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# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Report and Recommendations

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Date of Report and Recommendations – June 18, 2014

**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** a notice of appeal filed by Orest Werenka with respect to the issuance of Reclamation Certificate No. 00291862-00-00 to Advantage Oil and Gas under the *Environmental Protection and Enhancement Act* by the Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: *Werenka v. Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Advantage Oil and Gas* (18 June 2014), Appeal No. 11-061-R (A.E.A.B.).

**BEFORE:**

Mr. Eric McAvity, Q.C., Panel Chair;  
Justice Delmar Perras (Retired), Board Chair;  
and Mr. Jim Barlishen, Board Member.

**BOARD STAFF:**

Mr. Gilbert Van Nes, General Counsel and  
Settlement Officer; Ms. Denise Black, Board  
Secretary; and Ms. Marian Fluker, Associate  
Counsel.

**SUBMISSIONS BY:**

**Appellant:**

Mr. Orest Werenka, represented by Mr.  
Raymond Strom.

**Certificate Holder:**

Advantage Oil and Gas Ltd., represented by  
Mr. Daron Naffin, Bennett Jones LLP.

**Inspector:**

Ms. Heather Jones, Inspector, Northern  
Region, Operations Division, Alberta  
Environment and Sustainable Resource  
Development, represented by Ms. Wendy  
Thiessen, Alberta Justice and Solicitor  
General.

**WITNESSES:**

**Certificate Holder:**

Mr. Bruce Johnson, Salix Resource  
Management Ltd.

**Inspector:**

Ms. Heather Jones, Northern Region,  
Operations Division, Alberta Environment and  
Sustainable Resource Development.

## EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued a Reclamation Certificate to Advantage Oil and Gas Ltd. under the *Environmental Protection and Enhancement Act*. The certificate was issued with respect to a wellsite located in Smoky Lake County. The landowner, Mr. Orest Werenka, appealed the issuance of the certificate.

The Environmental Appeals Board (the Board) held a hearing to determine if the certificate was properly issued. At the commencement of the hearing, Mr. Werenka stated he was unwilling to participate in the hearing and would not be providing evidence. He stated that he did not believe the application for the Reclamation Certificate was valid and, therefore, the issuance of the certificate was invalid. Mr. Werenka also requested an adjournment to retain legal counsel and experts.

The Board denied Mr. Werenka's adjournment request as it was presented without any prior notice, and a significant amount of time had elapsed between the scheduling of the hearing in October 2013 and the actual hearing date in May of 2014. Mr. Werenka chose not to exercise his right to present evidence and left the proceedings.

The Board heard evidence from AESRD and Advantage Oil and Gas Ltd.

The application was sent to the address registered on the title certificate, which is considered sufficient service under the legislation. Although the application was sent to AESRD one day before the 30 day time period after providing notice to the landowner, this did not invalidate the Reclamation Certificate since AESRD did not review the application until well past the 30 days. Concerns raised by Mr. Werenka regarding the timing of the notice of the application were sufficiently remedied by subsequent actions of AESRD, which included two site assessments completed by two different inspectors. As well, the appellant, Mr. Werenka, was given many opportunities to provide input into whether the site met the reclamation criteria.

Mr. Werenka failed to meet the evidentiary onus of demonstrating the site did not meet the applicable reclamation criteria. Based on the record, submissions, and evidence presented, the Board found the site met the reclamation criteria, and the Board recommended the certificate be confirmed.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's report and recommendations in relation to an appeal filed by Mr. Orest Werenka (the "Appellant"). Alberta Environment and Sustainable Resource Development ("AESRD") issued Reclamation Certificate No. 00291862-00-00 (the "Certificate") to Advantage Oil and Gas Ltd. (the "Certificate Holder") for a wellsite and access road located in Smoky Lake County. The Appellant, who is the landowner, appealed the issuance of the Certificate.

[2] The Environmental Appeals Board (the "Board") held a mediation meeting via telephone conference, but no resolution was reached. The Board then held a hearing to determine the issue: "Was the Reclamation Certificate properly issued? In other words, does the site meet the reclamation criteria?"

[3] The applicable criteria used to determine if the site was properly reclaimed were the "Reclamation Criteria for Wellsites and Associated Facilities – 1995 Update" (the "Criteria").

[4] Written submissions were received from the Appellant, Certificate Holder, and AESRD. However, at the start of the hearing the Appellant stated he was unwilling to participate in the hearing. He argued the Certificate should not have been issued before a complete application was provided and AESRD did not follow its own guidelines. The Appellant said he did not receive a copy of the application until after the Certificate was issued. The Appellant also asked for an adjournment to seek legal counsel and an expert (an agrologist).

[5] After hearing comments from all of the parties, the Board agreed to hear evidence on the issue of whether the application for the Certificate was complete prior to hearing submissions on whether the site met the Criteria. The Board denied the adjournment request given the amount of time between the setting of the hearing on October 17, 2013, and the hearing dates, May 22 and 23, 2014, and given the appeal was filed in October 2011. The Appellant choose not to exercise his right to present evidence and left the proceedings.

[6] The Board heard evidence and oral arguments from the Certificate Holder and AESRD on whether the application was complete and whether the Certificate was properly

issued. Based on the record, written submissions, and oral evidence, the Board recommended the issuance of the Certificate be confirmed.

## **II. BACKGROUND**

[7] On August 9, 2011, the Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Inspector”), issued the Certificate under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), to the Certificate Holder with respect to the Navigo Whitford 10-33-57-14 wellsite and access road (the “Lease” or the “Site”) located at NE-33-57-14 W4M in Smoky Lake County.

[8] On October 7, 2011, the Board received a Notice of Appeal from the Appellant.

[9] On October 13, 2011, the Board wrote to the Appellant, the Certificate Holder, and the Inspector (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Certificate Holder and the Inspector of the appeal. The Board asked the Inspector to provide a copy of the documents upon which her decision was based (the “Record”). The Board also requested the Parties to provide available dates for a mediation meeting, preliminary motions hearing, or a hearing.

[10] On November 8, 2011, the Board received a copy of the Record. The Board provided a copy of the Record to the Parties on November 14, 2011.

[11] On November 23, 2011 and January 11, 2012, the Appellant requested additional time to consider how to proceed with his appeal. The Board granted the extensions.

[12] On March 8, 2012, the Board requested the Inspector and Certificate Holder to advise the Board when site visits would be completed.

[13] On March 23, 2012, the Certificate Holder advised the Board that the Certificate Holder did not intend to conduct a site visit. AESRD staff conducted site visits on May 9 and June 4, 2012.

[14] A mediation meeting was held on September 4, 2012, via conference call. No resolution was reached.

[15] On November 2, 2012, the Board notified the Parties that, based on the dates provided, the hearing was scheduled for March 19, 2013.

[16] The Notice of Hearing was published in the Lamont Farm 'n' Friends and Redwater Review to notify the public of the hearing and to ask members of the public who wished to make representations on the appeal to submit a request to the Board. A copy was provided to Smoky Lake County to place on its public bulletin board or website. Notice of the hearing was also posted on the Government of Alberta and Board websites. The Notice of Hearing was provided to the Public Affairs Bureau. No intervenor requests were received.

[17] On January 29, 2013, the Inspector requested an adjournment of the hearing in order that a further site visit take place because of concerns regarding one soil depth measurement collected by the previous inspector in June 2012, which had not met the Criteria. The Appellant and Certificate Holder both supported the adjournment request. On January 30, 2013, the Board granted the adjournment.

[18] On March 7, 2013, the Appellant requested interim costs of \$12,000.00 to \$15,500.00 for lawyer's fees, experts, travel, and accommodation. On March 14, 2013, the Board notified the Appellant that it would not award interim costs since the hearing scheduled for March 19, 2013, had been cancelled, but he could apply for interim costs if the hearing was rescheduled. The Board also advised that if he intended to claim final costs, the Appellant was to tell the Board at the end of the hearing during his closing comments.

[19] The Inspector conducted site inspections on July 8 and 17, 2013.

[20] On September 6, 2013, the Inspector confirmed the reclamation criteria were satisfied and the Certificate was properly issued.

[21] On October 1, 2013, the Board wrote to the Parties noting a telephone conversation held with the Appellant in which he told the Board he was not available for a hearing until May or June 2014. He advised he needed the time because there was more work to be done and he had to determine when witnesses would be available.

[22] On October 17, 2013, the Board notified the Parties that, based on the available dates provided, the hearing would be held on May 22, 2014.



[23] On November 4, 2013, the Appellant requested interim costs of \$18,000.00. He advised the Board he intended to submit a full costs application at the hearing.

[24] On November 5, 2013, the Board asked the Appellant for further information regarding his interim costs request. No response was received.

[25] On February 18, 2014, the Appellant wrote to the Board requesting interim costs.

[26] On February 24, 2014, the Appellant requested an adjournment of the May 22, 2014 hearing in order to allow him to act as an observer during the presidential elections in the Ukraine.

[27] On March 3, 2014, the Board wrote to the Parties stating it did not support the adjournment request primarily due to the length of time it had taken to deal with the appeal. It asked the Certificate Holder and Inspector to provide responses to the adjournment request.

[28] On March 4, 2014, the Board notified the Appellant that his application for interim costs was denied because it contained insufficient information.

[29] The Board received responses regarding the adjournment request from the Certificate Holder on March 6, 2014, and from the Inspector on March 10, 2014.

[30] On March 10, 2014, the Appellant withdrew his request for an adjournment.

[31] On March 17, 2014, the Appellant notified the Board of his intent to ask for final costs at the hearing.

[32] On March 18, 2014, the Board instructed the Appellant to include his request for costs in his written submission and to confirm his intent to ask for costs at the hearing during closing comments.

[33] On April 17, 2014, the Appellant asked the Board to: (1) compel a witness (a student who attended one Site visit with AESRD staff) to attend the hearing; (2) require the Inspector to name all AESRD staff who entered his lands from January 1, 2012 to the present; and (3) have AESRD produce certain documents. On April 24, 2014, the Board notified the Parties these requests were denied. The Board stated it uses its subpoena powers only where the evidence being sought is relevant and necessary to determining the issues of the appeal, so the

Board did not require the attendance of the AESRD summer student nor the information on AESRD personnel who entered his lands. The Board denied the document production request given the Inspector had provided a complete Record of the information relied upon to make the decision to issue the Certificate, and the Appellant had not identified any specific documents in his request.

[34] On April 22, 2014, the Appellant requested the hearing be held over a two-day period. After receiving comments from the Inspector and Certificate Holder, the Board notified the Parties on May 1, 2014 that the hearing would be held on May 22 and 23, 2014.

[35] The Board received written submissions from the Appellant on April 23, 2014, and the Board sent copies to the Certificate Holder and Inspector for delivery on April 28, 2014. The Board received written submissions from the Certificate Holder on April 25, 2014, and the Inspector on April 28, 2014. The Board acknowledged receipt of the submissions and instructed the Parties to notify the Board if they did not receive a copy of the submissions from the other Parties. None of the Parties indicated to the Board that they did not receive the other Parties' submissions.

[36] On May 13, 2014, the Certificate Holder advised the Board that two separate attempts to deliver its submission to the Appellant had been unsuccessful. On May 13, 2014, the Board sent copies of the Certificate Holder's and the Inspector's submissions to the Appellant.

[37] The hearing was held on May 22, 2014, in Edmonton.<sup>1</sup>

### **III. SUBMISSIONS**

#### **A. Appellant<sup>2</sup>**

[38] The Appellant stated he was not given notice of the intent to terminate the lease and he was not served with a copy of the application for the Certificate as required under the

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<sup>1</sup> As the Appellant did not stay for the hearing, the proceedings were completed in one day.

<sup>2</sup> The summary of the Appellant's submission is taken from his written submission provided to the Board on April 23, 2014, and provided to the other Parties on April 28, 2014.

Upstream Oil and Gas Reclamation Certificate Application Guidelines (the “Guidelines”).<sup>3</sup> The Appellant said he received a copy of the application seven months after the Certificate Holder applied for the Certificate and two months after the Certificate was issued. The Appellant explained he lives in Toronto and has always used his Toronto address in dealings with the surface lease.

[39] The Appellant argued the application was wrongfully accepted by the Inspector.

[40] The Appellant disagreed with the results found in the report prepared by Mr. Kale Bromley (the “Bromley Report”), a former AESRD inspector. The results in the Bromley Report were based on his independent site assessment completed after two site visits in 2012, which found the Site met the Criteria.

[41] The Appellant stated he has never met anyone from Salix Resource Management Ltd. (“Salix”), the company that completed the Detailed Site Assessment in 2010 and submitted the application for the Certificate on behalf of the Certificate Holder.

[42] The Appellant said it was not until September 28, 2011, that he became aware the Certificate was issued and he had not yet received a copy of the application package. The Appellant said he received the application package on October 19, 2011, minus the Acknowledgement of Information Disclosure Form (“Acknowledgement Form”) and the Upstream Oil and Gas Facility Complaint Form (the “Complaint Form”).

[43] The Appellant explained the land on which the Site is located was used for agricultural farming, a woodlot, and recreational purposes. The Appellant described the soils as loam with some black soil, sand, muskeg, and peat moss. The Appellant said there are some areas that provide a good source of sand and gravel.

[44] The Appellant said the Site was cultivated and sown into tame hay prior to construction, but now the Site has trees, shrubs, and weeds. The Appellant stated the vegetation

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<sup>3</sup> The Board notes the second landowner on the Land Title Certificate is the estate of Mr. Silver Werenka. The address is listed on the Land Title Certificate for the estate as Vilna, Alberta, and no notice of the application or the Certificate was provided to the estate. As the Appellant was listed as joint tenant on the Land Title Certificate, he would have the beneficial interest in the property.

is poor, and there are bare spots, mole hills, big rocks, and mounds of dirt. The Appellant said the Site needs to be cleaned and contoured and, in its current state, is unusable for farming.

[45] The Appellant explained the land is used for a number of purposes including: (1) primarily for growing grain, grass seed, and hay; (2) pasture; (3) a tree farm; (4) lumber; and (5) recreational use and vegetable gardens. The Appellant said there are also wildlife, mushrooms, and wild berry plants.

[46] The Appellant said he does not use or allow the use of pesticides or herbicides on his farm, and the farm is operated using organic farming principles.

[47] The Appellant stated that when he inspected the property in October 2011, after receiving notice the lease was terminated, he found the gates broken and unlocked. The Appellant said he could not use the access road because of fallen trees and much of the access road was overgrown with trees. The Appellant said the Site was not maintained and was not returned to a productive and agriculture-ready state.

[48] The Appellant stated that, at the end of the lease, the Certificate Holder was to return the Site clean, cultivated, and reseeded into tame hay of the landowner's choice.

[49] The Appellant explained that a seismic line ran through the Site in 2005, damaging the access road by compacting the soil and damaging the vegetation. The Appellant said he filed a complaint with AESRD and it was investigated.

[50] The Appellant explained the original lessee, Navigo Energy, used Kenton Environmental ("Kenton") to maintain the Site. The Appellant explained that Kenton called him in 2004 regarding the reclamation of the Site. He said they discussed importing some topsoil, but Kenton could not guarantee the soil was free from contamination so the Appellant agreed to provide the topsoil to ensure it was not contaminated.

[51] The Appellant was advised by Kenton that it would repair the road approach, fix the access road, and would reseed the Site to a grass mixture he agreed to. Kenton was in the process of installing the new steel gate and posts.

[52] The Appellant said Navigo put up a perimeter fence on the Lease after he made numerous requests.

[53] The Appellant stated the reclamation work completed by Kenton is not known and the results were not provided to him.

[54] The Appellant stated that, in 2007, someone spread debris northeast of the Lease into the willow bushes on the Appellant's property. He contacted Kenton asking the debris be removed, but he did not receive a call back.

[55] The Appellant explained that when Mr. Kale Bromley, former inspector for AESRD, took over the file, the Appellant told Mr. Bromley the Certificate Holder had not provided the Appellant with a copy of the application and the estate of his late brother, Mr. Silver Werenka, also had not received a copy.

[56] The Appellant noted the Certificate Holder did not wait the required 30 calendar days after serving him before forwarding the application to the Inspector.

[57] The Appellant stated Mr. Bromley provided him with two forms missing from the application the Certificate Holder sent to him on October 19, 2011, specifically the Acknowledgement Form and the Complaint Form.

[58] The Appellant said he attended the Site inspection with Mr. Bromley on May 9, 2012, but Mr. Bromley would not listen to his complaints regarding the approach or gate. The Appellant explained he pointed out: (1) the area of solid tansy on the access road; (2) how the access road was obstructed by trees; (3) that shrubs extended to at least 80 percent of the access road in some areas; (4) contouring problems; (5) rocks; (6) mole hills; (7) weeds; and (8) poor vegetation growth on the access road. According to the Appellant, Mr. Bromley said the Appellant was responsible for the mole hills, and the weeds came from private lands. The Appellant said Mr. Bromley documented the obstruction and debris area on the access road only after the Appellant insisted.

[59] The Appellant stated he told Mr. Bromley the land was used for growing grain and hay.

[60] When asked by the Appellant about the possibility there had been a pit created into which sludge, garbage, and other waste had been buried, Mr. Bromley told him that he was

not looking for pits, would not dig up any pits and was not looking for offsite spoils. According to the Appellant, he was told that if this was an issue, he could sue the Certificate Holder.

[61] The Appellant stated there was no continuity in the reclamation work started by Navigo and carried on by the Certificate Holder. The Appellant said they discussed the reclamation work on the access road that was necessitated by the seismic survey in 2005, and Mr. Bromley said it was repaired but he could not show the Appellant where the work had taken place (i.e. three years earlier).

[62] The Appellant stated Mr. Bromley told him that he was going to approve the Certificate even though at that time the inspection was not complete.

[63] The Appellant explained that after Mr. Bromley's May 9, 2012 inspection, he discovered two pylons hidden in the grass at the gate so he filed a second complaint letter.

[64] The Appellant stated he showed Mr. Robert Cole, an AESRD employee who attended the July 8, 2013 Site inspection with the Inspector, the contrast in vegetation from well centre to the north boundary, areas of poor vegetation, strawberry growth, mole hills, bare spots, and stunted areas of grass. The Appellant also showed areas with contouring problems and areas with buffalo berry shrubs. The Appellant said the contouring was such that a person could not drive or run machinery on it.

[65] The Appellant stated he also pointed out the contrast in the vegetation between the access road and adjacent lands. The Appellant said the adjacent lands had good vegetation of a mixture of alfalfa and brome whereas the access road had poor vegetation. The Appellant stated the soil on the access road was sandy and compacted. According to the Appellant, Mr. Cole told him that soil had been brought in to repair the access road, but the Appellant stated he did not know anything about the reclamation of the access road.

[66] The Appellant said he also pointed out the pit area on the northwestern corner of the Lease.

[67] The Appellant stated the Inspector told him that she had done a basic inspection, including digging six holes on-site and four holes off-site.

[68] The Appellant stated he pointed out the two pylons near the road approach to the Inspector.

[69] The Appellant stated that at the July 17, 2013 Site inspection, the Inspector asked the Appellant if a representative from Salix could join the inspection. The Appellant denied the request. The Appellant said the Certificate Holder had been offered access to the Site previously, but it declined the offer.

[70] The Appellant claimed the Inspector had told him that she would not be using the Bromley Report and that she was doing a new and independent inspection report. The Appellant noted the Inspector used information from the Bromley Report in her inspection report (the "Jones Report").

[71] The Appellant told the Inspector there had been no continuity between the reclamation work started by Navigo and continued by the Certificate Holder. The Appellant said there needs to be full disclosure of all reclamation work completed.

[72] The Appellant stated his brother, Mr. George Werenka, witnessed a work crew who had trespassed onto the Appellant's lands depositing debris on private property to the east of the Lease.

[73] The Appellant stated he told the Inspector about his concerns regarding contamination at the pit site. He said he saw discolored soil that could have been cement and there was another dark red substance. The Appellant said the Inspector told him the Lease was not contaminated.

[74] The Appellant acknowledged the Inspector sent a copy of her inspection results to him on September 6, 2013, but Mr. Cole's information had not been included.

[75] The Appellant argued the Bromley Report and Jones Report were biased, unfair, and incomplete. The Appellant stated inspection information was not included in the Jones Report.

[76] The Appellant stated he did not receive a copy of the application package for the Certificate from Salix, but he was provided a copy of the application on October 19, 2011, after

the Certificate was issued. The Appellant noted the Certificate Holder and Inspector did not consider the estate of Silver Werenka in the process.

[77] The Appellant stated that non-oilfield waste was buried on-site and off-site, but details of the waste disposal by the Certificate Holder are unknown and have not been disclosed. The Appellant said he has a witness who observed the Certificate Holder depositing spoils from the Site onto private lands.

[78] The Appellant disputed whether Salix installed a new gate. He explained that pylons were left on and off the access road, creating a hazard. The Appellant stated the Certificate Holder did not acknowledge the pylons. The Appellant said the Certificate Holder moved the gate to the west so it is now partially on private land. The Appellant noted releases are required for the gate and access road, but the application submitted to the Inspector did not have the releases checked off.

[79] The Appellant stated he discussed contamination at the Site with Navigo Energy in 2004 and with Salix.

[80] The Appellant stated the application was signed and submitted by the Certificate Holder before waiting the 30 days after providing a copy of the application to the landowner. The Appellant argued the Certificate Holder did not include a complete record of all the reclamation work performed over the nine years the lease was held. The Appellant stated the application was incomplete and should not have been accepted by the Inspector.

[81] The Appellant stated construction, soil disturbances, and reclamation occurred during the spring, summer, and fall seasons. He said there was heavy vehicle traffic and machinery on the Site and private lands. The Appellant stated that in 2005, the access road was severely damaged by seismic operations with shot holes and ripping up and compacting the access road. The Appellant stated the access road has been rutted, compacted, and the grasses damaged. The Appellant noted the Certificate Holder purported to have worked on the disturbed lands in 2009.

[82] The Appellant said the Certificate Holder allowed trees to grow onto the road and the land is unusable for agricultural purposes.



[83] The Appellant argued the Certificate Holder did not explain what happened to topsoil that was taken away and did not respond to issues such as contouring of the Site, contamination, or the removal of rocks.

[84] The Appellant said the Certificate Holder did not interview Navigo Energy, Sound Energy, or Kenton Environmental.

[85] The Appellant stated Salix did not:

1. acknowledge the existence of a pit;
2. explain where the spoils were disposed;
3. explain what was done to reclaim the access road;
4. explain where and why Navigo fenced off two areas of the Lease in 2004-2005;
5. report all areas of soil disturbances;
6. provide before and after reclamation photographs; and
7. provide information as to the location of pits, disposal areas or burial of spoils and cement, and contamination.

[86] The Appellant argued Salix did not complete a diligent investigation into the reclamation of the Site, did not address the Appellant's concern regarding contamination, and did not disclose activities on and off the Site.

[87] The Appellant explained he discussed his concerns about contamination with Salix, and he discussed his concern regarding the importation of soils and contaminated soils with Kenton. The Appellant said Kenton was to remove the contaminated soil. The Appellant noted Salix did not comment on Kenton's reclamation work, leaving unanswered questions regarding the reclamation work done by Kenton.

[88] The Appellant stated the access road was damaged in 2005 and Salix purported to have worked on the access road in 2009. The Appellant said he was not informed or consulted by Salix regarding the reclamation that was done on the access road.

[89] The Appellant argued a Phase II assessment must be completed to confirm the Site is not contaminated given the number of unknowns.

[90] The Appellant argued the application for the Certificate was compromised for the following reasons:

1. Salix did not provide photographs of the Site for the pre-drilling period, drilling period, and post-drilling period even though Kenton has photographs of the Site;
2. Salix did not provide photographs of the areas reclaimed, including on and off the Lease and the access road;
3. Salix did not explain what soils were used, where the soil was replaced, and the seed mixture that was used;
4. Salix did not inform or consult the Appellant regarding the reclamation, the reclamation policies, or the procedures required of the Certificate Holder;
5. the Appellant was not included in the reclamation process; and
6. the Certificate Holder did not meet with the Appellant on or off the Site.

[91] The Appellant stated soil on the Lease and access road were disturbed after the drilling was completed and there are still issues.

[92] The Appellant noted the Certificate Holder did not know what fertilizers were used on the Site so the soils should have been tested.

[93] The Appellant stated the issue of contamination remains, and the soils on the Site need to be tested for herbicides and sterilants.

[94] The Appellant noted the reclamation work done by Navigo was not investigated or included in the Salix report, including work on the access road, bringing in soil, fencing off two areas, and seeding areas.

[95] The Appellant stated there was never any discussion with him on the reclamation work so he did not accept the reclamation work or soil amendments.

[96] The Appellant noted the "Plant Height" and "Plant Density" sections of the application form were not answered by the Certificate Holder and instead plant species found on the Site were listed. The Appellant stated the plant species listed do not reflect the actual plants on the Site. The Appellant argued information about plant height and density is essential, and the Certificate Holder deliberately amended the standard form in order to avoid recording

essential information regarding vegetation health and the productivity of the tame hay. The Appellant argued that, without this information, the Certificate is compromised.

[97] The Appellant stated Salix did not report the following:

1. a large area of common tansy (a noxious weed);
2. the large areas of compacted soil;
3. a large area of land that is grown into shrubs, making it useless for agriculture; and
4. areas of the Site covered with various types of trees, shrubs, and weeds.

[98] The Appellant stated the plant assessment is misleading and not true to the actual conditions. He said there is little tame hay and the land is of no use for agricultural production. The Appellant said the health of the vegetation on the Lease is "...poor and devastating."<sup>4</sup>

[99] The Appellant noted AESRD conducted four site inspections and issued two reports. The Appellant said AESRD avoided recording detailed information regarding plant species and vegetation height and density.

## **B. Certificate Holder**

[100] The Certificate Holder argued the Appellant's concerns are without merit and no valid reason was provided to question the validity of the issuance of the Certificate. The Certificate Holder stated the Certificate was issued in accordance with the applicable legislation and regulatory requirements, and the Site meets or exceeds applicable criteria.

[101] The Certificate Holder noted that section 137 of EPEA requires operators to obtain a reclamation certificate for land used or held in connection with a well,<sup>5</sup> and this

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<sup>4</sup> Appellant's submission, received April 23, 2014, at Briefing Notes, at Tab 4, page 25.

<sup>5</sup> Section 137 of EPEA states:

- "(1) An operator must
- (a) conserve specified land,
  - (b) reclaim specified land, and
  - (c) unless exempted by the regulations, obtain a reclamation certificate in respect of the conservation and reclamation.
- (2) Where this Act requires that specified land must be conserved and reclaimed, the conservation and reclamation must be carried out in accordance with

requirement is repeated in section 3(2) of the *Conservation and Reclamation Regulation*, Alta. Reg. 115/93 (the “Regulation”).<sup>6</sup> The Certificate Holder stated AESRD provides application forms for reclamation certificates, and the information provided on the form determines whether a reclamation certificate should be issued. AESRD published the “Reclamation Criteria for Wellsites and Associated Facilities – 1995 Update” (the “Criteria”) to be used in conjunction with the application form in order to assess reclamation success and whether a reclamation certificate should be issued for the site.<sup>7</sup> The Certificate Holder noted that, under section 6(2) of the Regulation, a reclamation inquiry does not have to be conducted where the Director considers the application form to be complete and accurate.<sup>8</sup>

[102] The Certificate Holder explained the Site and surrounding lands are primarily pasture lands, portions of which at some point in time, had been broken. The Certificate Holder stated the Site was assessed by Salix in 2010, and at that time neither the Site nor surrounding lands had been grazed for several years so that a natural encroachment of woody species had been taking place.

[103] The Certificate Holder said a pre-construction assessment was completed in 2002 by Kenton, and this assessment recommended minimal disturbance of the Site due to high sand content in the soil.

[104] The Certificate Holder explained:

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- (a) the terms and conditions in any applicable approval or code of practice,
  - (b) the terms and conditions of any environmental protection order regarding conservation and reclamation that is issued under this Part,
  - (c) the directions of an inspector or the Director, and
  - (d) this Act.”

<sup>6</sup> Section 3(2) of the Regulation provides:

“A person who, pursuant to a registration or notice, as applicable, carries on an activity referred to in Column A of the Schedule shall comply with the corresponding Code of Practice in Column B of the Schedule in the carrying on of that activity.”

<sup>7</sup> Although AESRD has published the 2010 Reclamation Criteria for Wellsites and Associated Facilities, the 1995 Criteria apply to this specific site because it was assessed prior to January 1, 2011.

<sup>8</sup> Section 6(2) of the Regulation provides:

“Notwithstanding subsection (1), a reclamation inquiry need not be conducted where

- (a) the Director has received an application for a reclamation certificate in respect of an activity referred to in section 1(t)(i), and
- (b) in the Director’s opinion, the application is complete and accurate.”

1. in 2002 Navigo Energy Inc. leased 3.78 acres (2.07 acres for the wellsite and 1.71 acres for the access road) from Silver and Orest Werenka;
2. in December 2002, a well was drilled over a period of three days under frozen conditions to minimize the disturbance;
3. all drilling waste was land-sprayed;
4. the well never produced any product and was abandoned on June 17, 2003; and
5. after abandonment, surface soils in the disturbed areas were replaced, including at well centre.

[105] The Certificate Holder stated that, as part of the reclamation certificate application process, Salix conducted a Phase I environmental site assessment that included: (1) a Site visit, conducted on October 1, 2008; (2) aerial and satellite imagery review; and (3) an interview with the Appellant on June 2, 2008.

[106] The Certificate Holder said that, in October 2009, Salix repaired rutting on the access road, caused by the seismic survey in 2005, by spreading and contouring topsoil and seeding the portions of the access road that had been rutted. The Certificate Holder stated two steel gates and posts were replaced on the property line at the request of the Appellant.

[107] The Certificate Holder explained Salix also conducted a detailed site assessment on July 22, 2010, and the Appellant was interviewed as part of the detailed site assessment.

[108] The Certificate Holder stated that, on February 14, 2011, it mailed a package containing a copy of the application and all other required documents to the Appellant's Edmonton address found on the Land Title Certificate for the land where the Lease is located. The application was finalized on March 16, 2011, and was received by the Inspector on March 17, 2011.

[109] The Certificate Holder noted Mr. Bromley inspected the Lease on May 9, 2012, and June 4, 2012, to assess the Appellant's concerns. Mr. Bromley produced the Bromley Report which confirmed the Certificate had been properly issued.

[110] The Certificate Holder stated that, on July 8 and 17, 2013, two AESRD reclamation inspectors went to the Site and collected additional information, and the resultant "Jones Report" also confirmed the Certificate had been properly issued.

[111] The Certificate Holder stated the onus is on the Appellant to demonstrate the Site has not been reclaimed properly or that there are grounds to reverse the issuance of the Certificate.

[112] The Certificate Holder submitted the Appellant's concerns are without merit and are insufficient to discharge his onus of demonstrating the Site was not properly reclaimed. The Certificate Holder further submitted the Certificate was properly issued, and the events that occurred after the Certificate was issued (i.e. the independent investigations by two AESRD inspectors confirming the Criteria had been met) served repeatedly to demonstrate the Certificate was validly issued.

[113] The Certificate Holder noted the Appellant's concerns regarding the adequacy of the reclamation included:

1. the presence of rocks;
2. mole hills;
3. rutting;
4. poor gates and posts;
5. an alleged pit for disposal of waste and sludge;
6. soil and debris on the surrounding lands;
7. encroachment of woody and other species;
8. type of vegetation on the Site;
9. blown down trees;
10. repairs needed to the road approach;
11. inadequate fencing; and
12. failure to include results of the reclamation work in the application.

[114] The Certificate Holder submitted that many of the Appellant's concerns are vague and are unsubstantiated by any investigations of his own or the findings of Salix or AESRD. The Certificate Holder noted that, in the Jones Report, it was recorded the Appellant was unable to locate any soil disposal piles or any evidence of a pit used for the disposal of waste or sludge.

[115] The Certificate Holder submitted the Board should disregard the Appellant's concerns that have not been substantiated by any credible, tangible evidence.

[116] The Certificate Holder listed the Appellant's concerns that it considered had nothing to do with oil and gas activity at the site and are irrelevant for the purposes of determining if the Criteria are met:

1. molehills were found off-site in similar quantities as the Lease and are not related to oil and gas activity and are not under the jurisdiction of EPEA;
2. woody species encroachment is likely due to the lack of annual cropping or grazing and is not related to oil and gas activity;
3. blown down trees are not related to the oil and gas activity;
4. snowberry and strawberry encroachment are likely natural occurrences;
5. a specific seed mix as desired by the Appellant is not a requirement of the Criteria;
6. large rocks in the soil profile suggest large rocks are naturally occurring in the area and the Lease was naturally rocky; and
7. the road approach, gates, and fencing are outside the jurisdiction of the Inspector is assessing reclamation efforts.

[117] The Certificate Holder submitted these concerns should be disregarded.

[118] The Certificate Holder stated the concerns about not including the results of the previous reclamation work carried out at the Site in the application are without merit. The Certificate Holder said it provided all of the information required by the Guidelines regarding previous environmental site assessments conducted at the Lease. The Certificate Holder noted there is no requirement to provide full disclosure of previous work.

[119] The Certificate Holder explained the concerns regarding rutting of the access road and the gates and posts at the Site were dealt with by the Certificate Holder. According to the Certificate Holder, the rutting on the access road was repaired and the gates and posts were replaced in October 2009. The Certificate Holder noted there was no regulatory requirement to replace the gates and posts.

[120] The Certificate Holder submitted the Appellant's concerns regarding the adequacy of the reclamation were unsubstantiated, unrelated to its activities on the Site, irrelevant to assessing whether the Criteria were met, or were addressed by corrective action undertaken by the Certificate Holder.

[121] The Certificate Holder stated the Appellant was provided with the application and other required documents in accordance with the Guidelines. The Certificate Holder noted the Certificate of Title registered at Land Titles listed an Edmonton address for the Appellant. The Certificate Holder stated a complete copy of the application as well as the Acknowledgement Form, the landowner information letter, and the Complaint Form were mailed to the Appellant at the address listed on the Land Title Certificate. The Certificate Holder included a receipt from Canada Post indicating the package was received at the address listed on the Certificate of Title by a person related to the Appellant. The Certificate Holder noted the Appellant had indicated that, although he lived in Toronto, he could be contacted at the address in Edmonton.

[122] The Certificate Holder submitted the provision of the application and all required documents was completed in accordance with the Guidelines. The Certificate Holder stated the Appellant cannot argue that he was unaware of the application, and this concern does not present a reason to question the validity of the Certificate.

[123] The Certificate Holder submitted that, even if the Appellant did not receive a copy of the application, the subsequent actions undertaken by AESRD ensured that no prejudice occurred to the Appellant as a result of any failure to receive the application and required documents.

[124] The Certificate Holder argued the only prejudice the Appellant would encounter if he did not receive the application was that he would not have been afforded the opportunity to file a Complaint Form. The Certificate Holder stated that, where a complaint is filed, the application is considered non-routine and an investigation is undertaken by the Inspector to assess the completeness of the reclamation activities.

[125] The Certificate Holder said that as a result of the Appellant's concerns, and even though the complaint was not received prior to the issuance of the certificate, AESRD carried out two complete assessments of the Site. The Certificate Holder submitted that, even though the Appellant did not receive a copy of the application, the application was subjected to a non-routine process similar to what would have occurred had the Appellant filed a complaint. The Certificate Holder submitted the site assessments carried out by AESRD corrected any error in



the Appellant's claim of non-receipt of a copy of the application prior to issuance of the Certificate and, therefore, there is no reason to question the validity of the Certificate.

[126] The Certificate Holder submitted the Appellant was aware of the efforts undertaken to obtain the Certificate. The Certificate Holder stated that events that occurred in the years leading up to the filing of the application must have alerted the Appellant that reclamation of the Site was forthcoming. The Certificate Holder referred to the two interviews Salix had with the Appellant while completing the work for the application.

[127] The Certificate Holder submitted the Appellant's concerns regarding his unawareness or lack of notification of the reclamation process or termination of the lease is without merit and does not present a reason to question the validity of the Certificate.

[128] The Certificate Holder stated it is not a requirement of the Criteria for the operator to pay for an agrologist of the landowner's choosing to inspect the reclamation work. The Certificate Holder noted the person who completed the assessment for Salix, Mr. Bruce Johnson, is a professional agrologist who has a professional responsibility to conduct his work in an unbiased manner, and additional work by another agrologist would be duplicative.

[129] The Certificate Holder submitted that none of the Appellant's concerns present a reason to question the validity of the Certificate.

[130] The Certificate Holder submitted the Certificate was properly issued. It stated the application was completed in accordance with the legislative and regulatory requirements and the Site met or exceeded all applicable standards specified in the Criteria.

[131] The Certificate Holder stated the application form was complete and accurate at the time of submission and contained all required attachments. The Certificate Holder explained the application was completed using the Criteria for cultivated lands because the Site and surrounding lands had been broken at some time. The Certificate Holder stated the Criteria requires an assessment of the: (1) landscape, including drainage, erosion, contour, stability, gravel/rocks, debris, vegetation, and bare areas; (2) soils, including quantity, distribution, quality, overall profile, water permeability restriction, aeration restrictions, and vegetation restrictions; and (3) vegetation, including species composition, density, height, and general health.

[132] The Certificate Holder stated the Detailed Site Assessment completed by Salix on July 22, 2010, shows that all parameters for landscape, soils, and vegetation met or exceeded the Criteria.

[133] The Certificate Holder explained that no on-site inquiry was required in respect of the application because the application was considered complete and accurate. The Certificate Holder stated the Certificate was issued signifying that, in the Inspector's view, reclamation of the Site was completed in accordance with section 137(2) of EPEA.<sup>9</sup>

[134] The Certificate Holder stated the two subsequent site inspections completed by AESRD confirmed the Criteria were met and, therefore, the Certificate was properly and validly issued.

[135] The Certificate Holder noted the following comments in the first site inspection assessment completed by AESRD in 2012 (the Bromley Report):

1. soils meet and exceed all minimum standards of the Criteria for quality and quantity;
2. species composition on-site and on the access road are consistent with species found off-site, upland, mid-slope, and at terrestrial locations, and meet or exceed all minimum standards of the Criteria for quality and quantity; and
3. the wellsite conforms into natural topography well with no concerns or negative impacts due to surface debris, roughness, erosion, bare areas, stoniness, or drainage. There are no operability concerns with the current condition of the Site given the end land use. Landscape meets or exceeds the minimum standards of the Criteria.

[136] The Certificate Holder noted the second site assessment completed by the Inspector in 2013 confirmed the Criteria were met and the Certificate was validly issued. The Certificate Holder referred to the following comments in the Jones Report:

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<sup>9</sup> Section 137(2) of EPEA states:

“Where this Act requires that specified land must be conserved and reclaimed, the conservation and reclamation must be carried out in accordance with

- (a) the terms and conditions in any applicable approval or code of practice,
- (b) the terms and conditions of any environmental protection order regarding conservation and reclamation that is issued under this Part,

1. based on nine holes assessed in the second inspection and supplemented by the eight holes assessed in the first inspection, the soil depths, aggregate size, and aggregate strength meet Criteria; and
2. the vegetation met Criteria for cover, species, composition, and health. Species on the site are compatible with appropriate undisturbed area east of the wellsite.

[137] The Certificate Holder stated the Site was physically assessed in accordance with the applicable legislative and regulatory requirements no fewer than three times, and at each assessment, the Site was found to meet or exceed all applicable parameters for the reclamation of wellsites and access roads.

[138] The Certificate Holder submitted the Appellant failed to present any credible evidence to demonstrate the Site was not reclaimed properly or that there are grounds to overturn the issuance of the Certificate. The Certificate Holder stated the evidence demonstrates the Certificate was properly issued, and it was confirmed by the two assessments completed by AESRD that concluded the Criteria were met.

[139] The Certificate Holder submitted the appeal should be dismissed.

**C. Inspector**

[140] The Inspector explained the well was drilled in December 2002 and abandoned in June 2003. The undeveloped access road ran from Highway 652 to the Lease.

[141] The Inspector noted the application for the Certificate was submitted by Salix on behalf of the Certificate Holder on March 15, 2011. The Inspector said the application was submitted as routine, and it indicated the Site met all requirements under the Criteria. The Inspector noted the application indicated that a Phase I environmental site assessment was conducted which determined no contamination was likely present and no oil field waste had been buried on the Site. The Inspector said the application contained a declaration that the Certificate Holder had provided the landowner with a copy of the application package and that Salix had provided the landowner with the landowner information letter, a Complaint Form, and an

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- (c) the directions of an inspector or the Director, and
  - (d) this Act.”

Acknowledgement Form. The Inspector noted the application included a postal receipt for a package sent to the Appellant at the Edmonton address indicated for him on the Land Title Certificate, and the package was signed for by “A. Kliparchuk.”

[142] The Inspector noted the Phase 1 site assessment was completed by Salix on October 1, 2008, and found:

1. the vegetation was native and tame grasses, clover, minor alfalfa, willows, sages, and some Canada thistle that needed control;
2. two fenced areas remained, one around well centre and one probably where cement returns were buried;
3. no visual signs of open or potentially buried earthen pits;
4. no evidence of spills;
5. adjacent lands were not affected by operations on the Site;
6. no apparent vegetation stress; and
7. vegetation cover was excellent and uniform and on-site vegetation was consistent with off-site vegetation.

[143] The Inspector noted a pre-construction Phase 1 Environmental Site Assessment was conducted by Kenton which recommended not to strip the Lease or access road as long as dry and frozen ground conditions persisted. Kenton noted topsoil depths ranged from 15 to 19 cm.

[144] The Inspector noted the Certificate Holder replaced surface soils around well centre and “an additional disturbed area.” In addition, the Certificate Holder repaired rutting on the access road by spreading topsoil that it had obtained from another piece of the Appellant’s lands, contouring the road, and seeding it.

[145] The Inspector noted Salix conducted a Detailed Site Assessment on July 22, 2010, and concluded the Site met landscape, soil, and vegetation requirements of the Criteria. The Inspector noted the detailed site assessment described the Lease as follows:

1. average topsoil depth on the lease was 18.3 cm compared to 17.5 cm on the controls;
2. soils were replaced as evenly as possible across the Lease;
3. soil texture, admixture, aggregate size and strength, and percentage gravel and stones pass in all grid squares;

4. vegetation on the Lease was within 80 percent of the control vegetation for height and cover; and
5. plant health was considered as good or excellent for each assessment point.

[146] The Inspector said similar comments were made regarding the access road.

[147] The Inspector stated she sent a copy of the Certificate to the Appellant on August 9, 2011.

[148] The Inspector noted Salix conducted an interview with the Appellant on June 2, 2008, where the Appellant mentioned a number of concerns. Salix conducted another interview with the Appellant on July 22, 2010. The Inspector noted the application stated the Appellant expressed concerns about the gates installed at the entrance, but he seemed satisfied with the reclamation work on the Lease. The Inspector said the application indicated the gates were repaired in September 2010.

[149] The Inspector stated AESRD learned of the Appellant's concerns with the Site after receiving notice of the Appellant's appeal of the issuance of the Certificate. The Inspector said the Appellant sent letters to Mr. Bromley on January 3 and 15, 2012, March 27, 2012, and May 31, 2012. The Inspector stated the Appellant indicated he did not receive the application or a Complaint Form so the application should not have been accepted. In addition, the Appellant expressed concerns including: (1) dumping of soil and debris; (2) land was not returned to its original condition; (3) overgrown weeds and vegetation; (4) inability to use the access road; (5) unacceptable road approach and gates; (6) soil contamination; and (7) a fencing issue.

[150] The Inspector explained Mr. Bromley visited the Site on May 9 and June 4, 2012, where he assessed the landscape, soils, and vegetation in accordance with the Criteria. He found all parameters met the Criteria.

[151] The Inspector explained she assumed responsibility of the file after Mr. Bromley left his employment with AESRD. The Inspector reviewed the Bromley Report and noted one reported soil depth measurement of 8 cm at well centre, which would not meet the minimum soil replacement depth. The Inspector visited the Site on July 8 and 17, 2013, where she assessed the

landscape, soils, and vegetation in accordance with the Criteria and found all parameters met the Criteria.

[152] The Inspector stated that, under section 137 of EPEA, an operator is required to conserve and reclaim specified land. The Inspector noted the Regulation authorizes the Director to establish standards, criteria, and guidelines for conservation and reclamation of specified lands, and in this case, the relevant criteria are the Reclamation Criteria for Well Sites and Associated Facilities – 1995 Update.

[153] The Inspector noted the Regulation states “...the objective of conservation and reclamation of specified land is to return the specified land to an equivalent land capability.” “Equivalent land capability” means:

“That the ability of the land to support various land uses after conservation and reclamation is similar to the ability that existed prior to an activity being conducted on the land, but that the individual land uses will not necessarily be identical.”<sup>10</sup>

[154] The Inspector noted that equivalent land capability does not mean the specified land must be returned to exactly the same condition that existed prior to the disturbance; it is to be reclaimed to a condition that is capable of supporting similar uses.

[155] The Inspector stated the Criteria are used to measure the success of land reclamation against pre-construction conditions or, if pre-construction data are not available, the land, soil, and vegetation adjacent to the Site are used as a comparison.

[156] The Inspector explained the Site is considered cultivated land, because it was plowed to prepare a seed bed at some point in time and it has a well-defined Ap horizon.<sup>11</sup> The cultivated land criteria apply to continuous and rotational cropping systems and hayland.

[157] The Inspector stated the Criteria require landscape, soils, and vegetation assessments. The Inspector explained the landscape criteria, such as roughness and drainage, should be assessed by looking at the site in its entirety and comparing it to its pre-disturbance

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<sup>10</sup> Section 1(e) of the Regulation.

<sup>11</sup> An “Ap horizon” is a layer of soil near the surface that has been disturbed by man’s activities such as cultivation, logging, and habitation. See: Agriculture Canada Expert Committee on Soil Survey, *The Canadian System of Soil Classification*, 2<sup>nd</sup> ed. (Agric. Can. Publ. 1646, 1987).

condition or adjacent land. The Inspector stated the soils and vegetation assessments require the soils and vegetation conditions on-site be compared to off-site conditions. The Inspector explained the Lease is divided into a grid with 20 m by 20 m squares. Soil and vegetation are assessed at a point, generally near the centre of each square and should be representative of the soils and vegetation in each square. The soils and vegetation are assessed against at least four control sites outside the disturbed area.

[158] The Inspector explained the Criteria require the access road be assessed for landscape, soils, and vegetation. Assessment points are at 100 m intervals along the access road and each access point is paired with a control point off the access road.

[159] The Inspector submitted the Site meets the Criteria and the Certificate was properly issued. The Inspector further submitted that some of the Appellant's concerns have not been substantiated or are outside the Board's jurisdiction.

[160] The Inspector submitted the Site was reclaimed to an equivalent land capability and satisfies the Criteria.

[161] The Inspector stated that she, Salix, and Mr. Bromley each assessed the: (1) landscape; (2) soil quantity, distribution, and quality; and (3) vegetation cover, species composition, and health. The Inspector noted all three concluded the Criteria were met.

[162] The Inspector noted the Bromley Report concluded the Site met or exceeded the minimum standards of the Criteria. She referred to the Bromley Report where it stated the soils were never stripped so there were no landscape concerns, and it described the Lease as conforming well with the natural topography with no negative impacts as a result of surface debris, roughness, erosion, bare areas, stoniness, or drainage.

[163] The Inspector stated she was unable to find any lessee spoil piles, and she found there was no change in landscape or contour or increase in stones when she walked towards the location where the Appellant indicated the piles were located.

[164] The Inspector explained she assessed topsoil depth, aggregate strength and size, and topsoil texture at different locations on the Lease than those assessed by Mr. Bromley, and the Inspector stated they both found the soils met the Criteria. In addition, the Inspector noted

Mr. Bromley's observation that soils on-site did not appear to have been stripped as indicated by the undisturbed soil profile and horizons and as shown in the photographs supplied by the Appellant.

[165] The Inspector concluded the soils met criteria based on the nine holes she assessed in 2013 and supplemented by the eight holes assessed by Mr. Bromley in 2012.

[166] The Inspector said that although one assessment point in the Bromley Report did not meet the minimum soil depth requirements, it was not an automatic failure to meet the Criteria. The Inspector explained she dug an additional hole at well centre to determine whether Mr. Bromley's reported 8 cm depth was an anomaly. The Inspector said she measured a soil depth of 11 cm, which met the soil replacement depth requirements. The Inspector noted Mr. Bromley's measurement was likely an anomaly due to natural variability in the soil.

[167] The Inspector noted Mr. Bromley concluded the species composition was consistent with species off-site, upland, mid-slope, and at terrestrial locations, and the vegetation met or exceeded all minimum standards of the Criteria for quality and quantity.

[168] The Inspector stated she assessed vegetation cover, species composition, and health and found the Criteria were met. She explained she compared the Lease to an undisturbed portion of the quarter section that had not been recently cultivated. The Inspector stated the species on the Site were compatible and comparable with the species found in the undisturbed area, and the Lease had 100 percent vegetation coverage with no bare areas. The Inspector noted the vegetation species composition meets reasonable land objectives for a pasture, and a specific species composition is not required under the Criteria.

[169] The Inspector submitted a number of allegations raised by the Appellant are unsupported by verifiable evidence or are outside the jurisdiction of the Inspector and the Board.

[170] The Inspector stated the onus is on the Appellant to demonstrate on the preponderance of the evidence that the Certificate should not have been issued.

[171] The Inspector said the Appellant's concerns relating to the spoil piles were not substantiated, and there was no evidence of any spoil piles.



[172] The Inspector noted the Appellant alleged there was a pit on Site in which debris, sludge, and household and mechanical garbage were dumped. The Inspector stated this concern was not substantiated by evidence. The Inspector said her assessment did not reveal any visual indicators of issues with the pit area that would affect the Site meeting the Criteria. The Inspector noted the soil texture and aggregate size and strength in the area where the Appellant indicated the pit was located were all comparable to the soil characteristics in the remainder of the Site. The Inspector stated there was no evidence that debris, sludge, or garbage had been dumped in the area.

[173] The Inspector argued the Appellant did not provide any evidence that weeds on the Site are the result of oilfield activities. The Inspector referred to the Bromley Report in which it was reported there was a large colonization of common tansy, but given it was not on the Site, it was suggested it was not brought in as a result of oilfield activities. The Inspector could not confirm if the weeds were brought in as a result of oilfield activities.

[174] The Inspector stated there was no evidence of soil contamination.

[175] The Inspector said the Appellant's concerns related to mole hills, species encroachment, and downed trees are unrelated to oilfield activities and, therefore, are not relevant to the issue of whether the Site meets the Criteria. The Inspector observed the Lease was not stripped and stockpiled or seeded, so she believed the shrub encroachment occurred naturally during the 10 years since the well was abandoned.

[176] The Inspector noted the regulatory scheme does not require the lands to be restored to exactly the same condition that existed prior to the disturbance. The Inspector explained the land is measured against the original, or adjacent, site conditions to ensure the land is capable of supporting similar land uses.

[177] The Inspector stated the composition of pasture species is not relevant to determining if the Site meets the Criteria. The Inspector said there is no specific requirement relating to seed mix, and any agreement between the Certificate Holder and the Appellant is a civil matter.

[178] The Inspector stated the Appellant's issues regarding the gate, fencing, and the road approach are outside the jurisdiction of the Inspector and the Board.

[179] The Inspector submitted the Appellant received adequate notice of the application and adequate opportunity to voice his concerns.

[180] The Inspector noted that, under section 256(1) of EPEA,<sup>12</sup> service is deemed sufficient when the document is sent by mail to the address of the registered owner shown on the assessment roll. The Inspector said the application was sent by registered mail to the Edmonton address indicated for the Appellant on the Land Title Certificate.

[181] The Inspector submitted that, if the Appellant was not provided with proper notice of the application, such defect was remedied through AESRD's process given the Appellant was given adequate opportunity to voice his concerns. The Inspector explained the purpose of providing the landowner with notice of an application is to provide an opportunity to notify the applicant and AESRD of any concerns the landowner may have.

[182] The Inspector noted the process for reviewing an application as set out in the Guidelines:

1. routine applications are reviewed to ensure completeness, the application is signed by the appropriate party, and all required documents are attached; and
2. non-routine applications undergo a completeness review and then undergo a regulatory review. The regulatory review ensures the site is in compliance with all applicable standards/guidelines and reclamation criteria and that all complaints related to the application are resolved to the satisfaction of AESRD.

[183] The Inspector explained an application is classified as non-routine if there is an unresolved landowner complaint.

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<sup>12</sup> Section 256(1) of EPEA states:

“Where any notice, request, order, direction or other document is required to be given in writing or served under this Act, it is deemed to be sufficiently given or served if it is

- (a) personally given to or served on the person to whom it is directed,
- (b) sent by mail addressed to the person to whom it is directed at the last known address for that person, or

[184] The Inspector stated that, although the application was classified as routine, the Appellant was provided with every opportunity he would have been given had his complaints been known when the application was submitted and the application was treated as non-routine.

[185] The Inspector noted the Appellant sent four letters to Mr. Bromley setting out his concerns, and the Appellant completed and submitted the Complaint Form. The Inspector also noted that two detailed site assessments were completed by AESRD, first by Mr. Bromley and then herself.

[186] The Inspector stated that even though the on-site inspection was conducted after the Certificate was issued, the end result was the same.

[187] The Inspector submitted the Appellant was not prejudiced given his concerns were heard and considered by Mr. Bromley, and both Mr. Bromley and the Inspector conducted site assessments and found the Site met the Criteria and was reclaimed to an equivalent land capability.

[188] The Inspector stated she properly and reasonably exercised her authority and discretion to issue the Certificate. The Inspector submitted the Appellant did not meet the onus of demonstrating on the preponderance of the evidence that the Certificate should be cancelled. The Inspector said the evidence indicates the Site meets equivalent land capability.

[189] The Inspector stated the Appellant received adequate notice of the Certificate Holder's application and he had adequate opportunity to make his concerns known.

[190] The Inspector requested the Board confirm the Certificate was properly issued.

#### **IV. PRELIMINARY MATTERS**

[191] At the start of the hearing, the Appellant told the Board that he did not intend to participate in the hearing. The Appellant was of the view the errors in the application made the application invalid and, therefore, the resulting Certificate was invalid. It was the Appellant's belief that without a valid Certificate, there were no grounds to hold a hearing.

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(c) in the case of a registered owner of land, sent by mail to the address for the registered owner shown on the assessment roll.”

[192] In his opening remarks, the Appellant's representative said he was retained two days prior to the hearing and they were unable to review the material in sufficient detail to provide evidence and arguments at the hearing. The Board does not accept that the Appellant had insufficient time to prepare for the hearing. All of the submissions were due on April 28, 2014, and all submissions were received on or before that day. The Board notes the Appellant provided an extensive written submission including video recordings of the site on April 23, 2014. The Board distributed the Appellant's submission to the Certificate Holder and Inspector to ensure delivery on April 28, 2014.

[193] The Certificate Holder and Inspector attempted to deliver their submissions to the Appellant on numerous occasions, but delivery was unsuccessful. The Board also sent the submissions to the Appellant on May 13, 2014, by courier and mail. A final notice to pick up the submissions was sent by Canada Post to the Appellant on May 25, 2014.<sup>13</sup> Refusing service of the documents does not provide a ground for the Appellant to ask for an adjournment to prepare responses to the submissions from the other Parties. The Appellant had ample time to prepare and retain assistance to appear at the hearing. The Board notes the Appellant retained legal counsel during an earlier period of the appeal process.

[194] At the hearing the Board asked each of the Parties how they would like to proceed. The Certificate Holder and Inspector did not want an adjournment as they felt the Appellant had had ample time to retain legal counsel and experts.

[195] The Board asked each of the Parties if they would consider splitting their submissions to first address the completeness of the application and then address the substantive matter of whether the Site met the Criteria. None of the Parties objected to the splitting of the issues in that manner. The Appellant stated he was open to looking at the proposal, but he felt that, since he did not have legal counsel present, he was "out of his league." The Appellant still did not want to participate in any aspect of the hearing without getting an adjournment to retain legal and expert help.

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<sup>13</sup> After the hearing, on June 17, 2014, Canada Post returned the package the Board sent to the Appellant at his Toronto, Ontario address with the Certificate Holder's and the Inspector's submissions. The package was marked "Unclaimed." The Board notes the Appellant at no time expressed concerns about not receiving the submissions from the Certificate Holder or the Inspector.

[196] The Certificate Holder believed the split issues as proposed by the Board at the hearing were well within what was contemplated by all the Parties in preparing for the hearing, including whether the application was complete. The Certificate Holder noted all of the Parties had received the full submissions so the Parties were aware of the arguments that would be presented. The Certificate Holder opposed any adjournment. It stated the Appellant had ample time to retain counsel and it was his choice not to seek legal advice or retain an expert.

[197] The Inspector had no issue with splitting the issue as proposed by the Board, and she was prepared to proceed with her evidence. The Inspector objected to an adjournment given the time the Appellant had to prepare since notice of the hearing date was provided to the Parties.

[198] The Board denied the adjournment request. The Board considered the time the Appellant had between the Board setting the hearing date on October 17, 2013, and the actual date of the hearing on May 22, 2014. The Appeal was filed on October 7, 2011. The Appellant participated in mediation, and even though no resolution was reached, it provided an indication what type of information the Inspector uses in determining whether a certificate should be issued. A hearing had been scheduled for March 19, 2013, but the Inspector asked for an adjournment in order to gather more data. After the Inspector found the Site met the Criteria, the Appellant should have been aware of the need to gather data and be prepared to provide submissions and evidence to the Board. In fact, the Appellant asked that the hearing be held in May or June 2014 in order for him to prepare and to arrange for experts.

[199] The Appellant did not indicate in any communication prior to the hearing of his intention to ask for an adjournment. Although he had asked for an adjournment on February 24, 2014, to enable him to travel to the Ukraine, the Board denied the request given the length of time it has taken to hear the matter and the difficulty in getting dates for the hearing. Prior to the hearing, the Appellant raised a number of motions, including document production motions and to compel witnesses. During all of the communication from the Appellant, he did not suggest he would be seeking an adjournment at the hearing. In fact, the Appellant requested the hearing be extended over two days, which the Board granted, indicating the Appellant was prepared to attend the hearing and participate for two days.

[200] While the Appellant indicated he needed to retain legal counsel and experts to assist him at the hearing, it is clear that no steps to act on that need had been taken, notwithstanding the length of time between setting of the hearing date in October 2013 and the actual hearing date of May 22, 2014. As well, the Board notes the Appellant did have legal counsel at one point during the appeal process.

[201] Legal counsel is not a requirement to appear before the Board. There have been many unrepresented appellants who have appeared before the Board and who have done excellent jobs in bringing their evidence forward and in cross-examining witnesses. The Appellant had prepared a lengthy written submission that would have provided the basis for his oral evidence.

[202] In his final comments, the Appellant stated he was not prepared to participate in the hearing on May 22, 2014, or give evidence on the issue of whether the Site met Criteria. The Appellant said whether or not the Site met Criteria should not be considered until there is a proper application before the Inspector. The Appellant said he would not participate in the hearing. He considered the application was incomplete and it was not up to him to provide evidence to show it was incomplete. The Appellant stated it was clear and easy to understand that either the Inspector must be accountable and follow the guidelines or not.

[203] After the Board presented its decision to deny the adjournment and that the hearing would proceed, the Appellant confirmed he would not participate in the hearing. The Appellant and his representative left the proceedings.

[204] The Board asked if there were any other preliminary motions from the remaining Parties, and they indicated they had no further preliminary motions and were prepared to proceed with the hearing. The Board continued to hear oral evidence and arguments from the Certificate Holder and the Inspector.

## **V. ANALYSIS**

[205] The issue before the Board is: “Was the Certificate properly issued? In other words, does the site meet the reclamation criteria?” Under EPEA, the Board must recommend to

the Minister to confirm, reverse, or vary the decision being appealed, based on the evidence and submissions provided by the Parties to the Board.

[206] As a result of the preliminary issue raised by the Appellant, the Board divided the issue into two separate questions:

1. Was the application for the Certificate complete?
2. Did the Site meet the Criteria?

In the Board's view, these two questions were within the scope of the original issue that was set, being "Was the reclamation certificate properly issued?"

[207] The Parties had no concerns with the Board refining the issues to take the Appellant's concerns into account, and the Inspector and Certificate Holder were prepared to respond to these issues. As stated, the Appellant declined to participate in the hearing.

[208] The Board heard oral evidence from the Certificate Holder and Inspector and reviewed the Record and written submissions from all of the Parties.

#### **A. Completeness of Application**

[209] The Appellant raised a number of concerns regarding the application for the Certificate in his written submission and opening comments, suggesting the flaws he identified in the application process made the application and subsequent Certificate a nullity. These concerns included:

1. failure to provide notice of the application to the Appellant or to the estate of Mr. Silver Werenka;
2. failure to wait 30 days before submitting the application to the Inspector; and
3. failure to document past reclamation activities fully in the application.

[210] The Appellant suggested the application for the Certificate was not complete or not compliant with the Guidelines and should not have been accepted by the Inspector. According to the Appellant the application was incomplete because he did not receive a copy of the application prior to it being submitted to AESRD.

[211] One of the purposes for providing a copy of the application to a landowner is to allow them the opportunity to review the data provided and, if there are concerns, the landowner

has an opportunity to file a complaint with the Inspector. If a complaint is received, then the application is treated as non-routine. The Inspector will conduct an independent site assessment to determine if the complaint is substantiated by conditions at the site.

[212] The Appellant said the application was non-compliant with the guidelines because it was sent to the Inspector 29 days after the application was sent to the Appellant while the Guidelines require 30 days. The Certificate Holder acknowledged that it should have waited for the 30 days to pass, but it noted the Inspector would not have received the application until after the 30 days was past. Although the Certificate Holder should have waited for a clear 30 days before submitting the application, the Board does not view sending it on the 29<sup>th</sup> day as a reason to determine the application was invalid. The Inspector did not see the application until after 30 days had passed, and it would not have prevented the Appellant from submitting a Complaint Form to the Inspector.

[213] The Appellant stated the Certificate Holder had his correct address in Toronto. Under section 256(1) of EPEA, service is deemed complete when the document is sent to the address registered on the assessment roll, in this case the Land Title Certificate. The land in question is registered to the Appellant and the estate of Mr. Silver Werenka, and the address listed for the Appellant is in Edmonton. It is the landowner's responsibility to update the Land Title Certificate if there has been a change in the mailing address of the landowner. The Certificate Holder provided evidence that service was completed to the address indicated on the Land Title Certificate. The application package was accepted and signed for by the resident at that address. In addition, the Certificate Holder stated it was told by the Appellant that the Edmonton address was sufficient.

[214] Given the legislation and the documents indicating service of the application was completed, the Board considers the Appellant's arguments regarding non-receipt of a copy of the application are without merit.

[215] The Appellant argued the Certificate Holder did not submit the application properly and the Inspector did not abide by AESRD guidelines. According to the Appellant the Certificate is based on an application that should not have been accepted in the first place and is, therefore, void. The Board does not agree with the Appellant's conclusion. Any errors that



might have existed in the application were effectively corrected by subsequent actions of the Inspector.

[216] The Appellant pointed out page 2 of the Guidelines where it states that an incomplete application will be refused. The application before the Inspector was complete as required under the Guidelines and applicable legislation and, therefore, the statement does not apply.

[217] The Appellant mentioned in his submission that he felt the application was incomplete because it did not include the details of all the reclamation work completed on the Site and the Certificate Holder deliberately obscured required information in the assessment form.

[218] The Board understands the assessment completed for an application for a reclamation certificate is done based on what the conditions are at the site at the time the assessment is completed. The assessment looks at current conditions of the soils, vegetation, and topography to determine whether the site meets Criteria and is able to meet equivalent land capability. The details of how the applicant achieved the result are not as important as the end result. In the application the Certificate Holder noted that reclamation work had been done previously by Kenton. Although the details of the work completed are not included, it is up to the current operator to ensure the Site, as it was on the date of the assessment, met the Criteria.

[219] The Board finds the application was validly before the Inspector, and any flaws in the service of the application to the Appellant were rectified by the actions of AESRD after receiving the Appellant's Complaint Form. Subject to the discussion below, as the application was validly before the Inspector, the Certificate was validly issued. Neither the application nor the Certificate are a "nullity."

**B. Site Meet Criteria**

[220] In determining whether a reclamation certificate should be issued, the Inspector explained there are two steps to the process. First, the application is assessed to determine whether it is administratively complete. This involves checking to ensure all of the required documentation and data are attached and completed. If the application is administratively

complete, then the second step in the process requires the Inspector to assess the data to ensure they comply with the applicable reclamation criteria. In this case the applicable criteria were the 1995 Criteria.

[221] The Criteria set out the specific data needed to complete the assessment and the manner in which data are to be collected. The Criteria require a grid system be used on the Lease, resulting in 36 sample points, and measurements every 100 m along the access road. Four control sites are located off the lease, normally one on each side of the Lease. For the access road, one control is used for each sample point. If there is a high degree of variability, additional sampling points may be required. All data points need to be representative of the quadrant being measured. This method described in the Criteria is used to ensure a true representation of the existing conditions is provided.

[222] The onus is on the Appellant to demonstrate to the Board that the Site does not meet Criteria. The Appellant failed to explain in his submission how the Site did not meet Criteria, and he did not provide any oral evidence to show the Site was not reclaimed to legislated standards. As stated in the Board's decision of *Whitelock v. Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: ARC Resources Ltd. (14 February 2014) Appeal No. 13-004-R (A.E.A.B.):

“A party to an appeal of the issuance of a reclamation certificate must be able to demonstrate that data collected in support of such an appeal is gathered in a systematic and scientifically-approved manner such that the data collected and presented as evidence not only addresses the requirements of the Criteria but challenges the data submitted in support of an application. Such an approach not only assists the Board but also provides a more complete picture of the appellant's concerns with the site at issue.”<sup>14</sup>

[223] It was the Appellant's onus to provide sufficient evidence to show the Certificate should be reversed, but providing anecdotal statements without evidence to support it, not participating in the evidentiary phase of the hearing, and not providing supportive evidence subject to cross examination or answer questions posed by the Board does not meet the evidentiary standard required to meet the Appellant's onus.

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<sup>14</sup> *Whitelock v. Inspector, Northern Region, Operations division, Alberta Environment and Sustainable Resource Development*, re: ARC Resources Ltd. (14 February 2014) Appeal No. 13-004-R (A.E.A.B.) at paragraph

[224] Based on the Record, the written submissions of the Parties, and the oral evidence of the Certificate Holder and the Inspector, the Board finds the Site meets Criteria. In this case, the Board based its findings on the application filed by the Certificate Holder plus two additional reports completed by AESRD's Inspector and former inspector. The inspectors had no vested interest in the results of the assessments and both reports, the Bromley and Jones Reports, indicated the Site met Criteria for topography, soils, and vegetation and met the requirement of equivalent land capability. Although the Board reviewed the Appellant's written submission, he did not remain at the hearing to speak to the submission or be available for cross-examination by the Certificate Holder and Inspector or questioning by the Board. In the review of the Appellant's submission, it did not appear there was any attempt by the Appellant to collect and provide data in a manner required under the Criteria. Without some form of verifiable data, the Board cannot accept the Appellant's unsupported statements that the Site is not reclaimed properly.

[225] In the Bromley Report, there was an issue at well centre as to whether the topsoil depth was accurately reflected because it had measured a depth less than the minimum required topsoil replacement depth. The Board commends the Inspector's decision to request a delay in the appeal proceedings to enable a second assessment to determine whether the measured depth (8 cm) accurately reflected the conditions on the Site. At the Inspector's visit, she measured the topsoil depth at well centre to be 11 cm, well within the required topsoil depth as set out in the Criteria.

[226] The Board notes that, even though that one measurement did not meet the 80 percent value of the control in the Bromley Report, the Site did not fail the Criteria, because the Criteria allows for a measure of variability in the site conditions, just as there is variability in undisturbed, natural site conditions. Therefore, based on the evidence before it, the Board finds the Site meets the Criteria.

[227] Although the Appellant raised concerns there was contamination on the Site, none of the assessments found any indication that contamination exists, and the Appellant could not show areas of contamination when AESRD staff attended the Site. The Appellant could not

show AESRD staff where the alleged pit was located on the Lease. The reports provided indicated the soils and vegetation growth were similar throughout the Lease. Coupled with the non-productivity and short lifespan of the well, the Board finds the Appellant's concerns regarding contamination and pits used for the disposal of sludge, debris, or garbage are unsubstantiated.

[228] The Board notes that, under the Regulation, the Certificate Holder has a 25 year liability for unforeseen issues resulting from reclamation work and, under EPEA, the Certificate Holder has continuous liability regarding contamination.

[229] The Appellant had stated in his submission that a release was required for the gate and access road. Based on the evidence presented by the Certificate Holder and the Inspector, the actual access road was reclaimed. What remains is the access from the county roadway to the fence line of the property. Both this access and the gates were in place prior to the Certificate Holder leasing the Site, so no release from the Appellant was necessary.

[230] Given the evidence provided by the Certificate Holder and the Inspector and lack of evidence provided by the Appellant to meet his onus, the Board recommends the Certificate be confirmed as issued.

## **VI. RECOMMENDATIONS**

[231] The Board recommends the Inspector's decision to issue the Certificate be confirmed.

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

1. Mr. Orest Werenka;
2. Mr. Daron Naffin, Bennett Jones LLP, on behalf of Advantage Oil and Gas Ltd.; and
3. Ms. Wendy Thiessen, Alberta Justice and Solicitor General, on behalf of the Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

## VII. COSTS

[233] None of the Parties reserved their right to submit a final costs application. Although the Appellant stated in his correspondence to the Board of his intention to ask for costs at the hearing, he did not include the request in his written submission and did not present closing arguments at the oral hearing to confirm his intent to ask for costs. Pursuant to section 20 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, the request for final costs must be at the conclusion of the hearing. Therefore, no costs applications will be accepted by the Board.

Dated on June 18, 2014, at Edmonton, Alberta.

“original signed by”

Eric McAvity, Q.C.  
Panel Chair

“original signed by”

Delmar Perras  
Board Chair

“original signed by”

Jim Barlishen  
Board Member



ALBERTA  
ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT

*Office of the Minister  
MLA, West Yellowhead*

**Ministerial Order  
45/2014**

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

**Order Respecting Environmental Appeals Board  
Appeal No. 11-061**

I, Robin Campbell, Minister of Environment and Sustainable Resource Development, 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. 11-061.

Dated at the City of Edmonton, in the Province of Alberta, this 14<sup>th</sup> day of July, 2014.

*“original signed by”* \_\_\_\_\_

Robin Campbell  
Minister

## **Appendix**

### **Order Respecting Environmental Appeals Board Appeal No. 11-061**

With respect to the August 9, 2011 decision of the Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Inspector”), to issue Reclamation Certificate No. 00291862-00-00 under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to Advantage Oil and Gas Ltd., I, Robin Campbell, Minister of Environment and Sustainable Resource Development, order that the decision of the Inspector is confirmed.