ALBERTA
ENVIRONMENTAL APPEALS BOARD

Discontinuance of Proceedings

Date of Discontinuance of Proceedings – May 23, 2007

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

-and-

IN THE MATTER OF an appeal filed by Terasen Pipelines (Corridor) Inc. (now Kinder Morgan Canada Inc.) with respect to the decision of the Director, Northern Region, Regional Services, Alberta Environment, to refuse to issue a Reclamation Certificate to Terasen Pipelines (Corridor) Inc. in SE/NE 10-62-20-W4M.

Cite as: *Terasen Pipelines (Corridor) Inc. (now Kinder Morgan Canada Inc.)* v. *Director, Northern Region, Regional Services, Alberta Environment* (23 May 2007), Appeal No. 05-042-DOP (A.E.A.B.).

I. BACKGROUND

[1] On September 23, 2005, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), refused to issue a reclamation certificate to Terasen Pipelines (Corridor) Inc. (now Kinder Morgan Canada Inc.) relating to the parcel of land at SE 10-62-20-W4M near Newbrook, Alberta. The Director's September 23, 2005 letter stated:

> "…pursuant to s. 3 of the Conservation and Reclamation Regulation, A.R. 115/93…Alberta Environment…issued a guideline for the reclamation of land used in connection with the construction of industrial pipeline….The Guideline provides that operators should only apply for reclamation certificates for pipelines that have been completely reclaimed. As a general rule, certificates will not be issued for portions of pipelines. 'Exceptions may be granted in special cases, such as when a landowner or Municipality wishes to subdivide a piece of land'….You have applied for a reclamation certificate for the 'work area' associated with a Right of Entry Order No. 1755/2001. There is nothing in your application to suggest Terasen's situation is exceptional. The pipeline itself is operational and will not be reclaimed for some time….You are certainly welcome to apply again upon completion of reclamation of the pipeline…."

[2] On October 21, 2005, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Terasen Pipelines (Corridor) Inc. (the "Appellant") appealing the Director's decision.

[3] On October 27, 2005, the Board wrote to the Appellant and the Director acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board also requested the Director provide the Board with a copy of the record (the "Record") relating to this appeal and that the Director and the Appellant provide available dates for a mediation meeting, preliminary meeting, or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the Alberta Energy and Utilities Board (the "AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative. The AEUB responded on December 8, 2005 advising that although a hearing was held in relation to the pipeline, the conservation and reclamation of well sites is exclusively within the jurisdiction of Alberta Environment, therefore the reclamation certificate was not the subject of a hearing or review by the AEUB.

[5] On October 27, 2005, the Board wrote to Mr. Darryl Carter, Darryl Carter & Company, counsel for Mr. Dalton Trenholm, Ms. Gertrude Trenholm and Mr. Darwin Trenholm (the "Landowners") notifying him of the appeal.

[6] On November 14, 2005, the Board received a copy of the Record from the Director, and on November 16, 2005, forwarded a copy to the Appellant and the Landowners.

[7] On December 8, 2005, the Board, in consultation with the Director, the Appellant, and the Landowners (collectively the "Participants"), scheduled a mediation meeting for January 31, 2006 in Edmonton, Alberta. On December 15, 2005, the Board received a request from the Landowners to relocate the mediation meeting to Westlock, Alberta, and on December 29, 2005, the Board advised the Participants of the change of venue for the mediation meeting.

[8] On January 5, 2006, the Landowners advised the Board that the date for the mediation meeting was no longer available. The Board requested the Participants provide further available dates for the mediation meeting. On January 13, 2006, in consultation with the Participants, the Board re-scheduled the mediation meeting for March 23, 2006, in Westlock, Alberta.

[9] On March 13, 2006, the Board was advised by the Appellant that a scheduling conflict had arisen and requested the mediation meeting be rescheduled to April 18, 2006 in Westlock, Alberta. The Appellant advised that the other Participants were in agreement with the re-scheduling of the mediation meeting. On March 15, 2006, the Board granted the request and re-scheduled the mediation meeting to April 18, 2006, in Westlock, Alberta.

[10] Pursuant to section 11 of the *Environmental Appeal Board Regulation,* Alta. Reg. 114/93, the Board conducted a mediation meeting in Westlock, Alberta on April 18, 2006 with Mr. Ron V. Peiluck, Vice-Chair, as the presiding mediator (the "Mediator").

[11] In conducting the mediation meeting, the Mediator reviewed the mediation process and explained the purpose of the mediation meeting. He then circulated copies of the Participants' Agreement to Mediate. All persons in attendance signed the Agreement and discussions ensued.

[12] Following productive and detailed discussions at the mediation meeting, an Interim Agreement was reached and the Participants agreed to continue discussions.

[13] On June 26, 2006, further to status reports received from the Participants, the Board scheduled a second mediation meeting, to be held via conference call on July 14, 2006. The mediation meeting via conference call was subsequently re-scheduled to August 8, 2006.

[14] On August 2, 2006, the Board received a letter from the Landowners requesting that the Board conduct a site visit and meeting in lieu of the conference call scheduled for August 8, 2006. Comments from the Director and Appellant were received on August 2 and 3, 2006, at which time the Board decided to proceed with the conference call on August 8, 2006. The Board advised the Participants that a site visit could be discussed during the conference call. At the mediation meeting, the Participants agreed to a site visit and to continue with mediation.

[15] On August 18, 2006, in consultation with the Participants, the Board advised that the continuation of the mediation meeting, and site visit would be held on September 28, 2006, in Newbrook, Alberta. The mediation meeting was re-scheduled to October 31, 2006, at the request of the Appellant. At the mediation meeting, the Appellant agreed to provide a status report to the Board by November 15, 2006.

[16] On November 17, 2006, the Board received a letter from the Appellant requesting the Board hold the appeal in abeyance because the Appellant and Director were continuing discussions. The abeyance was granted, and status reports were received on December 8, 2006, from the Appellant, and on January 19, 2007 from the Director. On March 2, 2007 the Board received a letter from the Appellant requesting a hearing.

[17] The Board began to schedule the hearing, however, on March 19, 2007 the Board received a letter from the Appellant requesting the Board hold the appeal in abeyance *sine die*. The Board also received a letter from the Director on March 20, 2007 advising he had withdrawn his September 23, 2005 decision that gave rise to the appeal. The Director requested the Board dismiss the appeal.

[18] The Board responded by letter on March 22, 2007 stating:

> "The Board understands…that the Director has reconsidered his decision….It appears to the Board that this decision by the Director may have rendered the appeal moot. Further, should the Director reject Terasen's application for a reclamation certificate, Terasen will be free to appeal that decision, and should the Director issue the reclamation certificate, the landowner may appeal if he is unsatisfied. In this regard, Mr. Thrasher is requested to advise the Board, by **March 28, 2007**, if he will be withdrawing the appeal, or if he wishes to proceed to deal with Mr. McDonald's motion that the appeal is now moot."

[19] On March 28, 2007, the Board received a letter from the Appellant withdrawing the appeal. The Board acknowledged the Appellant's withdrawal letter on March 29, 2007, and advised it would issue a Discontinuance of Proceedings and close its file. However, on April 9, 2007, the Board received a letter from the Landowner requesting the issue of costs be dealt with.

[20] The Board responded to the Landowner's request by letter dated April 10, 2007, noting that the Participants had signed a Participants' Agreement to Mediate (the "Agreement") prior to the start of the mediation meeting on April 18, 2007. Paragraph 8 of the Agreement deals with costs and states:

> "The Participants acknowledge that the EAB does not generally award costs relating to the preparation for or attendance at a mediation. The Participants agree they shall not submit a request to the EAB for costs respecting the mediation after the conclusion of the mediation. This does not preclude costs between the Participants being addressed in an agreement between the Participants."

The Board's April 10, 2007 letter further noted that the Agreement had been sent to the Participants, prior to the mediation meeting on both January 16, 2006 and April 4, 2006 for their information, and that the Board's January 16, 2006 letter to the Participants, setting the mediation meeting, advised that the Board does not award costs relating to the preparation for or attendance at a mediation meeting. The Board, in its April 10, 2007 letter also stated it would issue a Discontinuance of Proceedings shortly and would be closing its file.

[21] On April 9, 2007, the Board received a letter from the Landowner stating "…there was more than just mediation." The Board responded on April 12, 2007, advising it received the Appellant's Notice of Appeal on October 21, 2005 and on December 15, 2005 scheduled a mediation meeting. The appeal remained in mediation until the appeal was withdrawn by the Appellant on March 28, 2007. The Board further advised it did not schedule a hearing for the appeal, and discussions or meetings held between the Participants, while the appeal was in mediation, are part of the mediation process. The Board's letter stated that the Landowner may provide the Board with further information if he wished to pursue the issue of costs.

[22] The Landowner responded by e-mail on April 14, 2007 stating:

> "Of course I wish to pursue the issue of costs. You are being much too quick to try to close the file. I do not know why you would have assumed that everything my clients or our office did was respecting the mediation."

[23] On April 16, 2007, the Board scheduled a written submission process to determine whether the Landowner is entitled to make an application for costs to the Board. Initial Written Submissions were due from the Landowner April 24, 2007; Response Written Submissions were due from the Appellant and the Director on May 1, 2007; and a Rebuttal Written Submission was due from the Landowner on May 8, 2007.

[24] On April 20, 2007, the Board received a letter from the Landowner advising "…I have nothing further to add." On May 1, 2007, the Board received Response Written Submissions from the Appellant and the Director, and on May 9, 2007, the Board received a letter from the Landowner stating "…I will not be submitting a rebuttal submission."

[25] On May 17, 2007, the Board issued its decision letter on whether the Landowner is entitled to make an application for costs to the Board. The Board denied the Landowner's motion to apply for costs. The Board's decision letter stated:

> "…Mr. Carter did not provide any information on the types of costs his clients incurred or how the costs were the result of further processes beyond the mediation process. Mr. Carter also did not provide any arguments as to why the Participants' Agreement to Mediate should not apply in this case. As a result, Mr. Carter has not satisfied his onus of demonstrating to the Board that clause 8 of the Participants' Agreement to Mediate should be waived in order to allow for a costs application. Therefore, the motion to allow for a costs application is denied…"

The Board also advised it would be closing its file for appeal 05-042 and would issue a Discontinuance of Proceedings shortly.

II. DECISION

[26] Pursuant to section 95(7) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and based upon the withdrawal of the appeal by the Appellant on March 28, 2007, and the Board's May 17, 2007 decision to deny the Landowner's motion to apply for costs, the Board hereby discontinues its proceedings in Appeal No. 05-042 and closes its file.

Dated on May 23, 2007, at Edmonton, Alberta.

"*original signed by*"

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Dr. Steve E. Hrudey, FRSC, PEng
Chair