2016 ABAER 006

Alberta Energy Regulator

Canadian Natural Resources Limited

Regulatory Appeal of a Reclamation Certificate Refusal
Boundary Lake South Field
Proceeding No. 1837447

June 1, 2016

Alberta Energy Regulator
Decision 2016 ABAER 006: Canadian Natural Resources Limited, Regulatory Appeal of a Reclamation Certificate Refusal, Boundary Lake South Field

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Decision

[1] Having carefully considered all of the evidence, the hearing panel confirms the Alberta Energy Regulator's (AER) decision to refuse to issue the reclamation certificate and denies regulatory appeal Proceeding No. 1837447.

Introduction

Proceeding

[2] On May 2, 2014, Canadian Natural Resources Limited (CNRL) applied to the AER for a reclamation certificate for a well site and access road in Legal Subdivision 11, Section 9, Township 83, Range 13, West of the 6th Meridian (11-9 site or site; see figure 1). On October 20, 2014, the AER refused to issue the reclamation certificate and provided notice of its decision to CNRL.

[3] On November 17, 2014, the AER received a request for a regulatory appeal of the AER's decision to refuse to issue the reclamation certificate under Part 1, Division 3, of the *Responsible Energy Development Act* and Part 3 of the *Alberta Energy Regulator Rules of Practice* (*Rules of Practice*).

[4] On September 9, 2015, the AER decided to set the matter down for a hearing. The purpose of the hearing was to determine whether the AER should confirm, vary, suspend, or revoke its decision to refuse to issue a reclamation certificate.

Background

[5] CNRL prepared the lease and drilled the well at the 11-9 site in August of 2001. The well did not produce and was subsequently abandoned and reclaimed in October of 2001. As requested by the landowners, a fence was built around the site. To begin the reclamation process, CNRL seeded the site with fescue. At the time, the adjacent field was planted with fescue for seed production. In October of 2002, the Municipal District of Clear Hills No. 21 issued a weed notice to the landowner that identified a high population of noxious and nuisance weeds on the site, specifically Canada thistle and wild oats. CNRL used weed control to address the problem. CNRL provided evidence that it continued its

maintenance of the site through the next ten years by spraying and mowing. CNRL and the landowner toured the site in 2012 and the landowner identified concerns with quack grass.

[6] In preparation for CNRL's reclamation certificate application, a detailed site assessment (DSA) was conducted on September 27, 2013, by Navus Environmental Inc. (Navus). The report detailing the findings of the DSA was completed and signed on November 27, 2013. CNRL submitted the reclamation certificate application to the AER on May 2, 2014, accompanied by a landowner complaint form. The application was submitted on a nonroutine basis because of the landowner complaint.

[7] As part of processing this nonroutine application, the AER's Reclamation Programs Group (RPG) conducted a complaint inspection of the site on August 18, 2014 (2014 complaint inspection).

[8] On October 20, 2014, the RPG sent a decision letter (2014 decision letter) refusing to issue a reclamation certificate. The 2014 decision letter cited these specific reasons for the refusal:

> Increased amount of incompatible vegetation (quackgrass patches) on portions of the well site and access road.
>
> The exemption justification form provided with the application is not acceptable as the quackgrass present on the site interferes with the landowner's use of the site for fescue production.

[9] The 2014 decision letter also stated that a new application could be submitted once CNRL had rectified these deficiencies and "reviewed the entirety of [its] application information to ensure no other deficiencies exist."

[10] On November 17, 2014, CNRL submitted its request for a regulatory appeal of the refusal. CNRL and the RPG attempted to resolve the matter through alternative dispute resolution. After the parties agreed that negotiations were not resolving the matter, the AER hearing process began with the first notice of hearing issued on September 9, 2015.

[11] As part of their preparation for the hearing, the RPG inspected the site on October 23, 2015.

[12] Table 1 provides a summary of the key dates associated with the reclamation certificate application process.

Table 1. Background summary

Date	Activity
August 2001	Lease site constructed and well drilled
October 2001	Lease site reclaimed, planted with fescue
Early 2002	Lease site fenced
Summer 2012	Landowner identified concerns with quack grass
September 27, 2013	DSA conducted by Navus for CNRL

November 27, 2013	DSA report completed
April 2, 2014	Landowner's written complaint about quack grass, etc.
May 2, 2014	Reclamation certificate application submitted
August 18, 2014	RPG complaint inspection
October 20, 2014	RPG decision letter issued
November 17, 2014	Regulatory appeal requested by CNRL
September 9, 2015	Notice of hearing issued
October 23, 2015	RPG site visit

Regulatory Context

[13] The duty to conserve and reclaim land and obtain a reclamation certificate arises from section 137 of the *Environmental Protection and Enhancement Act* (*EPEA*). "Reclamation," as defined in subsection 1 (ddd)(iv) of *EPEA*, includes the procedures, operations, or requirements specified in the regulations. Under section 2 of *EPEA*'s *Conservation and Reclamation Regulation* (*CRR*), the objective of conservation and reclamation is to ensure the specified land has "an equivalent land capability." Equivalent land capability is defined in Part 1 of the *CRR*:

> "[E]quivalent land capability" means that the ability of the land to support various land uses after conservation and reclamation is **similar** to the ability that existed prior to an activity being conducted on the land, but that the individual land uses will not necessarily be identical. [emphasis added]

[14] The definition of "specified land" under the *CRR* includes "land that is being or has been used or held for or in connection with the construction, operation, or reclamation of a well." The *CRR* also states that an operator must reclaim specified land in accordance with applicable standards, criteria, and guidelines. These include the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands*, 2013 update (*2010 Reclamation Criteria*). The *2010 Reclamation Criteria* are applied "to evaluate whether a site has met equivalent land capability." The criteria specify that to apply for a reclamation certificate, an operator must include in its application an evaluation of whether the lease site meets the reclamation criteria, which compares the reclaimed area to adjacent lands in terms of vegetation, soil quality, and landscape. The *2010 Reclamation Criteria* does not require lease sites to be returned to the exact state that they were in before the activity occurred. Rather, equivalent land capability is "based on land function and operability that will support the production of goods and services consistent in quality and quantity with the surrounding lands."

[15] The *2010 Reclamation Criteria* provides guidance for situations where the operator is not able to compare the lease site vegetation to that of the surrounding area, for example, when there is tame pasture on the lease surrounded by forest or cultivated lands.

> The assessor, operator, inspector or reviewer is not limited to the methods identified in the criteria to make his/her assessment. Where such circumstances occur and the site operator is satisfied that the site is ready to certify, an application can be submitted but must be accompanied with a detailed justification as to why the methodologies in the criteria do not support certification yet the site does meet equivalent capability… A fundamental principle carried forward in these criteria is that the success of land reclamation is measured against the representative (adjacent) site conditions with due consideration for construction norms at the time of development.

[16] If the off-site vegetation is not comparable and the evaluation techniques outlined in the *2010 Reclamation Criteria* cannot be implemented, the operator's assessor will use professional judgement to determine whether a reclamation certificate should be issued and outline the reasons in an exemption justification form. An application that includes an exemption justification form is subject to a technical review by an RPG assessor.

[17] Once a reclamation certificate is issued, the operator is responsible for surface reclamation for 25 years. The reclamation certificate can be cancelled following a failed audit or substantiated landowner complaint regarding surface reclamation at any point during that 25 year period. Landowners and other directly affected parties have one year after a reclamation certificate is issued to appeal the decision.

Hearing Participants

[18] As the decision maker, the RPG was a party to the regulatory appeal and the hearing. The AER received a request to participate in the hearing from Charles Johnson and Patricia Johnson, the landowners. Neither CNRL nor the RPG objected to the landowners' participation request. The hearing panel granted participation rights to the Johnsons in a letter dated December 10, 2015.

Hearing

[19] The AER held a public hearing in Grande Prairie, Alberta, which started on March 2, 2016, and ended on March 3, 2016, before hearing commissioners B. T. McManus, Q.C. (presiding), T. C. Engen, and L. Ternes, B.A., LL.B. Those who appeared at the hearing are listed in appendix 1.

[20] The panel did not visit the 11-9 site in person. However, with the agreement of the parties, an AER field inspector went to the site and took photographs for the panel to review. These photographs were taken on October 26, 2015, and, with the consent of the parties, were entered as an exhibit on the hearing record.

[21] On the afternoon before the hearing, the RPG distributed a PowerPoint presentation overview of its evidence. At the start of the hearing, CNRL sought to have portions of slides 15, 16, 17, and 33 excluded from the presentation on the basis that they contained new information or argument. The panel considered CNRL's motion and directed RPG to delete four bullet points from slide 17 and redistribute the presentation. In providing that direction, the panel recognized that the deleted contents from slide 17 might still be referenced during the hearing and clarified that the parties could still refer to and provide argument on that content. The panel found that the other information that CRNL wanted removed had already been filed as evidence and therefore could remain in the presentation.

[22] In reaching its decision, the AER has considered all relevant materials constituting the record of this proceeding, including the evidence and argument provided by all parties. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the AER's reasoning on a particular matter and do not mean that the AER did not consider all relevant portions of the record with respect to that matter.

Preliminary Legal Matters

In assessing the site's compliance with reclamation criteria, what point in time should be considered?

[23] On the instruction of the panel, the parties provided argument at the hearing about what timeframe the panel should consider when assessing whether the site meets the reclamation criteria. Related to this is the issue of whether the panel can or should consider new information not previously available at the time of the 2014 decision letter, including new information about site conditions.

[24] CNRL argued that the panel should not consider information about the site from any time before or after the site was assessed for compliance with the *2010 Reclamation Criteria*. CNRL argued that the 2013 DSA was the most relevant date to focus on because this was the only time there was a full evaluation of the site.

[25] CNRL confirmed that it was also appropriate to consider information about the site from the 2014 complaint inspection in determining whether reclamation criteria had been met but clarified that it was not appropriate to use that inspection to determine the accuracy or completeness of CNRL's application.

[26] The landowner argued that the DSA did not accurately represent the state of the site because it was only a snapshot in time. He argued that a broader time period should be considered when determining whether the reclamation criteria have been met. He submitted that the panel should consider a period of time beginning with the date of the DSA and ending with the issuance of the 2014 decision letter.

[27] The RPG agreed that the 2014 complaint inspection is a relevant point in time for determining whether the site meets criteria. It noted that the evidence collected by the RPG assessor is relevant and

material to the panel's consideration of whether the landowner's concerns were substantiated, as well as a verification of the completeness and accuracy of the application. However, in the RPG's view, the test in this case is whether the evidence is relevant and material and not when the evidence became available.

[28] The RPG took the position that the current regulatory appeal proceeding was in part a de novo hearing and in part a hearing on the record, meaning that the evidence upon which the initial decision was made was also before the panel. It argued that the panel therefore can consider new information that is relevant and material to the panel's decision, regardless of when it was collected. Furthermore, it submitted that section 31.1 of the *Rules of Practice* gives the AER the authority to consider new information that is relevant and material to the appealed decision.

[29] The RPG stated that the AER has broad powers to collect evidence to fulfil its function under *EPEA* and referred to Environmental Appeals Board (EAB) *Decision 94-014* and the ensuing Alberta Court of Queen's Bench decision in *Gulf Canada Resources v. Alberta (Minister of Environmental Protection)*, [1996] A.J. No. 1240 (Q.B.). The RPG submitted that these authorities and the *Rules of Practice* demonstrate that the panel has broad authority to receive and review all relevant and material evidence, including new evidence, up until the time of the hearing.

[30] CNRL did not specifically state whether the current regulatory appeal is a hearing de novo, but argued that even in appeals in which de novo hearings are statutorily mandated, the parties must follow the process established by the decision maker, and deference must still be given to the original decision in terms of presenting additional evidence. It referred to *Imperial Oil Resources Ltd. v. 826167 Alberta Inc.* (2007 ABCA 131) in support of its position.

[31] The panel finds the cases submitted by the RPG to be instructive. In *Decision 94-014*, the EAB determined that it could consider new evidence, conduct site visits, and ask for additional information. The EAB also found that it could consider relevant and material evidence of any changes in the condition of the land. The AER has similar statutory powers to those noted in *Decision 94-014*, including the power to consider relevant and material new information about site conditions after a decision has been made on a reclamation certificate.

[32] The panel notes that all parties identified more than one date that should be considered relevant. The panel understands that the DSA is the detailed review of the site by the operator's assessor, and a complaint investigation allows the RPG to explore the basis for a complaint made in relation to a reclamation certificate application. With this distinction in mind, the panel concludes that in this proceeding, the DSA and the complaint inspection are both relevant points in time. The DSA provided an analysis of site conditions as of September 2013, and the complaint investigation explored those conditions in the context of the landowner's concerns in August of 2014. Both are relevant to the issue of whether the site meets reclamation criteria.

[33] Given the AER's rules and the decisions referenced above, it is clear that the panel is entitled to consider all information that is relevant and material to the appealed decision. Furthermore, rule 31.1 of the *Rules of Practice* is unequivocal on this point. The panel concludes that, in accordance with rule 31.1, it will consider new information that is relevant to the 2014 decision letter. This includes

- the photos taken of the site in 2015 by AER field staff and filed on the record of the proceeding in accordance with the panel's directions in advance of the hearing;
- the RPG's information and documents relating to site conditions after October 2014, including its 2015 site visit; and
- the release from Alberta Infrastructure that was obtained and filed by CNRL during the hearing.

The panel considers this information both relevant and material, as it goes directly to the issues of whether the site met reclamation criteria and whether the application was complete.

[34] Regarding the authorities cited by CNRL, new evidence in this case will not undermine the underlying facts of the initial decision or lessen the value of the decision maker's expertise as referred to in *Imperial Oil Resources Limited*. The new information about the site is relevant and material and can be assessed to determine whether or not it supports or contradicts the underlying facts upon which the initial decision was premised. This goes directly to the panel's task of determining whether the 2014 decision should be confirmed, varied, suspended, or revoked.

What are the issues that are the subject of the appeal?

[35] The AER's authority to decide whether or not to issue a reclamation certificate is found in section 138(3) of *EPEA*, which allows the issuance of a reclamation certificate upon the satisfactory completion of the conservation and reclamation requirements of *EPEA* and its regulations. The *CRR* also provides authority to issue (or refuse to issue) a reclamation certificate. The 2014 decision letter states that the application for a reclamation certificate was found "not to be complete and accurate and is therefore refused pursuant to section 138 of *EPEA*." Subsection 138(1.1) of *EPEA* deals specifically with incomplete and inaccurate applications:

> 138(1.1) The Director or an inspector may **refuse to accept** an application for a reclamation certificate if, in the Director's or inspector's opinion, the application is not complete and accurate. [emphasis added]

[36] The 2014 decision letter cites the authority of section 138 of *EPEA* but does not point specifically to subsection 138(1.1). The letter states that the application was refused, not that the AER had "refused to accept" the application. The deficiencies cited in support of the decision relate to the RPG assessor's observations about the site and include findings about the landowner's intended use of the site. These reasons are clearly tied to the issue of whether the site meets criteria. Not only does the 2014 decision

letter indicate that the RPG assessor found the application incomplete and inaccurate, but it also indicates that his decision to refuse the certificate was made because he was not satisfied that the site met the conservation and reclamation requirements of *EPEA*, specifically the *2010 Reclamation Criteria*, as required by section 138(3) of *EPEA*.

[37] The panel also notes that the main issue that was identified in the notice of hearing was whether the AER should confirm, vary, suspend, or revoke its decision to refuse to issue a reclamation certificate. The RPG assessor confirmed during direct evidence that there were two components to his decision not to issue a reclamation certificate: first, he refused to accept the application because it was not complete and accurate, and, second, he refused to issue the certificate because he did not believe that the site met criteria. All parties agreed that the issue of whether the site met reclamation criteria is properly before the panel, in addition to the issue of whether or not the application was complete and accurate.

Issues

[38] The AER considers the issues raised by the regulatory appeal to be the following:

- Does the site meet reclamation criteria?
- Was the application complete and accurate?

[39] Other issues raised during the hearing that the panel will address are as follows:

- certain releases were missing from the application
- third-party impacts and the reclamation of the site
- communication between the parties

Does the site meet reclamation criteria?

[40] Section 138(3) states that the reclamation must have been completed in accordance with section 137(2), which states,

> 137(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.

[41] While the site meets many of the criteria for reclamation, the hearing panel is only focusing on the elements that CNRL might not have satisfied, according to the arguments of the parties. The questions considered by the panel in this particular instance are as follows:

- Is quack grass an undesirable plant?
- Does quack grass interfere with the landowner's future use of the site or with the landowner's ability to integrate the site?
- Does the site meet the *2010 Reclamation Criteria*?

Is quack grass an undesirable plant?

[42] The *2010 Reclamation Criteria* describes weeds as undesirable or unwanted plants and states that "undesired plants (i.e., volunteer crop, incompatible species) shall be controlled so that they do not impede land manager operability and/or management."

[43] CNRL stated that quack grass is not a prohibited noxious or noxious weed under the Alberta *Weed Control Act*. It concluded that since it is incompatible neither with the perennial pasture setting that the site is being used for nor with any future use of the site for cultivated crops or fescue seed production, it is not a weed under the *2010 Reclamation Criteria*.

[44] The landowner submitted that he considered quack grass to be an undesirable plant as it is difficult to eradicate and its presence in certain seed crops can reduce their value.

[45] The RPG submitted evidence that in agricultural areas, quack grass is a serious weed that can negatively affect cultivated crops. However, it can be used as pasture or hay and may be found on lists of preferred plants for rangeland. The RPG and the landowner both provided evidence that quack grass is compatible with a pasture situation, as it contains protein and nitrogen in suitable quantities.

[46] There was some discussion as to whether quack grass was a noxious weed, a prohibited weed, or some other category of vegetation. The panel notes that Alberta Agriculture and Forestry's weed survey categorizes quack grass as a nuisance weed and that in an investigation related to this site, the Alberta Institute of Agrologists considered it to be undesirable but not a designated noxious weed under the *Weed Control Act*. During questioning of CNRL, Dr. Mackenzie from Navus indicated that if he had seen quack grass, it would have been recorded in the DSA.

[47] The panel concludes that quack grass could be an undesirable plant under the *2010 Reclamation Criteria*, depending on whether it interferes with the landowner's use of the site.

Does quack grass interfere with the landowner's future use of the site or with the landowner's ability to integrate the site?

[48] At the time of lease construction, the adjacent field was planted in a fescue seed crop. To reclaim the lease site, CNRL planted fescue. The site has remained in fescue while the landowner has rotated the adjacent field through various management regimes.

Table 2. Vegetation on the site and adjacent field since 2001

Year	Vegetation on the site	Vegetation on the adjacent field
2001–2002	Fescue	Fescue
2003–2006	Fescue	Pasture
2007	Fescue	Barley
2008	Fescue	Canola
2009	Fescue	Barley
2010	Fescue	Wheat
2011	Fescue	Barley
2012	Fescue	Canola
2013	Fescue	Barley
2014	Fescue	Barley
2015	Fescue	Canola

[49] The landowner confirmed that prior to lease construction, the entire field was planted to fescue from which he harvested seed crops. The panel heard that fescue will produce seeds for one to two years and then seed production drops off as the crop ages and becomes root-bound sod. As seen in table 2, the site has been maintained in fescue since 2001, while the adjacent field has rotated through different crops since 2006.

[50] The RPG argued that the landowner's current use of the adjacent field for an annual crop was a reasonable basis for determining that the site could possibly be used for an annual crop or a perennial crop (e.g., fescue seed) in the future. The RPG assessor asserted at the hearing that assessors "need to consider past, present, and future agricultural-related uses" and that "reclamation requires the re-establishment of species that are compatible with the intended land use." Quack grass was identified by the RPG assessor as a concern for the landowner and determined to be a problem or undesirable plant in light of the intended land management objectives of the landowner. The RPG submitted that quack grass is a problem because it competes with seeded crops, it can affect the value of seeded crops, and it can be costly to control.

[51] The RPG clarified that the condition of a site when returned to a landowner must be such that the landowner can work, seed, and harvest the site at the same time as the rest of the field using the same equipment.

[52] CNRL submitted that the site is not currently being used for fescue or fescue seed production, despite being planted with fescue. It submitted that over the past 15 years the landowner has instead been using the site as pasture for cattle grazing and equipment storage and that quack grass does not interfere with those uses of the site.

[53] The landowner refuted CNRL's characterization of his intended use of the site and disagreed that he asked CNRL to continue to keep the site in fescue. He advised that once the site is ready to be integrated into the adjacent field, it will be kept in grains for a while. He stated that the entire field will only be put back into perennial grasses, which are always in his crop rotation, when he knows that there is no longer an issue with weeds.

[54] The landowner stated that if he were to take control of the site at this time, he might need to keep it separate from the rest of his land for several years. He stated that he would put it into a crop that he could spray for weeds for more than three years, with desiccation in the fall. He indicated that he would need to spray with herbicide at least three times a year.

[55] The landowner stated that the only thing that will kill quack grass is Roundup (glyphosate). He referenced the Crop Protection publication from Alberta Agriculture and Forestry (the Blue Book), which states that the herbicide used by CNRL prior to the DSA, Assure II, only suppresses quack grass. He stated that the Blue Book indicates that Assure II will provide long-season control, which will prevent the quack grass from going to seed and suppress and hold the plant until the fall when it can be killed with Roundup. The landowner further stated that even Roundup will only kill up to 86 per cent of the quack grass, and it is not a one-time strategy. He outlined that a weed control program to eradicate quack grass would involve spraying Roundup twice a year for at least three years, but that even after that, there might be some rhizomes left in the soil to regrow.

[56] CNRL agreed that different land management practices would be needed to control the perennial grasses and the quack grass and get the site to a state where it could be integrated into the landowner's adjacent field. It submitted that the process would involve applying a nonselective herbicide to kill all the vegetation, "working up" the site in the fall or spring, and subsequently seeding to the new crop. CNRL maintained that once the site was integrated, no different management practices would need to occur, as the landowner's regular cropping and spraying program would control any weeds on the entire field. CNRL further submitted that, upon integration, the landowner will need to control all the perennial grasses currently on the site, regardless of whether the entire field is used for a cereal crop or fescue production. CNRL submitted that the creeping red fescue and smooth brome on the site would need to be managed and that controlling those grasses would result in the control of the quack grass, without the need for any additional practices.

[57] As a result of the complaint inspection, the RPG assessor concluded that extra management practices would be required to control the quack grass in order to be able to incorporate the site into the

adjacent field. He testified that because "the species composition of the site did not meet reasonable land management objectives," he had not accepted the exemption justification form and had refused to issue the reclamation certificate.

[58] The panel notes that the adjacent field has not been used for pasture since 2006. The panel heard that the landowner wants to reintegrate the site into the adjacent field, which was most recently planted to canola, and that future use of the entire field might include fescue seed production. The panel does not agree that the landowner is currently using the site for pasture. The panel finds that the landowner's land management objective is to integrate the site into the adjacent field's crop rotation. Furthermore, the panel finds this objective to be reasonable.

[59] The panel accepts the evidence from the RPG and the landowner that quack grass can negatively affect cultivated crops and notes that CNRL did not directly refute this position, agreeing that perennial grasses could have effects on crops and other plants. The panel heard from all parties and agrees that a more vigorous management practice would need to be applied to the site in order to get it ready to be integrated into the adjacent field, although there was disagreement about how long this process would take. As mentioned earlier, the landowner estimated that it might take more than three years of intensive weed management to return the site to a state where it could be incorporated with the rest of the adjacent field into normal farming practice. In contrast, CNRL estimated that it could be done in a season. In any event, the panel finds that the quack grass is an undesirable plant because it would interfere with the landowner's use of the site.

Does the site meet the *2010 Reclamation Criteria*?

[60] In order to receive a reclamation certificate, a site needs to meet equivalent land capability based on the *2010 Reclamation Criteria*, including an evaluation of whether land function and operability of the site is comparable to the adjacent cultivated field.

[61] Since the DSA did not report quack grass on the site, the record of observation did not assess quack grass as a problem/volunteer plant. The RPG assessor testified that while conducting the complaint inspection, he noted that the quack grass patches on the site should have been assigned a higher rating than that contained in the DSA. The rating system is set out in the *2010 Reclamation Criteria*. He asserted that if this higher rating had been included in the record of observation, the critical value would be higher, causing the problem/volunteer plant rating parameter to be classified as a fail. The failure of this rating parameter would have resulted in the site not meeting criteria.

[62] In situations where a site does not meet the criteria stipulated in the *2010 Reclamation Criteria*, the operator may submit a justification for why the site should receive a reclamation certificate. In this instance, the RPG assessor considered the justification form that was submitted with CNRL's reclamation certificate application. The justification form stated that the 1995 update was used instead of the *2010*

Reclamation Criteria because the adjacent field was planted with wheat [*sic*], while the well site and access road were tame pasture, and representative controls were therefore unavailable. It indicated that the vegetation on the site "appeared healthy and there was greater than 80% cover of desirable vegetation." It concluded that "based on professional judgement, vegetation parameters on the wellsite and access road are acceptable." The detailed justification form did not mention quack grass.

[63] The panel notes that the RPG assessor testified that based on his assessment of the quack grass on the site, he would have assigned a higher value to problem weeds in the record of observation. The panel is satisfied that he observed quack grass in a greater quantity on the site than in the adjacent field, and that if the quack grass had been observable during the DSA, the record of observation in the application would have identified the quack grass.

[64] The RPG assessor testified that reclamation requires the re-establishment of species that are compatible with the intended land use. As noted earlier, CNRL argued that the site has been reclaimed to equivalent capability because it will support grazing and equipment storage, which CNRL claimed was the site's most recent use.

[65] The panel does not agree with CNRL's characterization that the site is used for grazing and equipment storage. As noted above, the adjacent field has not been used for pasture since 2006, and the landowner testified that he wants to incorporate the site into the adjacent field.

[66] The RPG submitted that the site should be reclaimed to a condition that would be manageable for the landowner and defined that as "a condition in which the landowner can work the site, seed it, and harvest it at the same time as the rest of the lands, using the same equipment." It also stated that "the site should be left in such a condition that it is not an obstacle to normal farming methods practiced."

[67] The landowner maintained that he was not willing to incorporate a weedy site into his adjacent field.

[68] The panel notes that the *2010 Reclamation Criteria* does not require complete eradication of all weeds and problem plants before a reclamation certificate can be issued. It requires that prohibited noxious weeds be destroyed and noxious weeds be controlled. It states that "undesired plants (i.e., volunteer crop, incompatible species) shall be controlled so that they do not impede land manager operability and/or management." In this instance, if the site were to be integrated into the adjacent field, the presence of quack grass could require a different management practice than what is applied to the remainder of the field. Regardless of any previous suppression efforts, the panel notes that CNRL has not sprayed for weeds since the DSA in 2013. The panel finds that CNRL did not continue to control the quack grass on the site.

[69] The panel notes that the DSA stated that, due to incompatibility of the vegetation, the site (tame pasture species) cannot be managed the same as the adjacent field (wheat [*sic*]). At the hearing, CNRL

confirmed that the perennial grasses on the site would need to be managed were the site to be incorporated into the adjacent field. The panel notes that even though the 2014 decision letter only referenced quack grass, the other perennial grasses on the site would also require a change in land management practices, confirming that the site does not meet equivalent land capability. CNRL planted the site to fescue and, in order to successfully reclaim the site, should put it into a state where it can be incorporated easily into the landowner's management of the adjacent field. If this involves additional preparation of the site, then CNRL should complete that work before applying again for a reclamation certificate.

[70] Based on the presence of quack grass and other perennial grasses on the site and their incompatibility with the cultivated crop in the adjacent field, the panel finds the site does not meet reclamation criteria and has not been returned to an equivalent land capability.

Was the application complete and accurate?

[71] The RPG argued that the application was not complete and accurate because

- quack grass was present on the site but not documented in the DSA and
- the application didn't include temporary work spaces.

Should quack grass have been documented in the DSA?

[72] The DSA conducted by CNRL in the fall of 2013 did not report quack grass on the site, only Canada thistle, a noxious weed, and dandelion, an undesirable plant.

[73] CNRL stated that it sprayed the site for quack grass with Assure II in September 2012 and in June 2013. It submitted that the herbicide application had supressed, controlled, or killed all above-ground growth of the quack grass, and therefore it was not visible during the DSA. The resulting reclamation certificate application submitted in May 2014 therefore did not indicate the presence of quack grass on the site. The accompanying landowner complaint dated April 2014 listed quack grass as a concern.

[74] The RPG assessor visited the site to conduct a complaint investigation in August of 2014, accompanied by an RPG land reclamation specialist. Also in attendance were the landowner and CNRL consultant representatives from Navus and Cougar Claw Consulting Ltd.

[75] During the complaint inspection, both the RPG assessor and CNRL identified patches of what they believed could be quack grass on the site. Samples were taken and both CNRL's testing and that of a third party, a member of the County of Grande Prairie agricultural field staff, confirmed the presence of quack grass in those samples.

[76] During the hearing, the RPG assessor stated that he did not find observable quack grass at the selected off-site control areas, and the notes from the complaint inspection indicated that the CNRL

consultants agreed with this observation: “We all observed quack grass patches on-site, and agreed there was a greater amount of quack grass on-site – quack grass wasn’t found in the adjacent control areas.”

[77] In its initial written submission, the RPG argued that the application was not complete and accurate because the DSA failed to document the presence of quack grass at the site.

[78] The panel heard evidence at the hearing that the two applications of Assure II would either have controlled or supressed the quack grass on the site. The panel finds that it is entirely reasonable that the DSA did not identify any quack grass on the site. The panel does not agree that the DSA was incomplete or inaccurate; it is a snapshot in time, and at that point in time, there was no observable quack grass.

[79] Given the clear evidence of the presence of quack grass in August 2014, the panel concludes that quack grass was present in September 2013 but was controlled so that it was not readily visible on the surface. The panel accepts that vegetation can be controlled at one time and uncontrolled at another time, depending on weed management practices.

[80] However, the panel is cognizant of the fact that until a reclamation certificate is issued, CNRL continues to be responsible for the care and control of the site through legislative requirements and as required by the surface lease agreement.

Should the application have included temporary work spaces?

[81] The *2010 Reclamation Criteria* application guidelines states that

> Any facilities and infrastructure associated with a wellsite require a reclamation certificate. These facilities and infrastructure must be included with the reclamation certificate application for the wellsite. Associated facilities and infrastructure may include, but are not limited to such things as… temporary access roads, temporary work space….

[82] It is undisputed that the reclamation certificate application sets out that CNRL was applying for certification of 6.96 acres of well site and access road. This acreage does not include a 30 metre (m) triangular piece of temporary work space located where the access road ties into the northeast corner of the well site, nor an additional 5 m “buffer area” work space on both sides of the access road and the four sides of the well site. CNRL submitted that the agreement for the 30 m triangular piece of temporary work space was granted by the landowner on July 17, 2001, expired on July 17, 2003, and was never used. CNRL argued that the agreement’s actual purpose was to increase surface rights compensation. CNRL pointed out that the August 26, 2001, construction sketch, referred to as an “as-built survey,” illustrates that the land in question was never used.

[83] The landowner stated that he observed that the proposed temporary work space was used to accommodate large equipment due to the angle of the road where it joined the well site and because the soil berms were placed on the west side of the well site. The landowner also stated that after the drilling

rig was removed from the site, he had noted that equipment and vehicles had used this temporary work space.

[84] The RPG submitted that the temporary work space was not included in CNRL's application for a reclamation certificate, despite the fact that this is specified land held in connection with the well, as documented by the signed agreement between the parties for the use of the work space. As such, CNRL has an obligation to reclaim this land. The RPG noted that section 1.6 of the *2010 Reclamation Criteria* application guidelines requires the applicant to include associated infrastructure in its application.

[85] The RPG also submitted that the panel should accept the landowner's evidence that he observed CNRL using the temporary work space as this is the best evidence available since he has direct knowledge of the site based on his observations from 2001 to present. Similarly, the landowner stated that he observed instances of trespass by CNRL in the 5 m buffer area. The RPG argued that both of these areas should have been included in the reclamation certificate application and that it is neither efficient nor effective to apply at different times for reclamation certification and issue partial reclamation certificates for the same lands.

[86] The panel notes that CNRL obtained a temporary work space agreement for the 30 m temporary work space. The landowner and CNRL provided competing evidence as to whether the lands in the work space were used by CNRL. However, only the landowner was able to provide a direct account of being at the site shortly after CNRL's drilling rig had been removed and had observed that the construction vehicles and equipment had "curved around" within the temporary work space. Regardless of when the agreement expired or whether the temporary work space was used, the panel finds that the lands were "held" by way of the agreement "in connection with" the site, as defined under the *CRR*, and would therefore fall within the *CRR*'s definition of specified lands. The panel finds that the 30 m temporary work space was specified land and should have been included in the reclamation certificate application, as required by the *2010 Reclamation Criteria* application guidelines. The 5 m buffer area was never the subject of a signed agreement, and it is not clear whether it was used during construction or reclamation. The panel is unable to find on the evidence before it that the 5 m buffer area falls into the category of specified lands, and the area therefore did not need to be included in the reclamation certificate application.

[87] The panel finds that the application should have included the 30 m temporary work space and therefore was not complete and accurate. The panel expects CNRL to ensure that this specified land meets the *2010 Reclamation Criteria* and is included in any future reclamation certificate application.

Other Issues

Certain Written Releases Were Missing From the Application

[88] The RPG argued during the hearing that the application was not complete because it did not include signed release letters stating that the existing perimeter fence and culvert and approach would remain in place. It pointed to the *2010 Reclamation Criteria* application guidelines, which states that facilities or features that are to remain in place require the approval of the landowner.

[89] It was CNRL's position that not including these sorts of releases in an application would normally be considered a minor deficiency that could be rectified during the 30 day response period rather than becoming "grounds for failure of an application."

[90] CNRL further identified that the culvert and approach were the property of Alberta Transportation, not the landowner. It referenced that the landowner wanted the culvert and approach to remain in place so that he could continue to access his field. During the first day of the oral hearing, CNRL secured the release from Alberta Transportation to leave those in place and entered it as an exhibit to this proceeding, thus making the issue moot. However, in the panel's view, the lack of a release from Alberta Transportation should have been identified in the 30 day response period so that CNRL could have addressed the matter expeditiously at that time instead of at the hearing.

[91] CNRL stated that, consistent with standard reclamation practice, a release for the fence was neither provided nor sought. CNRL submitted that the landowner consistently maintained that the fence must stay up until after the reclamation certificate is issued. The landowner's wishes were also reflected in the phase 1 site assessment, which recorded that the landowner wanted the lease fence to remain intact until the reclamation is complete.

[92] The panel understands that the fence will need to be taken down before a reclamation certificate is issued. Although the landowner would like the reclamation certificate to be issued before the fence is removed, the RPG process is to issue the certificate after the fence is removed. The panel does not consider the application to have been incomplete due to the absence of the fence release.

Third-Party Impacts and the Reclamation of the Site

[93] The AER's guidelines for third-party impacts are stated in *Conservation and Reclamation Information Letter 97-4* (*C&R/IL/97-4*). *C&R/IL/97-4* is not a binding instrument and is intended to help resolve issues involving third-party impacts, rather than allocating liability. Clear processes are set out to guide operators that are concerned that third-party impacts will affect reclamation certificate applications. *C&R/IL/97-4* states that third-party impacts do not release an operator from reclamation responsibilities. An analysis is done to determine what the problem is, not who may have caused the impact.

[94] The RPG has the authority to consider the impact of third parties on the reclamation of the site. When submitting a reclamation certificate application, an operator may also submit a third-party impact letter. The letter needs to explain that the site would meet reclamation criteria if it weren't for some specific third-party impacts. *C&R/IL/97-4* states that "all documentation about the impact from the third party action must be supplied" with the application for the reclamation certificate.

[95] CNRL did not submit a third-party impact letter with its application. However, at the hearing, CNRL argued that reclamation efforts were frustrated by the landowner's refusal to allow the removal of the fence around the site. CNRL further suggested that the landowner had interfered with the reclamation of the site by allowing it to be grazed by cattle and used as a storage site.

[96] CNRL submitted that the landowner's refusal to integrate the site into the surrounding field is the reason that there is quack grass on the site. The RPG pointed out that integration is not a requirement, and would not be until the government of Alberta releases policy on that issue. Indeed, the RPG submitted that it has never required integration and that any integration that has occurred would have been the result of a private agreement between the landowner and the company.

[97] CNRL admitted that it is common practice to leave fencing in place around lease sites, particularly in settings where the adjoining field is used to graze cattle.

[98] The landowner submitted that he did not permit his cattle to graze the site. He pointed to a few instances when cattle might have had access to part of the site: once when a tree fell on the fence permitting cattle to enter and a few times when he moved his cattle between fields and he was forced to use the shared access road. The landowner argued that there was no correlation between the infrequent instances of cattle on the site and the location of the quack grass patches found during the complaint inspection. He added that he has not had cows grazing in the adjacent field since 2006, as in 2007 the field was cultivated to grain and has remained in annual crops since that time.

[99] The landowner also refuted CNRL's claim that he was using the site as a storage yard. He admitted to one instance where he left a broken swather on the site for about 17 or 18 months.

[100] The DSA does not include any indication that cattle grazing on the site for an unknown period of time and the parked equipment had negatively affected CNRL's reclamation efforts, and no concerns regarding third-party impacts were included in CNRL's application. It was not until the hearing process that CNRL argued that the landowner's actions may have negatively affected reclamation of the site. However, CNRL's main contention regarding third-party impacts related to the landowner's refusal to integrate the site into the adjacent field. As the panel has already concluded, there was no obligation on the landowner to do so.

[101] Given these facts, the evidence does not establish that the landowner's actions adversely affected CNRL's ability to attain or maintain equivalent capability under the *2010 Reclamation Criteria*, and the panel places little weight on CNRL's argument about third-party impacts.

[102] Even if it had been demonstrated that the landowner had interfered with reclamation efforts, this does not release an operator from reclamation responsibilities and CNRL would still be required to satisfy reclamation criteria for the site in order to obtain a reclamation certificate.

Communication Between the Parties

[103] Over the course of this appeal proceeding, it became apparent that communication between CNRL and the landowner was insufficient and not effective from the time of lease construction through to the hearing.

[104] The panel notes that consistent and timely communication between the parties could have addressed many of the difficulties and concerns that were brought forward during this hearing process. Given that the responsibility for reclamation of the site rests with CNRL, it would have been much more effective for CNRL to have clearly documented its attempts to work with the landowner. At the very least, clarifying the landowner's future use of the site would have provided CNRL with a goal to work toward in terms of getting the site to equivalent capability with the adjacent field. Accountability for communication efforts lies with the leaseholder.

[105] Part of that accountability includes maintaining effective and respectful communication even when circumstances are strained. The 11-9 site was drilled in August 2001 and abandoned in October 2001, and now the panel is considering the appeal of the reclamation certificate refusal 15 years later. The panel concludes that responsible communication between CNRL and the landowner may have addressed and prevented many of the problems as they arose.

[106] The panel reminds CNRL and the landowner that the AER's alternative dispute resolution program is available for operational energy disputes. The goal of an AER-facilitated meeting or mediation is to help parties explore and understand each other's interests and develop acceptable solutions together. The benefits of mediation or a facilitated meeting for operational disputes is to help repair and enhance relationships and resolve concerns.

Conclusion

[107] This was the first proceeding of this type for the AER, and the hearing panel would like to comment on the timeframes associated with the original decision. The elapsed time between the 2013 DSA and the 2014 complaint assessment spanned nearly a full year. The reclamation certificate application was submitted in May 2014 more than seven months after the DSA was conducted, and the August 2014 complaint assessment occurred more than three months after application submission.

[108] The panel understands that both CNRL and the RPG have resource and workload limitations that affect the speed at which a reclamation certificate application can be completed, filed, considered, and decided. However, it is apparent to the panel that significant delays in the process greatly complicated the evidence about the site because assessments at different points in time resulted in different conclusions as to whether the site met the *2010 Reclamation Criteria*. The panel considers that a shorter timeframe between the DSA and the complaint inspection would have lessened the chance of changed site conditions. As indicated earlier, at all times, CNRL has responsibility for the care and control of the site, including the time between CNRL's DSA and the RPG's complaint inspection.

[109] As noted earlier, the RPG raised new issues in its overview presentation. The new issues included the releases, the temporary workspace, and the 5 m buffer area. Although the issues did relate to information and evidence previously filed on the proceeding record, they were not reflected in the 2014 decision letter or identified in the RPG's written hearing submissions. This led to CNRL's motion at the commencement of the hearing to exclude these issues and related information from the presentation. While the panel acknowledges that, with the exception of the fence release and the 5 m buffer area, CNRL should have included and addressed these matters in its application, it would have been preferable if these matters had been identified and raised by the RPG during the 30 day response period or in its written hearing submissions in order to avoid the delay caused by CNRL's motion.

[110] The panel finds that the correct decision was made by the RPG assessor in the 2014 decision letter because it identifies "incompatible vegetation (quackgrass patches) on the well site and access road." However, the panel notes that other incompatible vegetation (smooth brome and creeping red fescue) was noted in the RPG assessor's testimony during the hearing, although it was not reflected in the 2014 decision letter. Similarly, the RPG assessor testified that he had determined during the complaint inspection that future uses of the site could include annual crops or a perennial seed crop, and this testimony was not expressed in the 2014 decision letter. The panel finds that the 2014 decision letter could have referenced other perennial grasses on the site and contained a more accurate description of the landowner's future use of the site as reasons to support the refusal to issue the reclamation certificate. However, in summary, the panel considers that the 2014 decision letter, though not perfectly crafted, reflected a correct decision with a reasonable justification for the outcome.

[111] CNRL estimated that the site could be ready for seeding to a cultivated crop in one year. The panel notes that the landowner was able to convert the adjacent field from pasture to barley in one growing season. The panel finds it reasonable for CNRL to prepare the site for integration with the adjacent field by replacing the pasture with a cultivated crop. CNRL may apply for a reclamation certificate once the DSA demonstrates that the specified land meets the *2010 Reclamation Criteria*.

[112] Based on the consideration of all relevant evidence, the site does not meet the *2010 Reclamation Criteria* and CNRL's reclamation certificate application is incomplete. The hearing panel confirms the AER's decision to refuse to issue a reclamation certificate for the 11-9 site.

Dated in Calgary, Alberta, on June 1, 2016.

Alberta Energy Regulator

<original signed by>

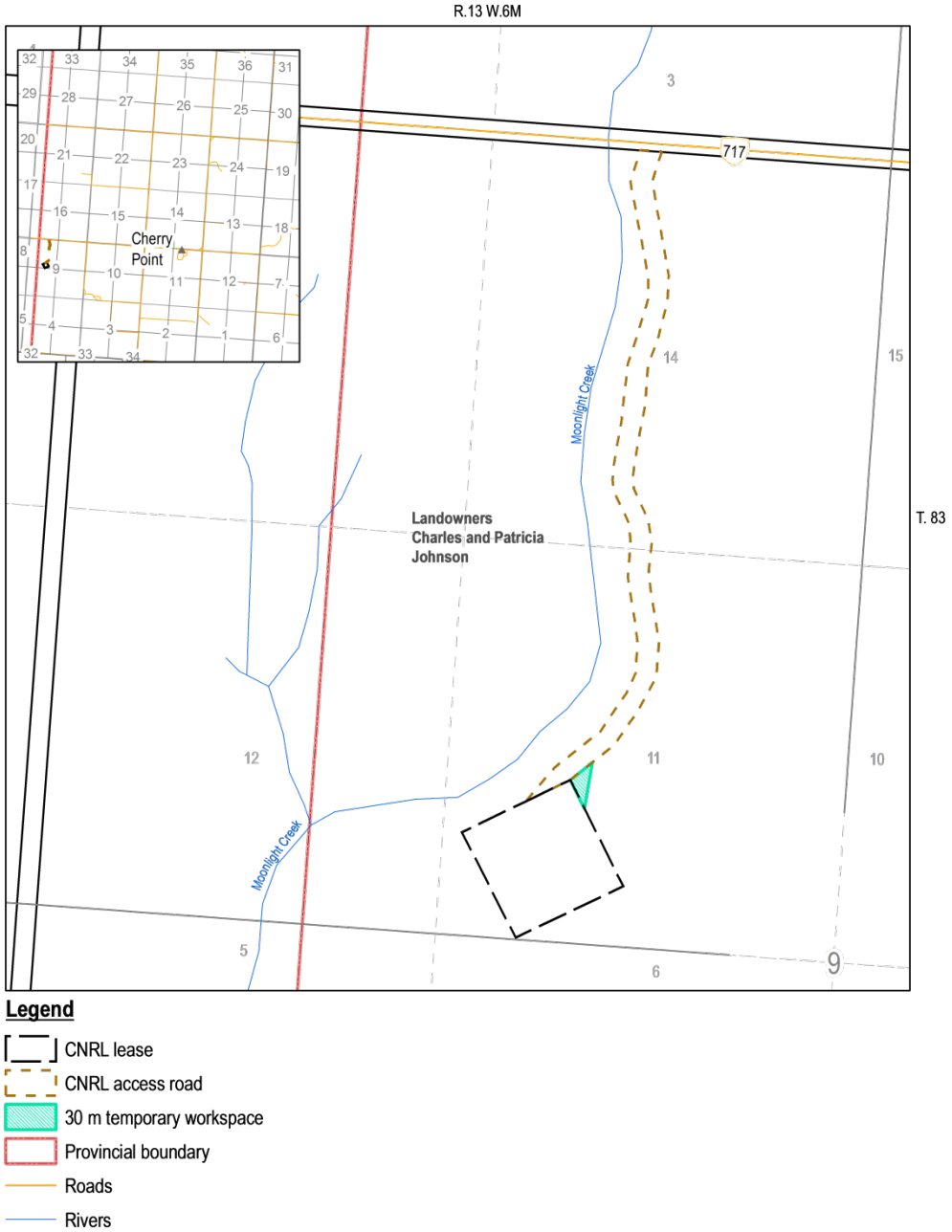
B. T. McManus, Q.C.
Presiding Hearing Commissioner

<original signed by>

T. C. Engen
Hearing Commissioner

<original signed by>

L. J. Ternes, B.A., LL.B.
Hearing Commissioner



Legend

- CNRL lease
- CNRL access road
- 30 m temporary workspace
- Provincial boundary
- Roads
- Rivers

Figure 1. Lease and access road at 11-9-83-13W6M

Appendix 1 Hearing Participants

Principals and Representatives (Abbreviations used in report)	Witnesses
Canadian Natural Resources Limited (CNRL) D. Naffin T. Meyers	J. Agate G. A. Clegg C. Beauvais, P.Ag. (Secure Energy Services, formerly of Cougar Claw Consulting Ltd.) D. D. MacKenzie, Ph.D., P.Ag. (Vertex Professional Services Ltd., formerly of Navus Environmental Inc.)
AER Reclamation Programs Group (RPG) A. Koper J. Moore	B. Dunkle, P.Ag. C. Robertson, P.Ag.
C. Johnson and P. Johnson (landowner) T. Bayly E. Compton	C. Johnson
Alberta Energy Regulator staff R. Mueller, AER Counsel S. Sexton, AER Counsel J. Koppe D. Howat D. Rawluk L. Olsen	