

**ALBERTA  
PUBLIC LANDS APPEAL BOARD**

**Decision**

April 11, 2017

**IN THE MATTER OF** sections 121, 124 and 125 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 Associated Aggregates Inc. under section 211 of the Public Lands Administration Regulation, and a request for reconsideration filed by the Director, Alberta Environment and Parks, under section 125 of the *Public Lands Act* and Rule 26.5 of the Interim Appeals Procedure Rules for Complex Appeals.

*Cite as:* Reconsideration Decision: *Associated Aggregates Inc. v. Director, Alberta Environment and Parks*, (20 March 2017) Appeal No. 15-0042-RD (A.P.L.A.B.).

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## Introduction

- [1] This is the decision arising from a request by the Director, Alberta Environment and Parks, for the Public Lands Appeal Board (the “Board”) to reconsider and vary the Board’s Report and Recommendations to the Minister in PLAB Appeal 15-0042 (the “Report”).

## Background

- [2] On July 11, 2014, Associated Aggregates Inc. (the “Appellant”) submitted an application for Surface Material Lease 140043 (the “SML”) to Alberta Environment and Parks (“AEP”). The application included public lands that had been previously identified as being largely in an area designated by AEP as a Non-Preferred Development Area (“NDA”), where the development of aggregate resources is discouraged. Despite being in a NDA, the Appellant’s application for the SML was accepted by the Director, Environment Assessment, Approvals & Dispositions, Alberta Environment and Parks (the “Director”) as being technically complete, and the Appellant was advised the application was being considered on its merits.
- [3] As part of the merits review, on November 19, 2014, the Field Officer for the Fox Creek area reviewed the Geographic Information Systems (“GIS”) map and data layers for the public lands identified in the Appellant’s SML application. The purpose of this review was to identify any wildlife sensitivities in the area of the proposed SML. Based on the review, the Field Officer recommended the SML be given “approval in principle,” with some conditions.
- [4] On June 23, 2015, AEP Provincial Approvals Section sent a letter to the Appellant advising the SML application had been given approval in principle. The letter advised the Appellant that a Conservation and Reclamation Business Plan, a plan of survey and amendment form, and a First Nations Adequacy Letter were required to be filed with AEP within six months of the date of the letter.

- [5] In September 2015, the Field Officer became aware he had not correctly applied a GIS data layer in his review of the Appellant's SML application. The Field Officer reprocessed the application using the correct data layer and discovered the application was within a NDA. The Field Officer also determined the Supplemental Guidelines for Aggregate Operations, Woodlands Area - Athabasca River Valley (the "Guidelines") applied to the Appellant's application.
- [6] The application of the GIS data layer and the Guidelines showed the Appellant's proposed SML was located within a NDA. Based on these findings, the Field Officer recommended the approval in principle of the SML application be revoked.
- [7] In a letter dated December 10, 2015, from the Director to the Appellant, the Director advised the proposed SML was within a NDA and was, therefore, the application for the SML was being refused. The Appellant filed a Notice of Appeal with the Board on December 22, 2015. In the Notice of Appeal the Appellant alleged the Director erred in the determination of a material fact on the face of the record. The Board opened file number 15-0042 for the appeal.
- [8] The Board appointed a panel to hear the appeal and an oral hearing was held on May 31, 2016. The panel reconvened on June 14, 2016, to consider the matter further. After these additional deliberations, the Board sent a letter dated July 8, 2016, to the Appellant and Director (collectively, the "Parties"), requesting that they provide written submissions on the following questions:
- In the event the Board finds the Director breached principles of natural justice and the duty to be fair (procedural fairness):
- What is the Board's jurisdiction with respect to this potential breach; and
- What is the appropriate remedy if such a breach has occurred?<sup>1</sup>
- [9] The Parties provided their written submissions by July 15, 2016.

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<sup>1</sup> Letter from the Board to the Parties, July 8, 2016.

- [10] In its Report to the Minister, the Board, upon reviewing the submissions, testimony and evidence of the parties, found the Director refused the Appellant's SML application based on an inflexible interpretation of the Guidelines without considering the merits of the application, and in doing so, fettered her discretion by not considering the application on an individual basis.
- [11] The Board found the Director erred in the determination of a material fact on the face of the record by blindly applying policy without consideration of the merits of the application. This error resulted in the Director making a decision without all the facts before her. The Director relied upon a flawed record that was incomplete as it lacked important documentation regarding the merits of the application. The Board found the Director did not have the correct information before her to make an informed decision. The Board found that by rejecting the Appellant's application for the SML without considering the merits of the application, and by fettering her discretion, the Director's decision was unreasonable.
- [12] The Board considered the Parties' submissions on the questions regarding natural justice and procedural fairness. The Board found that natural justice and procedural fairness are foundational doctrines of administrative law, and the Board has jurisdiction to consider whether the Director breached these fundamental principles.
- [13] The Board found there was evidence to suggest the errors made by the Director led to a breach of natural justice and procedural fairness. However, as the Board had already found the Director had made an error of material fact on the face of the Record, the Board chose not to consider this issue further.
- [14] The Board recommended AEP reconfigure the Site Information Form and any other relevant forms to clearly provide an opportunity for the applicant to identify if the location of the lands in the application are within a non-preferred development area or any other area where development would be restricted, discouraged, or prohibited. The purpose of this recommendation was to try to avoid the error made by the Field Officer in future applications. This recommendation was not included by the Board in the Ministerial Order signed by the Minister.

- [15] The Board also recommended that AEP implement a plan to prevent misidentification errors from occurring in the future and develop a procedure for alerting applicants promptly when approval or authorization of an application is reversed or suspended. This recommendation was not included by the Board in the Ministerial Order signed by the Minister.
- [16] The Board recommended the Minister reverse the decision of the Director to refuse the Appellant's application for the SML and order the Director reconsider the Appellant's application for the SML based on its merits. As part of the Director's consideration of the merits of the SML, the Board also recommended the Minister order the following:
- a. that the Appellant be given six months from the date of the Minister's Order to provide the Director with the following documents in support of the Appellant's SML application:
    - Conservation Reclamation Business Plan;
    - a plan of survey and amendment form;
    - a First Nations Adequacy Letter; and
    - any other documentation required by the Director for a merit decision.
  - b. furthermore, that the Director give consideration to the above documents provided in support of the Appellant's application for SML 140043, and consider whether the Supplemental Guidelines for Aggregate Operations, Woodlands Area - Athabasca River Valley, is appropriate for the Appellant's application for SML 140043.<sup>2</sup>
- [17] The Minister accepted the Board's recommendations and signed a Ministerial Order (M.O. 43/2016) implementing all of the Board's recommendations. The Report was provided to the Parties on October 13, 2016.
- [18] In a letter dated November 10, 2016, the Director requested a reconsideration of the Board's Report.

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<sup>2</sup> Report and Recommendations to the Minister for Appeal No. 15-0042, July 27, 2016 at paragraph 60.

## Board Procedure

- [19] To understand the Director's request for reconsideration, it is necessary to understand the procedure the Board follows after it has heard an appeal. For each appeal that proceeds to a hearing, the Board is required by the *Public Lands Act*<sup>3</sup>, section 124(1)<sup>4</sup> to submit a report to the Minister of Environment and Parks, which includes recommendations and a summary of representations that were made to it. Section 235 of PLAR states that the Board's report must contain a summary of the evidence, a statement of the issue to be decided, the reasons for the recommendations, and reasons for any dissenting decision.
- [20] The Minister considers the report and, depending on the recommendation from the Board and depending on whether the Minister agrees or disagrees, she signs a Ministerial Order confirming, reversing, or varying the Director's decision, and making any further order she thinks necessary for the decision to be carried out.
- [21] If a party to the appeal disagrees with the Board's Report, it may request the Board reconsider its report.

## Issue

- [22] Did the Director meet the criteria set in Rule 26.5 for reconsideration?

## Legislation and Rules

- [23] The relevant sections of the *Public Lands Act* are sections 10(1), 124, and 125. These sections provide:

10(1) The director may issue or refuse to issue a formal disposition applied for under section 9.

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<sup>3</sup> RSA 2000 Chapter P-40.

<sup>4</sup> Section 124(1) of the *Public Lands Act* reads: "The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it."

124(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.

(2) The report may recommend confirmation, reversal or variance of the decision appealed.

(3) On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision the person whose decision was appealed could have made, and make any further order the Minister considers necessary for the purpose of carrying out the decision.

(4) The Minister shall immediately give notice of any decision made under this section to the appeal body, and the appeal body shall immediately, on receipt of the notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the appeal body and to all the persons who the appeal body considers should receive notice of the decision.

(5) On complying with subsection (4), the appeal body shall publish or otherwise make available the appeal body's report, or a summary of it, and a notice of the Minister's decision in the manner the appeal body considers appropriate.

125 The appeal body may reconsider, vary or revoke any report made by it.

[24] The relevant sections of the *Interpretation Act*<sup>5</sup> are sections 2, 3(1), and 10, which state:

2 This Act applies to every enactment whether enacted before or after the commencement of this Act.

3(1) This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment.

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[25] The relevant sections of the Public Lands Administration Regulation ("PLAR")<sup>6</sup> are 9(5)(b) and 235, which state:

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<sup>5</sup> I-8 RSA 2000.

<sup>6</sup> A.R. 187/2011.

9(5) The director ...

(b) in any other case, must accept the application and proceed to consider it on its merits.”

235 A report of an appeal body under section 124 of the Act must contain the following in addition to the matters required to be included under that section:

- (a) a summary of the evidence;
- (b) a statement of the issue to be decided;
- (c) the reasons for the appeal body’s recommendations;
- (d) the reasons for any dissent, in the case of a panel consisting of 3 members.

### **Interim Appeals Procedure Rules for Complex Appeals, Rule 26.5**

[26] The relevant rule of the Board’s Rules of Practice is section 26.5, which provides:

The Board will not exercise its powers under section 125 of the *Public Lands Act* in the absence of the following:

- a) New facts, evidence, or case-law information which was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,
- b) A procedural defect during the hearing which prejudiced one or more of the parties,
- c) Material errors that could reasonably change the outcome of the decision, or
- d) Any other circumstance the Board considers reasonable and substantive.

[27] The Director has identified Rule 26.5(c) as the provision being relied upon for the reconsideration request.<sup>7</sup>

### **Submissions**

[28] In a letter dated November 10, 2016, the Director requested the Board reconsider and vary its Report. The Director provided written arguments in the letter in support of the

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<sup>7</sup> Letter from the Director to the Board, November 10, 2016 at page 2.

reconsideration request. In general, the Director objected to the Board recommending to the Minister the matter be returned to her to make the decision on the merits of the SML application. The Director's arguments are summarized below.

- a) Section 124 of the *Public Lands Act* and any legislation setting the Board's authority should be read narrowly to restrict the Board's jurisdiction to only the words in the legislation. This includes what the Board can recommend to the Minister, which in the Director's view is only to confirm, reverse, or vary the decision appealed.
- b) The Board may only take actions prescribed in section 124(2). The Board erred in law when it recommended the Minister reverse the Director's decision, order the Director to reconsider the Appellant's SML application on its merits, and recommended the Minister order the Director to reconsider her decision.
- c) In this appeal, under section 10(1) of PLAR, the Director only has authority to issue or refuse to issue the SML to the Appellant. The Board does not have the jurisdiction to recommend the Minister order the Director to do something the Director has no authority to do.
- d) By recommending the Minister order the Director to consider the Appellant's supporting documents and consider whether the Guidelines are appropriate for the SML application, the Board caused the Minister to fetter the Director's discretion. This would result in the Minister directing the Director how to exercise her discretion under section 10(1) of PLAR.<sup>8</sup> In the alternative, the Director submitted that if the Board determines it has jurisdiction to include the recommendation in the Report, the following words should be deleted from the Report:

[F]urthermore, the Director give consideration to the above documents provided in support of the Applicant's application for SML 140043, and consider whether the Supplemental Guidelines for Aggregate Operations,

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<sup>8</sup> Section 10(1) of the *Public Lands Act* reads: "The director may issue or refuse to issue a formal disposition applied for under section 9."

Woodlands Area - Athabasca River Valley, is appropriate for the Appellant's application for SML 140043.<sup>9</sup>

[29] The Director requested the following relief:

- 1) The Board reconsider and vary its Report by deleting the recommendations found in paragraph 60 of the Report in its entirety and substituting a recommendation that the Board has the authority to recommend as prescribed by section 124(2) of the Act;
- 2) The Board submit the varied report referred to in 1) to the Minister forthwith;
- 3) The Board recommend to the Minister that Ministerial Order 43/2016 be rescinded and a new order issued that the Minister has the authority to make as prescribed by section 124(3) of the Act;
- 4) In the alternative, if the Board takes the position that it has the jurisdiction to recommend that the Minister order the Director to reconsider the Appellant's SML application, that the Board vary the Report by the deleting the words "furthermore, the Director give consideration to the above documents provided in support of the Applicant's application for SML 140043, and consider whether the Supplemental Guidelines for Aggregate Operations, Woodlands Area - Athabasca River Valley, is appropriate for the Appellant's application for SML 140043."<sup>10</sup>

[30] The Appellant did not provide any submissions.

## Analysis

### Application of Rule 26.5(c)

[31] The Director submitted, and the Board agrees, the grounds for a reconsideration request are outlined in Rule 26.5(c) of the Board's Interim Appeals Procedure Rules for Complex Appeals, which reads:

The Board will not exercise its powers under section 125 of the *Public Lands Act* in the absence of the following:

...

(c) material errors that could reasonably change the outcome of the decision ...

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<sup>9</sup> Report at para. 60.

<sup>10</sup> Letter from the Director to the Board, November 10, 2016 at pages 4-5.

- [32] The Board finds that proof of any one of the four grounds listed in Rule 26.5 is sufficient to trigger a reconsideration. The Board focused on the ground the Director identified and determined the issue could be met by answering the following question: Has the Director identified material errors that could reasonably change the outcome of the decision?
- [33] Much of the Director's argument depends on how the relevant legislation is interpreted. The *Interpretation Act* sets out how legislation in Alberta is to be interpreted. Sections 2 and 3 of the *Interpretation Act* provide for the scope of the Act:
- 2 This Act applies to every enactment whether enacted before or after the commencement of this Act.
- 3(1) This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment.
- [34] There is nothing in the *Public Lands Act* or PLAR which suggests the *Interpretation Act* does not apply.
- [35] Section 10 of the *Interpretation Act* requires legislation to be interpreted fairly and liberally. It reads:
- 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.
- [36] The Director takes a very narrow and restrictive interpretation of the Board's jurisdiction outlined in the *Public Lands Act* and PLAR, instead of the "fair, large and liberal construction and interpretation" as required under the *Interpretation Act*. The *Interpretation Act's* approach is to enable the objectives of the legislation to be achieved. In the case of the *Public Lands Act* and PLAR, the objective is to enable the Minister to make informed decisions on appeals to the Board. The Director's interpretation does not assist the Minister.
- [37] The public lands appeal system set out in the *Public Lands Act* and PLAR is a bifurcated decision-making structure. The Minister exercises her decision-making powers only after

receiving advice and recommendations from an expert quasi-judicial body, the Board. The Board makes its recommendations after hearing the evidence and arguments from the parties through a fair and impartial appeal process. To effectively advise the Minister on how to decide the appeal, the Board must provide more than just a recommendation that “confirms, reverses, or varies” the Director’s decision.

[38] Section 235 of PLAR states what the report to the Minister must contain:

A report of an appeal body under section 124 of the Act must contain the following in addition to the matters required to be included under that section:

- (a) a summary of the evidence;
- (b) a statement of the issue to be decided;
- (c) the reasons for the appeal body’s recommendations;
- (d) the reasons for any dissent, in the case of a panel consisting of 3 members.

[39] Section 235 of PLAR states the Board must provide a rational explanation for the recommendations and advice, which includes providing background, context, and a discussion on the implications of the appeal. Restricting the Board’s ability to only recommending that the decision be “confirmed, reversed, or varied” undermines the advisory role of the Board and deprives the Minister of the advice and recommendations she needs to exercise her complete authority under section 124(3) of the *Public Lands Act* which is to “confirm, reverse or vary the decision appealed and make any decision the person whose decision was appealed could have made, and make any further order the Minister considers necessary for the purpose of carrying out the decision.”<sup>11</sup> Such a narrow approach advocated by the Director is not in keeping with the intent of the legislation. The Board finds that the recommendations in the Report are well within the scope of section 124 of the *Public Lands Act* and section 235 of PLAR.

[40] In the Report, the Board found the Director “erred in the determination of a material fact on the face of the record by blindly applying policy without consideration of the merits of

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<sup>11</sup> *Public Lands Act*, s. 124(3)

the application.”<sup>12</sup> The Board followed the principles of administrative law in finding the Director erred. As a result, the Board recommended the Minister “reverse the decision of the Director to refuse the Appellant’s application for SML 140043 and order the Director reconsider the Appellant’s application for SML 140043 based upon its merits.”<sup>13</sup>

“Reverse” is not defined in the *Public Lands Act* or in PLAR. The Dictionary of Canadian Law defines reverse as: “To make void, repeal or undo. A judgment is reversed when a court of appeal sets it aside.”<sup>14</sup>

[41] The Minister agreed with the Board and followed its recommendation to reverse the Director’s decision to refuse the Appellant’s SML application. As a result, the Director’s decision is void and has been sent back to the beginning of the merits consideration. The Director must now commence the merits consideration anew and do it without the errors committed in the initial consideration that was appealed.

[42] The Board’s recommendations that the Director give consideration to the documents submitted by the Appellant in support of its SML application, and also consider whether the Guidelines are appropriate for the Appellant’s application for the SML, does not fetter the Director or prevent her from fulfilling her responsibilities under the *Public Lands Act* or PLAR. The recommendation simply reiterates the Director’s responsibility under section 9(5)(b) of PLAR<sup>15</sup> to consider the application “on its merits.” The documents cited in the Report are documents the Board would expect the Director to review in the usual course of a proper merits consideration of any application under the *Public Lands Act*. As the Director used policy as an improper substitute for a section 9(5)(b) consideration of the merits of the Appellant’s application, the Board wanted to be clear the review of certain documents is an expected part of a thorough merits assessment. The Board is not dictating the result of the merit review as that is left to the Director in her professional capacity. The Board only wants to ensure the process is fair and just for all parties and in accordance with the legislation.

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<sup>12</sup> Report at para 53.

<sup>13</sup> Report at para 60.

<sup>14</sup> Duklow, Daphne A., and Betsy Nurse, *The Dictionary of Canadian Law*, 2d ed. (Toronto: Carswell, 1995) at page 1085.

<sup>15</sup> Section 9(5)(b) of PLAR reads: “The director ... in any other case, must accept the application and proceed to consider it on its merits.”

