Appeal No. 94-011

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing: November 5 and 6, 1996
Date of Decision: December 5, 1996

IN THE MATTER OF Sections 84, 85, 86 and 87 of the Environmental Protection and Enhancement Act (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF an appeal filed by Sarg Oils Ltd. and Sergius Mankow with respect to sixteen Environmental Protection Orders served upon them by the Director, Land Reclamation Division, Alberta Environmental Protection.

Cite as: Sarg Oils Ltd. and Sergius Mankow v. Director of Land Reclamation, Alberta Environmental Protection

HEARING BEFORE	Dr. M. Anne Naeth Dr. John P. Ogilvie Mr. Ron Peiluck

APPEARANCES

Appellants:	Sarg Oils Ltd. and Mr. Sergius Mankow, represented by Ms. Sean Kubara of Millar, Thiessen & Keith (counsel)
Other Parties:	Eugene Harrison, Inspector, Land Reclamation Division, Alberta Environmental Protection, represented by Mr. William McDonald (counsel)
Witnesses:	Mr. David Sandmeyer, President of Rife Resources Ltd.; Mr. Russ Waddell, Land Manager of Wascana Resources Ltd. and Mr. John Nichol, Alberta Energy and Utilities Board

BACKGROUND

Sarg Oils Ltd. (Sarg) and Sergius Mankow (Mankow) of Milk River, Alberta (the Appellants) filed sixteen notices of objection with the Alberta Environmental Appeal Board (the Board) on September 19, 1994. These appeals were filed with respect to sixteen environmental protection orders (the EPOs) issued against the Appellants under section 125 of the *Environmental Protection and Enhancement Act* (the Act) on behalf of Mr. Larry K. Brocke, Director of Land Reclamation, Alberta Environmental Protection (the Director) on September 12, 1994. The EPOs required the Appellants to take specific remedial actions on sixteen abandoned well sites in and around the County of Camrose.

The sixteen EPOs objected to and the names and locations of the wells concerned (legal subdivision, section, township and range) are as follows:

E.P.O.	Well Name	Location
94-06	Turbo Battle South	14-25-45-20 W4M
94-07	Turbo Battle South	3-36-45-20 W4M
94-08	B.A. CS Rankin BATLS	4-36-45-20 W4M
94-09	Turbo Battle South	5-36-45-20 W4M
94-10	Turbo Battle South	6-36-45-20 W4M
94-11	Turbo Battle	10-11-46-20 W4M
94-12	Turbo Battle North	16-15-46-20 W4M
94-13	Turbo Battle South	1-22-46-20 W4M
94-14	Turbo Battle South	4-23-46-20 W4M
94-15	Tenn A4 Joarcam	16-16-47-20 W4M
94-16	Tenn C1 Joarcam	1-21-47-20 W4M
94-17	Turbo Joarcam	8-21-47-20 W4M
94-18	Tenn C4 Joarcam	7-21-47-20 W4M
94-19	Turbo Joarcam	2-21-47-20 W4M
94-20	Turbo Joarcam	9-21-47-20 W4M
94-21	A Battery Site	11-11-46-20 W4M

Each EPO states that Sarg is the operator and registered leasee of the oil and gas facility identified in the particular EPO. Mr. Sergius Mankow is identified as the President, shareholder and agent of Sarg for each oil and gas facility. Each EPO further states that the Energy Resources Conservation Board (ERCB) caused an Order in Council to be issued directing Sarg to abandon the well located on the site for environmental reasons. Each EPO states that a reclamation inquiry was duly held on the site in October 1993, and that the Inspector determined that the particular site was not properly reclaimed under the Act, resulting in the EPO being issued by the Director against both Sarg and Mr. Mankow.

The Board wrote to the Director on September 20, 1994, informing him that the appeals had been filed and requesting copies of the EPOs and all related correspondence and materials. The Director supplied the documentation to the Board on October 7, 1994.

The Board sent letters on October 20, 1994, to the Appellants and the Director seeking further information. Both provided responses to the Board as requested.

The Board sent a letter to the ERCB, presently the Alberta Energy and Utilities Board (AEUB), enquiring whether they had conducted a hearing or review concerning Sarg's request to transfer well licences from Sarg to another party. The ERCB responded that no such hearing or review had occurred. On November 8, 1994, counsel for the Appellants sent the Board a copy of correspondence received from the ERCB, along with a Statement of Claim filed by the ERCB against Sarg. A Decision Report was issued by the Environmental Appeal Board on May 11, 1995, dismissing the appeals.

As a result of the Decision Report issued by the Environmental Appeal Board, an Originating Notice and supporting Affidavit were received by the Board on July 12, 1995, from Ms. Sean Kubara. On May 28, 1996, the Board received a copy of the filed Order of Mr. Justice Lomas stating:

> UPON THE APPLICATION of the Applicants for Judicial Review of a Decision of the ENVIRONMENTAL APPEAL BOARD dated May 11th, 1995; AND UPON READING the Chambers Briefs submitted on behalf of each of the parties; AND UPON HEARING from Counsel for the Applicants, Counsel for the Respondents and Counsel for the intervenor;
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> IT IS ORDERED:
>
> 1. THAT the Decision of the Environmental Appeal Board dated May 11th, 1995 is quashed as being ultra viries and in breach of the Rules of Natural Justice;
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> 2. THAT the matter is referred back to the Environmental Appeal Board for further consideration in accordance with the written Reasons for Judgment herein, dated the 29th day of March, 1996;
>
> 3. THAT costs may be spoken to.

As a result of this Order the Board wrote to all parties on June 4, 1996, advising that a hearing would take place on July 25, 1996, and requested written submissions by July 19, 1996. Correspondence was received from Ms. Sean Kubara on June 12, 1996, requesting that the hearing be rescheduled. The Board granted Ms. Kubara's request on June 13, 1996, and informed her and the Department that they would be consulted in the near future to arrange a new hearing date.

On June 19, 1996, Mr. Rod Knaut, on behalf of Mr. William James McGee, the registered land owner of SE 1/4-22-46-20-W4th, wrote to the Board requesting the right to make representation on behalf of his client. The Board determined on June 21, 1996, that he would be given party status.

On August 12, 1996, the Board wrote to all parties advising that the hearing was scheduled for November 5th, 6th, and 7th if necessary, and provided a copy of the Notice of Hearing which was advertised on August 21, 1996, in the Camrose Canadian and the Edmonton Journal. Written submissions were requested by October 24, 1996, and were received. Mr. Knaut informed the Board, by copy of his letter to the Department dated October 7, 1996, that his clients did not wish to appear or be represented at the hearing unless absolutely necessary.

THE HEARING

The hearing took place at the Board's office in Edmonton, Alberta on November 5 and 6, 1996.

STATEMENT OF THE ISSUES TO BE DECIDED

Based on the documents filed with the Board, the evidence presented by the parties and their arguments, the primary issues to be decided are:

1. Were Sarg and Mankow operators under section 119 of the Act when the EPOs for the sixteen properties were issued in 1994?

2. If Sarg and Mankow were operators did the Inspector use reasonable judgement in deciding to issue the EPOs to them jointly? Was the Inspector correct and reasonable in not naming previous operators in the EPOs?

3. Should the Board, in reaching a decision, place any weight on the failure to affect a transfer of the well licenses from Sarg to Sundial when the properties were sold to the latter?

SUMMARY OF THE EVIDENCE

Sergius Mankow

Mr. Mankow has been involved in the oil and gas industry for over 40 years, employed on oil rigs and then subsequently purchasing some properties in his own name. Sarg was incorporated in February 1977, at which time Mankow's personal properties were rolled into Sarg.

Sarg purchased the properties that are the subject of this appeal from Bankeno Resources Ltd. in 1985, and took possession of the wells in spring 1986. The wells were then approximately 30 years old having been drilled in 1954 and 1955. A number of operators had worked the wells over their life, including:

Dome Petroleum Limited
Turbo Resources Limited
The Bay Petroleum Corporation
Husky Oil Canada Limited
Bankeno Resources Limited
Gulf Oil Canada Limited
Imperial Oil Limited
Sun Oil Company
Husky Oil Alberta Limited

No records of the historical production under these operators were introduced as evidence, nor was there any indication of how much work each company did on the sites.

Sarg reconditioned the down hole equipment on six of the wells and obtained some production from them. Total production was 118.2 cubic metres with a gross value of between $11,000 and $12,000. The operating expenses, not including company wages and acquisition costs, were approximately $111,000. Because of the poor economics and more particularly because of the difficulties and stress involved in operating these wells in the Camrose area from Sarg's home base in Milk River, Mankow decided to sell them. The results from each well are summarized in the following table.

Well	Time Used (Months)	Production (Cubic Metres)
Turbo Battle South 14-25-45-20	3	5.7
Turbo Battle South 3-36-45-20	3	20.5
BA CS Rankin BATLS 4-36-45-20		Associated battery used 4 months
Turbo Battle South 5-36-45-20		Water disposal well used 4 months
Turbo Battle South 6-36-45-20	2	4.0
Turbo Battle 10-11-46-20	3	20.2
Turbo Battle North 16-15-46-20		Battery and water disposal well used 3 months
Turbo Battle Sorth 1-22-46-20	4	29.2
Turbo Battle Sorth 4-23-46-20	2	4.7
Tenn A4 Joarcam 16-16-47-20		Shut in Not used
Tenn C1 Joarcam 1-21-47-20		Shut in Not used
Turbo Joarcam 2-21-47-20		Shut in Battery Not used
Tenn C4 Joarcam 7-21-47-20		Shut in Not used
Turbo Joarcam 8-21-47-20		Shut in Not used
Turbo Joarcam 9-21-47-20		Shut in Not used
Total Production		118.2 cubic metres

Mankow testified that he sold all Sarg's interests in the above properties to Sundial Oil & Gas Ltd. (Sundial) in spring 1988. Before finalizing the sale, Mankow checked with the ERCB to determine that Sundial could hold a well license. He was advised that they could do so and had held a well license previously. In due course, assignments or transfers were completed with respect to the petroleum and natural gas rights, pipe line licenses and any applicable surface rights agreements. Sundial submitted the application for a transfer of the well license to the ERCB and it was received by the ERCB July 15, 1988.

Mankow testified that in spring 1989 he learned there was a hold-up in the transfer of the well license. Apparently Sundial had neglected to submit the proper fee for either a name change for the wells or for the actual transfer of the well license. Mankow said he personally paid a $750 fee which was subsequently returned to him but which he refused to accept. Mr. Mankow later learned that Sundial was requesting a change in the well license transfer so that 3D Enterprises (3D) would become the licensee. Since 3D was not an Alberta company, corporate information was requested by the ERCB. Mr. Mankow said at the time he was busy and left the well transfer from Sarg to Sundial in the hands of his attorney, Victor Naimish. The net result was that the well license transfer never took place and

Sarg is now listed in the records of the AEUB as the licensee of record.

Mr. Mankow said that Sarg did very little environmental damage to the well sites when he did operate them before the sale to Sundial. He did not use the salt pits or the flare pits. He alleged that Sundial entered the sites without permission during the winter 1988-89, tested the wells and removed equipment that was valued for insurance purposes at approximately $377,000. Mr. Mankow testified that this represented the replacement value and that the scrap value would be much lower.

Mr. Mankow said that his position and that of Sarg is that through a misunderstanding on his part he remained the license holder of record for the wells in question. Sarg is already under suit by the AEUB for the costs of abandonment of the wells. He believes that in all fairness the Inspector, Mr. Lloyd, should have exercised his discretion and spread the cost of surface reclamation over some of the previous license holders.

Mr. David Lloyd and Mr. Eugene Harrison

Mr. Lloyd is the Branch Head, Land Reclamation Division, Regulatory Services, Alberta Environmental Protection. It was under his authority and direction that the EPOs were issued to Sarg Oils Ltd. and Sergius Mankow. Mr. Harrison is the Conservation and Reclamation Inspector who was directly involved with the inspections and discussions regarding action to be taken by Alberta Environmental Protection with respect to the sixteen sites in question. He issued the sixteen EPOs to Mankow and Sarg. These two witnesses were presented as a panel.

Mr. Harrison testified that he did not become aware of the sixteen sites and the problems associated with them until 1989 when he received complaints from some landowners. On checking with the ERCB he found Sarg listed as the operator, owner and licensee. In 1991 the ERCB advised Alberta Environmental Protection that they were going to apply for an order on Sarg for down hole abandonment. The ERCB received the order in 1991. Sarg did not comply with the order and the ERCB conducted the down hole abandonment in 1993.

Mr. Harrison visited the sites in 1993 with the ERCB during the time of the down hole abandonment and noted that some surface reclamation would be required before a Reclamation Certificate could be issued and the surface lease terminated. He advised Sarg of its responsibility as licensee to complete reclamation of the surface and obtain a Reclamation Certificate. Mankow told him that, in his opinion, Sarg was not responsible as it no longer owned the properties. Harrison reiterated that as licensee of record, Sarg must carry out the surface reclamation.

Mr. Harrison held reclamation enquiries at all sixteen sites on October 19 and 20, 1993. Prior to those dates he sent written notification to all parties. Sarg was represented by Mr. Mankow's sister, Elizabeth Moffat, who attended as an observer.

Mr. Harrison testified that none of the sites met the criteria (equivalent land capability) for reclaimed well sites. He explained capability involved the vegetation, the landscape, the contours of the land and the soil condition. For a Reclamation Certificate to be issued, the land must be able to support an operation similar to that which it had supported before the activity took place on the land. In these cases, the activity was drilling the well.

Mr. Harrison said that in determining the steps to be taken in rectifying the situation, he took into account Mr. Mankow's concerns regarding Sarg's ownership and license position. He said that Mankow deemed it an ERCB issue rather than one for Alberta Environmental Protection. He talked to his supervisors regarding the policy of whether or not responsibility should be attached to previous operators and he said he was aware there had been a number of previous operators. He also knew Sarg had done no work on six of the sites. However, in his opinion, both Sarg and Mankow qualified as operators under section 119 of the Act and he concluded that EPOs should be issued. On September 12, 1994, he issued sixteen EPOs to Sarg and Sergius Mankow jointly.

Mr. Lloyd explained that he is Mr. Harrison's supervisor and, in that capacity, he was directly involved in the discussions leading to the issuance of the sixteen EPOs. He said that these were the first EPOs issued under Part 5, section 125(a)(i) of the Act since its proclamation in September 1993.

Mr. Lloyd testified that Alberta Environmental Protection does not keep records on who the current licensee and operator of any oil and gas wells are. They rely on the records of the AEUB and deal with the last licensee of record. He has discussed this practise with the oil and gas industry and has come to the clear conclusion that the last licensee should be considered the operator and should be responsible for reclamation.

Under cross examination, Mr. Lloyd admitted that responsibility for reclamation could fall on other than the last licensee under specific conditions. These could include a case where the license is held by a "shell" company with no assets or a bankrupt company. A company's agent also meets the definition of "operator" under section 119 and can be held responsible if the company has insufficient funds to complete the reclamation. Mr. Mankow was named in all the EPOs to cover the possibility that Sarg could declare bankruptcy.

In answer to a question by the Board, Mr. Lloyd reiterated that these EPOs were the first issued under the new Act and admitted that the Sarg case had generally triggered the policy of holding the last licensee of record responsible for reclamation.

Mr. Lloyd was asked if the entry onto the sites by Sundial (which Sarg contends was illegal) was considered. Mr Lloyd said that this situation could only be settled through legal action between Sarg and Sundial. He said the Department would only look to Sundial for doing the reclamation if Sarg were bankrupt and had been struck from the corporate register. He was not sure that the activities of Sundial on the sites would bring it under the definition of "operator".

Mr. Harrison was asked under whose responsibility the flare and salt pits fell. He replied that the reclamation of these pits was part of the surface reclamation actions and therefore, is part of the work that must be done and inspected to obtain a Reclamation Certificate. Spills, however, are the responsibility of the AEUB.

Mr. David Sandmeyer and Mr. Russ Waddell

Mr. Sandmeyer is President of Rife Resources Ltd. and Campar Holdings, a position he has held for fourteen years. Previously he was employed by Amoco Canada Petroleum Company for eighteen years, becoming Vice President of production. He was the representative of the Canadian Association of Petroleum Producers (CAPP) on the Fund Advisory Committee of the Alberta orphan well program. Mr. Waddell is Land Manager for Wascana Energy Inc. and has 17 years working experience in all aspects of petroleum land management. He has had land managerial positions with Texaco Canada Resources and Esso Resources. He is a member of the Canadian Association of Petroleum Landmen (CAPL) and a member of the Advisory Council, Canadian Association of Petroleum Land Administration (CAPLA). These witnesses were called as a panel to provide expert testimony regarding oil and gas industry practises.

Mr. Sandmeyer testified that the accepted industry practise is that the last licensee, is clearly responsible for well abandonment and surface reclamation. This licensee is the only person who can enter into and work on the site. When questioned what the effect on the industry would be if this policy were set aside he answered that the result would be chaos if each operator were responsible for some part of the abandonment and reclamation. A new code of practise would be required. The costs to industry would rise sharply and every well site could be the subject of a law suit.

Mr. Waddell testified he was involved most of his working life with documentation on the sale and transfer of petroleum and natural gas and surface rights and oil and gas well licenses. He said it is accepted by the industry that the licensee of record is responsible for the costs of abandonment and reclamation; a company may enter into an agreement of purchase and sale of a property but that company is still responsible until the license is transferred.

Mr. Waddell admitted that the business practise regarding transfer of licenses is changing. In earlier years the purchaser was generally responsible for affecting the license transfer. Today, because parties are more aware of the liabilities involved, the vendors are taking a more active role because

they recognise that they are responsible until the license is actually transferred to the purchaser.

Mr. Waddell said that at the time Mankow made his deal with Sundial it was standard practise for the purchaser to handle the license transfer. When Sarg acquired the right to work on the site it also acquired the license and, therefore, the liability to abandon the wells and reclaim the surface land. The vendor should do a due diligence study to determine what potential liabilities are being obtained and ensure that the purchaser is carrying out the paper work of transferring the license.

Under cross examination by the Appellant, Mr. Waddell said that the licensee of record was included in the definition of "operator" in the *Oil and Gas Conservation Act.* When asked about Sundial's alleged illegal entry onto the land, Mr. Waddell said that the license holder should press charges because if someone is on the site illegally, the only person who can charge them is the license holder. He said that in cases of a sale and a purchase it was a matter of "buyer beware" because while a sale might close, the AEUB might still refuse to transfer the license and then that license holder was still responsible.

Mr. John Nichol

Mr. Nichol was originally scheduled to be a witness for the Department. However, Mr. McDonald declined to call him. It was only after Ms. Kubara insisted, and the Board agreed, that he attended the hearing. He was then called by the Appellant. Mr. Nichol has been with the ERCB since 1970 in various regulatory functions involving oil and gas drilling and production. In 1987 he was appointed Manager, Drilling and Production where he was responsible for coordination of the staff, operational, technical and financial aspects of licensing of the wells and production facilities. These duties involved all technical matters related to equipping, drilling, completion and abandonment operations. In March 1996, he was appointed to the position of Group Leader, Corporate Compliance, Facilities Division and in August 1996, he was appointed to the position of Division Leader, Utilities. Mr. Nichol was one of two ERCB representatives on the Orphan Well Steering Committee and is currently chair of the successor committee, the Fund Advisory Committee.

Mr. Nichol said he was familiar with the Sarg/Sundial well license transfer and he had recently reviewed the file. He testified that the process of dealing with orphan wells began in 1985 and by 1989 the ERCB had taken a firmer position in dealing with their requirements regarding the transfer of well licenses. He also referred to a letter from the ERCB to Sarg, Sundial and 3D in which the writer, Ron Paulson, states "Sarg Oils Ltd. remains the licensee of record and is currently responsible for the wells in accordance with the Oil and Gas Conservation Act."

Mr. Nichol pointed out that the delays in notification to Sarg of the license transfer problems were due to Sundial's deficient application. It was not the practice of the ERCB to notify anyone other than the applicant of delays in the transfer arising from deficiencies. However, when it became obvious that something was amiss, the other party was notified. Mr. Nichol emphasized that in 1988 the ERCB were not looking at the seller when the purchaser applied for a license transfer and that it was the seller's responsibility to make sure that all license transfer applications proceed.

Mr. Nichol testified that he was not aware that any ERCB personnel had either checked the activities of Sundial on the sites nor attended the work on site. If Sundial were trespassing at that time, it was up to the licensee, Sarg, to prosecute, not the ERCB.

SUMMARY OF THE ARGUMENTS

The Appellants

Ms. Kubara said that Sarg's status regarding the licenses for the sixteen sites is indeterminate because that whole matter is before the courts. Further, Sarg did not conduct any activity on six of the sites. All it did was cut the weeds and keep them under control. Sarg's entire interests in the sites had been sold to Sundial in 1988 although the well licenses did not transfer.

Ms. Kubara said that Mr. Mankow does not have a problem with the general policy of holding the last licensee responsible, but feels there should be room for exceptions. Mr Mankow believes that

the Inspector, Mr. Harrison should have given consideration that Sarg conducted no activities on six of the sites nor did it use the salt pits. He should also have considered Sundial's activities on the sites. Ms. Kubara noted that Mr. Lloyd had discussed the policies regarding reclamation applicable in Sarg's case. He should have considered that others would fall under the definition of "operator" in section 119 of the Act.

The properties were sold by Sarg to Sundial in 1988 and the EPOs were issued 6 ½ years later. The delay affected Sarg, and Ms. Kubara noted that sections 102(2) and 226 of the Act might apply to Sarg.

Ms. Kubara states in her written submission to the Board on behalf of Sarg:

> "Licensee of record" is not mentioned in the EPE Act as part of the definition of "Operator" nor is it mentioned anywhere else in the statutory scheme or in the Regulations with one exception. There is a 1994 amendment to the *Oil and Gas Conservation Act* where in Section 20.2(1), a requirement has been added that a licensee must abandon a well."

The purpose of the Act is set out in section 2(i) as follows:

> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (i) the responsibility of polluters to pay for the cost of their actions;

It is trite law that the statutes should be given interpretations which are consistent with their stated purpose. It follows that the Environmental Protection Orders for reclamation should be directed at the actual polluters at these sites who otherwise fit the definition of "operators".

Ms. Kubara argues that at the time Sarg sold the wells to Sundial the *Land Surface Conservation and Reclamation Act* was in force and that Sarg fell into only one of the definitions of "operator" provided in section 34 of that Act whereas Sundial fell into all four of the definitions provided.

Section 34 provides the following definition of "operator":

> 34 In this Part,
>
> (b) "operator" means
>
> (i) a person in whose favour a surface lease or right of entry is held, as an original party or by transfer or other document, or by amendment of the order, or the agent of that person,
>
> (ii) when a surface lease or right of entry order has been surrendered or terminated, the person in whose favour the surface lease or right of entry order was held at the time of surrender or termination,
>
> (iii) when a surface lease has expired, the person in whose favour the surface lease was held at the time of the expiry, or
>
> (iv) a person who, whether as principal or agent and whether as owner or not, uses or has used land to which this Part applies for any purpose enumerated in section 35;

Ms. Kubara argues that under neither the preceding *Land Surface Conservation and Reclamation Act* nor the Act is "licensee of record" provided as a criterion for defining "operator". Sarg remains a licensee of record through circumstances beyond its control; namely the delays and eventual failure to affect the license transfer.

Regarding the policy of the Department to hold the last licensee responsible, Ms. Kubara points to the policies regarding orphan wells that were developing since 1988. It was not until 1993 that strict criteria were set out in detail for the first time.

Ms. Kubara concludes by pointing out that Sarg was not a polluter and that it did not use the salt water pits, that Mankow was not a beneficiary from the wells in that he obtained no commercial production from the wells nor salvage value from the equipment thereon. These facts should have been considered by the Inspector before he issued the EPOs.

Mr. William McDonald

Mr. McDonald argued, on behalf of the Inspector, that Sarg and Mankow are both operators under section 119(b) of the Act in that Sarg, with Mankow as its agent, carried out an activity on the land in question and that land was specified land under section 119(f). Therefore, the Inspector acted properly in issuing the EPOs. There was a need to reclaim and he was able to identify the last operator. Further, the three elements required for an Inspector to issue an EPO, as set out in section 125 of the Act, were met.

He argued the Inspector has exercised his discretion properly in issuing the EPOs. The Act only comes into a wellsite when the AEUB has approved the abandonment. The wells were abandoned in 1993 by the ERCB and notification given to the Department in 1994. The Department then sought the owner and determined it to be Sarg as it was the last licensee. Mr. McDonald noted that industry recognizes and accepts the general policy that the licensee is responsible for reclamation and abandonment.

Although the Act as it was proclaimed in 1993 does not include "licensee of record" in the definition of operator, it does not mean this phrase was not used to define an operator by the Department. The fact that the amendments passed by the legislature in 1996 which included in section 119(b)(ii.1) the definition "'Operator' means ... the holder of a license, approval or permit issued by the Energy Resources Conservation Board for purposes related to the carrying on of an activity on or in respect of specified land", indicates that the Act was being amended to reflect a practise that was already in effect.

CONSIDERATIONS OF THE BOARD

In determining if the Inspector, Mr. Harrison, was correct in issuing the sixteen EPOs to Sarg and Mankow, the Board must examine several matters:

1. Were Sarg and Mankow "operators" on each of the sixteen sites for the purposes of the Act?
2. Should the Inspector have named other operators, for example, those who preceded Sarg on the lands in question in the EPOs?
3. Are there extenuating circumstances that should be considered?

Were Sarg and Mankow "operators" on each of the sixteen sites for the purposes of the Act?

Section 119(b) of the Act provides the definition of operator applicable to Part 5, the Conservation and Reclamation part of the Act. This section stated at the time the EPOs were issued in 1994 (i.e. before the Act was amended in 1996):

> 119 In this Part,
>
> (b) "operator" means
>
> (i) an approval holder who carries on or who has carried on an activity on or in respect of specified land pursuant to an approval,
>
> (ii) any person who carries on or has carried on activity on or in respect of specified land other than pursuant to an approval,
>
> (iii) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and
>
> (iv) a person who acts as principal or agent of a person referred to in subclause (i), (ii) or (iii).

The drilling, construction, operation or reclamation of a well other than a water well is defined as an activity in Section 3 of Schedule A of the Act.

Section 119(f) provides the definition of specified land:

> 119(f) "specified land" means specified land within the meaning of the regulations on or in respect of which an activity is or has been carried on, but does not include
>
> (i) land used solely for the purposes of an agricultural operation,

(ii) subdivided land that is used or intended to be used solely for residential purposes, or

(iii) any part of any subdivided land that is the site of a residence and the land used in connection with that residence solely for residential purposes;

Applying these three definitions results in the conclusion that anyone who drills, constructs, operates (or in other words, produces) or reclaims has conducted an activity in relation to an oil well and therefore is an operator.

From the evidence and documents filed with the Board it is evident that Sarg gained production from, and therefore operated the following wells: Turbo Battle South 14-25-45-20, Turbo Battle South 3-36-45-20, Turbo Battle South 6-36-45-20, Turbo Battle 10-11-46-20, Turbo Battle South 1-22-46-20 and Turbo Battle South 4-23-46-20. In addition, the battery sites at 4-36-45-20 and 11-11-46-20 and a battery and water disposal well Turbo Battle North 16-15-46-20 were used. Under section 119(b)(ii), Sarg is an operator of these properties. Mankow as President of Sarg, and therefore its agent (in terms of ostensible authority), is also an operator of the same properties under section 119 (b)(iv).

The evidence also provided that the following wells were not used and were shut in: Tenn A4 Joarcam 16-16-47-20, Tenn C1 Joarcam 1-21-47-20, Turbo Joarcam 2-21-47-20, Tenn C4 Joarcam 7-21-47-20, Turbo Joarcam 8-21-47-20 and Turbo Joarcam 9-21-47-20. The only work that Sarg did on these wellsites was the cutting of weeds which it also did on the other sites. The Inspector argued that the cutting of weeds should be classed as an activity since that work is done in connection with production. In order to establish this concept, it is necessary to examine the definitions of the functions that make up an activity as expressed in Section 3 of Schedule A of the Act. These functions are drilling, construction, operation and reclamation. The Act does not define drilling, construction or operation but section 1(ccc) defines reclamation in terms of surface activities:

1(ccc) "reclamation" means any or all of the following:

(iv) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land; (emphasis added).

The cutting of weeds on the land is a maintenance function and is, therefore, an activity. The Board concludes that Sarg conducted an activity on these six well sites. Sarg and Mankow are therefore operators on these sites even though they were shut in.

Should the Inspector have named operators previous to Sarg in the EPOs that were issued?

The evidence presented indicated that the normal practise of the Department is to hold the last operator responsible for surface reclamation of a wellsite. This practise is recognized and accepted by the oil and gas industry. To determine who the last operator is, the Department refers to the records of the AEUB. In this case, Sarg had sold the properties to Sundial but the license had not been transferred to that company. Therefore, Sarg was listed as the licensee of record and consequently named in the EPOs issued.

Regarding Mr. McDonald's submission of the amendment to the Act which brings licensee of record into the definition of operator and the influence of legislative intent, the Board notes that the most recent Environmental Appeal Board decision involved a judicial reference to the concept. Mr. Justice Medhurst (in the context of a privative clause) stated:

> "Given that the Supreme Court of Canada has endorsed a "pragmatic and functional approach" to determining the intent of the legislature, I believe the recent amendments to the EPEA which have added a broad privative clause to the Act can and must be taken into consideration when determining whether the EAB is entitled to curial deference. Examining successive amendments to legislation often reveals the direction in which a legislative policy is evolving. An interpretation favouring that evolution is appropriately preferred over possible alternatives: R. Sullivan, Driedger on the Construction of Statutes, 3d ed. (Toronto: Butterworth, 1994) at 452-453; Dowson vs. R. (1983), 2 D.L.R. (4th) 507 at 516 (S.C.C.). In the Pezim case Mr. Justice Iacobucci noted at p. 27-28 that a crucial factor in determining the legislative intent in conferring jurisdiction to an administrative tribunal is whether or not the agency's decisions are protected by a privative clause. Considering the recent amendment to the EPEA which adds a privative clause it would appear that it is the evolving intention of the legislature that decisions of the EAB be protected from judicial review. This intention would support a finding that the EAB is entitled to

curial deference."

Applying this reasoning to the amendments to the definition of operator infers that the legislature's intentions in this regard were evolving towards a position of holding the licensee of record responsible for the site under licence.

If, in addition to the last operator, or the licensee of record, others were required to be held responsible for abandonment and surface reclamation, records would have to be kept showing who had been operators. Moreover, to allow equitable distribution of the costs involved in abandonment and reclamation, those records would have to show how much work each had done and possibly how much production each had realized. The Board agrees with the expert testimony presented that such a situation could result in chaos in the industry, administrative logjams and extensive litigation. The Board concludes that the Inspector acted properly in naming only Sarg and Mankow as the licensee of record and the last operator.

Are there extenuating circumstances that should be considered?

The evidence shows that when Sarg sold the properties to Sundial in 1988, its President, Mr. Mankow, left the transferring of the license in the hands of the purchaser, Sundial. This was standard practise in the industry at that time. Sundial's application for transfer to the ERCB was deficient and the application was not approved. Meanwhile Sundial applied to have a further transfer of the license from Sundial to 3D. Again the application was deficient, as 3D was not an Alberta company, and so could not hold a license. Mr. Mankow, as he had left the matter of overseeing the well license transfer in the hands of his then solicitor was unaware of the delay and only learned of it in 1989. By that time, Sundial had already been on the properties, illegally, according to Mr. Mankow's evidence, lost interest in them and let the matter of the well license transfer drop leaving Sarg as the licensee of record.

The question is: should the facts surrounding the abortive transfer of the well license have been taken into account by the Inspector before issuing the EPOs? The Board recognizes that the administration

of such a transfer is not under the jurisdiction of the Department and is also outside its own jurisdiction.

The purchase and sale of this type of property and the resultant transfers of permits, leases and licenses should be monitored by the parties as good business practise. The parties should be cognizant of the liabilities involved and ensure that they are adequately covered. The Board believes that there are no extenuating circumstances to be taken into account in this case.

Other Considerations

In administering the Act, the Department must at all times recognize the purpose of the Act: to ensure that the health of the environment is preserved. Section 2 provides:

> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
>
> (b) the need for Alberta's economic growth in an environmentally responsible manner and the need to integrate environmental protection and economic decisions at the earliest stages of planning;
>
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
>
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
>
> (e) the need for Government leadership in areas of environmental research, technology and protection standards;
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environmental through individual actions;
>
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;

(h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

(i) the responsibility of polluters to pay for the cost of their actions;

(j) the important role of comprehensive and responsive action in administering and enforcing this Act.

Ms. Kubara raises the point that one of the purposes of the Act is to require polluters to pay for their actions and suggests that previous operators, who, she says, were polluters, should share some of the costs of reclaiming the sites. The Board agrees that "polluters should pay" requiring "comprehensive and responsive actions in administering the Act".

In passing the Act, the legislature was directing that the environment be used wisely and not in a way that would hinder the economic growth of Alberta. The same reasoning applies to its administration: the cost of regulating the environment should not exceed the benefits of the regulation. The actions and decisions of the regulators should give a strong message the Act must be obeyed. But, in the interests of fairness, the penalties should not be overly destructive. With this in mind, the Board probably would not have named Sergius Mankow as an "operator" even though, as President of Sarg, he is the primary officer and agent of that company. To name both the small company and its President is, in this case, oppressive. Given, however, the broad definitions found in the Act as described above, and given the instructions of Mankow regarding the surface and subsurface activities, the Board does not believe the decision of the Director is contrary to law. The Board does recommend to the Department that they carefully review the matters considered in this case and in other similar cases to ensure that their decisions are fair, equitable and consistent.

The Act puts a strong obligation on the purchaser of a property to ascertain the liabilities that he may be acquiring with the property. Due diligence must be exercised which includes an audit of the environmental liabilities present. At the time Mankow purchased the sixteen properties, environmental audits were being conducted for potential purchasers but these audits were not as much a part of regular business practice as they are today. There may be some excuse for Mankow's failure to cause such an audit to be carried out, but not to forego thorough site investigations.

CONCLUSIONS

The Board has determined that the Inspector was correct in naming Sarg and Mankow as the operator of the following wells and properties:

Well Name	EPO issued
Turbo Battle South 14-25-45-20	94-06
Turbo Battle South 3-36-45-20	94-07
B.A.CS Rankin BATLS 4-36-45-20	94-08
Turbo Battle South 5-36-45-20	94-09
Turbo Battle South 6-36-45-20	94-10
Turbo Battle 10-11-46-20	94-11
Turbo Battle North 16-15-46-20	94-12
Turbo Battle South 1-22-46-20	94-13
Turbo Battle South 4-23-46-20	94-14
A Battery Site 11-11-46-20	94-21

The Board has determined that, although the following wells were shut in and never used by Sarg, Sarg did carry out activities by cutting the weeds on the site. Given the structure of the Act, the Inspector was, therefore, correct in issuing the EPOs to Sarg and its agent, Mankow, who either gave directions to the corporation or received direction from the corporation that the weeds should be cut:

Well Name	EPO issued
Tenn A4 Joarcam 16-16-47-20	94-15
Tenn C1 Joarcam 1-21-47-20	94-16
Turbo Joarcam 8-21-47-20	94-17
Tenn C4 Joarcam 7-21-47-20	94-18
Turbo Joarcam 2-21-47-20	94-19
Turbo Joarcam 9-21-47-20	94-20

RECOMMENDATIONS

1. The Board recommends that the Minister of Environmental Protection dismiss the appeals and confirm the decision of the Inspector relating to EPOs 94-06, 94-07, 94-08, 94-09, 94-10, 94-11, 94-12, 94-13, 94-14, 94-15, 94-16, 94-17, 94-18, 94-19, 94-20, and 94-21.

2. The Board recommends that the Minister of Environmental Protection direct the Inspector of Land Reclamation to immediately examine the criteria followed when deciding what parties are to be the recipients of Environmental Protection Orders to ensure that the decisions arrived at are timely, fair, equitable and consistent.

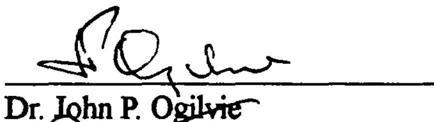
3. Once these criteria are developed they should be made publicly available.

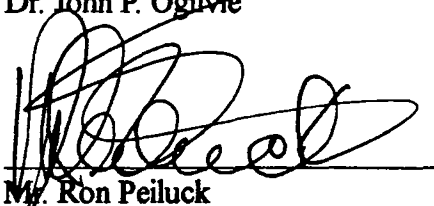
Further, with respect to section 92(2) and 93 of the *Environmental Protection and Enhancement Act*, the Board recommends that copies of this Report and Recommendations and of any decision by the Minister be sent to the following parties:

- Sarg Oils Ltd. and Sergius Mankow;
- Ms. Sean Kubara, Millar, Thiessen & Keith;
- Mr. William McDonald, Environmental Law Section, Alberta Justice, representing the Director, Land Reclamation Division, Alberta Environmental Protection; and
- Chair, Alberta Energy and Utilities Board.

Dated December 5, 1996, at Edmonton, Alberta.

Dr. M. Anne Naeth


Dr. John P. Ogilvie


Mr. Ron Peiluck

ORDER

I, Ty Lund, Minister of Environmental Protection:

yes Agree with the Recommendations of the Environmental Appeal Board and order that they be implemented.

____ Do not agree with the Recommendations of the Environmental Appeal Board and make the alternative Order set out below or attached.

____

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____

____

Dated at Edmonton this 16 day of December 1996.

Ty Lund
Honourable Ty Lund
Minister of Environmental Protection

___ Refer to Attachments (only if applicable)