

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 12, 2024

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 Clover Bar Sand and Gravel Ltd. with respect to the decision of the Director, North Region, Capital District, Regulatory Assurance Division, Alberta Environment and Protected Areas to issue Enforcement Order No. EO-EPEA-38679 under the *Environmental Protection and Enhancement Act* to Clover Bar Sand and Gravel Ltd.

Cite as: *Clover Bar Sand and Gravel Ltd. v. Director, North Region, Capital District, Regulatory Assurance Division, Alberta Environment and Protected Areas* (12 April 2024), Appeal No. 22-066-D (AEAB), 2024 ABEAB 13.

BEFORE:

Ms. Barbara Johnston, Board Chair; Mr. Kurtis Averill, Board Member.

PARTIES:

Appellant: Clover Bar Sand and Gravel Ltd., represented by Mr. Keith Wilson, Wilson Law Office.

Director: Mr. Maxwell Harrison, Director, North Region, Capital District, Alberta Environment and Protected Areas, represented by Ms. Vivienne Ball and Mr. Paul Maas, Alberta Justice.

EXECUTIVE SUMMARY

The Director, North Region, Capital District, Alberta Environment and Protected Areas (the Director) issued Enforcement Order No. EO-EPEA-38679 (Order) pursuant to the *Environmental Protection and Enhancement Act* (EPEA) to Clover Bar Sand and Gravel Ltd. (the Appellant). The Appellant appealed the Order to the Environmental Appeals Board (the Board).

The Order related to a sand and gravel pit (the Pit) in Edmonton being reclaimed by the Appellant under EPEA Registration No. 00015950-02-00. The Order required the Appellant to immediately suspend receiving any off-site material to be used for reclamation at the Pit until certain requirements set out in the Order were completed to the satisfaction of the Director.

The Director brought a preliminary motion challenging the Board's jurisdiction to hear the appeal. The Director argued that the Order was issued under section 210(1)(d) and (e) of EPEA and therefore no appeal right exists to the Board pursuant to section 91(1)(e). Appeals are only allowed under section 91(1)(e) where an enforcement order is issued under section 210(1)(a), (b), or (c).

The Board received submissions from the Appellant and Director and found that the Order fell under section 210(d) and (e) of EPEA and the Board did not have jurisdiction to hear the appeal. The Board dismissed the appeal.

TABLE OF CONTENTS

1. INTRODUCTION	1
2. BACKGROUND	1
3. ISSUE	4
4. LEGISLATION	4
5. SUBMISSIONS	5
5.1. Appellant.....	5
5.2. Director	8
6. ANALYSIS.....	12
7. DECISION.....	17

1. INTRODUCTION

[1] These are the reasons for the decision of the Environmental Appeals Board (the “Board”) regarding a preliminary motion brought by the Director, North Region, Capital District, Alberta Environment and Protected Areas (the “Director”) regarding the appeal of Enforcement Order No. EO-EPEA-38679 (the “Order”) issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to Clover Bar Sand & Gravel Ltd. (the “Appellant”).¹

[2] On October 19, 2022, the Board received a Notice of Appeal from the Appellant.

[3] The preliminary motion before the Board was whether the Board had jurisdiction to hear the appeal of the Order under section 91(1)(e) of EPEA.

[4] After considering written submissions of the Appellant and the Director, the Board determined it did not have jurisdiction to hear the appeal because the Order was issued under sections 210(1)(d) and (e). The Board dismissed the appeal.

2. BACKGROUND

[5] The Appellant carried on business under EPEA Registration No. 00015950-02-00 (the “Registration”) which authorized the construction, operation, and reclamation of a sand and gravel pit in Edmonton (the “Pit”).

[6] On January 19, 2021, Alberta Environment and Protected Areas (“EPA”) received a complaint from a member of the public that the Appellant was accepting “contaminated” materials to be used for reclamation purposes at the Pit.²

[7] On June 23, August 9, and October 5, 2022, site inspections of the Pit were conducted by EPA Environmental Protection Officers. At each inspection, the officers observed, among other things, that the layout of the Pit did not comply with the Appellant’s activity plan for the Pit (the “Activities Plan”), materials received at the Pit were not screened for contamination and fill material was mixed with waste and debris in certain areas of the Pit. During the inspection

¹ Dr. Chidinma Thompson was originally assigned to this panel but was appointed a Justice of the Court of King’s Bench of Alberta on October 20, 2023. Justice Thompson took no part in preparing these reasons.

² Affidavit of Maxwell Harrison, sworn November 29, 2022, at paragraph 4 and Exhibit “B” to the Affidavit.

and as part of each inspection report issued to by EPA to the Appellant, the Appellant was asked to produce certain documentation relating to the location, depth and quantity of reclamation materials brought to the Pit (the “Documents”). As of October 5, 2022, the Appellant had not produced the Documents.

[8] On August 10, 2022, EPA officers attended the Appellant’s main office and registered office, both located in Edmonton, and found the main office was vacant and were advised by personnel at the registered office that the Documents were not stored at that location.

[9] On August 17, 2022, the Appellant wrote to EPA stating the Appellant provided to EPA the only documents it was legally obligated to provide when it submitted its most recent five-year report (the “5-Year Report”).³ The Appellant stated that the Appellant did not accept plastic and woody debris as reclamation material and provided a description of the process used by the Appellant to receive offsite fill on the Lands. On August 29, 2022, EPA wrote to the Appellant clarifying that the review of the Appellant’s 5-Year Report by EPA did not mean that the officers’ requests for the Documents had been complied with.

[10] On October 14, 2022, the Director issued the Order. The Director found that the Appellant had contravened section 83.1 of EPEA⁴ by contravening certain sections of the *Code of Practice for Pits* (the “Code”) because the Appellant failed to produce required records, failed to screen reclamation material accepted at the Pit and allowed materials contaminated with woody debris and waste to be imported and deposited at the Pit.⁵

[11] The Order required the Appellant, amongst other things, to immediately suspend receipt of any materials at the Pit until certain requirements of the Order were completed, to prepare and implement a site assessment for the Pit and to comply with other reporting requirements.⁶

³ The Appellant submitted its 5-Year Report and updated Security Estimate on October 6, 2019.

⁴ Section 83.1 of EPEA provides:

“No person shall commence or continue any activity that is:

(a) designated by the regulations as requiring a registration, and

(b) governed by a code of practice except in accordance with that code of practice.”

⁵ Enforcement Order No. EO-EPEA-3869, at unnumbered pages 5 to 7.

⁶ Enforcement Order No. EO-EPEA-3869, at paragraphs 1 to 10.

[12] On October 19, 2022, the Board received a Notice of Appeal from the Appellant.

[13] On October 28, 2022, the Director made a preliminary motion to the Board requesting the appeal be dismissed on the grounds that the Order was issued under sections 210(1)(d) and (e) of EPEA and therefore was not appealable under section 91(1)(e) of EPEA (the “Jurisdiction Motion”). Appeals are only allowed under section 91(1)(e) where an enforcement order is issued under section 210(1)(a), (b), or (c).

[14] On November 2, 2022, the Board wrote to the Appellant and the Director (collectively “the Parties”) establishing a process for the Parties to make submissions on the Jurisdiction Motion. On November 17, 2022, the Board received the Appellant’s initial submissions (the “Appellant’s Initial Submissions”). On December 1, 2022, the Board received the Director’s response submissions (the “Director’s Response Submissions”) and on December 15, 2022, the Board received the Appellant’s rebuttal submissions (the “Appellant’s Rebuttal Submissions”).

[15] On December 23, 2022, the Appellant requested the Director clarify certain representations made to the Board in the Director’s Response Submissions regarding the Appellant’s ability to continue to receive fill for reclamation at the Pit (the “Clarification Letter”).

[16] On January 10, 2023, the Director wrote to the Appellant stating the Order was in full force and effect and “importation of offsite materials to the Lands” would be a contravention of the Order. On January 13, 2023, the Appellant wrote to the Director and the Board stating that the Appellant could no longer import soils to the Pit and therefore could not engage in the approved activities for the Pit. The Appellant requested the Board rule on the Jurisdiction Motion as soon as possible.

[17] On January 16, 2023, the Director responded to the Clarification Letter confirming the Order was in full force (the “Response Letter”). The Director noted that the Clarification Letter was received after the deadline for submissions set by the Board and the Director stated the Clarification Letter was either irrelevant to the Director’s Jurisdiction Motion or an improper surrebuttal submission.

[18] On January 25, 2023, the Board requested the Director provide a copy of the activities plan upon which the Registration is based.

[19] On January 27, 2023, the Appellant provided the Board with an activities plan (the “Activities Plan”) and stated that the Pit was closed due to the Order, employees had been laid off and reclamation work had stopped. On January 27, 2023, the Board wrote to the Director acknowledging receipt of the Activities Plan and requesting comment. No comments were received by the Board.

[20] On February 13, 2023, the Board wrote to the Parties informing them the Board had reviewed the file and submissions of the Parties regarding the Jurisdiction Motion. The Board advised it had determined the Order is not appealable as it is not an enforcement order issued under section 210(1)(a), (b), or (c) and dismissed the appeal.

[21] These are the Board’s reasons for the decision.

3. ISSUE

[22] The issue to be determined in this Jurisdiction Motion is whether the Board has jurisdiction to hear the Appellant’s appeal of Enforcement Order No. EO-EPEA-38679 having regard to sections 91(1)(e) and 210(1)(a), (b), (c), (d), and (e) of EPEA.

4. LEGISLATION

[23] The authority of the Director to issue an enforcement order is found in section 210(1) of EPEA as follows:

“210(1) Where in the Director’s opinion a person has contravened this Act except section 178, 179, 180, 181 or 182, the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:

- (a) the suspension or cancellation of an approval, registration or certificate of qualification;
- (b) the stopping or shutting down of any activity or thing either permanently or for a specified period;
- (c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act;

- (d) the doing or refraining from doing of any thing referred to in section 113, 129, 140, 150, 156, 183 or 241, as the case may be, in the same manner as if the matter were the subject of an environmental protection order;
- (e) specifying the measures that must be taken in order to effect compliance with this Act.

(2) Where an enforcement order specifies measures that must be taken under subsection (1)(e), the measures may impose requirements that are more stringent than applicable requirements in the regulations.”

[24] The right to appeal the issuance of an enforcement order is found in section 91(1)(e) of EPEA and applies to orders issued pursuant to sections 210(1)(a), (b), or (c). Section 91(1)(e) provides:

“91(1) A notice of appeal may be submitted to the Board by the following person in the following circumstances: ...

- (e) where the Director issues an enforcement order under section 210(1)(a), (b) or (c), the person to whom the order is directed. May submit a notice of appeal; ...”

5. SUBMISSIONS

5.1. Appellant

[25] The Appellant submitted the pith and substance of the Order falls within any or all of sections 210(1)(a), (b), or (c) of EPEA and is therefore appealable to the Board under section 91(1)(e).

[26] The Appellant submitted the Alberta Court of King’s Bench confirmed in *Graham v. Alberta (Director, Chemicals Assessment & Management Environmental Protection)*, [1996] AJ No. 1184, that the Board has the jurisdiction to determine the limits of its own jurisdiction and has a broad discretion to hear and determine appeals on a wide variety of matters.⁷ The Appellant submitted that the Order on its face was issued under section 210(1)(d) and (e) however, it does not make the Order unappealable. The effect of the Order must be examined.

⁷ *Graham v. Alberta (Director, Chemicals Assessment & Management Environmental Protection)*, [1996] AJ No. 1184.

[27] The Appellant relied on the decision of the Board in *Cherokee Canada Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, 2018 ABEAB 4 (May 4, 2018) (“*Cherokee*”) where a similar jurisdictional challenge arose in respect of appeals of four enforcement orders and an amendment.⁸

[28] The Appellant argued the substance and effect of the Order was to suspend the Registration (section 210(1)(a)) because it stopped the Appellant from receiving fill material at the Pit (section 210(1)(b)) and required the Appellant to cease reclamation activities and take certain actions before the activity authorized under the Registration could be resumed (section 210(1)(c)). The Appellant asserted the Order is therefore appealable under section 91(1)(e).

[29] The Appellant submitted the Order stated the Appellant had contravened section 83.1 of EPEA by failing to comply with certain sections of the Code. The Appellant noted that section 83.1 is not a section listed in section 210(1)(d).⁹

[30] The Appellant stated that the Director’s Response Submissions spend a lot of time talking about the Director’s choices of an enforcement tool and if the Board were to confirm its jurisdiction, the Board would be limiting the Director’s choices. The Appellant submitted that these arguments were a ‘red herring’ as a decision of the Board regarding jurisdiction does not limit the choice of a director but determines whether there is a right to have concerns about the Director’s actions reviewed by the Board.

[31] The Appellant argued the Director’s submissions regarding limiting the Director’s choice of an enforcement tool would only be valid if the Director’s motivation was to prevent the Appellant’s right of appeal to the Board. An enforcement order issued under sections 210(1)(a), (b), or (c) would have been on the same terms as the Order except the right of appeal would have

⁸ The appeals in *Cherokee* were vacated and reheard by the Board in *Cherokee Canada Inc. et al. v. Director, Red Deer North Saskatchewan River Region, Alberta Environment and Parks* (2 August 2018), 2018 ABEAB 7.

⁹ Section 83.1 of EPEA provides:

“83.1 No person shall commence or continue any *activity* that is
(a) designated by the regulations as requiring a *registration*, and
(b) governed by a code of practice
except in accordance with that code of practice. [Emphasis added by Appellant].”

been obvious on its face. The Appellant alleges that the Director's motivation was to block the Appellant's appeal rights, which is not proper and should not be condoned.

[32] The Appellant submitted that the Director's Response Submission contains an erroneous misdescription of the nature and scope of this preliminary jurisdictional issue. The Appellant refers to paragraph 100 of the Director's Response Submission which stated that:

“100. It is an error of law for the EAB to decide that the Director does not have authority to issue an enforcement order under EPEA s. 210(d) and (e) on a preliminary application challenging the EAB's jurisdiction.”

The Appellant argued that the only issue before the Board is whether the Board can hear the appeal filed by the Appellant. If the Board determines it has jurisdiction, the Appellant submitted that it does not mean the Order lacks authority because the decision of the Board in the Jurisdiction Motion is not regarding the merits or legality of the Order but is a decision about whether the Board can hear the appeal.

[33] The Appellant further submitted that paragraphs 148 to 151 of the Director's Response Submissions grossly misstate the effect of the Order as they alleged the Appellant was only suspended from receiving “contaminated” material, and the Appellant was not prevented from carrying out the activity authorized by the Registration and could continue reclamation activity using authorized materials located at the Pit.

[34] The Appellant noted that the Order stated that the Appellant “shall immediately suspend receiving *any material*” [Emphasis added by the Appellant] and that the word “contaminated” does not appear in the Order.¹⁰ The Appellant further submitted that if the Order prohibited the importation of contaminated material there would be no appeal as the Appellant would not object to such a requirement because contaminated material cannot be imported to the Pit under the Registration and Code.¹¹

¹⁰ Clause 1 of the Order states:

“1. CBSG shall immediately suspend receiving any material to the Lands until the requirement in clauses 2 to 7 of this Order are completed to the satisfaction of the Director and resumption of the receipt of material to the Lands is approved in writing by the Director:”

¹¹ The Board notes EPA responded, in the Response Letter, that the Order was in full force and effect and the importation of off-site materials to the Pit would be a contravention of the Order.

[35] The Appellant submitted that the Director's claim that the Appellant is allowed to spread and bury asphalt and concrete on the site as fill material and that the Appellant can continue reclamation by spreading out stockpiles of fill located on at the Pit was incorrect. It has been the Appellant's understanding that it is not allowed to bury asphalt and concrete on the site and the increase in elevation required by the approved reclamation plan cannot be achieved by simply spreading the limited stockpiles onsite. The Pit has operated for decades and will require the importation of large volumes of clean fill to raise surface heights as required under the reclamation plan for the Pit.

[36] The Appellant requested the Jurisdiction Motion be dismissed and the costs of the motion be granted to the Appellant.

5.2. Director

[37] The Director submitted the Order was issued under sections 210(1)(d) and (e) of EPEA and is not an enforcement order that is appealable to the Board under section 91(1)(e). The Director requested the appeal be dismissed.

[38] The Board considered submissions of the Director, a summary of which is provided below.

[39] The Director submitted he has the broad jurisdiction to issue enforcement orders under section 210(1) of EPEA and has the discretion to choose among the subsections of sections 210(1) as the legal basis for the issuance of an enforcement order provided the precondition in section 210(1), that there has been a contravention of EPEA, has been met. The Director submitted the Appellant contravened section 83.1 of the EPEA by contravening five sections of the Code¹² and the Director had the discretion to choose from section 210(1)(a) to (e) as the ground(s) upon

¹² See Director's Response Submissions at paragraph 51 which stated:
"The findings of facts described in the Order established that Clover Bar contravened EPEA section 83.1 by contravening five sections of the [Code]:
a) Section 2.1.1, requirement to carry out an activity at a pit in accordance with the Code;
b) Section 5.2.1, prohibition on burying waste or woody debris at a pit;
c) 5.2.2, restrictions on using material other than topsoil subsoil, overburden, or reject excavated from a pit for reclamation of a pit;
d) 5.2.3, requirement for a registration holder to record the location, quantity and depth of materials used for reclamation; and
e) 6.1.10 requirement to provide information required to be established or recorded under the Code to an inspector or director within 7 days or other time period specified by the inspector or the director."

which to issue an enforcement order. The Director determined the appropriate regulatory response was to issue an enforcement order under sections 210(1)(d) and (e). The Director argued the Board should not disregard the exercise of the Director's discretion by "re-categorizing" the Director's selection of legal basis for its enforcement order.

[40] The Director submitted that an enforcement order issued under section 210(d) cannot also fall under sections 210(1)(b) or (c). The Director argued the prohibitive powers contained in 210(1)(b) and (c) are broader than those found in section 210(1)(d). If an enforcement order issued under section 210(1)(d), directing a person to 'refrain from doing anything', can also be categorized under sections 210(1)(b) or (c), then section 210(1)(d) would be rendered nugatory. The Director argued this would disrupt EPEA's internal coherence because it would have the effect of allowing an unappealable enforcement order issued under sections 210(1)(d) to be appealed under section 91(1)(e) of EPEA. The Director argued this is not the intent of the Legislature.

[41] The Director submitted that, subject to statutory requirements, there are no limits on a director's discretion to choose one regulatory instrument over another in exercising its discretion under EPEA and the Director cannot be compelled to choose any particular provision in section 210(1) over another as the basis on which to issue an enforcement order.

[42] It was submitted by the Director that the objective of the issuance of the Order was to bring the Appellant into compliance with the Code, EPEA and the Activities Plan by prohibiting the Appellant from accepting contaminated reclamation material and requiring the Appellant to remove waste and woody debris from the reclamation material found at the Pit. The Director argued the objective of the Order was consistent with the objectives of EPEA, which are to promote the protection, enhancement and wise use of the environment while supporting economic growth in an environmentally responsible manner.¹³

¹³ Section 2(b) of EPEA provides:

"2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following...:

(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning; ..."

[43] The Director submitted each clause of the Order had a rationale and was supported by an authority in either section 210(1)(d) or (e) and furthers the objectives of the Order as follows:

1. clause 1 of the Order requires the Appellant to suspend the receipt of reclamation materials because the Director did not have sufficient information to determine if materials being received at the Pit were not contaminated and receipt of reclamation materials is a “thing” referred to in section 140 of EPEA;
2. clause 2 of the Order requires the Appellant to retain a professional to conduct an environmental site assessment which is a ‘measure’ to effect compliance with EPEA under section 210(1)(e) of EPEA;
3. clauses 3, 4, 5, 6 and 7 of the Order require the Appellant to prepare a site assessment plan, a remedial plan, and to remove waste from the site, clause 8 of the Order requires the Appellant to provide periodic progress updates to the Director and clause 9 of the Order requires the Appellant to submit a completion report, all of which are ‘things’ referred to in section 241 which is one of the enumerated sections found in section 210(1)(d) of EPEA; and
4. clause 10 of the Order requires the Appellant to submit an updated Activities Plan which is a ‘measure’ under section 210(e) of EPEA.¹⁴

[44] The Director submitted that a notice of appeal of an enforcement order issued under section 210(1)(d) and (e) was not a valid notice of appeal and the Board did not have the jurisdiction to hear the appeal because:

1. section 91(7) of EPEA provides that only a notice of appeal submitted to the Board in the circumstances set out in section 91(1) initiates an appeal of the decision objected to;
2. the Board can only conduct a hearing upon receipt of a valid notice of appeal;
3. the Board has no inherent jurisdiction;
4. the Board only has the jurisdiction granted to it by the provisions of EPEA; and
5. the Board cannot exceed the jurisdiction granted to it by the Legislature and the Legislature limited the appeals of enforcement orders to those issued under sections 210(1)(a), (b), and (c).

¹⁴ Director’s Response Submissions at paragraphs 61 to 79.

[45] The Director stated that while the Board has the authority to determine if it has the jurisdiction to hear an appeal because it needs to interpret its enabling legislation, the Board does not have the jurisdiction on a preliminary application to replace the authority under which the Director issued an enforcement with a different authority to bring the application within the jurisdiction of the Board. The Director stated that section 95(5)(a) of EPEA gives the Board the authority to dismiss appeals in circumstances listed in that section and through these provisions, the Board may consider as a preliminary application if it has jurisdiction to hear an appeal. However, the Director submitted that section 95(5)(a) does not give the Board powers to take jurisdiction over matters otherwise not within their jurisdiction under EPEA. The Director referred to the decision of the Board in *Cleanit Greenit Composting System Inc. v. Director, Regulatory Assurance Division North Region, Capital District Alberta Environment and Parks*, 2022 ABEAB 2, where it was stated that not all decisions made under EPEA are appealable and the Board has no jurisdiction to include other decisions of the Director to those listed in section 91(1).¹⁵

[46] The Director submitted that it is an error of law, on a preliminary application such as this Jurisdiction Motion, for the Board to decide that the Director does not have the authority to issue an enforcement order under sections 210(1)(d) and (e) as that is an issue for a hearing on its merits before a reviewing body, which in the current circumstances is the court.

[47] The Director submitted that the Board made an error in law in its decisions in *Cherokee Canada Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (10 February 2020), Appeals Nos. 16-005-056, 17-073-084, and 18-005-010-ID3 (A.E.A.B.), 2020 ABEAB 7, (“*Cherokee (2020)*”), when it determined it had the jurisdiction to change the authority of an enforcement order issued under sections 210(1)(d) and (e) to sections 210(1)(b) and (c), in order to bring the notice of appeal within the matters listed in section 91(1)(e).¹⁶ The Director submitted that the Board is not bound to apply the law in the same manner it did in *Cherokee (2020)* and noted that the Board’s Rules of Practice provide that the Board “must decide each case individually based on the material before it in that particular case”.

¹⁵ *Cleanit Greenit Composting System Inc. v. Director, Regulatory Assurance Division North Region, Capital District Alberta Environment and Parks*, 2022 ABEAB 2.

¹⁶ Director’s Response Submissions at paragraph 120.

[48] To the Appellant's argument that the Board should consider the substance and effect of the Order on the Appellant, the Director argued that is an error of law for the Board to do so. If the Board considers the effect of the Order on the Appellant, the Board will supplant the authority in section 210(1) selected by the Director to issue the Order and replace it by one of the Board's choosing to artificially bring the matter within the Board's jurisdiction.

[49] The Director also submitted that if the effect of the Order was considered by the Board, the substantive effect or essential character of the Order does not in purpose or effect suspend the Registration, shut down, stop, or cease the activities authorized by the Registration as contemplated by sections 210(1)(a), (b) or (c). The Director argued that even if the Order did have that effect, the Order is supported by the specific prohibitive authority in section 210(1)(d) with reference to section 140 of EPEA.

[50] The Director submitted that as supported by the Director's affidavit evidence, after the issuance of the Order, the Appellant remained "authorized to undertake construction, operation and reclamation and was in fact conducting the activity authorized by its Registration".¹⁷ The Director noted that the 5-Year Report indicated that as of October 2019, there was 38,200 m³ of topsoil stockpiled at the Pit which was authorized and available for reclamation of the Pit as well as other reclamation material including concrete, recycled concrete and aggregate.

[51] Based on the foregoing, the Director requested that the Board dismiss the Appellant's notice of appeal pursuant to section 95(5) of EPEA. The Director submitted this was not an appropriate case for costs, and the Appellant's request for costs should be denied.

6. ANALYSIS

[52] The authority of the Director to issue an enforcement order is found in section 210(1) and (2) of EPEA.¹⁸ The subsections listed in section 210(1)(a) to (e) provide the legal basis

¹⁷ Director's Response Submissions at paragraph 161.

¹⁸ Section 210 of EPEA provides:

"210(1) Where in the Director's opinion a person has contravened this Act, except section 178, 179, 180, 181 or 182, the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:

(a) the suspension or cancellation of an approval, registration or certificate of qualification;

for the Director to issue an enforcement order, provided the precondition that the legislative requirement found in section 210(1), that the Director is of the opinion the person to whom the enforcement order is directed has contravened EPEA, has been met. The circumstances where the Board may hear an appeal from the decision of the Director are listed in section 91(1)(e) and includes enforcement orders issued under sections 210(1)(a), (b), or (c), but not under 210(1)(d) and (e).¹⁹ Enforcement orders issued under 210(1)(d) or (e) can only be challenged by way of judicial review by the courts.

[53] While the Board appreciates the Director's extensive review of its authority to issue an enforcement order under section 210(1)(d) and (e) of EPEA, the issue before the Board is whether the Board has jurisdiction to hear the appeal of the Order, not whether the Director had the jurisdiction to issue the enforcement order under the chosen authorities. It is accepted by the Parties that it is well established that the Board has the authority to receive the Appellant's appeal and to assess the Board's jurisdiction with respect to it.²⁰

[54] When considering whether it has jurisdiction to hear the appeal of the Order, the Board accepts that the "operation of sections 91(e) and 210(1) means that some enforcement orders are appealable and others are not".²¹

[55] When an appeal of an enforcement order issued pursuant to section 210(1) is received by the Board, the Board must determine if all or any part of the enforcement order appears

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- (b) the stopping or shutting down of any activity or thing either permanently or for a specified period;
 - (c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act;
 - (d) the doing or refraining from doing of any thing referred to in section 113, 129, 140, 150, 156, 183 or 241, as the case may be, in the same manner as if the matter were the subject of an environmental protection order;
 - (e) specifying the measures that must be taken in order to effect compliance with this Act.

(2) Where an enforcement order specifies measures that must be taken in under subsection (1)(e), the measures may impose requirements that are more stringent than applicable requirements in the regulations."

¹⁹ "91(1) A notice of appeal may be submitted to the Board by the following person in the following circumstances: ...

(e) where the Director issues an enforcement order under section 210(1)(a), (b) or (c), the person to whom the order is directed may submit a notice of appeal; ..."

²⁰ *Cherokee (2020)*, at paragraph 41.

²¹ *Cherokee (2020)*, at paragraph 57.

to fall within the provisions of section 210(1)(a), (b) or (c) for the Board to have jurisdiction to hear the appeal. The difficulty arises when an enforcement order falls within one or more of sections 210(1)(a), (b) or (c), and sections 210(1)(d) or (e), particularly if the enforcement order states on its face that it was issued under sections 210(d) or (e), as is the case in the current application.

[56] This was the situation faced by the Board in *Cherokee (2020)*. The appeal was in respect of an enforcement order and amendment which were purportedly issued by the Director pursuant to section 210(1)(d) and (e) of EPEA. The Director argued that the enforcement order and amendment were not appealable to the Board pursuant to section 91(1)(e) of EPEA. In finding that the enforcement order and amendment effectively fell within the requirements of sections 210(1)(b) and (c), the Board determined that “stating an enforcement order was issued under section 210(1)(d) and (e) does not, in and of itself, make the enforcement order unappealable”.²² The Board found that:

“[w]hat is important, and what determines whether an order is appealable, is the substance of the order – what is it the order requires of the person named in the order. This is the legal principle that substance prevails over form. To give any other interpretation would effectively let the Director decide whether an enforcement order is appealable. Respectfully, that is the Board’s jurisdiction and not the Director’s.”²³

[57] The Board notes that the Director has submitted that *Cherokee (2020)* was wrongly decided by the Board. As the Director acknowledged, the Board considers each appeal that comes before it on a case-by-case basis. Parties are free to, and often do, argue that previous decisions of the Board should be distinguished on their facts. However, to argue that a previous Board decision was wrong in law where that decision was not overturned on appeal is a form of collateral attack which the Board will not consider.

[58] It is important to note that under EPEA, except for preliminary matters, after a hearing on the merits, the Board provides a report and recommendations to the Minister of the

²² *Cherokee (2020)*, at paragraph 59. See also *Cherokee Canada Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (2 August 2018), Appeal Nos. 16-051-055-056, 17-073-084 and 18-005-010-ID2 (A.E.A.B.), at paragraph 19.

²³ *Cherokee (2020)*, at paragraph 59. See also *Cherokee Canada Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (2 August 2018), Appeal Nos. 16-051-055-056, 17-073-084 and 18-005-010-ID2 (A.E.A.B.), at paragraph 19.

Environment and Protected Areas who then, acting on the advice of the Board, makes an independent and final decision as to whether the Director's decision should be confirmed, reversed, or varied. If it were accepted that enforcement orders stated to be issued under sections 210(1)(d) and (e) were on their face unappealable without considering the substance and effect of the order, the result would be to remove the Minister's final decision-making responsibility and replace it with the discretion of the Director exercised without a hearing and subject only to a potential challenge through judicial review. That approach, in the Board's view, is not consistent with the overall scheme of EPEA and would make enforcement orders that were purported to be issued under sections 210(1)(d) and (e) appeal proof.

[59] The Appellant submitted that the pith and substance of the Order falls within any or all of sections 210(1)(a), (b) or (c) and are therefore appealable. The Appellant argued the Order had the effect of suspending the Registration (section 210(1)(a)), stopping or shutting down the activities authorized by the Registration (section 210(1)(b)) and requiring the Appellant to cease reclamation activities until the Appellant had satisfied certain conditions set out in the Order (section 210(1)(c)). The Board notes the Appellant informed the Board on January 13, 2023, that the operations of the Pit were shut down because of the terms of the Order.

[60] The Director argued that once the Director was of the opinion the Appellant had breached EPEA, the Director had the discretion to choose which of the provisions in section 210 would form the legal basis for the issuance of the Order. The Director asserted that when the Director determined it was appropriate to issue the Order under sections 210(1)(d) or (e), it would be an error of law for the Board to supplant the authority chosen by the Director with one determined by the Board based on the effect the Order had on the Appellant. The Director stated that this would artificially bring the Order within the Board's jurisdiction. The Board respectfully disagrees.

[61] It is the Board's view, as was the case in *Cherokee (2020)*, that to accept an enforcement order issued under sections 210(1)(d) and (e) on its face as unappealable, without considering the substantive effect the enforcement order would have on the party to whom it is directed, would remove the Minister's final decision-making responsibility and replace it with the discretion of the Director, exercised without a hearing and subject only to a potential challenge

through judicial review. While the Director has the discretion to choose under which provision of section 210 the Director will issue an enforcement order, the Director does not have the discretion to determine which enforcement orders are or are not appealable by simply stating on the face of the enforcement order that it was issued under section 210(1)(d) or (e) of EPEA. That approach, in the Board's view, is not consistent with the overall scheme of EPEA.

[62] The Board finds it has the jurisdiction to determine if the Order is appealable under section 91(1)(e). In making the determination, the Board must apply the principles set out in *Cherokee (2020)* to the facts and the evidence before the Board. In the current circumstances, the core of this issue is whether the Order effectively suspended the Registration and stopped reclamation activities because the importation of off-site reclamation materials was suspended by the Order or if reclamation activities could continue utilizing the stockpiles of authorized materials located at the Pit. The Board notes that it does not accept the Director's characterization that the Order stopped only 'contaminated' materials from being accepted by the Appellant at the Pit. The Board finds the Order effectively suspended the importation of all off-site fill materials to the Pit.

[63] The evidence before the Board is that during the three inspections of the Pit, the enforcement officers observed stockpiles of authorized reclamation material on site.²⁴ As well, the 5-Year Report, provided that as of September 2019, 34.8 hectares of 59.6 total hectares had been reclaimed and 24.8 hectares remained an active area.²⁵ The 5-Year Report provided that there were estimated to be 38,200 m³ of reclamation materials stockpiled on site and estimated reclamation liability costs at \$109,898.00.²⁶ The reclamation liability cost estimate included costs for contouring, soil placement, seeding and project management. EPA determined, based on the 5-Year Report, that the Appellant had posted sufficient security with EPA.²⁷

[64] The Board notes that the 5-Year Report is a snapshot of the status of the Pit as of September 2019. One of its purposes of the 5-year Report was to allow EPA to determine if adequate security has been posted for reclamation obligations at the Pit. The 5-Year Report was

²⁴ Affidavit of E. Furler sworn November 29, 2022, at paragraphs 16 to 20.

²⁵ The 5-year Report, at unnumbered page 1.

²⁶ Letter from Martin, Remote Sensing Corporation to the Appellant dated September 25, 2019, at page 2.

²⁷ See Letter dated August 29, 2022, from Edward Furler, Environmental Protection Officer, EPA to the Appellant at page 1.

submitted approximately 3 years prior to the date of the issuance of the Order and depicted the Pit as being approximately 58% reclaimed, with stockpiles of soil and aggregate located on site.

[65] Although the Appellant argued that there are insufficient stockpiles on site to meet its reclamation obligations and that it had to shut down reclamation activities, the Appellant did not provide any persuasive evidence to indicate that the authorized fill that was on site, as represented by the Appellant in the 5-Year Report and confirmed during EPA's inspection reports of June, August, and September 2022, was insufficient to fulfil the Appellant's reclamation obligations. The only evidence provided by the Appellant was the Appellant's statement that the Pit required large volumes of fill to raise the surface height as required by the reclamation plan. The Appellant did not provide any further evidence as to the estimated additional volume of off-site fill that would be required, above and beyond what was already on site at the Pit or if at the time the Appellant shut down its reclamation activities, the available on-site fill had been fully used for reclamation purposes.

[66] The Board accepts the Director's evidence that sufficient stockpiles exist at the Pit to continue reclamation. The Board finds the substance and effect of the Order does not suspend the Registration and its effect is not to shut down, stop or cease the activity authorized by the Registration. Although there is disagreement as to whether concrete and asphalt stockpiles available on site could be used for reclamation purpose, the Board accepts the evidence provided by the Director that these materials are part of the authorized materials located on-site and available to the Appellant. Accordingly, the Board finds that the Order does not fall within the provisions of sections 210(1)(a), (b) or (c) but falls entirely within the provisions of sections 210(1)(d) and (e). As such, the Order is not appealable to the Board pursuant to section 91(1)(e) of EPEA.

7. DECISION

[67] On the application by the Director, the Board finds Enforcement Order EO-EPEA-38679 was issued under sections 210(1)(d) and (e) and is not appealable under section 91(1)(e) of EPEA. The Board dismisses the appeal of Enforcement Order EO-EPEA-38679 pursuant to section 95(5) of EPEA.

[68] To the Appellant's request for costs, the Board acknowledges the broad authority granted under section 96 of EPEA to award costs if it determines the situation warrants it.

However, the Board’s role is not simply to determine a dispute between parties. The Board’s mandate is to assess and balance the contributions of the parties in advancing the public interest relating to environmental protection and economic growth. As such, the Board is not bound by the loser-pays principle. The Board’s starting point is that costs incurred in an appeal are the responsibility of the individual parties. The Board’s jurisprudence regarding an award of costs against the Director requires a finding of special or exceptional circumstances.²⁸ Special or exceptional circumstances could include, for example, excessive or egregious action by the Director that went against the purpose of EPEA. The Appellant has not provided sufficient, if any, evidence of special or exceptional circumstances that would warrant an award of costs against the Director in this case.

Dated on April 12, 2024, at Edmonton, Alberta.

“*original signed by*”

Barbara Johnston
Board Member and
Panel Chair

“*original signed by*”

Kurtis Averill
Board Member

²⁸ Costs Decision: *Cherokee Canada Inc. et al. v. Director, Regional Complaint, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* 2020 ABEAB 10, at paragraph 10-13.