ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 1, 2013

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Parkland County with respect to Approval No. 0049589-00-00 issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to Northland Material Handling Inc. by the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: *Parkland County* v. *Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Northland Material Handling Inc.* (01 October 2013), Appeal No. 12-037-D (A.E.A.B).

BEFORE:		Justice Delmar W. Perras (ret.), Board Chair; Mr. Eric McAvity, Q.C., Board Member; and Ms. Christine Macken, Board Member.
SUBMISSIONS BY:		
	Appellant:	Parkland County, represented by Mr. William W. Barclay, Reynolds, Mirth, Richards & Farmer LLP.
	Approval Holder:	Northland Material Handling Inc., represented by Mr. Kim Wakefield, Dentons Canada LLP.
	Director:	Mr. Neil Hollands, Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Aurelia Nicholls, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued a Letter of Authorization to Northland Material Handling Inc. under the *Environmental Protection and Enhancement Act* (EPEA) for the reclamation of a landfill in Parkland County. The Letter of Authorization was required under an Approval issued in 2008 with an expiry date of 2018. In 2012, Parkland County refused to issue a development permit to Northland Material Handling Inc. As a result, the reclamation of the landfill site had to start prior to the landfill cells being filled. The Letter of Authorization allows for the use of inert waste to achieve the desired height in the completed landfill cells.

Parkland County appealed, arguing the Letter of Authorization was, in essence, an amendment to the Approval and, therefore, is appealable under section 91.

Section 91 of the EPEA specifies which decisions made by AESRD can be appealed. A letter of authorization is not listed as an appealable decision.

The Environmental Appeals Board found the Letter of Authorization was not an amendment to the Approval. Any changes made as a result of the Letter of Authorization were minor and fell under the section 67(3)(e) of EPEA and, therefore, an amendment to the Approval was not required.

The Board dismissed the appeal because the Letter of Authorization was not an appealable decision.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision regarding the appeal filed by Parkland County (the "Appellant") with respect to a Letter of Authorization ("2012 Letter of Authorization") issued to Northland Material Handling Inc. ("Northland" or "Approval Holder").

[2] Alberta Environment and Sustainable Resource Development ("AESRD") issued the 2012 Letter of Authorization with respect to an Approval issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to the Approval Holder for a landfill facility located in Parkland County.

[3] As the appeal was of a letter of authorization, the Environmental Appeals Board (the "Board") asked the Appellant to provide reasons why the Board should accept the appeal given it appeared EPEA does not appear to give a right of appeal of a letter of authorization. The Appellant argued the 2012 Letter of Authorization allowed for changes to the original reclamation plan and, therefore, constituted an amendment to the Approval. An amendment to the Approval would be appealable under EPEA.

[4] The Board dismissed the appeal because a letter of authorization is not appealable under section 91 of EPEA, and the Appellant did not demonstrate the 2012 Letter of Authorization was, in effect, an amendment to the Approval.

II. BACKGROUND

[5] On December 3, 2012, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued the 2012 Letter of Authorization to the Approval Holder to reclaim a landfill. The 2012 Letter of Authorization was in relation to Approval No. 49589-00-00 (the "Approval") that had been issued to the Approval Holder under EPEA in 2008 with an expiry date of 2018. The 2012 Letter of Authorization accepted the reclamation plan for the landfill submitted by the Approval Holder.

[6] On January 3, 2013, the Board received a Notice of Appeal from Parkland County appealing the 2012 Letter of Authorization.

[7] On January 10, 2013, the Board acknowledged the appeal and notified the Approval Holder and Director of the appeal. In this letter the Board noted a letter of authorization did not appear to be a decision that was appealable under section 91 of EPEA. The Board asked the Appellant to provide comments on whether the 2012 Letter of Authorization was appealable.

[8] The Appellant provided its response on January 24, 2013.

[9] On January 26, 2013, the Board requested the Director provide a copy of the record (the "Record") in relation to this appeal. The Board stated the Appellant would be given an opportunity to provide additional comments once the Record was received and distributed.

[10] On January 31, 2013, the Director asked the Board to summarily dismiss the appeal on the grounds:

1. the 2012 Letter of Authorization was not an appealable decision;
2. the Appellant was not directly affected; and
3. providing the Record would be a waste of time and resources.

[11] On February 4, 2013, the Approval Holder notified the Board that it should be able to provide a written submission.

[12] On February 20, 2013, the Board notified the Appellant, Approval Holder, and Director (collectively, the "Participants") that it denied the Director's request to summarily dismiss the appeal. The Board requested the Director provide the Record and notified the Participants that a submission process would be set once the Record was received.

[13] The Board received the Record on March 20, 2013, and copies of the Record were provided to the Participants on March 21, 2013. The Board also set the schedule to receive submissions on the following motions:

1. Was the Director's December 3, 2012 decision "an amendment, addition or deletion pursuant to an application under section 70(1)(a) [of EPEA] or … an amendment, addition or deletion pursuant to section 70(3)(a)…[of EPEA]?" If so, is this decision appealable?
2. Was the Director's December 3, 2012 decision a letter of authorization issued under EPEA Approval No. 49589-00-00? If so, is a letter of authorization, in and of itself, appealable?

3. Was the Director's December 3, 2012 decision an amendment of a reclamation plan? If so, is the amendment of a reclamation plan, in and of itself, appealable?

4. Does the January 2, 2013 Notice of Appeal disclose an appealable issue? If not, should the appeal be dismissed?

[14] The Board received submissions from the Participants between April 5, 2013, and May 7, 2013.

[15] On June 4, 2013, the Board notified the Participants that a reclamation plan referenced in the 2012 Letter of Authorization was not included in the Record. The Board asked the Director to provide the referenced reclamation plan as well as another document referenced by the Director. The Director provided these documents on June 13, 2013, and copies were provided to the Participants.

[16] On June 14, 2013, the Board set the schedule to receive additional comments from the Participants with respect to the additional documents that were provided. The Board received the submissions from the Participants between June 21, 2013, and July 5, 2013.

III. SUBMISSIONS

A. Appellant

[17] The Appellant stated it did not receive any notification of the Approval Holder's application to amend the Approval or the existing reclamation plan until December 28, 2012, even though the Director was aware of its interest in the Approval.

[18] The Appellant stated the Director approved a change to the reclamation plan ("2008 Reclamation Plan") that formed part of the Approval and that was submitted to and approved by the Director in June 2008. The Appellant noted there was nothing in any previous reclamation plan that suggested the Approval Holder could reclaim by continuing to landfill. The Appellant noted the operation plan that was previously submitted to the Director indicated that, at the end of the landfill's active life, the landfill would be covered with a one inch thick layer of native in-situ material and the saved topsoil would be distributed over the area and then seeded to grass. The Appellant submitted the 2012 Letter of Authorization effectively amends

the 2008 Reclamation Plan and the underlying Approval of which this reclamation plan formed a part and, therefore, the decision is appealable pursuant to section 91(1)(a)(i) of EPEA.[1]

[19] The Appellant argued the Director's decision is a nullity, or the appeal period has not started, because the Director did not provide notice to the Appellant of the application even though the Appellant had submitted a Statement of Concern and filed an appeal regarding the Approval.

[20] The Appellant argued that, alternatively, it has a right of appeal pursuant to section 91(1)(a)(ii) of EPEA[2], because the Director waived normal notice requirements pursuant to section 72(3) of EPEA.[3]

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1 Section 91(1)(a)(i) of EPEA provides:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)…."

2 Section 91(1)(a)(ii) of EPEA provides:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted…

(ii) by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3)."

3 Section 72(3) of EPEA states:

"Notwithstanding subsection (1) or (2), where the Director is satisfied that

(a) there is an emergency,

(b) the activity to which the application relates or the proposed amendment, addition, deletion or change is a routine matter within the meaning of the regulations, or

(c) adequate notice of the subject-matter of the application or the proposed amendment, addition, deletion or change has already been given,

[21] The Appellant noted section 67 of EPEA[4] states that no person will make any changes to an approved activity or the manner in which the activity is carried on unless an approval or an amendment to an approval authorizing the changes is issued by the Director. The Appellant acknowledged section 67(3)(e) of EPEA indicates the section does not apply to minor changes to conservation and reclamation plans that do not contravene the purpose or intent of the approval.

[22] The Appellant argued the change to the 2008 Reclamation Plan is not minor. The Appellant stated the intent of the Approval was that landfilling activities would cease and then reclamation would start and be completed relatively quickly. The Appellant submitted that landfilling and reclamation are different activities. The Appellant noted the Approval allows the Approval Holder to only accept inert waste, but the decision under appeal purports to allow the Approval Holder to continue landfilling under the guise of reclamation for at least five to six years. The Appellant stated there is nothing in the regulations that suggests reclamation can be

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the Director may waive the notice requirements set out in subsections (1) and (2)."

[4] Section 67 of EPEA states:

"(1) No person shall, with respect to an activity that is the subject of an approval, make any change to

(a) the activity,

(b) the manner in which the activity is carried on, or

(c) any machinery, equipment or process that is related to the carrying on of the activity

unless an approval or an amendment to an approval authorizing the change is issued by the Director.

(2) A person who wishes to make a change under subsection (1) shall apply to the Director in accordance with the regulations.

(3) This section does not apply to

(a) adjustments, repairs, replacements or maintenance made in the normal course of operations,

(b) changes that do not result in an increase in the release of a substance into the environment,

(c) short-term testing or temporary modifications to machinery, equipment or processes that do not cause an adverse effect,

(d) changes in the type of equipment used in the conservation or reclamation of specified land, or

(e) minor changes to conservation and reclamation plans that do not contravene the purpose or intent of the approval."

accomplished by continued landfilling, and allowing continued landfilling under the guise of reclamation is contrary and inconsistent with EPEA and the purpose and intent of the Approval. The Appellant argued the Director's decision negates the difference between the operational and closure phases contemplated by EPEA and the Approval.

[23] The Appellant said the October 15, 2012, reclamation plan (the "2012 Reclamation Plan") mentioned the Approval expired on June 30, 2018, but it did not mention the Parkland County development permit expired December 31, 2012.

[24] The Appellant stated the Director's decision allows continued landfilling for an indefinite period of time, estimated to be a period of five to six years. The Appellant argued this is not a minor change and contravenes the purpose and intent of the Approval that anticipated a shorter reclamation period.

[25] The Appellant noted the 2012 Reclamation Plan allowed for continued stockpiling of material on the site. The Appellant stated it was unaware of anything in the previous reclamation plan that allowed movement on and off the site of stockpile material. The Appellant argued the movement of such material has nothing to do with reclamation and does not comply with the definition of reclamation in EPEA. The Appellant argued the Approval Holder included this provision in the amended reclamation plan to allow it to continue its recycling and waste material handling business under the guise of reclamation. The Appellant argued this type of activity is not reclamation, and this is not a minor change to the reclamation plan and is in contravention of the purpose and intent of the Approval.

[26] The Appellant stated it does not make sense to suggest landfilling should be called reclamation or that operating a landfill is closing a landfill.

[27] The Appellant submitted the decision under appeal constitutes an amendment to the Approval and the reclamation plan and, therefore, is appealable.

[28] The Appellant noted the closest thing that demonstrated any type of analytical comments provided to the Director by his staff was an email dated October 29, 2012, which stated:

> "…essentially, what they are proposing to do is to fill their 'holes' (spaces between their cells and other areas that are earmarked for future landfilling) with C & D waste and then reclaim the landfill. This way, they get to continue landfilling even without a County permit as what they are doing would be considered as reclamation."[5]

[29] The Appellant noted the Approvals Program Policy (the "Policy") states "…the use of inert waste to fill wet lands or the creation of excavations for inert waste reclamation does not follow the spirit of this Act and Regulation."[6] The Appellant acknowledged the Policy, in defining reclamation, does not preclude using inert waste for filling in low spots and depressions or building up the land surface. The Appellant noted the use of inert waste in reclamation was intended to be limited to small scale uses, such as basement excavations, dug out or water reservoir excavations, and existing trenches or excavations not created specifically for waste disposal. The Appellant stated the definition of reclamation in EPEA relates to the surface of the land, not the subsurface, and does not relate to excavations such as landfill cells.

[30] The Appellant said the Policy is concerned with the use of inert waste for reclamation and, therefore, limits the possible uses. The Appellant noted the Policy states it only applies to man-made disturbances and not to any activity regulated under EPEA.

[31] The Appellant stated that, in accordance with the Policy, inert waste should not be allowed to be used for reclamation purposes. The Appellant submitted the use of inert waste for reclamation over an indefinite period of time, is inappropriate, and should not be used as a waiver pursuant to section 67(3)(e) of EPEA.

[32] The Appellant stated the Approval Holder, in its 2010 application to modify the Approval (the "2010 Reclamation Plan") applied for an increase in airspace to allow for continued operations until final elevations were achieved prior to the expiry of the Approval in 2018. The Appellant noted the 2010 Reclamation Plan and the Approval contemplated continued landfill operations until the vertical height of the landfill was achieved, and then the landfill would be closed and reclaimed. The Appellant noted the 2006 Operations Plan

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5 Director's Record at Tab 8, email from Harshan Radhakrishnan to Gene Leskiw, dated October 29, 2012.

6 Director's Record at Tab 28, Approvals Program Policy, Regional Services Division, Alberta Environment, October 18, 2005.

contemplated that closure would begin within six months after the landfill reached its designed elevation and would be completed within six months after the start of closure.

[33] The Appellant said that prior to the 2012 Letter of Authorization being issued, it was never contemplated the landfill would continue operations for an indefinite period of time and that landfilling operations would be called reclamation. The Appellant argued this is contrary to the intent of the Approval and 2008 Reclamation Plan.

[34] The Appellant stated there is no indication how the Director made his decision to issue the 2012 Letter of Authorization or what factors he took into account. The Appellant argued the 2012 Letter of Authorization was such a fundamental departure from the Approval that it constituted an amendment. The Appellant stated it cannot be considered a minor change within the meaning of section 67 of EPEA considering the misinterpretation of the word "reclamation" and given the magnitude of the continued landfilling the 2012 Letter of Authorization purports to authorize.

B. Approval Holder

[35] The Approval Holder explained it operated a sand extraction and landfill operation on the site since 1994. The current Approval was issued in 2008 with an expiry date of June 30, 2018, and a modified reclamation plan was accepted by the Director in 2010 by way of a letter of authorization ("2010 Letter of Authorization").

[36] The Approval Holder explained Parkland County refused to grant a renewal of its development permit beyond December 31, 2012.

[37] The Approval Holder stated it stopped sand excavation and landfill activities in late 2012, but the excavation of the cells resulted in two large holes that must be filled as part of an authorized reclamation plan. The Approval Holder said parts of its site were close to final elevation. The Approval Holder explained it submitted a Landfill Reclamation, Closure and Post-Closure Plan to the Director in October 2012 (the "2012 Reclamation Plan") as required under its Approval, and the Director accepted the plan by way of the 2012 Letter of Authorization.

[38] The Approval Holder noted the Appellant did not object to the 2008 Reclamation Plan or the 2010 Reclamation Plan.

[39] The Approval Holder noted the development permit was valid until December 31, 2012, but it allowed the required reclamation to continue beyond that date in accordance with any permits or approvals granted by AESRD.

[40] The Approval Holder argued the Appellant's interpretation of the meaning of "reclamation," to limit it to clay capping, topsoil, and landscaping, is not reasonable.

[41] The Approval Holder argued the Appellant did not raise any environmental concerns regarding the 2012 Reclamation Plan in its Notice of Appeal.

[42] The Approval Holder stated the 2012 Reclamation Plan represents its obligations under the Approval. The Approval Holder noted the Appellant was aware of the 2010 Reclamation Plan and the Appellant did not appeal it. The Approval Holder stated there is no change between the 2010 Reclamation Plan and the 2012 Reclamation Plan. The Approval Holder said that if the 2012 Reclamation Plan was set aside, the 2010 Reclamation Plan would be in effect. The Approval Holder explained that if it was denied the right to reclaim its property, someone else, perhaps Parkland County, would have to reclaim the site.

[43] The Approval Holder noted section 70 of EPEA[7] provides the authority for the Director to amend, add to, or delete a term or condition of an approval.

[44] The Approval Holder explained it initiated the letter authorization process to begin reclamation and submitted a reclamation plan and, therefore, section 70(3)(a) of EPEA[8] does not apply.

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[7] Section 70(1) of EPEA states:

"On application by an approval or registration holder, the Director may, in accordance with the regulations,

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an approval, or

(b) cancel an approval or registration,

if the Director considers it appropriate to do so."

[8] Section 70(3) of EPEA provides:

[45] The Approval Holder stated the Approval requires the Approval Holder to submit a closure and post-closure plan to the Director at the time the landfill was closing and obtain written authorization from the Director prior to starting reclamation work. The Approval Holder said no amendment of the Approval was requested, and the Director's decision to authorize the 2012 Reclamation Plan pursuant to the Approval iss not an amendment of the Approval. Therefore, section 70(1) of EPEA is not relevant.

[46] The Approval Holder stated a letter of authorization is not a type of appealable decision contemplated by EPEA, and there is no right to appeal a letter of authorization for implementing the requirements of an approval.

[47] The Approval Holder submitted that, since neither section 70(1)(a) nor 70(3)(a) apply, there is no right of appeal.

[48] The Approval Holder stated it did not request an amendment to its 2010 Reclamation Plan. The Approval Holder explained the 2008 Reclamation Plan included in the Approval was modified in 2010 by the 2010 Letter of Authorization to permit changes to the slopes and contours of the final site to deal with stormwater management. The Approval Holder stated the 2012 Letter of Authorization allows it to implement the 2010 Reclamation Plan, and no changes were made to the plan and no amendments were required.

"If the Director considers it appropriate to do so, the Director may on the Director's own initiative in accordance with the regulations

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an approval

(i) if in the Director's opinion an adverse effect that was not reasonably foreseeable at the time the approval was issued has occurred, is occurring or may occur,

(ii) if the term or condition relates to a monitoring or reporting requirement,

(iii) where the purpose of the amendment, addition or deletion is to address matters related to a temporary suspension of the activity by the approval holder, or

(iv) where the approval is transferred, sold, leased, assigned or otherwise disposed of under section 75…"

[49] The Approval Holder questioned whether the 2010 Letter of Authorization would have been appealable noting it allowed for a modification of the final grade and to extend the vertical height, but it did not amend the existing Approval.

[50] The Approval Holder said that unless one of the circumstances listed under section 72(3) of EPEA exists, there is no appealable issue and no notice is required. The Approval Holder argued that if every reclamation plan, implementing a requirement under an approval, resulted in an obligation to give notice and a right of appeal, the reclamation process would grind to a halt.

[51] The Approval Holder noted the definition of "reclamation" under section 1(ddd) of EPEA.[9] The Approval Holder stated the *Waste Control Regulation*, Alta. Reg. 192/1996, requires that a landfill be reclaimed to meet, as a minimum, the requirements specified in the regulation and the standards set out in the Code of Practice for Landfills (the "Code"). The Code requires a final cover system be installed which includes a barrier layer, subsoil, topsoil, and vegetation.

[52] The Approval Holder acknowledged this was an atypical situation because the municipality refused permission for the Approval Holder to complete the landfill before starting reclamation. The Approval Holder explained that, because of the present situation, the Director authorized the use of inert waste to reclaim the site to bring the landfill to its final elevation. The Approval Holder noted the legislation does not prohibit reclamation from being done this way, and the 2012 Reclamation Plan falls within the definition of reclamation under section 1(ddd)(iii) of EPEA. The Approval Holder stated that no work can be done to the surface of the land as

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[9] Section 1(ddd) of EPEA states:

"reclamation" means any or all of the following:

(i) the removal of equipment or buildings or other structures or appurtenances;

(ii) the decontamination of buildings or other structures or other appurtenances, or land or water;

(iii) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of land;

(iv) any other procedure, operation or requirement specified in the regulations."

required until the surface is reconstructed and stabilized to permit the installation of the final cover system.

[53] The Approval Holder submitted the use of inert waste to bring the landfill to its final elevation falls within the definition of reclamation as contemplated by EPEA and the relevant regulations. The Approval Holder stated the landfill must be brought to its final elevation in order to be returned to equivalent land capability as required under the *Conservation and Reclamation Regulation*, Alta. Reg. 115/93.

[54] The Approval Holder argued the Appellant's appeal would result in two large holes from sand extraction remaining without any environmental reason. The Approval Holder stated accepting the Appellant's arguments would restrict or prevent reclamation instead of encouraging reclamation.

[55] The Approval Holder noted the use of inert waste under the Approvals Program Policy[10] only relates to non-regulated landfills.

[56] The Approval Holder stated the change to the 2008 Reclamation Plan and Stormwater Management Plan was approved in 2010 but, pursuant to the Approval, the Approval Holder was required to submit a closure and post-closure plan to the Director and not to start reclamation or decommissioning without written authorization from the Director. The Approval Holder stated this was addressed in its 2012 submission to the Director and the 2012 Letter of Authorization.

[57] The Approval Holder stated there was no amendment of the Approval by the 2010 Letter of Authorization, because it was an application made pursuant to the Approval, which required reclamation to be done in accordance with the 2008 Reclamation Plan, unless otherwise authorized in writing by the Director.

[58] The Approval Holder argued that, if the 2010 Letter of Authorization is considered an amendment to the Approval, then the amendment was made in 2010, the Appellant was aware of the amendment, and the Appellant did not challenge it.

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[10] See: Tab 28 of the Record. Approvals Program Policy, Regional Services Division, Alberta Environment, October 18, 2005.

[59] The Approval Holder stated the 2012 Letter of Authorization did not change the 2010 Letter of Authorization since the 2012 application did not include a change to the permitted elevation, reclamation plan, sequencing plan, stormwater management plan, or change in the type of fill. The Appellant submitted that, if there was a change in the 2010 Letter of Authorization as a result of the 2012 Letter of Authorization, the change addressed minor matters of detail and was a minor change, not a major change.

[60] The Approval Holder noted the requirement to fill in the "holes" created by its sand extraction activities fits within the definition of reclamation in the Approval and 2012 Letter of Authorization.

[61] The Approval Holder noted the Code requires closure of a landfill to begin no later than 180 days after the landfill reaches its final design elevation. The Approval Holder stated closure of the landfill cannot start until the hole created by sand extraction has been filled, which includes stabilization, contouring, maintenance, conditioning, or reconstruction of the surface of the land. The Approval Holder argued whether or not landfill operation has stopped has no bearing on whether closure must begin. The Approval Holder explained closure consists of adding a cap of subsoil and topsoil over previously reclaimed areas, so until an area is reclaimed, closure cannot be accomplished.

[62] The Approval Holder noted the Approval provides for the use of waste material to reclaim the holes created by sand extraction. The Approval Holder argued that, whether this activity is called "landfilling" or "reclamation" does not change the fact that the "holes" must be filled in prior to closure, and the Director has approved doing so with inert waste.

[63] The Approval Holder submitted the appeal should be dismissed because there is no appealable issue.

C. Director

[64] The Director submitted the Letter of Authorization was not an amendment, addition, or deletion of the Approval pursuant to sections 70(1)(a) or 70(3)(a) of EPEA. The Director said the 2012 Letter of Authorization was issued under the authority of section 67(3)(e)

of EPEA, because it was a change to the reclamation plan that did not contravene the purpose and intent of the Approval. The Director stated there is no right of public notice or appeal of this type of decision.

[65] The Director noted section 70(1) of EPEA allows the Director, when an approval holder applies, to amend a term or condition of the approval, in accordance with the regulations, if the Director considers it appropriate to do so. The Director said section 67 of EPEA delineates how amendments to approvals are to be handled, but section 67 does not apply to minor changes to conservation and reclamation plans that do not contravene the purpose and intent of the approval.

[66] The Director stated the issuance of a letter of authorization is contemplated under the Approval, which requires the Approval Holder to receive written authorization from the Director before starting reclamation or decommissioning, and the landfill must be reclaimed as provided for in the plans submitted by the Approval Holder in June 2008 unless otherwise authorized by the Director.

[67] The Director said the 2012 Letter of Authorization approved the plan submitted by the Approval Holder as required under the conditions of the Approval.

[68] The Director stated the terms and conditions of the Approval were followed. No actual changes were made to the Approval. The Director argued the changes to the 2010 Reclamation Plan did not constitute an amendment, addition, or deletion to the Approval, and they did not contravene the purpose or intent of the Approval. Therefore, the exception contained in section 67(3)(e) does not apply to the 2012 Letter of Authorization.

[69] The Director stated the 2012 Letter of Authorization was issued pursuant to the Approval, because the Approval specifically contemplates such a letter would be issued, and the Approval Holder requires the letter be issued prior to starting the decommissioning and reclamation activities.

[70] The Director said that, even though the effect of the 2012 Letter of Authorization was to amend the 2008 Reclamation Plan, there was no requirement for public notice and there is no right to appeal the changes made to the 2008 Reclamation Plan.

[71] The Director submitted the appeal should be dismissed, because the legislation does not give the Board the authority to hear an appeal of a decision of the Director when issuing a letter of authorization approving a reclamation plan pursuant to an approval. The Director stated there is no right of appeal when changes are made to a reclamation plan when the changes do not change the purpose or intent of the approval.

[72] The Director noted the Approval contemplates the construction, operation, and reclamation of a waste management facility, and the 2012 Letter of Authorization specifically pertains to the reclamation of the facility. Therefore, it does not interfere with the intent or purpose of the Approval.

[73] The Director argued the Appellant did not raise an appealable issue to the Board and, therefore, the appeal should be dismissed.

[74] The Director explained the 2012 Reclamation Plan cannot be compared to the 2008 Reclamation Plan to determine if substantial changes to the Approval were authorized by the 2012 Letter of Authorization. The Director stated the 2012 Reclamation Plan was preceded by the 2010 Reclamation Plan.

[75] The Director noted that, in 2010, the Approval Holder submitted its application for the amendments to the 2008 Reclamation Plan to the Director and provided it to the Appellant. The Director did not have any records indicating the Appellant took issue with the amendments.

[76] The Director explained significant amendments to the 2008 Reclamation Plan were approved in 2010 including: changes to the filling elevations; changes to the sequencing of the reclamation; a modification of the final grade; an extension to the vertical height; an amendment to the capping requirements for Quadrants 1 and 2; and amendments to the stormwater management and surface water management plans.

[77] The Director explained all parties operated under the assumption the landfill would operate until all the cells were full prior to starting reclamation activities. In December 2012, it became apparent this was not the case, so the Approval Holder submitted an application

to revise the 2010 Reclamation Plan and to obtain the Director's authorization to commence reclamation activities.

[78] The Director stated there is no policy or legislation in place which prohibits the use of inert waste in reclamation activities. The Director said it would cause a detrimental impact to the environment to extract the amount of clean fill and arable land to fill the empty cells. The Director stated that given the changes approved in 2010, the 2012 Letter of Authorization was much less significant.

[79] The Director explained there is no statutory obligation for him to provide reasons for his decision, and a lack of documentation does not translate to a lack of due consideration. The Director explained he considered the application, and as a result, he changed the grading, depth, and amount of clean fill required. The Director argued the environmental damage to the surrounding lands to provide clean fill as sought by the Appellant outweighs the theoretical risks posed by allowing clean construction and demolition waste to fill the remaining empty cells. The Director stated this type of waste is inert and not expected to cause seepage.

[80] The Director stated there is no right of appeal of a decision made under section 67(3) of EPEA. The Director argued that if such a right existed, the proper time to raise the issue would have been in 2010 when the Approval Holder first submitted its amendment to the 2008 Reclamation Plan. The Director explained most of the substantive changes to the reclamation plan were made at the time of the 2010 application, and if the Appellant had concerns about the revised 2010 Reclamation Plan, then the Appellant should have raised its concerns in 2010 when it first became aware of the application.

[81] The Director stated that if the 2012 Letter of Authorization was not issued, the governing document would be the Approval.

D. Rebuttal

[82] The Appellant acknowledged the Approval Holder has a duty to reclaim the site, but it argued that what the Director purports to allow is not reclamation but landfilling.

[83] The Appellant noted the Code and the Standards for Landfills in Alberta (the "Standards") do not state waste is to be used for reclamation and closure purposes. The Appellant stated the Standards contemplate reclamation with a three layer cover system of specified depths, none of which contemplate the depths involved at the site. The Appellant said the Standards identify reclamation as being different than operations, it does not constitute landfilling, and reclamation refers to the surface of the land, not the subsurface.

[84] The Appellant noted the Director purported to approve the application pursuant to section 67(3) of EPEA. The Appellant said the Director issued the 2010 Letter of Authorization allowing the Approval Holder to make changes to the finished grade of the landfill, but there was no indication in the 2010 Letter of Authorization or in the Approval that waste would be used for reclamation purposes. The Appellant noted a reclamation sequencing drawing included as part of the Approval indicated reclamation would utilize three barrier layers of soil for reclamation purposes, specifically a clay cap, topsoil, and finished grade.

[85] The Appellant noted nothing in the 2010 Letter of Authorization allowed waste to be used for reclamation purposes, and the Approval contemplated reclamation would be accomplished with soil, not waste.

[86] The Appellant stated that, when a Director receives an application under section 67(2) of EPEA in respect of a change to an activity or an application under section 70(1)(a) of EPEA to amend a term or condition of, add a term or condition to, or delete a term or condition from an approval, the Director shall provide or require the applicant to provide notice of the application. The Appellant argued the Approval Holder's application was an application pursuant to section 67(2) of EPEA and should have been advertised.

[87] The Appellant submitted that, given the definition of reclamation in EPEA and the Standards and the previously existing reclamation plan, it is difficult to understand how using waste for reclamation purposes is a "minor change" to an activity. The Appellant submitted that using waste for reclamation purposes is contrary to the purpose and intent of the Approval.

[88] The Appellant said allowing waste to be used for reclamation purposes is a change to an activity within the meaning of section 67(1) of EPEA and cannot be considered a

minor change to the Approval. The Appellant argued the change can be viewed as an amendment to the Approval within the meaning of section 72(3) of EPEA and is appealable pursuant to section 91(1) of EPEA.

[89] The Appellant argued the Director's decision does not comply with EPEA, the regulations, Standards, or AESRD policies. The Appellant noted there is nothing in the Record that indicated the Director considered or requested an analysis of section 67 of EPEA and stating that section 67(3) applies does not make it so. The Appellant submitted the application was made pursuant to section 67(2) of EPEA and is an amendment addition, deletion, or change to an approval and the Appellant has a right of appeal.

[90] The Appellant submitted that what the Director has allowed is not reclamation and has no place in a reclamation plan.

[91] The Appellant disagreed with the Approval Holder's statement that there was no change between the 2010 Letter of Authorization and the 2012 Letter of Authorization. The Appellant noted that in 2010 the landfill was operating, and it continues to operate, but what has changed is the 2012 Letter of Authorization allows the Approval Holder to continue landfilling for an unprecedented and indefinite period of time and is to be called reclamation.

[92] The Appellant noted reclamation includes the stabilization, contouring, maintenance, conditioning, or reconstruction of the surface of the land, but what the Director allows in the 2012 Letter of Authorization has nothing to do with the surface of the land. The Appellant said the "holes" created by sand extraction are significant and extend below the surface.

[93] The Appellant stated the Director acknowledged he believed the cells would be full prior to reclamation. The Appellant stated the Director's belief that extracting clean fill for reclamation purposes would be detrimental to the environment is a question of fact that has not been established. The Appellant stated there is clean fill in the area that can be obtained at little cost and would not have to be extracted specifically for these purposes. The Appellant submitted

the landfill could be reclaimed more quickly, effectively, and in a more environmentally sustainable manner than allowing continued landfilling operations. The Appellant said the Director purports to allow the Approval Holder to continue landfilling for an indefinite period of time.

[94] The Appellant disagreed with the Director's statement that no policy is in place that prohibits the use of inert waste for reclamation activities.

[95] The Appellant stated that prior to the 2012 Letter of Authorization, there was no suggestion, and the Approval did not contemplate, that the Approval Holder could reclaim the landfill by continuous landfilling.

IV. Analysis

[96] Section 91 of EPEA lists the decisions made by the Director that can be appealed. The Board receives its authority to hear appeals under the applicable legislation. If the particular decision is not listed under section 91 of EPEA, the Board does not have jurisdiction to hear the appeal. It is clear section 91 does not provide a right of appeal of a letter of authorization. However, the Appellant's main argument was that the 2012 Letter of Authorization was actually an amendment to the Approval and, therefore, appealable under section 91.

[97] Section 67(3) of EPEA allows the Director to accept minor changes to conservation and reclamation plans without requiring an amendment to the Approval providing the changes do not contravene the purpose or intent of the approval. If the amendment is a minor change, then section 67(3) of EPEA applies. However, if the change is considered major or if it changes the purpose or intent of the Approval, then section 67(3) does not apply and the Director's decision may be appealable.

[98] Therefore, the issue before the Board is to determine whether the 2012 Letter of Authorization resulted in major changes to the Approval and whether it was, in effect, an amendment to the Approval. If it was an amendment to the Approval, there is a procedure that is followed including: public notice of the proposed amendment; the opportunity for those directly affected to submit a Statement of Concern; and an appeal right for directly affected persons under section 91 of EPEA. However, if it is not a major change and does not change the intent of the Approval, then there is no right of appeal.

[99] The Appellant argued the 2012 Letter of Authorization was an amendment while the Director and Approval Holder argued the 2012 Letter of Authorization was a requirement under the Approval to allow for reclamation of the landfill to start.

[100] The Director issued the Approval in 2008 with an expiry date of 2018. The Approval Holder expected to continue operating the landfill until 2018. However, in 2012, Parkland County chose to cancel the Approval Holder's municipal development permit to continue operating the landfill. Therefore, the Approval Holder cannot operate the landfill. As a result, the Approval Holder was required to modify its reclamation plan to compensate for the unanticipated, early closure of the landfill operations.

[101] In order to reclaim the site, the proper slope must be obtained. In normal circumstances, waste accepted into the landfill would fill in the "holes" until the required elevations and slopes are achieved. Without the municipal development permit, the Approval Holder cannot accept waste. However, the Approval Holder is still required to reclaim the site properly, and the Appellant concurs this must be done. It is important to note that, in the notice of the cancellation of the development permit, the Approval Holder is allowed to complete the required reclamation of the site in accordance with any approvals or permits granted by the Director.[11]

[102] The Board recognizes the Approval Holder must be able to achieve proper elevation and slopes in the holes to ensure stormwater is managed properly and proper capping

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[11] See: Approval Holder's submission, dated April 24, 2013, at Tab 8. The Board notes that the "holes" in the landfill will be filled with "inert waste," and the intended use of the "inert waste" is not for the purpose of disposal, but for the purpose of reclamation. This approach appears to be consistent with the AESRD's policies regarding reclamation and the *Waste Control Regulation*, A.R. 192/96.

and revegetation can take place to prevent erosion. These requirements are all part of reclamation as defined in the applicable legislation and policies.

[103] The 2012 Letter of Authorization allows the Approval Holder to proceed with its reclamation of the site according to the 2010 Reclamation Plan. The 2010 Reclamation Plan was submitted to the Director and the Director accepted the proposed plan. The 2010 Reclamation Plan, accepted under the 2010 Letter of Authorization, allowed for changes to the final grade, the vertical height of the cells, capping requirements in two quadrants, and amendments to the stormwater management and surface management plans. The 2012 Letter of Authorization does not change any of these aspects of the 2010 Reclamation Plan or any other of the major aspects of the 2008 or 2010 Reclamation Plans.

[104] The intent of the 2012 Letter of Authorization is to ensure the landfill is properly reclaimed according to the applicable legislation and policies. This does not contravene the purpose or intent of the Approval or the 2008 and 2010 Reclamation Plans.

[105] Therefore, the Board finds the 2012 Letter of Authorization did not result in major changes to the Approval and did not contravene the intent and purpose of the Approval. The 2012 Letter of Authorization did not amend the Approval and, therefore, is not appealable under section 91 of EPEA.

[106] In reviewing the history of the Approval and the reclamation plans, the substantial changes to the reclamation plan occurred in 2010. When the 2010 Reclamation Plan was submitted to the Director for his approval, the Appellant was also notified and it was provided with a copy of the proposed 2010 Reclamation Plan. If the Appellant had filed an appeal at that time, the Board may have been receptive to considering the 2010 Reclamation Plan resulted in an amendment to the Approval. However, even though the Appellant was aware of the proposed 2010 Reclamation Plan, it chose not to file an appeal. Now that it has been two years since the Director approved the 2010 Reclamation Plan, the appeal period has expired. It is important to note the 2010 Reclamation Plan is not currently an issue before the Board.

[107] It is standard practice to issue an approval for the construction, operation, and reclamation of the facility. If the Approval Holder was allowed to continue operations as envisioned until 2018, the Approval Holder would have filed a comprehensive reclamation plan with the Director in 2017, when the operations of the landfill would, at that time, revert to a more conventional reclamation process. However, the reclamation process has to be started earlier now that the Approval Holder does not have a municipal development permit.

[108] The legislation does not require public notice of a letter of authorization since it is fulfilling one of the conditions of the Approval.

[109] The Board finds the 2012 Letter of Authorization is not an amendment to the Approval. Therefore, the appeal is not within the Board's jurisdiction and must be dismissed.

[110] As the Board has dismissed the appeal, the matter on whether the Notice of Appeal has raised an appealable issue is now moot and need not be decided by the Board.

V. DECISION

[111] The Board dismisses the appeal because the 2012 Letter of Authorization is not appealable under section 91 of EPEA and it did not constitute an amendment to the Approval.

Dated on October 1, 2013, at Edmonton, Alberta

"*original signed by*"
D.W. Perras
Board Chair

"*original signed by*"
Eric McAvity, Q.C.
Board Member

"*original signed by*"
Christine Macken

Board Member