ALBERTA
ENVIRONMENTAL APPEAL BOARD

DECISION

Preliminary Meeting: December 10, 1997
Date of Decision: December 22, 1997

IN THE MATTER OF Sections 84, 85, 86, 87, and 90 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 Legal Oil and Gas Ltd. with respect to Environmental Protection Order No. 96-03 issued by Mr. Larry Brocke, Director of Land Reclamation Division, Alberta Environmental Protection.

Cite as: Legal Oil and Gas Ltd. v. Director of Land Reclamation Division, Alberta

Environmental Protection.

PRELIMINARY MEETING BEFORE		Dr. Steve E. Hrudey, Panel Chair Dr. John P. Ogilvie Mr. Ron V. Peiluck
APPEARANCES		
	Appellant	Legal Oil and Gas Ltd. represented by Mr. Charles Forster and Mr. Dennis Thomas (counsel)
	Other Parties	Mr. Grant Sprague and Ms. Maureen Harquail, counsel for the Director, Land Reclamation Division, Alberta Environmental Protection and Mr. Chris Powter, Branch Head, Land Reclamation Division, Alberta Environmental Protection Ms. Vivian Visscher of Visscher Farms Ltd.
	Other Appearances	Mr. John Forster, Servalta Oilfield Services Ltd. Mr. Peter Miller, counsel for Imperial Oil Resources Limited

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FINDINGS OF FACT

I. BACKGROUND

[1] On March 11, 1996, the Director of Land Reclamation Division, Alberta Environmental Protection (the Director) issued Environmental Protection Order No. 96-03 to Legal Oil and Gas Ltd. (the Appellant) after inspectors determined that the release of one or more substances had occurred from operations at two wells[1] licensed to Legal Oil and Gas Ltd. by the Alberta Energy and Utilities Board (AEUB), located in the Municipal District of Sturgeon, causing an adverse effect on the land adjacent to the well sites. An amendment to the Environmental Protection Order was issued on December 23, 1996.

[2] Approximately six months later, on June 11, 1997, Legal Oil and Gas Ltd. filed an appeal with the Environmental Appeal Board (the Board) appealing the decisions of the Director, Land Reclamation Division in letters dated May 14, 1997 and June 4, 1997. According to the Appellant, these letters had the effect of amending Environmental Protection Order No. 96-03.

[3] The Board advised the Director on June 12, 1997, that the Environmental Protection Order as amended (EPO) had been appealed, and requested copies of all related correspondence, documents and materials from the Department of Environmental Protection (the Department). Documents received from the Department on November 5, 1997, were forwarded to counsel for the Appellant on November 12, 1997. The delay in providing the documents to the Board was consented to by the parties.

II. THE PRELIMINARY MEETING

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[1] Imperial Legal No. 10-16V-57-25 and Imperial Legal No. 16-16V-57-25.

[4] The Board held a preliminary meeting on December 10, 1997, in Edmonton to deal with the jurisdiction of the Board to hear the issues raised by the Appellant. This meeting was held pursuant to section 87 of the *Environmental Protection and Enhancement Act (*Act).[2] In accordance with a letter from the Board dated December 8, 1997, directed to all the parties, "The sole purpose for this preliminary meeting is to deal with the jurisdiction of the Board to hear the issues raised by the Appellants."

III. SUBMISSIONS BY THE PARTIES

A. Ms. Vivian Visscher

[5] By agreement among the parties, Ms. Visscher was allowed to speak first. Ms. Visscher advised that she represented herself and her husband, Mr. Steve Visscher, as landowners for the site named in the EPO. She stated her belief that the appeal was intended to delay action on implementing a cleanup of this site and that the Appellant had shown a total disregard for the landowners, the regulators and the environment. Ms. Visscher described the file on this case as a disgrace to the oil industry, regulators and ultimately the taxpayer. The Visschers have been active in seeking a cleanup of this site since 1991 and now the EPO itself is coming up to two years old. Ms. Visscher challenged the Department to use the powers provided by the legislation to have this site cleaned up. She closed her submission by requesting to be included as a party if the appeal goes to a public hearing.

[6] In response to the Board, Ms. Visscher indicated that her husband had been an owner of the property since 1980. She indicated that the Appellant had sought access to their property off the lease to implement remedial action. This had been the subject of negotiations because the Visschers were seeking compensation for such lands being taken out of agricultural use. However, she indicated that an agreement for access had been reached and to her knowledge there were no access restrictions holding up the remedial clean up process by the Appellant.

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[2] *Environmental Protection and Enhancement Act* (S.A. 1992, ch. E-13.3 as amended).

B. Legal Oil and Gas Ltd.

[7] Mr. Thomas presented the submission as counsel for Legal Oil and Gas Ltd. He introduced Mr. Charles Forster as President of Legal Oil and Gas Ltd. and his son, Mr. John Forster. Mr. Thomas presented a set of seven drawings of the site[3] which summarized the location of various waste pits in relation to the wellhead of well 10-16 and the location of facilities currently on the site in order to assist the Board in following the history of this site.

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[3] Exhibit 1: Figure 1 showed the lease boundary in 1951 when the site was leased by Imperial Oil Ltd. (IOL), Figure 2 showed altered boundaries in 1963, Figure 3 showed a further altered lease boundary in 1967 at the time when the Appellant acquired the lease from IOL. Figure 2 showed two waste pits at the southern end of the lease which are now a major focus of the cleanup requirements under the EPO. One of these pits was completely within the 1967 lease boundary and the other was approximately 25% within the lease boundary, according to Figure 3, which was drawn based on a June 1962 air photo. Figure 4 showed conditions in 1974, with the same lease boundary, but with the more southerly of the two waste pits removed and a slightly modified shape for the more northerly of the original two waste pits (now located completely on the southern end of the lease in 1974), based on a September 1974 air photo. Figure 5 showed conditions in 1976 (based on a July 1976 air photo) indicating the same lease boundaries, but with the one remaining southerly waste pit now removed and replaced with a smaller waste pit, located off the southwestern corner of the lease. Figure 6 showed the lease boundary in 1985, smaller again, with removal of the southern portion of the lease where the one 1974 southerly waste pit (Figure 4) had been located. Finally, Figure 7 showed a composite of all the previous figures, along with contour lines and other surficial features to aid in describing current conditions.

[8] The essence of the Appellant's submission was that Legal Oil and Gas Ltd. disputes its liability for the contamination associated with the waste pits at the south end of the original lease (Figure 1). A major portion of the remedial action is directed toward dealing with groundwater contamination by salt water which the Appellant maintains was disposed to these pits by Imperial Oil Resources Limited (IOL) prior to the Appellant taking ownership in 1967. The Appellant maintains that they never used either of these waste pits for salt water disposal because they had access from 1967 onwards to a salt water disposal line making pit disposal of the salt water unnecessary. The Appellant admits to filling in the most southerly waste pit (Figures 1, 2 and 3) in 1974 at the request of the landowner at that time (this was prior to the current landowners' acquisition of the site in 1980). The Appellant did admit to use of the remaining southerly pit for flaring and consequently some hydrocarbon disposal. This waste pit was relocated at the request of the landowner of that time in 1976 to the new southwesterly location (off the actual lease) as shown in Figures 5 and 6.[4] The surface lease was never amended to reflect this change in waste pit location, but this was done informally with the landowner's verbal consent.

[9] The major problem to be addressed in the EPO, according to the Appellant, is the hydrocarbon contamination in the two southerly pits and salt water contamination of the groundwater arising from salt water disposal to these pits. The Appellant does not dispute the existence of this contamination, nor the need for cleanup. The submission of the Appellant is that IOL is the party responsible for this contamination and that IOL should have been served with the EPO for this cleanup. Mr. Thomas also indicated that the submission of the Appellant deals only with well site 10-16 and that the Board was being notified, without prejudice, of an intention to withdraw the appeal reference to well site 16-16.

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[4] Exhibit 1, ibid.

[10] Mr. Thomas maintains that the EPO is invalid because it was served under Section 102 of the Act. He noted that well site EPOs have normally been served under Section 125 of the Act which refers to an operator. In precedent cases[5], the operator for the purposes of an EPO under Section 125 has been deemed to be the holder of the well license, as registered with the AEUB, in accordance with accepted industry practice for assigning well site reclamation responsibility. The Appellant sold the site in 1994 to United Compass Resources Ltd. (UCRL) who have subsequently operated the site, but the well license was not transferred to UCRL until July 1997. Mr. Thomas led the Board through a review of Section 102(1) of the Act and indicated there was no debate with respect to 102(1)(a)[6] and there is some evidence with respect to 102(1)(b),[7] but he noted that the remainder of the section[8] refers to "the person responsible for the substance" and not the operator as referred to in Section 125. Mr. Thomas referred the Board to the definition of person responsible in Section 1 (ss) of the Act[9] and argued that the Appellant did not qualify as a person responsible

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5 *Sarg Oils Ltd.* v. *Director of Land Reclamation,* EAB No. 94-011, May 11, 1995. [hereinafter *Sarg Oils Ltd.*]

6 Section 102(1)(a) of the Act states:

102(1) Subject to subsection (2), where the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

...

7 Section 102(1)(b) of the Act states:

102(1) Subject to subsection (2) where the Director is of the opinion that

(b) the release may cause, is causing or has caused an adverse effect,

...

8 Section 102(1) continued:

...

the Director may issue an environmental protection order to the person responsible for the substance.

9 Section 1(ss) of the Act states:

1(ss) "person responsible" when used with reference to a substance or a thing containing a substance, means

(i) the owner and a previous owner of the substance or thing,

(ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,

(iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

under subsections (i) or (ii) because the contamination in question was caused by IOL prior to the Appellant taking ownership of the property in 1967 and because neither (i) or (ii) applied to the Appellant, neither (iii) or (iv) should apply either.

[11] Mr. Thomas presented the Board with five questions to consider:

1) Is the Appellant a "person responsible" with regard to an EPO issued under Section 102 of the Act?

2) Should the Director, based upon the evidence, have named IOL as a "person responsible" who deposited the substances which are the subject of the EPO?

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii), ...

3) Does the reasoning of Board Decision 94-011[10] apply to the Appellant given that the precedent decision referred to an EPO under Section 125 rather than the Section 102 EPO made to the Appellant?

4) Because the Appellant is no longer the well licensee and has not been since July 1997, should the EPO be maintained against the Appellant?

5) Given the existence of a Reclamation Certificate issued on October 23, 1963 with respect to the southerly portion of the well site, what is the legal effect of this reclamation certificate on the validity of the EPO which is the subject of this appeal?

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10 *Sarg Oils Ltd., Supra* note 5.

[12] With regard to the jurisdiction of the Board to hear an appeal on the EPO, Mr. Thomas submitted that there are a number of significant issues involved in this case that go beyond this specific site, but on the face of the issues, the Board has the jurisdiction to deal with this matter. Mr. Thomas acknowledged that *timeliness* of the Notice of Objection was an issue. He noted that the original EPO was issued on March 11, 1996 and that over the next year the Appellant engaged in data collection until April 1997 when a detailed reclamation plan[11] was submitted to the Department. In response to the filing of this remediation plan, the Director issued detailed letters dated May 14, 1997 and June 4, 1997, the content of which led the Appellant to file the Notice of Objection dated June 11, 1997. The Appellant had understood that it needed an EPO to get access to undertake remediation of this site so the Appellant did not dispute the original EPO. Mr. Thomas submitted that the Appellant was not in a position to understand the degree and extent of the contamination at the time the original EPO was issued. Only when the letters from the Director, dated May 14, 1997 and June 4, 1997 arrived making "unreasonable requests" did the Appellant find the need to appeal the EPO.

[13] Mr. Thomas summarized the options of the Board to find jurisdiction to hear the appeal. In the first case, Mr. Thomas submitted that the letters of May 14 and June 4 had the effect of amending the EPO, as amended (December 23, 1996), thereby extending the deadlines for filing an appeal with the Board. Alternatively, the Board should use its discretion under Section 84(5)[12] to extend the time allowed for filing the Notice of Objection. In support of the latter argument, Mr. Thomas submitted that the Board should take into account the complexity of the contamination at this site. Mr. Thomas advised that this case raises issues which must be resolved or ultimately the Courts would have to decide the issues. However, Mr. Thomas indicated that the Appellant clearly preferred that the Board exercise its discretion to hear this matter because of its expertise to deal with such issues.

[14] In response to Board questioning about the delays from March 1996 to April 1997, access to the site was raised as a problem, but the Appellant acknowledged that an agreement on access to the site had been concluded shortly after the initial

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11 AGRA Earth and Environmental, "Remediation Plan - Legal Oil and Gas Ltd. (18 April 1997) in Director's submission, Vol. 2, Doc. No. 240. [hereinafter Remediation Plan]

12 Section 84(5) of the Act states:

> 84(5) The Board may, on application made before or after the expiry of the period referred to in subsection (4), extend that period, where the Board is of the opinion that there are sufficient grounds to do so.

EPO.[13] The Board was advised that much of the time was engaged in characterizing the site and the Board notes that some of this work was done by Servalta Oilfield Services Ltd., a contractor engaged in coring and analysis for environmental assessment of oilfield sites and that Mr. John Forster, son of the President of Legal Oil and Gas Ltd., the Appellant, is the owner/manager of Servalta Oilfield Services Ltd.

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13 Letter from Visscher's lawyer to the Department including a copy of the Access Agreement concluded between the Visschers and Legal Oil & Gas Ltd. and United Compass Resources Ltd. (2 July 1996) in Director's submission, Vol. 1, Doc. No. 143.

[15] In response to Board questioning about the use of the southerly pits by Legal Oil and Gas Ltd., the Appellant acknowledged the more northerly pit had been used for flaring which means that some hydrocarbon contamination in this pit would be attributable to the Appellant which presumably makes the Appellant a "person responsible" with respect to hydrocarbon contamination of at least one of the southerly pits according to the Section 102 EPO. Furthermore, there had been some salt water spills at the 10-16 site while the well was operated by the Appellant. The Board notes that the AEUB reported[14] that a 60 m^3 spill occurred in October 1992. Although Mr. Thomas described the salt water spills by the Appellant as small, the Board notes that this 1992 spill would have been 60,000 litres in accordance with the AEUB estimate.

[16] The Board requested arguments as to why the letters of May 14, 1997 and June 4, 1997 should be considered to be amendments of the EPO. Mr. Thomas indicated that these letters are very detailed and very specific, used the term "shall" several times so that the Appellant is clearly being ordered to do things. In summary, the letters elaborate on the original EPO and the instructions are clearly mandatory.

[17] The Board noted that the remediation plan[15] submitted by the Appellant to the Department in April 1997 appeared to contemplate cleaning up the hydrocarbon sludges and the salt water contaminated groundwater which the Appellant maintains was caused primarily (in the former case) and solely (in the latter case) by IOL. This acceptance seems contrary to a position that the Appellant did not fully understand the extent of contamination until receiving the letters of May 14, 1997 and June 4, 1997.

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14 An internal AEUB memo from D.T. McCullogh to D.D. Waisman and D.L. Skappak with attached chronology of environmental issues at well 10-16 dating back to 1991 in Director's submission, Vol. 1, Doc. No. 102 [hereinafter Internal AEUB memo].

15 Remediation Plan, *supra* note 11.

[18] Mr. Thomas indicated on behalf of Mr. C. Forster that the Appellant was subjected to considerable economic pressure by the AEUB and this influenced the acceptance of the original EPO. The Board notes that the AEUB suspended production at well 10-16 on May 31, 1995 because the Appellant and UCRL had failed to comply with several AEUB requests.[16] This suspension would have had the effect of eliminating revenue generation from well 10-16. Furthermore, the AEUB chronology indicates that the Appellant's solicitor wrote to IOL on May 16, 1995 suggesting that IOL was partially responsible for environmental damage on section 10-57-25W4m. IOL apparently responded to the Appellant on May 29, 1995 indicating that IOL had met all their obligations under the sale of the property.

C. The Director

16 Internal AEUB memo, *supra* note 14.

[19] Mr. Sprague indicated that all parties agreed that there was serious contamination on the land in question. An EPO was issued on March 11, 1996, pursuant to Section 102 of the Act requiring the Appellant to submit an investigation plan, to develop a remediation plan and to implement the remediation plan. This EPO was formally amended on December 23, 1996 to impose additional obligations for specific reporting requirements. The original EPO established and fixed the liability for the contamination with the Appellant. This EPO was intended to provide sufficient flexibility to allow the Director and the Appellant to respond to the findings of the subsequent activities at the site. Section 102 (3) of the Act[17] establishes what an EPO can require and clearly allows for all the provisions of the original EPO. Mr. Sprague submitted that the Act contemplates that EPOs be done in the way that the EPO was done in this case and that an alternative system by which full investigation must be completed before issuing an EPO is not workable and would clearly be a different process than is contemplated for the Act.

[20] Mr. Sprague noted that the Notice of Objection was filed with the Board on June 11, 1997 and that matter was pursuant to Section 84(1)(h)[18] of the Act, which requires the Notice of Objection to be filed within 7 days, pursuant to Section

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[17] Section 102(3) of the Act states:

> 102(3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:
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> (a) investigate the situation;
> (b) take any action specified by the Director to prevent the release;
> (c) measure the rate of release or the ambient concentration, or both, of the substance;
> (d) minimize or remedy the effects of the substance on the environment;
> (e) restore the area affected by the release to a condition satisfactory to the Director;
> (f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;
> (g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
> (h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate or temporary basis the release of the substance into the environment;
> (i) report on any matter ordered to be done in accordance with directions set out in the order.

[18] Section 84 (1)(h) of the Act states:

> 84(1) A notice of objection may be submitted to the Board by the following persons in the following circumstances:
>
> (h) where the Director issues an environmental protection order, ... the person to whom the order is directed may submit a notice of objection;

84(4)(a)[19] of the Act. The required time limit in this case would only apply to the June 4, 1997 letter, if it was deemed to be an amendment to the EPO (as amended December 23, 1996, originally issued March 11, 1996). Because the original EPO fixed the liability for action on the Appellant, the Director takes the position that the period for filing an objection to the issue of liability has been exceeded (by almost 16 months) and consequently, the Board has no jurisdiction to consider the issue of the Appellant's liability in a hearing. In taking this position, the Director submits that the letters of May 14 and June 4, 1997 clearly do not amend the issue of the Appellant's liability. They only expand, within the allowable terms of the original EPO, on the details of how the Appellant must respond to the liability assigned by the original EPO.

[21] The Director submits that if the Board finds grounds for hearing an appeal on this case, the appeal ought to be limited to the contents of the letters with regard to whether they specify reasonable requirements, but the question of the Appellant's liability for remediation cannot be opened. Mr. Sprague noted that the Board has the ability to extend the deadlines for filing if the Board finds extenuating circumstances but he submitted that the circumstances raised by Mr. Thomas do not justify the Board invoking these powers. On the question of the EPO being issued under Section 102 rather than Section 125, the Director submits that the Appellant is a person responsible within the definition of Section 1(ss). The Appellant took over the site from IOL and should thus be viewed as a successor or assignee as covered by Section 1(ss)(iii). Likewise, the Appellant has admitted to using one of the waste pits as a flare pit and ultimately reclaimed that pit thereby qualifying as a person responsible under both Sections 1(ss)(i) and 1(ss)(ii).

[22] Mr. Sprague noted that the Appellant has argued that the EPO is unfair because Legal Oil and Gas Ltd. never used the waste pits for salt water disposal, but Legal Oil and Gas Ltd. clearly derived the economic benefit from this well from 1967 to 1994 and was able to sell the remaining value in the well to UCRL. The Appellant has argued that the Board should exercise its

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[19] Section 84(4)(a) of the Act states:

84(4) A notice of objection must be submitted to the Board

(a) not later than 7 days after receipt of a copy of the enforcement order or the environmental protection order, in a case referred to in subsection (1)(e), (f) or (h),

discretion because the contamination is very complex. The Director submits that adequate information was in the hands of the Appellant at the time the EPO was issued to allow the Appellant to launch a Notice of Objection. Certainly the salt water disposal issue could have been argued in March 1996.

[23] Mr. Sprague submitted that the Board must deal with the matter of certainty in this matter. The Director had determined that there was an environmental problem requiring the issuance of an EPO and that does not seem to be in dispute among the parties. Yet no Notice of Objection was filed to the EPO of March 11, 1996 nor to the EPO amendment of December 23, 1996. The Notice of Objection was not filed until June 11, 1997 and raised objections to issues raised in both the original EPO and the amended EPO, as well as to the content of the letters of May 14 and June 4, 1997. This was clearly too late to raise the issue of liability for remediation of the sites.

[24] The Director submitted that the letters of May 14 and June 4, 1997 were not amendments to the EPO, they were simply part of the administrative process of implementing the EPO, as clearly contemplated in the EPO. Specifically, the EPO and EPO amendment contained provisions for the Director to approve plans and schedules to be submitted by the Appellant and the letters were simply the means of dealing with these matters of approving the responses required of the Appellant by the EPO.

[25] The Director submitted that there are no extenuating circumstances which would warrant the Board to exercise its discretion under Section 84(5) of the Act to extend the deadlines for submission of a Notice of Objection. The Appellant had been the operator of this site for 17 years and the information relating to possible contamination of the site by IOL was available prior to the issuance of the EPO and that issue of liability should have been addressed at the time when the EPO was first issued. In this regard, the Board has rendered two decisions[20] which have upheld the Department's practice of holding the current holder of the well licence as the party responsible for remediating a site under the Act. The Director submitted that the facts of this case do not

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[20] *Sarg Oils Ltd., supra* note 5: Decision Report 94-011: *Sarg Oils Ltd.* v. *Director of Land Reclamation, Alberta Environmental Protection* (May 11, 1995) and Decision Report 96-012 *Gammon Resources Ltd.* v. *Director of Land Reclamation, Alberta Environmental Protection* (November 20, 1996). [hereinafter *Gammon Resources Ltd.*] The Board notes that the Sarg Oils decision is in Judicial Review proceedings. *Sarg Oils Ltd. et al. v. the EAB*, Lethbridge No. 9706-00570 (Alta. Q.B).

warrant any different treatment of the Appellant with respect to being held liable for remediation of the site.

[26] The Board noted the concerns of Ms. Visscher with regard to the level of enforcement of this case and asked Mr. Sprague if he could explain why this file had taken so long to resolve. Mr. Sprague responded that the Department has been working with the Appellant to try to bring this matter to a conclusion and the Department remains committed to achieving complete reclamation of this site. In response to a Board question of why the EPO was issued under Section 102 and not Section 125, Mr. Sprague responded, after consulting with the representative of the Director, that Section 102 was employed because a major issue in this case involved contaminated groundwater, a matter which was properly covered by the provisions of Section 102, as opposed to Section 125 which deals with surface reclamation.

D. Other Participants

[27] With the agreement of all the parties, Mr. Peter Miller, solicitor for Imperial Oil Ltd. addressed the Board to explain the position of IOL. Mr. Miller advised that IOL had not asked to be joined to the proceedings because of a logistical problem in terms of availability of an expert who would have been needed to lead any evidence for a hearing on December 10, 1997. However, IOL was requesting the Board to be granted party status if the Board decides to proceed to a hearing. Mr. Miller informed the Board that IOL is currently engaged in a civil action launched by the Appellant for the purposes of assigning liability for remedial cleanup of the 10-16 well site waste pits.

[28] Mr. Miller advised that IOL subscribes to the principle that the polluter pays and that if the Appellant was an innocent party who unknowingly acquired liability for contamination caused by IOL, that IOL would settle for the costs arising. However, IOL disputes the merits of the Appellant's position. IOL maintains that the property was sold 30 years ago with full knowledge on the part of the Appellant that the property was sold in "as is" condition and that industry practice was to sell the liabilities together with the assets in transferring a well from one licensee to another. IOL notes that the property was sold with the waste pits in place, in contemplation of future use. Mr. Miller maintained that it was the practice of IOL to have cleaned up waste

pits if they had not been contemplated for any future use. He acknowledged that some contamination likely did predate the sale in 1967. Salt water had been disposed to a container which had integrity and it would be necessary to establish when the release of salt water had occurred. Furthermore, the Appellant had in fact decommissioned the pits and may have impaired the integrity of this pit when it was decommissioned.

[29] Mr. Miller submitted that the Board would be entering a minefield if it had to determine the facts of who did what 30 years ago and that the industry practice of holding the current well license holder liable was ultimately the fairest to all parties. IOL would prefer, if the Board decides to revisit the issue of liability for this site, that the entire matter be handled under Section 114 of the Act, as a contaminated site, so that any relevant issues about liability could be fully dealt with.

[30] In response to questioning by the Board, Mr. Miller indicated that IOL would not be interested in party status to a hearing if the Board rules that it has no jurisdiction on the matter of liability in this case and decides to hold a hearing restricted to the issues of whether the requirements of the May 14 and June 4, 1997 letters were reasonable.

IV. FINAL ARGUMENTS OF THE PARTIES

A. Ms. Vivian Visscher

[31] Ms. Visscher summarized her final reply to the other parties with her concerns about the apparent lack of enforcement on this site, the extreme length of time which had transpired and the concern she had as a landowner whose land has been shown to be contaminated with possible consequences for using their land as security for their ongoing dairy and grain operations.

B. Legal Oil and Gas Ltd.

[32] In summary response to the presentations of the other parties, Mr. Thomas indicated that he was pleased that

IOL had admitted responsibility for contamination by their operation and he disputed that difficulty in providing evidence on an issue was valid grounds for failing to hear this issue. Mr. Thomas argued that the letters of May 14 and June 4, 1997 had the full force of an order and if they were not part of the order, then what were they? The letters contained instructions which were clearly intended to be obeyed, these were the intentions of the Director in sending these letters to the Appellant. Mr. Thomas argued that the Board should not be influenced by the form of these communications, rather by their intent and effect. In response to the argument that the Appellant is a person responsible because the Appellant is a successor, Mr. Thomas argued that the Appellant never owned the off site contamination created by IOL and could not be considered a successor to this contamination. In response to the argument that the Appellant should have appealed at the time of the EPO, Mr. Thomas argued that the extent of this off site contamination was not known to the Appellant at that time. Finally, Mr. Thomas argued that the form of the EPO indicated that the Director clearly styled the Appellant as the operator in the sense of an EPO under Section 125, but the Appellant was no longer the operator of the well in 1996. The Board notes that the Appellant was still the holder of the well license in 1996, the criterion previously upheld for responsibility in previous Board decisions.[21]

C. The Director

[33] Mr. Sprague responded to the other parties by noting that the EPO was issued under Section 102 and this was not a contaminated site EPO (Section 114), so that the parties were not before the Board to discuss who was liable. The Section 102 EPO established the liability as belonging to the Appellant and the Appellant did not file a Notice of Objection to the original EPO of March 11, 1996 nor the amended EPO of December 23, 1996. Mr. Sprague submitted that the matter of off site or on site contamination with respect to determining who was a person responsible was a red herring because a person responsible is responsible for contamination regardless of where the contamination ends up, on site or off site. With regard to the letters of May 14 and June 4, 1997, these were clearly intended to be obeyed because they are clearly part of the EPO process, but that does not make them amendments to the EPO, and it certainly does not reopen the issue of liability which was established by the original EPO.

V. ISSUES

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[21] *Sarg Oils Ltd., supra* note 5. See also, *Gammon Resources Ltd. supra* note 20.

[34] The Board identifies the following preliminary issues with regard to its jurisdiction to hear this appeal:

1. Should the letters of the Director, dated May 14 and June 4, 1997 be considered as amendments to the original EPO and if so, does that provide the Board with the jurisdiction to hear the appeal?

2. If not, are there sufficient extenuating circumstances in this case that would allow this Board to provide the Appellant with an extension of filing time?

VI. CONSIDERATIONS OF THE BOARD

[35] The Board notes that neither issues of notice nor fairness of the notification process were raised by the Appellant. Consequently, the Board concludes that the Appellant has no issue concerning timely receipt of the EPO of March 11, 1996 or the amendment to the EPO of December 23, 1996 that would cause the Board to extend those deadlines.

[36] The Board must determine if it has the jurisdiction to hear an appeal arising from a Notice of Objection to an amended EPO as has been proposed in this case. The jurisdiction of the Board to hear an appeal to an EPO issued under Section 102 of the Act is established in Section 84(1)(h)[22]. However, Section 84 is silent on the matter of hearing an appeal on an amendment to an EPO. The December 23, 1996 amendment to the EPO was issued under the authority of Section 229 of the Act[23], which is also

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22 Section 84(1)(h) of the Act states:

84(1) A notice of objection may be submitted to the Board by the following persons in the following circumstances:

(h) where the Director issues an environmental protection order, ... the person to whom the order is directed may submit a notice of objection;

23 Section 229(1)(a)(b)(c) of the Act states:

229(1) The Director may

silent on the matter of the amendment being appealable. Section 84 does explicitly recognize the right to appeal an amendment to an *approval* issued by the Director in Section 84(1)(a)(ii) and (iii). Likewise, Section 84 recognizes the right of appeal for an amendment to a reclamation certificate in Section 84(i). Notwithstanding the absence of a clear directive to the Board on this matter, if an appeal had been filed on the December 23, 1996 amendment, the Board would have been strongly inclined to hear that appeal particularly if the amended EPO had substantively increased the consequences of the EPO on the party served with the EPO. However, based on the information before the Board, we are not convinced that the December 23, 1996 amendment to the EPO did substantially increase the consequences of the original EPO on the Appellant and in any case, no Notice of Objection was filed on the December 23, 1996 amendment to the EPO.

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an environmental protection order,

(b) cancel an environmental protection order, or

(c) correct a clerical error in an environmental protection order.

[37] With respect to considering the letters to be amendments to the EPO, the Board notes that both the EPO and the amended EPO have a very explicit structure which firstly sets out the basis for the order or amendment, then presents the legal authority for the order followed by a list of specific orders to the recipient. Following the signature of the Director is an explicit statement of the recipient's right to appeal the decision above.[24]

[38] Could either letter be deemed to amend the EPO? The May 14, 1997 letter to the Appellant, under the "10-16 Site", begins:

> "Pursuant to Environmental Protection Order No. 96-03 (as amended) the schedule of implementation for the 10-16 site listed in your April 18, 1997 Remediation Plan is approved subject to the following conditions which are referenced to the schedule of activities;"

[39] The letter continues with a number of specific requests and directives. The Appellant has argued that the specificity and the directive nature of the letter effectively makes the May 14 letter an amendment of the EPO. The Board notes that the matters addressed in the May 14 letter all fit reasonably under clause 4 of the amended EPO[25] which provides the Director with the discretion to approve the Remediation Plan and to approve the schedule of implementation. Furthermore, the Board notes that the December 23, 1996 amendment to this clause of the original EPO clauses did not widen the scope of the Director's discretion to approve the Remediation Plan, it only adjusted the date of submission of the Remediation Plan, delaying this deadline almost 11 months from the original EPO, an amendment presumably to the benefit of the Appellant. The Board finds that the May 14, 1997 letter has the neither the form nor the substance of an amendment to the EPO (as amended December 23, 1996).

[40] The June 4, 1997 letter begins with:

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24 Section 84 of the Environmental Protection and Enhancement Act may provide a right of appeal against this decision to the Alberta Environmental Appeal Board (W.A. Tilleman, Chair). There may be a strict time limit for filing such an appeal. A copy of section 84 is enclosed. For further information, please contact the Board Secretary at #400 Alberta Treasury Branches Plaza, 9925 - 109 Street, Edmonton, Alberta, T5K 2J8; telephone (403) 427-6207; fax 427-4693.

25 The Operator will submit a Remediation Plan to the Director no later than March 14, 1997, for approval. The Remediation Plan shall outline how the Operator plans to remediate the land as identified in the Investigative Plan and shall include a schedule of implementation.

"Thank you for your Fax of May 21, 1997 confirming you intend to proceed with your remediation activities at the 10-16 and 16-16 sites.

We have reviewed your proposed changes to the schedule and accept that some dates need to be pushed back; however, other activities are not dependent on weather nor access and therefore must not be delayed. Access should have been dealt with by now; this is not an acceptable cause for delay.

An updated remediation schedule for the 10-16 and 16-16 sites is enclosed for your reference."

[41] The letter continues with discussion of the schedule and notes that the bi-weekly report due on May 23, 1997 has not been received. The Board finds nothing particularly contentious in the June 4 letter and notes that the Notice of Objection only references this letter as follows:

"In respect to the June 4 Letter and the 10-16 Site:

1. Containment System Installation;
   a. surface water containment systems,
3. Groundwater Flow System Characterization;
   b. radius of influence of weeping tile measurements,
4. Brine Contaminated Soils
   a. implementation of pilot soil flushing,
   b. assessment of soil flushing performance,
   c. completion of soil remediation

Legal states that it would be reasonable to readjust the dates for the completion of these requirements."

[42] The Board notes from the revised schedule that the Director appended to the June 4, 1997 letter, the Director had adjusted dates towards those proposed by the Appellant, splitting the difference, in all but two cases (4b and 4c) and in those cases, the two positions differed by only one month. Given the chronic slippage on meeting deadlines by the Appellant throughout this affair and that the entire schedule has been rendered moot by these proceedings, the minor issues raised about the June 4, 1997 letter in the Notice of Objection warrant no renewed jurisdictional attention by this Board. In any case, the Board finds no merit to the contention that the June 4, 1997 letter has either the form or the substance of an amendment to the EPO (as amended December 23, 1996).

[43] On the matter of the Board's discretion under Section 84(5) of the Act[26] to consider waiving the deadlines for appealing an EPO because of extenuating circumstances, the Appellant has argued the Board should exercise that discretion in this case because:

1) of the complexity of the contamination issue at this site which precluded the Appellant from appreciating the consequences of the liability associated with contamination the Appellant claims to be the responsibility of IOL.

2) the EPO is invalid with respect to the Appellant because it was served under Section 102 of the Act rather than under Section 125 and that the Appellant is not a "person responsible" as defined under Section 1(ss) of the Act and as required to give effect to the Section 102 EPO.

3) the Appellant is no longer the well licensee since July 1997 and thus should no longer be the subject of the EPO.

4) a Reclamation Certificate was issued on October 23, 1963 respecting the southerly portion of the well site which may invalidate the EPO.

[44] Although the Board appreciated the clear and succinct arguments made by the Appellant, the Board was not persuaded by the Appellant's arguments for the Board to exercise its discretion to extend the deadlines on any of the foregoing grounds for the following reasons.

[45] First, with respect to the first argument on complexity of contamination precluding the ability of the Appellant to

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[26] Section 84(5) of the Act states:

84(5) The Board may, on application made before or after the expiry of the period referred to in subsection (4), extend that period, where the

recognize the need for an appeal to the EPO, the Board notes:

1) Legal Oil and Gas Ltd. operated the site for 17 years from 1967 until selling to UCRL in 1994 providing ample opportunity to be aware of and understand the nature of activities, including waste disposal, at the site.

Board is of the opinion that there are sufficient grounds to do so.

2) When Legal Oil and Gas Ltd. acquired the site in 1967 the waste pits in question with regard to contamination were open to full view, one was located fully on the surface lease and one was located partially on the lease.[27]

3) An argument that the most southerly waste pit was not the responsibility of Legal Oil and Gas Ltd. because it was located partially off the surface lease acquired from IOL seems to depend on a very strict and narrow interpretation of the lease boundaries which is inconsistent with the informal practice of Legal Oil and Gas Ltd. in relocating its waste pit site to another site off the surface lease in 1976, based on an informal agreement with the landowner of that time.

4) In any case, Legal Oil and Gas Ltd. reclaimed the most southerly waste pit prior to 1974, notwithstanding the fact that this pit was not wholly within the lease boundaries acquired by Legal Oil and Gas Ltd in 1967.

5) The solicitor for Legal Oil and Gas Ltd. wrote to IOL on May 16, 1995 to suggest that IOL was at least partially responsible for contamination associated with the southerly pits and IOL responded on May 29, 1995 indicating that IOL had met all of its obligations under the sale of the property meaning that the issue of contamination from these pits was in the mind of the Appellant at least 10 months prior to the March 11, 1996 EPO.

6) Mr. John Forster, the son of the President of Legal Oil and Gas Ltd., who the record shows responded to many of the communications with the Department on behalf of the Appellant, is the owner and operator of Servalta Oilfield Services, (Servalta) who list their activities as performing coring and analysis for environmental assessment of oilfield sites. Servalta performed some of the site investigation work for the Appellant and, on the face, of it would appear to have been well qualified to

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[27] Exhibit 1, Figure 1, *supra* note 3.

advise the Appellant of the implications of the original EPO with regard to the substantive issue of being assigned liability for investigation and site cleanup.

7) The remediation plan prepared for the Appellant by AGRA Earth and Environmental Ltd. and filed April 18, 1997 in response to the EPO as amended (December 23, 1996) addresses the need to remediate both oily sludges and salt water contamination associated with former waste pits, which is not consistent with a view that the grounds for appealing the EPO were only triggered with the Director's letters of May 14 and June 4, 1997.

[46] With respect to the second argument on the EPO being invalid because of being filed under Section 102 of the Act, the Board notes:

1) Legal Oil and Gas Ltd. admits to having used the more northerly of the two southerly waste pits as a flare pit leading to at least some hydrocarbon contamination of this pit, which appears to make the Appellant a person responsible for this source of contamination.

2) Legal Oil and Gas Ltd. admits to having reclaimed the southerly waste pit prior to 1974, after taking possession of the lease from IOL in 1967. This activity appears to fall under the categories of "handling, use, storage, disposal," mentioned in Section 1(ss)(ii) which defines person responsible for the Act in a very broad sense.

3) Legal Oil and Gas Ltd. was clearly a successor to IOL on this lease and thereby would qualify as a person responsible for activities associated with that lease, regardless of where any contamination from facilities acquired by the Appellant, initially on or partially on the lease, ultimately ended up.

4) The form of a Section 102 EPO has no substantive bearing on the Department's practice of attributing cleanup liability to the holder of the well license. This practice has been upheld in two previous decisions of the Board, in part because of persuasive arguments by the regulator and oil industry

representatives that to do otherwise would introduce chaos into the timely and responsive cleanup of oil well sites. The size of the file on this case and the nature of the arguments made to the Board by the Appellant only reinforce the need to have a consistent policy on wellsite cleanup liability which has been widely accepted by the oil industry.

[47] With respect to the third argument about the Appellant not being the well license holder since July 1997, the Board notes:

1) Legal Oil and Gas Ltd. was the well licence holder at the time of the original EPO, at the time of the amended EPO and at the time of filing the Notice of Objection.

2) The AEUB held up the transfer of the well licence to UCRL because of outstanding issues associated with well site reclamation.

3) Transfer of the well license after the issuance of the EPO fixing the liability on Legal Oil and Gas Ltd. has no bearing on current liability.

[48] With respect to the fourth argument about a reclamation certificate having been issued in October 1963, the Board notes:

1) Legal Oil and Gas Ltd. acquired the site in 1967 with two active waste pits fully visible. The issuance of a reclamation certificate 4 years earlier has no bearing on the fact that there were clear waste disposal activities continuing on the site for up to 4 years by IOL and subsequently by the Appellant for 17 years.

2) The reclamation certificate in question was not placed before the Board to establish its relevance. Given the information available to the Board, the Board must conclude that this reclamation

certificate is irrelevant to our deliberations on the existence of grounds for exercising our discretion on the deadlines for filing an appeal to the EPO.

[49] In consideration of the totality of the arguments and information placed before it, the Board notes that the Appellant has been remarkably successful in having timelines extended. However, the Board is not persuaded that there are any grounds to justify the Board exercising its discretion to extend the timelines for the Appellant to file an appeal on either the original EPO (March 11, 1996) or the amended EPO (December 23, 1996).

[50] The Board notes that an Appellant may well have concerns with whether all of the provisions, which a Director may approve or not approve pursuant to an EPO, are reasonable. Without deciding the issue, the Board shares this concern in the sense that the Director must act reasonably within his discretion, but the Board finds no jurisdiction under the Act to review every detailed discretionary decision taken by the Director in the performance of his responsibilities under the Act. In particular, the Board notes that the Director is bound by Section 2(j) of the Act[28] to achieve "comprehensive and responsive action in administering this Act". Placing truly "unreasonable demands" on the recipient of the EPO would lead to resistance and dispute which can only have the effect of delaying action under the EPO. The Board trusts that the Director recognizes that such delays caused by making "unreasonable demands" would frustrate the intent of the Act and would take appropriate actions to avoid making "unreasonable demands" or in responding constructively to concerns by the recipient of the EPO that certain demands were unreasonable. In any case, the Board was presented with no details of any attempts by the Appellant in this case to resolve concerns about the reasonableness of the requirements of the letters of May 14 and June 4, 1997 with the Director.

[51] The Board also notes that there is an obligation on the Director to ensure that EPOs issued under the Act contain sufficient clarity and detail to allow the party named in the EPO to establish if there are grounds for appeal. The Board would view sympathetically a case for extending the deadline for filing a Notice of Objection where subsequent letters to implement an EPO

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[28] Section 2(j) of the Act states:

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

raised new liability issues which were not adequately explained in the original EPO. The Board finds no grounds for such sympathy in the case of Legal Oil and Gas Ltd. and EPO 96-03.

[52] The case made by Ms. Visscher concerning the length of time taken to deal with contamination on their property, which all parties acknowledge to exist and to have been caused by activities associated with well 10-16, was compelling. The Board notes that the Act offers no provision for the Visschers, as a party directly affected, to appeal an EPO. Their involvement is restricted to status as a party to the hearing of an appeal by the party named in an EPO. Yet, their interests appear to have been clearly compromised by the failure to achieve a satisfactory cleanup of this site. Accordingly, the Board believes the Department should act on Ms. Visscher's request for applying the full force of the powers provided under the Act, in order to ensure that the intent of the EPO and the Act are satisfied. In particular, the Board notes the expectations set for the Department by Section 2 (a) and (j) of the Act.

DECISION

[53] Legal Oil and Gas Ltd. has failed to persuade the Board that it has jurisdiction to hear their appeal or that the Board should exercise its discretion under Section 84(5) to extend the timelines for filing a Notice of Objection to allow the Board jurisdiction to hear the Appeal. Accordingly the appeal is dismissed.

Dated on December 22, 1997, at Edmonton, Alberta.

Dr. Steve E. Hrudey

(j) the important role of comprehensive and responsive action in administering this Act.

Dr. John P. Ogilvie

Mr. Ron V. Peiluck