

**1994 ABEAB 6**

**Appeal No. 94-007  
August 9, 1994**

**IN THE MATTER OF** Sections 84, 86, 87, 91 and 92 of the *Environmental Protection and Enhancement Act*, (S.A. 1992, ch. E-13.3 as amended);

**-and-**

**IN THE MATTER OF** an appeal filed by Wade Tobler and Frances Tobler, dated July 18, 1994, with respect to Approval P-25-94 issued on June 21, 1994 by or on behalf of Larry Brocke, Director of Land Reclamation, Alberta Environmental Protection. The Approval, pursuant to Application No. RS15045, was issued to NOVA Corporation of Alberta for the construction, operation and reclamation of the Eastern Alberta System Mainline Loop #3 (Matzhiwin East Section) Pipeline.

### **Report and Recommendations**

Cite as: Tobler v. Director of Land Reclamation, Alberta Environmental Protection.

**PRE-HEARING MEETING BEFORE:** William A. Tilleman, Chair

#### **PARTIES TO THE APPEAL:**

Wade and Frances Tobler, *Appellants*

NOVA Gas Transmission Ltd. represented by David J. Thompson, Rick Crawford, Darwin McNeely, and Colleen Goertz

Director of Land Reclamation represented by Ralph Dyer

## I. FACTUAL BACKGROUND

On July 19, 1994, Wade and Frances Tobler of Patricia, Alberta (the appellants) filed a notice of objection by fax with the Environmental Appeal Board. Their concerns involve Approval P-25-94 issued by the Director of Land Reclamation, Alberta Environmental Protection (the Department) to NOVA Corporation of Alberta (NOVA) because of the possibility that NOVA's construction activities might spread "downy brome", a nuisance weed, to the Toblers' land.

The project in question is NOVA's proposal to loop the Eastern Alberta System Mainline to meet required delivery increases. The pipeline will commence at SE 1/4 07-22-14 W4 and extend southeasterly to tie-in at NOVA's #308 valve site at NE 1/4 13-20-12 W4. It will parallel and utilize a portion of the existing right-of-way along the north side of the operating pipelines. The Town of Brooks is approximately 35 kilometers to the south of the pipeline route.

The proposed pipeline (the project) will involve the construction of approximately 33 kilometers of NPS 48 pipe. Construction of the project is expected to start in mid-August of 1994 and to be completed during the last week of October or first week of November, 1994. The construction will cross a small portion of the appellants' land in the extreme NE 1/4 21-20-12 W4.

In public documentation, NOVA identified the project as having a number of key environmental issues, but the only issue under appeal is the potential spread of downy brome to the appellants' land.

On or about February 3, 1994, the Energy Resources Conservation Board (ERCB) placed a notice regarding NOVA's application (RS15045) in the local (Brooks, Alberta) newspaper. This notice had apparently followed earlier notices placed in the local newspaper by NOVA in September of 1993 seeking public input on the project, generally. The appellants had previously written to NOVA, on September 20, 1993, in response to NOVA's proposal. At that time, they expressed concern about downy brome and its potential to spread.<sup>1</sup>

The appellants also wrote a letter, or a statement of concern, to the ERCB on February 9, 1994 in response to ERCB's formal advertisement. Although this correspondence by the appellants raised several other issues, the issue of downy brome was not directly addressed. Copies of earlier correspondence that raised the downy brome issue were, however, sent by the Toblers with their statement of concern.

NOVA replied to each of the appellants' concerns with letters dated May 13, 1994 and May 24, 1994. NOVA also wrote to the Department on June 7, 1994, and since NOVA felt satisfied that all of the appellants' concerns had been addressed (and it appeared they had), NOVA sought the Approval from the Department through Larry Brocke, Director of Land Reclamation.

---

<sup>1</sup> Actually, it appears that the appellants first notified NOVA of their specific concerns regarding downy brome on August 4, 1992.

On June 21, 1994, the Department issued the Approval to NOVA. The Department notified the Toblers of this decision and advised them of their right to appeal. The Toblers filed their appeal on July 19, 1994, on the basis that the past 60 days had apparently provided evidence that downy brome on NOVA's adjacent lateral loop was "out of control". The appellants raised heightened fears that downy brome is or could be harmful or fatal to cattle and that the weed was spreading from east and west, directly towards their land.

## **II. INVOLVEMENT OF THE ENVIRONMENTAL APPEAL BOARD**

Once the appeal was received by the Board, the appellants were asked to provide background information including earlier correspondence with NOVA. The Board then wrote to the Department and asked for a copy of NOVA's application and the approval. Both the Department and the appellants complied with the Board's requests. The Board took jurisdiction over this appeal pursuant to s. 84 of the Act.<sup>2</sup>

On July 27, 1994, NOVA phoned the Board and asked if a pre-hearing meeting could be held to attempt to resolve this appeal. The Board agreed to a pre-hearing meeting, as long as all currently identified parties would consent. All parties did agree to a pre-hearing meeting, scheduled to be held at the appellants' farm near Patricia, Alberta, on August 4, 1994 at 10:00 a.m. The Board's Chair attended this meeting, but before doing so, the Board sent out a list of procedural rules to be followed at the meeting.

All of the parties appeared at the pre-hearing meeting, and, surprisingly, so did several others. (The appellants had apparently asked several neighbours to make representations to the Board.) In consultation with the parties, the Board's Chair agreed to allow representations by all attendees, as long as the discussion focused on downy brome, the issue being appealed. Following a description of procedural matters and a brief introduction, the Chair asked for presentations by those who had an interest. Presentations on downy brome were made by Bob Kaufmann, Range Management Specialist for Ducks Unlimited, Clinton Henrickson, Director for the Eastern Irrigation District (EID), and several others. (A complete list of those who attended the pre-hearing meeting is set out in Schedule A.)

Following these presentations and discussions, which proved to be informative, valuable and constructive, the parties and the Board's Chair proceeded to visit and examine several sites. This tour was conducted by NOVA's weed control specialist, and field inspections were done with the

---

<sup>2</sup> Having said this, all parties were notified at the start of the pre-hearing meeting that the issue of "standing" (whether the appellants were "directly affected") might in fact be in issue, as might be the finalization of what matters, if any, a panel of the Board would deem necessary and proper, if a resolution of the appeal at this pre-hearing meeting failed.

permission of adjacent landowners.

After the field inspections, the Chair and the three parties returned to the appellants' residence where each party made submissions to the Chair. Following discussions and debate, a resolution of the appeal, found in Part IV of this Report, was finally reached.

### **III. DISCUSSION**

The evidence gained in the short time span of this Approval has proven helpful. Downy brome (*bromus tectorum*) appears to be a serious problem for Alberta farmers and ranchers. This weed, commonly called cheatgrass, is spreading to southern Alberta, either from northern Montana or southwestern Saskatchewan. Apparently, there are several places in the western United States where the weed is out of control. The evidence suggests that the weed germinates under a variety of conditions and seems to be common in disturbed or eroded areas. Pipeline rights-of-way, therefore, would be prime habitat for spreading the weed, if conditions were right.

In Alberta, the weed is a severe problem in both rangeland and cultivated crops. In Saskatchewan, this weed is classified as a noxious weed, perhaps because cattle can accidentally eat the mature seed. If this happens, the seed parts can invade the soft tissue areas of the mouth and cause subsequent inflammation and infection. Apart from this, downy brome causes no harm because it lacks toxicological characteristics.

NOVA, in its efforts to reclaim some of its pipeline rights-of-way in the region, may have used straw bales or seed mixes that were contaminated with downy brome. To its credit, NOVA has been dealing with or fighting the downy brome syndrome since 1990 or 1991. Following the downy brome discovery in the Cessford area, NOVA has used combinations of mowing, burning and herbicide application to control the problem and to prevent spreading. Of all types of weed control used for downy brome, the application of Round-Up (glyphosate) appeared to be the best.

While NOVA may be at least partially responsible for the introduction of downy brome to this area of Alberta, the company appears to have adopted an aggressive action plan for control of the weed. The company has been in contact with several experts to help understand the problem and to learn how to control it. And, in this particular instance, NOVA appears fully willing to assist the appellants. The assistance of NOVA is described in the Resolutions below. The Department has also showed an aggressive interest in preventing the spread of this weed on the right-of-way.

The Board is satisfied with the resolution to this problem as proposed, based upon these facts and the pre-hearing meeting with respect to this appeal.

#### **IV. RESOLUTION OF THE APPEAL**

*All parties to the appeal have agreed to the following terms and conditions:*

1. THAT all of NOVA Gas Transmission Ltd. (NOVA) equipment will be cleaned before work begins on the project;
2. THAT all of the topsoil stripping equipment will be cleaned by NOVA before work begins on the Toblers' land;
3. THAT any equipment used for topsoil handling or replacement will be cleaned before entry onto the Toblers' land;
4. THAT all tracked equipment will be restricted to the pipeline right-of-way;
5. THAT, upon completion of construction of the pipeline on the Toblers' land and when the general contractor leaves, NOVA and the Toblers will jointly inspect the right-of-way for downy brome every two weeks until and including October 31, 1994;
6. THAT, beginning with the growing season in the spring of 1995, but in any event no later than April 1, 1995, NOVA and the Toblers will jointly conduct visual inspections of the right-of-way for downy brome every two weeks up to and including June 1, 1995;
7. THAT, if downy brome is found on the right-of-way on the Toblers' land or adjacent to the right-of-way within a reasonable distance, NOVA will hand-pick, spray or otherwise control the downy brome as often as necessary;
8. THAT any seeding by NOVA will be done with guaranteed downy brome-free seed;
9. THAT, following seeding of the right-of-way, tackifier will be applied to the right-of-way on the Toblers' land to prevent wind erosion;
10. THAT the use of cars or trucks on the right-of-way will be restricted to construction requirements and based on essential need; and
11. THAT Alberta Environmental Protection's Reclamation Inspector has a responsibility to monitor the pipeline right-of-way to ensure that the Toblers' land is returned to its pre-construction condition and to assist the parties in the event of any dispute with respect to this agreement. All parties have the responsibility to maintain communication with this Inspector.

RESOLUTION AGREED TO BY:

“original signed by” \_\_\_\_\_ Date: August 10, 1994  
Wade or Frances Tobler

“original signed by” \_\_\_\_\_ Date: August 10, 1994  
" " \_\_\_\_\_  
NOVA Gas Transmission Ltd.

“original signed by” \_\_\_\_\_ Date: August 10, 1994  
" " \_\_\_\_\_  
Land Reclamation Division  
Alberta Environmental Protection

## V. RECOMMENDATIONS

The Board recommends that the Minister of Environmental Protection confirm the decision of the Director of Land Reclamation in Approval P-25-94, subject to the Resolution contained herein.

Further, with respect to section 92(2) of the Act, the Board recommends that distribution of this Report and Recommendations and of any decision by the Minister be sent to the parties and to the following: (1) the Eastern Irrigation District; (2) Ducks Unlimited; (3) the private individuals who submitted information to the Board during the pre-hearing meeting; (4) the Minister of Agriculture, Food and Rural Development; (5) the Minister of Energy, and (6) the Energy Resources Conservation Board.

Dated August 10th, 1994, at Calgary, Alberta.

“original signed by”

---

William A. Tilleman, Chair



**ORDER**

I, Brian Evans, Q.C., Minister of Environmental Protection , make the following Order:

I confirm the decision of the Director of Land Reclamation, subject to the Resolutions listed above and the Report and Recommendations of the Environmental Appeal Board. If any further order is needed, it is either set out below, or attached.

I reverse the decision of the Director of Land Reclamation and make a further order as set out below or attached.

I vary the decision of the Director of Land Reclamation and make a further order as set out below or attached.

Dated at Edmonton, AB this 24 day of August, 1994.

“original signed by”

\_\_\_\_\_  
Honourable Brian Evans  
Minister of Environmental Protection

Attachments

No attachments

**SCHEDULE A**

=====

The following individuals attended the initial portion of the pre-hearing meeting at the Toblers' residence:

Eastern Irrigation District: Gary Redelback, Head of Land Dept.  
Clinton Henrickson, Director  
Dan Lowen, Director

Ducks Unlimited: Bob Kaufmann, Range Management Specialist

Landowners on the Pipeline Right-of-Way:

Fred Conners  
Guy Fukuda  
Warren Fukuda  
Norman Musgrove  
Jim Neely  
Gene Westwick

Other Landowners: Alfred Tobler