



# Oil and Gas Appeal Tribunal

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## DECISION NO. 2015-OGA-006(a)

In the matter of an appeal under section 72 of the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36.

<b>BETWEEN:</b>	Anthony James Formby Eleanor Gertrude McDaniel (Deceased) Jeanette Eleanor Formby Maryann Catherine Liddle Maureen Ralph Michael Forhan Norman Forhan Olga Jeanette Formby Paul Charles Formby	<b>APPELLANTS</b>
<b>AND:</b>	Oil and Gas Commission	<b>RESPONDENT</b>
<b>AND:</b>	Pacific Northwest LNG Ltd.	<b>THIRD PARTY</b>
<b>BEFORE:</b>	Jeffrey Hand, Panel Chair	
<b>DATE:</b>	January 19, 2016	
<b>PLACE:</b>	Vancouver, BC	
<b>APPEARING:</b>	For the Appellant: For the Respondent: For the Third Party:	Salim M. Hirji, Counsel Sara J. Gregory, Counsel Rick Williams and Kristen Brewer, Counsel

## APPEAL

[1] This appeal concerns a permit issued by the Oil and Gas Commission (the "OGC") on July 24, 2015 (the "Permit"). The Permit authorizes the Third Party, Pacific Northwest LNG Ltd. ("PNW") to construct, operate and maintain an oil and gas road on property owned by the Appellants.

[2] The Appellants submit that the OGC failed to properly consider whether a road right-of-way of 75 metres in width was necessary for construction of the road. The Appellants seek an order reducing the width of the right-of-way or, alternatively, an order remitting the matter back to the OGC for reconsideration.

[3] The Oil and Gas Appeal Tribunal has the authority to hear this appeal under section 72 of the *Oil and Gas Activities Act*, S.B.C. 2008 c. 36 (“OGAA”). Section 72(6) of the OGAA gives the Tribunal the power to “confirm, vary or rescind” the determination, or to send the matter back with directions to the person who made the determination.

[4] An appeal by a land owner is limited in scope by section 72(2) of the OGAA, which provides, in part, that a land owner:

... may appeal a determination under this section only on the basis that the determination was made without due regard to

(a) a submission previously made by the land owner under section 22(5) or 31(2) of this Act ...

...

[Emphasis added]

[5] Section 22(5) of the OGAA states:

(5) a person, other than the applicant, may make a submission to the commission with respect to an application or a proposed application under section 24 [application for permit and authorization].

## **BACKGROUND**

[6] The Appellants are joint owners of certain lands in the District of Port Edward, British Columbia, more particularly known and described as:

Assigned Block A, District Lot 41, Range 5, Coast District Plan 850  
Except Plan 1468  
PID 014-813-157 (the “Lands”)

[7] The Lands are located approximately three kilometres south of Port Edward and to the immediate east of Lelu Island. A Canadian National Railway Company (“CNR”) railway line runs in a north/south direction between the Lands and Lelu Island. The nearest public road is Skeena Drive, which runs in a north/south direction just beyond the eastern boundary of the Lands along the British Columbia mainland.

[8] PNW is the general partner of the Pacific Northwest LNG Limited Partnership, a limited partnership formed for the purpose of constructing, owning and operating a liquefied natural gas facility on Lelu Island (the “Facility”).

[9] In 2013, PNW began to consider how to access Lelu Island from Skeena Drive. It developed a plan to build a road across the Lands and, from there, to build a bridge over the railway lines and the Lelu Slough onto Lelu Island.

[10] In late 2014, PNW opened a dialogue with the Appellants regarding this plan. These discussions with the Appellants included the possibility of purchasing the Lands, or otherwise reaching an agreement on allowing access to the Lands for construction of the proposed road.

[11] On December 19, 2014, PNW sent an "invitation to consult" to the Appellants, advising them of PNW's intention to apply to the OGC for an oil and gas road permit. The invitation to consult invited the Appellants to enter into consultation with PNW, and to provide any written response to PNW with respect to securing the oil and gas road permit.

[12] The Appellants responded in writing to the invitation to consult on January 6, 2015 voicing their objection to the proposed road. The Appellants objections are summarized as follows:

- 1 An agreement between the Appellants and PNW granting access to the Lands has not yet been secured;
- 2 The proposed road would bifurcate the Lands, thereby limiting the future potential for commercial or recreational use;
- 3 PNW had not yet made a final investment decision for the proposed LNG plant; and
- 4 The Appellants proposed an alternative route approximately one kilometre south of the Lands, which would provide access to Lelu Island via Stapledon Island.

[13] The Appellants retained a real estate appraiser, Greg Simons, to advise them in their consultation with PNW.

[14] On January 19, 2015, representatives of PNW met with two of the Appellants, Anthony Formby and Maureen Ralph, along with Mr. Simons. Minutes of that meeting state only that the proposed location for the access road was discussed. Specifics of that discussion were not recorded. Anthony Formby, the only witness called by the Appellants, testified that there was some discussion that the width of the roadway itself might be as little as 20 metres.

[15] On January 22, 2015, PNW sent digital drawings of the proposed roadway by email to Greg Simons. This email and attached drawings, which was entered into evidence at the hearing, show the proposed roadway in both plan and section views. The plan view, or overhead view, shows the edge of a fill embankment supporting the roadway as a dotted line. The section view drawing shows the profile of the proposed fill used to support the road.

[16] On February 6, 2015, PNW made two requests of the OGC:

- (a) PNW asked to install a security gate across the proposed access road near the intersection of the access road and Skeena Drive; and
- (b) PNW requested an exemption from section 16 of the *Oil and Gas Road Regulation*, B.C. Reg. 56/2013, which would otherwise prevent PNW from restricting public access to the road.

[17] On February 19, 2015, PNW submitted its road permit application to the OGC. The cover letter to that application indicated:

- (a) The road would be 208 metres long and 13.3 metres wide, within a construction corridor 103 metres wide;

(b) Within this construction corridor there would be an embankment to allow for the construction of permanent ancillary sites, including a guard post, a parking lot, and a security area; and

(c) The drawings submitted with the application were for one of the road designs under consideration, being the one that provided the largest footprint of all options.

[18] The Appellants objected to the road being closed to public access. In addition, they raised concerns about PNW's proposal to construct a guard post, including a security gate, a security area, and a parking area. However, those issues became moot when PNW amended its road permit application on March 11, 2015, removing its request to construct the security area, guard post, and parking area and thereby restricting its permit application to the construction of a road only, with no ancillary structures.

[19] The issue of closing the road to public access also became moot on July 22, 2015, when PNW withdrew its request to install a security gate and its request to be exempted from the requirements of section 16 of the *Oil and Gas Road Regulation*.

[20] On April 15, 2015, PNW amended its road permit application by deleting any reference to the construction of ancillary sites. The application still sought a maximum right-of-way width of 103 metres for the proposed road.

[21] Natasha Horsman is the Authorizations Manager with the OGC who reviewed PNW's road permit application, and was the statutory decision-maker pursuant to the authority delegated to her under section 7 of the *OGAA*.

[22] On May 12, 2015, Ms. Horsman wrote to PNW to say that she was conducting a review of its road permit application. Ms. Horsman asked for clarification as to why PNW was seeking a road right-of-way of 103 metres in width when the road itself was said to be only 13.3 metres wide.

[23] PNW responded the following day. PNW advised that it had reviewed its engineering design and determined that it could reduce the right-of-way from 103 metres in width to 75 metres. It stated that this width of right-of-way was necessary in order to support the fill embankment required to construct the roadway.

[24] On June 2, 2015, Ms. Horsman asked PNW to provide the technical rationale to explain why this amount of fill was necessary. PNW advised that this volume of fill was required in order to construct the roadway at the required elevation such that it would have the necessary clearance over the CNR railway tracks. PNW also supplied Ms. Horsman with copies of the design drawings that had previously been provided to Mr. Simons in January 2015, showing the road design both in plan and section view.

[25] PNW explained that the bridge had to be built at least 11 metres above the railway tracks to provide sufficient clearance for railway cars. In order to achieve this elevation, the Lands would have to be built up to have the road meet this bridge crossing.

[26] Subsequent to these discussions with Ms. Horsman, PNW amended its road permit application by reducing the maximum right-of-way width to 75 metres.

[27] On July 24, 2015, Ms. Horsman issued the Permit to PNW under section 25(1) of the *OGAA*, allowing it to construct, operate and maintain an oil and gas road within the 75 metre corridor shown on the design drawings submitted, subject to the following conditions:

1. The permit holder must construct and install all bridges and culverts in accordance with section 6 of the *Oil and Gas Road Regulation*, ...
2. If artifacts, features, materials or things protected under section 13(2) of the *Heritage Conservation Act* are identified, the permit holder must, unless the permit holder holds a permit under section 12 of the *Heritage Conservation Act* ... in respect of that artifact, feature, material or thing
  - (a) immediately cease all work in the vicinity of the artifacts, features, materials or things,
  - (b) immediately notify the Commission and the Archeology Branch of the Ministry of Forest, Lands and Natural Resources and Operations, and
  - (c) refrain from resuming work in the vicinity of the artifacts, features, materials or things except in accordance within an appropriate mitigation plan that has been prepared in accordance with the *Heritage Conservation Act* and approved by the Commission.
3. Except for the purposes of conducting investigations, surveys and other low impact activities that require only minimal brush and scrub cleaning, the permit holder must not commence construction on the road until such time as the primary oil and gas activity has been authorized by the BC Oil and Gas Commission.
4. Prior to completion of the construction of the road, the permit holder must develop a traffic management plan and provide information regarding the plan to the owners ... [of the Lands].

[28] The Appellants filed a Notice of Appeal from Ms. Horsman's decision on August 7, 2015.

[29] On October 16, 2015, the Surface Rights Board issued an Order allowing PNW to access the Lands.

[30] At the time of the hearing, the Facility had not been constructed.

## **ISSUE**

[31] Whether the OGC gave "due regard" to the Appellants' concerns before granting the Permit?

## DISCUSSION AND ANALYSIS

### **Whether the OGC gave “due regard” to the Appellants’ concerns before granting the Permit?**

[32] This appeal is limited in scope by sections 72(2) of the *OGAA* which grants the Appellants a right of appeal on the grounds that the Permit was issued by the OGC without due regard to the concerns that had been raised by the Appellants. The Appellants do not say that the Permit should not be allowed across their property, nor do they say that Ms. Horsman failed to give due regard to any of the concerns raised in their letter of January 6, 2015. Rather, the Appellants submit that the size of the right-of-way is excessive, and that the embankment intended to support the roadway is not required. The Appellants also submit that the OGC failed to properly consider whether or not the 75 metre right-of-way width set out in the Permit was actually required in order to support the construction of the road. The appeal is confined solely to the issue of the width of the right-of-way.

[33] Mr. Formby was the only witness to testify on behalf of the Appellants. He said that he did not appreciate the scale and extent of the embankment that would be constructed to support the road until after this appeal was commenced. However, on January 22, 2015, Gerry Fraser of PNW sent an email with certain attachments to Greg Simons. Mr. Formby confirmed that Mr. Simons was a land appraiser who was providing advice to the Appellants with respect to PNW's proposed roadway. The Panel notes that Mr. Fraser's January 22nd email was sent to Mr. Simons email address, but the message was directed to both Mr. Formby and Mr. Simons.

[34] This January 2015 email attached drawings in both plan and section view of the proposed roadway and supporting embankment. The section view clearly shows that fill would be placed on the Lands at a depth of up to 10 metres in order to bring the roadway level with the proposed bridge that would cross over the railway and Lelu Slough.

[35] Mr. Formby testified that he did not understand these drawings. However, the Panel does not accept this testimony as establishing that, as of January 2015, the Appellants did not fully appreciate what was being proposed for the Lands. Firstly, the drawings attached to the January 2015 email clearly show a considerable expanse of embankment supporting the roadway, even if one did not take the time to scale the dimensions. Likewise, the presence of fill supporting the roadway is clearly shown, and there is a notation showing it as deep as nearly 10 metres at its maximum depth. Mr. Formby ought to have known this based on a review of the drawings.

[36] Secondly, while Mr. Simons never testified at the hearing, as a land appraiser, it is reasonable to expect that he would have some familiarity interpreting design drawings relating to land. Certainly, if either Mr. Simons or Mr. Formby had any doubts about the depth of fill required for the road, they should have sought clarification from PNW.

[37] The Panel also notes that Mr. Formby testified that he received PNW's initial application to the OGC on or about February 2015, and the narrative attached to

this submission clearly identifies the construction corridor for the road as being 103 metres wide with a supporting embankment. Looking at PNW's submission, and the earlier email from Mr. Fraser dated January 22, 2015, the Panel finds that, as of February 2015, the Appellants were aware that PNW was proposing the construction of a roadway supported by a significant embankment within a right-of-way corridor 103 metres in width. Accordingly, the Panel does not accept that the Appellants were unaware of the full scope of what was being proposed prior to the OGC considering the permit application.

[38] Ms. Horsman testified about her review of the application made by PNW, and her consideration of the concerns raised by the Appellants.

[39] While the Appellants' only issue on this appeal relates to the width of the road right-of-way, not the other basis on which the Permit was granted, the Panel will briefly review the whole of Ms. Horsman's evidence concerning the approval process.

[40] The Appellants' concerns were expressed to the OGC in two documents: the first being a letter from Mr. Formby dated January 6, 2015; the second being a letter from the Appellants counsel, Salim Hirji, dated July 17, 2015. Their concerns are summarized as follows:

1. PNW and the Appellants had not yet agreed on any arrangement to allow access to the Lands.
2. The road will divide the property, thus limiting its future commercial or recreational uses and impacting the future value of the property.
3. PNW has not yet made a final investment decision to proceed with the LNG plant on Lelu Island.
4. There is an alternative route south of the Lands via Stapledon Island.
5. PNW was seeking approval to restrict public access to the road in violation of section 20 of the regulation.
6. There is no reason given for PNW to install a security gate, security kiosk and parking area on the Lands, and these structures are not ancillary to the road.

[41] Items 5 and 6 are not relevant to the appeal because PNW withdrew its request to construct the ancillary facilities, and it withdrew its request to be exempt from the requirements to keep the road open to the public, prior to the permit application being considered by the OGC.

[42] The Panel finds that the other 4 items were given due consideration by Ms. Horsman in the following way.

[43] The Appellants' concern that they had yet to reach an agreement with PNW regarding access to the Lands was made known to Ms. Horsman, and was appropriately dealt with by providing advisory guidance within the Permit directing PNW to obtain access to the Lands, either by agreement with the Appellants, or by order of the Surface Rights Board, before construction of the road begins.

[44] The Appellants' concern that the economic impact on the value of the property was yet to be addressed, was properly considered by Ms. Horsman in her

rationale for the granting of the Permit which was, again, subject to legal arrangements being concluded to allow access to the Lands. She rightly observed that the OGC does not have the legislative authority to become involved in compensation discussions, or to stipulate the appropriate compensation. These are matters between the parties and/or within the jurisdiction of the Surface Rights Board.

[45] The third concern raised by the Appellants is that the Permit should not have been granted until such time as PNW made a final investment decision to proceed with the Facility on Lelu Island. In the Panel's view, Ms. Horsman appropriately dealt with this concern by making it a condition that construction of the roadway could not proceed until a final investment decision was made by PNW (i.e., condition 3).

[46] The fourth concern was the Appellants' preference that PNW access Lelu Island through Stapledon Island to the south of the Lands. In considering this issue, Ms. Horsman concluded that the route through the Lands would result in less disturbance to wetlands, forested lands and marine habitat than would the southern route. The Stapledon Island route would be longer, require additional road alignments to Skeena Drive, and would require two crossings over Lelu Slough. In contrast, a single bridge was required if access was made via the Lands. The use of a single bridge, as opposed to two bridges, would reduce the impact to fish habitat and riparian areas. The Appellants do not challenge any of these findings made by Ms. Horsman.

[47] For the reasons above, the Panel finds that Ms. Horsman gave due regard to the issues raised by the Appellants in their January 6, 2015 letter. In addition, Ms. Horsman went further and considered the right-of-way width.

[48] In reviewing PNW's initial road permit application, Ms. Horsman noted two issues of concern for which she sought clarification from PNW. These concerns are directly relevant to this appeal. The first was the size of the road right-of-way, which was then stipulated at 103 metres. Ms. Horsman asked PNW whether this was necessary for the construction of the roadway. The second issue concerned the following ancillary structures that were identified in PNW's initial permit application:

- (a) a security area,
- (b) a guard post, and
- (c) a parking area.

[49] In her May 12, 2015 email, Ms. Horsman sought clarification from PNW on both of these issues. In terms of the ancillary structures, she advised PNW that the OGC does not regulate these types of ancillary activities on private land, and that any authorization which might be granted for the road would not authorize ancillary activities on private land. Secondly, Ms. Horsman sought clarification as to whether the 103 metre wide right-of-way allowance was, in fact, necessary.

[50] In response, PNW amended the permit application to delete any reference to the three ancillary structures, making the first concern moot.

[51] In terms of the roadway allowance, PNW indicated that it could reduce the right-of-way to approximately 75 metres to allow for the construction of the fill embankment to support the raised elevation of the roadway. PNW advised that approximately 25 metres was needed on the northwest side of the road to incorporate the fill that would be used to support the road, and approximately 50 metres was needed on the southeast side of the road. A small sketch showing this revised 75 metre right-of-way was submitted to the OGC.

[52] In further response to this revised road right-of-way width, Ms. Horsman followed up with PNW on June 2, 2015, asking for the technical rationale to justify the need for a 75 metre right-of-way when, in Ms. Horsman's view, a typical road right-of-way width for an oil and gas road is no more than 30 metres.

[53] Responding that same day, PNW confirmed that the 75 metre right-of-way was necessary to support the fill embankment required to build the roadway up to the height required to span the railway tracks.

[54] With this information from PNW, Ms. Horsman testified that she next considered the road clearing width provisions found in section 5 of the *Oil and Gas Road Regulation*, which states:

- 5 A road permit holder who constructs an oil and gas road must ensure that the road's clearing widths are within the road right of way and are not less than the width necessary to ensure all of the following:
  - (a) the safety of permit holders using the oil and gas road;
  - (b) the integrity of the topography of the area;
  - (c) the maintenance of drainage of water in the area;
  - (d) the stability of terrain in the area;
  - (e) the safe conduct of operations, considering all of the following:
    - (i) the placement of pits, quarries, landings or waste areas;
    - (ii) the storage of bridge or culvert material;
    - (iii) the amount of area required to operate equipment within the clearing width, including equipment turnaround sites;
    - (iv) the need to remove snow;
    - (v) the need to construct fencing or other ancillary structures.

[55] Based on the revised design submitted by PNW and its rationale, Ms. Horsman testified that she was satisfied that a 75 metre right-of-way was necessary to ensure the safe construction of the roadway, road stability, and the integrity of the demography of the surrounding area.

[56] On July 24, 2015, Ms. Horsman issued the Permit, subject to conditions, that would allow PNW to construct an oil and gas road and turnaround within the 75 metre right-of-way designated on the plan drawing submitted to the OGC. Ms. Horsman also issued her rationale for issuing the Permit in a document, also dated July 24, 2015.

[57] The Panel finds that Ms. Horsman gave due regard to the concerns of the Appellants before issuing the Permit. Further, despite the fact that the Appellants did not specifically raise the width of the roadway as a concern, Ms. Horsman independently followed up with PNW to determine whether the 103 metre wide right-of-way was necessary. When PNW reduced the right-of-way to 75 metres, Ms. Horsman sought a specific engineering rationale for this revised width.

[58] In his closing submission, counsel for the Appellants argued that Ms. Horsman never received a clear rationale from PNW regarding the need for a right-of-way width of 75 metres. The Panel does not agree. The evidence clearly reveals that Ms. Horsman received a rationale from PNW, which she found to be acceptable.

[59] The Panel is satisfied that Ms. Horsman gave due consideration to the need for the 75 metre wide right-of-way allowance for the proposed road based on the information that she received from PNW.

[60] PNW called Dr. Tucklong Chan as a witness. Dr. Chan holds a PhD in chemical engineering, and was responsible for overseeing the feasibility study for the LNG facility, including the design efforts that went into the preparation of the road design.

[61] Dr. Chan testified that the right-of-way width of 75 metres was reduced from 103 metres after PNW amended its permit application by removing its request for the guard house, security gate, and parking area. Dr. Chan testified that PNW's engineering department had determined that the embankment width of 75 metres was the minimum necessary to safely support the fill.

[62] Dr. Chan also testified that this width of embankment is necessary to provide for a traffic turnaround, and a flat area for staging equipment and materials for the construction of the bridge.

[63] Counsel for the Appellant submits that the Panel should find that the size of embankment proposed is not required to support the roadway, and that an embankment of this size is only there to allow PNW to install the guardhouse and parking area. However, the Appellants provided no engineering evidence to demonstrate that the 75 metre embankment width is not necessary to support the proposed roadway. The Panel accepts Dr. Chan's evidence that the reduction in the embankment width, from the original 103 metres to 75 metres, was proposed by PNW after further engineering review and, specifically, because the ancillary structures had been deleted from its permit application. The Appellants have not tendered any evidence to establish that the road construction can be undertaken safely without an embankment width of this size, or that the embankment is not necessary to safely allow for the staging of construction equipment and materials.

[64] Counsel for the Appellants also submits that Ms. Horsman ought not to have granted the Permit in the absence of PNW submitting finalized construction drawings, given that some of PNW's design proposals are not consistent. Specifically, the Appellants state that one design proposal shows the location of the roadway falling in the center of the right-of-way (with 37.5 metres of embankment falling on either side), whereas, in another proposal, the roadway is located with 25 metres of the embankment to the north, and 50 metres to the south.

[65] Ms. Horsman testified that she did not require finalized engineering drawings in order grant this Permit. The Permit allows the roadway to be constructed in the future. It was sufficient for her to understand the rationale for the 75 metre right-of-way, and to allow PNW to construct its road on any alignment within that right-of-way.

[66] The Panel finds that nothing turns on the difference between the drawings submitted by PNW to Ms. Horsman. The drawings are preliminary and not final. The Permit designates the maximum width of the right-of-way within which the road can be constructed. In the Panel's view, no additional detail was required at the time that the Permit was issued.

[67] The Panel finds that the design drawings submitted by PNW to Ms. Horsman were sufficiently detailed to show the proposed road and turnaround falling somewhere within the 75 metre right-of-way. The maximum boundaries of that embankment are identified in the design drawings, and the Permit granted by Ms. Horsman does not allow those boundaries to be exceeded. In addition, the scaled drawings submitted by PNW show the depth of the fill necessary to increase the road elevation. The Panel finds that Ms. Horsman had sufficient detailed information to grant the Permit.

[68] In conclusion, the Panel finds that Ms. Horsman gave due regard to the concerns raised by the Appellants, that she diligently undertook a complete review of PNW's permit application, and that she considered all issues that she was required to under the *Oil and Gas Road Regulation*. The Appellants have not demonstrated otherwise.

## DECISION

[69] In making this decision, the Panel of the Tribunal has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated herein.

[70] For the reasons provided above, the Panel confirms the Permit.

[71] Accordingly, the appeal is dismissed.

"Jeffrey Hand"

Jeffrey Hand, Panel Chair  
Oil and Gas Appeal Tribunal

April 13, 2016