File No. OG 001-10

M. Orr	)	Thursday, the 20th day
Deputy Mining and Lands Commissioner	)	of January, 2011.

THE OIL, GAS AND SALT RESOURCES ACT

IN THE MATTER OF

A referral by the Minister pursuant to subsection 13(2) of the **Oil, Gas and Salt Resources Act**, R.S.O. 1990 c. P. 12, as amended, as requested by the Appellant dealing with a decision of the Respondent, dated the 8th day of July, 2010, in respect of the conditions on oilfield disposal Well VRI #1 (Horizon #1), Romney 2-23-V, situate on Lot 23, Concession V, Township of Romney, covered by Well Licence 10690, issued to the Appellant;

AND IN THE MATTER OF

Ontario Regulation 245/97, as amended.

B E T W E E N:

CLEARBEACH RESOURCES INC.

Appellant

- and -

THE MINISTER OF NATURAL RESOURCES

Respondent

REPORT TO THE MINISTER OF NATURAL RESOURCES

WHEREAS THIS REFERRAL was filed with this tribunal by the Respondent, on the 9th day of July, 2010;

AND WHEREAS a hearing under the **Oil, Gas and Salt Resources Act** (**OGSRA**) was held in the courtroom of this tribunal on the 17th and 18th days of November, 2010;

Appearances:

Mr. Christopher A. Lewis:	Counsel, appeared on behalf of the Appellant, Clearbeach Resources Inc.
Ms. Tania Monteiro:	Counsel, appeared on behalf of the Respondent, the Minister of Natural Resources.

INTRODUCTION

This matter involves the Ministry of Natural Resources' (MNR) (the Respondent) refusal to amend a condition of a licence and related request by Clearbeach Resources Inc. (Clearbeach) (the Appellant) pursuant to subsection 13(2) of the **Oil, Gas and Salt Resources Act (OGSRA)** that it be referred to the tribunal. The referral, received on the 9th day of July, 2010, was heard by the tribunal on November 17 and 18, 2010.

A well drilled in 2003 by the Appellant's predecessor, was converted from a production well to a disposal well by the Appellant in 2006. Approval for its use as such was granted by the Respondent Ministry on July 14, 2008 with conditions attached. The condition which is the subject matter of this referral was that disposal fluid be restricted to oilfield fluids produced in association with crude oil from the Trenton Group formation.

In 2009, the Appellant sought to change the disposal terms of the licence (including the restriction to the Trenton Group), which the Respondent refused, thereby leading to this referral.

THE ISSUE

1. Are the conditions imposed by the Respondent Ministry that restrict the formation for disposal and require local disposal into the same formation contrary to law and unreasonable and should they be amended?

THE EVIDENCE

The Appellant

The Appellant called three witnesses, two in chief and one in reply. The first witness was Mr. Aaron Verstraete, the owner of "Oil Patch Services", an "oil field servicing company" which hauls brine between wells and storage locations. Despite the fact that his trucks and drivers are duly licenced, none of these licences actually mention brine in any way.

Brine is the by-product of oil well extraction. Oil Patch Services hauls brine for the Appellant. Mr. Verstraete is familiar with the history of the subject well including the work done to convert it from a producing to a disposal well. He produced a series of photos which depict how brine is moved from tanker to well. Under the terms of Clearbeach's licence, the brine was permitted to be disposed from 35 kilometres away (the distance of the furthest source

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well). Six wells are involved: four in Essex and two south of Chatham. All are in the Trenton Group formation. His company averages ten truckloads per month for the Appellant.

By way of explanation to the tribunal, Mr. Verstraete described how brine is disposed of in wells, or storage pits and sometimes sprayed on gravel roads to keep dust down in the country areas. In some jurisdictions, it is used on roads in the winter.

In 2009, the Appellant applied to dispose of brine from wells in three other formations – none of them being the Trenton Group. The Appellant named these other formations as "Silurian Guelph" and "Cambrian". (Whether these names are being used in a correct geological sense is not important for these purposes as it was accepted that they are not in the Trenton Group.) These wells are not in the same field as the six wells for which the current disposal licence was granted. They are in different fields and the distances from the subject well to these fields can be anywhere from 30 to 110 kilometres. The truckloads would increase with another 225 loads of brine being moved each year (increasing from 2.4 truckloads to 4.3 loads per week). The brine from these wells is currently being stored in Blenheim, Ontario, in a storage facility (an earthen pit inspected by the MOE), and is also used as a dust suppressant on municipal roads. Some brine also gets trucked to Michigan (a more expensive proposition at approximately $6.50 - $9.00 per barrel "delivered to the site"). (The tribunal notes that an undated Report by an MNR/MOE Committee dealing with "Oilfield Disposal Materials" submitted by the Appellant and appearing to date from when the **Petroleum Resources Act (PRA)** was in place, costs for trucking fees generally depend on the distance and are generally between $3.15 and $9.40 per cubic metre. (There was no information produced by either side that explained how this cost compared to the $9.00 per barrel quoted at the hearing.)

While the brine in question has been analyzed and found to be "naturally occurring brine", it does not exhibit the same chemical characteristics as the Trenton Group brine – different formations naturally producing brines of varying characteristics.

Storage pits sometimes have to be shut down when rainfall affects their levels or in winter when dust suppression is not allowed. (The Appellant's witnesses indicated that the Appellant used storage pits and also possessed at least one other storage well at the Becher source pool.)

Meetings with the Respondent Ministry resulted in the Ministry advising of its concerns about the movement of brine across municipal boundaries and a perceived lack of control over the substance being moved, which might become contaminated during transit.

Mr. Verstraete could not understand the Ministry's bases for concerns as the brine is spread on country roads (by municipal agreement) and there are no licences required for such activity (although a spill of brine would trigger Ministry of Environment action).

The Ministry set out its concerns in a letter dated January 18, 2010, wherein it refused the request to add brine from other fields in other formations saying:

> "Your request to accept fluids from other formations and location was reviewed by the petroleum Resources Centre and was also discussed with the Waste Approvals branch at the MOE. Based on potential concerns regarding

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> trucking of oilfield wastes from various pools and locations, this application is deemed to be a commercial disposal site and subject to approvals from the MOE. This is consistent with the recommendations of the MOE/MNR/OPI Brine Disposal Committee".

Under cross-examination, Mr. Verstraete agreed that the signage and pressure readers found in the photos depicting the disposal well were required by the Respondent Ministry to control the movement of the brine from truck to disposal well. He agreed that amending the disposal licence as requested would result in triple the amount of brine being trucked. He did not see this as a significant increase. He also pointed out that brine is a "non-placard" item under environmental laws and that it is a non-hazardous load when trucked. He also clarified that his understanding of "commercial" had nothing to do with "trucking" per se but with situations where different producers paid a well owner to dispose of their waste.

The next witness, Ms. Jane Lowery has been the owner of Clearbeach Resources Inc., the Appellant since 1989. She is also or has been involved with other oil and gas companies. She is aware of the economics of running a small business. Getting rid of brine always carries some sort of cost to her company. When storage facilities for the brine fill up, she has to reduce well production. Shipping brine to Michigan would be cost prohibitive. Clearbeach owns 50% of Oil Patch Services.

Ms. Lowery also attended the meetings with the Respondent Ministry staff and told the tribunal that one of the Ministry's suggestions was to dispose of the brine in disposal wells located in each of the fields. This was not feasible. Finding a well to use for disposal was a difficult exercise and even if one was found, it was expensive to convert a producing well to a disposal well. In addition, not all landowners want to have a disposal well on their property (the lands are not owned by Clearbeach). She would be forced to cut back on production were she faced with being unable to use the Romney Well. Before the Romney Well received its current disposal well licence, she was shipping brine through another trucking company and the brine was being used for dust control, or put into a storage pit, or sent to the United States. She was adamant – existing production would have to be curtailed were she unable to use the Romney Well as she had requested.

Under cross examination Ms. Lowery repeated the points she had expressed initially – disposing of brine was costly, subject to the desires of landowners and to the availability of brine pits. The Romney Well, with its capacity to take large amounts of brine, was the best option for a small business like Clearbeach. Since the brine was already being trucked from wells within the approved field, she failed to see why the Ministry was pointing to trucking distances as a factor in its decision to refuse the request to amend the current licence.

The Respondent Ministry

The Respondent Ministry produced three witnesses. The first was Mr. Rudy Rybanski, Chief Engineer, Petroleum Resources Centre, MNR, a Geological Engineer by profession and employed by the Ministry's Petroleum Resource Centre since 1981. He was familiar with the **OGSRA**, its regulations and the Provincial Standards. He had helped develop the provincial policies that pre-dated the Standards and advised that the policies had evolved into the Standards. His duties included reviewing technical applications for licences and permits as well as reviewing and updating technical standards for the industry. While he could not claim

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sole ownership of the contents of the Standards, he had written the words. He reiterated what eventually became something of a mantra for the Ministry, namely "local production: local disposal". His testimony was that the Ministry had long applied the policy of requiring that locally produced oil field fluids be disposed of in the places where they were produced. When asked about the meaning of "local", he indicated that "If you are a producer in a particular location of oil and gas, obviously you're going to produce water in most cases, and so that has a physical location out there in the landscape and fields can be smaller or larger, depending on the geology, so that would -- it's related to the field or pool…." Wells have a geographic location and the policy is that "if you produce here, you have to dispose here". The Ministry's reason for establishing the policy was and is that there are too many "unknowns" as far as dealing with the fluids produced from wells. The character of a fluid (it can contain heavy metals, benzene etc.), its source, and tracking it from source to disposal all present problems for the Ministry. The policies are intended to exert a form of control over the unknowns so that the public interest is served.

The Provincial Standards (the "Standards") are law by the fact that they are adopted by reference in Regulation 245/97 (made under the **OGSRA**) which is entitled "Exploration, Drilling and Production". Operators are bound by the Standards and the Ministry as licensor can impose terms, conditions, duties and liabilities in addition to the Standards pursuant to Section 13 of the **OGSRA**. The Ministry can consider broader issues even if an applicant complies with licensing requirements.

The Petroleum Resources Act preceded the current **Oil, Gas and Salt Resources Act**. **The Environmental Protection Act (EPA)** finds its way into the mix through the fact that one of its regulations (Regulation 341), deals with "oil field brine" by defining it ("means brine produced in association with oil and gas drilling and production operations that are controlled under the **Petroleum Resources Act**"); designating it a waste and then exempting it from the **OGSRA** and the Regulation. This has left a "gap" as far as control over the transporting of brine is concerned since the MOE does not regulate it and neither does the MNR except through the application of its own legislation. The Ministry is concerned by the gap. The MNR's attempts to deal with the gap are in line with its role of protecting the public and upholding the public interest. This it does by taking into account the scale of the operation (number of trucks involved) and basically applying the "local production; local disposal" policy.

Under cross-examination, Mr. Rybanski admitted that the phrase "local production; local disposal" could not be found in any of the documentation produced by the Ministry for the hearing including the aforementioned Committee Report dating from 1994. The old policies (which were applicable under the **PRA**) were reviewed at some point in the past prior to the enactment of the current **OGSRA**, the Report was produced and the Standards appeared. In Mr. Rybanski's words, the Ministry applied conditions that eventually worked their way into the body of the Standards. Nothing had changed as far as the application of the "local production; local disposal" policy was concerned, even if there was no specific wording to support his assertion.

Mr. Rybanski was questioned about the revision of the Standards (the version in effect today is Version 2 dated March 27, 2002) and asked why simple language could not have sufficed for Section 7.6. He replied that while that was the intent, it was not accomplished. He was further questioned about the Ministry's logic in arguing that trucking distances were a key

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factor in its refusal to amend the licence. Counsel for the Appellant could not understand why trucking from different locations (ranging from 35 – 110 kilometres away) was such a crucial issue when the current licence allowed it to be trucked from 35 kilometres away. Mr. Rybanski responded to counsel's questioning by pointing out that the Ministry was attempting to exert control over the substance by limiting trucking and taking into consideration the scale or scope of the operation in its bid to limit the impacts of "widespread trucking". His fear was that this application (which uncovered the legislative gap already discussed) represented the thin edge of the wedge and that it could set an undesirable precedent allowing the movement of many trucks carrying brine from an assortment of wells all with no controls over the scale of the trucking itself and over the identity of the brine. Limiting the disposal of the brine to the location in which it was produced was the Ministry's way of controlling something that could become a problem as far as the public was concerned.

The Ministry's second witness was Mr. Jug Manocha, Operations Engineer - Petroleum Resources Centre, a professional engineer (mechanical) and a long-time employee of the Ministry. He reviews applications for disposal wells and applies the Provincial Standards. He seeks input from others and makes recommendations to the approving manager. He was involved in policy development and specifically the report that came about in 1994, leading to the creation of the Standards. He reiterated the policy that fluids should be returned to their source. The intention is to contain what has to be disposed. The Ministry does not want the brine to "migrate". He felt that the public was concerned with the disposal of brine as an issue and the Ministry wanted to address the public concern by exerting control over the substance.

Mr. Manocha produced a policy directive dated April 7, 1993 (issued March 1994) that according to him, addressed the conditions that were attached to well permits, namely that disposal or injection could occur only with the prior written approval of the Ministry. He pointed out that the Ministry recommended that oilfield brine be disposed into the same formation from which it originated. He said that the concept of limiting fluids has always been in existence, drawing attention to a copy of a letter dated 1993 whereby the Ministry listed a number of disposal conditions for an operator's use of a disposal well. It stipulated that the disposal fluids in question were restricted to "oilfield brine produced as a by-product of oil and gas production taken from wells operated" by the operator in the Petrolia field. Mr. Manocha said that the Section 7.6 of the Standards was intended to control the sources of fluids. In terms of moving fluids, pipeline was the preferred method and trucking was second. The Ministry is aware of the need for companies to dispose of fluids as part of their business.

Mr. Manocha reviewed the current licence held by Clearbeach. The report that accompanied the disposal application (received by the Ministry on May 9, 2008) was relied on to set the conditions and approval was subsequently given. When the second application was received only a year later in May of 2009, Mr. Manocha said his reaction was "why bring it now?" In other words, why had this request not been part of the original application?

The Ministry was not prepared to amend the approved licence to allow fluids from formations other than the Trenton formation to be disposed of in the Romney well. The Ministry was concerned with public reaction, in the unknown characteristics of the fluids, and the loosening of control over the disposal of the fluids.

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In cross-examination, Mr. Manocha was asked why the Ministry did not take the opportunity to make it clear that the policy of "local production: local disposal" applied to the disposal of fluids. He agreed that the conditions of the current licence were being satisfied, that the Trenton Group (stated in the licence as the source of the fluids intended for disposal) could be found throughout Ontario and that the wells mentioned in the licence were not specified - the result being that Clearbeach could truck the fluid from anywhere as long as long as it had originated in the Trenton Group. Mr. Manocha was asked a number of questions about the distances that trucks had to travel to move the brine.

The Ministry's third witness was Mr. Ray Pichette, Director - Natural Heritage, Lands And Protected Spaces Branch, MNR, who described the thinking behind the exemption stated in the **EPA** – namely that the policy makers wanted to make it easier for operators to deal with government requirements as there would be fewer levels to contend with. Mr. Pichette described how the Ministry wanted what he described as a "closed system", meaning that oil fluid produced in a field would be moved to a disposal point within the same field by way of pipes. Brine that came from any source and disposed of for a fee was considered commercial brine disposal.

In cross-examination, Mr. Pichette advised that while a third version of the Standards had been discussed, nothing had been completed to date. He said that Version 2 was "adequate" and he understood there to be a "typo" in the wording. He acknowledged that ten years had passed since their inception. Mr. Pichette also talked about the approach taken by the MNR in terms of brine once it had left a well – the Ministry did not want to have anything to do with it. He said that the trucking of brine should be regulated in order to limit risk.

The Appellant brought a witness in reply, Mr. McIntosh, who was familiar with the various aspects of brine disposal wells including their construction. He was and had been a member of various committees (including the aforementioned 1994 Report Committee) and he stated that he could not recall any discussion of the policy "local production: local disposal". No commercial disposal was going to be allowed, brine should not change hands while being moved and if it came from the same field, it had to be piped. He did not agree that Section 7.6 contained a typing error and in fact the wording between the two versions was the same. He stated that 90% of brine is disposed of by producers in their own fields. Clearbeach's circumstances were different in that the amount of brine involved was small and it would be costly to drill a disposal well for the additional fields. In cross-examination he did not agree that the volume presented any problems, that the capital cost of building a new disposal well in the other fields outweighed the cost of trucking the brine and that the ability to dispose of brine had a bearing on the ability to produce gas since an inability to dispose of brine would mean that gas production had to be reduced or stopped altogether.

FINAL SUBMISSIONS

The Appellant

The Appellant wants to expand the terms of its current disposal licence to allow it to truck brine from wells located in formations other than the Trenton formation. The Ministry does not agree that the licence can or should be expanded to allow for the trucking of brine from locations not associated with the disposal well – the Romney Well. The Appellant described the

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Ministry's position as "unreasonable". The only difference between what the Appellant is allowed to do now and what it wants to do is the amount of brine (more) and a further distance in terms of truck travel. Environmental issues could crop up over any distance and the brine was currently being trucked 35 kilometres. As for the Standards, there was nothing in their wording to say that brine disposal was restricted to the same formation but rather the intention was to prevent operators from picking up brine from anywhere and disposing of it not knowing what was in the brine itself. Trucking brine was contemplated as seen by the Standards' requirements that transit slips be kept, etc. The Ministry's concerns associated with trucking brine do not make sense, given that it was suggesting that the Appellant truck brine to the United States as an alternative to using the Romney Well. The suggestion that another local disposal well be drilled was unreasonable given the costs involved ($200,000-500,000). The eight fields in question produce smaller amounts of oil and larger quantities of brine.

With respect to the MNR policy of "local production: local disposal", it has never been updated and has never made it into the Standards (which were revised in 2002). The Appellant asks, if the policy was as important as the MNR says it is, why was it not incorporated into the Standards? (The MNR has said that it is in the Standards, but that there is a mistake in the wording.)

As for the trucking of brine, the Appellant argued that it is appropriately licenced (drivers and trucks).

The Appellant reviewed the legislative history having to do with the **OGSRA**, the **EPA**, the exemption given to oilfield waste under that **OGSRA's** Regulation 341, and said that the policy in question should be found in the Standards (the four corners of the law) and that it must be reasonable.

The wording in Section 7.6 of the Standards is intended to ensure that commercial disposal does not occur. The Appellant argued that the MNR's 1994 policy is not found in the current Standards. The issue of proximity is found in clause 7(a)(ii) and not in 7(a)(i). The Appellant found it significant that it was included in one and not in the other. All that the section is saying is that an operator can dispose of its brine, regardless of the brine's source. If it was produced by the operator, then the operator can dispose of it. The wording should be given the plain and ordinary meaning. The MNR cannot do indirectly what it cannot do directly and try to restrict the disposal this way. The rules are not clear and they are not consistent.

The Respondent Ministry

The Ministry objected to the Appellant's saying that the policy requirement was contrary to law and unreasonable. The Ministry argued that its policy of "local production: local disposal" was made a long time ago and that the intention was to manage the risks associated with the disposal of oilfield waste, balancing the interests between the industry and the public and the wise management of the resource.

Counsel for the Ministry reiterated the Ministry's witnesses' testimony that Section 13 of the **OGSRA** provided the Ministry with broad powers to impose conditions on licences under the **OGSRA**. Trucking and its effect on the public, management of the resource and the public interest, could all be factored into the Ministry's decision-making process. The

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Ministry had discretion in the exercise of a statutory power and in considering the legislation on a broad level. All of the factors that the Ministry considered could be found within the purpose and intent of the statute. Counsel posed the question "does the Minister have to issue a permit if an applicant complies with the laws?", and answered that the exercise of the discretion should not be fettered by having to issue a licence even if an applicant complied – the Minister could consider other relevant factors and still make a decision that was not contrary to the law.

THE LAW, FINDINGS AND CONCLUSIONS

The Law

The Oil, Gas and Salt Resources Act, R.S.O. 1990, c. P. 12, was preceded by the **Petroleum Resources Act**. **The Petroleum Resources Act** (the "**PRA**") provided that the Lieutenant Governor in Council could make regulations regulating "… the use of the subsurface for the disposal of brine produced in association with oil and gas drilling and production operations." The applicable regulation notes that the location of a well drilled for the disposal of "mineral waters" was subject to the approval of the Minister. The disposal of mineral water itself in an underground formation was subject to the approval of the Minister. Also, the wells themselves had to be cased and cemented to prevent the mineral water from entering any formation not approved for the purpose of disposal. Operators were required to keep certain records including the fluid's source. At this time the Ministry's regulatory work was supported by the use of policies. A policy document was provided by the Ministry for this hearing and will be dealt with at length in the Findings section.

The current applicable legislation consists of the **Oil, Gas and Salt Resources Act**, (**OGSRA**), its regulations and a document entitled "Oil, Gas and Salt Resources Operating Standards".

The **OGSRA** is similar in many ways to its predecessor, the **PRA**. Neither has an actual "purpose" section; both give the Minister the discretionary power to grant a licence or a permit with terms and conditions and both have regulations dealing with the disposal of "mineral water" (**PRA**) and "oil field fluid" (**OGSRA**). Ontario Regulation 245/97 made under the **OGSRA** presents the "Provincial Standards" which are defined as "the standards set out in "Oil, Gas and Salt Resources of Ontario Operating Standards" published by the Ministry, as amended from time to time". The regulation makes it a requirement for operators of a work governed by the **OGSRA** to comply with the Provincial Standards. The **OGSRA** says that "a regulation may adopt by reference … any standard…." 17(5).

The aforementioned Standards first made their appearance in 1997 (Version 1). They were followed by a second version in 2002 (Version 2). Both versions describe themselves as "minimum requirements". Both warn the reader that their requirements are adequate under "normal conditions". And both agree that changes may have to be made to address new technology, experience or both.

Section 7.6 of the Standards for both versions is the section of most interest to this matter. While the other sections speak to various technical requirements associated with disposal in a well, it is this section that places a certain limit on the operator's conduct. Under Version 1, the section reads that "the operator shall conduct disposal operations within the following limits:

(a) only formation water and drilling fluids may be disposed into wells;

(b) only oil field fluids produced by the operator or oil field fluid originating from the same field and delivered by pipeline to the disposal well shall be injected into operator's disposal well".

Under Version 2, the section reads that "the operator shall:

(a) only inject oil field fluid (formation water and drilling fluid) into a disposal well that; (i) is produced by the operator, or (ii) originates from the same field and is delivered by pipeline to the disposal well…." The phrase "oil field fluid" is a defined term found in the regulation and means (a) anything that has been used as a well drilling fluid, and

(b) formation water that is recovered from a well".

The matter before this tribunal comes through the wording of subsection 13 (2) of the **Act** that says that before the Minister amends, suspends or revokes any term, condition, duty or liability imposed on a licence or permit, the holder of the licence or permit can request a hearing before the Mining and Lands Commissioner. After holding a hearing, the Commissioner files a report with the Minister.

Government policies help the regulated public understand how they should conduct their affairs under the applicable legislation. Here, it is necessary to refer to the policy that was in place under the **PRA** – the reason being that the Ministry claims the policy made its way into the Standards and should therefore be applied to the Appellant's request thereby disallowing the movement of brine from locations other than the location in which it was produced. This, despite the wording in Section 7.6 which should be treated as a typographical error; The Appellant claims that the policy now has no role to play; it has never been incorporated into the Standards and in any event, the Standards allow for the movement of brine from locations other than the location in which it was produced.

The Parties' Positions

The Ministry states that its Brine Disposal policy of 1993/94 is the source for the rule of "local production; local disposal". It says that the rule has always been applied to disposal well permits and that this particular case has revealed a typographical error in the wording of the Standards. The Ministry says that the Standards should be read to implement the aforementioned rule. The **EPA**'s exempting oil field brine from regulation under that **OGSRA** was not intended to create a regulatory vacuum but to "give to MNR the ability to permit the local disposal of oil field fluids from local wells". Oil field fluid is a designated waste under that legislation and it was not intended to leave it unregulated. The MNR admits that the so-called typographical error found in the Standards has created a regulatory vacuum. The Provincial Standards are being applied in the way that the Ministry has dealt with the disposal of oil field fluids as originally envisioned – local production: local disposal.

The Ministry says that Section 13 of the **OGSRA** allows the Minister wide leverage in terms of the conditions to be imposed on a licence – including a restriction regard-

ing where the brine can be disposed. It has always been this way and it falls in with the Ministry's intention to protect the public from large scale operations with a large number of trucks making their way from oil field source to disposal well as well as management of the resource. Furthermore, it is in the public interest to uphold this rule.

The exercise of the Minister's discretion in this matter was a key component to the Ministry's argument. The wording of Section 13 was "permissive" and allowed the Minister to set conditions or to say "no" to an applicant – the conclusion being that the Minister could not be bound to grant a licence. Of course, the Minister's decision must be consistent with the purpose of the **OSGRA** and not arbitrary. As long as the Minister's decision is lawful (meaning in part that relevant factors have been considered), then the Minister can impose the type of restriction imposed in this case (i.e., dispose of what you have produced in the place you produced it).

The Appellant wants to expand the use of its disposal well to allow for the disposal of brine from other formations and says that the policy being applied by the MNR is not current; it does not exist anymore; it was not incorporated into the Standards ; it has been supplanted by the current legislation, and the Minister has imposed an unreasonable restriction on the Appellant's activities to the point where it would have to shut down producing wells if it is unable to dispose of brine. The Appellant takes issue with the Ministry's reasons for rejecting its request, especially the Ministry's concerns about the trucking of oil field wastes from various pools and locations. The Appellant argues that there is no such limitation in the Standards and indeed, the current licence itself could be interpreted to allow for brine from anywhere to be disposed of in the Romney Well as long it had been produced in the Trenton Formation. The Ministry would be content if the fluid was piped in to the Romney Well, but not trucked. If it was trucked, the Ministry would consider the matter to be a commercial enterprise and in need of environmental assessment.

The Appellant says that the Ministry is being unreasonable when it suggests the use of pipeline to move the fluid. The additional wells are located "miles away" and cannot be connected. The Appellant also stated that its trucking company is fully compliant with all "relevant laws, rules and regulations" and that the MNR cannot point to any law, rule or regulation that prohibits the trucking of oil field fluids by the trucking company. Furthermore, the Appellant's interpretation of the law (and the granting of its request) would not open the floodgates to a host of similar requests, since 95% of brine disposal in Ontario is done through pipeline.

Findings

To begin, the tribunal is providing this report pursuant to Section 13 of the **OGSRA**. It is not the role of this tribunal to make the actual decision regarding the terms and conditions being considered but to render a report to the Minister after a hearing into the matter.

Section 13 gives the Minister the power to exercise discretion to grant licences and permits under the **OGSRA**. This discretion is one that can be exercised with or without an examination of the applicant. The Minister can exercise discretion as well when imposing terms, conditions, duties and liabilities "as the Minister in his or her discretion considers proper". The tribunal agrees with the Ministry's argument about "compellability" and the Minister's decision.

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The Minister cannot be compelled in the way that a minister can be compelled when legislation stipulates that a government official "shall" issue a licence to an applicant who has met a series of regulatory requirements – the Livestock and Livestock Products Act R.S.O. 1990 c. L. 20 is an example.

What guides the Minister in the exercise of the aforesaid discretion?

The Minister obviously exercises this discretion within the confines of the legislation. It is well-known that the Minister must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations. Respecting the confines of the legislation means that the Minister must not try to promote purposes that have no connection to the purpose of the legislation. These are all well-known precepts.

In the case at hand, the Minister has the legislation to guide him or her and this includes the Standards, (which happen to represent a minimum standard). The Ministry in this case has argued that a policy espousing "local production: local disposal" is also something that has guided staff since before the Standards were formalized through the Regulation. The Ministry produced a policy document which did in fact make reference to the Ministry's recommendation that oilfield brine be disposed into the same formation from which it originated. This document, entitled "Oilfield Brine Disposal – Application Requirement" is dated April 7, 1993 and its date of issue is March 1994. The first version of the Standards was published in 1997, the second version following in 2002. The Ministry witnesses admitted under cross examination that neither of these documents actually contains the phrase "local production: local disposal". In fact, there was nothing produced aside from the aforementioned policy document that contained this wording. However, it is clear from the information produced by the parties that the Ministry did (and does) in fact follow this policy in granting licences to dispose of brine.

A closer look at the policy document reveals that it contained suggested formats for approval letters and for the conditions that could accompany such approval. Two such sample conditions are, "[d]isposal fluids shall be restricted to oilfield brine produced as a by-product of oil and gas production taken from the wells operated by "Name of Applicant" from the following location" – a location identifier follows, and "[d]isposal is restricted to the "Name of Disposal Formation" formation, using the "Name of Disposal Well" disposal well". Being suggested formats, it is apparent that the wording is loose enough to allow for the Minister to follow the recommendation of brine being disposed into the same formation from which it originated. One simply has to insert the appropriate formation names.

While the policy document has not been updated, as admitted by the Ministry, it is the tribunal's finding that the policy is still recognizable in the **OGSRA**, the regulation and the Standards and that these all point to an intention on the part of the government to exert control over oil field fluids – even to the point that their disposal is restricted to a particular formation. It was apparent to the tribunal that all of those present at the hearing knew of the existence of the government's intention to exert control over disposal and that the intention factored into the licence issuing process. The Ministry witnesses were steadfast that they observed and carried out the so-called policy. The Appellant itself did not raise any objection when a Ministry witness (Mr. Manocha) recalled being told at a meeting with the Appellant's officials that their own consultant had cautioned them about trying to attempt applying for a licence to dispose of brine from non-originating locations. While little weight can be given to such evidence, it is

interesting that the initial disposal application was most likely made at a time when the additional wells were producing brine that had to be sent somewhere.

The Ministry's adherence to its policy is shown by the chart produced by the Appellant itself and entitled "Disposal wells licenced in Ontario". (Exhibit 9) Many, if not all of the 59 licences listed in that chart show a correlation between the so-called "Source Formation" and the "Disposal Formation". (The tribunal notes that there was a loose approach to naming geological periods and the formations that are associated with each geological period. However, in referring to the chart, it is apparent that formation names are important.) The licence dates range from 1959 to 2008. The tribunal concludes that a policy controlling the disposal of oil field fluids has been followed through two eras of legislation and through two versions of the Standards. Implementation of a policy through the imposing of conditions restricting source and disposal locations is not unreasonable and is reflective of the need to maintain control over a substance that might contain "unknowns".

As for the Standards, it was the position of both parties that the wording in Section 7.6 was a problem. The Ministry even admitted that it constituted a "typo". The tribunal does not agree that there is any error in the wording under the current version. The language in Version 2 is clumsy and an obvious attempt has been made to reduce the number of words while still achieving the same objective. However, there is no typographical error as far as the tribunal is concerned and the effect of both sections in both versions is to say that first, only formation water and drilling fluids (oil field fluids) may be disposed into an operator's disposal wells. Secondly, an operator can inject oil field fluid into the operator's disposal well only if the fluid was produced by the operator or if the oil field fluid originates from the same field and is delivered by pipeline to the operator's disposal well. Mr. McIntosh, for the Appellant, was probably the most articulate witness when reviewing the Standards and his clarity was appreciated. For the purposes of this hearing, the tribunal is of the view that Section 7.6 has been given more importance or weight than is necessary when it comes to understanding the intention to control the disposal of fluids in particular formations. The emphasis should be on reading the **Act**, its regulation and the Standards in their entirety. In doing that, one can see certain themes emerging in the use of words like "formation".

The word "formation" is of some importance to the **OGSRA**, its regulations and to the Ministry's policies. Knowledge about the types of formations encountered by operators and the characteristics of such formations appears to be useful in the regulation and control of the resources for which the **OGSRA** is named. The intention also seems to be to prevent fluids pumped into one formation from crossing into different formations for various reasons. The Report that was produced by the Appellant appears to address a need of the MNR to understand the source formation for brine as well as the disposal formation. A review of the **PRA** and its regulation 915 by the tribunal confirms that the Ministry has always been concerned with the control of fluids produced by drilling as well as their disposal and storage. Section 22 and subsection 37(2) of the regulation are but a couple of examples. It is also evident that the Ministry has always been aware of a need to ensure that any of the industry's regulated activities do not constitute a "hazard to public health or safety". This would surely include the disposal of brine.

The Standards provide additional examples of Ministry attempts to control the movement of fluids.

. . . . 14

2.2 Injection Well Design

Operators shall design injection wells to:

(a) permanently isolate and protect all potable water formations from contamination;
(b) prevent the migration of the injected fluid from the target formation to other existing and potential hydrocarbon bearing formations;
(c) prevent the migration of fluids between permeable formations; and
(d) ensure that the injection fluids do not enter formations other than the injection formation.

2.3 Injection Well/Project Construction, Operation & Maintenance

14.3 Oil Field Fluid Storage

Where formation water is stored in an earthen pond, pit or underground tank the operator shall:

(a) ensure that the fluid cannot create or constitute a hazard to public health or safety, run into or contaminate any fresh water horizon or body of water or run over or damage any land, road, building or structure;
(b) ensure that any pond, pit or tank does not leak into the surrounding soil and is suitable for the fluid being stored;

It stands to reason that the Ministry would want to maintain control over the disposal of oil field fluids and it is common sense that one would want to avoid mixing fluids from different formations (and not just fluids from different operators' wells) when one is not completely sure of the results.

Unfortunately, the Ministry's articulation of its own policy suffered from what can only be called "distortion". If trucking is an issue or the distances being taken to truck brine is an issue that needs attention, then one should be able to spot the supporting wording somewhere. The Ministry seems to have found itself caught in a dilemma when oil field waste was exempted from regulation under the **EPA** and this is unfortunate. The Ministry's witnesses were tying themselves in verbal knots trying to explain (unnecessarily) how trucking brine a distance of 100 kilometres was worse than trucking brine a distance of 35 kilometres. There is no practical difference. The potential harm (from a spill) is the same for both distances. The potential for dust and noise from truck traffic is something that can be addressed through municipal laws. The tribunal was puzzled by the Ministry's position regarding trucking. The Ministry has every reason to be concerned about the "disposal" of fluids and it makes sense to require that source formation and disposal formation match up on disposal. It is perfectly understandable for the Ministry to be concerned about not knowing what might be in the disposed fluids. But the concern over trucking added very little to the merits of the Ministry's position. Using the Standards to support the Ministry's position on this point was not helpful. There is no reference to the distance that fluids have to travel nor is there any indication that

trucking itself or trucking a particular distance is an issue as far as the Standards are concerned. However, this observation is in no way to be taken as minimizing the concerns that the Ministry has with the trucking of brine. It was clear to the tribunal that trucking brine presents as much a concern as trucking any other potentially harmful substance.

What did "local" mean? Despite talking about areas of the fields and so on, there was really no solid definition that the tribunal could identify after all was said and done. The size of a formation could mean that trucks might have to travel hundreds of kilometres to deposit their load of brine.

The Appellant is seeking something it knows is not possible. It could have applied to include the additional wells at the time of its original application and its own consultant appears to have advised against this. The knowledge of the Ministry's policy was "out there" as the Ministry witnesses indicated. One is not going to find the exact phrase "local production: local disposal" anywhere in the legislation or the Standards, but the tribunal is satisfied that what is evident is an intention to control the handling of oil field fluids including brine from production to disposal to among other things, protect public health and safety. This control can include restricting disposal of brine to a particular formation – as the Minister sees fit.

While the Ministry's approach to the problem of brine disposal has been muddled by the passage of time and the lack of any recent efforts to deal with a concern that seems to have been recognized as far back as 1994 with the inter-ministerial/OPI Report, the tribunal is of the view that the Ministry's conditions are within the law and reasonable.

DATED this 20th day of January, 2011.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER