

**THE SURFACE RIGHTS BOARD OF MANITOBA
BOARD ORDER**
Under The Surface Rights Act, C.C.S.M. c. S235

File No: 03-2012

Hearing: Town Municipal Office

Order No: 05-2012

Virde n, Manitoba

Date issued: December 13, 2012

BEFORE:

**Margaret Hodgson, Presiding Member
Clare Moster, Deputy Presiding Member
Claude Tolton, Board Member
Russell Newton, Board Member
Barbara Miskimmin, Board Administrator**

BETWEEN:

Enerplus Resources Corporation

(Applicant)

- AND -

Wallace Henry Octave Gabrielle and Charlotte Gwen Gabrielle

(Respondent)

CONCERNING:

Parts of North East ¼, Section 28, Township 11, Range 26 West of the Principal Meridian in Manitoba.

(Hereinafter referred to as "the lands")

PURPOSE OF HEARING:

To hear and receive evidence regarding an application received from the Applicant, for right of entry and compensation for surface rights to run an underground fluid line across the Respondent's land.

RIGHT OF ENTRY AND COMPENSATION ORDER

BACKGROUND:

The Applicant applied on September 13, 2012 under Section 21 of *The Surface Rights Act* for an order granting the right to enter the lands for the purpose of running an underground fluid line across the lands and setting compensation payable for this right of entry.

The Respondents have refused access to the Applicant to undertake the work required and has further refused to enter into negotiations as to the compensation payable.

Pursuant to subsection 25(2) of *The Surface Rights Act*, the members of the Board inspected the site on November 28, 2012. From this inspection, the Board members determined that the existing surface land use is agriculture and that the lands could support an underground fluid line.

ISSUES:

1. Does the Applicant have the right to enter upon the lands of the Respondent?
2. Does the Respondent have the right to deny entry?
3. Does the Board have the authority to direct the removal and location of flow lines?
4. Does the Respondent have the right to annual compensation for a flow line?
5. If right of entry is granted what terms and conditions should apply.
6. Are costs to be considered?

APPEARANCES:

For the Applicant:

- Counsel: David E. Swayze, Meighen Haddad LLP

Witnesses:

- Kevin Martin, "Sworn", Surface Land Coordinator, Enerplus Resources Corporation
- Curtis Dobbyn, "Sworn", Land Manager, Mammoth Land Services Ltd.

For the Respondent:

- Kevin Gabrielle, "Sworn", son & authorized representative of Landowner
- Wallace Gabrielle, "Sworn", Landowner

EXHIBITS:

Applicant Exhibits:

- #1 Binder containing tabs A-F, Operator's documents for disclosure
- #2 Excerpts from *The Surface Rights Act* re: definition of "Owner"
- #4 Board Order #5/2011
- #5 Board Order #2/2011

Respondent Exhibits:

- #3 Binder containing Exhibits 1-11, Owner's documents for disclosure

DECISION:

Upon hearing the presentations of each of the parties and the oral evidence on the 28th day of November 2012 and reviewing the submissions into evidence and final arguments; decision being reserved until today's date:

It is the Order of this Board That:

1. Pursuant to *The Surface Rights Act* which defines a "surface right" in detail and Part III of this act which further specifies those rights, this Right of Entry application is granted subject to the terms and conditions as set out on Schedule "A" & "B" and access to the site and plan of the lands involved are shown on Sketch Plan "1" which are all attached to and forming part of this Board Order.
2. After consideration of all of the evidence, and based on the Board's opinion that an award of compensation must be focused upon evidence and in respect to some real loss or damage suffered, the Board determined that awards of \$1,000.00 per acre for the flow line of 2.43 acres and \$500.00 per acre for the temporary work space of 1.02 acres are just and reasonable.

REASONS FOR DECISION

1.) Does the Applicant have the right to enter upon the lands of the Respondent?

The Board is of the opinion that the definition of "operator" in *The Surface Rights Act* describes a person who has the "right" to conduct any operation in connection with the production of a mineral.

The Surface Land Coordinator for the Applicant testified that Enerplus Resources Corporation was an operator under *The Surface Rights Act* and this fact was not challenged by the Respondent; therefore based on this and other evidence, the Board determined that as such, Enerplus has the right to enter upon the lands for the purpose of running an under-ground fluid line across the lands.

2.) Does the Respondent have the right to deny entry?

The Board considered the Respondent's position and determined that, based on the fact that the Applicant was an operator with the right to establish any equipment for use in connection with the extraction of a mineral, the owner cannot prevent entry for any purposes as may be necessary in connection with the producing operations, including the transportation of said mineral.

3.) Does the Board have the authority to direct the location of the well-sites, other than access roads?

The landowners have some concerns that the Operator intends to place its' installation in a location that will cause greater hardships than would other locations. The landowners requested the Board to direct the Operator to remove the existing flow lines and place the new line in the existing right-of-way.

Section 25(4)(e) of *The Surface Rights Act* was amended in 1988 to clarify the authority of the Board in relation to the location of access roads. The legislative provision enabled the Board to determine and direct the location of access roads to a well site. The Board concluded that this amendment only applies to the location of access roads to a well site and not the location of any infrastructure, including an underground fluid line.

While there may well be excellent farming or other reasons for a different location for the flow lines, the Board must defer to the provision of *The Surface Rights Act*. The legislation does not provide the Board with the jurisdiction to require an operator to place a flow line in a specific location.

4.) Does the Respondent have the right to annual compensation for a flow line?

The Board is of the opinion that an Owner has no right to compensation unless the loss or damage has been suffered or unless it has been established on a balance of probabilities that the loss or damage will occur in the future.

The Board considered the evidence related to the annual compensation requested by the Respondent and is of the opinion that it is not sufficient to claim that it is possible; the mere possibility of damage is not a basis for an award of compensation unless there is a specific statutory provision to that effect.

5.) If right of entry is granted what terms and conditions should apply?

The Board is of the opinion that any right of entry order should specify the rights in detail in order to avoid disputes between owners and operators, and Part III of *The Surface Rights Act* does not specifically address items in detail.

Attached to and forming part of this Board Order are schedules "A" & "B" that detail the terms and conditions for right-of-way for flow lines and temporary work space located in NE 1/4 28-11-26 WPM.

6.) Are costs to be considered?

After reaching the above decision, the Board opened the sealed envelope containing a final offer pursuant to subsection 26(4) and 26(5) of *The Surface Rights Act*.

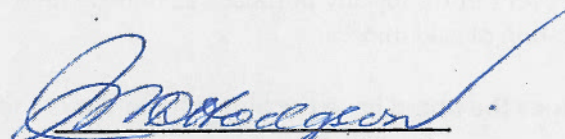
The following offer was received from Enerplus Resources Corporation:

\$1,000.00 per acre for the flow line right of way

\$ 500.00 per acre for the temporary work area

Therefore, no costs are awarded.

Decision delivered this 13th day of December 2012



M. D. Hodgson, Presiding Member

Schedule "A"

Attached to and forming part of Board Order No 05-2012

Terms and Conditions for Right-of-Way for Flow lines located in NE 1/4 28-11-26 WPM

1. Quiet Enjoyment

The Operator performing and observing the covenants and conditions on its part to be performed and observed shall and may peaceably hold and enjoy the rights, liberties, and easements hereby Ordered without hindrance, molestation or interruption of the part of the Owner (or any person claiming that by, through, under, or in trust for the Owner) for so long thereafter as the Operator, his successors, and assigns continues to use the right-of-way for the purposes herein set forth.

2. Demised Premises

The Owner for the purposes and at the consideration hereinafter to be determined, does hereby grant, transfer and convey to the Operator all and singular those parts of the shown upon the sketch or plan attached hereto as Sketch Plan #1 (hereinafter called the "demised premises") to be held by the Operator, for itself, its servants, agents and contractors, the right, licence, liberty, privilege and easement, to survey and select so much of the demised premises as may be necessary for a right-of-way seventeen (17) metres in width throughout for the laying down, construction, operation, maintenance, inspection, removal, replacement, reconstruction and repair of a flow line/pipeline or lines, and appurtenances as may be necessary or convenient in connection therewith, for the carriage, conveyance, transportation and handling of petroleum or petroleum products, water and/or gas through or by means of the same, and the right of ingress and egress for all purposes incidental to this grant as and from the date hereof and for so long hereafter as the Operator may desire to exercise the rights and privileges hereby given. The right to construct more than one flow line/pipeline in the right-of-way hereby Ordered shall be limited to one construction operation.

3. Protection of the Right-of-Way

(A) Subject to the following, the Owner shall have the right to use and enjoy the right-of-way.

i. The Owner shall not use the right-of-way for any purpose which might either interfere with the rights granted herein to the Operator, or incur a liability for damages to the Operator without the prior written consent of the Operator, including in particular, no permanent structures may be erected on the right-of-way by the Owner without the written consent of the Operator.

ii. The Owner hereby indemnifies and saves harmless the Operator from all actions, causes of action, proceedings, claims, demands, losses, costs, damages and expenses which the Operator may pay or incur as a result of or in connection with any use by the Owner of the right-of-way.

(B) The Operator shall be responsible for and compensate the Owner for reasonable additional costs incurred by the Owner which may be caused by the existence of the said pipeline, pipelines, and right-of-way, in connection with the excavation, drilling, installation, erection, repair, or construction for any permitted operation for agricultural or related purposes across, over or under, on or through the right-of-way.

4. Removal of Property

Notwithstanding any rule of law or equity, the pipeline or pipelines shall at all times remain the property of the Operator, notwithstanding that the same may be annexed or affixed to the demised premises and shall at any time and from time to time be removable in whole or in part by the Operator.

5. Damages

The Operator shall pay compensation for any and all damage where such damage occurs as a result of the operations of the Operator, its servants, agents, or contractors.

6. Liability

The Operator covenants and agrees to indemnify and save harmless the Owner from any and all liabilities, damages, costs, claims, suits, or actions caused by or resulting from the construction, operation, maintenance, and/or repairs of the said pipeline or pipelines and/or any related fixtures and appurtenances affixed to the right-of-way other than through wilful damage or gross negligence by the Owner.

7. Topsoil

Insofar as it may be practicable to do so, the Operator shall, unless otherwise requested by the Owner, strip from the ditch line prior to construction such width as may be required under good oil field practices and in compliance with existing regulations and replace the topsoil as near as possible to its original condition following construction.

8. Taxes

The Operator shall pay all rates and taxes that may be assessed and levied from time to time against its interest in the demised premises and installation or in connection with its operations thereon.

9. Above Ground Installation

The Operator shall, so far as may be practicable, locate any above ground installation in such a fashion as to provide a minimum of inconvenience to the Owner. The Operator agrees to compensate the Owner for such above ground installation by separate agreement and failing such agreement within sixty (60) days from the date of such installation, the matter of compensation shall be submitted to arbitration as hereinafter provided.

10. Discontinuance and Abandonment

Upon the discontinuance of the use of the said right-of-way and of the exercise of the right(s) hereby Ordered, the Operator shall restore the demised premises to the same condition, so far as may be practicable to do so, as the lands were prior to the entry thereon and the use thereof by the Operator.

11. Discharge of Encumbrances

The Operator shall have the right at its option, to pay or discharge any balance owing under any agreement of sale or mortgage or any tax charge, lien or encumbrances of any kind or nature whatsoever, which may exist prior to the registration of this Board Order, upon or against or in any way affecting the demised premises, in which event the Operator shall be subrogated to the rights of the holder or holders thereof and may, in addition to exercising and enforcing such rights, at its option, apply and credit the amount so paid by it, to the considerations as set forth above in this Board Order.

12. Additional Terms

Any additional terms, expressed or implied, shall be of no force or effect unless made in writing and agreed to by the Owner and the Operator.

13. Assignment

All the covenants and conditions herein contained, shall extend to, be binding upon, and inure to the benefit of the executors, administrators, successors and assigns of the Owner and the Operator respectively.

Schedule "B"

Attached to and forming part of Board Order No 05-2012

Terms and Conditions for Temporary Work Space located on NE ¼ 28-11-26 WPM

The Owner for the purposes and at the consideration hereinafter to be determined, does hereby grant to the Operator, its contractors and/or representatives utilizing temporary workspace, as approximately shown on the plan attached hereto as Sketch Plan #1, for the purposes of:

1. For access and clean-up of right-of-way for flow lines.


The Operator will restore the surface of the temporary workspace area to the same condition so far as may be practicable to do, as the same was prior to the entry thereon and the use thereof by the Operator, its contractors and/or representatives.

The Operator will compensate the Owner for damages that will occur in the area covered by the Temporary Work Space. The area designated as Temporary Work Space will automatically expire on the one (1) year anniversary of this Board Order.

enerPLUS CORPORATION

INDIVIDUAL OWNERSHIP PLAN

Showing
RIGHT-OF-WAY
 in
N.E.1/4 Sec.28 - Twp.11 - Rge.26 WPM
 Scale - 1 : 5000

Portions referred to outlined thus: 

Unless indicated otherwise, Azimuths and Coordinates are based on the NAD 83 (Original) datum, UTM Grid projection referred to the Central Meridian 99° W. (Zone 14) and were derived by G.N.S.S.

TITLE No.: 250382/2

OWNER: Wallace Henry Octave Gabrielle

OWNER: Charlotte Gwen Gabrielle

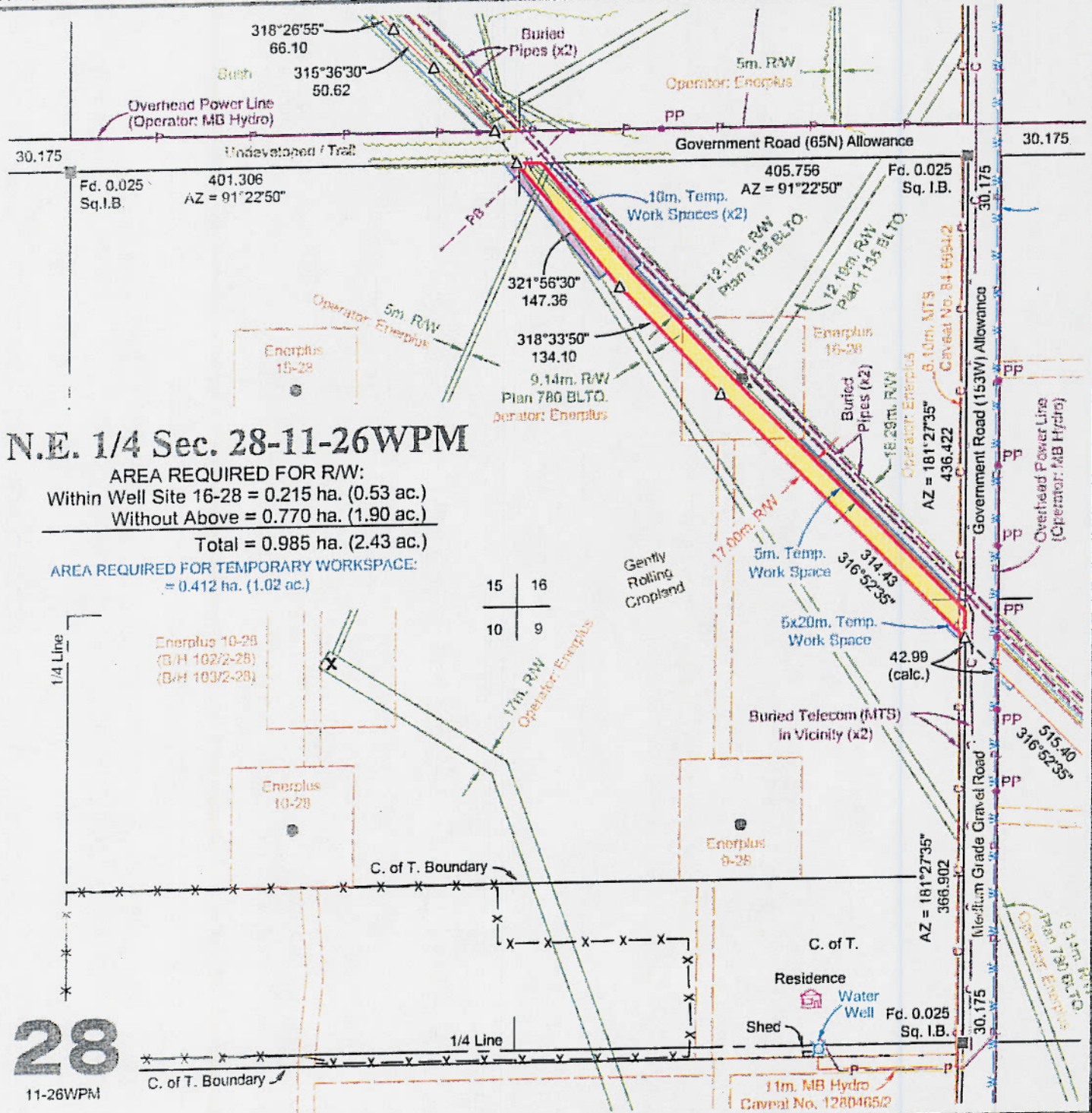
I/We, the landowner(s), consent to the location of the Right(s)-of-Way as shown and have no objections to The Manitoba Petroleum Branch of Manitoba Mines and Minerals Issuing an Underground Facility and / or construction permit
 Dated this ___ day of _____, 2012.

Wallace Henry Octave Gabrielle

Witness

Charlotte Gwen Gabrielle

Witness



N.E. 1/4 Sec. 28-11-26 WPM

AREA REQUIRED FOR R/W:

Within Well Site 16-28 = 0.215 ha. (0.53 ac.)

Without Above = 0.770 ha. (1.90 ac.)

Total = 0.985 ha. (2.43 ac.)

AREA REQUIRED FOR TEMPORARY WORKSPACE:

= 0.412 ha. (1.02 ac.)

28
11-26WPM

Altus Geomatics
Manitoba



Toll Free: 1-800-465-6233
www.altusgeomaticsmb.com

I.O.P. No.: 3

SEGMENT:

Client File No: 130592

Client Proj No: E014930

REV. Revision:

Date: July 23, 2012

Job No.: 151112-V

File: 151112P

Initials: CM/DS/DH - TJ - PFS