

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 19, 2012

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

-and-

IN THE MATTER OF notices of appeal filed by Calmar Lands
Ltd. and 1330075 Alberta Ltd. with respect to the issuance of
Reclamation Certificate No. 00296303-00-00 to Penn West
Petroleum Ltd. under the *Environmental Protection and
Enhancement Act* by the Director, Northern Region, Operations
Division, Alberta Environment and Sustainable Resource
Development.

Cite as: *Calmar Lands Ltd. and 1330075 Alberta Ltd. v. Director, Northern Region,
Operations Division, Alberta Environment and Sustainable Resource
Development*, re: *Penn West Petroleum Ltd.* (December 19, 2012), Appeal Nos.
12-031 and 12-032-ID1 (A.E.A.B.).

BEFORE:

Justice Delmar Perras, (ret.) Chair.

SUBMISSIONS BY:

Appellants: Calmar Lands Ltd., represented by Mr. William Martenson and Mr. Doug Martenson; and 1330075 Alberta Ltd., represented by Mr. Ron Aitkens.

Certificate Holder: Penn West Petroleum Ltd., represented by Mr. Jerrad Kubik.

Director: Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Alison Altmiks, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued a reclamation certificate to Penn West Petroleum Ltd. under the *Environmental Protection and Enhancement Act*.

Calmar Lands Ltd. and 1330075 Alberta Ltd. appealed the decision. Calmar Lands Ltd. commenced foreclosure proceedings on 1330075 Alberta Ltd., the current owners of the property on which the wellsite is located. Calmar Lands Ltd., AESRD, and Penn West Petroleum Ltd. were asked to provide submissions on whether Calmar Lands Ltd. had a right of appeal given the wording of section 91 of the *Environmental Protection and Enhancement Act*.

After reviewing and considering the submissions and the applicable legislation, the Board determined that Calmar Lands Ltd. has a right to appeal the decision to issue the Reclamation Certificate. Calmar Lands Ltd. registered a *lis pendens* on the title of the land at issue in the appeal. There is a reasonable possibility the lands might revert back to Calmar Lands Ltd. as a result of the bankruptcy proceedings against the current owner. Therefore, the Board found Calmar Lands Ltd. has a valid legal interest in how the land is reclaimed.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision in relation to an appeal filed by Calmar Lands Ltd. ("Calmar Lands" or "Appellant"). Alberta Environment and Sustainable Resource Development ("AESRD") issued a reclamation certificate to Penn West Petroleum Ltd. for an upstream well site. The Environmental Appeals Board (the "Board") received an appeal of the decision under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA").

[2] The Board received and considered submissions on whether Calmar Lands had a right to file an appeal under section 91(1) of EPEA.¹ The basis of the Appellant's claim is that it is in the process of foreclosing on the subject lands.

II. BACKGROUND

[3] On October 18, 2011, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued Reclamation Certificate No. 00296303-00-00 (the "Certificate") to Penn West Petroleum Ltd. (the "Certificate Holder") for the 11-30-049-26W4 wellsite and access road near Calmar, Alberta.

[4] On September 25, 2012, the Board received a Notice of Appeal from Calmar Lands appealing the Decision of the Director to issue the Certificate.

[5] On September 28, 2012, the Board wrote to the Appellant, the Certificate Holder, and the Director (collectively the "Participants") acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board noted section 91(1)(i) of EPEA, and asked

¹ Section 91(1) of EPEA states:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(i) where an inspector issues a reclamation certificate under section 138, or the Director or an inspector amends a reclamation certificate under section 139, the operator and any person who receives a copy of the certificate or amendment under section 145 may submit a notice of appeal...."

the Participants to provide comments on whether the Appellant had the right to appeal the Certificate.

[6] The Board received comments from the Director and the Certificate Holder on October 19, 2012.

III. SUBMISSIONS

A. Appellant

[7] The Appellant stated that, based on investigations completed on the site, the land has not been remediated. It argued the Certificate Holder's application for the Certificate was inaccurate and incomplete. The Appellant explained the estimated cost for remediation would be approximately \$1.5 million, including costs associated with removing a substantial amount of salt contaminated soil.

[8] The Appellant explained 1330075 Alberta Ltd. ("1330075 Alberta") is in CCAA protection² since approximately \$4 million is owed on a number of mortgages on the land. The Appellant stated foreclosure proceedings have commenced on the mortgages, which are held to the benefit of the Appellant. The Appellant explained it sold the land to 1330075 Alberta in 2002, but 1330075 Alberta still owes the Appellant more than \$1 million. As a result of non-payment of the debt, the Appellant commenced foreclosure proceedings on the property. The Appellant noted 1330075 Alberta is in bankruptcy and 1330075 Alberta's debts are greater than the value of the land. The Appellant speculated 1330075 Alberta is likely to walk away from the land, and if this happens, the Appellant will be the owners of the land and responsible for working out the issues.

[9] The Appellant stated it has a strong financial interest in the property and there is a possibility the land will revert back to it when the foreclosure occurs.

[10] The Appellant requested the Certificate be overturned and the Certificate Holder be required to clean up the land.

² This refers to protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[11] In its rebuttal submission, the Appellant acknowledged it did not receive a copy of the Certificate, but as a mortgagee on the land, it has a strong vested interest in maintaining the value of the property. The Appellant explained it has commenced foreclosure proceedings and, pending the outcome of the foreclosure action, it will likely become the landowner again and would be responsible for advancing the development of the site.

[12] The Appellant argued it was entitled to receive a copy of the Certificate since the start of the foreclosure action preceded the issuing of the Certificate, but the Director was unaware of the legal proceedings. The Appellant explained its only security is the value of the land, which would be diminished as long as the land is contaminated. The Appellant argued it is directly affected by the activity to which the Certificate relates.

[13] The Appellant stated that, regardless of the ownership of the land and who received the Certificate, the land still requires reclamation work that was not apparent at the time the Certificate was issued.

[14] The Appellant requested the Certificate be cancelled given the amount of work required and that an environmental protection order be issued.

B. Certificate Holder

[15] The Certificate Holder noted the Certificate was issued to it and a copy provided to 1330075 Alberta as the registered owner of the lands. The Certificate Holder stated the Appellant was the previous owner of the land, and there was no indication a copy of the Certificate was provided to the Appellant.

[16] The Certificate Holder argued section 91(1)(i) of EPEA impacts the Appellant's ability to file a Notice of Appeal, because it is dependent on having received a copy of the Certificate directly from the Director. The Certificate Holder argued that, because the Appellant did not receive a copy of the Certificate, it has no standing to submit a Notice of Appeal.

[17] The Certificate Holder requested the Board dismiss the Appellant's appeal.

C. Director

[18] The Director noted the Certificate was not provided to the Appellant and, therefore, it does not meet the requirements of sections 91(1) and 145(a) of EPEA. However, the Director did not have any objections to the Appellant being a party, because it demonstrated a genuine interest in the land based on the interests it has registered on title.

IV. ANALYSIS

[19] Section 91(1) of EPEA states:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (i) where an inspector issues a reclamation certificate under section 138, or the Director or an inspector amends a reclamation certificate under section 139, the operator and any person who receives a copy of the certificate or amendment under section 145 may submit a notice of appeal....”

[20] Section 145 of the EPEA states:

“Where...a reclamation certificate is issued under this Part, in addition to giving a copy of the...certificate to the operator, the person issuing the...certificate

- (a) shall give a copy of the...certificate to the owner of the land concerned, and
- (b) may give a copy of the certificate to any other person whom the person issuing the certificate considers to be directly affected by the activity to which the certificate relates.”

[21] Section 95(6) of EPEA provides:

“Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

[22] In addition, section 1(f) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”),³ allows the Board to determine who is a party to an appeal.

[23] The Appellant in this case, Calmar Lands, has a registered interest in the lands in question. It has filed a *lis pendens*⁴ on the property, indicating it has a valid interest in the property.

[24] The legislation limits who may file an appeal regarding reclamation certificates to the company requesting a reclamation certificate if it is denied or cancelled, and in the case where the reclamation certificate is issued, the appeal right is limited to those who received a copy of the reclamation certificate.

[25] The appeal before the Board is an unusual set of circumstances. The property at this time is currently owned by 1330075 Alberta. However, there are a number of *lis pendens* filed on title against the property, including one filed by the Appellant. The Appellant explained bankruptcy proceedings are underway against 1330075 Alberta. Depending on the result of the bankruptcy proceedings, the property could revert back to the Appellant. Although there is uncertainty at this time as to what will be the final result of the bankruptcy proceedings, the Appellant raised relevant concerns regarding whether the Certificate should have been issued and

³ Section 1(f) of the Regulation defines “party” as:

- “(i) the person who files a notice of appeal that results in an appeal,
- (ii) the person whose decision is the subject of the notice of appeal,
- (ii.1) where the subject of the notice of appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the *Water Act*, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and
- (iii) any other person the Board decides should be a party to the appeal.”

⁴ “*Lis pendens*” is defined as:

“A pending suit. Jurisdiction, power, or control which courts acquire over property in litigation pending action and until final judgment....

Purpose of ‘lis pendens’ is to notify prospective purchasers and encumbrancers that any interest acquired by them in property in litigation is subject to decision of court and while it is simply a notice of pending litigation the effect thereof on the owner of the property is constraining.”

See: Black’s Law Dictionary, 6th ed., s.v. “*lis pendens*”.

how the concerns would be addressed if the property reverts back to the Appellant and it had lost its right to appeal.

[26] The Board notes 1330075 Alberta has now filed its own Notice of Appeal. However, should the foreclosure occur before the appeal is heard, 1330075 Alberta may withdraw its appeal because it no longer has an interest in the property, or the Certificate Holder might argue the appeal should be dismissed because 1330075 Alberta no longer owns the property. If either of these scenarios should occur, and the property has reverted back to the Appellant, then the Appellant would not have a right to appeal. The appeal period would have elapsed and the Appellant would have no recourse to have its concerns addressed.

[27] In its submission, the Certificate Holder did not argue the Appellant did not have an interest in the property, only that under section 91(1) of EPEA, the Appellant does not have a right of appeal. The Director did not object to including the Appellant as a party to the appeal.

[28] Under section 145(b), the Director had the option to provide a copy of the Certificate to the Appellant. The Appellant filed a *lis pendens* on title on January 19, 2012, after the Certificate was issued, so the Director could not have known that legal action had started against the existing landowner. The Board believes it is reasonable to assume the Director may have provided a copy of the Certificate to the Appellant had he been aware of the pending legal actions and the possibility the Appellant may regain ownership of the property.

[29] The Board finds the Appellant has a genuine, legal interest in the property subject to the appeal. Given the circumstances in this appeal, the Board accepts the Appellant is directly affected and should be given the right to appear before the Board. Therefore, the Board accepts the Notice of Appeal filed by the Appellant.

V. DECISION

[30] The Board accepts the Notice of Appeal filed by the Appellant. The Appellant has a registered legal interest in the property at issue in the appeal and a genuine interest in ensuring the property is reclaimed properly.

Dated on December 19, 2012, at Edmonton, Alberta.

“original signed by”

D.W. Perras
Chair