File No. RE 6809 Decision No. 2008/0182

SURFACE RIGHTS ACT
RSA 2000
Chapter S-24
(hereinafter "the *Act*")

Before:

SURFACE RIGHTS BOARD
(hereinafter "the Board").

IN THE MATTER OF certain lands subject to a right of entry order in the West Half of Section 13, Township 25, Range 29, West of the 4th Meridian, in the Province of Alberta (hereinafter referred to as "the said land").
Excepting thereout all Mines and Minerals.

B E T W E E N:

NEXEN INC.,

Operator,

- and -

FARM AIR PROPERTIES INC.,
HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED BY THE MINISTER OF INFRASTRUCTURE
and
GENESIS LAND DEVELOPERS LTD.,

Respondents.

D E C I S I O N

Upon application by the Respondent Farm Air Properties Inc. for review of the rate of compensation payable in respect of a right of entry order in the said land; and upon the Board being satisfied that conditions precedent to the application had been met; the Board held a hearing on the application on January 14, 2008, to January 18, 2008, at Calgary, Alberta.

PRESIDING BOARD:

- N. Allen Maydonik, Q.C., Presiding Chair
- Karen R. Fraser
- D. A. Sibbald

APPEARANCES:

For the Operator:

- L. H. Olthafer and A. W. Hayter, with the law firm Fraser Milner Casgrain LLP, Legal Counsel;
- J. R. MacEachern, with Nexen Inc.;
- G. Denham, A.Ag., with Nexen Inc.;
- B. Romanesky, President, Romanesky Urban Planning and Management Ltd.; and
- Brian S. Gettel, B. Comm., AACI, of Gettel Appraisals Ltd.

For the Respondent Farm Air Properties Inc.:

- J. P. Peacock, Q.C., with the law firm Peacock Linder & Halt LLP, Legal Counsel;
- J. L. McCready, with the law firm Peacock Linder & Halt LLP, Legal Counsel;
- Robert Manning, President of Farm Air Properties Inc.;
- Robert A. Berrien, P.Ag., A.R.A., President, Berrien Associates Ltd., Appraisers;
- F. Lourido, P.Eng., Associate, Urban Land Engineering, Stantec Consulting Ltd.; and
- S. Paton, MCIP, Principal, with Stantec Consulting Ltd..

The other Respondents were not represented although duly notified of the hearing.

A. BACKGROUND

By letter dated September 25, 2003, Farm Air Properties Inc. applied to the Board pursuant to Section 27, or alternatively, Section 29 of the *Act* for a review of the compensation payable pursuant to a Right of Entry Order No. 13466, as amended, with respect to a portion of a well site and access road ("the Site") on lands legally described as the North West Quarter of Section 13 in Township 25, Range 29, West of the 4th Meridian. The parties are in agreement that the Site encompasses 4.03 acres. The "effective date" for a review under Section 27 of the *Act* is November 18, 2003.

It is important to note at the outset that this Hearing relates only to the portion of the Site owned by Farm Air Properties Inc. and not the adjacent portions owned by the other Respondents.

The Hearing was scheduled to proceed in May 2004 but at the request of the parties was rescheduled on several occasions and ultimately proceeded for five days commencing on January 14, 2008.

The Site is located within the City of Calgary and as such the land use issues are substantially different than those which arise in the vast majority of matters before the Board.

Due to the length of the Hearing and the issues raised, the Board arranged to have a court reporter present throughout the Hearing and a transcript of the proceedings was created.

B. EXHIBITS:

A list of the Exhibits filed at the Hearing is attached as an Appendix to this Decision.

C. FACTUAL OVERVIEW

Although no formal agreement was provided to the Board, the evidence established that the vast majority of the background or historical facts are not in dispute. As such, a chronology summarizing those facts is set out below to provide context to the matters discussed in the remainder of this Decision.

The original Order Granting Right of Entry was granted on November 18, 1958 such that the effective date for this review is November 18, 2003. The original compensation was determined in the same Order.

A gas well was drilled on the site in the late 1950's. The well was in production from one zone for several years before 1971 when it was shut in. In the early 1970's, a dual zone well was completed and gas flowed from both zones for several years until 1977 when the Crossfield Wabamun A zone was shut in but gas continued to flow from Rundle B.

In February 1979, the Alberta Energy Resources Conservation Board ("ERCB") issued Interim Directive ID 79-2 which required a 100 meter setback of residential development from new sour gas facilities. This was replaced in December 1981 ERCB Interim Directive ID 81-03 which provided revised requirements but the 100 meter setback continued to be in force.

In late 1981, Cathton Holdings Ltd. acquired approximately 2,300 acres of land including the Site in a share purchase acquisition. The land transfer was registered in February 1982.

In November 1982, the well was reconfigured to provide for water disposal into Wabamun A but gas continued to flow from Rundle B.

In June 1984, the Council of the City of Calgary ("the City") approved Bylaw 3P84 being the Saddle Ridge Area Structure Plan which required a 300 meter development setback from sour gas wells.

In 1989, the lands in question were annexed by the City and the Saddle Ridge Area Structure Plan was amended to include the Site and adjacent land.

In 1990, the lands were transferred from Cathton Holdings Ltd. to its 100 per cent owned subsidiary, Cathton Developments Ltd., which was renamed Farm Air Properties Inc. ("Farm Air") in 1993.

In April 1993, the Rundle B well was shut in; while water disposal into Crossfield Wabamun continued.

Stanley Environmental reported to Farm Air in July 1998 that "the presence of a sour gas compressor station lease within the boundaries of the Site may have resulted in chemical of hydrocarbon impacts to the site" and that "prior to further development, further environmental assessment is recommended."

In 2000, Farm Air retained Stantec Consulting Inc. ("Stantec") to begin the planning process. In March 2003, Stantec, on Farm Air's behalf, provided the City with a Submission of an Outline Plan and Land Use Redesignation for Saddlebrook Stage 1 for NW-13-25-29-W4M. This application covered 107.77 acres and proposed that the 40.4 acres within the City's 300 meter setback remain as urban reserve. The submission stated the "this Area will be the subject of a future land designation once the well has been abandoned."

As part of the development review process, the City identified a number of concerns the most significant of which related to financial requirements for transportation issues. Negotiations resulted in an agreement on that matter being reached in 2004.

In May 2004, Nexen Canada Ltd. ("Nexen"), which became the Operator of the Site by Board Order dated February 20, 2002, provided Farm Air with a commitment to "make all reasonable commercial efforts to find an alternative disposal well, abandon the well on the NW ¼-13-25-29-W4M, and reclaim the well site in accordance with the *Environmental Protection and Enhancement Act* and to the satisfaction of the City of Calgary, by May 2005."

During the installation of a pipe for the storm water system in May 2005, hydrocarbon contamination was discovered in an area 55 to 70 metres northwest of the Site. The contamination was subsequently determined to extend to an area extending into the Site, off-site lands owned by Farm Air and a Transportation and Utility Corridor to the north of the Site owned by the Province of Alberta. A remediation project was undertaken by Nexen.

In July 2005, the well was capped and abandoned.

In 2004 and 2005, the City approved two subdivisions which encompassed slightly over 55 acres being essentially all the proposed developable land outside the 300 meter City development setback. Until that time those lands had been undeveloped pasture.

In March 2005, Farm Air applied to the City for land use redesignation for Phase 3, the balance of the land within the 300 meter setback.

In May 2006, Farm Air amended its Phase 3 application to obtain land use approval only for land on the outer perimeter of the 300 meter setback and believed to be outside the identified area of contamination.

Following further testing to delineate the contaminated area, the revised Phase 3 was approved by the City in February 2007.

Farm Air's application for Phase 4, which was for the remaining land outside the 100 meter setback area was approved by City Council in July 2007.

Alberta Environment confirmed that remediation of the well site was completed by letter dated November 26, 2007.

The last portion of the project, Phase 5 was approved by the Calgary Planning Commission in January 2008 and is scheduled to proceed to council in March 2008.

During the course of the Hearing, Alberta Environment issued a Reclamation Certificate No. 00245581-00-00, dated January 16, 2008, with respect to the Site pursuant to section 138 of the *Environmental Protection and Enhancement Act.*

This factual background is significantly different than that typically presented to the Board in an application under Section 27 to "…make an order fixing, confirming or varying the rate of compensation payable …". In the present case, the Board is asked to consider the impact of the Site and the contamination on a residential development and what, if any, consequences, which are compensable under the *Act*, arise therefrom.

D. POSITION OF FARM AIR

Counsel described this as a "unique and precedent setting" claim.

Farm Air's overriding submission is that the *Act* and in particular Section 27 should be given a broad and liberal interpretation. That position is based in part on the contention that the *Act* is akin to expropriation legislation and should be similarly interpreted. The often cited decision of the Supreme Court of Canada in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd., [1997] 1 S.C.R. 32* was referenced.

Farm Air also submitted that if the Board determined that its claims were outside the scope of Section 27 of the *Act* that the Board has jurisdiction to grant the compensation sought under Section 29(b) of the *Act* which provides that the Board may: "review, rescind, amend or replace a decision or order made by it".

It was argued that the constraints on development which arose are adverse effects within the meaning of Section 27 of the *Act* for which Farm Air is entitled to be compensated since they were caused by the Site or the operations which occurred thereon. Compensation is sought on essentially three bases:

1. Reduction in the available front footage which could be sold due to design inefficiencies arising from the presence of the Site.
2. Losses from the delay in the development of the project arising from the discovery of contamination and resulting remediation.
3. Additional costs associated with changes in design arising from the discovery of contamination and resulting remediation.

1. Losses from Design Inefficiencies

Farm Air maintains that the existence of the Site and the setbacks around the well required the project to be designed in a less efficient manner. It was submitted that if the well had not been there a further 824 front feet would have been available for sale at an average price of $1,414.00 per front foot.

A design premised on a "no well" scenario was presented to illustrate the inefficiencies when contrasted with the design which ultimately was approved. Examples of the limiting factors were said to include the location roadways, lanes and open spaces. Sue Paton, a planner with Stantec who was involved in the development process with the City testified that the no well concept incorporated many of the views which had been voiced by both City staff and the local alderman during the reviews.

Robert Manning ("Manning"), the current President of Farm Air's parent, Cathton Holdings Ltd., acknowledged that he was not involved in the purchase of the shares which resulted in Cathton acquiring these lands. Nevertheless, he testified that there was nothing in the "documents that relate to this purchase to allocate price"; referencing the overall acquisition of some 2,300 acres of which this parcel was only a portion. He indicated that the corporate philosophy had always been that hydrocarbon facilities were "not necessarily permanent… it was temporary".

2. Losses from the Delay during Contamination Remediation

Farm Air contends that the contamination was caused by the operations on the Site and that the losses arising therefrom are compensable as an adverse effect pursuant to Section 27 of the *Act.*

To support its position on causation, reference is made to a report dated September 2005 from Komex International Ltd., which Nexen had retained to provide engineering consulting services, where it is stated at page 8:

> "The area surrounding the former Nexen well site located at 11-13-25-29-W4M has been impacted by hydrocarbons most likely associated with the former well site and operations".

Farm Air claims that the remediation program which undertook the clean up of the contamination resulted in a delay in the development of the project and thus monetary losses. Essentially it is alleged that the appropriate compensation is based on 12% of the net margin for Phases 3, 4 and 5. This equates to approximately $1.7 million.

3. Extra Expenses Arising from the Contamination Remediation

This aspect of the claim is based on a similar premise to that set out above with respect to the delay losses. It is maintained that because of the contamination and subsequent remediation that the project was divided into several phases.

The amount of the claim is based on the following:

- Stantec has invoiced that which it is claimed would be "in addition to the standard planning and engineering fees specifically required for each additional land use application."
- Stantec has invoiced an additional, it is claimed $156,642.00, for engineering costs.
- Stantec has, it is claimed, invoiced an extra $65,000.00 planning fees for phases 43 and 4. It was further estimated that extra planning costs for Phases 5 would be $60,000.00.

Examples of the extra engineering services were said to include the following:

- Dealing with Nexen and public authorities for the decommission and abandonment of the well;
- Preparing drawings related to the well abandonment and remediation;
- Conducting topographic survey of well related utilizes, areas and stockpiles;
- Reviewing and conducting follow-up of reports from Nexen's consultants relative to the remediation;
- Communicating with officials at the City, Calgary Health region and Alberta Environment; and
- Preparing documentation concerning the well abandonment and remediation for the land use application to the City.

E. POSITION OF NEXEN

The Operator ("Nexen") contends that the vast majority of the compensation sought is not properly advanced under Section 27 of the *Act*. There are two principle grounds for that position:

- Section 27 is intended to provide a review of recurring or continuing losses whereas the claims advanced are "one time events"; and

- Section 30 of the *Act* provides the Board with jurisdiction to provide compensation for "damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator."

In addition, it was submitted that Section 29 of the *Act* could not relied upon since Farm Air had not complied with Section 10(1) of the *Surface Rights Act Rules of Practice and Procedure* which reads as follows:

> *A request by any party to have the Board review, rescind or amend a decision or order made by the Board must be in writing and set out clearly the reason or reasons for the request.*

Nexen maintained that Farm Air had not provided any reasons for the request and as such the Board should not base its determination on Section 29 of the *Act*.

Nexen also relies on Section 4 of the *Administrative Procedures and Jurisdiction Act, RSA 2000, as amended,* which states that:

Evidence and representations

4 Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority

(a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,

(b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail

(i) to permit the party to understand the facts or allegations, and

(ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations, and

(c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

RSA 1980 cA-2 s4

It was submitted that Farm Air's failure to provide the details of its request under Section 29 results in the Board not being able to comply with the requirement to allow Nexen to "understand the facts", "furnish relevant evidence" and have " an adequate opportunity of making representations".

In the event the Board concludes that the claims advanced by Farm Air do fall within Section 27 of the *Act* that the amounts sought are unproven or overstated.

1. Losses for Design Inefficiencies

Nexen advanced three arguments with respect to this part of Farm Air's claim:

- As a one time claim for injurious affection these alleged losses do not fit within section 27 of the *Act*;
- Farm Air, or its predecessors were aware of the Site and the associated development restrictions when the land was acquired and should not now be able to be compensated for what was or should have been accounted for in the price;
- The uncertainty of the specifics of the claim such that it requires a hypothetical analysis to the point of being unsupported or unproven.

2. Losses from the Delay during Contamination Remediation

Nexen strenuously argued that any losses arising from contamination should be advanced under Section 30 of the *Act* which reads in part as follows:

Settlement of disputes

30(1) *Subject to subsections (2) to (4), the Board may hold a hearing and make an order with respect to a dispute between the operator and an owner or occupant who are parties to a surface lease or the operator and an owner or occupant under a right of entry order as to the amount of compensation payable by the operator*

> *(a) for damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator,*
>
> *...*
>
> ***(2)** The Board has jurisdiction to hear and determine a dispute under this section only if*
>
> *(a) the application is made in writing to the Board by a party to the dispute within 2 years from the last date on which damage is alleged to have occurred,*
>
> *...*
>
> *(c) in the case of an application made on or after July 1, 2001, notwithstanding that the damage in respect of which the application is made may have arisen before, on or after July 1, 2001, the amount claimed by the owner or occupant does not exceed $25 000.*
>
> ***(3)** This section does not apply to a claim for compensation the amount of which may be determined by the Board under section 25.*
>
> ***(4)** An order under this section may be appealed by the operator or the owner or occupant as though the order were a compensation order under section 23.*
>
> *RSA 2000 cS-24 s30; 2001 c12 s2*

Simply put, it was submitted that this aspect of the claim is for "damage caused by or arising out of the operations" of Nexen to Farm Air lands outside of the Site. As such it was argued that the alleged losses should have been claimed under Section 30 with its two year limitation period and $25,000.00 monetary cap.

As additional support for that position, reference was made to the limited scope of the discovery process under the Board's procedure being inappropriate for claims of this nature. It was suggested that the statutory monetary limitation was intended to recognize those restrictions and the Board's mandate of providing an expeditious dispute resolution mechanism. As such, the Board should not be adjudicating complex matters by expanding its jurisdiction under Section 27.

Alternatively, it was submitted that the claim as advanced had not met the burden of proof imposed on Farm Air under Section 27. Specifically, Nexen submits that even if there was a delay in the development, it has not resulted in Farm Air suffering the monetary losses claimed but rather simply in Farm Air having to wait longer to receive the proceeds from the sale of the property. The very substantial increase in residential property values over the time in question, in Nexen's submission, resulted in the land being released for sale at more opportune times than may have occurred had the contamination not occurred.

Moreover, Nexen maintained that some or all of any delay arose from the actions of Farm Air and/or the City. As such, it is argued Nexen should not be required to pay for the actions of others.

3. Extra Expenses Arising from the Contamination Remediation

Nexen's primary response to this part of the claim is very similar to the delay claim above. That is the claim is more appropriately brought under Section 30 of the *Act*.

It was also urged on the Board that the lack of a discovery process (both oral and documentary) results in an inability to properly challenge the quantum of the claim. Nexen argued that the Board is being asked to accept that the "extra" costs included in the invoicing are not only reasonable but also directly attributable to the delay for the contamination remediation.

Nexen's expert, Brian Gettel, provided evidence of two agreements Nexen has entered into for well sites in the area of the Site. These were put forward in the context of developing a "pattern of dealings" as that term is used in surface rights compensation. Both are located, like the Site, in the Saddle Ridge area. A brief summary of the pertinent information is as follows:

a. a 5.45 acre well site owned by the City is surrounded by residential development on land with annual compensation agreed to in 2000 at $8,000.00; and

b. 3.675 acre well site is "slated for future industrial development". The annual compensation was agreed to in August 2002 at $8,074.00.

It was acknowledged that unlike in rural Alberta, locating well sites within an urban setting significantly limited the number of possible comparables to the Site.

Gettel also provided an assessment based upon an "urban land rental analysis" for the loss of use and adverse effect components. This analysis resulted in a variable annual compensation increasing over to $91,597.00 by the fifth year after the effective date.

F. ISSUE

1. What is the appropriate annual compensation payable to Farm Air by Nexen?

G. DECISION

The Board has heard and considered the oral evidence adduced at the Hearing, read the Exhibits filed, and considered the submissions made on behalf of the parties. The Board varies the annual compensation payable under the Order as follows:

For the period November 18, 2003 to November 17, 2004:
Loss of Use $43,000.00
Adverse Effect $12,500.00
Total $55,500.00

For the period November 18, 2004 to November 17, 2005:
Loss of Use $63,000.00
Adverse Effect $18,500.00
Total $81,500.00

For the period November 18, 2005 to November 17, 2006:
Loss of Use ....$ 84,000.00
Adverse Effect ....$ 24,500.00
Total $108,500.00

For the period November 18, 2006 to November 17, 2007:
Loss of Use $111,000.00
Adverse Effect:
Extra Expenses Arising from Contamination Remediation......$ 96,000.00
Development Delay ....$ 32,000.00
Total $239,000.00

After November 17, 2007, and so long as Order No. 13466 is in effect:
Loss of Use ....$ 85,000.00
Adverse Effect:
Extra Expenses Arising from Contamination Remediation......$ 92,000.00
Development Delay ....$ 42,000.00
Total $219,000.00

G. ANALYSIS

At the outset, the Board must consider the statutory framework from which its mandate and jurisdiction arises. Unlike the superior courts, the Board has no authority other than that set out in the *Act*.

Initially, it appears that two divergent interpretations of Section 27 of the *Act* are at the core of this dispute. While those differing views must be weighed, as is almost always the case, the real questions relate to the conclusions to be drawn from the evidence. In particular, the Board must consider whether the claims of Farm Air have on the evidence presented been established.

A. Section 27 Overview

The Board views Section 27 of the *Act* as requiring the parties to a surface lease or Board compensation order which provide for the payment of compensation on an annual or other periodic basis to consider every five years whether that compensation is appropriate or if a change is warranted (see Section 27(3) through (7) of the *Act*). If the parties cannot agree on a new rate of compensation, a party can apply to the Board to have the rate of compensation varied (see Section 27 (8) and (9) of the *Act)*.

After hearing the application, Section 27(11) of the *Act* requires the Board to "make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4)."

The term "rate of compensation" is defined in Section 27(1) (d) as:

> *"rate of compensation" means the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d).*

Unlike when determining the initial compensation payable after the granting of a right of entry, the rate of compensation to be determined in a Section 27 application relates only to those matters within Section 25(1)(c) and (d) which read as follows:

> ***25(1)*** *The Board, in determining the amount of compensation payable, may consider...*
>
> *(c) the loss of use by the owner or occupant of the area granted to the operator,*
>
> *(d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator, ...*

The purpose of Section 27 is thus to provide for a review every five years of the rate of compensation. As such, the Legislature has created a mechanism for a reconsideration of that rate in light of changing circumstances within that time period. Those changes must, of course, be related to the "compensation payable on an annual or other periodic basis … in respect of those matters referred to in Section 25(1)(c) and (d)."

Traditionally, this legislative framework has been applied in the agricultural setting and required a determination of the loss of production for the acres granted to the operator and the adverse effect on the production of the remaining agricultural lands of the landowner/occupant.

The facts in the present case require the Board to consider how to apply the framework to a very different situation where, since the last review, the use of the land has been dramatically changed.

Farm Air asks the Board to liberally interpret the *Act* and in essence blend together the loss of use and adverse effect factors to consider the overall impact of the Site and the operations carried out thereon.

Nexen submits that a much narrower interpretation is appropriate. It was argued, for example, that "adverse effect" relates only to the consequences of the "area granted". In other words, Nexen says if the contamination arises from the operations on the Site, it is not an "adverse effect" but rather damage which should be addressed under Section 30 of the *Act*. The rationale presented being that "adverse effect", as that term is used in the *Act*, is only for those impacts arising from the actual physical presence of the "area granted".

The Board considers the *Act*'s overriding purpose to be to provide an effective means to compensate landowners for the intrusion unto their land by operators. Section 10 of the *Interpretation Act*, RSA 2000, as amended, directs that:

> *Enactments remedial*
>
> *10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.*
>
> RSA 1980 cI-7 s10

As such, the Board has concluded that the proper interpretation of "adverse effect" includes not only the consequences of the physical presence of the "area granted" on the remaining land of Farm Air but also the consequences of the operations carried out on the "area granted" on the remaining land of Farm Air. Those consequences include the losses sustained from contamination of the land arising from the operations carried out on the area granted.

The Board recognizes that Section 30(1) (a) of the *Act* provides a dispute resolution mechanism for "damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator". Importantly, that jurisdiction is limited by Section 30(3) which reads:

> *(3) This section does not apply to a claim for compensation the amount of which may be determined by the Board under section 25.*

The Board has determined that "adverse effect" as that term is used in Section 25 is broad enough to include the consequences of operations on the area granted. Section 27 provides for the review of the rate of compensation as opposed to Section 30 which is intended to provide a "one time" determination of compensation for isolated events resulting compensation of less than $25,000.00.

It was argued by Nexen that many of the components of Farm Air's claim did not fit within Section 27 since they were one time losses or expenses. The basis of this position appears to arise from Section 27(1) (d) which is set out above and Section 27(3)(a) which reads as follows:

> *(3) This section applies to compensation orders and surface leases*
>
> *(a) that provide for the payment of compensation on an annual or other periodic basis, or*
>
> ...

Both of these subsections refer to compensation which is on an "annual or other periodic basis". Importantly, they both also refer to the "compensation payable" or the "payment of compensation" on that basis. In other words, it is the payment must occur on an annual or other periodic basis not the loss or damage which is being compensated.

In summary, the Board concludes that the nature of the claims advanced by Farm Air fall within the scope of Section 27 of the *Act* and then turns to a consideration of whether the claims have been established and, if so, what is the appropriate rate of compensation.

Before turning to a consideration of each aspect of the review, the Board refers to the following statement from Kerans, J.A., *in Jorsvick v. Pennzoil Petroleums Ltd. [1988] A.J. 327*:

> *It follows that once either party triggers a review, the entire question of annual compensation is at large, and must again be fixed by the Board on the basis of the material then before it. What happened earlier is merely a factor to be considered. It is not correct to say that the applicant, to gain a change in the award, must show altered circumstances. It is correct to say that, to gain any new award, the applicant will only get the award he proves he is entitled to. The onus is on the applicant, whoever he may be. There is no presumption for or against the previous award.*

The Applicant in this case is Farm Air.

B. Evaluation of the Component Parts of Farm Air's Claim

a. Losses for Design Inefficiencies

As noted above, Farm Air maintains that the presence of the Site resulted in the design of its residential development having less front footage which it could market to home builders. The theory being that the Site limited the potential manner in which the roadways, lanes, public areas and lots could be laid out. As the developer, once Farm Air obtains approval for development from the City it then sells the lots within the development to builders who then market the lots, either with or without residences to the public.

Farm Air adduced evidence through Bob Berrien ("Berrien") and Sue Paton ("Paton") that had the Site not been present an additional 824 front feet of lots could have been offered for sale. Using statistics from the actual sale to date and some forecasting, Berrien opined that the average price per front foot which should be applied was $1,414.00. He then allocated the loss to different points in time depending of which Phase was involved and when that Phase went to market.

Although Nexen took issue with the extent, if any, of the reduction in front footage through its witness, Brian Romanesky, the Board was impressed with Paton's ability to apply her personal knowledge from having been through the development process concerning these lands.

The Board views the fact that the Site was in place and producing sour gas when Farm Air or its corporate successor acquired the land as a major obstacle to establishing this loss. Manning testified that there was no record of any such consideration in the corporate documents from the time. Nevertheless, the matter at hand is significantly different from a situation where a landowner with a prospective intention to develop property is restricted from doing so by the intrusion of the granting of a right of entry. The result may also be different if while a party owns rural land with a surface lease or right of entry and residential or commercial growth expands to that property such

that development a real possibility. Another distinguishing fact in the present case is that the sole purpose of Farm Air acquiring this land was to hold it for development with the knowledge that there are limitations on that ultimate use.

Although the setback at the time of acquisition may have only been 100 meters, the Board was not provided with any cogent way to differentiate between the restrictions arising from that area and a 300 meter setback which came into force shortly thereafter.

The simple reality is that it was known at the time of acquisition that there was a sour gas facility on the land which would limit the design possibilities. Following Nexen's commitment to attempt to reclaim the Site by May 2005, it was also known that the setback almost certainly be significantly reduced in the near term. Although it was not until January 2008 that the Reclamation Certificate was issued and even later corrected to include the proper Plan , a claim that the efficiency of the development was restricted by a known obstacle at the time of acquisition is not supportable.

In summary, the Board determines that Farm Air has failed to meet the onus of establishing that compensation should be awarded for this component.

b. Losses from the Delay during Contamination Remediation

Nexen did not seriously contest that operations on the Site was the cause of the contamination. The only evidence before the Board is that it was "most likely" that the contamination was "associated with the former well site and operations."

The extent of the contamination from the Site into the adjacent lands of both Farm Air and the Province was not challenged.

Moreover, it was not contested that the remediation of the contamination resulted in a delay in Farm Air's ability and opportunity to develop its land both within the Site and adjacent thereto.

What is at issue is what, if any, loss was suffered by Farm Air as a result of the delay.

Each party adduced evidence on this issue through highly experienced expert witnesses: Berrien for Farm Air and Gettel for Nexen. Those opinions were vastly different.

Berrien presented two possible approaches of evaluating compensation from the delay: "deferred revenue" and "land value". He clearly stated that he preferred the approach based on Farm Air's rate of return and presented the land value method for completeness.

Gettel commented that for a number of reasons he had not used the deferred revenue approach in this case. One of the most important being a lack of access to the detailed information needed to undertake that task.

Both experts described the rapid escalation in land value which has occurred over the time at issue. Berrien estimated that there had been an increase in the order of 58 % in the period from approximately mid 2005 to mid 2007. Gettel provided statistics what he described as Calgary's "exceptionally strong real estate market".

The Board has reviewed Berrien's evidence in detail. The first step in assessing the compensation to Farm Air for this delay is to determine, what amount of money was unavailable to Farm Air as a result of the delay in development while the remediation of the contamination occurred. Berrien described that as being the "margin" between the revenue received and the costs to generate that revenue. Once that amount was determined, he then applied a "compensatory rate of return" to compensate for Farm Air's inability to use that unreceived margin during the delay period. Conceptually, the Board also considers that step to be appropriate.

As was pointed out in cross examination of Berrien and in Gettel's evidence, Berrien's assessment of the unreceived margin was overstated. This results in his proposed compensation being unacceptable.

In the simplest of terms, Berrien quantified the total margin for all phases of the project at $24,041,745.00. This includes some projected revenue for those lands not yet developed. In other words, that amount is Berrien's opinion of what Farm Air will ultimately receive as a net return on this development by deducting costs from revenue.

Berrien calculated what he opined would be the margin as a result of the delay from November 2006 to November 2008 which totals $22,196,288.

He had allocated different amounts to November 2006, November 2007 and November 2008 (being the anniversary of the November 2003 effective date for this review within the years of the delay). He then applied a 12% rate of return to each of those annually allocated amounts to develop the amount needed to compensate Farm Air for its lost opportunity to use that money. Those amounts were:

To November 2006	$ 11,466.00
To November 2007	$ 902,966.00
To November 2008	$ 857,451.00
TOTAL	$1,771,883.00

The flaw in his reasoning is simply that the projected actual margin for the project exceeds the estimated margin without the delay by $1,845,457. As acknowledged in cross examination, because the delay resulted in the sale of the land in an escalating market there were higher margins due to increasing prices, and thus, a surplus in revenue compared to what would have been received had the delay not occurred. Although costs were also increasing the evidence indicated that the revenue increases were outpacing the cost increasing to result in increased margins.

As a result, the deferred revenue approach is rejected as being a basis of determining compensation since the onus of establishing a loss was not met.

c. Extra Expenses Arising from the Contamination Remediation

These expenses which Berrien allocated to Years 4 and 5 at $143,321.00 and $138,321.00 are viewed by the Board as being matters of "nuisance, inconvenience" arising from the contamination and the resulting remediation. They are adverse effects which have been suffered by Farm Air. Nevertheless, the Board is concerned that not all of these costs are attributable to the changes which came about because of the contamination as opposed to other issues such as required changes from the City unrelated matters. That concern is heightened by the fact that the supporting records were not placed in evidence for inspection.

Without further information the Board is left to make an arbitrary reduction of 1/3 to reflect the uncertainty and lack of substantiation. Therefore as part of the Adverse Effect component, the Board allocates $96,000.00 (rounded) to Year 4 and $92,000.00 to Year 5.

C. Evaluation of Nexen's Position

Nexen put forward some evidence to support a "pattern of dealings" although that position was not strongly advocated. The Board has concluded that in this unusual situation it is not feasible to conclude that two agreements amount to there being "such a number of deals established so that it may be said that a pattern has been established by negotiation between the landowners and oil companies in a district" (see *Imperial v. 826167 Alberta Ltd. 2007ABCA 131 quoting Livingston v. Siebens (1978) 8A.R., 439*).

The use of urban land rentals to develop the appropriate compensation was advanced by Nexen's expert, Gettel.

The basis of that approach is to initially determine the appropriate land value for the property in question and then apply yield factor to represent what the property could reasonably be expected to yield in the commercial market.

After referencing several sales and making adjustments for factors such as location, time and risk, Gettel opined that the value for the Site increased since the effective date. The resulting estimates for the parcel were as follows:

November, 2003..$ 85,000.00 per acre
November, 2004..$142,500.00 per acre
November, 2005..$200,000.00 per acre
November, 2006..$285,000.00 per acre
November, 2007..$345,000.00 per acre

Gettel then opined that the yield rate needed to be adjusted to reflect the dynamic real estate market in the period at issue. He concluded that it was appropriate to use 10 % in November 2003 and reduce it by 1.0% in the second year and 0.5% each year thereafter.

To develop an annual loss of use Gettel then applied those factors to the 4.03 acres within the Site. The exception was the final year by which time a portion of the Site had been developed so only 2.36 acres was not available to Farm Air.

The following summarizes his conclusions for the annual loss of use:

Year 1: 4.03 acres @ $85,000/acre x .10.........$34,255.00
Year 2: 4.03 acres @ $142,500/acre x .09.......$51,684.00
Year 3: 4.03 acres @ $200,000/acre x .085.....$68,510.00
Year 4: 4.03 acres @ $285,000/acre x .080.....$91,884.00
Year 5: 2.36 acres @ $345,000/acre x .075.....$61,065.00

The Board has concluded that this approach provides the most appropriate compensation for loss of use presented at the Hearing. It reflects Farm Air's inability to use the land granted to Nexen and also the escalating marketability. The Board, however, is concerned that land value used as the basis of this calculation may be low. The four sales from 2003 result in an average of approximately $125,000.00 per acre and in 2004 of $155,750.00 per acre. Gettel explained the reduction from the 2003 average to $100,000.00 by such factors as size, location, and timing. Nevertheless, since the effective date is in the last quarter of the year, it is the Board's view that the increasing prices in 2004 become a significant factor to consider. Gettel also commented that the "transportation issue" raised by the City was a factor to consider in the 2003 value. However, he appears to have discounted for same twice by considering it in the 2003 value and again as a separate reduction after setting the per acre value.

On balance, the Board has concluded that a November 2003 land value of $125,000.00 per acre is appropriate with a 40% percentage annual increase being the lower end of the range during the peak increase). The Board also accepts Gettel's 10 % yield factor with the associated annual decrease.

Based on the foregoing, the Board determines the annual loss of use to be as follows:

Year 1: 4.03 acres @ $125,000/acre
(less a 15% risk factor for the transportation issue) x .10...$ 43,000.00 (rounded)
Year 2: 4.03 acres @ $175,000/acre x .09...............................$ 63,000.00 (rounded)
Year 3: 4.03 acres @ $245,000/acre x .085.............................$ 84,000.00 (rounded)
Year 4: 4.03 acres @ $343,000/acre x .080.............................$111,000.00 (rounded)
Year 5: 2.36 acres @ $480,200/acre x .075.............................$ 85,000.00 (rounded)

Turning to the Adverse Effect, Gettel did not provide for any compensation related to the delay arising from the contamination. He did acknowledge that an area of 1.18 acres surrounding the Site could not be developed until a Reclamation Certificate was obtained. He considered that delay to be an adverse effect on the "remaining land" of Farm Air. Using the urban land formula above, he calculated the annual loss for Year 5 at $30,532.00. Gettel suggested that amount should be reduced to reflect the fact that the Reclamation Certificate had been obtained thus most likely allowing development to proceed within the year.

The Board agrees that this as an Adverse Effect but concludes that it is not limited to the Year 5 but rather is for each year from the effective date of November 2003 which with the adjustments to Gettel's formula results in the following:

Year 1: 1.18 acres @ $125,000/acre
(less a 15% risk factor for the transportation issue) x .10.....$12,500.00 (rounded)
Year 2: 1.18 acres @ $175,000/acre x .09 ....$18,500.00 (rounded)
Year 3: 1.18 acres @ $245,000/acre x .085 ....$24,500.00 (rounded)
Year 4: 1.18 acres @ $343,000/acre x .080 ....$32,000.00 (rounded)
Year 5: 1.18 acres @ $480,200/acre x .075 ....$42,000.00 (rounded)

These amounts are in addition to the Extra Expenses Arising from the Contamination Remediation of $96,000.00 and $92,000.00 for Years 4 and 5, respectively, as described above.

The Board does not accept Nexen's argument that the final year's compensation should be reduced to reflect the possibility that the entire Site may be developed before the next anniversary date in November 2008. Nexen has the right to enter and use the Site for the specified purposes until an Order is granted terminating the Right of Entry Order. The Board will determine the appropriate rate of compensation for the review period which will continue to be payable until a further review or until the Right of Entry Order is terminated whichever shall first occur.

D. Section 29 Application

As an alternative position to its Section 27 application, Farm Air submitted that if the Board found that its claims were outside the scope of Section 27 of the *Act* that the Board should amend the Order by varying the compensation to reflect the evidence adduced at this Hearing.

The Board has concluded that it does not need to consider the merits of that position since it has found that Farm Air's claims, if established by the evidence, conceptually fall within the provisions of Section 27 of the *Act*.

E. Summary of Compensation

In summary, the Board fixes the annual compensation as follows:

For the period November 18, 2003 to November 17, 2004:
Loss of Use $43,000.00
Adverse Effect $12,500.00
Total $55,500.00

For the period November 18, 2004 to November 17, 2005:
Loss of Use $63,000.00
Adverse Effect $18,500.00
Total $81,500.00

For the period November 18, 2005 to November 17, 2006:
Loss of Use ....$ 84,000.00
Adverse Effect ....$ 24,500.00
Total $108,500.00

For the period November 18, 2006 to November 17, 2007:
Loss of Use $111,000.00
Adverse Effect:
Extra Expenses Arising from Contamination Remediation......$ 96,000.00
Development Delay ....$ 32,000.00
Total $239,000.00

After November 17, 2007, and so long as Order No. 13466 is in effect:
Loss of Use ....$ 85,000.00
Adverse Effect:
Extra Expenses Arising from Contamination Remediation......$ 92,000.00
Development Delay ....$ 42,000.00
Total $219,000.00

TO WHOM COMPENSATION IS PAYABLE:

As noted at the outset, this Hearing dealt only with Farm Air's compensation and as such the amounts determined herein are payable only to Farm Air.

INTEREST:

The parties have not had the opportunity to address the issue of interest. Subject to a request being made within 15 days of the date of this Decision to lead oral evidence on that issue, the parties shall provide written submissions to the Board and opposing counsel in accordance with the following schedule:

1. Farm Air — within 30 days after the date of this Decision
2. Nexen — within 21 days of receiving Farm Air's submission
3. Farm Air's Reply — within 15 days of receiving Nexen's submission.

COSTS:

The parties requested the opportunity to attempt to resolve the issue of costs between themselves. Therefore, the Board will reserve the right to address the issue of costs if asked to do so by either party within 30 days of the date of this Decision.

ORDER:

An Order will issue varying the compensation payable by the Operator to Farm Air Properties Inc. as set out below:

(a) For the period November 18, 2003, to November 17, 2004, the sum of $55,500.00, less any payment made,

(b) For the period November 18, 2004, to November 17, 2005, the sum of $81,500.00, less any payment made,

(c) For the period November 18, 2005, to November 17, 2006, the sum of $108,500.00, less any payment made,

(d) For the period November 18, 2006, to November 17, 2007, the sum of $239,000.00, less any payment made; and

(e) After November 17, 2007, and so long as the said Order No. 13466 is in effect, for each year or portion thereof, the sum of $219,000.00, to be paid on or before November 18, 2007, and on or before the 18th day of November in each year thereafter,

which amounts are payable to Farm Air Properties Inc.

Costs and Interest are hereby reserved in accordance with the Decision.

Dated at the City of Edmonton in the Province of Alberta this 10th day of July, 2008.

SURFACE RIGHTS BOARD

MEMBER

APPENDIX

EXHIBITS FILED:

Exhibit 1: Application Filed by Farm Air Properties Inc., dated September 25, 2003, with copies of Board Orders, and other pertinent information attached. Response to Application Filed by Nexen Canada Ltd., dated November 14, 2003.

Exhibit 2: "Estimate of Compensation Under the Surface Rights Act of Alberta For a Wellsite and Access Road in NW¼ 13-25-29-W4M" prepared by Berrien Associates Ltd. for Peacock Linder & Halt LLP.

Exhibit 3: "Compensation Analysis" prepared by Gettel Appraisals Ltd. for Fraser Milner Casgrain LLP.

Exhibit 4: Biographical Sketch for Robert A. Manning.

Exhibit 5: Several copies of letters between Petrogas Processing Ltd. and Cathton Holdings Ltd., and other related information.

Exhibit 6: Plan of "Landuse Applications" of Phases 1 to 5 for Farm Air Properties Inc., prepared by Stantec Consulting Ltd.

Exhibit 7: Copy of credentials for Francisco Lourido, P.Eng., Associate, Urban Land, Stantec Consulting Ltd.

Exhibit 8: Outline Plan, Relevant Planning History, Planning Evaluation and detailed map of Land Use Redesignation.

Exhibit 9: Letter to Stantec Consulting Ltd. from the City of Calgary confirming the planning approval status.

Exhibit 10: Letter from Peacock Linder & Halt to Nexen Canada Ltd.

Exhibit 11: Letter from the City of Calgary to Stantec Consulting Ltd. with attached Bylaw 44Z2004.

Exhibit 12: Comments on proposal prepared by the City of Calgary.

Exhibit 13: Letter from Stantec Consulting Ltd. to Farm Air Properties Inc. regarding Land Use Redesignation Application.

Exhibit 14: Copy of emails between Robert Manning and Ray MacEachern of Nexen Canada Ltd., and a letter from Farm Air to Ray MacEachern.

Exhibit 15: Letter to Farm Air Properties Inc. from Stantec Consulting Ltd. regarding Saddlebrook Stage II Land use Redesignation Application.

Exhibit 16: Letter from Stantec Consulting Ltd. to City of Calgary regarding Saddlebrook Stage I - Phase 3.

Exhibit 17: Email from Francisco Lourido to Joel Armitage, copied to Robert Manning and several other people.

Exhibit 18: Copy of several emails between Robert Manning, Ray MacEachern and Francisco Lourido.

Exhibit 19: Letter dated May 26, 2005, from Nexen Inc. to Stantec Consulting Ltd.

Exhibit 20: Letter dated May 30, 2005, from Stantec Consulting Ltd. to Nexen Inc.

Exhibit 21: Enviro-Test Chemical Analysis Report and several emails from Bruce Dewar of Stantec Consulting Ltd.

Exhibit 22: Letter from Peacock Linder & Halt LLP to Nexen Canada Ltd. regarding Saddlebrook Phase 3 Lands.

Exhibit 23: Email from Bruce Dewar and "Draft Minutes of the Meeting Between Nexen Inc. & Farm Air".

Exhibit 24: Meeting Notes regarding Saddlebrook Phase III / Nexen 11-13-25-29W4M.

Exhibit 25: Email from Francisco Lourido to Andrew Hamilton at Nexen, and copy of letter from Nexen Inc. to Stantec.

Exhibit 26: Remedial Action Plan Former Nexen Wellsite, prepared for Nexen Inc.

Exhibit 27: Email from Francisco Lourido attaching Minutes of the December 8, 2005 meeting.

Exhibit 28: Letter from Farm Air Properties Inc. to Nexen Canada Ltd., regarding Status of Saddle Ridge Phase 3 Development.

Exhibit 29: Map of Storm Sewer Line Excavation Confirmatory, prepared by Komex International Ltd.

Exhibit 30: Copy of two letters from Nexen Inc. to Farm Air Properties Inc., regarding Abandonment of Nexen sour gas pipeline and Abandonment of Nexen fresh water pipeline.

Exhibit 31: Land Use Amendment and Planning Evaluation for Saddle Ridge.

Exhibit 32: Copy of fax from Farm Air Properties Inc. to Nexen Canada Ltd., regarding Saddlebrook Phase 3.

Exhibit 33: Emails between Francisco Lourido and Greg Denham, with attachment from EUB to Nexen Canada Ltd. regarding Abandonment Statement.

Exhibit 34: Letter dated July 19, 2006, from Farm Air Properties Inc. to Nexen Canada Ltd.

Exhibit 35: Letter from Stantec Consulting Ltd. to City of Calgary regarding Saddle Ridge Phase 3, Western-most 35 lots, with attached map.

Exhibit 36: Letter from Stantec Consulting Ltd. to Farm Air Properties Inc. regarding Saddle Ridge Phase 3, Environmental Drilling Program, with attached map.

Exhibit 37: Letter from Farm Air Properties Inc. to Nexen Canada Ltd. regarding NW 13 Remediation, with Results sheet, Chemical properties sheet, Data entry sheet and Intermediate calculations sheet and map attached.

Exhibit 38: Emails between Francisco Lourido and Paul Leong.

Exhibit 39: Meeting Minutes dated October 19, 2006 at Nexen.

Exhibit 40: Fax dated October 25, 2006, from Farm Air Properties Inc. to Nexen Canada Ltd., regarding NW 13 Remediation.

Exhibit 41: Letter from Stantec Consulting Ltd. to the City of Calgary regarding Saddlebrook Stage 1, Phase 3B.

Exhibit 42: Meeting Minutes at Stantec, dated April 9, 2007.

Exhibit 43: Letter dated April 10, 2007, from Stantec Consulting Ltd. to the City of Calgary, regarding Saddle Ridge Phase 4 (formerly 3B).

Exhibit 44: Letter dated May 24, 2007, from WorleyParsons Komex, Environment & Water Resources, to Nexen Inc.

Exhibit 45: Meeting Notes, of July 3, 2007, with Stantec Consulting Ltd. and Farm Air Properties Inc.

Exhibit 46: Copy of Bylaw 62Z2007 (LOC2007-0027) with schedule A and B attached, from the City of Calgary to Stantec Consulting Ltd, dated July 24, 2007.

Exhibit 47: Fax dated September 13, 2007, from Farm Air Properties Inc. to Nexen Inc., regarding Surface Reclamation for Wellsite and Access Road at Wascana.

Exhibit 48: Copy of Meeting Discussion held at the Nexen Inc. office on October 15, 2007.

Exhibit 49: Letter dated October 26, 2007, from Stantec Consulting Ltd. to the City of Calgary, regarding Saddlebrook Phase 5.

Exhibit 50: Coloured Mediated Annexation May of the City of Calgary.

Exhibit 51: Seventeen (17) Certificates of Titles covering Twp. 25, Rge. 29, W4M, ten (10) of which are cancelled titles.

Exhibit 52: A seventy (70) page document for the "Saddle Ridge Area Structure Plan - Supporting Information" dated August 2007, from the City of Calgary, Land Use and Mobility.

Exhibit 53: Electronic image of document registered as: 901148475 from Alberta Government Services, Land Titles Office.

Exhibit 54: Two (2) items from the Alberta Energy and Utilities Board (Interim Directive ID 81-2 and ID 97-6), and a three (3) page article from Municipal Affairs & Housing entitled "Advisory Land Use Planning Notes On Abandon Well Sites".

Exhibit 55: Email from Greg Denham to Francisco Lourido and others regarding "Saddlebrook offsite storm sewer & pond", with attachments.

Exhibit 56: Coloured Subdivision and Land Use Map prepared by Romanesky Urban Planning and Management Ltd.

Exhibit 57: Letter dated February 21, 2007, from Farm Air Properties Inc. to Nexen Canada Ltd., attached report "Environmental Drilling Program, Saddle Ridge Phase 3B" prepared by Stantec Consulting Ltd.

Exhibit 58: Court of Queen's Bench of Alberta Judicial Centre of Calgary, Statement of Claim between Farm Air Properties Inc. and Nexen Inc.

Exhibit 59: Document on Saddlebrook Stage 1 Outline Plan and Land Use Redesignation Applications, dated March 2003, by Stantec Consulting Ltd.

Exhibit 60: A double-sided document for the "Saddle Ridge Area Structure Plan" dated February 1999, from the City of Calgary, Planning & Building Department.

Exhibit 61: Copy of credentials for Bryan Romanesky and Greg Denham.

Exhibit 62: Two pages of a "Well Diagram" from Nexen Inc.

Exhibit 63: Letter dated November 26, 2007, from Alberta Environment to Nexen Inc.

Exhibit 64: Coloured "Enlarged Area" map prepared by Romanesky Urban Planning and Management Ltd.

Exhibit 65: Coloured "Final Phase" map prepared by Romanesky Urban Planning and Management Ltd.

Exhibit 66: White binder containing documents and information prepared for Nexen Inc. and Fraser Milner Casgrain LLP by Romanesky Urban Planning and Management Ltd.

Exhibit 67: A nine (9) page "Certificate of Amendment" document from Alberta Corporate Registry.

Exhibit 68: Copy of Reclamation Certificate No. 00245581-00-00, dated January 16, 2008, for the W ½-13-25-29-W4M, held by Nexen Inc.

Exhibit 69: A "Outline Plan & Land Use Redesignation" map, for Farm Air Properties Inc., Saddlebrook Stage 1, dated March 2003, from Stantec Consulting Ltd.

Exhibit 70: A "No Well Alternative" map, Appendix VI, for Farm Air Properties Inc., Saddlebrook Stage 1, dated May 2004.

Exhibit 71: A coloured "No Well Alternative planning comments on the design" map.

Exhibit 72: A coloured "No Well Alternative Re-Design" map, prepared by Romanesky Urban Planning and Management Ltd.

Exhibit 73: Copy of a cheque for $25,000.00 from Nexen Inc., payable to Farm Air Properties Inc.

Exhibit 74: Copy of credentials for Sue Paton, BA, MCIP, with Stantec Consulting Ltd.

Exhibit 75: A coloured "combined lotting plan" map for Farm Air Properties Inc., Saddle Ridge Phase 1-5, in the NW ¼-13-25-29-W4M.

Exhibit 76: A "No Well Alternative, planning comments on the design" map.

Exhibit 77: A coloured "No Well Alternative Re-Design" map showing the "Existing sour gas well location as per A.E.U.B. not located by survey", prepared by Romanesky Urban Planning and Management Ltd.

Exhibit 78: A "No Well Alternative" map Appendix VI, dated May 2004, for Farm Air Properties Inc., Saddlebrook Stage 1.

Exhibit numbers 1 to 60, inclusive, and Exhibit numbers 74 to 78, inclusive, were filed for the Respondent Farm Air Properties Inc. Exhibit numbers 61 to 73, inclusive, were filed for the Operator.