

1995 ABEAB 24

Appeal No. 95-012

Date of Hearing - November 8, 1995

Date of Report and Recommendations - December 7, 1995

IN THE MATTER OF Sections 84, 85, 86, 87, 91, 92 and 93 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 Victoria Olekshy-Wallace, Valerie Olekshy-Greenslade and Risa Olekshy with respect to the reclamation certificate issued by the Inspector, Land Reclamation Division, Alberta Environmental Protection to Imperial Oil Resources Ltd.

Report and Recommendations

Cite as: Victoria Olekshy-Wallace *et al* v. Inspector, Land Reclamation Division, Alberta Environmental Protection.

**HEARING BEFORE: Max A. McCann, Chair
M. Anne Naeth
John P. Ogilvie**

APPEARANCES:

Appellants: Victoria Olekshy-Wallace, Valerie Olekshy-Greenslade and Risa Olekshy represented by Donald Ingram, Q.C. (counsel).

Witnesses: Russell Olekshy, Russell Kushinski.

Other Parties: Inspector, Land Reclamation Division, represented by William McDonald (counsel).

Witnesses: Andy Etmanski, Ron Fisher.

Imperial Oil Resources Ltd., represented by Peter Miller (counsel).

Witnesses: David Slade.

For a List of Exhibits in this matter, please see the Appendix.

I. FACTUAL BACKGROUND

On July 5, 1994, an inspector with the Land Reclamation Division of Alberta Environmental Protection (the 'Inspector') issued Reclamation Certificate No. 31471 (the 'Certificate') to Imperial Oil Resources Ltd. ('Imperial') for an abandoned well site located at NE 4-50-26-W4M.

Victoria Olekshy-Wallace, Valerie Olekshy-Greenslade and Risa Olekshy (the 'Appellants') filed a notice of objection with the Board on July 4, 1995. They appealed the issuance of the Certificate because stones remained on the site and abandoned flowlines were not addressed.

On July 5, 1995, the Board wrote to the Director of Land Reclamation, Alberta Environmental Protection advising him that the appeal had been filed and requesting a copy of the Certificate as well as the application for it. Imperial was also informed on July 5, 1995 that an appeal had been filed. William McDonald, Barrister and Solicitor, Environmental Law Section, Alberta Justice subsequently responded to the Board on behalf of the Department of Environmental Protection and provided the documentation, as requested.

The Board wrote to the three parties on July 19, 1995 asking several questions concerning the Appellants' concerns. Responses were requested by August 18, 1995. At the request of Mr. McDonald of Alberta Justice, the deadline was subsequently extended to August 31, 1995. Answers to the Board's questions were provided within the extended deadline by all of the parties.

On September 13, 1995, the Board decided to proceed with a hearing and scheduled it for November 8, 1995. The Notice of Hearing was published in the *Leduc and County This Week* on September 22, 1995 and a copy of it was sent

to Imperial Oil. Imperial Oil wrote a letter to the Board requesting party status at the hearing and the Board agreed to that request.

Written submissions, in accordance with section 10 of the Environmental Appeal Board Regulation, were filed with the Board by all three parties prior to the hearing.

II. EVIDENCE OF THE APPELLANTS

In his opening statement Mr. Ingram stated that the objection of the Appellants was twofold. First, they objected to the presence of rocks on the reclaimed lease and access road. Secondly, they objected to flowlines left in the land and they were worried about future environmental effects, particularly in the event an environmental assessment were to be required as a condition of sale or construction on the property.

Mr. Olekshy testified that the land in question was broken by his grandfather in 1907 and has been in the family ever since. Title to the 80 acres containing the lease is held jointly by his three daughters, Victoria Olekshy-Wallace, Valerie Olekshy-Greenslade and Risa Olekshy, the Appellants.

Mr. Olekshy stated that he had actively cultivated the land in and around the lease as a teenager and at that time there were no rocks, stones or gravel on the land. He noted that the criteria for reclamation allowed an increase in surface stones of 10 percent. However, he said that 10 percent of zero is still zero. Accordingly, in his opinion, there should be no stones after reclamation.

Mr. Olekshy testified that on a visit to the lease after the Certificate had been issued he observed a number of stones or rocks that he estimated to be 8 to 10 inches in diameter. He picked some up with his front end loader and took them home. He introduced as evidence (Exhibit 3) a number of stones from one to six inches in size that he had collected along the lease road on November 4, 1995. The exhibit consisted of both smooth, rounded river bed stones and broken, sausage-shaped rocks with rough fractured areas.

Under cross examination by Mr. McDonald, Mr. Olekshy indicated that there had been no cultivation at the actual well site or the access road when the well was producing. The well site lease had been seeded in 1993 and 1994 and he testified that there was little difference between the crop on the well site and that offsite.

Mr. Kushinski, who is the present operator of the land on which the site is located, stated that he had farmed 80 acres around the lease with the Olekshys for ten years. He said that, according to his experience, the land is not an area in which rocks and stones are normally found during cultivation. He described the condition of the lease after reclamation as "not bad" around the well site whereas the condition of the access road was "worse". He noted stones during cultivation and testified "the more we worked it the more we saw". He testified that stones and rocks similar to Exhibit 3 would not cause much of a problem during cultivation but could be a problem during harvesting as they might damage the equipment.

Mr. Kushinski observed that the land at the start of the access road into the well site and the land adjacent along the fence is low and wet. In 1993 the wet area was seeded to grass, as it was too wet to support a crop.

Under cross examination by Mr. McDonald, Mr. Kushinski stated that he had farmed the lease area in 1993, 1994 and 1995 during which time he saw "the odd rock". He had performed deep cultivation on the access road.

III. THE EVIDENCE OF THE INSPECTORS

In his opening statement Mr. McDonald pointed out that the treatment and reclamation of the flowlines were not under the jurisdiction of the Department of Environmental Protection. Therefore, the flowlines were not considered by the inspectors in their determination to grant the Certificate.

Mr. Etmanski testified that the reclamation inquiry had been arranged by Mr. Ron Fisher and that Mr. Olekshy was present. Before the inquiry began, Mr. Etmanski explained the procedure that would be followed. He explained that Imperial Oil had applied for the reclamation certificate. He also asked if anyone had any comments or concerns before the inquiry began. Since the well had been drilled in 1949, the criteria for wells drilled prior to 1983 was used to assess the effectiveness of the reclamation. During the inquiry Mr. Olekshy complained of the presence of rocks. Mr. Etmanski testified that he explained to Mr. Olekshy that the criteria for reclamation for wells drilled prior to 1983 allowed the presence of 10 percent stones for cultivated land and 20 percent stones for grassland. Mr. Olekshy pointed out that 10 percent of nothing is still nothing and, therefore, there should be no rocks present. Mr Etmanski stated that, if rocks are present, they must be less than 10 centimetres in size. The criteria was not interpreted as 10% of 0 = 0; but rather that it was a 10% absolute increase.

Mr. Etmanski testified that, because of the marked difference between the extremely wet area along the access road and the rest of the lease, he used two different criteria to judge the effectiveness of the reclamation. For the area

in crop he used Cultivated Lands criteria and for the wet area Grass Lands criteria.

Mr. Etmanski testified that the reclaimed lease "far surpassed the criteria for well sites constructed prior to 1983." He said that he did observe some gravel on the site but that it only constituted some two to three percent of the surface. He therefore had no difficulty in issuing the Certificate.

IV. THE EVIDENCE OF THE OPERATOR

In his opening statement Mr. Miller stated that the flowlines had been removed from the lease itself but remained in the land between the lease and the battery site that had been fed by the well on the lease. He said that the lease had been reclaimed properly and any matter of compensation should be dealt with by the Surface Rights Board.

Mr. Slade testified that he is responsible for supervising the reclamation process to Imperial's wells in the Leduc area. The actual work is performed by contractors. He described the reclamation process as it applied to the Olekshy lease. First, the flowlines serving the well on the lease were cleaned and purged by forcing a plastic pig through them with compressed air. Then those flowlines on the lease itself were removed leaving the flowlines off-lease which were capped. The topsoil was then removed from the entire lease area and screened through a grizzly and down to a half inch screen. The subsoil was then plowed to a depth of three feet with rippers three feet long and spaced eighteen inches to two feet apart. The plowing was done in a criss-cross manner to ensure that all the subsoil was broken up and any compaction removed. The screened topsoil was then placed on top of the decompacted subsoil and the lease was ready for seeding.

Mr Slade said that the rocks Mr. Olekshy found could have fallen under the grizzly and been missed when the rock screenings were removed from the site. He said that in his capacity as supervisor he visited the site five or six times during the time the contractor was engaged in the reclamation operation. In his opinion the site had been reclaimed properly and he recommended that Imperial Oil apply for a reclamation certificate.

Mr. Slade introduced photographs (Exhibits 6 & 7) showing the access road and adjacent land. He said that these photographs showed the presence of bulrushes and willows along the road, an indication of how wet the area is.

Mr. Slade said that a committee made up of representatives from industry and government are presently developing criteria covering the reclamation of abandoned flowlines.

V. FINAL ARGUMENTS

Messrs. McDonald and Miller agreed in their arguments that the inspectors were satisfied that the reclaimed well site met the criteria for well sites constructed prior to 1983. Mr. McDonald pointed out that the inspectors had indicated that they were fully satisfied with the reclamation and that it far exceeded minimum standards. Mr. Miller noted that the Act does not permit an appeal based on the adequacy or inadequacy of reclamation criteria.

Mr. Ingram reiterated his argument that the land had not been properly reclaimed because rocks were present where there had been no rocks before.

VI. OBSERVATIONS OF THE BOARD

The Board recognizes that drilling practices in the 1940s were not nearly as refined as those used today. This is recognized by allowing for different criteria to be used by the Inspectors in judging the effectiveness of the reclamation. Therefore, while the topsoil may have been free of rocks and stones prior to the drilling of the well, the criteria allow for the presence of some stones after reclamation.

The issue of flowlines on the land around the lease was raised by the Appellants and following discussion it was conceded by all parties that the disposition of the lines were outside the Board's jurisdiction. Accordingly, the Board makes no comment on the flowlines.

VII COSTS

Mr. Ingram argued for the Appellants that as long as the appeal is reasonable and presented in good faith the Appellants should be entitled to be reimbursed for their costs. Both Mr. McDonald and Mr. Miller disagreed. Neither of them seek costs and do not believe that any costs should be awarded.

The Board has decided that costs will not be granted to any party and has notified them of its decision.

VIII. RECOMMENDATIONS OF THE BOARD

The Board considers that the issue before it in this hearing is whether or not the decision of the Inspector to issue Reclamation Certificate No. 31471 dated

July 5, 1994 was reasonable and justified. The onus in this appeal is upon the Appellants to present evidence which would indicate that there are grounds to overturn the Inspectors' decision. The Inspectors' decision was based on criteria for reclamation for wells drilled prior to 1983 which allowed for the presence of 10 percent stones for cultivated land.

The Board will not lightly interfere with a reclamation inspectors' decision. The legislation imposes a duty on an inspector to determine on an independent basis whether or not, in his opinion, the land has been reclaimed to a satisfactory condition.¹ Accordingly, the standard is different from the one now in use under the *Environmental Protection and Enhancement Act*. The inspector is independent of the landowner, the company, and the originating regulatory agency, the Energy Resources Conservation Board. While this Board has the power to accept a broad scope of evidence, including new evidence up to the time of the hearing, the Appellants have not made a case which would lead the Board to question the Inspectors' decision.

The Board relies on its earlier decisions that the test determining if a Reclamation Inspector's decision should be overruled is whether or not such action is reasonable and justifiable having regard to the particular circumstances.² In this case, the Board believes that the Inspector acted correctly in issuing the Reclamation Certificate.

The Board recommends that the appeal be dismissed.

¹ The application for this reclamation certificate was made under the former *Land Surface Conservation and Reclamation Act*.

² See *Leonard and Elva Semack v. Director, Alberta Environmental Protection*, Appeal No. 94-010, issued 29 June 1995, at page 5-6.

Further, with respect to section 92(2) of the Act, the Board recommends that copies of this Report and Recommendations and of any decision by the Minister be sent by the Board to the following parties:

Victoria Olekshy-Wallace, Valerie Olekshy-Greenslade and Risa Olekshy
do Russell Olekshy Professional Corporation;

Imperial Oil Resources Ltd
do Peter Miller, Solicitor; and

the Inspector, Land Reclamation Division,
Alberta Environmental Protection
do William McDonald, Alberta Justice.

Dated on December 7, 1995 at Edmonton, Alberta.

“original signed by”

Max A. McCann

“original signed by”

M. Anne Naeth

“original signed by”

John P. Ogilvie

ORDER

I, Ty Lund, Minister of Environmental Protection:

Agree with the Recommendations of the Environmental Appeal Board and order that they be implemented.

Do not agree with the Recommendations of the Environmental Appeal Board

Dated at Edmonton this 12th day of December, 1995.

Honourable Ty Lund
Minister of Environmental Protection

Refer to attachments (only if applicable)

APPENDIX

EXHIBITS LIST

Appeal No.: EAB 95-012

No.	Description	Filed By
1	Notice of Hearing	the Board
2	Rocks found on well site NE4-50-26-W4M	Appellants
3	Survey plan of well site NE4-50-26-W4M	Appellants
4	Reclamation Certificate 31471	Department
5	Reclamation Criteria for Well Sites and Associated Facilities	Department
6	Photograph of roadway - taken July 1992	Imperial Oil
7	Photograph of well site - taken July 1992	Imperial Oil

