

ALBERTA  
ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

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Date of Hearing – February 19, 2008  
Date of Report and Recommendations – March 18, 2008

**IN THE MATTER OF** sections 91, 92, 94, and 95 of the  
*Environmental Protection and Enhancement Act*, R.S.A. 2000, c.  
E-12;

-and-

**IN THE MATTER OF** an appeal filed by Talisman Energy Inc.  
with respect to the cancellation of *Environmental Protection and  
Enhancement Act* Reclamation Certificate No. 226501-00-00  
issued to Talisman Energy Inc. by the Director, Northern Region,  
Environmental Management, Alberta Environment.

Cite as: *Talisman Energy Inc. v. Director, Northern Region, Environmental Management,  
Alberta Environment* (18 March 2008), Appeal No. 07-133-R (A.E.A.B.).

**HEARING BEFORE:**

Dr. Steve E. Hrudehy, Chair;  
Mr. Ron V. Peiluck, Vice-Chair; and  
Dr. Dan L. Johnson, Board Member.

**PARTIES:**

**Appellant:** Mr. Nevin Wolf, Talisman Energy Inc.

**Director:** Mr. Greg Smith, Director, Northern Region,  
Environmental Management, Alberta  
Environment, represented by Ms. Erika  
Gerlock, Alberta Justice.

**WITNESSES:**

**Appellants:** Mr. Nevin Wolf, Talisman Energy Inc.; and  
Mr. Jeff Biegel, Sharp Environmental (2000)  
Ltd.

**Director:** Mr. Greg Smith, Director, Northern Region,  
Environmental Management, Alberta  
Environment; and Ms. Carrie Robertson,  
Reclamation Inspector, Alberta Environment.

**BOARD STAFF:**

Mr. Gilbert Van Nes, General Counsel and  
Settlement Officer; Ms. Valerie Myrmo,  
Registrar of Appeals; and Ms. Marian Fluker,  
Associate Counsel.

## EXECUTIVE SUMMARY

As a result of an audit by Alberta Environment, Reclamation Certificate 226501-00-00 issued to Talisman Energy Inc. was cancelled. The surface audit was conducted at a wellsite located at 8-15-82-6-W6M and revealed the conservation and reclamation requirements had not been met. Specifically, the vegetation did not meet the 80 percent density requirement and the average replaced depth of topsoil on site did not meet reclamation criteria. The Board received a Notice of Appeal from Talisman Energy Inc.

The Board held a hearing on February 19, 2008 and after hearing arguments from the parties, the Board recommended the decision to cancel the Reclamation Certificate be confirmed.

As general recommendations, the Board recommended:

1. a policy be developed to clarify the audit program, the manner in which audits are conducted, and to have it readily available to landowners, oil companies, and industry consultants to allow everyone involved in reclamation to understand what to expect in an audit;
2. the reclamation certificate application should require that if the applicant believes there are factors that would account for variance that might prevent the site from achieving the reclamation criteria, these factors should be clearly indicated on the application;
3. when a reclamation certificate is cancelled following an audit, the letter notifying the certificate holder should include a rationale and explanation for the site failure;
4. any deletions made to the copies of the Director's record for the purposes of an appeal should be marked and explained to make it clear the record provided is complete; and
5. original field data and notes should be included in the Director's record as they are the only original evidence upon which all subsequent proceedings rely.

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## **I. BACKGROUND**

[1] On October 2, 2007, the Director, Northern Region, Environmental Management, Alberta Environment (the “Director”), cancelled Reclamation Certificate No. 226501-00-00 (the “Certificate”) that was issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), to Talisman Energy Inc. in relation to the Inverness George 8-15-82-6-W6M well (the “Site”) in the Municipal District of Fairview No. 136.

[2] On October 31, 2007, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Talisman Energy Inc., (the “Appellant”) appealing the cancellation of the Certificate. The cancellation was the result of the Site failing a surface audit.

[3] On November 1, 2007, the Board wrote to the Appellant and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to this appeal and that the Parties provide the Board with their available dates for a mediation meeting, preliminary meeting, or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board (now the Energy Resources Conservation Board and Alberta Utilities Commission) asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] On November 28, 2007, the Board received a letter from the Appellant advising that Mr. William and Ms. Kathryn Stelmaschuk (the “Landowners”) are the landowners and proposing additional information be gathered prior to a mediation meeting or alternatively an on-site assessment be held. The Board acknowledged receipt of the letter on November 29, 2007, and requested the Director provide comments to the Appellant’s letter by December 10, 2007.

[6] On November 29, 2007, the Board wrote to the Landowners notifying them of the appeal and requesting they advise the Board by December 10, 2007, if they wished to participate in the appeal.

[7] On December 6, 2007, the Board received a copy of the Record and on December 10, 2007, forwarded a copy to the Appellant and Landowners.

[8] On December 13, 2007, the Board received a letter from the Director rejecting the Appellant's suggestions for a resolution in his November 27, 2007 letter, and requesting the Board set the matter down for a Hearing.

[9] On December 27, 2007, the Board acknowledged receipt of the Director's letter of December 13, 2007. The Parties were requested to hold the date of February 19, 2008, for the Hearing. The Board also noted the location of the Hearing would be determined based on whether the Landowners wished to be involved in the appeal. The Board requested a response from the Landowners by January 7, 2008.

[10] On January 9, 2008, the Board acknowledged receipt of a telephone call from the Landowners advising they would not be attending the Hearing. The Board confirmed the Hearing date of February 19, 2008, in the Board's office in Edmonton. The letter also indicated that the Board was combining the hearing of Appeal Nos. 07-133 and 07-134; however, on January 24, 2008, the Appellant withdrew Appeal No. 07-134.<sup>1</sup> The Board placed a Notice of Hearing advertisement advising that any other persons who wished to make a representation were to make application to the Board by January 29, 2008. This date was then extended to February 6, 2008. The Board did not receive any applications to intervene.

[11] The submissions for the Hearing were received February 6, 2008.

[12] The Hearing of Appeal No. 07-133 was held in Edmonton on February 19, 2008.

## **II. SUBMISSIONS**

### **A. Appellant**

[13] The Appellant argued the Director should have determined that the differences in vegetation assessments between the Appellant's assessment and the Director's surface audit were

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<sup>1</sup> See: *Talisman Energy Inc. v. Director, Northern Region, Environmental Management, Alberta Environment* (31 January 2008), Appeal No. 07-134-DOP (A.E.A.B.).

attributable to natural variability versus being the result of inadequate soil quantity negatively impacting plant health and vigour and affecting percent density.

[14] The Appellant argued the Director did not use an adequate and appropriate number of control sites and, therefore, did not adequately represent offsite vegetation conditions. The Appellant stated the control sites demonstrated the range of variability seen in the control vegetation. The Appellant submitted it is hard to justify vegetation failure based on a single point in time and a few inspection points.

[15] The Appellant explained it completed vegetation assessments on August 13, 2003, August 9, 2004, and July 28, 2005, and found the vegetation height, health, and density onsite was equivalent to the offsite control. The Appellant argued the plant count determined by the four control points at the Director's audit may not adequately represent plant growth across the area given the topography. The Appellant noted two audit assessment points used by the Director were located close to a drainage area of the Site that was prone to wetness during spring runoff events.

[16] The Appellant argued the number of topsoil samples taken by the Director was not sufficient to prove or disprove compliance with the criteria described in the Reclamation Criteria for Wellsites and Associated Facilities 1995 Update (the "Reclamation Criteria").

[17] The Appellant argued the soil data it collected were accurate to that of the Director's audit findings. The Appellant stated that if its data were accurate compared to the Director's findings, the Site passes criteria based on the full 25-grid assessment it completed. The Appellant explained the Director assessed only five control grid points onsite and based on those five grids, the Director failed the Site.

[18] The Appellant stated the soil replacement depth on the access road met the soil quantity criteria in August 2004 and July 2005.

[19] Talisman requested the Certificate be reinstated.

**B. Director**

[20] The Director explained the Appellant submitted its application for the Certificate in December 2005, and the inspector reviewed the application in March 2006. In completing the

Reclamation and Remediation Audit Program – Administrative and Technical Review Checklist, the inspector noted the Landowners’ concerns and that an unknown material was hauled onto the lease and incorporated into the soil in August 2002. The Director stated the inspector asked the Appellant for further information regarding the unknown material and the Landowners’ concerns. The Director explained the Certificate was issued on August 22, 2006, based on the inspector’s paper review. The Director explained the Certificate states:

“The Director may cancel this reclamation certificate where he/she is of the opinion that further work may be necessary to conserve and reclaim the above specified land to which this certificate relates.”

[21] The Director explained that for all sites that receive reclamation certificates, random audits will be conducted at approximately 15 percent of the sites to ensure all standards and guidelines have been met, and if the site does not meet the Reclamation Criteria, the reclamation certificate can be cancelled. The Director stated industry has a 25-year liability period for reclamation.

[22] The Director stated the Site was randomly selected for a surface reclamation audit, which was conducted on July 19, 2007. The Director explained the inspector recommended canceling the Certificate because the Site had insufficient soil quantity (the average replaced depth of 16 cm of topsoil across all grids did not meet the required replacement depth of an average of 18 cm of topsoil), and two grids within the Site failed to meet the required vegetation density. The Director explained the Reclamation Criteria allow for a variation of 20 percent in assessing land capability so it only has to meet 80 percent of the average topsoil depth of the control areas. The Director cancelled the Certificate for failing to meet Reclamation Criteria as assessed at the Site audit.

[23] The Director argued he properly exercised his discretion under section 139(1)(c) of EPEA<sup>2</sup> to cancel the Certificate based on the Site audit as the consequence of a site failure under the reclamation program.

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<sup>2</sup> Section 139(1)(c) of EPEA provides:

“The Director or an Inspector may cancel a reclamation certificate where no reclamation inquiry was conducted prior to the issuance of the certificate and the Director or the Inspector is of the opinion that further work may be necessary to conserve and reclaim the specified land to which the certificate relates.”

[24] The Director explained the Reclamation Criteria are objective criteria and provide tolerances of 20 percent for various parameters for assessing equivalent land capability so that acceptable standards for soil quantity and distribution required 80 percent compared to that of the control areas. Vegetation density must also be 80 percent or greater of control areas to be acceptable. The Director explained the reclamation criteria assist the Director in assessing equivalent land capability, but the discretionary decision is based upon consideration of all factors.

[25] The Director explained he considered all of the circumstances surrounding the failure of the Site, including the tolerances of the reclamation criteria and the nature and extent of the lease failures, specifically vegetation failed to meet density requirements in two grid locations and the average soil depth across the Site was less than the required replacement depth by two cm and, therefore, did not meet reclamation criteria.

[26] The Director argued his decision to cancel the Certificate was reasonable and within his statutory authority. He stated he expects every certified site to meet criteria upon inspection by Alberta Environment, and if it does not, usually additional reclamation work is required.

[27] The Director argued his decision to cancel the Certificate was made "...upon consideration of all the factors of the Site Audit, the tolerances provided within the *Reclamation Criteria*, and the stated outcomes of the Reclamation Program for the failure of a site to meet a site audit."<sup>3</sup>

[28] The Director requested the Board confirm the decision to cancel the Certificate and dismiss the appeal.

### **III. DISCUSSION**

[29] The Appellant appealed the cancellation of a reclamation certificate that was issued to it in 2006. Under the current reclamation certificate process, reclamation certificates are issued based on the applications completed and submitted by the company, or its designate,

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<sup>3</sup> Director's submission, dated February 6, 2008, at paragraph 28.

holding the lease for the site. If all of the information is provided as required and the data meets the Reclamation Criteria, the certificate is issued. To ensure companies complete the application accurately and to provide assurance to the public that sites are being reclaimed properly, random audits are conducted on leases that receive a reclamation certificate. Each year, 15 percent of the applications are randomly selected for audits, 10 percent will have reclamation audits completed on the site and the inspector will conduct more in-depth contamination audits on five percent of the sites. Audits involve inspectors going onto the site and conducting an assessment of the reclamation work to determine if the site meets reclamation criteria.

[30] Based on the Reclamation Criteria, a site that was constructed after April 30, 1994, which includes this Site, requires the replacement depth of the replaced surface soil to be 80 percent of the control. The Reclamation Criteria explains the average replaced surface soil depth is the mean of all the assessment locations, and the average must be equal to or greater than the required replacement depth. This document has not been updated since the commencement of the audit program and it does not contemplate requirements for performing an audit assessment.

[31] The Director explained the Site failed two parameters, the average topsoil replacement depth and vegetation density. The 80 percent criteria requirement recognizes that it is unlikely to have topsoil replaced to the exact same depth across the lease. Because the required replacement depth is an average, the inspector also looks at the variability of the replaced soil depth. The criteria require a minimum replacement depth of 80 percent of the required replacement depth, but variations may be acceptable if soil texture is also assessed. No case was made at the Hearing for variation based on soil texture. In order to meet the Reclamation Criteria, vegetation on the lease site must have a density and height greater than or equal to 80 percent of the control.

[32] One of the major issues raised by the Appellant was the number of control points used by the Director in the audit. The Director selected four off lease points as controls and compared it to five points taken on lease. The Appellant essentially argued that because it took more samples, 25 on lease and eight off lease as required by the Reclamation Criteria, its data are more reliable. The Appellant acknowledged these data were collected at a different point in time than the audit.

[33] The Director stated he is not doing a complete site assessment; the applicant for the reclamation certificate should have completed a complete assessment. What the Director is looking for in an audit is whether the information found in the audit supports the issuance of a reclamation certificate. In this case, based on the audit data, topsoil replacement did not meet criteria and vegetation did not meet density criteria on 40 percent of the points measured.

[34] At the Hearing the Appellant explained it had returned to the lease site and had conducted additional topsoil and vegetation assessments. Part of the argument presented by the Appellant was that more data is better because it provides an enhanced understanding of the site. The Board agrees, so it is not clear why the Appellant did not provide its data from October 2007 in its submission and evidence. The additional data only became known to the Board during cross examination of the Appellant by the Director.

[35] The inspector explained she conducted the audit to replicate the general sampling plan of the assessment completed by the Appellant, except at a reduced scale of sampling. The inspector who completed the audit explained she did not have the averages submitted by the Appellant in its application with her at the time of the audit. The Board sees this as a benefit to ensure the data collected is not biased to support or disprove the information on the application.

[36] The Appellant argued the audit provides a snapshot of the vegetation at the time the audit is completed. It is also a snapshot in time when the assessment is completed by the applicant because the vegetation is assessed and the data provided is based on what is seen on the day of the assessment. Although the Appellant may have been on the site previously, the data included in the application does not include averages or data collected over a number of consecutive years. An audit is not completed the same day as the assessment by the applicant and usually not in the same year. This is why the data gathered off lease must be compared to the data collected on lease at the time of the audit and not compared to the data in the application. Regardless of the arguments about sample numbers, at the time of the audit, the Site failed to meet The Reclamation Criteria for plant density on 40 percent of the sample points. Therefore, the Director was justified in canceling the Certificate.

[37] The Board accepts the Director's position that an allowance for sample variance is built into the Reclamation Criteria by allowing a site to reach as low as 80 percent of the control

sites. If no leeway was built into the Reclamation Criteria, the Director would expect 100 percent of control values. Because there is tolerance incorporated into the Reclamation Criteria, the Director did not consider it correct to further increase the tolerance by allowing any lower average. The Board agrees the Reclamation Criteria must be followed unless specific reasons are provided to explain why they should not be strictly followed; if the Director allowed a site to pass with 78 percent of the topsoil depth of the control, then why not 76 or 70 percent, starting on the "slippery slope." This concern applies to both topsoil depth and to vegetation density.

[38] The Board is concerned with the apparent lack of policy that exists for conducting surface audits and potentially contamination audits. The Director was unable to explain to the Board why four control sites were chosen instead of some other number of control sites. The Director stated that when inquiries were done, four control sites were chosen. He stated the audit process is the same as the inquiry process, but the Board cannot agree. Part of the inquiry process involved landowners and company consultants and they assessed the site together with the inspector at the time of the inquiry. If issues arose during the inquiry, all of the participants could discuss the issue and come to a resolution or, at least an understanding, of what was required to meet the Reclamation Criteria. The inquiry also allowed the applicant to explain variances in data. At an audit, only the inspector is assessing the site. Because consultants and landowners are not involved in the audit, they must have a clear understanding of how an audit is conducted. This will provide assurances to companies and landowners that the audit is conducted fairly and comprehensively. The number of control sites used in an audit should not be arbitrarily chosen; there must be some rationale behind what is being done. The Board appreciates the audit process had to start somewhere, but the Board recommends a policy concerning how audits are to be conducted be developed for the benefit of companies, consultants, landowners, and the inspectors who must perform the audits.

[39] The Director explained that if there is some issue that might explain why the site might not meet criteria or that might account for variances, it should be noted on the application. The Board agrees with the Director on this point. If this type of commentary is required, the application should clearly state this.

[40] The intent of the audit program is to ensure the environment and the public are being protected. This requires criteria that are obtainable, allows for minimal tolerances,

justifiable, and adhered to. With this, there must be a balance such that all who are involved in the process can know what to expect in an audit.

[41] The Board notes Alberta Environment's compliance inspection program rewards companies with good environmental performance by decreasing the frequency of inspections. If the audit program has a similar system in that companies that routinely fail audits will be audited more frequently, the Board does not consider that this case warrants the Appellant falling into the category of having a poor environmental performance. It did not blatantly disregard the Reclamation Criteria. This is not a case that warrants penalizing the Appellant beyond having to resubmit an application for a reclamation certificate after the Director's requirements for this site have been satisfied.

[42] The aim of reclamation is to obtain equivalent land capability, and to achieve that, the parameters measured must be as near to pre-disturbance as possible. The intent of having 80 percent of control measurements on lease was not to allow the company completing reclamation to do less than the best job possible. The tolerance was incorporated into the Reclamation Criteria as recognition of the fact that soil will admix during stripping and replacing, creating variability in the soil that could affect plant growth. Companies reclaiming sites should not see 80 percent as the goal; they clearly should be striving for 100 percent or better. If companies only strive to reach 80 percent, it is inevitable that when an audit is conducted, some of the sites will not pass. Companies that appear to be striving for only 80 percent as a goal should be considered for audits on a more frequent basis as they are not meeting the intent of the legislation or the Reclamation Criteria.

[43] The Board recommends the Director's decision be confirmed and the Certificate cancelled.

## **IV. RECOMMENDATIONS**

### **A. General Recommendations**

[44] The Board recommends Alberta Environment develop a policy on how an audit is conducted with rationale provided to explain why certain procedures are done in a specific

manner and to provide a clearer statistical foundation for the sampling protocol. The policy should clearly indicate the consequences of failing or passing an audit.

[45] The Board recommends that it be clearly stated on the reclamation certificate application that, should the applicant believe there are factors that would account for variances that might prevent the site achieving Reclamation Criteria, it must be indicated on the application.

[46] The Board recommends the Director consider that his letters notifying a certificate holder of cancellation of a reclamation certificate should include a rationale and explanation for the site failure. The Director stated at the Hearing the audit report was available if the Appellant had asked for it. The Board believes that an important regulatory decision by the Director such as cancellation of a reclamation certificate should provide reasons to assure an open and transparent process.

[47] At the Hearing, the Board noted the Record provided by the Director had certain sections deleted. When asked about the gaps, the Director explained that the information deleted related to other files unrelated to the file being appealed, except for one section of a document related to this appeal that had been inadvertently deleted by clerical staff. To ensure the Record is complete and that it is clear to the reader that information has been deleted on grounds such as being irrelevant or subject to privilege, any deletions should be clearly indicated on the page or pages.

[48] As there is some prospect that the decisions made based on an audit may result in an appearance before a tribunal or court, field data taken by the Director or inspector should be included as part of the record. The field data and notes are the only original evidence upon which all subsequent proceedings must rely.

**B. Specific Recommendation**

[49] The Board recommends the Director's decision to cancel Reclamation Certificate 226501-00-00 be confirmed.

**V. OTHER MATTERS**

[50] With respect to sections 100(2) and 103 of the *Environmental Protection and Enhancement Act*, the Board recommends copies of this Report and Recommendations, and any decision by the Minister, be sent to the following:

1. Mr. Nevin Wolf, Talisman Energy Inc. and Mr. Jeff Biegel, Sharp Environmental (2000) Ltd.;
2. Ms. Erika Gerlock, Alberta Justice, representing the Director, Northern Region, Environmental Management, Alberta Environment; and
3. Mr. William and Ms. Kathryn Stelmaschuk.

**VI. COSTS**

[51] At the Hearing, both Parties confirmed they would not be seeking costs.

Dated on March 18, 2008, at Edmonton, Alberta.

*“original signed by”*

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Dr. Steve E. Hrudehy, FRSC, PEng  
Chair

*“original signed by”*

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Mr. Ron V. Peiluck  
Vice-Chair

*“original signed by”*

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Dr. Dan L. Johnson  
Board Member



ALBERTA  
ENVIRONMENT

*Office of the Minister  
MLA, Medicine Hat*

## Ministerial Order 1/2008

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

### Order Respecting Environmental Appeals Board Appeal No. 07-133

I, Rob Renner, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 07-133.

Dated at the City of Edmonton, in the Province of Alberta, this 1 day of April, 2008.

Rob Renner  
Minister

## Appendix

### Order Respecting Environmental Appeals Board Appeal No. 07-133

With respect to the decision of the Director, Northern Region, Environmental Management, Alberta Environment (the "Director"), to cancel Reclamation Certificate No. 226501-00-00 (the "Reclamation Certificate") issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to Talisman Energy Inc., I, Rob Renner, Minister of Environment, order:

1. THAT the decision of the Director to cancel the Reclamation Certificate is confirmed.