advised that the lands that were the subject of the application were located entirely within the Nipisi Woodland Caribou Range identified in the Recovery Strategy. The Director further submitted that in the absence of a range plan for the Nipisi caribou herd, it is appropriate for the Director to take a cautious approach when making decisions about proposed industrial activities in favour of conserving local populations of caribou and critical habitat. The Director noted the cumulative effect of all factors influencing caribou survival, noting “In this legal and policy context for caribou, because AEP would not issue a surface materials development authorization such as a surface materials licence for the lands, it would not be appropriate to issue a SME for the lands.”

Analysis

[13] The Director's refusal letter inaccurately stated the rationale for the rejection of the SME, stating:

“This is not a suitable location for an extraction operation and therefore not suitable for exploration.”

[14] The Director stated:

“because AEP would not issue a surface materials development authorization such as a surface materials licence for the lands, it would not be appropriate to issue a SME for the lands.”

The Director has erred in considering any potential future application or development such as a Surface Materials Lease (“SML”) when deciding whether to issue the SME. Any application that may originate from the work undertaken under an SME must be considered on its merits and not presumed. The Board has considered the weight of this statement so as to provide context that any activity that would further disturb the Nipisi woodland caribou range would be inappropriate.

[15] The Panel found that the evidence presented at the hearing by the Director and the Department proved that the caribou within the Nipisi woodland caribou range are declining and that the range is critical habitat necessary for the recovery of the caribou. The Panel accepted the evidence provided by the Director and the Department that the Department is currently developing a range plan for the Nipisi woodland caribou range.

[16] The Panel found that it was reasonable and appropriate for the Director to use the “cautious approach” in determining what industrial activities to permit while a range plan is being considered.

[17] The Director’s consideration of the SME and its impact upon significantly disturbed lands when rejecting the SME application is appropriate.

[18] The Panel found that the Director did not err in the determination of a material fact.

IV RECOMMENDATIONS

RECOMMENDATION 1

[19] The Panel recommends that the Minister confirm the Director’s decision to refuse the Appellant’s application for SME 150098, and that the appeal PLAB 15-0028 be dismissed without costs.

RECOMMENDATION 2

[20] The Panel also recommends that the Minister endorse the following recommendations to the Department:

1. That the Department develop a “decision tree process” to assist the public in understanding the Department’s approach to dispositions where key policies regarding wildlife and critical habitat must be considered. This decision tree should be available to the public; and
2. That the Department develop a checklist or template for decision letters that enhances the transparency of the decision for the applicant. The Panel found that the decision letter was inaccurate and inadequate in explaining to the applicant the basis of the decision. Decision letters do not have to be exhaustive, but the courts have held that they do need to contain enough information for an applicant to understand why a decision has been made and to assess whether there are sufficient grounds for an appeal. The checklist or template should be designed to provide information reflective of the process leading up to the decision.

_____ (*original signed by*) _____

Gordon McClure, Chair