ENVIRONMENTAL LAW CENTRE

COMMENTS ON WELLSITE RECLAMATION CRITERIA AND PROPOSED AUDIT PROGRAM

The Environmental Law Centre appreciates the opportunity to be involved in this public consultation. Our comments below generally follow the structure of the Guide distributed with the package of public consultation materials.

Wellsite Reclamation Criteria

With respect to paragraph 5 on vegetation criteria, we acknowledge that the current Wellsite Reclamation Criteria encourage the use of native species for revegetation of sites on public land under the grassland and forested land (Green Area) categories. However, we would like to see a stronger requirement in relation to the use of native species on public land, and also a statement encouraging their use on private lands where the landowner is in agreement. Consideration could be given to requiring operators on private land to discuss the use of native species for revegetation with the landowner, and to document this on the application.

As well, we feel that the vegetation criteria should also address revegetation methods, including the use of herbicides and pesticides on the site. This will be particularly relevant to landowners who carry out organic agricultural operations, in order to ensure the integrity of those operations.

We support the proposed inclusion in the Criteria of requirements to conduct a contamination and remediation assessment (paragraph 6). We suggest that the assessment requirements be tied to those currently used by the Contaminated Sites and Decommissioning Branch, Alberta Environmental Protection, in order to ensure a consistent approach to site contamination within the Department and the province as a whole. As well, we suggest that the Department take steps to ensure that both reclamation and remediation are carried out in a manner that recognizes the particular sensitivity of surrounding property and the landowner's uses of the property. Where contamination is identified on a site, will the operator be required to obtain a remediation certificate prior to applying for a reclamation certificate? We suggest that this would be a prudent requirement to include in the Criteria.

With respect to paragraph 8 proposing the inclusion of landowner comments and concerns on the application, we note in our review of the current application form that this is already provided for (see Wellsite Reclamation Certificate Application – 1995 Update, Part IV, point 1). As such, how does the proposal differ from this existing requirement? Is this intended to provide for landowner participation under the proposed audit program that would otherwise be lost by the elimination of reclamation inquiries prior to certification? Further details on how this is distinguished from existing requirements would be useful.

Proposed Audit Program

In the covering letter received with the materials package, we note mention of the pilot project on an audit process carried out for wellsites in the Green Area. Are the results of this pilot project publicly available? We believe that the results of this pilot are particularly relevant and of import for stakeholder review in consideration of the proposals put forward for an audit program. If the results are publicly available, we suggest that they be circulated to all stakeholders for review, in order to determine whether further comments on the proposed audit program are merited.

We find that there are significant difficulties with the proposed audit program. In particular, we are concerned by the lack of a defined process for carrying out the audits, particularly in comparison to the existing procedural requirements related to reclamation inquiries under the Conservation and Reclamation Regulation. We believe that a clear and definite audit process should be developed, publicly reviewed and then included as part of either the Environmental Protection or Enhancement Act or the Conservation and Reclamation Regulation.

We note that the proposal does not address the potential effects on lease agreements and access issues. In particular, we question how access will be dealt with in instances where an operator fails an audit. It is possible that the operator may be at a distinct disadvantage in this situation in seeking to re-establish an access agreement without being held to ransom. As well, what effects, if any, will a failed audit have on the matter of compensation payments to landowners? Will these be made retroactive to cover the operator's non-compliance, or will this be a matter of negotiation if the operator is required to negotiate a new access agreement?

In paragraph 9.2 (Field Review), we are concerned that a particular percentage is not specified for review of certified sites. We feel that a specific percentage figure, for example, at least 50 percent of sites certified, should be set for review. Given that the audit program would be moving government review of these sites from 100 percent under the current certification system to something significantly less under the proposal, we believe that review of 50 percent of the sites certified in the previous year is not unreasonable. The Department may wish to consider developing a staggered system, similar to sampling requirements in some approvals, in which 50 percent of sites are initially reviewed. If the audit results are acceptable, then a lesser percentage of sites could be reviewed the next year (for example, 35-40 percent), and a lesser percentage in following years provided that audit results continue to be acceptable. Failure of an audit would move the operator back to the level of the highest percentage of sites audited. This would operate as an incentive to operators to ensure that all sites are satisfactorily reclaimed, and would also operate to ease the Department's administrative burdens.

We also have concerns about accessibility of the audit process, in relation to participation by the operator and the landowner, and also in relation to public access to audit results. The current certification system allows for operator and landowner involvement in the reclamation inquiry. It is unclear whether the same opportunity will be afforded to these

parties in relation to audits of certificates. We believe that this should be the case, given the apparent elimination of reclamation inquiries under this proposed program. To do otherwise would prevent the landowner from having an opportunity to express concerns to the Department at the reclaimed site itself. We also feel that the results of audits should be publicly available.

There are a number of questions that have arisen in our review of paragraph 10.1 on penalties. We have concerns about the legality of the proposal for assessment of a penalty where a site fails the field review. If the penalty is intended to be an administrative penalty, it will be necessary to create an offence under either the Act or the Conservation and Reclamation Regulation for failure to pass a field review/audit, as an offence must exist in order for an administrative penalty to be imposed. If some other type of penalty or punishment is intended, this should be clearly indicated.

As well, we feel that a penalty and cancellation of the reclamation certificate is not a sufficient deterrent to poor operators. Given that the reclamation process may stretch over a period of years, we believe that there will be a high risk of default unless some ties are created to the operator after the reclamation certificate is issued. Possibilities include holding security after the issuance of the reclamation certificate until the audit process is successfully completed, with conditions attached that the security is forfeited if the site fails the audit, or making a link to the operator's ongoing activities, such as refusing to issue well licences while the operator remains in default. We acknowledge that this last suggestion would involve the Energy and Utilities Board, but we feel it is appropriate that the Board have some involvement or role in assisting in the successful reclamation of wellsites. If security will be used to guard against default, we suggest that the Director assess risk factors consistent with the recommendations of the Financial Security Task Force when determining the amount of security required, and that such assessments be done in a public way. The proposed audit program appears to make the initial assumption that all parties will be good operators, which is somewhat contrary to the purpose of requiring security.

With respect to appeals (paragraph 11), we question whether an appeal by the operator is necessary where an application is returned due to technical errors. This seems similar to situations where a Director seeks further information on an application for an approval, and is more of an administrative matter not meriting a right to appeal. However, if the return of the application is treated the same as a refusal to issue an approval, then the right of appeal is reasonable. This should be clarified.

We see a great deal of uncertainty in relation to the appeal by the landowner. How long does the Department propose to extend the appeal period where there is no reclamation inquiry? This proposal will generate a great deal of uncertainty without further refinement. It will be necessary to deal with the effect, if any, of an audit on the appeal period. If a successful audit is completed during the appeal period, will that terminate the appeal period or otherwise affect the landowner's right to appeal? We feel that extension of the appeal period may also create uncertainty for operators who have completed reclamation due to the lengthy time period.

We have grave concerns regarding the informal appeal process discussed in paragraph 11.3. It appears to us that this process is structured to deal with the operator and the landowner on a negotiated basis, and it is unclear what role or interest Alberta Environmental Protection will hold in the informal process. A number of procedural questions arise as well, regarding costs, appointment of the panel, technical expertise of the panel, establishment of review criteria for the panel, and the treatment of such proceedings in subsequent appeals to the Environmental Appeal Board. We are also concerned that this informal appeal process may prejudice parties with respect to exercise of their right to appeal to the Environmental Appeal Board, particularly given the relatively short appeal period of 30 days for operators. Also, we question whether there would be a means of ensuring that the informal panel's opinions are consistent with reclamation standards.

In summary, although there may be merits to a program for the audit of reclamation certificates, we feel that this proposal lacks sufficient detail to allow us to support it. We would like to see a more detailed proposal that sets out the entire audit process, and deals with procedural questions as raised in our comments. We also feel that it is necessary to review the results of the pilot project on the audit program in the Green Area, as that may answer a number of our questions.

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