

Reclamation and Remediation Issues before the EAB and PLAB

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About the EAB



- In place since 1993
- Established under Part 4 of the *Environmental Protection and Enhancement Act*
 - *Environmental Appeal Board Regulation*
 - Rules of Practice
- Hears appeals of decisions made under
 - **EPEA**
 - *Water Act*
 - *Emissions Management and Climate Resilience Act*
 - Schedule 5 of the *Government Organization Act*
- De novo consideration of facts

About the EAB (2)



Act	Appealable decisions	Filing deadlines
EPEA	s. 91(1)	s. 91(4)
<i>Water Act</i>	s. 115(1)	s. 116(1)
EMCRA	s. 42(1)	s. 42(2)
<i>Government Organization Act</i>	Schedule 5, s. 6(1)	Schedule 5, s. 6(2)

About the PLAB



- In place since 2011
- Established under Part 7 of the *Public Lands Act*
 - *Public Lands Administration Regulation*
- Hears appeals of decisions under the *Public Lands Act*
 - PLAR s. 211 – list of appealable decisions
 - PLAR s. 217(1), 234(1) – filing deadlines

About the PLAB (2)



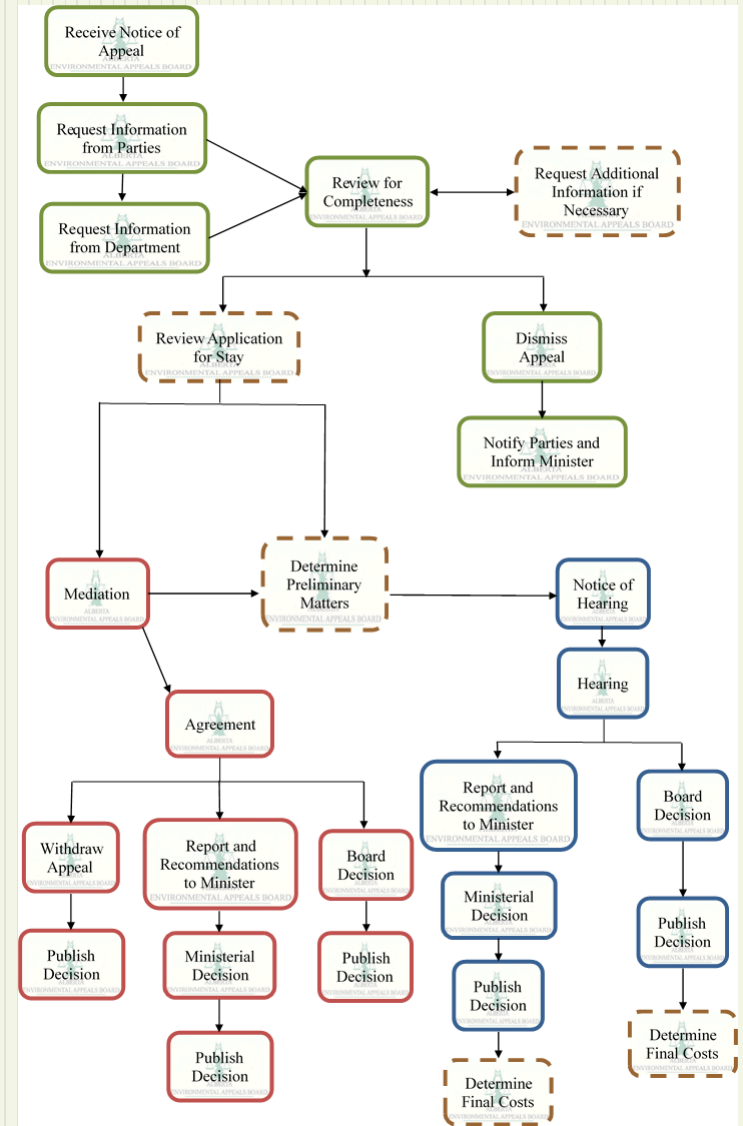
- **Differences from EAB appeals**
 - Appeal based only on the decision and the record of the decision-maker
 - Grounds for appeal are very specific (PLAR s. 213)
 - Counsel for Director usually not present at mediations
- **Appeal types**
 - Complex appeal
 - Summary appeal (stop order or removal of a thing causing loss or damage to land or anything on the land)

Board Structure

- **EAB Chair**
 - Alex MacWilliam (appointed – recruiting now)
- **PLAB Chair and Appeals Coordinator**
 - Gord McClure (AEP staff)
- **General Counsel and Settlements Officer, Associate Counsel, Board Secretary, Registrar of Appeals**
- **Eleven members appointed by Order-in-Council**
 - Sit on both Boards
 - Various education, expertise and experience backgrounds
 - Staggered appointments allow for continuity as well as new members

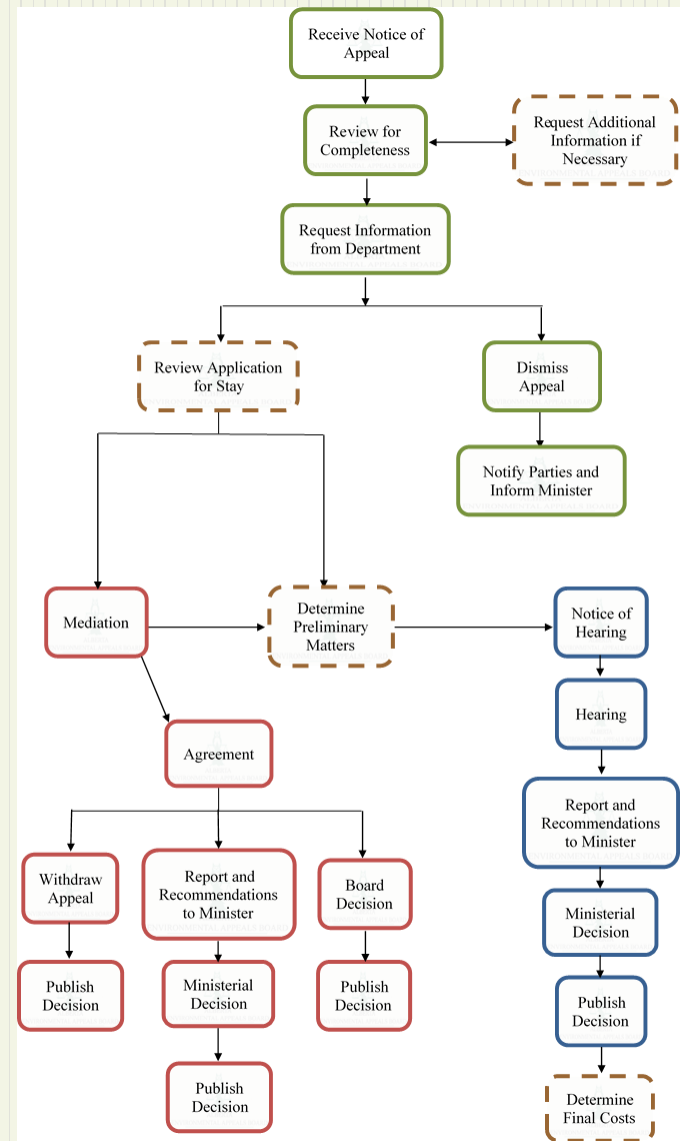
EAB Process

- Confirm valid appeal
- Determine if Stay issued
- Determine if Mediation or Hearing
- Conduct Mediation
 - Resolution: regulatory/other
 - No or partial resolution = Hearing
- Conduct Hearing
 - Board Decision
 - R&R to Minister
 - Confirm, reverse or vary decision
- Minister Decision
 - Orders confirm, reverse or vary decision
 - Additional orders
- Judicial Review



PLAB Process

- Generally the same as the EAB, except
 - Summary appeals are handled differently
 - PLAB reviews for completeness before requesting information from the Parties
 - All PLAB hearing processes result in a Ministerial decision



Mediation vs. Hearing

Mediation	Hearing
Confidential	Public
Usually oral	Written or oral
Easier process for unrepresented Parties	Can be intimidating for unrepresented Parties
Parties run the process	Panel and lawyers run the process
Resolved by the Parties	Resolved by the Panel or Minister
Inexpensive	Expensive
Costs not usually awarded	Costs may be awarded

Role of Practitioners

- **Witness**
 - General – provide facts
 - Expert – provide facts and opinion
 - Education, experience, professional designation
- **Purpose**
 - Provide context and interpretation of information already in the record
 - DO NOT repeat the record
- **Process**
 - Sworn in or affirm
 - Provide testimony
 - Respond to questions by the Parties and the Panel



ALBERTA
ENVIRONMENTAL APPEALS BOARD

Lafarge Canada Inc. (16-044)

- Refusal to issue rec cert for a pit in Ponoka County based on landowner concerns
- Appealed by Lafarge
- Mediation held and agreement reached to issue the certificate
- Decision
 - Minister ordered Director's decision reversed
 - Minister ordered the certificate be issued

Lafarge Canada Inc. (16-043)

- **Director refused to issue rec cert for a pit in Leduc County**
 - Lack of DSA for a waterbody
 - Missing County written consent for a roadway
- **Appealed by Lafarge**
 - Landowners happy
 - Detailed waterbody info was provided
 - County road is undeveloped road allowance therefore no consent required

Lafarge Canada Inc.

- **Lafarge, landowners and Director went to site before mediation**
 - **Director notified Board issues were addressed and certificate could be issued**
- **Decision**
 - **Minister ordered decision reversed**
 - **Minister order rec cert be issued**

Whitelock (13-004)

- **Landowner appeal of Brazeau County wellsite recert issued to ARC Resources Ltd.**
 - **Admixing of the soil, weed growth, and reduced productivity**
- **Hearing held**
- **Board determined landowners did not provide verifiable evidence relevant to the 1995 Criteria**
- **Decision**
 - **Minister ordered the decision confirmed**

Sears, Concord and Suncor (17-069-070 and 18-013)

- **Gas station leak in Calgary**
 - Owned by Sears from 1958 to 1994
 - Operated by Sunoco (Suncor) 1984 to 1994
 - Contamination discovered in 1989 during a tank replacement
 - Decommissioned in 1994
 - Remediation ongoing from 1998
 - Land purchased by Concord in 2015
 - Sears receives protection under CCAA June 22, 2017
 - Sears informs AEP it is unable to continue remediation work Dec 13, 2017
 - AEP issues EPO to Sears and Concord Feb 29, 2018
 - AEP amends EPO to add Suncor Oct 11, 2018
 - AEP accepts Revised Remediation Plan and amends EPO Nov 15, 2019

Sears, Concord and Suncor

- **Appellants**
 - Sears (and FTI, the court appointed monitor)
 - Concord
 - Suncor
- **Intervenors**
 - Hounsfeld Heights Landowners Group
 - Ms. Linda Barron
 - Mall Owners
- **Mediation not successful**
- **Hearing Dec 3-5, 2019**

Sears, Concord and Suncor

- Parties and the Board relied extensively on issues raised at previous Board hearings for Imperial Oil Lynnview Ridge and McColl Frontenac

Sears, Concord and Suncor

- **Was it appropriate for AEP to issue the EPO?**
 - Was AEP's decision was improperly based on Sears' financial situation
 - EPO based on letter indicating Sears was unable to continue remediation, not on bankruptcy
 - Should the EPO have been issued under the contaminated site provisions of EPEA
 - Director has discretion in terms of which provision to use
 - Contaminated sites requires *significant adverse effect* which was not present
 - Is there an adverse effect
 - The potential for vapours entering residences is only being prevented by current remediation efforts
 - Adverse psychological effects from worry

Sears, Concord and Suncor

- **Are Sears, Concord, and Suncor properly persons responsible as defined in EPEA, and are there other parties, such as the owners of the shopping mall, who should be named as persons responsible**
 - Sears and Suncor are persons responsible – they had charge, management and control
 - Concord is not a person responsible – simple ownership of contaminated land is not enough to be a person responsible
 - Similarly, the Mall Owners and residents are not persons responsible

Sears, Concord and Suncor

- **Are the terms and conditions of the EPO appropriate**
 - **Yes, but the Board heard concerns related to**
 - **Timeliness of remediation under the Revised Remediation Plan – another 15 years**
 - **Access to private properties to conduct proper contaminant delineation**
 - **The method, frequency and content of communications with the residents**

Sears, Concord and Suncor

- **Decision**
 - **Minister upheld Sears and Suncor as Parties to the EPO but not Concord**
 - **Minister made several changes to the EPO to address the concerns heard**
 - **Residential areas to be priority focus of active remediation**
 - **Complete delineation within 18 months**
 - **Review and update Revised Remediation Plan annually and share with landowners**
 - **Annual Reports that include**
 - Communication efforts and results
 - Work done and work planned for next year
 - Efforts to access private properties for delineation
 - **Assignment of key contact person to work with residents**

Cherokee, 1510837 Alberta Ltd and Domtar Inc. (16-055-056, 17-073-084 and 18-005-010)

- Five enforcement orders plus two amendments issued from 2016 to 2018
- Former Domtar wood products manufacturing plant in northeast Edmonton purchased by Cherokee for redevelopment
- **Definition of waste/landfill**
 - Movement of material onsite doesn't make it waste
 - Placement of material in berm doesn't make the berm a landfill

Cherokee, 1510837 Alberta Ltd and Domtar Inc.

- **Is 30-year-old contamination migrating**
 - NAPL, naphthalene, dioxins and furans
 - Evidence, groundwater flow direction plus compacted nature of berm materials means no drive mechanism to move contamination
- **Requirement to immediately remove contamination**
 - No immediate threat
 - Excavation could create new exposure pathways
 - Material can be managed onsite

Cherokee, 1510837 Alberta Ltd and Domtar Inc.

- **Process for creating new guidelines**
 - Director relied on two new (2018) Provisional Guidance Documents for acute exposure developed by staff
 - No evidence of Department review or senior level sign-off therefore not formal policy
 - Concerns with the technical aspects of the criteria

Cherokee, 1510837 Alberta Ltd and Domtar Inc.

- **Application of *Remediation Regulation* and Tier 1 Guidelines for brownfield redevelopment**
 - Remediation Reg (up until Dec 31, 2018) was only intended for rem certs, not general remediation
 - Tier 1 Guidelines do not prescribe the cleanup criteria to be used for an industrial site that is in the middle of a brownfield redevelopment

Cherokee, 1510837 Alberta Ltd and Domtar Inc.

- **Decision**
 - **Minister reverses all the orders**
 - **Minister issues two new orders**
 - **Assigns Approval Director to the file**
 - **Requires involvement of Chief Scientist, ADM, Environmental Monitoring and Science Division**



**PUBLIC LANDS
APPEAL BOARD**

1657492 Alberta Ltd., 1798471 Alberta Ltd., and Big Easy Ventures Ltd. (17-0022, 0025-0027, and 0045)

- **3 appellants applied for 5 surface dispositions for sand and gravel activities**
- **Director refused to issue the dispositions**
 - **Primary reason – affiliated entities applying for areas in excess of policy limit (80 acres for SML; 320 acres for SME)**
 - **Additional reasons – PNT, Grazing lease, Key Wildlife and Biodiversity Zone (KWBZ) on 4 of 5 dispositions**

1657492 Alberta Ltd., 1798471 Alberta Ltd., and Big Easy Ventures Ltd.

- **Affiliated entities**
 - Board found the regulatory definition focuses on business forms not personal / family relationships
 - Inadequate evidence in the record to meet the definition
- **Other reasons**
 - Board determined the other reasons for refusal were valid
- **Decision**
 - Minister confirms decision for 4 dispositions
 - Minister reverses decision on 5th disposition that didn't have another reason for refusal and orders it issued

Associated Aggregates Incorporated (15-0042)

- Director refused to issue an SML
 - Application is in a Non-Preferred Development Area (aggregate resource extraction is discouraged)

The Panel found that 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 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 Panel found that the Director did not have the correct information before her in order to make an informed decision.

Associated Aggregates Incorporated (15-0042)

- **Decision**
 - Minister ordered the decision reversed
 - Minister ordered the Director to reconsider the application based on its merits, including some specified documents
 - Minister ordered the Director to consider whether the *Supplemental Guidelines for Aggregate Operations, Woodlands Area - Athabasca River Valley*, is appropriate for the Appellant's application

Associated Aggregates Incorporated (15-0042)

- **Director requested the Board reconsider and vary its R&R**
 - Board can only confirm, reverse or vary the decision, not order it to be reconsidered
 - Minister ordering the Director to consider in light of specific documents fetters the Director's discretion
- **Decision**
 - Director did not identify a material error that could reasonably change the outcome of the decision and, therefore the Board denied the request

Take Aways

- **Communication remains the key to avoiding appeals**
 - Numerous times the appeal is the first time a party, especially small businesses and landowners, meet the decision maker and get someone to hear their concerns or explain rules and procedures
 - This will only get worse as we streamline and move to automated processes
- **Understand definitions and how they are applied**
 - Person responsible, adverse effect, affiliated entity

Take Aways

- **Understand policies and how they are applied**
 - Director's discretion to name parties to an EPO or choose which type of EPO to issue
 - Effect of a PNT or KWBZ
- **Read Board and Court decisions!**
 - The Board and Courts rely on past decisions to help frame responses to future appeals

Questions?

