
ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing - July 22, 1997

Date of Report and Recommendations - August 6, 1997

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 Mr. Larry A. Paulgaard,
with respect to Reclamation Certificate No. 29385 issued to Husky
Oil Operations Ltd., by Mr. Doug Rawluk, Inspector of Land
Reclamation Division, Alberta Environmental Protection.

Cite as: Paulgaard v. Inspector of Land Reclamation Division, Alberta Environmental
Protection

HEARING BEFORE

Dr. John P. Ogilvie, Panel Chair
 Dr. M. Anne Naeth
 Dr. Ted W. Best

APPEARANCES

Appellant:

Mr. Larry A. Paulgaard

Other Parties:

Mr. Gilbert Van Nes, Environmental Law Section,
 Alberta Justice, representing Mr. Doug Rawluk,
 Inspector, Alberta Environmental Protection and Mr.
 Burt Forbes

Mr. Dwayne Lundquist and Mr. Garry Lorenz, Husky
 Oil Operations Ltd.

BACKGROUND

On April 10, 1997, the Environmental Appeal Board (the Board) received a Notice of Appeal from Mr. Larry A. Paulgaard (the Appellant). The appeal challenges Reclamation Certificate No. 29385 issued to Husky Oil Operations Ltd. (Husky Oil), certifying that the surface of the land held by Husky Oil, within NW 1/4 Sec. 22 Tp. 38 Rge 3 W. 4th Mer., in connection with or incidental to Husky Provost 12D-22-38-3 well, was in satisfactory condition. The Reclamation Certificate was issued November 14, 1996, by the Inspector of Land Reclamation Division, with the condition that when absinth (Latin name *Artemisia absinthium* - also known as absinthe, absinthium, wormwood, American wormwood, wormwood sage) becomes evident on the lease, the Operator shall continue to remove it until the plant is no longer evident on the site.

The Board wrote to the Department of Environmental Protection (the Department) on April 10, 1997, to request copies of all related correspondence, documents and materials. On that same date the Board wrote to Husky Oil informing them that an appeal had been filed and providing them with a copy of the appeal.

On April 23, 1997, the Board wrote to the Natural Resources Conservation Board (NRCB) and the Alberta Energy and Utilities Board (AEUB) asking whether this matter had been the subject of a hearing or review under their respective Boards' legislation.

On April 25, 1997, the NRCB, advised the Board that the appeal did not deal with a matter that had been the subject of a review under the provisions of the NRCB Act.

On April 28, 1997, the AEUB, advised the Board that the Notice of Objection, being the terms of the reclamation certificate, were not within the jurisdiction of the AEUB.

All requested correspondence was received from the Department and a copy was sent to the Appellant on April 28, 1997. Along with the information sent, the Board requested comments to the following procedural issues from the Appellant and the Department:

1. In the event that the Board decides to proceed with this appeal, do you wish to have a mediation meeting under section 11 of the Environmental Appeal Board Regulation? If so, what would you contemplate to be the agenda for that meeting?
2. In your opinion, are there any other persons who have an interest in this matter?

Responses were received from the Department and Husky Oil advising that a mediation meeting would be beneficial. However, on May 14, 1997, Mr. Paulgaard advised he wished to proceed directly to a hearing.

THE HEARING

On May 27, 1997, the Board wrote to all parties advising that through consultation with the parties, the hearing date had been set and included a Notice of Hearing. Written submissions were requested from all parties and received from Husky Oil and the Department. On July 22, 1997, the hearing took place in Provost.

THE ISSUE

The issue to be considered is whether the Land Reclamation Division Inspector erred in issuing reclamation certificate No. 29385 following the inquiry on October 25, 1996.

SUMMARY OF THE EVIDENCE

The Appellant

Mr. Paulgaard testified that he was dissatisfied with the condition in which Husky Oil left the lease associated with the well Husky Provost 12D-22-38-3. The land was infested with weeds and unproductive. He said the weed problem existed from the start of the reclamation process. He claimed this was due to spraying to control the weeds late in the season, after the weeds had gone to seed, and the next spring these seeds germinated producing a new crop.

He noted that forty year old manure was brought into the site from somewhere to the north and after it had been applied the weed absinth appeared. He intimated that the absinth had been brought in by the manure.

He said that the inspections had been called for the inquiry after the site had been cleaned up and there was a lack of sufficient vegetation for a good comparison on and off site. Further, the inspection did not quantify crops on and off site by taking head counts, plant density and height. Visual inspection only formed the basis of their assessment. Mr Paulgaard noted that there were some bare spots and areas of light coloured soil which had not been there before.

He also commented on the condition of the access road. He said it had never been levelled out properly and contained a number of deep dips which hindered access with farm machinery.

Under cross-examination, Mr. Paulgaard said the soil characteristics varied considerably from place to place on the quarter section containing the lease. 1995 the site was seeded to barley and under seeded to fall rye for grazing. When the inquiry was held in October of that year, there were bare patches and poor growth. He said he agreed with Husky Oil to apply manure to the site in 1991 and 1992 but had been unable to do so because he had little manure and then became too busy. He said that he had not farmed or seeded the lease in 1996 or 1997.

The Department

Doug Rawluk, Reclamation Inspector for the Department, testified that Husky Oil, the operator of the wellsite Husky Provost 12D-22-38-3, submitted a completed application for a Reclamation Certificate July 4, 1991 (Exhibit 5). He noted that, since the application was submitted prior to the *Environmental Protection and Enhancement Act* (the Act) coming into force, the application was dealt with as provided in the Act¹ in that the criteria to be met by the surface of the lease are those specified in the *Land Surface Conservation and Reclamation Act*.² This Act requires that the land be returned to a condition of equivalent capability before the well was constructed.

In October 1991, the Department received the results of soil analyses from Husky Oil (Exhibit 6). The results were unsatisfactory and Husky Oil was required to do further reclamation work on the lease. Mr Rawluk testified Husky Oil retained Norwest Labs to carry out a program of reclamation.

¹ Section 243(1) of the Act states:

243(1) Where immediately before the coming into force of this section a complete application has been made for
 (a) a reclamation certificate under the Land Surface Conservation and Reclamation Act,
 the application shall be dealt with under that Act as if it had not been repealed, but the reclamation certificate once issued, is deemed to be a reclamation certificate under this Act.

² Land Surface Conservation and Reclamation Act , revised Statutes of Alberta 1980, Chapter L-3, repealed 1992.

Mr. Rawluk advised that in summer 1993 Arnold Janz, a soil specialist with the Department visited the site and advised

Husky Oil that there was a lack of topsoil in a few areas. The company corrected this deficiency by bringing in manure and topsoil from off site. In summer 1994 the company requested that the inquiry at the site be delayed until 1995.

An inquiry was held at the site on October 24, 1995 with Doug Rawluk, Burt Forbes, (the local inspector of the Municipal District of Provost), Mr Paulgaard, Mr. Lundquist and Mr. Lorenz (of Husky Oil) in attendance. At this inquiry the site met the landscape, soil quality, soil quantity, soil profile and soil aggregate criteria. The vegetation on the site (barley) was comparable to vegetation on adjacent land. However, Mr. Rawluk noted the site did not meet the vegetation criteria as there was an infestation of absinth on the lease land. Therefore, no reclamation certificate was issued. Following the inquiry, Mr Rawluk testified he issued Conservation and Reclamation Notice No. EP 748 to Husky Oil directing the company to eliminate the absinth by October 1, 1996.

Mr. Rawluk received notice from Husky Oil in October 1996 that the company had complied with Conservation and Reclamation Notice No. EP 748 and requested an inquiry. Mr. Rawluk held an inquiry at the site on October 25, 1996 with the same parties present as attended the 1995 inquiry. All parties agreed there were no visible signs of absinth. However, Mr. Paulgaard was unhappy with the condition of the site. Specifically he was concerned about the presence of some “white” areas and was worried about the long term carry-over of seeds of absinth both on and off the site. Mr. Rawluk directed Husky Oil to take soil samples in areas where the soil was lighter in colour and have them analysed. The results of these analyses indicated there was not a salinity problem on the site. Mr Rawluk said since the conditions on the site were comparable to those on adjacent land he considered the site to have been properly reclaimed and decided to issue a reclamation certificate. As a result of the previous occurrences of absinth and because it could not be determined if all the seeds had been removed, the certificate was issued with the condition that:

“Where absinth (commonly known as wormwood sage) becomes evident on the lease, the Operator shall continue to remove the Absinth until the plant is no longer evident on the Site.”

Under cross-examination, Mr. Rawluk agreed there was no term to the condition attached to the certificate and that it only applied to the lease area. He indicated that the Department would remove the condition when they were satisfied that the absinth was no longer present.

Mr. Forbes, the local inspector, testified that 1995 was one of the driest years the Provost area had ever experienced. At the time of the inquiry in 1995 the barley crop both on and off lease showed evidence of drought stress. Comparing height and plant density indicated to him the crop was similar on and off lease. The soil was very dry both on and off lease. There was evidence of manure having been applied on the lease. In his opinion, the soil condition on and off lease was equivalent. White flakes were observed in some areas of the soil on the lease. He reported that three absinth plants were found. In the 1996 inquiry no absinth plants were found and the soil appeared to be equivalent both on and off lease. In his opinion the site had been satisfactorily reclaimed.

Husky Oil

Mr. Dwayne Lundquist and Mr. Garry Lorenz summarized the history of Husky Provost 12D-22-38-3. The surface lease was signed in November 1984 and the well drilled shortly thereafter. The well produced for a short period but was uneconomical and was abandoned in July 1987 when the casing was cut and capped. Husky Oil took soil samples in September 1988 and performed some surface reclamation in 1988, 1989, 1990 and 1991. Husky Oil submitted a completed application for a reclamation certificate on July 4, 1991 under the *Land Surface Conservation and Reclamation Act* that was then in force. In October 1991, Husky Oil submitted the results of analyses on soil samples requested by the Department. These were unsatisfactory and further analyses were required.

During 1992 Husky Oil retained Norwest Labs to examine the site and recommend and carry out a reclamation program which was completed in 1992 and the lease was seeded to fall rye. Arnold Janz, soil specialist with the Department visited the site in June 1993 and advised Husky Oil more topsoil was required in some areas. Some drilling mud was found near the well centre. Husky Oil retained Nelson Construction to complete the reclamation. In November 1993 Nelson Construction

hauled in 100 yards of topsoil from an off-site area southeast of Provost, 280 yards of manure from an unknown site and dug out and removed the drilling mud near the well centre.

Inspection in October 1994 revealed the presence of absinth on the lease. During 1995 the lease was sprayed twice; once with a 2,4-D mixture by Mr. Paulgaard and once with 2,4-D and Dycleer. In addition, the absinth plants were hand picked and dug from the ground. The Department held an inquiry at the site on October 24, 1995 and advised Husky Oil that soils and crop growth on the site met the reclamation criteria. However, because absinth had been found on the site, Husky Oil would receive a conservation and reclamation notice directing them to control the weeds. This notice was received November 2, 1995.

In spring 1996 Husky Oil retained Cactus Environmental Services Ltd. to attack the weed problem on the lease. The field, excluding the well site, was seeded to spring rye. The wellsite was infested with flixweed. Cactus Environmental Services rotivated the wellsite in June and sprayed it in August and again in September with a mixture of banvil, round up and ammonium sulphate. On October 3, 1996, six absinth plants were found and removed.

On October 25, 1996 an inquiry was held at the site. No absinth plants were found. Mr. Paulgaard expressed concern over the presence of whitish areas in the topsoil. Husky Oil took six soil samples and provided the results to the Department. On November 19, 1996, Husky Oil received a reclamation certificate for the lease with the proviso that Husky Oil has the responsibility for removing absinth from the lease if it reappeared.

Site Visit

After hearing the evidence and before final agreements were presented, the Board and the parties visited the site which is located about ten kilometres south-west of Provost. The land is somewhat rolling and observation of the crops on land near the site indicates that the soil quality is highly variable.

The quarter section on which the lease lies had been seeded to barley but the lease itself had not been seeded. There was a heavy growth of *descurainia sophia* (flixweed) on the lease with a few plants of *amranthus retroflexis* (pig weed), *thlaspi arvense* (stink weed) and some *tanacetum vulga* (tansy). The flixweed was so heavy that most other weeds had been crowded out. There was no evidence of absinth either on or adjacent to the site.

SUMMARY OF FINAL ARGUMENTS

The Appellant

Mr. Paulgaard stated that all he wanted was to have the weeds removed, the soil returned to equivalent quality and quantity compared to the rest of the quarter section and to be able to grow a crop on the site again. He believes holding the inquiry in a dry year was unfair. The fact that the crops both on and off lease were drought stressed made meaningful comparison between them almost impossible.

The Department

Mr. Van Nes said the main issue to determine was if the inspectors were patently unreasonable in making their decision under the *Land Surface Conservation and Reclamation Act* to issue Reclamation Certificate No. 29385. He noted the Act requires that disturbed land be returned to an equivalent capability

to that which existed prior to the disturbance. In this case that means the land must be capable of growing a crop equivalent to those grown before the disturbance. Once the operator, Husky Oil has put the land back into an equivalent condition, they have completed the reclamation and a certificate may be issued. According to the inspectors Husky Oil has completed their obligation of equivalent capability and a certificate was issued.

Regarding the condition attached to the reclamation certificate, Mr. Van Nes noted that the Act permits the issuance of a conditional certificate.³ He pointed out that, although this is a transfer situation between the *Land Surface Conservation and Reclamation Act* and the Act, since the certificate is issued under the Act, Mr. Paulgaard receives a benefit via the conditional certificate (absinth must be eliminated) that he would not have received under prior legislation.

Regarding the information provided to Mr. Rawluk by Mr. Janz, Mr. Van Nes noted that an inspector must rely to some extent on expert knowledge provided by others in the Department as he cannot be expert in all fields. Although Mr. Janz was not provided as a witness to present his testimony, Mr. Van Nes noted that his expertise was relied upon and such information should not be regarded as hearsay.

Mr. Van Nes concluded by arguing that the inspectors had been reasonable in making the decision to issue Reclamation Certificate 29385 and that Mr. Paulgaard's appeal should be dismissed.

Husky Oil

Mr. Lundquist argued that the lease had been reclaimed properly in that the soil quality and vegetation on the lease were equivalent with that off lease. He noted that absinth is not particularly

³ Section 123(3.1) of the Act states:

123(3.1) An inspector may issue a reclamation certificate subject to any terms and conditions the inspector considers appropriate.

competitive and, therefore, if the land were farmed the weed would disappear. He said Mr. Paulgaard's farming practice, or lack thereof, on the lease had resulted in a lot of the weed problem that was seen during the site visit.

CONSIDERATION OF THE EVIDENCE BY THE BOARD.

The Board notes that Reclamation Certificate 29385 was issued pursuant to an application by Husky Oil submitted under the *Land Surface Conservation and Reclamation Act*. Therefore, this application was dealt with according to the Regulation under that legislation. However, the reclamation certificate issued shall be dealt with as if it were issued under this Act. The Board agrees with the Department that it has jurisdiction to hear this appeal.

Mr. Paulgaard's evidence regarding the condition of the site and its ability to grow a crop was lacking in that his observations were based only on visual examination and did not contain any quantitative measures of the differences between conditions on site and off site. The Inspectors' observations were made upon the same basis. However, the Inspectors had the results of soils analyses to rely upon. According to these analyses, the soil conditions on and off site are similar.

Mr. Paulgaard's main concern appeared to be the weed infestation and how those weeds affected the productivity of the site. He noted that he was concerned about all the weeds, not just the absinth. Evidence presented by the Department and Husky Oil suggested that a large part of the weed problem, particularly that involving flixweed, stink weed, pig weed and tansy, resulted from the fact that Mr. Paulgaard had not farmed the site during 1996 and 1997. The Board agrees. Tilled land that is not farmed will always produce weeds native to the area.

Mr. Paulgaard stated he had never seen absinth in this area before and, in fact he was not familiar with the weed prior to seeing it on the lease. He observed it after the manure had been applied and believes that the seeds came into the lease with the manure. Topsoil from an unknown source south of the lease ("out of the country" according to Mr. Paulgaard) was brought to the lease at the same time as the manure. This topsoil

could have been the source of the absinth. According to a document filed by the Department at the hearing as Exhibit 13,⁴ absinth is a perennial which reproduces by seed. The seeds may remain viable in the soil for several years. As the seeds are small and hairless, they are not generally transported by wind. The plant is not very competitive. It will grow where crops are thin. Its most rapid spread is in pastures where it grows unhindered since livestock refuse to eat it but graze grasses and other forage plants that would otherwise hold its development in check. Because livestock refuse to eat absinth, it is unlikely that the manure was the source of this weed.

Based on the soil analyses submitted by Husky Oil and the advice received from Arnold Janz, Department soil specialist, the Department determined the soil conditions on and off site were satisfactory. The light coloured patches do not indicate salinity (presence of sodium chloride) but may be alkali as this material is present in the area. The Board noted that soil conditions in the general area are variable and there were alkali patches present when it visited the site and believes that the soil reclamation conditions of the *Land Surface Conservation and Reclamation Act* have been met. This legislation requires that the land be returned to an equivalent capability to that which existed before the disturbance. The Department testified that, in the judgement of the Inspectors, the land had been returned to its original capability and, therefore, issued the reclamation certificate.

The inspectors recognized that there was a danger that the absinth, although it was not visible on the site, may not have been completely eradicated. Accordingly, the reclamation certificate was issued on a conditional basis as is permitted under the Act.⁵ The condition applied required Husky Oil to continue to remove absinth from the site until it is no longer present. The Board notes that there is no time limit attached to this condition.

⁴ Exhibit No. 13: Public document issued by Alberta Agriculture entitled Absinth (*Artemisia absinthium* L.)

⁵ See footnote 3.

CONCLUSIONS

The Board concludes that the Inspectors exercised prudent judgement in issuing the conditional Reclamation Certificate No. 29385. However, the fact that the requirement to continue to remove absinth in the future, whenever the plant appears, is onerous. The Board believes there should be a limited term specified.

The Board believes that the present infestation of the site with flixweed and stink weed is a result of the farming practice exercised by Mr. Paulgaard. If he had incorporated the site into his normal rotation of farming practice these weeds, while they might be present in the seed bank as they are native to the area, would not constitute the problem they currently present. The absinth was certainly imported to the site as a result of the reclamation program carried out by Husky Oil and the condition attached to the reclamation certificate makes them responsible for its complete elimination. The Board believes that the appeal should be dismissed but we go further: the condition attached to the reclamation certificate should be varied by setting a time limit on it.

The Board has a general comment regarding the terminology used by the Department for weeds. Common names for weeds tend to be local in nature. Note the several names used for absinth - absynthe, absinthium, wormwood, wormwood sage, American wormwood. It would provide more specific and definitive information if the Department were to adopt a policy of referring to weeds and other plant species by their Latin names. In addition, the Board suggests that when topsoil or manure is brought onto the lease from outside the general area consideration be given to subjecting the soil or manure to a seed bank test to ensure that no seeds that could cause a potential adverse effect to the lease area are introduced.

RECOMMENDATIONS

The Board recommends to the Minister of Environmental Protection:

- (a) that the appeal be dismissed; and
- (b) that the condition attached to Reclamation Certificate 29385 be varied by setting a term of 10 years upon that condition.

Further, with respect to section 92(2) and 93 of the *Environmental Protection and Enhancement Act*, the Board recommends that copies of this Report and Recommendations and of any decision by the Minister be sent to the following parties:

- Mr. Larry A. Paulgaard
- Mr. Dwayne Lundquist, Husky Oil Operations Ltd.
- Mr. Gilbert Van Nes, Environmental Law Section, Alberta Justice, representing the Inspector, Land Reclamation Division, Alberta Environmental Protection

Dated August 6, 1997, at Edmonton, Alberta.

“original signed by”
Dr. John P. Ogilvie

“original signed by”
Dr. M. Anne Naeth

“original signed by”
Dr. Ted W. Best

ORDER

I, Ty Lund, Minister of Environmental Protection:

 yes 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 and make the alternative Order set out below or attached.

Dated at Edmonton this 13 day of August 1997.

“original signed by”

Honourable Ty Lund
Minister of Environmental Protection

 Refer to Attachments (only if applicable)