

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Close of Written Hearing – November 12, 2010
Date of Report and Recommendations – December 10, 2010

IN THE MATTER OF sections 91, 92, 95, and 99 of the
Environmental Protection and Enhancement Act, R.S.A. 2000, c.
E-12;

-and-

IN THE MATTER OF an appeal filed by Peter Kostawich with
respect to *Environmental Protection and Enhancement Act*
Reclamation Certificate No. 00254244-00-00 issued to Bonavista
Petroleum Ltd. by the Director, Central Region, Environmental
Management, Alberta Environment.

Cite as: *Kostawich v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Bonavista Petroleum Ltd.* (10 December 2010), Appeal No. 09-030-R (A.E.A.B.).

HEARING BEFORE:

Dr. Alan J. Kennedy, Panel Chair
and Board Member,
Mr. Jim Barlishen, Board Member, and
Mr. Eric O. McAvity, Q.C., Board Member.

SUBMISSIONS BY:

Appellant: Mr. Peter Kostawich.

Director: Mr. Darren Bourget, Director, Central Region,
Environmental Management, Alberta
Environment, represented by Ms. Aurelia
Nicholls, Alberta Justice.

Certificate Holder: Bonavista Petroleum Ltd., represented by Ms.
Patricia Quinton-Campbell, Burnet, Duckworth
& Palmer LLP.

EXECUTIVE SUMMARY

Alberta Environment issued a reclamation certificate to Bonavista Petroleum Ltd. for the Petrorep et al Provost 10-15-34-8 well located at NE 15-34-8-W4M near Consort, Alberta.

The landowner, Mr. Peter Kostawich, appealed the issuance of the certificate on the grounds the topsoil depth and quality did not meet the required standards. Mr. Kostawich also argued the application for the certificate should have been treated as non-routine, because he had filed a complaint form with Alberta Environment. He asked that the certificate be cancelled. The Board held a hearing through written submissions.

Based on the evidence and data provided, the Board recommended the certificate be confirmed.

In response to the arguments regarding the application process, the Board found that, even if the application had been considered non-routine, the error was rectified by Alberta Environment through an on-site investigation. Even though this on-site investigation was conducted after the certificate was issued instead of before, the end result was the same in that Alberta Environment conducted an independent investigation in response to the complaint.

Regarding the data provided by Mr. Kostawich, the Board concluded the data were not representative of the site as the data were not collected in an unbiased manner and did not follow the requirements as stated in the Reclamation Criteria for Wellsites and Associated Facilities. The Board found the data provided by Bonavista were collected as required under the Reclamation Criteria for Wellsites and Associated Facilities and the Upstream Oil and Gas Reclamation Application Guidelines. Therefore, the Board considered the data submitted by Bonavista to be more representative of the site conditions. According to Bonavista's data, the site met or exceeded the more comprehensive criteria for cultivated land rather than the less stringent criteria for grassland. The data collected by Alberta Environment during its investigation confirmed Bonavista's findings.

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I. BACKGROUND

[1] On October 20, 2009, the Director, Central Region, Environmental Management, Alberta Environment (the “Director”), issued Reclamation Certificate No. 00254244-00-00 (the “Certificate”) pursuant to the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to Bonavista Petroleum Ltd. (the “Certificate Holder”) for the Petrorep et al Provost 10-15-34-8 well located at NE 15-34-8-W4M near Consort, Alberta.

[2] On November 30, 2009, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Peter Kostawich (the “Appellant”) appealing the Certificate. The Appellant provided additional information on December 14, 2009.

[3] On December 2, 2009, the Board wrote to the Appellant, the Certificate Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Certificate Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to the appeal, and that the Parties provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[4] On December 18, 2009, the Board received a copy of the Record from the Director, and on December 9, 2009, forwarded a copy to the Appellant and Certificate Holder.

[5] A mediation meeting was held on June 2, 2010, at Veteran, Alberta. No resolution was reached.

[6] On June 3, 2010, the Board asked the Parties for available dates for a hearing. In response, the Appellant provided one date in June 2011. The Board requested the Appellant revisit his schedule. The Appellant responded that he would not be available until mid 2011. On July 2, 2010, the Board indicated to the Parties that, in balancing the interests of the Certificate Holder and Director to be heard in a timely manner, the Board was not willing to wait until June 2011 to hold the hearing. The Board stated the hearing would be held on September 15, 2010, and asked the Appellant whether he would like the hearing be held in person or in writing.

[7] On July 29, 2010, the Appellant notified the Board that he would proceed via a written hearing. The Certificate Holder and Director did not present any concerns with proceeding via a written hearing. On August 4, 2010, the Board set the schedule to receive submissions. The submissions were received between August 30, 2010 and October 27, 2010. The Appellant provided his rebuttal submission before the hearing closing date of November 12, 2010.

II. APPLICATION PROCESS

A. Submissions

1. Appellant

[8] The Appellant argued the Certificate was issued in error. The Appellant explained that, after he received notice of the application for the Certificate, he submitted an Upstream Oil and Gas Facility Complaint Form (“Complaint Form”) to the Director in May 2009. The Appellant stated he was not contacted about his complaint, but in October 2009, he received notice of the Certificate being issued.

[9] The Appellant argued that, according to the Update Report of Alberta Environment’s Upstream Oil and Gas Reclamation Certificate Program (the “Update Report”), the Certificate application became non-routine when the Complaint Form was filed and the complaint was not resolved. The Appellant expected the Certificate would be cancelled immediately because the application did not meet the requirements as outlined in the Update Report.

2. Certificate Holder

[10] The Certificate Holder noted the Appellant asked the Certificate be cancelled, because he filed a complaint with the Board on May 29, 2009 and the application should have been treated as non-routine. The Certificate Holder assumed the Appellant meant the complaint was sent to the Director and not the Board.

[11] The Certificate Holder explained that, according to the Upstream Oil and Gas Reclamation Certificate Application Guidelines (“Application Guidelines”) and the Update Report, a routine application will be reviewed for completeness, inclusion of required documents and signatures, and landowner complaints. If there is a landowner complaint, the application becomes non-routine and the Director will conduct a completeness review and a regulatory review. If the application passes both reviews, the certificate is issued.

[12] The Certificate Holder stated it did not receive any notification the Appellant had filed a complaint prior to the issuance of the Certificate, and if the complaint had been received by Alberta Environment and processed, the Certificate Holder would have been notified. The Certificate Holder explained the complaint would have made the application non-routine and subject to the regulatory review to ensure compliance with the criteria.

[13] The Certificate Holder stated that, even though the regulatory review did not take place prior to the Certificate being issued, the review took place after the Certificate was issued and Alberta Environment concluded the wellsite met the applicable reclamation criteria and the Certificate was upheld. The Certificate Holder argued there is no requirement in the Application Guideline that requires the cancellation of a reclamation certificate or that prevents a regulatory review to be completed after the issuance of a reclamation certificate. The Certificate Holder noted that, had Alberta Environment found the wellsite did not meet the criteria, the Certificate could be cancelled.

[14] The Certificate Holder submitted that, even though the complaint did not trigger the application to be treated as non-routine, the procedure and review required for a non-routine application has been undertaken. The Certificate Holder explained that if the application passed the completeness and regulatory review, then according to the Application Guidelines, the certificate would be issued. The Certificate Holder argued the “miscategorization of the application is merely a technicality and cannot be used to set aside a reclamation certificate that meets the requirements of both a routine and non-routine application.”¹

¹ Certificate Holder’s submission, dated October 5, 2010, at page 5.

[15] The Certificate Holder argued the Certificate complied with all of the procedural requirements of a non-routine application since the investigation conducted by Alberta Environment confirmed the reclamation met the required criteria. The Certificate Holder argued that to allow the appeal for the purpose of correcting a technicality which had been already corrected, serves no useful purpose and would increase costs and waste resources.

3. Director

[16] The Director stated the application indicated:

1. the lease site met the Tier 1 and Tier 2 Soil and Groundwater Remediation Guidelines and all other applicable standards and guidelines;
2. the Appellant was provided with a complete copy of the application by registered mail sent to the address recorded on the land titles certificate;
3. there were no unresolved complaints;
4. no Complaint Form accompanied the application;
5. the site was not reclaimed using a management plan; and
6. in an interview with the landowner, he indicated his only concern was the removal of the fence on the lease site, which was later removed.

[17] The Director explained the application was reviewed as a routine application based on the information provided and no complaint accompanied the application. He issued the Certificate because the application was complete. A copy of the Certificate was sent to the Appellant.

[18] The Director stated he did not receive a Complaint Form from the Appellant until after the Certificate was issued. The Director explained Alberta Environment visited the site on May 21, 2010, and June 2, 2010, and the observations were consistent with the information provided in the application and the site met the applicable criteria, guidelines, and standards.

[19] The Director submitted the application was properly reviewed as a routine application, but if it should have been processed as non-routine, the procedural error was remedied since there was an investigation and regulatory review that would have been conducted had the application been processed as non-routine.

[20] The Director stated Alberta Environment published its policy for the review of reclamation certificate applications in the Application Guidelines. The Director explained the Application Guidelines set out the requirements for a reclamation certificate application and the review process that is applied. The Director stated that, if an application has an outstanding complaint from a landowner that has not been addressed or if the complaint is received during the review but prior to issuing the certificate, then the application is reviewed as non-routine.

[21] The Director explained a routine application is reviewed to ensure it is complete, signed by the appropriate party, all required documentation is attached, and to determine whether the box indicating a landowner complaint is checked. The Director stated the application did not indicate there was a landowner complaint and no outstanding complaint was recorded, but the landowner indicated he wanted the fence surrounding the lease site removed, which the Certificate Holder completed prior to submitting the application. The Director stated a complaint regarding the application was not received until after the Certificate was issued.

[22] The Director explained there might have been a misunderstanding regarding whom the actual landowner was and who was actually notified of the application. The Director stated the Appellant advised him the Certificate Holder consulted the Appellant's brother regarding the application. The Director explained the Certificate Holder sent the application by registered mail to the address recorded on the land titles certificate but, according to the Appellant, the recorded address was incorrect.

[23] The Director noted the Appellant indicated he received a copy of the application in May 2009, approximately four months prior to the Director's review of the application. The Director submitted there was sufficient time between the Appellant receiving the application and the actual review for the Appellant to advise the Director of his concerns regarding the reclamation of the lease site, but he failed to do so. The Director noted the Appellant said he filed a Complaint Form with the Board even though the form clearly indicates a copy is to be returned to the operator and Alberta Environment.

[24] The Director stated he did not receive a copy of the Complaint Form until after the Certificate was issued. The Director explained that if the Appellant sent the Complaint Form to the Board, the Board is independent from Alberta Environment and is not involved in the

upstream oil and gas certificate program, it might not necessarily have reached Alberta Environment. The Director stated Alberta Environment did not receive the Complaint Form at any of the addresses listed on the form prior to the Certificate being issued.

[25] The Director argued the Appellant is in the best position to determine if the address recorded on the land title certificate is correct, and Alberta Environment cannot be expected to double check the address on a land title certificate for accuracy. The Director argued he is entitled to rely on the information contained in the application, on the Certificate of Title, and the Record when conducting a review.

[26] The Director argued that any prejudice to the Appellant by not receiving the application in January 2009 was remedied when he received the application in May 2009 since the Certificate had not been issued, and he had adequate time to file a complaint with Alberta Environment. The Director stated the Appellant failed to forward his complaint to the appropriate public body. The Director argued he cannot be expected to know of a complaint when it is not received, and he should not be penalized for following the policies and procedures absent a complaint.

[27] The Director explained that, had the application been processed as non-routine, he would have conducted a regulatory review of the application and the Appellant's concerns would have been investigated prior to issuing the Certificate. The Director stated that if the investigations did not support the complaints and the site was reclaimed according to the standards, criteria, and guidelines, a reclamation certificate would still have been issued. The Director stated two site visits were done to conduct a regulatory review and investigate the Appellant's complaints, and he concluded the reclamation of the lease site meets the applicable standards, criteria, and guidelines. The Director submitted that any prejudice the Appellant may have suffered by the application being processed as routine has since been remedied by the subsequent investigations. The Director stated the Appellant's concerns have been investigated and it was determined the Certificate was properly issued.

4. Rebuttal Submission

[28] The Appellant acknowledged he received the application for the Certificate in May 2009, and he filed a Complaint Form with Alberta Environment on May 20, 2009, indicating why the Certificate should not be issued. The Appellant said he was not contacted by the Director regarding the complaint. The Appellant also confirmed he received a copy of the Certificate in October 2009, and he filed a Notice of Appeal with the Board on November 10, 2010.

[29] The Appellant noted that, according to the Application Guidelines, the application became non-routine with an unresolved complaint and therefore, the Certificate should be cancelled. The Appellant argued the Director should adhere to the requirements outlined in the Application Guidelines.

B. Analysis

[30] Before the Board provides its analysis of the evidence and arguments presented, the Board notes the Appellant's rebuttal submission included comments that the Board could not take into consideration. The comments related to discussions and information obtained through the mediation meeting. These comments could not and were not considered by the Board in its analysis of the evidence because of the confidentiality of the mediation meeting that was agreed to by all the attendees, including the Appellant. The Board also notes the Director alluded to the mediation meeting, but he did not convey any information that would be captured by the confidentiality agreement.

[31] It is unclear what happened with the Complaint Form filed by the Appellant in response to the application. To clarify, the Board did not receive any Complaint Form in May 2009. With the adoption of paper reviews for reclamation certificates, the complaint process is essential to ensure landowner's concerns are heard and considered by the Director. The Complaint Form lists six regional offices. It may be helpful if the address to which complaint forms are to be forwarded is clearly marked in the certificate application information package provided to landowners, particularly when the site is located a distance from any of the six offices. The complaint process provides landowners with the opportunity to raise concerns that would have been raised during the on-site inquiries that were previously conducted by Alberta

Environment prior to issuing a reclamation certificate. At the inquiries, the landowner and the companies seeking a reclamation certificate were given the opportunity to present their concerns. Since the use of complaint forms is such an essential aspect of the reclamation certificate application process, steps should be taken to ensure landowners understand the purpose of the complaint form and where it should be submitted if the landowner has any concerns.

[32] The Director in this case approached the complaint appropriately. Although the Certificate was issued, he elected to conduct a site inspection to see if the Landowner's concerns were valid. A site inspection was conducted with the Certificate Holder present. The Board understands the Appellant was asked to attend the site visit, but no explanation was given why the Appellant chose not to attend. It is unfortunate the Appellant did not attend, since it was his opportunity to point out his concerns directly to the Certificate Holder and Alberta Environment on the site.

III. DATA ANALYSIS

A. Submissions

1. Appellant

[33] The Appellant explained the surface lease agreement was signed in 1974 with the understanding that the wellsite and access road would be reclaimed to its original condition. The Appellant stated that topsoil preservation was not considered during construction of the wellsite, and the topsoil was mixed with the subsoil. According to the Appellant, topsoil on the access road was windrowed to the centre of the roadway and was mixed with subsoil, and subsoil from the ditch was windrowed over the mixture. The Appellant stated gravel was placed on top to produce an elevated all-weather road.

[34] The Appellant explained the well was capped in 1997. He stated the wellsite was reclaimed by leveling the topsoil/subsoil mixture and topsoil from the perimeter of the lease was "feathered" towards the well head, resulting in a thin layer of topsoil over the topsoil/subsoil mixture. According to the Appellant, the gravel and subsoil on the access road was used mainly to level out the ditches and a thin layer of topsoil was placed on the topsoil/subsoil mixture.

[35] The Appellant argued the depth of topsoil on the wellsite and access road is less than the depth of topsoil found in undisturbed areas, topsoil is mixed with subsoil, and there are areas of compacted soil due to the lack of topsoil.

[36] The Appellant stated the reclaimed area is less productive because of the mixing of the topsoil with the subsoil and there is more topsoil in the undisturbed areas. The Appellant stated the undisturbed areas have a definite line where the topsoil meets the subsoil, but the disturbed areas have a thin layer of topsoil with admixture below. He explained that on the areas with compacted soil on the wellsite and access road, grass growth is limited and weeds are prevalent. The Appellant noted the site has been reclaimed for approximately 10 years, but the vegetative growth does not compare to the growth in the undisturbed areas.

[37] The Appellant provided data of topsoil depth on the wellsite and access road and compared the data to undisturbed sites. According to the Appellant, the average topsoil depth on the wellsite is 6.2 cm compared to 16.3 cm off lease, and on the access road, topsoil depth is 10 cm compared to 18.25 cm off the access road.

[38] The Appellant noted that, to rectify this deficiency on the wellsite and access road, the existing weeds and non-native aggressive grasses need to be sprayed; 10 cm of weed-free topsoil needs to be added uniformly across the disturbed area; the total area needs to be seeded with an approved native grass; the area needs to be fenced until the grasses are established; and the site needs to be maintained by the Certificate Holder until the grasses are comparable to the surrounding area. The Appellant stated he would monitor the work and the maintenance of the site until the criteria are met to his satisfaction.

[39] The Appellant argued that, with only 60 percent of the topsoil, productivity is reduced by 40 percent. The Appellant noted the Certificate Holder and Alberta Environment have a 25 year liability for losses to the landowner. Based on an annual productivity rate of \$2,400 for the wellsite and a 40 percent reduction in productivity, the Appellant argued he would be owed \$24,000 as a lump sum.² The Appellant asked for an additional \$10,000 for professional advice and preparation for the appeal. The Appellant stated that, even though the

² \$2400 x 40% = \$960 per annum
\$960 x 25 years = \$24,000

Board requested costs be included, he preferred the Certificate Holder bring the site to its original productive level.

[40] The Appellant explained that, in 1994, Alberta Environment introduced the Reclamation Criteria for Wellsites and Associated Facilities – 1995 Update (“Reclamation Criteria”), that required only 60 percent of the original topsoil depth on sites drilled prior to 1983. He argued this requirement “...absolved the Operator of physical, financial, and moral liabilities for the loss of production of the site by reducing the soil depth to 60% of the original depth and failed in its duty of care to the landowner.”³ The Appellant stated he was not aware of the Reclamation Criteria until June 2010.

2. Certificate Holder

[41] The Certificate Holder explained the well was spud in 1974 and produced oil until September 1997. The Certificate Holder stated the wellsite was seeded in 1997, fill seeded in 2001, and herbicide was applied in 2002. The Certificate Holder stated it acquired the site in 2003, and the Appellant acquired the land from the Special Areas Board in 2003 and the land was then transferred into the Appellant’s name in 2005.

[42] The Certificate Holder explained it retained Hemisphere Land & Resource Consulting Ltd. (“Hemisphere”) to manage the reclamation of the site, which included a Phase I Environmental Site Assessment (“ESA”) in July 2008 and a Phase II ESA in August 2008. The Certificate Holder stated the site met all relevant requirements of the Alberta Environment’s Tier I and Tier 2 Soil and Groundwater Remediation Guidelines, and after conducting a detailed site assessment in October 2008, determined the site met all of the Reclamation Criteria.

[43] The Certificate Holder stated a copy of the Certificate application submitted to the Director was also sent to the Appellant and was picked up by Mr. Phillip Kostawich. The Certificate Holder explained no one contacted it regarding the application, and the Certificate was issued on October 20, 2009.

³ Appellant’s submission, dated August 30, 2010.

[44] The Certificate Holder noted the Director completed an onsite investigation in May 2010 in response to the Appellant's complaint and appeal, but even though the Appellant was invited, he did not attend. The Certificate Holder did attend the investigation, and noted the Director confirmed the wellsite met the applicable Reclamation Criteria.

[45] The Certificate Holder explained that Alberta Environment has criteria applicable to reclamation of wellsites in the Reclamation Criteria. The Certificate Holder stated that, even though the current land use of permanent grassland allowed it to use the less stringent grassland assessment criteria, its consultants used the more stringent criteria for cultivated land.

[46] The Certificate Holder stated the wellsite meets or exceeds all criteria that must be assessed, including soil quantity and quality, landscaping, and vegetation. The Certificate Holder explained the Reclamation Criteria require wellsites constructed prior to 1983 to have soil replacement depths of 60 percent of the control depth and vegetation must be 80 percent of the averaged control data. The Certificate Holder stated the mean control topsoil depth was 7.63 cm so the required replacement depth was 4.58 cm, and the actual average topsoil depth on the wellsite was 8.4 cm and on the access road, the topsoil depth was 88 to 200 percent of the respective control. The Certificate Holder stated the admixing ranged from 0 to 30 percent, exceeding the target of less than 30 percent on sites constructed after 1994. The soil texture and compaction, drainage, erosion, stability, and vegetation height, density, and percent ground cover all met or exceeded the criteria.

[47] The Certificate Holder submitted that, even though the Appellant may disagree with the criteria and how they were implemented, it is not an issue for the Board.

[48] The Certificate Holder noted the Appellant took various measurements from locations identified on a sketch attached to his submission and then stated his measurements show the criteria were not met. The Certificate Holder submitted the Appellant's soil measurements should not be used to determine if the wellsite meets the criteria for the following reasons:

1. the Appellant measured only topsoil depths;
2. topsoil texture, aggregate size and strength, admixing, soil restrictions, and percentage of gravel and rocks were not assessed;

3. plant health and cover were not compared to off-lease;
4. the selected control topsoil depths do not provide an accurate representation of the natural variability observed in the area;
5. the control locations were selected to present a best case scenario; and
6. based on the scale provided in the sketch, much of the outer perimeter of the wellsite was not assessed, so an accurate topsoil distribution across the wellsite was not provided.

[49] The Certificate Holder stated its consultants conducted a proper assessment and found the topsoil depth and all other applicable reclamation criteria were met.

[50] The Certificate Holder noted the Appellant referred to productivity loss due to the lack of topsoil depth. The Certificate Holder argued the Appellant provided no evidence of loss of productivity. The Certificate Holder stated the entire wellsite is being grazed, is withstanding grazing pressure, and is comparable to the control area in relation to vegetation height, density, and percent ground cover.

[51] The Certificate Holder noted the Appellant's calculations for loss of productivity are based on an assumption that 60 percent topsoil results in a 40 percent reduction of productivity. The Certificate Holder pointed out that 60 percent topsoil is the criteria set by Alberta Environment, and the Appellant is seeking compensation for meeting the criteria. The Certificate Holder stated compensation is not the mandate of the Board.

[52] The Certificate Holder stated the wellsite complies with all of the relevant application criteria and meets or exceeds all the requirements as stated in the guidelines.

[53] The Certificate Holder submitted the appeal should be denied and the Certificate upheld.

3. Director

[54] The Director referred to section 3(1) of the *Conservation and Reclamation Regulation*, Alta. Reg. 115/93 in which the Director can establish standards, criteria, and guidelines for the conservation or reclamation of specified land, which includes land used for the construction, operation, and reclamation of a well. The Director explained guidelines relating to the reclamation of wellsites have been established under the *Remediation Certificate Regulation*,

Alta. Reg. 154/09, the Reclamation Criteria, and the Application Guidelines. The Application Guidelines provide the requirements for a reclamation certificate application and a guide to the application process. The Director noted an operator is required to reclaim the specified land in accordance with the applicable standards, criteria, and guidelines.

[55] The Director explained the Reclamation Criteria require the wellsite to be assessed based on 20 metre by 20 metre sampling grid with equal vertical and horizontal divisions, resulting in assessment locations in the centre of 25 grids. He stated the Reclamation Criteria require the following:

1. The average replacement depth of surface soil is calculated by averaging the surface soil depths recorded from all of the assessment locations on the site.
2. The required replacement depth of surface soil for sites constructed prior to 1983 is 60 percent of the control depth.
3. The control depth is calculated from using a minimum of four assessment locations in the control area located off the lease site.
4. If the control area has variable characteristics that coincide with characteristics of the site, then surface soil depths can be obtained from representative samples on the lease site and corresponding representative samples in the control area. Surface soil depths can be averaged.
5. If there is a high probability the former lease site will be used for agricultural purposes, it must be reclaimed to the cultivated land criteria which provide:
 - i. Revegetation and species composition should be comparable with original or control vegetation or meet reasonable land management objectives.
 - ii. The vegetation density on the lease site should be 80 percent or more than the control area.
 - iii. The height of the vegetation on the lease site should be 80 percent or more than the height of the vegetation on the control area.
 - iv. The plants should be healthy. Characteristics looked at are plant vigour, height, colour, if diseased, and vegetative quality.
6. The cultivated land criteria regarding surface soil provide:
 - i. Soil aggregate classes: No soil aggregates greater than 10 cm are allowed unless similar sized aggregates are present in the control soil.
 - ii. Soil aggregate strength (friable, firm, hard) must remain in the same class.

- iii. Gravel and rocks may not be piled, windrowed, or concentrated in one area.
- iv. A distribution and quality allowance allows for three grids to vary from the desired outcomes where the surface soil depth is 15 cm or greater. Each of these grids may:
 - a. have a replaced surface soil depth between 40% and 80% of the required replacement depth; or
 - b. drop one soil quality class; or
 - c. have both a replaced soil depth between 40% and 80% of the required replacement depth and drop one soil quality class.
- v. Where the surface soil depth is less than 15 cm, there is no minimum replacement depth and three grids may drop one quality class.

[56] The Director noted the lease site was constructed in November 1974. The Director stated the application indicated the lease site was located on a pasture, but there was a potential for the area to be cultivated in the future so the cultivated land criteria were applied to the lease site.

[57] The Director explained the application:

- 1. identified the soils on and off the lease site to consist of sandy and clay loams with areas of minimal surface soil;
- 2. reported that root restrictions occurred on and off the lease site and there were blow outs in the control area; and
- 3. revegetation on the lease site was comparable with vegetation on the control area, and the density, height, and health of the revegetation met the standards.

[58] The Director noted the following from the application:

- 1. Eight control locations were assessed to obtain the average surface soil depth of the control area and 25 locations were assessed on the lease site to obtain the average surface soil depth of the lease site.
- 2. The surface soil depth in the control area ranged from 3 to 12 cm with a mean depth of 7.63 cm. The required placement depth that was used was 80% of the control or 6.1 cm, even though the actual replacement depth for a site constructed prior to 1983 is 60% of the control depth. The minimum replacement depth that was used was 60% of the control or 4.58 cm.

3. The lease site surface soil depths ranged from 5 to 15 cm with an average depth of 8.4 cm, which exceeds the required replacement surface soil depth, and complies with the Reclamation Criteria.⁴

[59] The Director stated the Certificate Holder provided an additional report on December 31, 2008, as required for a Phase II ESA. The report indicated:

1. Soil sampling was done in accordance with accepted industry practice and the *Canadian Council of Ministers of the Environment Guidance Manual on Sampling, Analysis, and Data Management for Contaminated Sites*.
2. Soil samples were tested for salinity, hydrocarbons, and select metals.
3. The analytical results from the soil samples were less than or met the applicable guidelines.

[60] The Director explained notes from the investigations of the lease site on May 21 and June 2, 2010, indicate:

1. Eight representative soil assessments were taken from the control area and five were taken from the lease site.
2. The variation in soil depth on the lease site was consistent and representative of the variation in soil depth on the control area. Surface soil depth for the control area ranged from 3 to 18 cm with an average depth of 9.25 cm. Surface soil depths for the lease site ranged from 9 to 16 cm and an average of 13.2 cm.
3. The revegetation species and composition on the lease site was comparable to vegetation on the control area. There were no concerns with the health of the vegetation.
4. The thinly vegetated areas on the lease site were not large enough to form a grid and were consistent with thinly vegetated areas in the control area. The density and height of the vegetation on the lease site appeared to be 80% or more of the vegetation on the control area.
5. Surface soil depths and vegetation on the lease site are greater than or meet the criteria.
6. The information collected was consistent with the information provided by the Certificate Holder.

[61] The Director noted the Appellant, not an independent expert, conducted his own investigation into the surface soil depths of the lease site and control area. The Director acknowledged the Appellant recorded different surface soil depths and averages than those obtained by the Certificate Holder and the Director. The Director noted the Appellant's

⁴ The Board notes the minimum topsoil depth of 5 cm also exceeded the 4.58 cm replacement depth criteria.

measurements of surface soil depth were consistently low for the lease site and consistently high for the control area. The Director argued the Appellant's results were not representative of the variability of surface soil depths on the control area or lease site. The Director pointed out the Certificate Holder and Alberta Environment recorded high and low surface soil depths on the lease site and control area.

[62] The Director submitted the Appellant's measurements are not representative of the actual surface soil depths on the lease site and control area, and the measurements taken by the Certificate Holder and Alberta Environment were more representative of the area.

[63] The Director submitted the surface soil depths of the lease site meet the reclamation criteria and the Certificate was properly issued.

[64] The Director noted the Appellant did not itemize the costs claimed for preparation for the hearing and no details were provided to demonstrate how the lump sum of \$10,000.00 was reached. The Director argued that, since no details were provided, it is inappropriate for the Board to award costs to the Appellant. The Director submitted the results provided by the Appellant were of little assistance because the Appellant did not follow the published requirements for testing of a wellsite. The Director submitted the costs claimed by the Appellant for the loss of productivity of the land are compensatory costs and are not costs of, or incidental to, the appeal.

[65] The Director submitted that each of the Parties should be responsible for their own costs and no award of costs should be made against the Director. He stated he acted in good faith in considering the application and issuing the Certificate, and no special circumstances were demonstrated to warrant an order of costs against the Director.

4. Rebuttal Submission

[66] The Appellant stated the control sites have a distinct difference between the topsoil and subsoil, with the topsoil containing organic matter and dark colour and the subsoil containing more clay and appearing tan in colour. The Appellant stated the topsoil depths taken around the wellsite by the Appellant and the Certificate Holder were similar, except the

Appellant had fewer samples and focused more on the soil depths closer to the well head. The Appellant noted the topsoil depths measured by the Certificate Holder on the control site were lower than the Appellant's measurements.

[67] The Appellant argued the samples taken by the Certificate Holder for the control area were not a true indication of the soil depths. He noted the Certificate Holder's data showed the topsoil depth on the control site was less than the topsoil depth on the well site. The Appellant argued that would require topsoil being hauled in, but his records and the Certificate Holder's records do not show this occurred. He explained in the reclamation process, topsoil is mixed with the subsoil, resulting in less topsoil depth on the disturbed sites.

[68] The Appellant explained his data mainly focused on topsoil depth since topsoil is essential for good, productive plant growth. The Appellant stated he took at least the same number of samples as the Certificate Holder since he recorded topsoil depths at 8 control site locations for the well site and access road, whereas the Certificate Holder collected data from 8 control sites for the well site and 5 control sites for the access road.

[69] The Appellant explained the area was fenced for approximately 10 years, which would have given the site time to re-establish, which it did not. He argued the site does not compare to the control area with respect to native grass cover, aggressive grasses, compaction, weeds, and bare areas.

[70] The Appellant said that, according to his measurements, topsoil depth on the wellsite was 40 percent of the control and on the access road, topsoil depth measured 54 percent of the control sites.

[71] The Appellant stated he was never contacted by the Certificate Holder nor the Director regarding the reclamation of the site, and if there was any meeting, it was not under his instructions or wishes. He said the first time he met the Certificate Holder and the Director was at the mediation meeting on June 2, 2010. The Appellant explained the land was rented in 2009, but prior to that and since then, he operated the land. The Appellant stated the site is located on pasture and will remain pasture, and therefore, the grassland criteria should apply.

[72] The Appellant argued there is a significant difference between the Certificate Holder's and Alberta Environment's topsoil measurements. The Appellant stated the 12 topsoil measurements he took on the wellsite were similar to the grid locations used by the Certificate Holder. The Appellant argued the Certificate Holder and Alberta Environment selected an area that was not representative of the control area. He stated the control area with 3 cm of topsoil was possibly part of the road construction. The Appellant noted Alberta Environment's access road data are confusing and not legible for proper comparisons to be made.

[73] The Appellant provided the breakdown of his costs: 2 hours for the mediation meeting, 2 hours for the site visit, 20 hours collecting field data, 20 hours assembling the field data, 6 hours preparing submissions, for a total of 50 hours, and at \$200 per hour, totals \$10,000.

[74] The Appellant submitted he is not preparing documentation for an application for a reclamation certificate, but demonstrating the topsoil depth is unacceptable.

[75] The Appellant stated the Director ignored the Complaint Form and treated the application as routine.

[76] The Appellant argued "it is unconscionable that Alberta Environment has little regard to the landowner's request to bring the site to a productive state."⁵ The Appellant stated he was not requesting compensation, but wanted the Certificate Holder to bring the site topsoil to the original condition. He argued that landowners are left with land with only 60 percent of the topsoil. The Appellant submitted the criteria, standards, and guidelines set by Alberta Environment are not in the best interests to preserve the environment and to restore topsoil for productive production. He argued the issue of restoring topsoil has to be raised to ensure agricultural land remains productive.

B. Analysis

[77] The Director provided a summary of what is required in conducting a site assessment in order to complete an application for a reclamation certificate. The Reclamation Criteria clearly explains what measurements are required and how these measurements are to be

⁵ Appellant's submission, received October 27, 2010.

taken when gathering data for a certificate application. The collection of data is based on scientific principles to ensure representative and comparable samples are taken both on and off the lease site.

[78] The Appellant stated in his rebuttal submission he focused on topsoil measurements at well centre. This clearly indicates the samples taken by the Appellant did not follow prescribed sampling procedures. Part of the purpose of having 25 section grids is to increase the likelihood the data collected are representative of the reclaimed site and that the data can be compared to the control sites. The sample sites should not be selectively chosen as it can skew the data sets.

[79] The Certificate Holder retained Hemisphere to gather the data and complete the application. The measurements taken demonstrate variability across the lease site that correlates well with the variability found in the control area. According to the Appellant, the variability of topsoil depth on the wellsite was from 5 to 9 cm and offsite the depths varied from 15 to 18 cm. This compares to the measurements collected by Hemisphere, which ranged from 5 to 14 cm on the wellsite and 3 to 12 cm offsite. There is a considerable difference in the amount of variability between the Appellant's measurements and Hemisphere's measurements. Hemisphere collected the data as specified in the Reclamation Criteria, whereas the Appellant did not. This leads the Board to believe the Appellant's sample locations were not chosen in an unbiased manner.

[80] Hemisphere used the criteria for cultivated lands, which is a more comprehensive standard than the less stringent standard for grassland, even though the Appellant thought the criteria for grasslands should have been used. Based on the data provided by Hemisphere, the site meets or exceeds the cultivated lands criteria. This was confirmed by Alberta Environment's investigation in response to the Appellant's complaint.

[81] Based on the data and evidence provided by the Parties, the Board finds the Certificate Holder's data were collected in accordance with the Application Guidelines for conducting a proper site assessment, thereby giving credibility to the data collected. The Appellant's data were not collected in accordance with the Application Guidelines, thereby making the data less reliable.

[82] In his Notice of Appeal, the Appellant asked the site be returned to an acceptable production level. However, no evidence was provided in the Appellant's submission to indicate the site is not at an acceptable production level.

[83] The onus is on the Appellant to demonstrate to the Board the site has not been reclaimed properly, and the Appellant did not meet this onus. Therefore, the Board finds the Certificate was properly issued, and recommends the Certificate be confirmed.

IV. RECOMMENDATIONS

[84] The hearing was held by written submissions only. The Appellant was given the opportunity to attend an oral hearing of his appeal, but he was unable to provide any available dates in 2010 and only one date in 2011. Although the Board takes every effort to accommodate the parties, it must also balance the interests of all the parties involved. This includes taking into consideration the rights of the Certificate Holder and Director to have a timely hearing of the matter; waiting one year before starting the hearing does not seem reasonable in this case especially when the site had been reclaimed for a number of years. As a result, the Board asked the Appellant if he wanted to attend at the oral hearing or proceed via written submissions. The Appellant chose to proceed by way of written submissions. The Certificate Holder and Director did not object to proceeding with the hearing by written submissions only. Therefore, in this case, the Board had to rely on the submissions provided and the Record. There was no opportunity for cross-examination or questioning by the Board.

[85] The Board recommends Reclamation Certificate No. 00254244-00-00 be confirmed as issued.

[86] With respect to sections 100(2) and 103 of EPEA, the Board recommends that copies of this Report and Recommendations, and of any decision by the Minister, be sent to the following:

1. Mr. Peter Kostawich;
2. Ms. Aurelia Nicholls, Alberta Justice, on behalf of the Director, Central Region, Environmental Management, Alberta Environment; and

3. Ms. Patricia Quinton-Campbell, Burnet, Duckworth & Palmer LLP, on behalf of Bonavista Petroleum Ltd.

V. COSTS

[87] In his submissions, the Appellant referred to costs associated with the appeal. In the Board's August 24, 2010 letter to the Parties, the Board included a clause regarding final costs.⁶ The Board believes the Appellant may have misunderstood this clause. If the Parties intended to ask for costs, they were required to include a statement to that effect in their submissions. They were not required to set out the costs claim.

[88] If the Appellant intends to make a costs claim, the Board requests that an application for costs be provided to the Board within two weeks of the date of the Minister's Order with respect to this Report and Recommendations. The Board will then provide the Parties with information regarding the submission process should a costs application be made.

Dated on December 10, 2010, at Edmonton, Alberta.

“original signed by”

Dr. Alan J. Kennedy
Panel Chair and Board Member

“original signed by”

Mr. Jim Barlishen
Board Member

“original signed by”

Mr. Eric O. McAvity, Q.C.

⁶ The Board stated in August 24, 2010 letter:
“If the parties intend to ask for final costs, they **must indicate so in their written submissions**. The Board will establish a submission process to address any cost applications after the Minister has made his decision in this matter.” (Emphasis in original.)

Board Member



ALBERTA
ENVIRONMENT

*Office of the Minister
MLA, Medicine Hat*

**Ministerial Order
10/2010**

*Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12*

**Order Respecting Environmental Appeals Board
Appeal No. 09-030**

I, Rob Renner, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 09-030.

Dated at the City of Edmonton, in the Province of Alberta, this 15 day of December, 2010.

“original signed by”

Rob Renner
Minister

Alberta 

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Appendix

Order Respecting Environmental Appeals Board Appeal No. 09-030

With respect to the decision of the Director, Central Region, Environmental Management, Alberta Environment (the “Director”), to issue Reclamation Certificate No. 00254244-00-00 (the “Certificate”), under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to Bonavista Petroleum Ltd., I, Rob Renner, Minister of Environment:

1. Order that the decision of the Director to issue the Certificate is confirmed.