

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – February 14, 2014

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

-and-

IN THE MATTER OF an appeal filed by Cliff and Audrey
Whitelock with respect to the issuance of Reclamation Certificate
No. 00300909-00-00 to ARC Resources Ltd. under the
Environmental Protection and Enhancement Act by the Inspector,
Northern Region, Operations Division, Alberta Environment and
Sustainable Resource Development.

Cite as: *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.).

PANEL MEMBERS:

Mr. Eric McAvity, Q.C., Panel Chair;
Dr. Alan Kennedy, Board Member; 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:

Appellants:

Mr. Cliff Whitelock and Ms. Audrey
Whitelock.

Certificate Holder:

ARC Resources Ltd., represented by Mr.
Daron Naffin, Bennett Jones LLP.

Director:

Mr. Al Malcolm, Inspector (Retired), Northern
Region, Operations Division, Alberta
Environment and Sustainable Resource
Development, represented by Ms. Vivienne
Ball, Alberta Justice and Solicitor General.

WITNESSES:

Appellants:

Mr. Cliff Whitelock; Ms. Audrey Whitelock;
and Mr. Dean Matheson, My Landman Group.

Certificate Holder:

Ms. Tara Linton, ARC Resources Ltd.; and Mr.
Michael Parker, Operations Manager,
Environmental Services, Newalta Corporation.

Director:

Mr. Dwayne Metro, Environmental Protection
Officer (Former Inspector), Northern Region,
Operations Division, Alberta Environment and
Sustainable Resource Development.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued a Reclamation Certificate to ARC Resources Ltd. under the *Environmental Protection and Enhancement Act*, for an abandoned well site located in 19-48-8-W5M in Brazeau County near Drayton Valley, Alberta.

The landowners, Mr. Cliff Whitelock and Ms. Audrey Whitelock, appealed the issuance of the Reclamation Certificate on the grounds the site was not properly reclaimed. The Whitelocks said there are issues with admixing of the soil, weed growth, and reduced productivity.

The Board held a hearing to determine the issue: “Was the Reclamation Certificate properly issued? In other words, does the site meet the reclamation criteria?”

In assessing whether a reclamation certificate should be issued, AESRD checks the application for completeness and then compares the data provided in the application with the applicable criteria. The criteria that applied to this specific site were the Reclamation Criteria for Wellsites and Associated Facilities - 1995 Update.

The Board received and reviewed the submissions, evidence, and arguments of the parties and reviewed the AESRD record. The Board found the Whitelocks did not meet their onus of demonstrating that, on a balance of probabilities, the reclamation certificate should not have been issued. The evidence the Whitelocks presented could not be verified as being representative of the site, and the data they provided, including nutrient value of the grasses on and off lease and the number of bales produced on and off lease, were not required information under the applicable reclamation criteria. The Whitelocks did not present verifiable evidence to show the reclamation criteria were not met.

The Board recommended the decision to issue the Reclamation Certificate be confirmed.

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I. INTRODUCTION

[1] This is the Board’s Report and Recommendations to the Minister of Environment and Sustainable Resource Development regarding the appeal filed by Mr. Cliff Whitelock and Ms. Audrey Whitelock (the “Appellants”). Alberta Environment and Sustainable Resource Development (“AESRD”) issued Reclamation Certificate No. 00300909-00-00 (the “Certificate”) to ARC Resources Ltd. (the “Certificate Holder”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”). The Certificate, issued on April 8, 2013, was for an abandoned well site located on the Appellants’ land near Drayton Valley that was previously used for water injection to enhance oil recovery.

[2] The Appellants appealed the issuance of the Certificate on the grounds the site was not properly reclaimed because of the presence of weeds, low productivity, and soil admixing. The Board 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 was the “Reclamation Criteria for Wellsites and Associated Facilities - 1995 Update” (the “Criteria”).

[4] Following a hearing, the Environmental Appeals Board (the “Board”) recommends the decision to issue the Certificate be confirmed. The Appellants did not provide verifiable evidence to show the lease site did not meet the Criteria.

II. BACKGROUND

[5] On April 8, 2013, the Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Inspector”),¹ issued the Certificate to the Certificate Holder. The Certificate is for an abandoned water injection well site located in 19-48-8-W5M (the “Lease”) in Brazeau County near Drayton Valley, Alberta.

¹ The Inspector who made the decision to issue the Certificate, Mr. Al Malcolm (“Initial Inspector”), retired from AESRD in 2013. Mr. Dwayne Metro (“Former Inspector”) visited the site at the request of the Initial Inspector and provided his opinion on the reclamation work. When the Initial Inspector retired, the Former Inspector took over the file. Mr. Metro left AESRD late in 2013, but he appeared at the hearing to represent the decision-maker. In this decision, the Board will use “Inspector” as a general reference that could apply to either or both the Initial Inspector and the Former Inspector.

[6] On April 29, 2013, the Appellants filed an appeal of the decision to issue the Certificate. On April 30, 2013, the Board notified the Certificate Holder and Inspector of the appeal and requested the Inspector provide the Board with a copy of the records (the “Record”) relating to the appeal. The Record was received on May 31, 2013, and copies were provided to the Certificate Holder and Appellants on June 4, 2013.

[7] On June 22, 2013, the Board notified the Appellants, Certificate Holder, and Inspector (collectively, the “Parties”) that, based on their available dates, a mediation meeting would be held on July 31, 2013. On July 15, 2013, the Appellants notified the Board that they did not want to proceed with the mediation meeting and asked that a hearing be scheduled. The Board cancelled the mediation meeting.

[8] The Board notified the Parties that, based on the dates provided by the Parties, the hearing would be held on January 16, 2014.

[9] The Board published the Notice of Hearing in the Drayton Valley Western Review to notify the public of the hearing and requesting those with an interest in the appeal to file a request to intervene. The Board also provided a copy of the Notice of Hearing to the County of Brazeau to place on its public bulletin board or website, and it was placed on the Government of Alberta and Board websites. The Board issued a News Release that was distributed to the media throughout the Province by the Public Affairs Bureau. The Board did not receive any intervenor requests.

[10] The Board received written submissions for the hearing from the Parties between December 16 and 18, 2013.

[11] The hearing was held on January 16, 2014, in Edmonton to hear evidence and submissions on the issue: “Was the Reclamation Certificate properly issued? In other words, does the site meet the reclamation criteria?”

III. SUBMISSIONS

A. Appellants

[12] The Appellants stated reclamation on the Lease started in 2002. The Appellants explained:

1. the Lease was stripped and all the soil pushed to one side, resulting in admixing of the topsoil and subsoil;
2. approximately 60 tonnes of contaminated soil around the well head was removed, but no additional subsoil was hauled in to replace the soil removed at the well head;
3. the topsoil that was hauled in and spread over the Lease to level out the area that had settled over the sump resulted in wild oats, wild mustard, and other weeds growing in the Lease even though the Certificate Holder said the source of the soil was tested every year for presence of weed and was sprayed annually; and
4. they told the Certificate Holder the sump had to be cleaned out.

[13] The Appellants stated the sump was dug out approximately four years later, which required the area to be stripped again and approximately 500 cubic metres of contaminated soil to be removed. The Appellants said that grass was seeded on the Lease in 2009. The Appellants stated that, since that time, the Lease does not grow grass very well and the Lease is contaminated with wild oats. The Appellants said that soil that is admixed, has no fertilizer added, and the area is improperly contoured, results in inferior conditions to establish forage and cereal crops.

[14] The Appellants stated they asked the Certificate Holder and the Inspector to stake the boundaries of the Lease and mark the well centre. The Appellants said there are three different stakes marking the well centre, one is the Appellants' and the other two are from two different AESRD inspectors. The Appellants explained they wanted the Lease surveyed so they could work their land without interfering with the Lease and, as the AESRD inspectors did not stake the Lease accurately, the Appellants subsequently hired a surveyor to mark the Lease boundaries.

[15] The Appellants said the Lease is full of weeds, including wild oats. The Appellants explained they did not have wild oats on the land where the Lease is located because they previously grew seed oats on that site, which they could not have done if wild oats were

present. The Appellants explained they have a hay field adjacent to the Lease that was ready to be worked up in 2010. The Appellants said the hay on the Lease is inferior to the hay crop on the adjacent field. The Appellants disagreed with the Certificate Holder's report that indicated the vegetation was the same on Lease as off Lease. The Appellants said the off Lease vegetation was ready to be worked up because it was older and unproductive, but the Certificate Holder used it as a comparison for the vegetation on the Lease.

[16] The Appellants stated a hay field is most productive in the first three years after seeding and then deteriorates. The Appellants stated the new hay on the Lease should be greener, thicker, and more productive than what was present in the hay field adjacent to the Lease before it was worked up. The Appellants stated the older hay field out-yielded the newly seeded Lease, as did the hay that was seeded in 2010, one year after the Lease was seeded. The Appellants stated the Lease averaged two bales an acre on the first cut and there was insufficient growth for a second cut. The Appellants' field, sown in 2010, produced 3.89 bales per acre on the first cut and two bales an acre on the second cut. The Appellants said they took grass samples from the Lease and the 2010 hay field and sent the samples to a laboratory to be analyzed for nutrient value. The analysis indicated the hay from the Lease had only half as much protein as the hay from the field sown one year after the Lease.²

[17] The Appellants argued that both reduced bale production and nutrient value in the hay produced on the Lease, as compared to off Lease, substantiates their claim that a reclamation certificate should not have been issued.

[18] The Appellants stated the sump was filled with clay that does not absorb water but instead holds water, creating a bog that does not dry out like the rest of the field. This makes it difficult for cattle and equipment to cross. The Appellants said topsoil was used from the rest of the Lease to fill in the low area of the sump thereby leaving the rest of the Lease with inadequate topsoil depth. The Appellants stated the Lease needs to be built up so that it has proper drainage and to enable farm equipment to cross it without bogging down.

² See: Appellants' submission, dated December 16, 2013, at Tab C.

[19] The Appellants said the contour of the Lease is not the same as before the well was drilled or the access road built, and the contour of the Lease is not consistent with the rest of the field. They stated that, as a result, water pools on the Lease instead of draining to the county ditch.

[20] The Appellants stated the topsoil on the Lease appears to be mixed with drilling mud or clay.

[21] The Appellants requested the Certificate be cancelled.

B. Certificate Holder

[22] The Certificate Holder argued the Appellants' concerns are without merit and fail to raise doubt regarding the sufficiency of the reclamation work carried out. The Certificate Holder stated the Lease meets or exceeds the minimum reclamation criteria applicable to the Lease.

[23] The Certificate Holder explained the Lease was assessed using the Criteria. Under the *Conservation and Reclamation Regulation*, Alta. Reg. 115/1993 (the "Regulation") a reclamation inquiry does not have to be conducted where the Inspector considers the application to be complete and accurate. The Certificate Holder stated a reclamation certificate may be issued where reclamation has been carried out pursuant to any applicable approval or code of practice, the terms and conditions of an environmental protection order regarding reclamation, the directions of the Inspector, or otherwise under EPEA.

[24] The Certificate Holder explained the well was drilled in July 1954 and abandoned in October 2000. The Certificate Holder stated that, as part of the abandonment process:

1. 51.92 tonnes of impacted soil was removed from around well centre;
2. 130 cubic yards of topsoil was used to fill in the sump area on the Lease, and the Appellants checked the work at the time and expressed their satisfaction with the reclamation work;
3. the source of the fill soil was sprayed annually and was considered to be certified soil at the time it was hauled to the site. According to the analysis of the fill soil, dated June 25, 2002, only inert wild buckwheat and inert lamb's quarters seeds were observed; and
4. the fill soil remedied the settlement of the sump area.

[25] The Certificate Holder stated that sometime between 2002 and 2005, the Appellants seeded the Lease to a hay mixture.

[26] In October 2005, the Certificate Holder visited the Lease, and at that time, the Appellants expressed their concerns regarding wild oats and wild mustard infesting the Lease. The Certificate Holder stated the Lease and surrounding field were cut down at that time, but there was no indication that any weeds, including wild oats or wild mustard, were present on the Lease.

[27] The Certificate Holder explained a Phase II Environmental Site Assessment was completed to determine if there were any impacts at the well centre, to identify the drilling waste disposal area (i.e. sump), and to characterize the environmental status of the Lease. The following recommendations were made by the Certificate Holder's consultants after the Phase II Environmental Site Assessment was completed:

1. remediation work associated with the well centre was not required;
2. remove soil impacted by hydrocarbons, brine, and metals from the drilling waste disposal area;
3. design a sampling program to confirm all impacted soil was removed;
4. backfill the drilling sump excavation with clean subsoil and recontour the disturbed area according to the surrounding natural topography; and
5. re-vegetate the disturbed area using a certified seed mix consistent with the surrounding vegetation and undertake noxious weed control during the establishment of the vegetation.

[28] The Certificate Holder explained remediation and reclamation operations began on July 25, 2007, and continued to October 2007 and included the following:

1. contaminated soil from the drilling waste disposal area was excavated, after the topsoil was stripped, and stored on an onsite liner to prevent leaching into the clean subsoil material;
2. samples of the excavated area confirmed sufficient contaminated soil had been excavated from the Lease;
3. the contaminated stockpile material was hauled off of the site and the storage area was scraped clean of the plastic barrier that held the contaminated soil;
4. the excavation area was temporarily fenced so the Appellants' livestock could pasture in the area;

5. backfilling of the excavated area was carried out and areas of the access road were ripped to alleviate compaction caused by trucks hauling soil to and from the Lease; and
6. topsoil was spread on the Lease and access road on October 2, 2007.

[29] The Certificate Holder said the Lease was sprayed in 2008 to prevent the growth of wild mustard and stinkweed, but no wild oats were identified on the Lease.

[30] The Certificate Holder explained further reclamation work was done on October 29, 2008, to address minor subsidence at the site. The Certificate Holder stated that all the topsoil supplied in 2007 and 2008 came from a source selected by the Appellants, and then the Lease was seeded to a grass mixture approved by the Appellants.

[31] The Certificate Holder said a detailed site assessment (“DSA”) was completed on the Lease on August 6, 2010, and at that time the Appellants indicated they were satisfied with the soils on the Lease but were concerned that once the Lease was tilled, weed growth would occur even though no weeds were present at that time. The DSA determined the Lease complied with all the Criteria requirements. A reclamation application was prepared in October 2011 and was provided to the Appellants.

[32] The Certificate Holder stated it was notified by the Inspector on November 2, 2011, that he had received a telephone complaint from the Appellants and a subsequent written complaint was filed by the Appellants on November 16, 2011, regarding the application. The application was submitted to the Inspector on November 21, 2011.

[33] The Certificate Holder said it, as well as representatives from AESRD, met with the Appellants on the Lease to discuss the application. The Certificate Holder stated that it offered to spread more soil over the Lease, even though the Lease met the Criteria, but the Appellants did not respond to this offer.

[34] The Certificate Holder submitted the Appellants’ concerns are without merit, and the Appellants did not meet their onus of demonstrating the Lease was not properly reclaimed or that there were any grounds to cancel the Certificate.

[35] The Certificate Holder stated the Lease complies with legislated and regulatory requirements as confirmed by the Phase I and Phase II assessments and the DSA completed for

the application, and by the Inspector reviewing the application and issuing the Certificate. The Certificate Holder stated the Lease meets or exceeds the Criteria for a wellsite and access road.

[36] The Certificate Holder denied the Appellants' allegations that the fill soil introduced wild oats and wild mustard to the Lease since the soil analysis confirmed the source soil did not contain these weeds and the assessments completed in connection with the application did not find any wild oats or wild mustard. The Certificate Holder understood other quarter sections surrounding the Lease that were owned or managed by the Appellants do contain wild oats, and the Appellants do not clean their farming equipment when they moved the equipment from field to field.

[37] The Certificate Holder submitted that no part of the reclamation process caused wild oats to enter the Lease given the assessments of the Lease and the soil analysis report completed on the fill soil.

[38] The Certificate Holder stated the only explanation for the presence of wild oats on the Lease is the Appellants' farming practices and the presence of wild oats on neighbouring quarter sections.

[39] The Certificate Holder argued the Appellants' allegations that the Certificate was issued prematurely are baseless given the completeness and accuracy of the application. The Certificate Holder said the reclamation was properly completed and the Certificate was issued at the appropriate time.

[40] The Certificate Holder stated there is no evidence of drainage problems or that the reclamation contributed to any decrease in expected normal production levels on the Lease.

[41] The Certificate Holder argued the Appellants' concerns regarding the reclamation of the Lease are vague and unsubstantiated by any of the Appellants' investigations or any investigations completed by the Certificate Holder or the Inspector.

[42] The Certificate Holder stated the application was completed in accordance with section 138(1) of EPEA and section 12(1) of the Regulation.³ The application was completed using the Criteria for cultivated lands since the Lease and surrounding lands had been cultivated in the past. The Certificate Holder stated the Criteria sets parameters for reclaimed well sites and access roads in relation to landscape, soils, and vegetation.

[43] The Certificate Holder explained that, in terms of landscape, the Criteria require the site be compared to pre-disturbance conditions or adjacent land, and any differences must not interfere with normal land use or show a negative impact on or off site. The Criteria consider features such as drainage, erosion, contour, stability, gravel and rocks, debris, vegetation, and bare ground.

³ Section 138(1) of EPEA states:

“An application for a reclamation certificate must be made by the operator to the Director or an inspector in the form and manner and within the time provided for in the regulations.”

Section 12(1)(b) of the Regulation provides:

“An application for a reclamation certificate must ... contain the following information in respect of the specified land, where the Director does not provide a form under clause (a):

- (i) a map, with references to legal boundaries, showing the land for which the certificate is being requested and the adjacent land use;
- (ii) particulars of the characteristics and properties of the conserved and reclaimed land, including topography, drainage, soils, vegetation and land capability;
- (iii) documentation of conservation and reclamation procedures;
- (iv) documentation of the history of surface disturbance;
- (v) documentation of and justification for any surface improvements to be left on the conserved and reclaimed land and written acceptance of the improvements by the registered owners of the land;
- (vi) a declaration that the operator has complied with
 - (A) all terms and conditions of any applicable approval, code of practice, environmental protection order or enforcement order,
 - (B) the directions of an inspector or the Director, and
 - (C) any applicable standards, criteria or guidelines established under section 3(1);
- (vii) the name, address and telephone number of all of the registered owners of the land;
- (viii) particulars of any surface lease or right of entry order for the land;
- (ix) a description of any substance present as a result of the operator’s activity on the land and a description of the nature and extent of the adverse effect caused by the presence of the substance;
- (x) particulars of any remedial measures taken with respect to a substance referred to in subclause (ix);
- (xi) any additional information required by an information document or requested by the Director.”

[44] The Certificate Holder said the Criteria require soils on the site be evaluated with respect to quantity, distribution, quality, and overall profile. The Certificate Holder stated the surface soil plus an additional 20 cm below the surface soil is assessed for vegetation restrictions, water permeability restrictions, and soil aeration restrictions.

[45] The Certificate Holder stated the Criteria require the re-vegetation on the site be assessed to ensure the species composition is compatible with the original vegetation or that it meets reasonable land management objectives and the vegetation is assessed for density, height, and general health.

[46] The Certificate Holder noted the DSA indicated that all the parameters required by the Criteria for landscape, soils, and vegetation were met or exceeded.

[47] The Certificate Holder stated the application was completed according to AESRD standards, and no on-site inquiry was required because the application was considered complete and accurate.

[48] The Certificate Holder said the Certificate was properly and validly issued, and the Lease, assessed in accordance with all applicable legislative and regulatory requirements, met or exceeded all applicable parameters under the Criteria.

[49] The Certificate Holder stated the application and the process through which it was prepared met all applicable requirements and satisfied the Inspector so the Certificate was issued. The Certificate Holder submitted this alone is sufficient to demonstrate the validity of the Certificate and the circumstances under which it was issued.

[50] The Certificate Holder argued the Appellants did not present sufficient credible evidence to meet their onus or substantiate their claims, and they failed to demonstrate that the alleged problems exist. The Certificate Holder noted the Appellants relied on speculation and anecdotal evidence.

[51] The Certificate Holder requested the Inspector's decision to issue the Certificate be confirmed.

C. Inspector

[52] The Inspector explained the wellsite was constructed in 1954 and abandoned in 2000. The Certificate Holder provided a copy of the application for the Certificate to the Appellants in October 2011. The application, submitted to the Inspector on November 21, 2011, indicated the Appellants called in a complaint to AESRD on November 2, 2011.

[53] The Inspector stated the “Landowner Complaint” box on the “Reclamation and Remediation Audit Program, Completeness Review Checklist” (the “Checklist”) was checked off and a note was attached setting out the result of the Initial Inspector’s investigation of the Appellants’ complaints.

[54] The Inspector explained the Appellants’ complaints were reviewed and the Initial Inspector conducted two site visits and had two meetings with the Appellants. Based on his review of the application and the site visits and meetings, the Initial Inspector found the application satisfactory and the Certificate was issued on April 8, 2013. The time delay between submission of the application and issuance of the Certificate was to enable any outstanding issues to be resolved between the Appellants and the Certificate Holder.

[55] The Inspector noted section 137 of EPEA requires operators (the Certificate Holder) to conserve and reclaim the specified land.⁴ The Inspector stated that, as noted in the Regulation, the objective of the conservation and reclamation of the specified land is to return it to an equivalent land capability, and “equivalent land capability” means:

⁴ 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
(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.”

“...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.”⁵

[56] The Inspector noted that “equivalent land capability” does not mean the specified land must be returned to exactly the same condition that it was prior to the disturbance, only that it be reclaimed to a condition that is capable of supporting similar uses.

[57] The Inspector stated the applicable reclamation requirements for the Lease are the Criteria. The Inspector explained the Criteria require landscape, soils, and vegetation assessments.

[58] The Inspector explained the landscape criteria, including roughness and drainage, are assessed by looking at the site and comparing it with pre-disturbance conditions or adjacent land conditions. The Inspector said the differences between the site and adjacent land must not interfere with normal land use and must not show a negative impact on or off site. The Initial Inspector found that, when he assessed the landscape on Lease, it met the Criteria. The Initial Inspector found the contours on Lease were consistent with adjacent land and any minor contour issues present could be resolved through normal farming practices and equipment.

[59] The Initial Inspector assessed topsoil quantity, distribution, and quality at the Lease and found it met the Criteria and, compared to adjacent land, there were no profile restrictions or bare areas, and there was consistent aggregate size and strength.

[60] The Initial Inspector said he assessed the vegetation criteria, specifically species composition, on the Lease and compared it to adjacent land. The Initial Inspector noted the vegetation met the Criteria and the vegetation was excellent. The Initial Inspector noted that, on the two site visits he conducted, there were no wild oats on Lease or on adjacent land.

[61] The Inspector explained the “Upstream Oil and Gas Reclamation Certificate Application Guidelines” (the “Guidelines”) set out the process for the review of applications, including non-routine applications. The Inspector stated that, where there is a landowner complaint, the application is considered non-routine. The Inspector explained a non-routine application requires a completeness review, a regulatory review, and then the Inspector must

⁵ *Conservation and Reclamation Regulation*, Alta. Reg. 115/1993, at section 1(e).

ensure all complaints are resolved to his satisfaction. The Inspector explained that when there is a complaint, an investigation is conducted to confirm the extent or degree of compliance with legislation, criteria, guidelines, and policy. If an unresolved complaint is identified, the operator will be contacted, and an assessment will be conducted to determine the scope of the complaint and the actions required, if any, to resolve the complaint. The Inspector stated that, when a complaint is substantiated, the application is refused.

[62] The Inspector stated the completeness review ensures an application is complete and complies with all administrative requirements, whereas the regulatory review determines if the site complies with all applicable standards, guidelines, and reclamation criteria. The Initial Inspector reviewed the application and found it was complete and in compliance with the regulatory requirements.

[63] The Initial Inspector contacted the Certificate Holder in November 2011 regarding the Appellants' concerns about weeds, roughness, and low spots with poor vegetation growth, and he requested an update on the reclamation status of the Lease. The Certificate Holder responded by providing a chronology of the remediation and reclamation activities on the Lease and indicated the Certificate Holder had not seen wild oats on the Lease.

[64] The Initial Inspector said he inspected the Lease on November 4, 2011, and again on June 26, 2012.

[65] The Appellants wrote to the Initial Inspector in August 2012 respecting their concerns regarding wild oats and the contour of the Lease.

[66] The Former Inspector stated he inspected the Lease on October 17, 2012, and found the Lease met the Criteria and the Appellants' complaints were unsubstantiated. The Former Inspector found no further action was required.

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

IV. ANALYSIS

[68] The issue before the Board is: "Was the Reclamation 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 and the Record.

[69] In determining whether the Certificate should be issued, the Inspector must assess the data provided by the Certificate Holder in its application. The Inspector explained there is a process that must be followed. First, the application for the Certificate must be administratively complete. The Inspector must determine whether the application was completed in full and the required data were provided. Once the application has been deemed to be administratively complete, then the Inspector must assess the data provided to ensure they comply with the applicable reclamation criteria. In this case, the applicable criteria were the 1995 Criteria.

[70] Under the Criteria, the applicant must assess the site in a specific manner. The specific criteria to be met and the process to collect the data are set out in the Criteria. The process was established to prevent applicants from selectively sampling and measuring specific areas that would support the application. The intent is to ensure a true representation of existing conditions on the site.

[71] The Criteria requires an applicant to measure vegetative parameters and soil characteristics at 36 sample points on the Lease area containing the wellsite, as well as additional points along the access road. The 36 sample points are determined using a grid system across the entire well site. These points on the Lease are then compared to four random control points located outside the Lease, normally one on each side of the Lease. Additional data are collected on the access road and these points are compared with a random control point off the access road. If there is a high degree of variability on or off the Lease, then additional data points may be required.

[72] The Appellants raised concerns regarding weed growth on the Lease, loss of productivity, and soil conditions. To support their position, the Appellants submitted an aerial photograph of the Lease taken in 2012.⁶ Although the Lease site was clearly visible on the photograph because of a difference in colour of the vegetation on Lease compared to off Lease, the Certificate Holder argued that a photograph alone cannot be used to make a determination of whether the site met the Criteria.

⁶ See: Exhibit 11, AbaData Aerial Photograph dated August 16, 2012 to September 27, 2012.

[73] The Board realizes the value in presenting aerial photographs to provide a general oversight of the area. However, more detailed information is required to determine whether the Criteria are met. That is why ground sampling and measurements on the actual Lease are necessary. The Board notes that none of the Parties could explain to the Board why the vegetation on the Lease appeared to be different than off Lease. Although the Appellants tried to explain the differences were due to poor productivity and weed growth, the claims were not substantiated by the data collected and provided to the Board.

[74] The aerial photograph may have been of assistance to the Inspector at the time he investigated the Appellants' complaint to demonstrate their concerns pictorially. However, it does not provide the same level of detail a ground assessment completed on the Lease would provide. Since the photograph was only one piece of information, and there was more information that provided a more detailed assessment of the Lease, the Board cannot find the photograph presented as being conclusive proof the Lease was not properly reclaimed or, even on the balance of probability, that the Lease did not meet the Criteria.

[75] The Criteria require vegetation to be 80 percent of the density and height of the control areas off site. This type of detail cannot be calculated from an aerial photograph nor can an aerial photograph provide detailed information on the species composition on and off the Lease. Therefore, an aerial photograph, without additional data, is of limited assistance to the Board to determine if the reclaimed site meets the applicable standards.

[76] The Appellants compared the aerial photograph of the Lease to an aerial photograph of another well site located on the Appellants' property approximately six miles away. The Board understands the Appellants presented the photograph of the other site to show as a comparison how another wellsite reclaimed at the same time as the Lease was not as easily identifiable in the aerial photograph. In the aerial photograph of the other site, the vegetation on and off the lease were of similar colour in the photograph. However, there may have been other site differences between the sites that could account for the differences. For example, no information was provided to indicate the similarity of the soils, the vegetation, or the topography on the two sites, or whether the drilling method, timing, and reclamation process were the same. Precipitation events can also vary between sites and potentially result in varying images in an aerial photograph. Without additional data, including ground sourced data responsive to the

requirements of the Criteria, it is difficult to comparatively assess two sites simply by reference to aerial photography.

[77] The Appellants brought in soil samples to show the differences in soil quality and root growth. Although they marked the samples as being on or off the Lease, there was no clear indication on how the samples were collected. The Appellants did not explain to the Board how the specific areas selected for sampling were chosen. Without some evidence on how the sampling sites were chosen, it is difficult for the Board to be confident the samples were representative of conditions on the Lease.

[78] The Appellants brought in samples of hay grown on and off Lease. Again, the Board is unclear how the specific samples were collected and whether the samples were randomly or selectively collected. The same applies to the nutrient analysis information submitted by the Appellants. The Board acknowledges the analysis was completed by an independent laboratory, but the process for collecting the samples tested was not explained. The Board also notes the Criteria do not require a comparative nutrient analysis of the vegetation growing on the site to the vegetation growing off site. Therefore, the Inspector would not have used the nutrient analysis as a reason to deny the Certificate.

[79] The Appellants argued the production on the Lease is less than half of the production off the Lease. They compared the number of bales they got on the 4.52 acre Lease to the number of bales they got off the 80-acre field adjacent to the field where the Lease is located. If the Appellants based the production rate off Lease as an average across the 80-acre field, this could be representative of expected hay yields in the area. However, the Appellants did not explain the basis for their off Lease production rates; there may have been portions of the 80-acre field that were hayed that were comparable to the Lease and other areas where the productivity was significantly higher. Comparing a 4.52-acre parcel to an 80-acre parcel is tenuous without knowing all the inputs to determine whether a fair comparison can be made. Since the method of determining the comparative production rates was not clearly provided, the Board finds it difficult to reach any conclusions whether the production levels on and off Lease were not comparable. The Board also notes that determining productivity by counting the number of bales produced is not required under the Criteria.

[80] The Appellants did not refer to the Criteria to explain how the Lease failed to meet the legislated reclamation standards. They provided data that are not required under the Criteria. Had the Appellants provided the Inspector their soil and crop nutrient data at the time of their complaint, it may have provided a basis upon which the Inspector might have required further site specific data from the Certificate Holder. It appears from the evidence and arguments presented by the Appellants, they do not agree with the legislated criteria for reclamation standards. The Board is aware new criteria were released by AESRD, and the new criteria require additional data from applicants.⁷ However, even under the updated criteria, applicants are still not required to conduct nutrient analysis of forage crops or determine the number of bales on and off lease. It is important to understand that it is the 1995 Criteria that apply in this appeal, not any subsequent criteria.

[81] The Appellants argued the Lease is now infested with wild oats and wild mustard. The Initial Inspector and Former Inspector as well as the Certificate Holder did not find any wild oats or wild mustard on the Lease when they visited the site on November 4, 2011, June 26, 2012, and October 17, 2012. The Appellants' evidence was conflicting with respect to the wild oats. In their evidence, the Appellants explained that wild oats would not be visible in a well-established forage crop, and that is one reason why the Inspector and Certificate Holder did not see any wild oats on the Lease when the site visits were conducted. However, the Appellants also argued the growth on the Lease was not as dense or healthy as the off Lease vegetation. This would suggest the vegetation was not well-established and, if wild oats were present, the Inspector and Certificate Holder should have seen wild oat plants on the site visits or when the DSA was completed.

[82] The Appellants presented photographs which they said showed the wild oats and wild mustard growing on the Lease. The photographs were taken in 2008, but the Inspectors' site visits and the DSA were completed after the photographs were taken and no wild oats or wild mustard were found. If the weeds were present, the Appellants should have been able to specifically identify the weeds during the site visits and when the DSA was completed.

⁷ See: 2010 Reclamation Criteria for Wellsites and Associated Facilities.

[83] The application was a non-routine application because the Appellants had filed a complaint, which they are allowed to do under the reclamation certificate application process. The Initial Inspector investigated the complaints and, after visiting the site and reviewing the information provided by the Certificate Holder, found the complaint was without merit. The Initial Inspector took an additional step by requesting the Former Inspector to visit the Lease to obtain a second opinion on whether it appeared the complaints were valid. When visiting the Lease, neither of the Inspectors found evidence of wild oats or wild mustard on the Lease and they did not view any water ponding on the Lease that could indicate improper drainage from inadequate contouring of the Lease. The Initial Inspector complied with the requirements to investigate the complaint and determine whether or not the complaint had merit.

[84] The Appellants argued the weeds on the Lease were brought in when the topsoil was hauled onto the Lease. They referred to a picture taken in 2008 of a topsoil pile that was covered with weeds. However, no evidence was provided to confirm this was, in fact, the source of the topsoil used on the Lease. Therefore, the photographs of the topsoil piles provided by the Appellants cannot be considered persuasive evidence in this appeal particularly since the topsoil was placed in 2002. The analysis of the soil placed on the Lease in 2002 indicated there were inert buckwheat and inert lamb's quarters seeds in the soil. This supports the Certificate Holder's claim that the weeds on the Lease were not a result of the addition of the topsoil that was applied to the Lease as part of the reclamation process. The Appellants were unable to provide confirmed evidence to show where the topsoil spread on the Lease was actually brought in from or that its weed content was different than the analysis provided by the Certificate Holder.

[85] The Board acknowledges the Appellants have concerns with the wild oats and wild mustard on the Lease. However, the Board is unable to determine the source of the weeds and notes that such weeds can be controlled through farming practices. As such, this does not provide the basis for the Board to recommend cancelling the Certificate.

[86] In addition, under the Regulation, the Certificate Holder is liable for the reclamation work completed for 25 years from the time the Certificate was issued. Therefore, if the Lease becomes infested with weeds and it can be shown the weeds are the result of the

reclamation work, the Appellants would have further recourse to have additional work completed on the Lease.

[87] The Appellants had access to farm the Lease since 2010 when the Certificate Holder told the Appellants that the reclamation work was complete. However, the Appellants chose not to integrate the Lease into their farming operations at that time. Had the Lease been worked by the Appellants for two years and a wild oat problem became evident, the Certificate Holder and the Inspector would have been aware that an issue existed, and this evidence may have influenced whether a Certificate was issued in 2013 or not. Further, had a wild oat problem become apparent, that evidence would have been available to the Board at the hearing.

[88] The Appellants requested that, if the Certificate is not reversed, then additional data collection should be conducted in 2014 and 2015 using an independent consultant. The Board does not have the jurisdiction to recommend to the Minister that such a continuous data collection process be undertaken. The Board is limited to recommending to the Minister that the Inspector's decision to issue the Certificate be confirmed, reversed, or varied.

[89] The Board notes that Newalta, the company that completed the site assessments on behalf of the Certificate Holder, is an independent consultant. Even though Newalta was retained by the Certificate Holder, it has a professional responsibility to conduct itself in an unbiased manner, and there are consequences if it should provide anything other than truthful information in the application.

[90] The Appellants understood and recognized the Criteria are based on achieving equivalent land capability. This does not mean the Lease will be returned to exactly the same state it was in prior to construction. As the Appellants stated, the land will change over time. The Criteria is in place to ensure a disturbed site is capable of supporting the same land uses as adjacent lands. Despite the concerns raised by the Appellants, the Board accepts the data collected by Newalta was collected in accordance with the Criteria.

[91] Significantly, the Appellants did not argue the application was incomplete or that the Criteria were not met based on the data provided in the application. The Appellants chose to present evidence and data that were not requirements of the Criteria.

[92] 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.

[93] In order for the Board to recommend reversing the Inspector's decision, the onus was on the Appellants to provide sufficient evidence that showed more than mere doubt that the Certificate was issued in error. Although the Appellants brought photographs of the site as well as an aerial photograph and vegetation and soil samples, there was insufficient accompanying information for the evidence to be verifiable. The evidence presented was insufficient and inconclusive in its detail. As well, the site specific data submitted by the Appellants as evidence were not collected in a manner that could be accepted as scientifically sound to effectively challenge the data submitted in support of the application for the Certificate. Most of the evidence was anecdotal and not supported by accepted data collection methods.

[94] Based on the foregoing, the Board recommends the Minister confirm the Inspector's decision to issue the Certificate.

V. RECOMMENDATIONS

[95] The Board recommends the Minister confirm the Inspector's decision to issue Reclamation Certificate No. 00300909-00-00. The Appellants did not provide sufficient verifiable evidence to demonstrate the reclamation of the Lease did not meet the applicable Criteria.

[96] 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. Clint Whitelock and Ms. Audrey Whitelock;
2. Mr. Daron Naffin, Bennett Jones, on behalf of ARC Resources Ltd.; and

3. Ms. Vivienne Ball, Alberta Justice and Solicitor General, on behalf of the Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

VI. COSTS

[97] The Appellants stated each of the Parties should pay their own costs. The Certificate Holder reserved its right to ask for costs if the Appellants changed their position.

Dated on February 14, 2014, at Edmonton, Alberta.

- original signed -

Eric McAvity, Q.C.
Panel Chair

- original signed -

Alan Kennedy
Board Member

- original signed -

Jim Barlishen
Board Member



ALBERTA
ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT

Office of the Minister

MLA, West Yellowhead

Ministerial Order
26 /2014

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

Order Respecting Environmental Appeals Board
Appeal No. 13-004

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. 13-004.

Dated at the City of Edmonton, in the Province of Alberta, this 25th day of February, 2014.

Robin Campbell
Minister

Appendix

Order Respecting Environmental Appeals Board Appeal No. 13-004

With respect to the April 8, 2013 decision of the Inspector, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Inspector"), to issue Reclamation Certificate No. 00300909-00-00 under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 to ARC Resources Ltd., I, Robin Campbell, Minister of Environment and Sustainable Resource Development, order that the decision of the Inspector is confirmed.