

Vantage Point Resources Inc.
Regulatory Appeal of a Reclamation
Certificate

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Alberta Energy Regulator

Decision 2021 ABAER 004: Vantage Point Resources Inc., Regulatory Appeal of a Reclamation Certificate

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2021 ABAER 004

Vantage Point Resources Inc. Regulatory Appeal of a Reclamation Certificate

Decision

[1] Having carefully considered all of the evidence, the Alberta Energy Regulator (AER) revokes the decision of the AER Enterprise Reclamation Group (ERG; known at the time as the Reclamation Programs Group) to issue reclamation certificate 397929 to Vantage Point Resources Inc. (Vantage). The revocation is effective September 09, 2019, the date of the decision to issue the reclamation certificate.

Introduction

Application and Request for Regulatory Appeal

[2] On October 2, 2018, Vantage, as lessee and operator, applied for a reclamation certificate for a well site and access road in Legal Subdivision 7, Section 23, Township 27, Range 2, West of the 4th Meridian (the site), about 30 kilometres (km) east from Oyen and about 140 km north from Medicine Hat.

[3] On October 31, 2018, the owner of the site, R.A. Shields, filed a statement of concern (SOC) in respect of Vantage's application.

[4] On June 25, 2019, in response to the SOC, ERG reclamation assessor, T. Kupchenko, along with Mr. Shields, D. Shields, and J. Kanderka and M. Wilkes from Vantage, visited the site. At this time, Ms. Kupchenko (the ERG assessor) completed an assessment of the site, which she recorded in a reclamation certificate program criteria report.

[5] Based on the results of the detailed site assessment (DSA) submitted by Vantage in August 2018, and her own assessment, the ERG assessor recommended the AER issue the reclamation certificate. The AER decision maker, by way of reasons dated September 5, 2019, disposed of Mr. Shields's SOC without a hearing. The AER issued reclamation certificate 397929 on September 9, 2019. The portion of the AER decision maker's reasons for issuing the reclamation certificate that are relevant to this decision include the following:

- Post remediation [part of the site was previously contaminated], the licensee tried to source Altai wild ryegrass in 2013 and could only find seed in Serbia [Siberia]. As such, the site was seeded in 2013 to a mixture of crested wheatgrass, smooth brome and alfalfa, which is a typical dryland forage/hay seed mixture.
- Jorgensen Land Management Ltd. (JLM) conducted a DSA on August 14, 2018. The DSA indicates that the conditions of the vegetation, soil, and landscape on the well site and the access trail meet all parameters of the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands* (reclamation criteria).

- The reclamation criteria are applied ‘to evaluate whether a site has met equivalent land capability.’ The DSA indicates that the well site and the access trail meet the reclamation criteria. Accordingly, the AER is satisfied that the well site and the access trail have met equivalent land capability.
- With respect to the outcome you are seeking (to have the site re-seeded with Altai wild ryegrass) there is a high possibility it would result in ecological damage to the sandy soils on site, which is unreasonable under the circumstances. The current vegetation is healthy, robust, and meets the reclamation criteria.
- As a result, the AER is satisfied that your concerns have been adequately addressed.

[6] On September 19, 2019, the AER received Mr. Shields’s request for a regulatory appeal of the AER’s decision to issue the reclamation certificate, under Division 3 of Part 2 of the *Responsible Energy Development Act (REDA)* and Part 3 of the *Alberta Energy Regulator Rules of Practice (Rules of Practice)*.

[7] On February 6, 2020, the AER granted Mr. Shields’s request for regulatory appeal 1924500 and asked the chief hearing commissioner to appoint a panel of hearing commissioners to conduct a hearing of the regulatory appeal.

[8] The AER issued notice of hearing for the regulatory appeal on March 10, 2020, and issued a notice of scheduling of hearing on November 19, 2020.

[9] The purpose of the hearing was to determine whether the AER should confirm, vary, suspend, or revoke the decision to issue the reclamation certificate.

Hearing

[10] Mr. Shields, Vantage, and the ERG were parties to this regulatory appeal. The hearing panel confirmed participation rights in the notice of hearing issued on March 10, 2020.

[11] Neither Mr. Shields nor Vantage were represented by counsel in this proceeding. The ERG filed a hearing submission but did not participate in the oral hearing.

[12] Those who appeared at the hearing are listed in Hearing Participants.

[13] The AER held an electronic hearing via Zoom on December 3, 2020, before hearing commissioners C. A. Low (presiding), E. McNaughtan, and T. D. Stock.

[14] In reaching our decision, we have considered all relevant materials constituting the record of this proceeding, including the evidence and argument provided by all parties. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding 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.

History of the Site

[15] A brief history of the site provides useful context for our consideration of the issues. One well was drilled on the site in 1992 and abandoned in 1994. Multiple operators have held the lease for the site over the years. The site was first reclaimed in the early 2000s with seeding taking place about that time. In preparation for filing an application for a reclamation certificate, the operator at the time found a portion of the site to be contaminated. Subsequently, the contaminated portion of the site was remediated and then reclaimed a second time, with reseeding in 2013.

[16] Vantage acquired the site in 2018. It did not conduct reclamation or remediation work on the site. The remediation work is not an issue in this regulatory appeal.

[17] Figure 1 is a site sketch from the cultivated land DSA filed by Vantage showing the location of the site in relation to the well, the access road, and the surrounding lands. It also identifies the use of the surrounding lands, and the vegetation types. At the hearing Mr. Shields confirmed that figure 1 is a good representation of the site and surrounding land use.

[18] After it became the lessee and operator of the site, Vantage had the DSA carried out by JLM. The DSA was completed in August 2018 and was submitted as part of a routine reclamation certificate application (the focus of this appeal).

[19] The lease perimeter fence was removed in 2018 at or near the time of the reclamation certificate application, except for six fence posts which remain in the northernmost low-lying area marked on figure 1.

[20] Mr. Shields was concerned that the site was seeded with a forage/hay seed mix and not with Altai wild rye, even though he told both the operator who conducted the reclamation work before the remediation in 2013, and the operator who conducted the post remediation reclamation work, that he wanted the site seeded with Altai.

[21] Finally, the site is located in Special Area 3 but because it is privately owned land, the Special Area Board has no jurisdiction over the site for reclamation purposes.

Regulatory Framework

[22] Pursuant to section 41(2) of *REDA*, our task on this regulatory appeal is to decide whether to confirm, vary, suspend, or revoke the decision to issue a reclamation certificate to Vantage for the site. To make that decision we had to consider the relevant provisions in the applicable legislation, regulations, directives, and reclamation criteria. We also considered a prior decision of the AER. Those relevant provisions and the prior decision are summarized below.

[23] The duty to conserve and reclaim land, and obtain a reclamation certificate, arises from section 137 of the *Environmental Protection and Enhancement Act (EPEA)*. “Reclamation,” as defined in

subsection 1(ddd)(iv) of *EPEA*, includes the procedures, operations, or requirements specified in the regulations. Under section 2 of *EPEA's Conservation and Reclamation Regulation (CRR)*, the objective of conservation and reclamation is to ensure the reclaimed land has an equivalent land capability.

[24] Equivalent land capability, as defined in section 1(e) of the *CRR*, means

that the ability of the land to support various land uses after conservation and reclamation is similar to the ability that existed prior to an activity being conducted on the land, but that the individual land uses will not necessarily be identical. (emphasis added)

[25] The *CRR* also requires operators to reclaim specified land in accordance with applicable standards, criteria, and guidelines. Specified land is land that is being or has been used or held for, or in connection with, certain activities that include the construction, operation, or reclamation of a well.

[26] The applicable criteria are found in the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Lands* (reclamation criteria) and are applied “to evaluate whether a site has met equivalent land capability.” The reclamation criteria specify that an operator must include in its application an evaluation of whether the lease site meets the reclamation criteria by comparing the reclaimed area to adjacent lands in terms of vegetation, soil, and landscape.

[27] Section 138 of *EPEA* outlines that an application for a reclamation certificate must be made to the AER in accordance with the *CRR*.

[28] In addition, section 12(1) (a) of the *CRR* states that an application for a reclamation certificate is to contain the same information as is required in the well site reclamation application form. This information includes a DSA that provides comparisons of on- and off-site landscape, vegetation, and soil parameters using the reclamation criteria and documents whether, in the opinion of the assessor, a site meets equivalent land capability. Consistent with the *CRR* definition of equivalent land capability, the reclamation criteria do not require lease sites to be returned to the exact state they were in before the activity occurred. According to section 6.1 of the reclamation criteria, equivalent land capability is “based on land function and operability that will support the production of goods and services consistent in quality and quantity with the surrounding lands.”

[29] *Specified Enactment Direction 002: Application Submission Requirements and Guidance for Reclamation Certificates for Well Sites and Associate Facilities (SED 002)* sets out specific requirements for the information to be included in an application for a reclamation certificate. In this case, the relevant requirements are the following:

Operators must ensure that the landowner (or designate) and interest holder are interviewed, that their concerns are addressed, and that they are sent a copy of the application package the same day the application is submitted to the AER. (Section 6.2.1)

For sites that have been seeded to pasture or other perennial vegetation, attach a copy of the species mix approval, seed certificates, and the date seeded if known. If this information is unavailable, provide a list of the species composition found on site. (Section 7.4.1)

Ensure that the landowner or land manager has been consulted prior to submitting an application to ensure that the plant species present on site are acceptable. (Section 7.4.1)

[30] Section 2 of *REDA* sets out the AER's mandate, which includes providing for the efficient, safe, orderly, and environmentally responsible development of energy resources in Alberta through its regulatory activities. Finally, section 15 of *REDA* is relevant because it requires the regulator to consider the interests of landowners when conducting a regulatory appeal.

Issues

[31] Following review of the public record for this regulatory appeal and the record of the decision maker, the panel identified issues for the hearing. As noted, the reclamation criteria require evaluation of landscape, soil, and vegetation parameters on the reclaimed site and consultation with the current landowner or occupant. Mr. Shields's SOC, request for regulatory appeal, and his evidence and submissions in the hearing focused on the vegetation component of the site reclamation and the consultation process. In a letter dated March 10, 2020, we set out the issues and invited the three parties to advise Hearing Services by a specified date and time whether they had additional issues or if they wanted any issues to be rephrased.

[32] Both Mr. Shields and Vantage indicated their agreement with the issues as framed by the panel. ERG was silent on the issues. The questions and related issues are listed below and discussed in the following sections:

- 1) Does the site meet the applicable reclamation criteria?
 - a) Compatibility of seeded species used on the reclaimed site with the adjacent, off-site species.
 - b) Incorporation of the vegetation established on the reclaimed site in the operation and management of the lands.
 - c) Was there adequate landowner consultation concerning seeded species used on the reclaimed site?
- 2) Was the application technically complete and accurate?

[33] To arrive at our decision in Mr. Shields's regulatory appeal we considered the AER's reasons for the decision to issue the reclamation certificate as well as the steps taken and information gathered to reach that decision. The steps included Vantage's filing of the application for the reclamation certificate; Mr. Shields's filing of the SOC; the site visit in June 2019 providing the parties an opportunity to share information and concerns; and the ERG assessor's recommendation to issue the reclamation certificate based on the site visit and Vantage's DSA. We also answered the two questions and subissues set out

above after considering the evidence, the applicable regulatory framework, and submissions of both parties.

Question 1: Does the site meet the applicable reclamation criteria?

Subissue 1(a): Compatibility of seeded species used on the reclaimed site with the adjacent, off-site species.

Submissions of the Parties

[34] Mr. Shields was clear that Altai was, and is, his preferred species for reseeding the site. According to Mr. Shields's SOC, the site had been planted with slender crested wheatgrass and Russian wild rye and not his "approved seed for this site," which is Altai. Mr. Shields said he seeded lands adjacent to the site to Altai in 1993. Figure 1 shows the location of the site in relation to the adjacent lands. In oral questioning at the hearing, Mr. Shields confirmed that the lands labelled "tame pasture" in the figure are lands he seeded with Altai (the Altai field).

[35] Mr. Shields also said during oral questioning that the difference in on-site and off-site concentration of Altai (on the site and Altai field respectively) is very noticeable, with perhaps 0.5–1% of Altai on the site and 90–95% Altai in the Altai field.

[36] During the site visit Mr. Shields said that he had used the Altai field for seed crop. However, during the hearing, Mr. Shields answered questions about his use of the Altai field for seed in different ways. He said that after being seeded in the 1990s the Altai field "[was] not being worked at all." He said that the Altai field had not been used for seed, and then said that the Altai field had been "seldom" used. Later he said he had not produced seed for at least several years.

[37] Vantage submitted photos of the site, including photos taken from the centre of the former well site looking towards the adjacent fields, including the Altai field. The DSA also included photos, which Mr. Shields was asked about during oral questioning. Mr. Shields indicated that Altai, which appears in clumps, and crested wheatgrass, could be seen in the photo of the west side of the site taken from the well centre. However, Mr. Shields did not think the Altai clumps were located on the site. There was nothing in the photo marking the site boundary.

[38] In addition to photos of the site, Vantage relied on the observations and conclusions included in the DSA. The JLM assessor's observations are summarized as follows:

- crested wheatgrass comprised 20–30% of on-site vegetation and 15–20% of off-site vegetation;
- bromegrass comprised 20–30% of on-site vegetation and 10–15% of off-site vegetation;

- Russian wild rye was found to comprise 5–20% of the vegetation mix on site, and 40–45% of off-site vegetation mix; and
- some native infill and weed species were identified both on and off site.

[39] The vegetation assessment portion of the DSA concluded that “vegetation growth on site was comparable to off site and met criteria. Vegetation on and off site was dominated by crested wheatgrass and smooth brome grass. Vegetation parameters measured on site were comparable to off site and met criteria.”

[40] It was not apparent whether JLM was aware that Mr. Shields had specifically asked that the site be reseeded to Altai.

[41] ERG’s submissions include notes made by the ERG assessor at the time of the site visit. Among other things the notes state that Altai had been incorrectly identified as Russian wild rye in the DSA. Based on that visit and review of the site, ERG submitted that:

- the site is covered with a healthy and robust mixed perennial crop (crested wheatgrass, smooth bromegrass and alfalfa);
- the adjacent field (specifically the field identified as the Altai field) did not show signs of harvesting or grazing; and
- Altai is moving onto the site naturally.

[42] The ERG assessor’s summary of the site explicitly noted no evidence of tracks or use, by grazing or cultivation, of the Altai field. The ERG assessor also observed over 800 pounds/acre of litter (old grass) (her typed notes suggest that number may be over 2000 pounds/acre), indicating little or no use of that field.

[43] ERG submitted that the regulatory framework does not require a site to be reclaimed to the exact same species as on adjacent land, and that the objective of reclamation is to reclaim land to an equivalent land capability. ERG submitted that Altai is a perennial forage crop, as are crested wheatgrass, smooth bromegrass, and alfalfa, and that the site was covered in healthy forage vegetation that could support grazing or hay production. The ERG assessor found that although the vegetation on the site was not exactly the same species found on the adjacent lands, it was comparable. She also concluded that the site had been reclaimed to equivalent land capability.

Panel’s Analysis and Findings

[44] To meet the equivalent land capability standard, the vegetation established on the site must be comparable to off-site vegetation as evaluated using the DSA. The DSA and the reclamation criteria set out and describe specific parameters to be evaluated at assessment points on and off the reclaimed site, which include plant height, plant density, plant health, weeds, and undesired plants. The DSA form to be completed by the assessor also shows that the on-site and off-site crop types must be documented. The

on-site crop must be “compatible” with the off site, or, if it is not, it must have been approved by the landowner or must be able to be managed the same as the off-site crop.

[45] In this case the on-site crop was not approved by Mr. Shields. So, we have to decide what “compatible” means in these circumstances. The reclamation criteria do not define the term, but do state that equivalent land capability means the land will produce similar goods and services to surrounding land, and that the vegetation on the site should reflect that ability, but not necessarily be exactly the same as adjacent land. This means a compatible crop does not have to be identical to the crop on surrounding land. However, in light of the DSA assessment criteria, and a previous AER decision that is addressed below, a compatible crop must

- not contain noxious weeds or invasive species that adversely affect use of adjacent lands, and
- be able to be incorporated into the management of the off-site crop.

We deal with the second point in our discussion of findings for subissue 1(b) concerning the incorporation and management of the site with the adjacent lands.

[46] Mr. Shields estimated the Altai concentration on the site to be significantly lower than the concentration in the Altai field. However, both the DSA and the ERG assessor concluded the concentrations were comparable. The DSA estimate was based on close assessment of sample locations on and off the site. In addition, the photos included with the DSA and reviewed with Mr. Shields at the hearing show a noticeable percentage of Altai on site, although the photos do not allow for an estimate or comparison of the relative concentrations. We find the DSA assessment persuasive and conclude that, while the vegetation on the site was not exactly the same as the vegetation on the adjacent lands, it was comparable.

[47] A previous AER decision (*2016 ABAER 006*) on an appeal about a reclamation certificate found that vegetation used in reclamation is not compatible if it contains noxious or invasive weeds or other species that negatively impact the use of the adjoining lands. Mr. Shields did not mention noxious weeds or invasive species in the SOC or his submissions. In particular, he did not make any submissions about whether or how any of the species reseeded on the site would negatively impact his use of the adjacent lands.

[48] Starting with the SOC, Mr. Shields suggested that he had used the Altai field for Altai seed production. We note that if the Altai field was being used for seed production, then having a flourishing crop of non-Altai perennial forage species on the site may not be compatible. However, there was insufficient evidence to persuade us that the adjoining field has been used for Altai seed production. In addition, the evidence did not persuade us that the Altai field is being managed for the purpose of future Altai seed production. The evidence shows that the Altai field has not been harvested for years. Mr. Shields’s own evidence was that he had not used the Altai field for seed crop, or at least not for several years. Finally, Mr. Shields said that the adjacent field east of the site as shown in figure 1 is either

cultivated and now growing alfalfa or is part of an active, weedy well site (not leased or operated by Vantage). He did not raise any concerns about the compatibility of the vegetation established on the site with the adjacent field to the east.

[49] We found that the Altai field has not been used for Altai seed crop and is not being managed for that purpose. As a result, we are persuaded that the healthy perennial forage established on the site is compatible with the adjacent off-site species.

Subissue 1(b): Incorporation of the vegetation established on the reclaimed site in the operation and management of the adjacent lands

[50] It became clear during the course of the oral hearing that fence posts had been left on the site. Since fence posts may interfere with the incorporation of the site in the operation of the adjacent lands we deal with the remaining fence posts as part of this subissue.

Submissions of the Parties

[51] In response to questioning, Mr. Shields stated that the Altai field “has not been worked at all” (which we interpret as it has not been cultivated) and that it has not been combined in “quite a few years.” When asked about the use of the Altai field for seed, he said that “we just haven’t gotten around to combining it... but we have in the past and we will in the future.”

[52] Mr. Shields also said he asked for the well site perimeter fence and posts to be removed and this was not completed.

[53] ERG’s submission included observations from the ERG assessor’s site visit, in which she did not observe signs that the Altai field had been harvested, grazed, or bailed, and that Altai was moving naturally onto the site.

[54] The ERG assessor also made notes about the remaining fence posts in the reclamation criteria report, noting: “Drought year, so wetland on A/R is dry enough to remove remaining fence posts in low lying area.” On the associated facilities page of the reclamation criteria report, the ERG assessor marked six fence posts in a wetland/low spot and noted: “We did not walk access b/c Robbie was happy to get posts and didn’t voice concern after that. *Concerns were on wellsite.” Finally, in the additional comments section of the report, the ERG assessor noted there were no concerns at “A/R,” which we interpret to be access road, except posts. The ERG assessor also noted “Robbie will remove and keep posts.” On the first page of the same report next to “Landowner’s Name” is written “R. Shields (Robbie).”

[55] Additional notes of the site visit meeting state: “There were still fence posts in the wetland which Mr. Shields was upset about. Vantage indicated at this meeting that since it was drought conditions, that the posts would be removed this week. The posts would be given to Mr. Shields.”

[56] Vantage did not address the issue of the incorporation of the vegetation established on the site in the operation and management of the adjacent lands. Vantage admitted that it said it would remove the fence posts and that it had failed to remove all of them due to an oversight.

Panel's Analysis and Findings

[57] To meet the equivalent land capability standard, vegetation established on a reclaimed site must be able to be incorporated into the operation and management of adjacent lands.

[58] The reclamation criteria do not include a definition of operability in the vegetation criteria. In our view, the criteria suggest that factors such as differences in crop measurement and crop health and the presence of weeds can negatively affect the incorporation of a reclaimed site into the operation and management of the adjoining lands. However, we have no reason to question the DSA's conclusion that crop measurement and health and presence of weeds on the site was comparable to the adjacent lands.

[59] The site was seeded to a tame forage mix that was appropriate for cultivated forage production in the area at the time. Therefore, we need to consider if the forage mix on the site interferes with or directly and adversely affects Mr. Shields's operation and management of the adjacent land.

[60] Altai has been seeding naturally onto the site. Likewise, the evidence of crested wheatgrass and other grasses off site confirm the off-site vegetation includes species other than Altai. Mr. Shields considered that unacceptable in what he described as a seed crop. If the Altai field was being actively managed as a seed crop, the presence of other forage species might cause Mr. Shields to manage the site differently than the Altai field. However, we find that the Altai field is not being actively managed, so there is no direct and adverse interference with Mr. Shields's management of the adjacent land.

[61] In our view, the vegetation on the site can be incorporated into the operation and management of the Altai field as a cultivated field. While Mr. Shields stated his future plans to use the Altai field for seed, the evidence does not persuade us that is likely to happen in the near future because the off-site vegetation contains forage species other than Altai.

[62] However, facilities and features such as fence posts can interfere with the incorporation of reclaimed lands into the operation and management of adjacent lands and can also pose safety issues. *SED 002* requires written approval from the landowner if fences are to be left in place, otherwise they must be removed and the holes filled before an application for a reclamation certificate is filed. In addition, we understood Mr. Shields's concern about the six remaining fence posts to be that Vantage had repeatedly said they would remove them and give them to him, but they did not. In light of Vantage's admission about the fence posts and in the absence of Mr. Shields's written consent to leaving fence posts in place on the site, Vantage should have removed the six remaining fence posts before the reclamation certificate application was filed. In the context of the *SED 002*, the presence of the fence posts on the site

without Mr. Shields's expressed consent prevent us from finding that the site can be incorporated into the operation and management of the adjacent lands.

Subissue 1(c): Was there adequate landowner consultation concerning seeded species used on the reclaimed site?

Submissions of the Parties

[63] Mr. Shields said he had spoken with representatives of the various operators over the life of the well site lease about seeding Altai. He also recalled being consulted about sourcing fill and topsoil in 2011 or 2012 by a contractor completing the post remediation reclamation work on the site. Mr. Shields said he provided soil for the reclamation work but he was not approached to reseed the site after the remediation.

[64] Mr. Shields said he had contacted the lease holders about his choice of Altai for reseeding during the time between the post remediation reclamation work and the application for reclamation certificate in October 2018. He said that for the reclamation of the remediated portion of the lease, when he asked for Altai to be reseeded, the operator was having trouble finding seed. He suggested "Sara" could provide us more information.

[65] Mr. Shields was referring to S. Wilke, a registered agrologist and consultant to Vantage. At the hearing she said she was the environmental coordinator for Penn West, the company that carried out the second, most recent reclamation and that she had dealt with Mr. Shields in that capacity. Her evidence was that she had tried to source Altai seed and the best source she was able to locate at the time was Siberia. She also said she could not find any in North America.

[66] Mr. Shields also told us that he could have provided Altai seed if asked. He stated he was not contacted about supplying Altai seed, and that it could have been harvested from his field or sourced commercially up to about 2010. Mr. Shields acknowledged that he did not offer to provide seed in 2013 for the reclamation of the remediated portion of the site.

[67] Mr. Shields did not provide any records of consultation with any of the operators of the site.

[68] Vantage said consultants who had worked on the site for previous operators remembered speaking with Mr. Shields but had no documentation of the topic(s) of those conversations. Vantage also said there was no evidence in the records available to it that Mr. Shields told previous operators he wanted the site seeded to Altai. However, Ms. Wilke did know Mr. Shields wanted the site to be seeded with Altai. It was Vantage's evidence that Ms. Wilke had been "working with the company for years," knows the site, and had been directly involved. When asked, Ms. Wilke indicated that she understood from her consultant that Mr. Shields was not able to supply Altai seed at the time of the reclamation of the

remediated portion of the lease because he had not combined his Altai field at any time (to harvest Altai seed).

[69] Ms. Wilke also acknowledged that she did not consult directly with Mr. Shields but relied on her consultant to contact him for the purpose of completing the reclamation application.

[70] We understand Vantage's evidence to be that JLM filed the reclamation certificate application for Vantage. The interview details part of the application form shows that S. Sydenham interviewed Mr. Shields on September 6, 2018. The "Other Notes & Comments" column says "Spoke to Robert who indicated he was going to look at the site as he wasn't sure where it was." The comments column says "No concerns/Work completed acceptable."

[71] No one from JLM appeared as a witness. Vantage was not able to elaborate on the information provided by JLM in the reclamation certificate application form.

[72] In its response to Mr. Shields's SOC, Vantage reported that they had investigated suitability and availability of Altai. However, the seed companies told them that Altai had gone out of favour as a forage crop ten or more years ago due to low palatability for cattle and invasive growth habit. Vantage also reported that it was told Altai is not native to the site area and many seed companies have no knowledge of the species. Vantage said that it learned Altai grass seed was produced in North Dakota but there were limitations on its import into Canada. Vantage's witness, Mr. Finn, a custom seed operator, said that he could not find Altai seed in North America.

[73] Finally, Vantage said it contacted Mr. Shields by telephone in October 2018, after the DSA and reclamation certificate application was complete, about removing the fence around the well site. At about that time, the work was completed except for the six remaining posts in a low-lying area on the lease access road. Vantage did not discuss the vegetation with Mr. Shields at that time.

[74] The issue of consultation did not appear in the notes made by the ERG assessor during the site visit. However, the AER's reasons for issuing the reclamation certificate state that the AER decision maker was satisfied that Mr. Shields's concerns had been adequately addressed. ERG did not address the issue of consultation in its submissions.

Panel's Analysis and Findings

[75] The reclamation criteria and *SED 002* clearly require consultation as a part of the reclamation process leading up to the application for a reclamation certificate.

[76] The reclamation criteria do not provide guidance on sufficiency of consultation but does state in section 10.1 that vegetation choices should be made along with the land manager, who in this case is the landowner.

[77] *SED 002* guidance on landowner consultation is specific about the completion and submission of the reclamation certification application. *SED 002* sections 6.2.1 and 6.2.3 require the concerns of the landowner to be addressed and that a copy of the application package be sent the same day the application is submitted to the AER. Any unresolved concerns must be described in the reclamation application. In addition, section 7.4.1 says “Ensure that the landowner … has been consulted prior to submitting an application to ensure that the plant species on site are acceptable.”

[78] It is not clear whether the AER decision maker specifically turned their mind to the question of the adequacy of consultation by Vantage prior to filing its application for a reclamation certificate. It is possible that the conclusion that Mr. Shields’s concerns had been adequately addressed meant that, from the decision maker’s perspective, the post application SOC and site visit had remedied the lack of pre-application consultation. However, we are not able to draw that conclusion. The evidence before us showed that Mr. Shields consistently communicated that he wanted the site reseeded with Altai. Although Mr. Shields was engaged in the second reclamation through purchase and replacement of top soil, his concerns about the vegetation used for reseeding the site were not addressed to his satisfaction. Seeding choices made by previous operators were compatible with cultivated forage production in the area, but were not responsive to Mr. Shields’s requests for Altai.

[79] Regardless of whether previous operators effectively consulted with Mr. Shields, it is the responsibility of the operator that applies for the reclamation certificate to consult with the landowner before filing the application. Consultation means, at a minimum, contacting the landowner, as described in the reclamation criteria, to find out whether they have any concerns. If they do have concerns, consultation means making a genuine effort to address those concerns or explain to the landowner and in the application for a reclamation certificate why the concerns will not, or cannot, be addressed in the landowner’s preferred manner.

[80] We conclude that, for the purpose of applying for the reclamation certificate, Vantage relied on whatever consultation previous operators may have undertaken. Vantage also relied on communications between Mr. Shields and third-party consultants. However, it is the responsibility of the operator applying for a reclamation certificate to either consult directly or to ensure that appropriate consultation has been conducted before the application is filed. The evidence shows that Vantage did not begin to engage directly with Mr. Shields until after the reclamation application had been submitted and after Mr. Shields had registered a SOC.

[81] We find that Vantage did not consult as required by the *SED 002* and the reclamation criteria. This is because, before filing its application for the reclamation certificate, Vantage did not consult directly with Mr. Shields, nor did it take steps to ensure that its consultant had engaged appropriately with Mr. Shields regarding whether he had any concerns about the site.

Question 2: Was the application technically complete and accurate?

Submissions of the Parties

[82] Mr. Shields's SOC specifically referred to the interview details in section 4.2.2 of Vantage's reclamation certificate application. He noted that when he had spoken to S. Sydenham he was busy harvesting and did not know which well site he was being asked about. In the SOC, he went on to say:

I told him that I was not sure which of the many wells on my land was the one in question, so the statement in part 4.2.2 of the Reclamation Application stating that I had no concerns is not correct.

Now that I have had time to review the location, and which well is referenced, my concern is that the site is planted with Slender Crested Wheatgrass and Russian Wild rye grass. My approved seed for this site is Altai Wild Ryegrass, which I have told the leaseholder multiple times in the past. I would like the site replanted with Altai Wild Ryegrass in accordance with my common practices. The rest of the field is already growing Altai Wild Ryegrass.

[83] Vantage did not make any submissions specifically about the completeness or accuracy of the application.

[84] In its submissions, ERG said it was the AER decision maker's view that the application was complete and accurate when she issued the reclamation certificate. No reasons were given to support that conclusion.

Panel's Analysis and Findings

[85] Vantage acquired the site after it was reclaimed and the plant species were well established. In Vantage's view, all that remained was to apply for a reclamation certificate.

[86] *SED 002* provides detailed guidance to operators about the requirements for completing an application for a reclamation certificate. The provisions set out above require operators to consult with landowners so that they can learn and address landowner concerns and ensure that plant species used in the reclamation process are "acceptable." Section 6.2.3 of *SED 002* requires that the reclamation application indicate unresolved concerns. Vantage's application did not indicate unresolved concerns, but rather suggested that Mr. Shields had no concerns.

[87] Vantage hired and relied on a consultant, JLM, to complete the reclamation certificate application on its behalf, which it was entitled to do. However, as the operator, Vantage was required to either fulfill the application requirements directly or ensure that they were fulfilled through its consultant(s). In the circumstances of this case, Vantage was responsible for ensuring that Mr. Shields or his delegate was interviewed and that his concerns, if they could not be addressed, were documented in the reclamation certificate application.

[88] The electronic reclamation certificate application filed on behalf of Vantage, contains a number of mandatory fields. In particular, we point to section 4.2.2 of the application form:

4.2 LandOwner And Occupants

4.2.1 Contact Information

Stakeholder Type	Company	Contact Name	Phone Number	Address	Email	Communication Preference
Landowner		Robert Shields	403-664-3690	Box 136 Oyen Alberta T0J 2J0 Canada		Mail

4.2.2 Interview Details

Stakeholder Type	Name	Date	Interviewed By	Comments	Other Notes & Comments
Landowner	Robert Shields	09-06-2018	S. Sydenham	No concerns/Work completed acceptable.	Spoke to Robert who indicated he was going to look at the site as he wasn't sure where it was.

4.2.3 List of attached documents

Document Type	Date	User (BA ID)	Date	Comments
Land Title	09-05-2018	A7B1	09-05-2018	

[89] Of concern to the panel are the comments in 4.2.2., “No concerns/Work completed acceptable.” In his SOC, Mr. Shields expressly described the interview details part of the application as inaccurate. Under “Other Notes & Comments,” the notation says “Spoke to Robert who indicated he was going to look at the site as he wasn’t sure where it was.” There appears to be information missing. Specifically, did or when did Mr. Shields (Robert) look at the site and get back to S. Sydenham or Vantage to let them know whether he had concerns? There is no evidence to suggest that Vantage or its consultant followed up on the September 6, 2018 interview with Mr. Shields to find out if he had looked at the site before the application was filed.

[90] In the oral portion of the hearing, when asked about section 4.2.2 of the reclamation certificate application form, Mr. Shields said that due to the number of (well) sites on his lands, when he received the phone call (he did not say from whom) he was unsure which site he was being asked about. He mentioned he had concerns about every site on his lands. He said he wanted to check with his workers and or view it himself and get back to the caller. He admitted that he did not get back in a timely manner.

[91] Other than the short statement in the form that there were no concerns and the work completed was acceptable, nothing in the evidence before us suggests that Mr. Shields’s recollection of that phone conversation is not accurate. Indeed, it is clear from the evidence in this proceeding that Mr. Shields had concerns with and arising from this particular well site since before the well was drilled. He was also clearly frustrated with how he had been treated by the operators of the site.

[92] We find it unlikely that Mr. Shields would have said he had no concerns and that the work completed was acceptable to him. The evidence shows he consistently communicated that work completed on the site was not acceptable because it was not reseeded to Altai. This was confirmed by Vantage’s witness, Ms. Wilke.

[93] In addition, the evidence shows that six fence posts were left on the site. Section 7.4.7 of *SED 002* requires the removal of fences before filing an application for a reclamation certificate. Vantage was clearly aware of Mr. Shields's concerns about the remaining fence posts. As Vantage's representative noted at the hearing, due to an oversight, the six fence posts still have not been removed and remain a source of friction between the parties. Finally, in section 5.6.2 of Vantage's electronic reclamation certificate application form, the "No" box is marked with an [x], indicating no facilities or features have been left in place. That was clearly not accurate, because the six fence posts had not been removed, nor had Mr. Shields provided written approval to leave them in place.

[94] Regardless of whether a reclamation certificate application is filed by the operator or a consultant on its behalf, it is the operator's responsibility to ensure that the application accurately reflects any outstanding concerns at the time the application is made. The AER must be provided with the information necessary to make informed decisions on how to process an application and the level of review required to make a decision. For the same reason, it may not be appropriate to rely on the SOC and site visit processes as a means of curing a lack of preapplication consultation. Those processes may provide a path to resolving concerns, but they do not satisfy the requirement of consultation by the operator as part of the reclamation certificate application process.

[95] In our view, the application and supporting materials were incomplete and inaccurate for two reasons. First, they did not reflect the fact that at least six fence posts remained on the site at the time the application was filed. Second, they did not reflect Mr. Shields's concern about the use of non-Altai seed on the site. As a result of these two shortcomings, we also find that the application was potentially misleading.

Summary of Findings

[96] The answer to our first question is that, while the site vegetation is comparable and compatible with the off-site vegetation, the existence of the fence posts means equivalent land capability has not been achieved. We also found that Vantage did not consult Mr. Shields as required before it filed its application for a reclamation certificate.

[97] The answer to our second question is that the reclamation certificate application was not complete or accurate because of the missing or inaccurate information about Mr. Shields's concerns and because of the inaccurate information about the remaining fence posts.

[98] In light of our findings, we have to decide whether we should revoke, vary, or suspend the approval.

[99] Mr. Shields said that the outcome he wants is to have the site reseeded to Altai. We also heard that he would like to be treated with respect. His evidence strongly suggests to us that being treated with

respect includes being actively engaged by lease holders during reclamation work on his lands and that lease holders meet their obligations in a full and timely manner.

[100] Vantage and ERG submitted that the decision to issue the reclamation certificate should be confirmed.

[101] After giving the matter much consideration, we have decided to revoke the decision to issue the reclamation certificate. Vantage must take steps to remove the six remaining fence posts and properly fill the post holes, or obtain written consent from Mr. Shields to leave them in place, before refiling an application for a reclamation certificate for the site. Vantage must also consult with Mr. Shields and accurately report any concerns that are unresolved at the time the new application is filed. It is our view that allowing operators to file applications for reclamation certificates that are inaccurate or potentially misleading is not consistent with the safe, orderly, and efficient development of energy resources in Alberta. Inaccurate applications or potentially misleading applications effectively prevent the AER from fully and effectively discharging its mandate.

[102] We should also address a submission made by ERG in this proceeding. As noted above, Mr. Shields said that he wants to have the site replanted to Altai. ERG and Vantage argued that because the soils on the site are sandy and because of its higher elevation, replanting the site would result in ecological damage due to wind erosion. Mr. Shields disagreed. His evidence was that, based on his years of farming and cultivating lands near the site, the work could be managed to reduce the risk of soil erosion although it would take years. Given our finding that the site meets the vegetation comparability and compatibility standards, we do not need to deal with this submission further.

[103] Finally, we want to acknowledge that Mr. Shields expressed concerns about oil and gas development in Alberta generally and how landowners are often treated disrespectfully. He was clearly frustrated about issues with other oil and gas related sites on his lands. We find that Mr. Shields has been negatively affected, in that his time and energy used on this matter might have been usefully directed elsewhere.

Conclusion

[104] In this regulatory appeal we have to focus on the decision to issue the reclamation certificate, including the reasons for doing so. We also considered the process leading to the decision including the SOC and the site visit. As a statutory decision maker, we must evaluate the decision and reasons in the context of the regulatory and legal framework described above. Doing so, and for the above reasons, we find that, it is appropriate in this case to revoke the decision to issue a reclamation certificate.

Dated in Calgary, Alberta, on March 2, 2021.

Alberta Energy Regulator

Cecilia Low, LL.B., LL.M.

Presiding Hearing Commissioner

Elizabeth McNaughtan, M.B.A., P.Ag.

Hearing Commissioner

Tracey Stock, J.D., M.B.A., Ph.D., P.Eng.

Hearing Commissioner

Appendix 1 Hearing Participants

Principals and Representatives

(Abbreviations used in report)

Witnesses

Vantage Point Resources Inc.

J. Kanderka

S. Wilke

K. Dembicki

G. Finn

R.A. Shields (landowner)

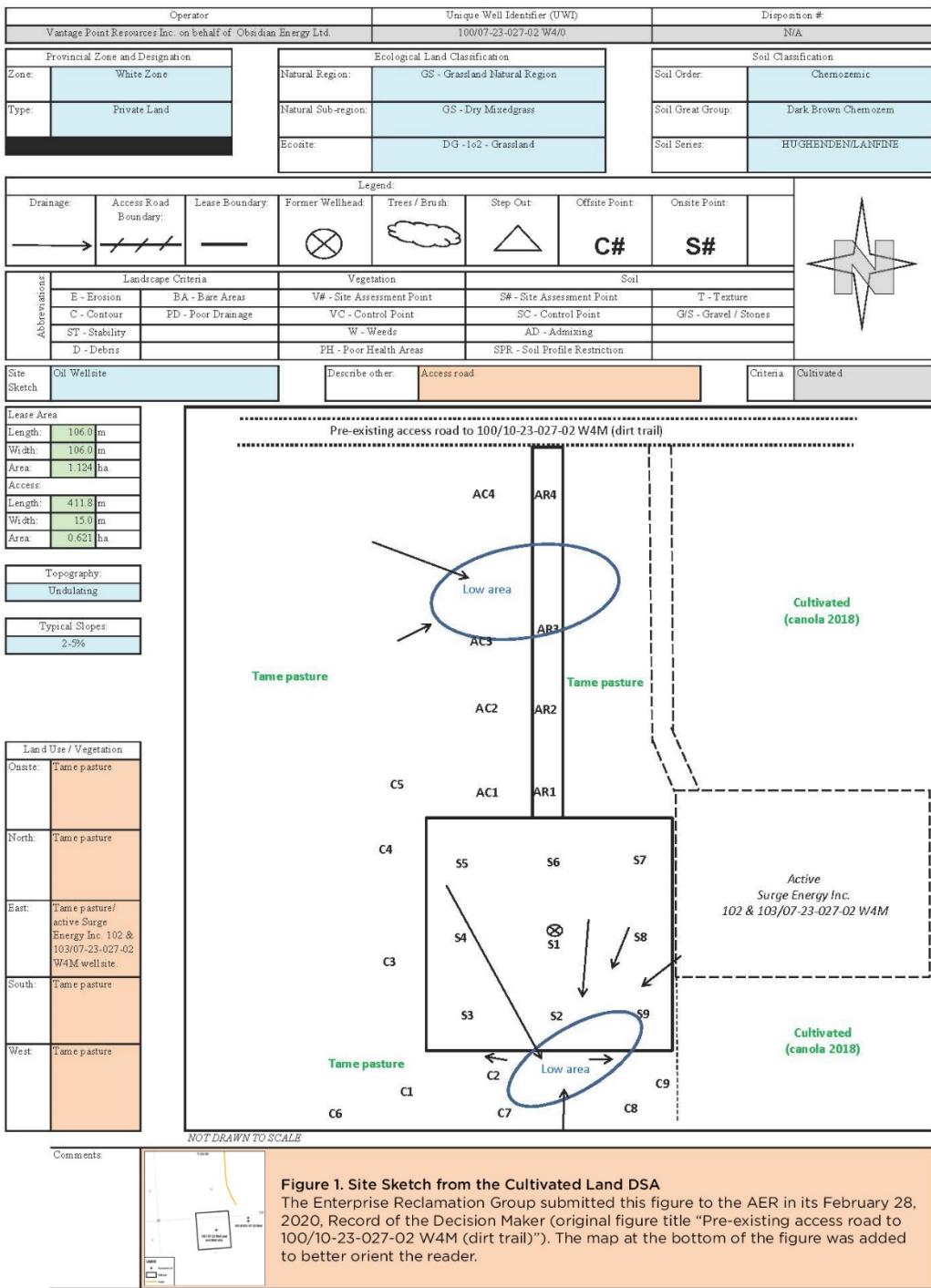
Alberta Energy Regulator Staff

M. Lavelle, AER Counsel

T. Wheaton, AER Hearing Coordinator

T. Turner, AER Hearing Coordinator

B. Dunkle, AER Reclamation Assessor



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Figure 1. Site Sketch from the Cultivated Land DSA