

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 14, 2014

IN THE MATTER OF sections 91, 92, 93, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF notices of appeal filed by ConocoPhillips Canada Resources Corp. and Bonavista Energy Corporation with respect to the issuance of Environmental Protection Order No. EPO-2014/02-SSR to ConocoPhillips Canada Resources Corp. and Bonavista Energy Corporation under the *Environmental Protection and Enhancement Act* by the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: *ConocoPhillips Canada Resources Corp. and Bonavista Energy Corporation v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development* (14 August 2014), Appeal Nos. 13-031 and 032-D1 (A.E.A.B.).

BEFORE:

Justice Delmar Perras (Retired), Board Chair;
Mr. Eric McAvity, Q.C., Board Member; and
Ms. A.J. Fox, Board Member.

SUBMISSIONS BY:

Appellants: ConocoPhillips Canada Resources Corp.,
represented by Mr. Randall Block, Borden
Ladner Gervais LLP; and Bonavista Energy
Corporation, represented by Ms. Patricia
Quinton-Campbell, Burnet, Duckworth &
Palmer LLP.

Director: Mr. Craig Knaus, Director, South
Saskatchewan Region, Alberta Environment
and Sustainable Resource Development,
represented by Ms. Alison Altmiks, Alberta
Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Environmental Protection Order (EPO) to ConocoPhillips Canada Resources Corp. (ConocoPhillips) and Bonavista Energy Corporation (Bonavista) under the *Environmental Protection and Enhancement Act* (EPEA). The EPO was issued with respect to a gas plant and well located in Mountain View County. ConocoPhillips and Bonavista appealed the issuance of the EPO to the Environmental Appeals Board (the Board).

AESRD issued an amended EPO changing the section of EPEA under which the EPO was issued. No other changes were made to the EPO. ConocoPhillips filed an amended Notice of Appeal, adding additional grounds of appeal and remedies sought.

The Board asked for submissions on how the amended EPO should be addressed and what effects the amendment made to the EPO had on ConocoPhillips' ability to amend its Notice of Appeal.

After reviewing the written submissions, the Board did not accept the amended Notice of Appeal. The Board found the change made to the EPO was a clerical correction, which is not appealable under the legislation. Even if the Board had found the amendment to the EPO to be more than a clerical correction and it amounted to an actual amendment of the substantive terms of the EPO, there is no appeal right of an amendment to an environmental protection order in the legislation. Since the amendments to the Notice of Appeal were submitted after the time period to file a Notice of Appeal, the Board did not have the jurisdiction to accept the amended Notice of Appeal.

TABLE OF CONTENTS

I. INTRODUCTION	1
II. BACKGROUND	1
III. SUBMISSIONS	3
A. ConocoPhillips	3
B. Bonavista	5
C. Director	6
IV. ANALYSIS	8
V. DECISION	11

I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision in relation to appeals filed by ConocoPhillips Canada Resources Corp. ("ConocoPhillips") and Bonavista Energy Corporation ("Bonavista"). Alberta Environment and Sustainable Resource Development ("AESRD") issued Environmental Protection Order EPO-2014/02-SSR (the "EPO") to ConocoPhillips and Bonavista on March 21, 2014. The Environmental Appeals Board (the "Board") received Notices of Appeal from ConocoPhillips and Bonavista (collectively, the "Appellants") appealing the EPO on March 27, 2014.

[2] On April 3, 2014, AESRD amended the EPO by changing the section under which the EPO was issued from section 210 to section 113 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). ConocoPhillips filed an amended Notice of Appeal on April 10, 2014, based on the view that the amendment to the EPO was more than correcting a clerical error and, therefore, a new appeal period had started.

[3] The Board received and considered written submissions on how the amended Notice of Appeal should be addressed and what effects the amendment made to the EPO on April 3, 2014, had on CononcoPhillips' ability to amend its Notice of Appeal.

[4] The Board found the amendment to the EPO was to correct a clerical error and, therefore, there was no right of appeal. The amended Notice of Appeal was filed outside the legislated time period, so the Board could not accept the amended Notice of Appeal.

II. BACKGROUND

[5] On March 21, 2014, the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development (the "Director"), issued an EPO under EPEA to the Appellants with respect to the Crossfield Sour Gas Processing Plant and the well located at NW-14-29-3 W5M (the "Site") in Mountain View County.

[6] On March 27, 2014, the Board received Notices of Appeal from the Appellants.¹ The Appellants also requested a stay.

¹ On March 28, 2014, ConocoPhillips filed a Notice of Appeal of the Director's decision to refuse to cancel Approval No. 10955-02-00. ConocoPhillips withdrew its appeal on April 15, 2014, and the Board closed its file on this appeal on April 17, 2014. See: Appeal No. 13-033.

[7] On March 31, 2014, the Board wrote to the Appellants and the Director (collectively the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Director of the appeals. The Board asked the Director to provide a copy of the documents upon which his decision was based (the “Record”).

[8] On April 3, 2014, the Director amended the EPO, changing the section of EPEA under which the EPO was issued from section 210² to section 113.³

² Section 210 of EPEA states:

- “(1) Where in the Director’s opinion a person has contravened this Act, except section 178, 179, 180, 181 or 182, the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:
- (a) the suspension or cancellation of an approval, registration or certificate of qualification;
 - (b) the stopping or shutting down of any activity or thing either permanently or for a specified period;
 - (c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act;
 - (d) the doing or refraining from doing of any thing referred to in section 113, 129, 140, 150, 156, 159, 183 or 241, as the case may be, in the same manner as if the matter were the subject of an environmental protection order;
 - (e) specifying the measures that must be taken in order to effect compliance with this Act.” (Emphasis added.)

³ Section 113 of EPEA provides, in part:

- “(1) Subject to subsection (2), where the Director is of the opinion that
- (a) a release of a substance into the environment may occur, is occurring or has occurred, and
 - (b) the release may cause, is causing or has caused an adverse effect,
- the Director may issue an environmental protection order to the person responsible for the substance....
- (3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:
- (a) investigate the situation;
 - (b) take any action specified by the Director to prevent the release;
 - (c) measure the rate of release or the ambient concentration, or both, of the substance;
 - (d) minimize or remedy the effects of the substance on the environment;

[9] On April 7, 2014, the Director agreed to a temporary stay of the EPO until June 30, 2014, to allow for the Record to be provided to the Board and for a mediation meeting to be held. The Board granted the short term stay until June 30, 2014.

[10] On April 10, 2014, ConocoPhillips filed an amended Notice of Appeal.

[11] On April 22, 2014, the Board asked the Parties to provide submissions on how the Amended Notice of Appeal should be addressed and what effects the amendment made on April 3, 2014, had on CononcoPhillips' ability to amend its Notice of Appeal.

[12] The Board received written submissions from the Parties on April 30 and May 1, 2014.

III. SUBMISSIONS

A. ConocoPhillips

[13] ConocoPhillips explained it was served with the EPO on March 21, 2014, pursuant to section 210 of EPEA, and on March 27, 2014, it filed its Notice of Appeal. On April 3, 2014, the Director advised the Appellants that a typographical error had been made in the EPO and that a correction was being made pursuant to section 243(1)(c) of EPEA.⁴ ConocoPhillips

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- (e) restore the area affected by the release to a condition satisfactory to the Director;
 - (f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;
 - (g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
 - (h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
 - (i) report on any matter ordered to be done in accordance with directions set out in the order." (Emphasis added.)

⁴ Section 243(1)(c) of EPEA states:

"The Director may ... correct a clerical error in an environmental protection order."

said the correction stated the EPO was issued pursuant to section 113 of EPEA and not section 210.

[14] ConocoPhillips noted that, under section 243(4) of EPEA,⁵ the Director was obligated to serve a copy of the amended EPO on ConocoPhillips, but according to ConocoPhillips, the Director had not done so.

[15] ConocoPhillips submitted that revising the basis for the issuance of the EPO was more significant than a clerical error. ConocoPhillips stated the amendment had the effect of eliminating one of ConocoPhillips' grounds of appeal.⁶ ConocoPhillips argued it was entitled to a new appeal period of seven days in accordance with sections 91(h) and 91(4)(a) of EPEA.⁷ ConocoPhillips stated that if it was unable to respond to the amendment, the appeal process would be procedurally unfair.

[16] ConocoPhillips stated its amended Notice of Appeal was filed on April 10, 2014, which was within seven days of the Director's letter notifying it of the amendment. ConocoPhillips argued its amended Notice of Appeal should be allowed because it was filed before the appeal period had expired.

[17] ConocoPhillips stated allowing the amendments to its Notice of Appeal would not prejudice any of the Parties, because they are able to proceed with presenting evidence and their positions in response to ConocoPhillips' amended Notice of Appeal as though the amendments

⁵ Section 243(4) of EPEA provides:

"A copy of an environmental protection order amended under subsection (1) shall be served on the same person to whom the original order was directed."

⁶ Paragraph 12(h)(ii) of ConocoPhillips' Notice of Appeal stated:

"Breaching the requirements of procedural fairness owed to ConocoPhillips by, including but not limited to... Contrary to section 210(3) of EPEA, failing to advise ConocoPhillips of, or to include in the EPO, the section or sections of EPEA which, in the Director's opinion, have been contravened by ConocoPhillips."

⁷ Sections 91(h) of EPEA states:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances... where the Director issues an environmental protection order, except an environmental protection order directing the performance of emergency measures under section 114, 151 or 160 and an environmental protection order referred to in clause (g), the person to whom the order is directed may submit a notice of appeal."

Section 91(4)(a) of EPEA provides:

"A notice of appeal must be submitted to the Board not later than 7 days after receipt of a copy of the enforcement order or the environmental protection order, in a case referred to in subsection

were in the original Notice of Appeal filed on March 27, 2014. ConocoPhillips argued its amendments should be allowed because the amendments provide more particulars and do not prejudice any of the Parties.

[18] ConocoPhillips stated its amendments result in all relevant issues being placed before the Board which allows for a meaningful and well-reasoned decision to be made based on the merits of the Parties' positions.

B. Bonavista

[19] Bonavista stated there are no legislative provisions that authorize the amendment of a Notice of Appeal. Bonavista noted that, under section 91(5) of EPEA⁸ the Board may extend the appeal period when an application is made, or the Board may, under section 93 of EPEA,⁹ extend time periods not specific to appeal periods.

[20] Bonavista said where there are sufficient grounds, an extension of time to file the Notice of Appeal could allow for a new Notice of Appeal to be filed which contains all the amendments sought. Bonavista noted that in this case, no application was made for an extension of time pursuant to section 91(5) of EPEA.

[21] Bonavista submitted the amendments made by ConocoPhillips are not generally of the nature of changes allowed by the Board. Bonavista stated the amendments are not clarification, because they change the scope of the appeal by expanding the relief sought and grounds for appeal. Bonavista noted the amendments were filed outside the appeal period, creating a shifting target for the Board, Director, and Bonavista to address, which is unfair to these Parties.

1(e), (f) or (h).”

⁸ Section 91(5) of EPEA states:

“The Board may, on application made before or after the expiry of the period referred to in subsection (4), extend that period, where the Board is of the opinion that there are sufficient grounds for doing so.”

⁹ Section 93 of EPEA provides:

“The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so.”

[22] Bonavista submitted the Director's amendment to the EPO pursuant to section 243(1) of EPEA did not entitle ConocoPhillips to amend its Notice of Appeal. Bonavista stated there is no appeal right of an amendment of the EPO and an amendment to an environmental protection order does not allow the filing of an amended Notice of Appeal.

[23] Bonavista stated the amendments made by ConocoPhillips did not address any matter arising from the amendment to the EPO. Bonavista noted the amendment to the EPO did not change the appeal period or the grounds upon which an appeal may be based to give rise to new grounds of appeal in the amended Notice of Appeal. Bonavista stated the amendments to the Notice of Appeal addressed matters contained in the original EPO, so even if it was permissible to amend Notices of Appeal to address amendments to an environmental protection order, this would not be such a case.

C. Director

[24] The Director noted the EPO identifies on its face and on each subsequent page that it was an environmental protection order, and the Notice of Appeal filed by the Appellants also referred to the EPO.

[25] The Director explained he sent notice to the Appellants on April 3, 2014, to correct the legislative reference in the EPO. The Director stated the legislation allows for the correction of a clerical error in an environmental protection order pursuant to section 243(1)(c) of EPEA. The Director said that, under section 256 of EPEA,¹⁰ service is sufficient if done by mail or personal service.

¹⁰ Section 256 of EPEA provides:

“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
- (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.”

[26] The Director stated that, even though amendments to an approval may be appealed under section 91(1)(a) of EPEA, the correction of a clerical error in an environmental protection order is not appealable.

[27] The Director noted a Notice of Appeal related to the issuance of an environmental protection order may be submitted to the Board under sections 91(1)(f), (g), or (h), but there is no corresponding ability to appeal the amendment of an environmental protection order as there is in the case with amendments to approvals.

[28] The Director stated a Notice of Appeal related to an enforcement order or an environmental protection order must be submitted no later than seven days after receipt of a copy of the enforcement order or environmental protection order. The Director said ConocoPhillips' original Notice of Appeal filed on March 27, 2014, was submitted within the appeal period, but the amended Notice of Appeal filed on April 10, 2014, was submitted outside the appeal period. The Director noted there was no request for an extension to the appeal period under section 91(5) of EPEA.

[29] The Director stated the appeal period for an enforcement order and an environmental protection order are the same, so there was no prejudice to ConocoPhillips by the correction of the clerical error.

[30] The Director said the receipt of the correction of the clerical error did not constitute receipt of the EPO as contemplated in section 91(1)(4)(a) of EPEA. The Director stated the EPO was issued on March 21, 2014, received by the Appellants on the same day, and was the subject of the Notices of Appeal submitted on March 27, 2014.

[31] The Director noted that only two of ConocoPhillips' amendments appeared to be related to the April 3, 2014, correction of the clerical error. The Director argued the majority of the amendments were relief and grounds that were available and could have been raised in the March 27, 2014 Notice of Appeal.

[32] The Director stated his April 3, 2014 correspondence correcting a clerical error did not restart or extend the appeal period. The Director argued the amended Notice of Appeal was filed outside the appeal period and should not be accepted by the Board.

[33] On May 1, 2014, the Director provided copies of Affidavits of Service related to the EPO and the April 3, 2014 amendment.

IV. ANALYSIS

[34] The issues before the Board are:

1. Was the change made by the Director on April 3, 2014, a clerical correction to the EPO or an amendment to the EPO?
2. Should the Board accept the amendments to ConocoPhillips' Notice of Appeal?

[35] The amendment the Director made to the EPO was to change the section number under which the EPO was issued. Section 113 allows the Director to issue an environmental protection order, which requires the recipient to take certain actions to address the release of a substance into the environment that may cause or is causing an adverse effect. Section 210 of EPEA allows the Director to issue an enforcement order, requiring the recipient to stop an activity because the recipient of the enforcement order has contravened EPEA. An enforcement order is an enforcement procedure whereas an environmental protection order is remedial in nature. Both an environmental protection order and an enforcement order have appeal periods of seven days from the date the order is received. By changing the section under which the EPO was issued did not change the time period in which ConocoPhillips had to file a Notice of Appeal; the appeal period was seven days.

[36] It is clear from the plain reading of the EPO that it is an environmental protection order and not an enforcement order. By changing the section number the Director was correcting a clerical error, which he has the authority to do under section 243(1)(c) of EPEA. The Director made no other changes to EPO. The substantive requirements of the EPO did not change.

[37] The Board finds the change made by the Director was solely to correct a clerical error.

[38] The jurisdiction of the Board is set out in the legislation. Not all decisions made by the Director are appealable. Section 91 of EPEA identifies those decisions made by the Director that can be appealed. Section 91 of EPEA does not include the right to file an appeal of

the Director's decision to correct a clerical error. Therefore, there is no right of appeal of the amendment to the EPO.

[39] Even if the Board accepted the argument that the change was an amendment, there is no appeal right under section 91 for an amendment of an EPO.¹¹ Although there are provisions under section 91 of EPEA to appeal an amendment of an approval or certificate, the legislators determined there should be no right of appeal for an amendment of an environmental

¹¹ Section 91 of EPEA states:

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

- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted...;
- (b) where the Director refuses
 - (i) to issue an approval, or
 - (ii) to make an amendment, addition or deletion in respect of an approval pursuant to an application under section 70(1)(a),
the applicant may submit a notice of appeal;...
- (e) where the Director issues an enforcement order under section 210(1)(a), (b) or (c), the person to whom the order is directed may submit a notice of appeal;
- (f) where an inspector issues an environmental protection order regarding conservation and reclamation under section 140 or 141, the person to whom the order is directed may submit a notice of appeal;
- (g) where the Director issues an environmental protection order under section 129,
 - (i) the person to whom the order is directed, and
 - (ii) any person who is directly affected by the designation of the contaminated site
may submit a notice of appeal;
- (h) where the Director issues an environmental protection order, except an environmental protection order directing the performance of emergency measures under section 114, 151 or 160 and an environmental protection order referred to in clause (g), the person to whom the order is directed may submit a notice of appeal;
- (i) where an inspector issues a reclamation certificate under section 138, or the Director or an inspector amends a reclamation certificate under section 139, the operator and any person who receives a copy of the certificate or amendment under section 145 may submit a notice of appeal;....
- (l) where the Director or an inspector issues, amends or cancels a remediation certificate under section 117, any person who receives notice of the issuance, amendment or cancellation as provided for in the regulations may submit a notice of appeal;....”

protection order. If the Board accepted ConocoPhillips' argument that the amendment was more than correcting a clerical error, there still would be no right of appeal under section 91 of EPEA.

[40] The Board has in the past allowed for amendments of a Notice of Appeal but only in limited circumstances: (1) still within the appeal period; (2) the Board asks for additional information; or (3) for clarification or narrowing of the issues.

[41] ConocoPhillips acknowledged in its cover letter to its amended Notice of Appeal that it was raising additional grounds for appeal, which does not fall into the three circumstances listed above for accepting amendments to a Notice of Appeal.

[42] By not accepting the amended Notice of Appeal, the Board does not believe ConocoPhillips will be prejudiced. The issues raised in the amended Notice of Appeal are already encapsulated in the issues listed in the original Notice of Appeal.

[43] In addition, before the Board makes a determination of the issues for the hearing, the Parties will be given the opportunity to provide submissions on what issues should be heard at the hearing. Although ConocoPhillips stated one of the reasons it provided the amended Notice of Appeal was to clarify its position in its original Notice of Appeal, the Board has reviewed the Notice of Appeal and is able to understand the issues raised by ConocoPhillips. ConocoPhillips will be given the opportunity to narrow down its concerns and suggest phrasing of the issues to be determined at the hearing in such a manner as to address the Appellants' issues. The issues must still be within the Board's jurisdiction and included in the original Notices of Appeal.

[44] If the Board allowed the amended Notice of Appeal to be filed, the only issue that would be considered would be the actual amendment made. As stated in previous Board decisions, an amendment does not allow an appellant to appeal the entire approval or certificate.¹² It is only the amended clauses that are appealable. Therefore, even if there was an

¹² See: *Visscher v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Provident Energy Ltd.* (07 February 2011), Appeal Nos. 10-011-012-ID1 (A.E.A.B.); *Cold Lake Fibromyalgia Support Group et al. v. Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (22 January 2009), Appeal Nos. 07-004-021, 028-033, 040-075, 100-105, 112-117-ID1 (A.E.A.B.); and Preliminary Motions: *Walsh and Abrams v. Director, Southern Region, Regional*

appeal right for an environmental protection order, which there is not, what would be appealable in this case would be the section under which the EPO was issued, and the Board understands ConocoPhillips has no issue with that decision.

[45] The Board finds the amendment to the EPO was to correct a clerical error, and there is no right of appeal for such amendments.

[46] The amended Notice of Appeal was filed past the legislated time period for filing an appeal, and ConocoPhillips did not provide sufficient reasons for the Board to accept the late filed amended Notice of Appeal.

V. DECISION

[47] The Board finds the Director made a clerical change to the EPO, which is not appealable under section 91 of EPEA. Even if the Board had found the change to be in the nature of an amendment of the EPO, section 91 of EPEA does not include the right to appeal an amendment of an environmental protection order.

[48] Therefore, the Board finds ConocoPhillips' April 10, 2014 amended Notice of Appeal is not properly before the Board, and the amended Notice of Appeal is dismissed. The original Notices of Appeal filed by ConocoPhillips and Bonavista are still before the Board.

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

"original signed by"
D.W. Perras
Board Chair

"original signed by"
Eric McAvity, Q.C.
Board Member

"original signed by"
A.J. Fox
Board Member