

Whitecap Resources Inc.
Regulatory Appeal of Reclamation
Certificate 382273

June 6, 2022

Alberta Energy Regulator

Decision 2022 ABAER 002: Whitecap Resources Inc., Regulatory Appeal of Reclamation
Certificate 382273

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2022 ABAER 002

Whitecap Resources Inc.

Regulatory Appeal of Reclamation Certificate 382273

Application No. 1933054

Decision

[1] Having carefully considered all the evidence, the Alberta Energy Regulator (AER) confirms the decision of the AER Enterprise Reclamation Group (ERG) to issue reclamation certificate 382273 (the reclamation certificate) to Whitecap Resources Inc. (Whitecap). The version of the reclamation certificate we have confirmed is that dated March 9, 2022.

Introduction

In the introductory sections that follow, we have included background information. Greater detail is provided in the relevant parts of these reasons.

Reclamation Certificate Application Background

[2] On August 14, 2018, Whitecap filed reclamation application 382272 (the application) using OneStop, the AER's electronic application platform. The asset identified in the application was the Midway-Garr 8-18-31-1 well (the well and the land on which it was located [well site]). Associated activities identified in the application form were:

- access road, full disturbance (east-west access road)
- proposed access road, zero disturbance (north-south access road)
- 3.2 m x 96 m strip of land outside the south boundary of the well site, full disturbance (southern strip)

[3] According to the information included in the survey plans filed with the OneStop form, the total land to be certified was 3.5 acres. The application form also listed "fence" and "access road" (the latter three times) as facilities to be left in place.

[4] The well site, both access roads, and the southern strip are on land located at Didsbury, Alberta, at Block 2, Lot 3, Plan 151 2407 (within Legal Subdivision 8, Section 18, Township 31, Range 1, West of the 5th Meridian), which is owned by Mr. Herman and Mrs. Shirley Dorin (the Dorin lands). Mr. and Mrs. Dorin's home is also on the lands. The Dorins' son, Mr. Mark Dorin, has an interest in the lands. Mr. and Mrs. Dorin and Mr. Mark Dorin will be referred to as the Dorins in this decision.

[5] On September 13, 2018, the Dorins filed statements of concern 31313 and 31323 (the SOC's) about the Whitecap application.

[6] The application was referred for technical review due to unresolved concerns about fencing that remained in place and salinity impacts identified on the well site that were not remediated.

[7] On April 3, 2019, the AER issued a supplemental information request (SIR) to Whitecap. Whitecap was given until June 1, 2019, to provide the requested information. Its application was put into abeyance pending receipt of that information. The SIR required Whitecap to remove "the fence remaining around the site" and fill the remaining postholes or obtain a release to leave the fence in place. The SIR also stated:

The previously certified east-west access road to the site needs to be highlighted in yellow and included in the total acreage to be certified with respect to this reclamation certificate application.

Please show the e-w access road also in red to be released to the landowners and left unreclaimed and confirm this is still the case.

[8] On May 31, 2019, Whitecap provided its response to the SIR. In it, Whitecap outlined efforts it had made to obtain a release for or to remove the fencing from the well site and indicated that those efforts were unsuccessful.

[9] On July 18, 2019, after considering the SOC's, Whitecap's response to the SIR, and other materials and correspondence, the AER decided to approve the application without a hearing.

Appeal Background

[10] On July 17, 2020, the Dorins filed a request for regulatory appeal of the AER's decision to grant the reclamation certificate.

[11] On May 14, 2021, the AER granted the Dorins' request in part and specified the appeal was granted on the question of whether the reclamation certificate was properly issued. The request was not granted on other matters raised in the request, including matters related to the 1977 issuance of the well licence, general challenges to the AER's processes, statutory authority, and policies, and the AER's test and processes around reconsiderations.

[12] On June 14, 2021, a notice of hearing was published on the AER's website and in the *Mountainview Albertan* on June 15, 2021. The Dorins, Whitecap, and ERG were identified as parties to the regulatory appeal. Other persons were given until June 28, 2021, to file a request to participate. Two requests were received. Neither of the requesters persuaded the panel that they would be directly and adversely affected by the decision on the regulatory appeal or that their participation would materially assist the panel. We denied their requests to participate.

[13] On July 13, 2021, in a letter to ERG, the Dorins, and Whitecap, the panel confirmed full participation rights in the proceeding to the Dorins and Whitecap and directed ERG to participate fully in the hearing. In addition, all parties were directed to file written submissions on the preliminary issue of:

Whether the lands that are covered by the reclamation certificate are “specified lands” within the meaning of the conservation and reclamation framework of the *Environmental Enhancement and Protection Act (EPEA)*.

[14] On September 17, 2021, we issued a decision letter to the parties stating our decision that the lands covered by the reclamation certificate are “specified lands” within the meaning of the conservation and reclamation framework of *EPEA*, (the [preliminary decision](#)).

[15] On October 21, 2021, after considering comments from the parties, we confirmed four issues for the hearing.

[16] On December 15, 2021, after considering comments from the other parties, we approved a request for adjournment and new filing dates made by ERG.

[17] On January 20, 2022, after considering comments from the other parties, we approved ERG’s request for a further extension of time for filing of its submission.

[18] On March 1, 2022, the Dorins filed two motions. The first motion asked the panel to amend the first of the four issues identified by the AER for the hearing and to add an issue. The second motion asked the panel to consider as evidence in this hearing the fact that the Dorins have or will be filing an application with the Land and Property Rights Tribunal (LPRT) that is related to matters in this hearing.

[19] Also, on March 1, 2022, the Dorins filed a request that we exercise our authority under section 42 of the *Responsible Energy Development Act (REDA)* to reconsider the implementation of a communications protocol by the AER Engagement and Communication group (formerly Stakeholder and Government Engagement) and two decisions, one made by the AER prior to this proceeding on the Dorins’ regulatory appeal, and the preliminary decision made by us on September 17, 2021, in this proceeding.

[20] On March 2, 2022, ERG submitted a late filing in response to the Dorins’ reply submissions. All parties stated it would be helpful to have the information on the record, so we allowed the late filing.

[21] Also, on March 2, 2022, we issued our decision on the first motion submitted by the Dorins. We decided it was not necessary to amend or add an issue as requested by the Dorins because the proposed issue was within the scope of the existing issues as identified in the panel’s letter dated October 21, 2021.

[22] On March 4, 2022, we issued our decision denying the Dorins’ requests for reconsideration. We also confirmed that the communication protocol applicable to Mr. Mark Dorin did not apply to the hearing process.

[23] Also, on March 4, 2022, we informed the Dorins by letter that we would not grant the second motion, which was to consider Mr. Mark Dorin's filing of an application to the LPRT as evidence in this proceeding.

[24] The AER issued a notice of hearing for this regulatory appeal on June 14, 2021, a notice of scheduling on December 13, 2021, and a notice of rescheduling of hearing January 14, 2022.

Hearing

[25] The Dorins, Whitecap, and ERG were parties to this regulatory appeal. The Dorins were represented by Mr. Mark Dorin. Whitecap and ERG were represented by counsel.

[26] Those who appeared at the hearing are listed in appendix 1.

[27] The AER held the oral portion of the hearing electronically via Zoom on the 8th, 9th, and 10th of March 2022 before hearing commissioners C.A. Low (presiding), C. McKinnon, and E. McNaughtan.

[28] During our deliberations, we received word that Mr. Herman Dorin passed away. Mr. Dorin was one of the regulatory appeal requesters and was represented throughout the regulatory appeal process by his son Mr. Mark Dorin. Mr. Dorin's passing does not affect our decision in any way.

[29] In reaching our decision, we have considered all relevant materials constituting the record of this proceeding, including evidence and argument provided by the parties. References in this decision to specific parts of the record are intended to assist the reader in understanding our reasoning on a particular matter and do not mean that we did not consider all relevant portions of the record with respect to that matter.

[30] The hearing record was extensive. All parties filed materials that were relevant and helpful as well as materials that were not.

[31] The Dorins filed over 1400 pages of materials as part of the reclamation certificate application review and regulatory appeal process. The Dorins' submissions were often contradictory. For example, they stated in paragraph 14 of their submissions on the merits that "the AER made no error in certifying the 0.61-acre access road as reclaimed in 2019 (it was conserved and thus no work is required)." This refers to the road identified as the north-south access road. Yet, in paragraph 42 of the same submission, the Dorins, referring to the north-south access road, stated, "it is clear the road area was not assessed, so they do advocate for revocation of the Reclamation Certificate as issued."

[32] Whitecap and ERG both provided submissions about what they believed to be the Dorins' motivations for pursuing this regulatory appeal. Whitecap's submissions about the Dorins' motivations totalled two full pages.

[33] The motivations of the Dorins are not relevant to this appeal, and we have not taken these submissions from Whitecap and ERG into account.

[34] Likewise, we did not take into consideration submissions by the Dorins on issues that were outside the scope of this regulatory appeal such as their submissions that the Midway-Garr well was not drilled in a location that complied with the applicable regulations.

History of the Site

[35] The Midway-Garr well was drilled on the Dorin lands in 1977. The Dorins did not negotiate a lease with the operator. The operator obtained a right of entry order concurrently with the well licence.

[36] The well produced crude oil and natural gas before it was abandoned in 2011. Drilling waste was stored in two sumps south and west of the well and then spread on the site after being mixed with clay (mix-bury-cover). Some of that waste may also have been trucked off site and disposed of elsewhere. In addition to the wellhead and a pumpjack, infrastructure on the site included a separator, two tank farms, a flare pit, garbage pit, and fencing.

[37] Access to the site was by the east-west access road shown in figure 1. The east-west access road was included in the right of entry order. Figure 1 also shows the site and the relative location of the well and associated facilities and infrastructure.

[38] The east-west access road shown in figure 1, labeled “AR Rec Certified,” is the only access road to the site that was constructed and used. The north-south access road, labeled “Proposed AR (not built, not used),” was surveyed and held for use as an access road to the well site but was never entered or used for that purpose.

[39] There is no record of any spills on the well site or on the lands where the access roads and the southern strip are located.

[40] The well site, both access roads, and the southern strip (the site) are included in a subdivision of Didsbury that is currently designated as “urban reserve” in the Town of Didsbury Land Use Bylaw No. 2019-04. Part of the subdivision has been developed for residential use, including the construction of a seniors’ residence on the land immediately to the north of the site. Mr. and Mrs. Dorins’ residence and farmyard are located northwest of the site. The land to the east, south, and west of the site is tame pasture.

[41] Whitecap acquired the site in 2012. Whitecap carried out reclamation work on the well site and southern strip. That work was completed in 2016.

Operator Whitecap Resources Ltd.		Unique ID / License No 00 / 08-18-031-01-W5 : 0065135		Disposition #: NA	
Provincial Zone and Designation		Ecological Land Classification		Soil Classification	
Zone:	White Zone	Natural Region:	PK - Parkland Natural Region	Soil Order:	Chernozemic
Type:	Private Land	Natural Sub-region:	PK - Central Parkland	Soil Great Group:	Black Chernozem
		Ecosite:	cultivated	Soil Series:	ANTLER

Legend:							
Drainage:	Access Road Boundary:	Lease Boundary:	Former Wellhead:	Trees / Brush:	Step Out:	Offsite Point:	
					C#	S#	

Abbreviations	Landscape Criteria		Vegetation		Soil	
	E - Erosion	BA - Bare Areas	V# - Site Assessment Point	S# - Site Assessment Point	T - Texture	
	C - Contour	PD - Poor Drainage	VC - Control Point	SC - Control Point	G/S - Gravel / Stones	
	ST - Stability		W - Weeds	AD - Admixing		
	D - Debris		PH - Poor Health Areas	SPR - Soil Profile Restriction		

Site Sketch	Wellsite Only	Describe other:	Criteria
			Cultivated

Lease Area	
Length:	106.0 m
Width:	106.0 m
Area:	1.1 ha
Access:	
Length:	m
Width:	m
Area:	ha
Topography:	
Undulating	
Typical Slopes:	
0.5-2%	

Land Use / Vegetation	
Onsite:	Pasture / grass mix
North:	City lot
East:	Pasture / grass mix
South:	Pasture / grass mix
West:	Pasture / grass mix

Comments:

The MIDWAY GARR 8-18-31-1 wellsite is situated within a cultivated pasture used to graze cattle. The site has been reseeded to a pasture grass mix consisting of species requested by the landowner and is well established. A survey done by the town of Didsbury in 2014 discovered that the barbwire fencing on south side was built 3.2 m south of the lease boundary. All the disturbed areas, including the strip outside the S lease boundary, have been reclaimed and the site meets all the requirements of the 2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands with respect to soils, landscape and vegetation.

ERG submitted this figure to the AER in its June 21, 2021, Record of the Decision Maker.

Figure 1. Site sketch from the cultivated land detailed site assessment

History of the Parties

[42] The relationship between the Dorins and Whitecap seems to have begun on a positive note but has been highly acrimonious for some time. Communications between the parties are problematic at best. Both parties characterize the other as difficult and frustrating to deal with.

[43] In addition to this regulatory appeal, the Dorins and Whitecap are embroiled in an ongoing dispute or disputes before the LPRT (formerly the Surface Rights Board) relating to the right of entry order for the well site and east-west access road lands.

[44] Finally, Mr. Mark Dorin has been and continues to be a strong and highly determined advocate for his parents who have resided on the lands for many decades. His exasperation with the regulatory framework for upstream oil and gas operations, how landowners are sometimes dealt with in Alberta, and his concerns with the specific impacts of oil and gas operations on the Dorins' land are apparent.

Regulatory Framework

[45] Pursuant to section 41(2) of *REDA*, our task on this regulatory appeal was to decide whether to confirm, vary, suspend, or revoke the decision to issue the reclamation certificate to Whitecap for the site. We needed to consider the relevant provisions in the applicable legislation, regulations, directives, and reclamation criteria to make this decision. The purposes and overarching provisions are summarized below. More detailed analysis of applicable provisions is provided in the relevant parts of these reasons.

Environmental Protection and Enhancement Act

[46] A stated purpose of *EPEA* is to promote the protection and wise use of the environment.

[47] Part 5 of *EPEA* imposes a duty on operators to take all reasonable measures to remediate a substance released into the environment that may cause, is causing, or has caused an adverse effect.

[48] Part 6 of *EPEA* imposes a duty on operators to conserve and reclaim specified land and, unless exempted by the regulations, obtain a reclamation certificate.

[49] Section 137(2) of *EPEA* states that conservation and reclamation must be carried out in accordance with, among other things, the terms and conditions of any applicable approval or code of practice.

Conservation and Reclamation Regulation

[50] According to section 2 of the *Conservation and Reclamation Regulation (CRR)*, the objective of conservation and reclamation “is to return the specified land to an equivalent land capability.” Equivalent land capability is defined to mean:

...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.

[51] Pursuant to section 3 of the *CRR*, a Director may establish standards, criteria, guidelines, and directives for conservation or reclamation of specified land. The Director may also develop and release information documents about those standards, criteria, guidelines, and directives. The Minister designates persons as directors for the purposes of *EPEA* and the associated regulations.

[52] Subsection 12(1) of the *CRR* states:

An application for a reclamation certificate must

(a) contain the information in respect of the specified land that is required in a form provided by the Director for that purpose or

(b) contain the following information in respect of the specified land, where the Director does not provide a form under clause (a):

(xi) any additional information required by an information document or requested by the Director.

2010 Reclamation Criteria for Wellsites and Associated Facilities on Cultivated Lands

[53] The 2010 reclamation criteria were established by the Government of Alberta. They are used to evaluate whether reclaimed land meets equivalent land capability. The 2010 reclamation criteria establish parameters to be measured to assess land function and operability and whether they are comparable to the surrounding land or an appropriate reference.

Specified Enactment Direction 002

[54] As contemplated by section 12 of the *CRR*, *Specified Enactment Direction 002: Application Submission Requirements and Guidance for Reclamation Certificates for Well Sites and Associated Facilities (SED 002)* sets out the information required for a reclamation certificate application to the AER and guidance on how to adequately prepare the application. This information includes a detailed site assessment (DSA) that provides comparisons of on- and off-site landscape, vegetation, and soil parameters using the reclamation criteria and documents and whether, in the assessor's opinion, a site meets equivalent land capability as defined in the *CRR*.

[55] *SED 002* states that any facilities and infrastructure associated with an asset, including well sites and access roads, require a reclamation certificate and must be included in the reclamation certificate application for the well site.

Government of Alberta's Contaminated Sites Policy Framework

[56] The *Contaminated Sites Policy Framework (CSPF)* sets out the Government of Alberta's policy framework for managing contaminated sites. It provides the framework for the *Tier 1 Soil and Groundwater Remediation Guidelines* (tier 1 guidelines) and *Tier 2 Soil and Groundwater Remediation Guidelines* (tier 2 guidelines).

[57] The AER uses the *CSPF* to ensure that objectives of Alberta Environment and Parks are met.

[58] A stated purpose of the *CSPF* is to ensure risks to human health and the environment are minimized and that land is returned to productive use. The AER is responsible for ensuring the objectives are met for upstream oil and gas activities.

Alberta Tier 1 and Tier 2 Soil and Groundwater Remediation Guidelines

[59] The January 2019 tier 1 and tier 2 *Soil and Groundwater Remediation Guidelines* establish the framework for evaluating and managing contaminated sites in Alberta. This includes the principles of source control, delineation, and management of contaminants as well as protocols for determining risk-based remediation objectives for a range of contaminants.

[60] The tier 1 guidelines use a set of conservative assumptions to derive a set of generic remediation objectives and criteria that can be applied to most sites in Alberta without modification. The tier 1 guidelines also set out objectives for remediating salt contamination and set out generic criteria for salinity and sodicity (the sodium content of the soil).

[61] Site-specific guidelines may be developed when background concentrations of a contaminant, such as salt, exceed the tier 1 guidelines.

[62] The tier 2 guidelines describe the process for developing site-specific guidelines for remediating contaminated sites.

[63] The goal of the tier 1 and tier 2 guidelines is pollution prevention, health protection, and the achievement of equivalent land capability after remediation.

Salt Contamination Assessment and Remediation Guidelines

[64] The May 2001 *Salt Contamination Assessment and Remediation Guidelines (SCARG)* provide additional guidance on how tier 1 criteria should be used where salt contamination is identified. The guidelines apply to determine the need for remediation to prevent adverse effects. The intent is to ensure equivalent land capability.

Decision Maker's Discretion Under the Regulatory Framework

[65] Each parcel of land to be reclaimed is unique. The 2010 reclamation criteria cannot neatly fit every parcel and are not expected to. That is why reclamation assessors and decision makers are given discretion to assess and pass parcels that may not strictly meet or align with applicable criteria. For example, section 6.1 of the 2010 reclamation criteria includes the following statement:

Given the complexity of the different land use types, soil zones and landscapes, it is acknowledged that the 2010 Reclamation Criteria may not be applicable to all sites under all circumstances. The assessor, operator, inspector or reviewer is not limited to the methods identified in the criteria to make his/her assessment.

[66] Similarly, section 8.2 of *SED 002* allows operators to provide professional justification for why a site should be permitted to vary from the criteria and still receive certification.

[67] A Director (*EPEA*) and the AER can direct applicants to file any further information they consider necessary to gain a full and satisfactory understanding of an issue in an application for a reclamation certificate pursuant to subsection 55(1) of the *Alberta Energy Regulator Rules of Practice* (*Rules of Practice*) and subsection 12(1)(b)(xi) of the *CRR*.

[68] The exercise of discretion in assessing and deciding whether to issue reclamation certificates is always guided by the principles that land is returned to equivalent land capability, and any risk to human health or the environment is minimized.

Nature of this Regulatory Appeal and Burden of Proof

[69] Regulatory appeals are established and governed by Part 2, Division 3, of *REDA* and Part 3 of the *Rules of Practice*. Given the broad mandate of the AER, a wide range of decisions and decision types may be the subject of a request for a regulatory appeal, from decisions to issue an approval for an energy resource activity to enforcement orders and stop orders.

[70] Section 39(3) of *REDA* gives the AER the discretion to decide which matters raised in a request for regulatory appeal will be included should the request for appeal be granted in full or in part. Under section 31.1 of the *Rules of Practice*, when hearing a regulatory appeal, the AER can consider new information filed in the regulatory appeal that is relevant, material, and not available to the original decision maker.

[71] The Dorins made submissions in this regulatory appeal focussed on what they said were the appropriate legal tests for review of the original decision maker's decision. Whitecap argued that under *REDA* and the *Rules of Practice*, regulatory appeals are not like a judicial review by the courts where the panel tests the legal correctness and reasonableness of the original decision.

[72] ERG noted in its submissions that regulatory appeals are hybrid de novo proceedings that give the hearing panel considerable latitude to address procedural anomalies in the original process.

[73] *REDA* and the *Rules of Practice* are silent on the nature of a regulatory appeal. They do not say, for example, that appeals are “hybrid de novo” hearings or that they are hearings about the correctness or reasonableness of the decision appealed from. However, the legislation is clear that for regulatory appeals, new information may be submitted that is relevant and material to the decision appealed from and which was not available to the decision maker previously. In our view, each regulatory appeal must be approached in a manner best suited to the specific regulatory appeal, the issues, and whether new information has been submitted.

[74] In this regulatory appeal, the parties submitted new information that was not available to the original decision maker. Further, one of the issues we identified for hearing was about the fairness of the process followed by the AER in arriving at the decision to issue the reclamation certificate. Given these factors, we looked with fresh eyes at all the relevant evidence on the hearing record to determine whether we should confirm, vary, suspend, or revoke the reclamation certificate. We also considered whether the process that was followed by the original decision maker gave rise to any procedural fairness concerns. We have not given any deference to the original decision maker’s decision for the purposes of arriving at our decision.

[75] Finally, there were submissions about which party has the burden of proof in this regulatory appeal. In this case, the regulatory appeal requesters, the Dorins, had the onus to persuade us that we should decide each issue in the way they advocated.

Issues

[76] Based on the record of the proceeding and submissions from the parties, we identified five issues for this regulatory appeal. The issue of whether the lands covered by the reclamation certificate are “specified lands” within the meaning of the conservation and reclamation framework of *EPEA* was a preliminary issue to the hearing, which was resolved in our September 17, 2021, decision letter. This issue will not be dealt with in these reasons.

[77] The parties were given an opportunity to comment on the remaining four issues before they were finalized. ERG did not comment. The Dorins and Whitecap agreed with issues (i) through (iii) below. Whitecap submitted that issue (iv) was unnecessary because the regulatory appeal process would remedy any unfairness. The Dorins submitted that issue (iv) was necessary and suggested three related subissues. Two of the suggested subissues—the AER’s decision not to request a cooperative proceeding with the then-Surface Rights Board (now the LPRT) and circumstances and factors relating to the issuance of well licence 65135 on August 5, 1977—had already been considered and dealt with by the AER when deciding the Dorins’ request for a regulatory appeal. The third subissue was the impact on the fairness of the reclamation certificate application review process from the communication protocol implemented by the AER in 2016 for communications with Mr. Mark Dorin. We consider that in the context of issue (iv) below.

[78] After considering the Dorins' and Whitecap's submissions, we determined the following issues for hearing in this proceeding:

Should the reclamation certificate be confirmed, varied, suspended, or revoked, in consideration of:

- i) the fencing that remains in place at or near the well site
- ii) the status of the east-west access road and the legal effect of the 2008 release relative to the reclamation certificate
- iii) the soil condition on the lands covered by the reclamation certificate
- iv) the process followed by the AER in its decision to grant the reclamation certificate and whether it gave rise to any procedural fairness concerns that are not remedied through this regulatory appeal process

[79] On March 2, 2022, we clarified that issue (i) necessarily includes fencing within any area covered or that should be covered by the reclamation certificate, including fencing along the east-west access road.

[80] We also communicated that to decide whether to confirm, vary, suspend, or revoke the reclamation certificate, we will have to determine what land is associated with the underlying asset and associated activities that the reclamation certificate will cover or should cover.

Matters that Need No Further Consideration

[81] The north-south access road and the southern strip were included in the reclamation certificate.

[82] The Dorins said they have no issue with the certification of the southern strip. We will not consider the southern strip in the balance of these reasons.

[83] The Dorins took no position on whether the north-south access road should be certified. They did express their disagreement with the panel's finding that the north-south access road is specified land.

[84] We found the north-south access road to be specified land in our decision on the preliminary issue. We declined to reconsider that decision.

[85] The evidence on the record of this proceeding, including the oral testimony of Mr. Mark Dorin at the hearing, is that the north-south access road is, and always has been, the driveway for access to his parents' home and farmyard. While it was once held in connection with the well site by a former operator, it was also the Dorins' evidence that the north-south access road was never entered or used by any operator.

[86] The relevant regulatory instruments are not explicit about whether an existing driveway that is identified and held for use as a well site access road but was never entered or used as such must be assessed for the purposes of a reclamation certificate. The north-south access road is not cultivated land, grassland, forested, or peatland as those terms are defined for the purposes of the regulatory framework applicable to reclamation. The north-south access road has not been altered or used in any way by any operator, and its use did not change because of oil and gas activity on the well site. Therefore, we find there is no need to assess it to determine whether it has been returned to equivalent land capability to include it in the reclamation certificate for the site. No further consideration of the north-south access road is required.

Issue 1 – Fencing

[87] For the following reasons, the panel finds no reason to vary, suspend, or revoke the reclamation certificate regarding fencing that remains in place within the area intended to be covered by the reclamation certificate.

[88] Fencing remained on the site at the time Whitecap filed its application. Video evidence filmed in 2021 shows fencing in place at the site. Some of it is in good repair, some not. Evidence in the form of diagrams made at various times by or for the Dorins, and for Whitecap and its predecessors, shows different fencing configurations at or near the well site and along the east-west access road. The fencing for the east-west access road includes a Texas gate at the east end. Different fences were built and removed by different operators or the landowners at different times.

[89] Appendix 2 provides two fencing sketches for comparison. One sketch is from the Whitecap DSA (shown previously as figure 1), and the other was provided by the Dorins with their submissions.

[90] Evidence from the oral portion of the hearing shows that all the remaining fencing is an issue except the fencing south of the well site around the east, south, and west edges of the southern strip. No further consideration of this fencing is required.

[91] The presumption in the regulatory framework is that all facilities and improvements constructed on land that is to be conserved and reclaimed will be removed as part of the reclamation process.

[92] Where facilities such as fencing are to remain in place, section 7.4.7 of *SED 002* requires that the fencing must be an improvement for landowner use. In that case, the reclamation certificate application must be accompanied by a written acceptance signed by the appropriate parties acknowledging that they agree to the facilities being left on the site.

[93] Section 7.4.7 also provides that if the fencing is not required or poses a potential liability or environmental risk, the AER may refuse the agreement and reject the reclamation certificate application. If a landowner does not want facilities left in place, the site must be completely reclaimed and the facilities removed.

[94] Whitecap's reclamation certificate application noted fencing was left in place. It also indicated there were outstanding issues about the fencing. Indeed, the record of this proceeding demonstrates that fencing has been a longstanding concern and point of friction between the Dorins and successive operators, including Whitecap.

[95] In support of the application, Whitecap provided an overview dated June 12, 2018, of its disputes with the Dorins about fencing. Whitecap indicated it was willing to remove the fences but had not received clear direction from the Dorins. Whitecap indicated it continued to discuss the matter with Mr. Mark Dorin but that the matter was still unresolved.

[96] The SIR issued to Whitecap required Whitecap to either remove the fencing and fill in postholes or obtain a release from the landowners to leave the fencing in place. Whitecap responded on May 31, 2019.

[97] In its SIR response, Whitecap described its efforts to either negotiate a release or to access the site to remove the fencing. Whitecap identified fundamental and longstanding disagreements about fencing and noted the full reclamation of the site and the matter of a release for fencing to remain in place had been contentious. The latter point is reinforced by evidence that both parties felt it necessary to engage the support of the local RCMP detachment over Whitecap's plan to enter the well site to remove fencing in May 2019. After receiving advice from the RCMP that they would not intervene absent clear direction from the AER or a court of law and that removing fencing without the landowner's approval could expose them to charges of mischief, Whitecap decided not to proceed with its plan.

[98] In its SIR response, Whitecap referred to what it said are its rights under the right of entry order and requested the AER exercise its discretion to continue processing Whitecap's application with the fencing left in place. As an alternative, Whitecap asked the AER to issue an environmental protection order to Whitecap, pursuant to *EPEA*, directing it to remove the fencing.

[99] The Dorins argued that the use of mandatory language in *SED 002* (i.e., "must") means the AER has no discretion to issue a reclamation certificate without a written release for fencing to remain in place. The Dorins said, in that case, the application must be rejected.

[100] The record shows that fencing issues are enmeshed with disputes between the Dorins and successive operators, and now Whitecap, about compensation and the right of entry order. The disputes have been ongoing for years, since at least 2015 with Whitecap. For example, in an email dated May 13, 2019, addressed to Whitecap in response to a proposed fencing release, Mr. Mark Dorin

indicated that removal of fencing at the well site would contravene the right of entry order. In the same email, Mr. Mark Dorin stated, “In short there shall be no fencing release for the issues set out in the letter.”

[101] In the Dorins’ view, when they tried to negotiate fencing releases with Whitecap starting in 2015, Whitecap’s wording in the proposed releases went beyond fencing and the landowners were unwilling to compromise their rights in other regards.

[102] Throughout this proceeding, the Dorins forcefully expressed their position that the AER should not make any decision about fencing that would negatively affect the landowners’ rights and obligations under the right of entry order. They frame the issue as one of collateral attack on the right of entry order.

[103] Whitecap argued *SED 002* provides guidance and does not have the force of law. It argued the AER has the discretion to approve a reclamation certificate application where the landowner has refused to sign a release for fencing to remain in place or to gain entry to the lands to remove the fencing. Whitecap said that to revoke the reclamation certificate based on the fencing issue in this case would set a dangerous precedent.

[104] It was ERG’s evidence that, although rare, the AER has issued reclamation certificates where the landowner and operator were at an impasse over fencing, and they could not reach an agreement to leave fencing in place or come to terms to allow the operator to remove the fencing. In those cases, the reclamation certificate acknowledged fencing was to remain in place until after the certificate was issued.

[105] ERG submitted that it is not appropriate to allow a party to frustrate an operator’s reclamation efforts by simultaneously refusing to sign an acceptance for a fence and actively preventing the operator from removing the fence. ERG also expressed concern about the precedent such a decision would set.

[106] ERG submitted that where the specific circumstances of an application warrant the exercise of discretion by the AER decision maker, *EPEA*, the *CRR*, and the associated standards criteria and guidelines provide the necessary discretion to depart from the generally applicable requirements in *SED 002*.

[107] ERG further submitted that policy guidance on third-party impacts on reclamation, in the form of a Conservation and Reclamation Information Letter titled *Third Party Impact on Reclamation* (the information letter), recognizes that there may be circumstances beyond the reasonable control of an operator that adversely affect the operator’s ability to achieve equivalent land capability and compliance with relevant legislative requirements. ERG said the information letter contemplates that if the operator adequately documents and provides information to the AER about its efforts to comply with the requirements in the regulatory framework, the AER has the discretion to decide whether it is appropriate to approve the reclamation certificate application in the circumstances.

[108] Finally, ERG's evidence at the hearing was that an environmental protection order (EPO) is used for extenuating circumstances to prevent, contain, or remedy environmental degradation of land and to deal with adverse environmental effects. Mr. Brad Dunkle, an ERG witness who was the AER reclamation assessor and decision maker on the application, said he did not feel an EPO was necessary in these circumstances.

Analysis

[109] The Dorins and Whitecap referred to the right of entry order in support of their positions on fencing. We have no jurisdiction over the right of entry order or compensation. The question we must answer is whether in the circumstances, where Whitecap and the Dorins have reached an impasse over fencing, the AER can issue a reclamation certificate with fencing remaining in place without written acceptance signed by the landowners. We do not need to consider the right of entry order to make our decision, nor does the existence of the right of entry order prevent us from exercising our jurisdiction to decide this appeal.

[110] As noted above, reclamation assessors and decision makers are given discretion under the regulatory framework to assess and pass parcels that may not strictly meet or align with applicable criteria. *SED 002* specifies that a reclamation certificate must include written consent for fencing to remain. There was no written consent in this case, but in the written and oral evidence, including the record of the decision maker, there is a clearly communicated intention by the landowners about fencing: the Dorins want the fencing on the site to remain in place at least until the issues with the right of entry order are resolved. In the specific circumstances of this case, and given the difficulties in the relationship between Whitecap and the Dorins, we find that the Dorins' communicated intention is sufficient and written consent is not required.

[111] The other matter we must consider is whether the land has been returned to equivalent land capability even with the fencing remaining in place. We deal with the question of equivalent land capability in the conclusion to these reasons. To assess the impact of remaining fencing, we are guided by the 2010 reclamation criteria and *SED 002*, which require that facilities left in place must be stable, nonhazardous, nonerosive, and have no impact on off-lease lands. In addition, section 7.4.8 of *SED 002* makes it clear that one reason for removing fencing prior to an application for a reclamation certificate is to ensure that the land can withstand grazing pressure.

[112] To decide whether it is appropriate to exercise the discretion to issue a reclamation certificate for the site with fencing remaining in place, we considered the following:

- Whether the remaining fences are used by or useful to the landowners.
- Whether the remaining fences pose a hazard.
- Whether the lands can withstand grazing pressure.

[113] Throughout the Dorins' submissions and evidence are clear indications that they use or rely on the remaining fencing. For example, in Exhibit 4.01 at PDF page 431 and PDF pages 478-479, the Dorins state that removal of the fencing would result in livestock straying. They also said that the functional fencing is used for livestock control. In his oral evidence Mr. Mark Dorin referred again to the problem of livestock straying if fencing were to be removed. Although the Dorins do not currently use or rely on the Texas gate, there is more than enough evidence on the record to conclude the fencing that remains in place is useful to the landowners.

[114] We have no evidence from the renter mentioned by Mr. Mark Dorin in his oral evidence about any adverse impacts from fencing or the Texas gate. Mr. Mark Dorin's evidence was clear that he has taken the initiative to replace and repair fencing on the site at various times. There is not enough evidence on the record to lead us to conclude that either the fallen fencing or the Texas gate impedes the use of the lands or that they pose a hazard to the environment or adjacent lands.

[115] It is also clear from the record that the well site and east-west access road can withstand grazing pressure. The remaining fencing is not used to keep cattle away from well site infrastructure. It is keeping the cattle from straying from the site. It was the Dorins' evidence that cattle graze the well site lands and east-west access road pursuant to a rental agreement with the owner of the cattle (not the Dorins). The photographic and video evidence shows that cattle have access to the whole well site area and the east-west access road, and there is no evidence that the vegetation growth throughout the area cannot withstand grazing.

[116] The impacts on landowners and occupiers of specified lands are a consideration in the legislative framework regarding the duty to conserve and reclaim specified land. But the duty is not owed to landowners or occupants. It is broader and part of the overall purpose of *EPEA* to promote the protection and wise use of the environment. Although landowners are given some input to the reclamation process, such as approving a seed mix, operators like Whitecap are required to do the work of conservation and reclamation under the legislative framework. Landowners, occupants, and operators are expected to engage in the reclamation process in good faith to support conservation and reclamation.

[117] There is no doubt Whitecap and the Dorins are at an impasse over fencing. We have found that in the circumstances of this case, written consent for the fencing to remain in place is not required. In addition, Mr. Mark Dorin's evidence was that the remaining fencing is used to manage cattle, and he has taken the initiative to repair and replace fencing in the past where it has fallen into disrepair or posed a hazard. In light of those facts, and since we find below that the site was returned to equivalent land capability in terms of landscape, vegetation, and soils, we find it appropriate in the specific circumstances here to exercise the discretion to issue the reclamation certificate with fencing remaining in place without written consent.

Conclusion

[118] The reclamation certificate does not need to be varied, suspended, or revoked in light of the fencing remaining in place at or near the well site.

Issue 2 – East-West Access Road Status

[119] For the following reasons, the panel finds no reason to vary, suspend, or revoke the reclamation certificate regarding the status of the east-west access road and the effect of the 2008 release relative to the reclamation certificate.

[120] In our preliminary decision, we found that the east-west access road is specified land. So, as the operator, Whitecap was required to conserve and reclaim the access road unless exempted by the regulations and obtain a reclamation certificate. There is no exemption in the regulations applicable to the east-west access road.

[121] It is not clear from the record whether the east-west access road was intended to be included for certification as part of the reclamation application as originally entered in OneStop in August 2018. The total acreage to be certified did not include the east-west access road and the plans included with the application did not show the east-west access road highlighted in yellow as required. However, an access road described as “full disturbance” was listed as an associated activity in section 2.2 of the application form. The application also listed a 2008 reclamation certificate in the “Additional Certificate” section of the application form. A copy of a 2008 release for the east-west access road was included with the application.

[122] According to Whitecap witness Mr. Vic Toews, even though Whitecap re-entered and used the east-west access road to conduct reclamation work on the well site and southern strip, the east-west access road was not included in Whitecap’s application for a reclamation certificate filed in August 2018. Mr. Toews said that was because the east-west access road had previously been certified as reclaimed.

[123] Two of the three questions posed in the SIR concerned the east-west access road. They were:

The previously certified east-west access road to the site needs to be highlighted in yellow and included in the total acreage to be certified with respect to this reclamation certificate application.

Please show the east-west access road also in red to be released to the Landowners and left unreclaimed and confirm this is still the case. It isn't highlighted in red as an attachment within this reclamation certificate application.

[124] In response to the second question Whitecap stated:

Original lease and E-W access road: 3.84 acres

Surveyed N-S access road (never built, never entered): 0.61 acres

Extra 3.2 m X 9.6 m strip of land enclosed by south lease boundary fence: 0.076 acres

Total acreage to be rec certified: 4.53 acres

[125] Whitecap also provided plans showing the east-west access road with the requested highlighting and a copy of the 2008 release. Finally, Whitecap stated, “We confirm this road is to be released. Please see the attached map as requested.”

[126] There is a reclamation certificate on the record issued in November 2008 certifying that the surface of the land held in connection with or incidental to the east-west access road complied with the relevant conservation and reclamation requirements of *EPEA* (the 2008 reclamation certificate). The validity of the 2008 reclamation certificate was not an issue in this proceeding. The 2008 reclamation certificate was issued on the strength of a release dated February 14, 2008, signed by Mr. and Mrs. Dorin (the 2008 release). There is no dispute among the parties about the existence of the 2008 release. However, a question that arises is whether the 2008 release is effective to relieve Whitecap from the obligation to reclaim the east-west access road.

[127] The Dorins submitted that Whitecap cannot rely on the 2008 release because it formed part of a now expired agreement with a different company and was given for a specific purpose that was not fulfilled. The company was one of Whitecap’s predecessors as operator. The purpose for the release was to facilitate the termination of a right of entry order as it applied to the east-west access road so that those lands could be included in a residential development. The north-south access road was identified in evidence as one of two means of accessing the well site to replace the east-west access road. The north-south access road was surveyed but never entered or used by any operator for oil and gas activity. The residential development did not proceed.

[128] The Dorins said that because Whitecap could not rely on the 2008 release, the east-west access road should have been included in the DSA that was conducted for the well site and associated activities and should have been reclaimed.

[129] Whitecap said the east-west access road was not modified after the 2008 release and reclamation certificate. It also said the condition of the road has not changed. Whitecap noted that at no point did the Dorins ask for the east-west access road to be removed. Whitecap argued that because the 2008 release remains in full force and effect, it did not have to reclaim the east-west access road.

[130] ERG noted that the east-west access road remains specified land and its reuse by Whitecap reset the obligation to obtain a reclamation certificate. Neither of the other two parties disagreed. ERG submitted that the application included the 2008 release and the appropriate plan showing the road to be left in place as an improvement. ERG said that because title to the Dorin land had not been transferred since the 2008 release, the decision maker considered it to be a valid acceptance for the east-west access road for the purposes of the application. ERG argued that the 2010 reclamation criteria do not apply to a facility or feature, such as an access road, to be left in place when a reclamation certificate application is accompanied by a release or acceptance. They relied on section 6.1 of the 2010 reclamation criteria which states, in part:

The reclamation criteria apply to well site leases and access roads...With written agreement from the Land Manager, they do not apply to facilities or features that are left in place as developed (e.g., roads, pads, dugout) although these facilities or features will be covered by the reclamation certificate.

[131] ERG also said that roads left in place must be stable, nonhazardous, and nonerosive as required by the 2010 reclamation criteria and *SED 002*. Finally, ERG submitted that the decision maker did not see any issues relating to drainage mentioned in the DSA or in photographs included in the DSA and that no concerns were raised about the east-west access road by the Dorins in their SOC.

Analysis

[132] Read together, the 2010 reclamation criteria and *SED 002* are clear that the reclamation criteria apply to access roads except where the owner (in the case of private land) has provided written agreement that the road is to remain in place as an improvement for the landowner's use. Even then, as noted by ERG, roads that are to remain in place must be stable, nonhazardous, and nonerosive. They must not pose a potential liability or environmental risk.

[133] The 2008 release is clearly marked as "Schedule I." It was the Dorins' evidence that the 2008 release was a schedule to the expired agreement with one of the previous operators. The 2008 release is short. It states that Herman and Shirley Dorin

DO HEREBY REMISE, RELEASE AND FOREVER DISCHARGE CAMINO INDUSTRIES INC. its servants, agents, employees, contractors, successors and assigns, of and from all reclamation responsibilities, in connection with the access roadway granted under Right of Entry Order No. C263/77

[134] The evidence on the record of this proceeding raises a question about whether Whitecap could rely on the 2008 release alone as indicating the landowners' continuing acceptance of leaving the east-west access road in place and unreclaimed. The evidence strongly suggests that the 2008 release was a schedule to a land use agreement. The 2008 release may have expired in 2010 when the land use agreement expired. The 2008 release appears to have been granted for a specific purpose—termination of the right of entry order explicitly referred to in the release—and that purpose was not and has not been met. In addition, we note that the 2008 release is silent on the topic of whether the east-west access road was to remain in place as an improvement for the landowners' use.

[135] However, considering the accumulation of evidence on the record of this proceeding relating to the east-west access road, we do not need to decide the legal force and effect of the release. We find the 2008 release is one indication of the landowners' intentions. Another indication of the landowners' intentions about the east-west access road is found in the interview details section of the application. The information provided was that Mr. Herman Dorin was interviewed on June 18, 2017, by Mr. Shane Millard for the purposes of completing the reclamation certificate application. Mr. Herman Dorin is reported to have said he was happy with the condition of the reclaimed well site, but he had outstanding

issues regarding the fencing. No concerns were noted about the east-west access road. The accuracy of that information was not disputed.

[136] In addition, in an affidavit sworn by Mr. Herman Dorin in September 2018 for use before a different tribunal but filed as evidence of the Dorins in this proceeding, Mr. Dorin specifically referred to the 2008 release. Notably, he described it as a release relating to the reclamation of the east-west access road. In his affidavit, Mr. Dorin also acknowledges receipt of the phase 1 environmental assessment prepared by Abandonrite, the Arletta Environmental Consulting phase 2 environmental assessment, and the Equilibrium Environmental Inc. phase 2 environmental assessments. The phase 1 assessment is dated 2011. It makes note of the east-west access road and the fact that the operator added gravel in places where drainage was an issue. It also noted the east-west access road had been certified. The east-west access road is identified in the air photographs included with the phase 1 assessment, but it is not included in the site condition report. None of the phase 2 assessments examined the east-west access road as part of the assessment process. In his affidavit, Mr. Dorin described the information from the reports that he said was misleading. No mention was made of the east-west access road.

[137] Further evidence of the landowners' intent about the east-west access road is found in video evidence filed in this proceeding. There, Mr. Mark Dorin said that the "landowners really don't care about it because it is going to be residential."

[138] The most persuasive evidence of the landowners' intentions about the east-west access road was Mr. Mark Dorin's evidence in the oral portion of the hearing. He described the east-west access road as a laneway that is often used to move cattle that graze the site, and a quarter section of land to the east, to a point where they can be loaded on trucks. Cattle currently grazing the site and being moved via the east-west access road are owned by a renter.

[139] Whitecap appeared to suggest that because the Dorins did not ask for the east-west access road to be removed that is evidence of their agreement that it should remain in place. There is a clear presumption in the regulatory framework that all facilities and improvements constructed on land that is to be conserved and reclaimed will be removed as part of the reclamation process. The presumption is only rebutted on private land by evidence of the landowner's agreement that a facility or improvement will not be removed. *SED 002* requires that evidence be in writing.

[140] In his oral evidence, Mr. Dunkle said about the 2008 release:

I asked them to confirm if that – to confirm that... that release was still valid..

And, yes, they did – ... they confirmed that, yes, that, indeed was the case.

[141] In our view, the SIR request to “...show the east-west access road in red to be released to the Landowners and left unreclaimed and confirm this is still the case.” and Whitecap’s response, “We confirm this road is to be released. Please see the attached map as requested.” left room for interpretation. Particularly when read together, the SIR question and response could reasonably be interpreted to suggest that it was Whitecap’s intention to take a further step or steps to release the east-west access road. However, it was Whitecap’s evidence at the hearing that they did not reach out to the landowners to confirm that they continued to consider the 2008 release to be valid.

[142] It would have been preferable if Whitecap had sought confirmation from Mr. and Mrs. Dorin that the east-west access road was to remain unreclaimed as contemplated in the 2008 release before filing the application or their SIR response. However, we find that the various indications of the landowners’ intentions about the east-west access road as described above, particularly the fact that Mr. Herman Dorin raised no concerns about the east-west access road when interviewed by Mr. Millard, Mr. Mark Dorin’s evidence that the landowners don’t care about it because of the plans for the land to be used for residential purposes, and the fact the east-west access road is now used by a renter for moving cattle all demonstrate an expectation on the part of the Dorins that the east-west access road would remain in place and not be reclaimed.

[143] Finally, we must also be satisfied that the east-west access road is stable, nonerosive, and does not pose a hazard or environmental risk. ERG submitted that the decision maker did not see any drainage issues identified in the DSA. Because the east-west access road was not included in the DSA, we would not expect any drainage issues specifically relating to the road to be mentioned in it. Nor would the DSA identify any changes such as rutting or compaction resulting from use by Whitecap. However, in addition to the many photographs showing the east-west access road that formed part of the AER decision maker’s review, there was extensive video evidence filed by the Dorins on the record of this proceeding that also showed the condition of the east-west access road. We find that in all the information about or showing the east-west access road, there is nothing to persuade us that it is not stable, or that it is erosive, or hazardous in some other way. Similarly, there was no evidence of any potential adverse on-site or off-site environmental impacts, such as drainage issues, from the east-west access road.

Conclusion

[144] Based on the evidence on the record, including new evidence filed in this regulatory appeal, the reclamation certificate does not need to be varied, suspended, or revoked in consideration of the status of the east-west access road and the effect of the 2008 release relative to the reclamation certificate.

Issue 3 – Soil Conditions

[145] For the following reasons, the panel finds no reason to vary, suspend, or revoke the reclamation certificate regarding the soil condition on the lands covered by the reclamation certificate.

[146] The Dorins raised two concerns about soil conditions on the site. The first was about salt contamination (salinity) on the well site and the second was about the well site contours after reclamation.

Salt Contamination

[147] A company must address any contamination before reclaiming land and applying for a reclamation certificate. This involves at least a phase 1 environmental site assessment. The phase 1 assessment is done to identify any potential source of contamination both on and off lease. If the potential for contamination is identified in phase 1, a phase 2 environmental site assessment must be completed. Phase 2 environmental site assessments gather information about the presence, nature, depth, and extent of the contamination.

[148] If the phase 2 assessment identifies contamination levels exceeding those set out in the tier 1 and tier 2 guidelines, the company must identify the source of the contamination, delineate it, and then remediate the contamination in accordance with the guidelines.

[149] The tier 1 guidelines describe generic criteria for salinity (as measured by electrical conductivity; EC), sodicity (as measured by the sodium absorption ratio; SAR), and other contaminants.

[150] Where the contaminant is a salt, the *SCARG* contains additional information and should be used in conjunction with the tier 1 guidelines.

[151] The goal of remediation is to reduce contaminant concentrations to a level that permits unrestricted land use that is consistent with the *CSPF*.

[152] Salt contamination was initially identified on the well site in a soil sample from a borehole located to the north and west of the well. Further work to delineate the extent of the contamination showed soil samples that exceeded the criteria for salt present to the west and northwest of the well extending to the edges of the well site and beyond.

[153] Early work to delineate and identify the source of the salt suggested that manure from the Dorins' farm operation and drilling mud spread near the well site were potential sources. The final report prepared by Equilibrium in response to the Dorins' submissions on the issue of salt contamination concluded that manure was the source of contamination.

[154] The Dorins initially disputed the conclusion that manure from cattle operations on their land was the source of the elevated salt levels. The Dorins' position evolved over the course of the hearing process and in final argument they acknowledged that manure from cattle operations on their lands was one source of the elevated salt levels. However, they argued that there is a 0.15-acre area of salt contamination to the north and west of the former well that Whitecap was required to remediate because it is either related to drilling waste or caused by third-party impacts that were within the reasonable control of Whitecap.

[155] Whitecap said it met the 2010 well site criteria for remediation of contamination and provided evidence of site investigations collected over seven years, starting in 2011, before it became the operator, and concluding in 2018. Consulting firms retained by Whitecap carried out a phase 1 and four phase 2 assessments of the well site and an additional site-specific tier 1 assessment of salinity.

[156] Whitecap referred to section 11.2 of the 2010 reclamation criteria. The relevant parts of that section say:

The need for a Level 2 assessment is triggered on sites where anomalies in parameter measurements and/or ratings are encountered at a level 1 and further investigation is needed to assist in making a Pass/fail decision

Level 2 is used to quantify relative differences between onsite and off the site ... the process of which may help to isolate the problem requiring mitigation.

If the site fails any of the Level 2 soils parameters, then the site fails, unless failure is clearly unrelated to the well site (i.e., third party impacts).

[157] Whitecap argued that because the site investigations confirmed that oil and gas activities were not the cause of the salinity exceedances found on the site, it did not have to remediate.

Analysis

[158] The overarching question we must answer is whether it is appropriate to issue a reclamation certificate for the site despite the unremediated salt contamination. To answer that question, we considered the following:

- Whether the potential sources and extent of contamination were appropriately identified.
- Whether Whitecap and its predecessors were required to prevent or mitigate contamination from a third-party source, in this case, cattle manure from the Dorins' cattle operations.
- Whether Whitecap should be required to remediate the salt contamination, specifically considering whether it may cause adverse environmental effects on or off site.

Were the potential sources and the extent of contamination appropriately identified?

[159] The site assessments conducted on behalf of Whitecap and its predecessor are summarized in appendix 3. The work done to identify potential sources and extent of salt contamination on the site was extensive.

[160] The Dorins originally challenged the reliability of the site assessments and the conclusion that manure was a source of elevated salinity on the site. This position was based in part on Whitecap's consultants finding the corral and manure storage area were upslope from the well and overland flow had contributed to salinity issues on the well site.

[161] The Dorins had identified that cattle tracked manure out of the corral, along the north and west sides of the well site. However, they disagreed that overland flow could have carried manure salts to the area near the wellhead as they said a ridge directed runoff to the east, west, and northeast of the corral, but not southeast towards the wellhead. Mr. Mark Dorin also pointed out during the oral portion of the hearing that Whitecap consultant and witness, Mr. Anthony Knafla, had referred to a photograph of disturbed soil from a pipeline removal as a cattle track. After Mr. Mark Dorin corrected him, Mr. Knafla then relied on other photographs to point to cattle tracks and manure on the well site.

[162] Photographs in the record clearly show slopes to the east and southeast from the historic manure storage areas at the northwest corner of the well site. Aerial photographs on the record also clearly show dark areas extending from the corral and manure storage areas down into the well site, specifically to the west, northwest, and north of the well. The dark areas correspond with the Dorins' evidence about the location of historical manure storage areas and cattle movement across the site and its use.

[163] The Dorins also said a cut made during construction of the well site at the base of a hill located to the west of the well site could have brought naturally occurring salts closer to the surface. Mr. Knafla agreed that was a possibility but unlikely because sample results from background sites located away from the manure and oil and gas sources did not have elevated natural salts, which indicates disturbance of the soil during construction was not the cause of elevated SAR values.

[164] Whitecap's investigations revealed a few samples from sites near the wellhead that did not meet the site-specific tier 1 criteria developed for SAR. A mass balance calculation indicated drilling waste could have accounted for the sodium and chloride on the site. However, Whitecap eliminated drilling waste as a potential source of the SAR values because the soil samples from an area where drilling waste was spread by mixed bury cover did not have elevated SAR and EC as expected if the drilling waste were the source. Mr. Knafla also explained SAR is a ratio of the concentration of sodium to the sum of the concentrations of calcium and magnesium. He said the elevated SAR values close to the wellhead are not indicative of high salinity because of lower-than-average background concentrations of calcium and magnesium relative to sodium in that area of the site.

[165] Maps on the record showed the highest values of SAR and EC along the west side and the northwest corner of the site. High EC values extended off site to the north and northwest towards the corral and historical manure storage area. Similarly, evidence of the results of an electromagnetic conductivity survey of the well site shows the highest values along the west side and the northwest corner of the site. Elevated electromagnetic conductivity values are an indicator of elevated salt levels relative to background levels.

[166] Contour mapping of sodium, chloride, sulphate, potassium, and nitrate ions also showed that the highest values occurred along the west side and the northwest corner of the well site. The uncontradicted evidence in this hearing was that potassium, sulphate, and nitrate were not present in drill mud additives but are present in and characteristic of manure samples in high concentrations.

[167] Finally, in oral evidence, ERG witness, Ms. Heather Jones, said that mass balance calculations provided by Whitecap indicated that drilling additives could have contributed to the elevated EC and SAR on the site. However, she went on to say the presence of nitrate in the soils on the well site points to an alternate or additional source of salinity, and ERG accepted the conclusion of Whitecap's evaluation that manure was the cause of elevated EC and SAR on the site.

[168] We are satisfied that the potential sources and extent of contamination were appropriately investigated and identified. Although the Dorins did suggest alternative sources of salt contamination to manure, they did not provide evidence to support their contention. Nor did they challenge the methodologies used by Whitecap's consultants to eliminate drilling waste and the hill cut as potential sources.

[169] We are persuaded that if drilling waste were a source of contamination, the samples taken from the area where evidence showed drilling waste had been spread would have had elevated EC and SAR. They did not. We are also persuaded that given the absence of elevated salt levels in soil samples taken from areas away from both manure impacted soils and oil and gas activity, there are not sufficient grounds to conclude that soil disturbance during construction of the hill cut could have brought salt near to the surface. Finally, the extensive analytical data provided in the successive phase 2 assessments show a clear link between manure salts off the well site and salts in samples on the well site. Consequently, we conclude manure is the most likely cause of the elevated salinity found in the area to the west, northwest, and north of the well site.

Should Whitecap and its predecessors have prevented or mitigated contamination of the site from third-party sources?

[170] The Dorins relied on the information letter to argue that Whitecap was required to prevent third parties from adversely affecting the land or take reasonable steps to do so.

[171] The Dorins said Whitecap could have excluded cattle from grazing the well site as had been done by previous operators until about 1995, thereby mitigating the potential for cattle to track manure onto the well site. They said the choice of well location close to the corral and manure storage area and the failure of operators to exclude cattle from the site led to the elevated salt levels on the site that were attributable to manure.

[172] Whitecap argued that, in the circumstances, it had no obligation to prevent or mitigate contamination of the site by manure. It said it did not have the ability to exclude cattle from the site because the right of entry order gave the Dorins the right to graze livestock on the site and pointed to evidence of Mr. Herman Dorin's request that he be able to graze livestock on the site. Whitecap also said it had no control over the location of the well. In addition, Mr. Knafla gave evidence in the electronic hearing that, even if there had been fencing in place around the well site to exclude cattle, the presence and movement of cattle to the west, northwest, and north of the well site could still have resulted in salt contamination of the soils on the site because of the tendency of salts to move with surface water flow.

[173] The information letter provides guidance to parties assessing third-party impacts and the extent of the problem. It also provides guidance to operators about their obligations where third-party impacts create the risk of future environmental damage and the information on third-party impacts that they should include in a reclamation certificate application. The information letter clearly contemplates that the decision maker may issue a reclamation certificate where there has been third-party impact beyond the reasonable control of the operator that adversely affects the operator's ability to achieve equivalent land capability and compliance with relevant legislative requirements.

[174] As noted above, Whitecap did provide extensive information in support of the application about how it identified and evaluated the extent of the third-party impacts on the well site.

[175] The evidence on the record demonstrates that the manure impacts are not causing and are not expected to cause environmental damage. Indeed, the site clearly supports the current use for grazing and the evidence of both the Dorins and Whitecap is that the elevated salinity and sodicity measured on the site will not negatively affect the planned use of the lands for residential development.

[176] With respect to mitigation of third-party impacts and whether Whitecap had the ability to limit the effect of manure on the well site, the panel considered multiple facts. Both parties rely on the conditions set out in the right of entry order. To restrict grazing would have limited the landowners' rights and might not have mitigated any historical effect of the manure storage which occurred over a long period of time. Siting the well near the farm site in 1977 likely contributed to some of the presence of manure on the site, but this was not within Whitecap's control, nor could it be remedied by Whitecap. And it was Whitecap's uncontradicted evidence that excluding cattle from the well site would not necessarily have prevented manure-caused salt contamination of soils on the well site. Therefore, the panel finds it unreasonable to expect that mitigation of manure effects was within Whitecap's control.

Should Whitecap be required to remediate the salt contamination, specifically considering whether it may cause adverse environmental effects on or off site?

[177] The goal of the tier 1 guidelines is to protect soils as a resource to support ecosystem function. To meet equivalent land capability, contaminants must be identified and remediated to meet the tier 1 criteria or to a level equivalent to or less than background concentrations. Equivalent land capability may also be achieved by following the process for developing site-specific remediation guidelines described in the tier 2 guidelines.

[178] Section 2.4.2 of the tier 1 guidelines states that when the background concentration of a substance is greater than the tier 1 guideline, the remediation level “shall be set to background or to guidelines developed using tier 2 procedures.” Acceptable approaches to determining site-specific background concentrations are described in the tier 1 and 2 guidelines and the *SCARG*.

[179] In support of the application, Equilibrium developed site-specific background criteria to account for manure impact on and off site, using approaches and analysis contemplated by the tier 1 and 2 guidelines. The Dorins did not challenge these criteria.

[180] The *SCARG* requires remediation for topsoil and subsoil either to a depth sufficient to prevent impact on the rooting zone or to a depth at which there are similar levels of naturally occurring salts in the control soils. The *SCARG* also allows that where there is no potential for adverse effects on the current or reasonably anticipated uses of the land and concentrations of salinity or sodicity are not greater than background, then remediation does not have to exceed background. For clarity, operators are not required to remediate to concentrations lower than background conditions.

[181] Whitecap concluded that the sample sites with SAR values above the site-specific background did not require remediation as the sodium and chloride concentrations were within the range of concentrations found in the samples used to calculate the background values. Additionally, the elevated SAR values close to the wellhead are most likely due to the relatively lower concentrations of calcium and magnesium at the affected sample sites.

[182] When questioned by Mr. Mark Dorin about the effect of elevated SAR on land uses, Mr. Knafla said that high sodium in soil can lead to changes in soil conditions that affect water penetration, particularly in surface soil, and can limit vegetation growth. When asked specifically if the SAR values would restrict residential use in this case, Mr. Knafla said it would have no effect on residential uses such as gardening.

[183] Remediation would require soil disturbance to either apply a calcium amendment or excavate the contaminated soil. However, the record shows the well site is supporting vegetation equivalent to off-site conditions and that rooting zone restrictions and vegetation stress were not evident during the DSA. In addition, the absence of bare spots and salt crusting are further indications of good plant health and soil

condition on the well site, and it is clear it supports grazing by cattle. Residual SAR values should not restrict residential uses such as gardening and are clearly not restricting the current agricultural uses. We are persuaded that well site productivity and ecological function are equivalent to off-site conditions, and remediation is not required.

Site Contours

[184] One element of equivalent land capability is a landscape assessment. Part 9 of the 2010 reclamation criteria sets out the specific criteria to be assessed as part of the landscape assessment. Macro-level land contours are an element of the operability criteria.

[185] In their written hearing submission, the Dorins said while contouring work had been done on the site, the original contours had not been achieved, particularly in the southwest corner of the well site near a hill cut. We note that the Dorins did not raise this issue further in their written reply submissions or their oral submissions.

[186] Whitecap said it was not required to return the site to its original contours. Whitecap argued that it had reclaimed the site to the equivalent land capability standard.

[187] According to Part 9 of the 2010 reclamation criteria, the contours of reclaimed land must “conform and blend with adjacent contours or be consistent with present or intended land use.” Restoration of preexisting contours is not required. Section 9.5.1 states that the landscape level contours are to be “comparable to (e.g., integration with surrounding landscape) the off-site landscape and not result in excessive erosion, slumping/wasting or water flow issues or workability with implements.”

[188] The DSA did not identify any landscape issues on the site. The video and photographic evidence did not show any breaks or abrupt changes in contours from the site to the surrounding lands. The Dorins’ evidence about the past and present use of the site for grazing demonstrates operability has been maintained. We are not persuaded that the site contours are not comparable to the off-site landscape or that they would result in any of the negative consequences identified in section 9.5.1 of the 2010 well site criteria.

Conclusion

[189] Based on the evidence on the record, including new evidence filed in this regulatory appeal, the reclamation certificate does not need to be varied, suspended, or revoked in light of the soil conditions on the site.

Issue 4 – AER Process and Procedural Fairness

[190] For the following reasons, the panel finds no reason to vary, suspend, or revoke the reclamation certificate as amended on March 9, 2022, due to any unremedied procedural fairness concerns.

[191] As a statutory decision maker, the AER was obliged to conduct a review of the application in a manner that was procedurally fair. The duty of fairness extended to the Dorins.

[192] As required by the AER, Whitecap filed its application online through OneStop. According to ERG, OneStop has an internal side accessible only to the AER and a “public query viewer” where the public can search a location or registered application.

[193] The application identified the well site as the asset and the following associated activities: access road (full disturbance), proposed access road (zero disturbance), and a 3.2 m x 96 m strip outside the well site south boundary.

[194] Plans uploaded as part of the application showed the total land to be certified was 3.5 acres—the 3.5 acres is the total of the well site, the southern strip, and the north-south road acreage. It does not include the 1.03 acre east-west access road. The application listed “fence” and “access road” as facilities to be left in place (“access road” was listed three times).

[195] As noted above, the application required a technical review as unresolved matters were identified in the application, including the concerns about soil salinity and outstanding fencing issues.

[196] The Dorins received notice of Whitecap’s application and were given the opportunity to file statements of concern, which they did. About nine months after Whitecap’s original application, Mr. Dunkle noted there was information missing in Whitecap’s application and issued the SIR to Whitecap. The application was placed in abeyance pending receipt of the SIR response.

[197] The record shows there was substantial communication between the Dorins and Whitecap, with copies to the AER, about the SIR and about the requirement in the SIR that fencing be removed or a release obtained to leave fencing in place.

[198] In its SIR response filed on May 31, 2019, Whitecap provided the revised plans as requested and clarified the total acreage it was applying for was 4.53 acres—the 4.53 acres is the total of the well site, the southern strip, the north-south road, and the east-west access road acreage.

[199] After considering the application, including the supporting materials, the SIR response, the Dorins’ SOC’s, and other information filed by the Dorins, the AER exercised the discretion to issue the reclamation certificate without holding a hearing. It concluded the site had been conserved and reclaimed in accordance with section 137(2) of *EPEA*. In a letter dated July 18, 2019, addressed to Mr. Herman Dorin (the decision letter), the AER advised the Dorins of the decision to issue the reclamation certificate. It also provided reasons why it had decided not to hold a hearing to consider the Whitecap application.

Finally, the letter informed the Dorins of their right to file an appeal of the decision to issue the reclamation certificate. The letter included a copy of the reclamation certificate.

Analysis

[200] The questions we must answer are as follows:

- Whether the application review process was fair.
- If the answer to the first question is no, whether the unfairness was remedied through this regulatory appeal process.

[201] The record reveals two potential sources of unfairness. The first was the application review process itself. The second was the process for issuing and amending the reclamation certificate that resulted in discrepancies in the various versions of the reclamation certificate that were published through OneStop and provided by AER staff. The two potential sources of unfairness are addressed in turn below.

The Application Review Process

[202] The Dorins submitted there was a lack of procedural fairness in the AER's decision-making process. They alleged the unfairness resulted in impacts that damaged the Dorins financially. The Dorins said they had a reasonable expectation that the AER would conduct a site visit, and the fact it did not also resulted in unfairness. The Dorins believed Whitecap's application ought to have been referred for an oral hearing. They made a reference to a reasonable apprehension of bias on the part of the decision maker in issuing the SIR to Whitecap and alleged that the applicant had greater access to the decision maker than the landowners. The Dorins submitted that the decision maker misunderstood aspects of the Dorins' SOC's.

[203] Mr. Mark Dorin claimed he had limited access to the AER decision maker and that was because of a communications protocol implemented in 2016 by the AER's Stakeholder and Government Engagement Group (Stakeholder Engagement). Under the protocol, Stakeholder Engagement communicated with Mr. Mark Dorin on behalf of the AER. The Dorins submitted that the protocol was a major contributor to the unfairness and was also the reason there were errors with the reclamation certificate.

[204] Whitecap argued that the AER's decision was not procedurally unfair, but even if it were, any unfairness was remedied by the appeal process. The communications protocol, and any perceived procedural fairness issues associated with it, had absolutely no bearing on the ultimate issue of whether the site has been properly reclaimed. Whitecap said that the communications protocol was "actually" an effort by the AER to facilitate Mr. Mark Dorin's participation in its processes and afford the Dorins an opportunity to be heard.

[205] ERG submitted that the AER's decision letter thoroughly and directly addressed the substance of the Dorins' complaints and provided them with ample reasons for why the decision to issue the reclamation certificate was made without a hearing. ERG also argued that the communications protocol did not hinder the Dorins' ability to meaningfully participate in the initial decision process nor be heard by the decision maker. ERG agreed with Whitecap that any unfairness in the decision-making process was remedied by the appeal proceeding.

[206] The purpose of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure appropriate to the decision to be made, with an opportunity for those affected to know the case they must meet and put forward their views and evidence and have them considered by an unbiased decision maker. The duty of procedural fairness is flexible and variable and depends on the relevant regulatory framework.

[207] Under *REDA*, the *Rules of Practice*, and *EPEA*, there is no right to a hearing on reclamation certificate applications, nor is a site visit always required. The Dorins had the opportunity to submit SOC's. Their SOC's were some 45 pages in length, not including attachments. Those SOC's were considered in the decision-making process and were specifically addressed in the decision letter.

[208] No provision is made in the regulatory framework for SOC filers to submit additional information for consideration in the reclamation certificate application review process. However, the Dorins filed, and the AER included in the record of the decision maker, various materials in which the Dorins raised additional concerns and points for clarification throughout the course of the application review process. For example, a May 27, 2019, email from Mr. Mark Dorin to the AER, copied to Whitecap, set out the Dorins' perspective on the SIR requirement that fencing be removed or a release obtained and set out three specific requests to the AER relating to the application.

[209] ERG witness, Mr. Dunkle, testified that he spoke with Mr. Mark Dorin by phone about Whitecap's application in the earliest stages of the process. In total, including the SOC's, the Dorins submitted over 350 pages of material to the application review process. Mr. Mark Dorin even suggested in this proceeding that the AER was prompted on at least one occasion to seek information from Whitecap because of a submission from the Dorins.

[210] The record shows the Dorins were able to file extensive submissions in the application review process and the AER decision maker engaged with the relevant materials filed by Mr. Mark Dorin. Therefore, we are not persuaded that Mr. Mark Dorin was constrained from making submissions to the decision maker on behalf of the Dorins by the communications protocol or otherwise.

[211] Furthermore, in the decision letter, the AER provided a summary of how some of the Dorins' concerns were taken into account and why the rest were not in the AER's jurisdiction or relevant to the application.

[212] Finally, the basis for the Dorins' claim of bias arising from the SIR is not clear. If the suggestion is that the SIR gave Whitecap an opportunity to fix its application, that opportunity did not necessarily mean the application would be approved. The Dorins did make some comments about the east-west access road in their SOC's even though it was not clear at the time whether Whitecap had included it in the application. And, as noted, the Dorins' correspondence about the SIR was before Mr. Dunkle as the AER decision maker and was included in the record of decision maker.

[213] We find that the Dorins' participation in the application review process was extensive. They were provided with a copy of the SIR and updates about the status of the application review process. They were aware of the issues under consideration. The Dorins had formal opportunities and numerous additional opportunities to communicate their views to the AER. The decision letter and other materials on the record demonstrate the AER considered the Dorins' concerns before deciding to issue the reclamation certificate. Therefore, we conclude the application review process was procedurally fair.

[214] However, questions about fairness did not end with the issuance of the reclamation certificate. From the date the reclamation certificate was issued, questions arose about whether it accurately reflected what was intended to be certified.

Problems with the Reclamation Certificate

[215] Issues about the accuracy of the reclamation certificate, specifically about what associated activities it was intended to certify, have persisted for three years despite Mr. Mark Dorin's efforts and, more recently, efforts by this panel.

[216] As the appeal unfolded, it became apparent that there was a discrepancy between the reclamation certificate generated by OneStop and the actual decision made by the AER. As described below, that reclamation certificate was subsequently amended but the first amendment did not fully correct the discrepancy. In addition, the amended version of the reclamation certificate was only available on the AER-facing side of OneStop, which Mr. Dunkle said would also have been available to Whitecap but not available through the public viewer. Only the original version of the reclamation certificate would display on the public side of OneStop. This led to the unfortunate situation where it was unclear what had been certified and the appearance of more than one reclamation certificate for the site.

[217] The documents Whitecap filed in response to the SIR, specifically the plans with the east-west access road highlighted in yellow and in red, were not incorporated into OneStop. Mr. Dunkle confirmed in his testimony that it is not possible to change the information a company inputs in OneStop once it has been submitted. Consequently, Whitecap's application in OneStop remained unchanged from the one it filed on August 14, 2018, and did not reflect the updated information included in its SIR response.

[218] Mr. Dunkle also testified that he could not update Whitecap’s application on OneStop before the system generated the reclamation certificate that was issued July 18, 2019. To address this problem, Mr. Dunkle said the reclamation certificate had to be amended and a “proper, complete, certificate with all the proper survey plans attached” was created (amended reclamation certificate). However, the reclamation certificate generated by OneStop and sent to the Dorins on July 18, 2019, with the decision letter did not appear to be the amended reclamation certificate. The opening sentence of the cover letter said, “Enclosed is a copy of the Reclamation Certificate No. 382273 issued to Whitecap Resources Inc.” The first page of the enclosed document, clearly marked in bold typeface at the top as “Reclamation Certificate No. 382273,” identified only one access road and listed the 3.2 m x 96 m strip twice. The attached plans only highlighted 3.5 acres in total of reclaimed land.

[219] Mr. Mark Dorin wrote to the AER on August 13, 2019, pointing out the problems with the reclamation certificate he had received, including issues with yellow highlighting in the attached surveys and a resulting lack of clarity regarding the total acreage certified. Stakeholder Engagement followed up with an email to him on August 15, 2019, confirming that the certificate sent to the Dorins with the decision letter was the correct certificate and reattached it for his convenience. By that date, Mr. Dorin had received multiple versions of the reclamation certificate:

- a four-page version sent to the landowners by the AER that did not include a plan with the east-west road highlighted
- a four-page version downloaded by Mr. Mark Dorin from the OneStop public viewer that did not include a plan with the east-west access road highlighted
- a five-page version sent to Mr. Mark Dorin by Stakeholder Engagement that was the same as the four-page version with the addition of a plan which, when viewed online, showed yellow highlighting on the east-west access road and, when printed on paper, showed the well site shaded but not the east-west access road

[220] The front page of all versions of the reclamation certificate remained unchanged. It still did not list the east-west access road and listed the 3.2 m x 96 m strip twice.

[221] Speaking about the issues with the front page of the reclamation certificate, Mr. Dunkle’s testimony was:

...there’s a double entry occurring. It’s showing that workspace – it’s given a double entry...That – that’s another correction that needs to be done. There are some glitches in that OneStop system that it ... it just displays it that way. But – but, yeah, that is something we need to have corrected as well.

[222] Additional oral evidence from ERG made clear that this is not the first time that OneStop has failed to accurately display the relevant information. In their written submissions and Mr. Mark Dorin's oral testimony, the Dorins also expressed concern that there are no page numbers in the OneStop reclamation certificate and therefore no reliable means of telling whether the pages are in the correct order or if a page is missing or has been replaced. To illustrate his concern about the lack of security features on the system, Mr. Dorin demonstrated that it was possible for a user to change the highlighting on the survey. We agree that these are valid concerns.

[223] It was ERG's evidence that the amended reclamation certificate, which we understand to be the one the AER considered to be correct, was forwarded to Mr. Dorin on July 30, 2019, and in the August 2019 email from Stakeholder Engagement. However, the amended reclamation certificate sent to the Dorins in July and August 2019 still did not accurately reflect the AER's decision because it listed the 3.2 m x 96 m strip twice, listed only one access road as an asset and, depending on whether it was viewed online or printed, may or may not have included a plan that showed the east-west access road was intended to be certified. More on this below.

[224] It also came to light during oral evidence that what a member of the public would have seen on the OneStop public viewer if they had searched for the reclamation certificate was the unamended version—even when the AER-facing side of OneStop showed the amended version. So, even if the Dorins had been sent the first amended version of the reclamation certificate with the same plans and highlighting as those showing on the AER-facing side of OneStop, a search on the public viewer would have brought up the original, unamended reclamation certificate. All of this gave rise to the appearance of more than one reclamation certificate for the same lands.

[225] In our initial review of the record of decision maker, we also noted problems with the reclamation certificate. On August 23, 2021, we requested the ERG to provide a copy of reclamation certificate 382273 and to set out, in writing, the specific associated activities and related acreages of surface lands that were the subject of the reclamation certificate. ERG responded via email to the parties and the panel on August 30, 2021, stating that the certificate related to the well, the access road in 08-18, and the 3.2 m x 96 m strip of land outside the south boundary. ERG attached a copy of reclamation certificate 382273 and stated that the total acreage covered by the certificate was 3.5 acres. The copy of the reclamation certificate provided to the panel and parties was the same one that was initially generated by OneStop on July 18, 2019. It did not include the plans with the east-west access road highlighted in yellow and red, the strip outside the well boundary was listed twice, and the certified acreage described by the ERG was identified as 3.5 acres.

[226] Later that same day, August 30, 2021, ERG provided a correction to its earlier correspondence. It clarified that the certificate covered the original well site lease, the east-west access road (3.84 acres), the surveyed north-south access road (0.61 acres), and the extra 3.2 m x 96 m strip of land (0.076 acres) for a total certified acreage of 4.53 acres. ERG said the discrepancy was due to OneStop not being updated with the most current information.

[227] On February 28, 2022, after the last deadline for parties' submissions, ERG submitted a letter to the panel responding to matters raised in submissions made by the Dorins about the reclamation certificate. In that letter ERG stated:

The amended reclamation certificate is not found when a search is done for the application through the OneStop program located on the AER's website. This error has been noted and will be communicated to AER staff responsible for the OneStop program to resolve this problem. While the OneStop program does not have an up-to-date amended reclamation certificate, the ERG attaches an email dated August 15, 2019 from AER Stakeholder Engagement to Mr. Dorin. It is in response to an email Mr. Dorin sent to Stakeholder Engagement on August 13, 2019, where he noted he had two versions of the reclamation certificate and asked which version "can be used or relied on in the future," as well as the total area certified as reclaimed.

[228] The ERG letter went on to state:

In response Stakeholder Engagement stated the following: The reclamation certificate and survey plan's [sic] highlighted in yellow that went out with the Notice of Disposition letter dated July 16, 2019 are the correct official final documents. (reattached here for your convenience). The survey plan submitted by the company with the original application did not include the east-west access road, however through a supplementary information request made to Whitecap, they provided an updated survey plan which included the highlighted road and well site. The total area highlighted in yellow to be certified could not be changed from what was inputted into OneStop when the company submitted their reclamation certificate application. The acreage difference would be related to the east-west access road which wasn't included originally. (1.03 acres)

[229] After receiving comments from the Dorins, Whitecap, and ERG, we decided to enter the February 28, 2022, ERG letter on the record of this proceeding.

[230] The reclamation certificate generated by OneStop caused uncertainty for the Dorins and the panel in this proceeding. It seems it also caused confusion for Whitecap. We heard uncontradicted evidence that when Whitecap sought to have the right of entry order revoked by the LPRT, its application was dismissed on the basis that the total area certified as reclaimed was unclear and that there appeared to be two versions of the reclamation certificate.

[231] On the last morning of the hearing, immediately before final argument was scheduled to begin, ERG provided its response to an undertaking to:

provide a copy of the ticket created confirming that a request had been made to provide confirmation of a service request to OneStop regarding repair of the issue of the duplication of the southern strip on the table on the reclamation certificate.

[232] Counsel for ERG filed a screenshot of the OneStop service ticket and stated it will take time for OneStop staff to replace the current reclamation certificate with a corrected one so it can be accessed through the public-facing OneStop application query tool on the AER's website.

[233] At the same time, ERG filed a letter signed by Mr. Corey Zadko, manager ERG, dated March 9, 2022. That letter gave notice that reclamation certificate 382273 had been amended to provide clarification of the activity types covered under the reclamation certificate. It also noted that page four of six (the survey of the east-west access road with the road unhighlighted) was removed from the reclamation certificate (reclamation certificate, version 3). Mr. Zadko's letter included reclamation certificate version 3 (see appendix 4). Reclamation certificate version 3 appears to accurately reflect the AER's decision on Whitecap's application¹.

[234] Although we found the application review process was procedurally fair, we are concerned that the reclamation certificate did not accurately reflect the AER's decision until the last day of the hearing. In addition, after the first amendment, the version of the reclamation certificate available to the public through the OneStop public viewer was not the same as the reclamation certificate available on the AER-facing side of OneStop. This confusion continued despite concerns repeatedly raised by the Dorins.

[235] Where a decision maker issues formal evidence of a decision in the form of a legally authorized instrument, such as a reclamation certificate, it is not sufficient that the decision maker knew what they meant if those affected by the decision cannot rely on the instrument as an accurate reflection of the decision that was made. The AER was not able to provide the Dorins, Whitecap, and the panel with a reclamation certificate that accurately reflected what had been certified. Furthermore, this did not happen just once but repeatedly and over three years. Only on the last day of the electronic hearing were the parties provided with a version of the certificate that accurately reflected the AER's decision. Where an instrument such as a reclamation certificate is issued to officially communicate a decision, it must clearly and accurately reflect the decision made so it can be relied on.

¹ Because reclamation certificate version 3 had not been requested as part of ERG's undertaking, the parties were given an opportunity to comment on whether any additional hearing process was required to address the most recent version of the reclamation certificate. As part of that process, we communicated that we considered reclamation certificate version 3 filed with Mr. Zadko's letter to be the version that accurately reflected the AER's intentions when it decided to approve Whitecap's application.

The Dorins asked for time (three and a half days) to review the latest reclamation certificate before presenting their final argument. Whitecap and ERG agreed that it would be appropriate to give the Dorins time to review reclamation certificate version 3. Whitecap stated that an hour would be a fair and reasonable amount of time. ERG took no position on the amount of time the Dorins requested. We adjourned the hearing till the afternoon giving the Dorins over four hours to review the latest filing and make any adjustments to their final argument.

[236] The inaccuracies in the reclamation certificate and the amended reclamation certificate were not typographical errors. The reclamation certificate originally issued by the AER could not be relied on and did not reflect the decision that was made. The process followed for issuing the reclamation certificate failed to consider that the application filed through OneStop was amended or updated in the course of the review. Because the additional information could not be added to OneStop, the reclamation certificate issued through OneStop did not accurately reflect the decision made. Subsequent attempts to issue a reclamation certificate that accurately reflected the decision made were unsuccessful. The process for issuing the reclamation certificate was so flawed it was unfair.

Unfairness Remedied Through This Process

[237] We found that the application review process was procedurally fair. If we are wrong in that, we find any unfairness in the application review process was remedied through this regulatory appeal process. The Dorins filed extensive evidence and submissions during this appeal process. They filed several prehearing motions and had a full and fair opportunity to testify, cross-examine Whitecap and the ERG, and make a final argument. The regulatory appeal process provided ample opportunity for the Dorins to have their submissions fully considered by the panel, which we have done.

[238] The regulatory appeal process also uncovered problems with the reclamation certificate and revealed the extent of those problems. In the end, the AER was finally able to issue a certificate that accurately reflected what the AER certified as reclaimed. In terms of time and effort, it was an inefficient and costly way to remedy the problems with the reclamation certificate. Reclamation certificate version 3 filed by ERG on the final morning of the hearing accurately reflects what was certified as reclaimed, and there remains nothing to remedy. Considering our decisions on the first three issues, we have decided to confirm reclamation certificate version 3.

Conclusion

[239] After a full hearing with over a thousand pages of evidence, oral testimony, and final argument and based on the evidence on the record, including new evidence filed in this regulatory appeal, we decided the following:

- i) It was appropriate in the specific circumstances here to exercise the discretion to issue a reclamation certificate with fencing remaining on the site.
- ii) The evidence demonstrated an expectation on the part of the Dorins that the east-west access road would remain in place and not be reclaimed. The road is useful, stable, and nonerosive and does not pose a hazard or environmental risk. It did not have to be reclaimed or assessed.
- iii) The small area on the well site with SAR and EC exceedances did not need to be remediated because it is no worse than the elevated background levels of salts and because the exceedances were not caused

by oil and gas activity. The evidence shows the well site is supporting vegetation equivalent to off-site conditions, and there are no signs of vegetative stress.

iv) While the application review process was procedurally fair, problems extending over three years in getting a reclamation certificate that accurately reflected the AER's decision gave rise to unfairness. That unfairness was remedied through this hearing process and the AER's issuance of a reamended reclamation certificate on the final day of the hearing.

[240] Finally, the information on the record of this proceeding shows that the 2010 reclamation criteria for landscape, vegetation, and soils were satisfied. In particular, the results of the DSA and the full suite of phase 1 and 2 environmental site assessments filed with Whitecap's reclamation certificate establish that the well site meets the 2010 reclamation criteria for landscape, vegetation, and soils. Considering our decisions about fencing, the east-west access road, and soils, the well site has been returned to equivalent land capability.

[241] For the preceding reasons, we confirm the AER's decision to issue the reclamation certificate as it appears in appendix 4.

Dated in Calgary, Alberta, on June 6, 2022.

Alberta Energy Regulator

Cecilia A. Low, B.Sc., LL.B., LL.M.
Presiding Hearing Commissioner

Clare McKinnon, LL.B.
Hearing Commissioner

Elizabeth McNaughtan, MBA, P.Ag.
Hearing Commissioner

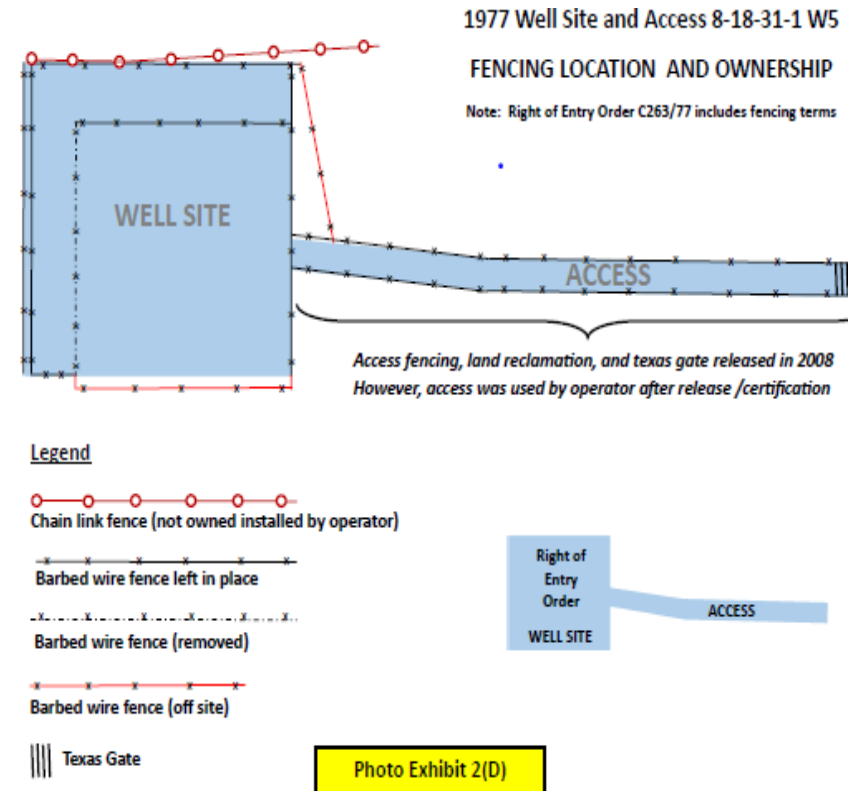
Appendix 1 Hearing Participants

Principals and Representatives	Witnesses
Herman, Shirley, and Mark Dorin (the Dorins) M. Dorin, Representative	M. Dorin
Whitecap Resources Inc. (Whitecap) D. Naffin T. Myers, Legal Counsel	K. O'Shea J. Carscallen T. Knafla S. Millard E. Toews
Alberta Energy Regulator, Enterprise and Reclamation Group (ERG) B. Kapel Holden, Legal Counsel S. Poitras, Legal Counsel	B. Dunkle H. Jones
Alberta Energy Regulator staff M. LaCasse, AER Counsel L. Mosher, AER Counsel D. Lockwood J. Mekar A. Lung P. Rodericks T. Turner	

Appendix 2 Fencing Sketches

Operator Whitecap Resources Ltd.		Unique ID / License No. 007-08-18-031-01-W5 - 0065133		Disposition #: N/A	
Provincial Zone and Designation Zone: White Zone Type: Private Land		Ecological Land Classification Natural Region: PK - Parkland Natural Region Natural Sub-region: PK - Central Parkland Ecosite: cultivated		Soil Classification Soil Order: Chernozemic Soil Great Group: Black Chernozem Soil Series: ANTILER	
<p>Legend</p> <p>Drainage: Access Road Boundary: Lense Boundary: Former Wellhead: Tree / Brush: Stop Out: Offsite Point: Onsite Point: C# S#</p> <p>Site Sketch: Wellsite Only: Describe other: Criteria: Cultivated</p>					
<p>Site Sketch: Wellsite Only: Describe other: Criteria: Cultivated</p> <p>Length: 106.0 m Width: 106.0 m Area: 1.1 ha Access: Length: m Width: m Area: ha</p> <p>Topography: Undulating Typical Slopes: 0.5-2%</p> <p>Land Use / Vegetation Onsite: Pasture / grass mix North: City lot East: Pasture / grass mix South: Pasture / grass mix West: Pasture / grass mix</p> <p>Comments: The MIDWAY GARR 8-18-31-1 wellsite is situated within a cultivated pasture used to graze cattle. The site has been reseeded to a pasture grass mix consisting of species requested by the landowner and is well established. A survey done by the town of Didsbury in 2014 discovered that the barbed wire fencing on south side was built 3.2 m south of the lease boundary. All the disturbed areas, including the strip outside the 5' lease boundary, have been reclaimed and the site meets all the requirements of the 2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands with respect to soils, landscape and vegetation.</p>					

Sketch from reclamation certificate application (same as figure 1)



Sketch submitted by the Dorins

Appendix 3 Summary of Environmental Site Assessments

Phase 1 and phase 2 environmental site assessments (ESAs)

The ESAs are found in Exhibit 4.04.

Date	Company	ESA type	Activity
May 2011	Abandonrite	Phase 1	Site assessment
August 2011	Abandonrite	Phase 2	Locate and characterize areas of potential environmental concern as identified in the phase 1 ESA
March 2015	Arletta Environmental Consulting	Phase 2 (supplemental)	Delineate vertical and horizontal impacts of salinity at the site
April 2016	Equilibrium Environmental Inc. (Equilibrium)	Phase 2	Assess a suspected salinity anomaly located north of the well site for detailed salinity and available nutrient characteristics and assess the manure used as fertilizer for detailed salinity characteristics
February 2018	Equilibrium	Phase 2	Assess salinity and nutrient characteristics in manure and off-site locations to assess potential salinity and impacts from third party source of manure
February 2018	Equilibrium	Tier 1 guidelines	Salinity and sodicity assessment of the well site to determine background conditions and choose appropriate background samples for generating site-specific tier 1 salinity and sodicity guidelines

Note: ESA = environmental site assessment

Appendix 4 Reclamation Certificate Version 3

Reclamation Certificate No. 382273

March 9, 2022

WHITECAP RESOURCES INC. (A5BE)3800, 525-8th Ave SW
Calgary, AB T2P 1G1Edmonton Office
4th Floor, Twin Atria Building
4999 – 98 Avenue
Edmonton, Alberta T6B 2X3
Canadawww.aer.ca**RE: AMENDMENT TO RECLAMATION CERTIFICATE 382273****MIDWAY GARR 8-18-31-1****SE ¼ Section 18 Township 31 Range 1 W5M****Licence No. 0065135**

This letter gives notice that Reclamation Certificate No. 382273 has been amended to provide clarification of the activity types covered under Reclamation Certificate 382273.

The reclamation certificate has been amended with the following details:

Activity Type	If Other (Describe)	Licence/ Segment #	LLD	Asset Name
Wellsite		0065135	SE (8)-18-31-1-W5M	MIDWAY GARR 8-18-31-1
Access Road			8-18-31-1-W5M	E-W Access Road
Other	Proposed access road - not built, not used		8-18-31-1-W5M	N-S Access Road
Other	3.2 x 96m strip outside wellsite south boundary		8-18-31-1-W5M	

Additionally, page 4 of 6 was removed (survey of the E-W access road with the road unhighlighted) from the reclamation certificate (see Exhibit 83.02 of Hearing Proceeding ID 411 Dorin Whitecap Regulatory Appeal), as it was superseded when the survey with the E-W access road highlighted was added. The reclamation certificate is now 5 pages.

Please see the attached amended reclamation certificate.

Should you have any questions or concerns please contact 1-855-297-8311 or recremquestions@aer.ca

Yours truly,

A handwritten signature in blue ink, appearing to read "Corey Zadko".

Corey Zadko, P.Ag.

Manager, Enterprise Reclamation

Enclosure(s):

cc: Herman and Shirley Dorin

Mark Dorin

Shalor Consulting Ltd.

inquiries 1-855-297-8311
24-hour
emergency 1-800-222-6514

July 18, 2019

Edmonton Office
4th Floor, Twin Atria Building
4999 – 98 Avenue
Edmonton, Alberta T6B 2X3
Canada

www.aer.ca

Herman Dorin
Box 835
Didsbury , Ab T0M 0W0

**RE: Whitecap Resources Inc.
MIDWAY GARR 8-18-31-1
SE 8-18-31-1-W5M**

Enclosed is a copy of the **Reclamation Certificate No. 382273** issued to Whitecap Resources Inc..

The Responsible Energy Development Act (REDA) permits the filing of a request for a regulatory appeal by an eligible person in regards to an appealable decision as defined in Section 36 of *REDA*.

If you are eligible to file a request for a regulatory appeal and you wish to do so, you must submit your request in the form and manner and within the timeframe required by the AER. Filing requirements are set out in Section 30 of the *Alberta Energy Regulator Rules of Practice* available on the AER website, www.aer.ca, under Rules & Directives > Acts, Regulations and Rules. Regulatory appeal requests should be e-mailed to RegulatoryAppeal@aer.ca.

Should you have any questions or concerns, please do not hesitate to contact me directly by phone at 1-855-297-8311 or by e-mail at RecRemQuestions@aer.ca.

Sincerely,



Reclamation/Remediation Technical Coordinator

RECLAMATION CERTIFICATE NO. 382273

This reclamation certificate is issued pursuant to section 138 of the Environmental Protection and Enhancement Act (the act), following a review of the information provided in the application. No reclamation inquiry has been held.

This certifies that the surface of the land held by Whitecap Resources Inc., in connection with or incidental to the activities:

Activity Type	If Other (Describe)	Licence/Segment #	LLD	Asset Name
Wellsite		0065135	SE 8-18-31-1-W5M	MIDWAY GARR 8-18-31-1
Access Road			8-18-31-1-W5M	E-W Access Road
Other	Proposed access road not built, not used		8-18-31-1-W5M	N-S Access Road
Other	3.2 x 96m strip outside wellsite south boundary		8-18-31-1-W5M	

as shown outlined in yellow on the attached plan(s), complies with the conservation and reclamation requirements of Part 6 of the act.

Issued on July 18, 2019



Brad Dunkle
Designated Inspector Under the Act

Operator/Agent:
Whitecap Resources Inc.
3800 - 525 8 Ave SW
Calgary
T2P 1G1

The AER may cancel this reclamation certificate pursuant to section 139 of the act where it is of the opinion that further work may be necessary to conserve and reclaim the above specified land to which this certificate relates.

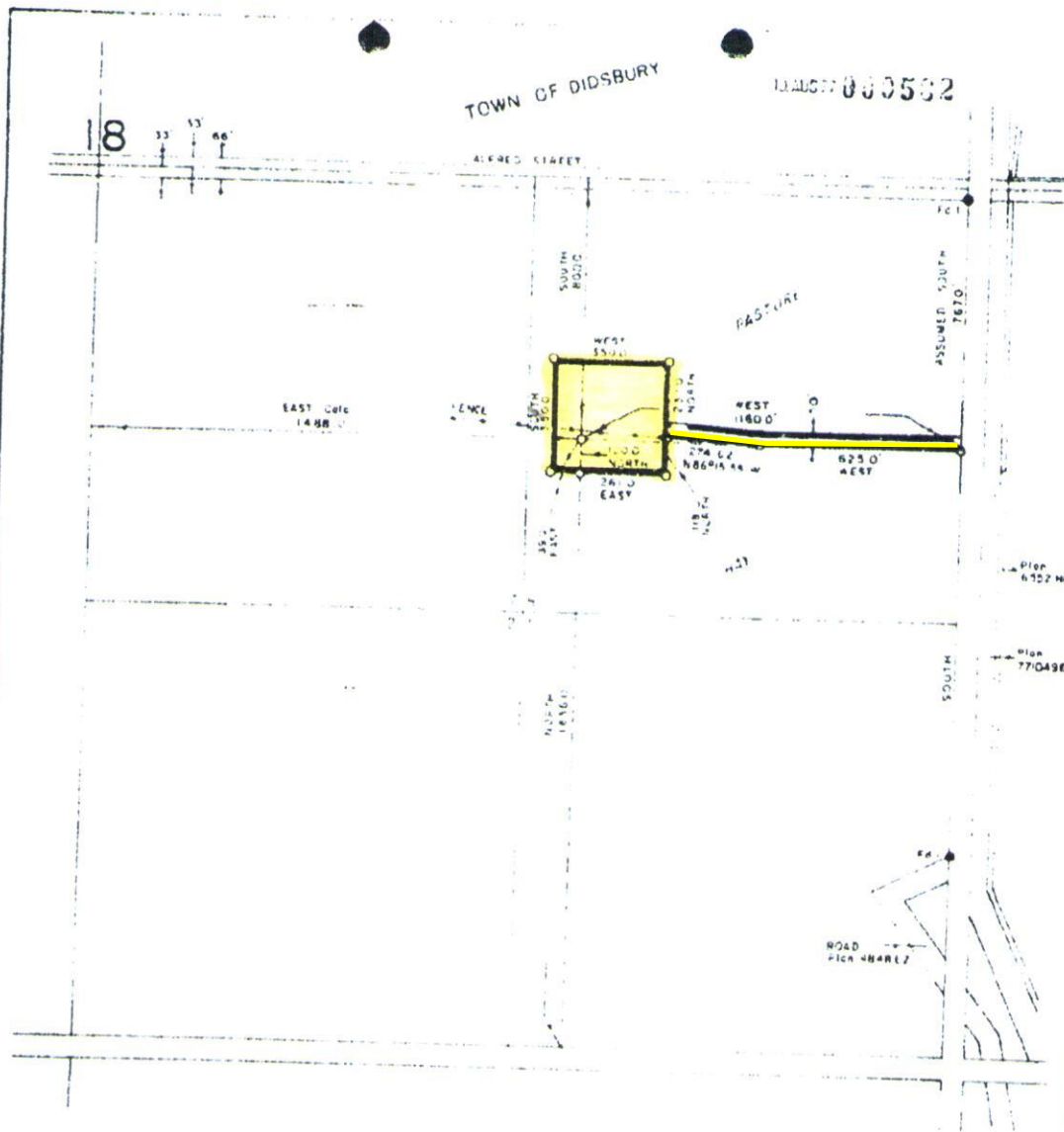
The Responsible Energy Development Act (REDA) permits the filing of a request for a regulatory appeal by an eligible person in regards to an appealable decision as defined in section 36 of REDA.

If you are eligible to file a request for a regulatory appeal and you wish to do so, you must submit your request in the form and manner and within the timeframe required by the AER. Filing requirements are set out in section 30 of the Alberta Energy Regulator Rules of Practice available on the AER website, www.aer.ca, under Rules & Directives > Acts, Regulations and Rules. Regulatory appeal requests should be e-mailed to RegulatoryAppeal@aer.ca.

Alberta Energy Regulator Suite 1000, 250 Street SW, Calgary, Alberta T2P 0R4

TOWN OF DIDSBURY

DEMO 000502



↑
REVISED

PLAN SHOWING LOCATION OF

DYCO OLDS 8-18-31-1

IN LSD. 8 SEC 18 TWP 31 RGE 1 W 5 M.




SCALE: 1" = 400'

I certify that the survey represented by this plan is correct and true to the best of my knowledge and was completed on the 3rd day of August, AD 1977.

W. J. J. J.
ALS

W. J. J. J.
WITNESS

LEGEND

Survey monument found shown thus 
12" Iron Spikes planted shown thus 
Portions referred to shown thus 
Distances are in feet and decimals thereof

CO-ORDINATES: 1836.0' N of S. Bdy and
1160.0' W of E. Bdy of Sec. 18-31-1-5

AREAS

Well Site	2.81 Acres
Access Road	1.03 Acres
Total	3.84 Acres

WELL SITE

CORNER ELEVATIONS

NE	3397.1'
SE	3400.0'
SW	3407.1'
NW	3403.1'

GROUND ELEVATION: 3402'

FOR DYCO PETROLEUM CORPORATION

W. J. J. J.



ALL CAN ENGINEERING & SURVEYS (1976) LTD
Job No. 77-577 [Checked *W. J. J. J.*] Date 3/13/77

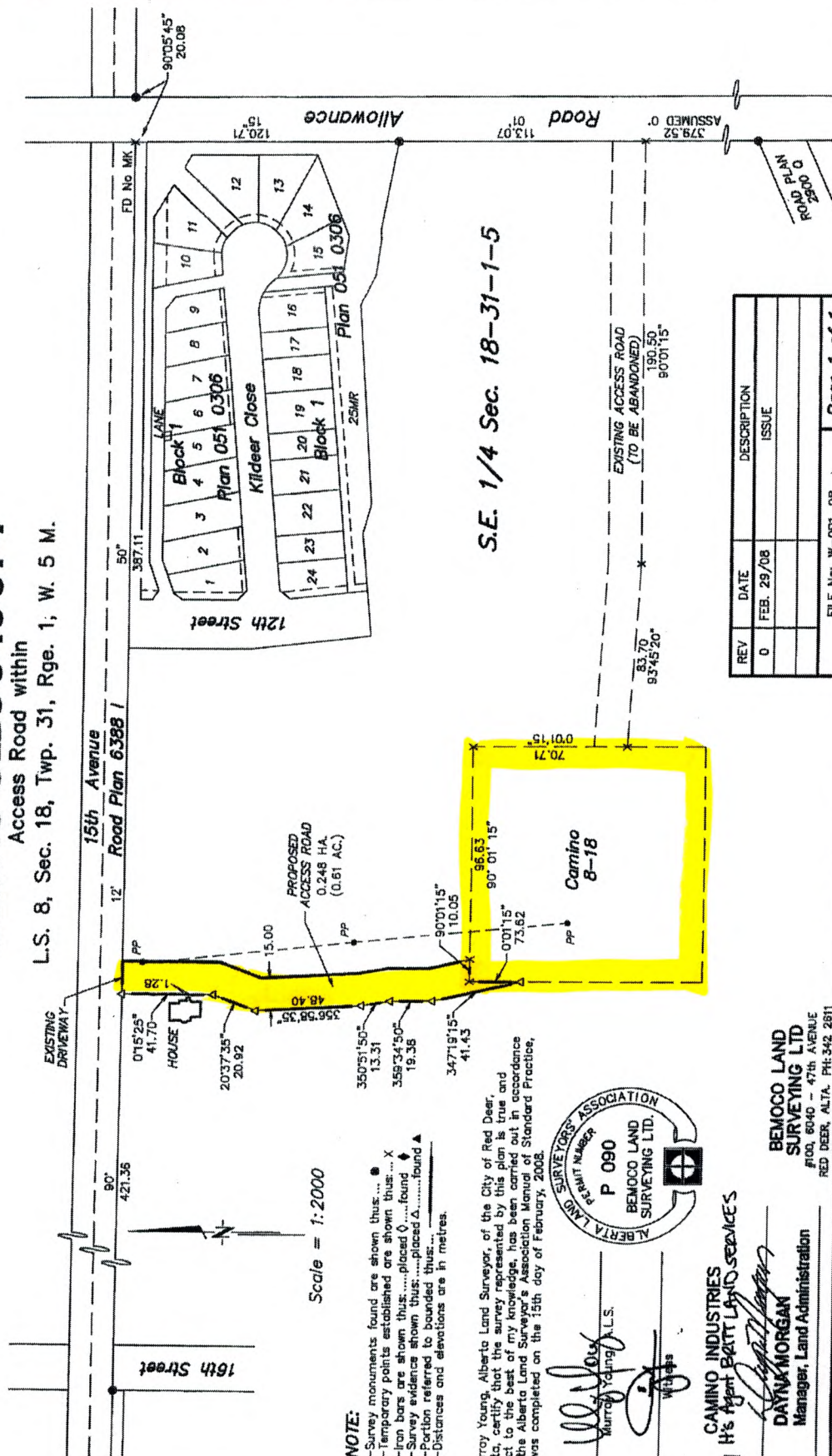
REVISION

1 Well Location

3/8/77

CAMINO OLDS 8-18-31-1

Access Road within
L.S. 8, Sec. 18, Twp. 31, Rge. 1; W. 5 M.



Scale = 1:2000

NOTE:

- Survey monuments found are shown thus: ●
- Temporary points established are shown thus: X
- Iron bars are shown thus: ○ placed ○ found
- Survey evidence shown thus: placed △ found ▲
- Portion referred to bounded thus: —
- Distances and elevations are in metres.

I, Murray Young, Alberta Land Surveyor, of the City of Red Deer, Alberta, certify that the survey represented by this plan is true and correct to the best of my knowledge, has been carried out in accordance with the Alberta Land Surveyor's Association Manual of Standard Practice, and was completed on the 15th day of February, 2008.



Murray Young
Murray Young L.S.
Witness

CAMINO INDUSTRIES
By It's Agent BERTY LAND SERVICES

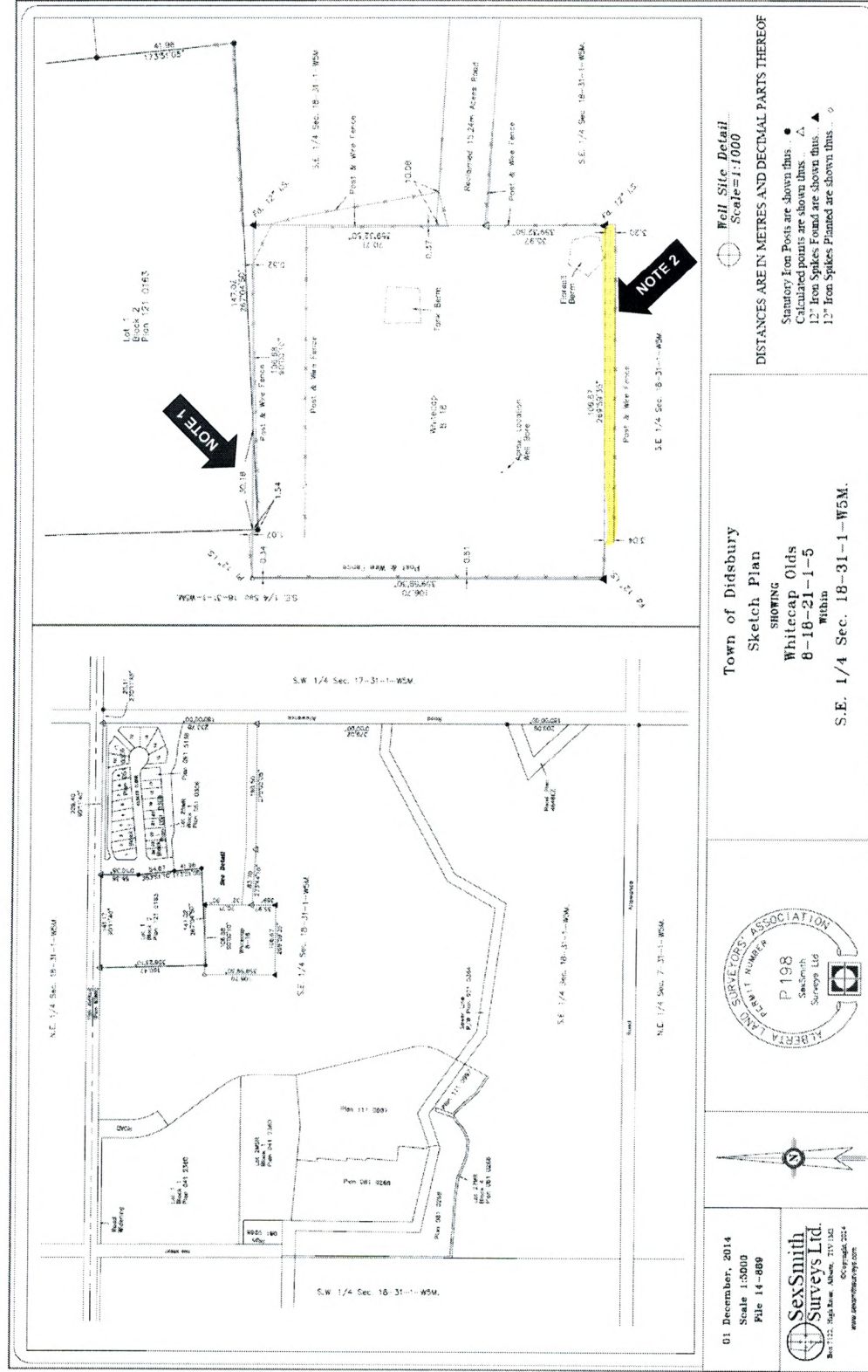
Dawn Morgan
DAWN MORGAN
Manager, Land Administration

BEMOCO LAND
SURVEYING LTD.
#101, 6040 - 47th Avenue
RED DEER, ALTA. PH: 342 2811

S.E. 1/4 Sec. 18-31-1-5

REV	DATE	DESCRIPTION
0	FEB. 29/08	ISSUE
FILE NO: W-001-08		
Page 1 of 1		

Attachment 3 (Letter to Equilibrium Environmental, dated June 16, 2015)
As-Built Plan of Survey Dated December 1, 2014, With Added Notes



NOTE 1:

The portion of Lot 1, Block 2, Subdivision Plan 121 0163, currently owned by Bethany, is shown at left by the red arrow marked NOTE 1 inserted by the writer.

Such small sliver of land shall likely become Lot 2, Block 2, and be transferred back to the Dorins.

Otherwise Bethany would have to be involved in any application for a reclamation certificate in respect of such area where Lot 1, Block 2, Plan 121 0163 overlaps the "well

NOTE 2:

An area south of the "well site" has been fenced by the Operator, and therefore:

1. Is presumably "specified land" as defined in Part 6 of the *Environmental Protection and Enhancement Act*;
2. Presumably requires a reclamation certificate.

This area is shown at left by the arrow marked NOTE 2, as to the grey-shaded area (shading and Note 2 inserted by the writer).

Town of Didsbury
Sketch Plan
SHOWING
Whitcap Olds
8-18-21-1-5
Within
S.E. 1/4 Sec. 18-31-1-W5M.



01 December, 2014
Scale 1:5000
Pile 14-689

**SexSmith
Surveys Ltd.**
SexSmith
Surveys Ltd.
1000-10th Ave. S.E.
Calgary, Alberta T2C 1P4
www.sexsmithsurveys.com

Well Site Detail
Scale=1:1000

DISTANCES ARE IN METRES AND DECIMAL PARTS THEREOF

- Standard Iron Posts are shown thus: ●
- Calculated points are shown thus: △
- 12" Iron Spikes are shown thus: ▲
- 12" Iron Spikes Planted are shown thus: ○