



National Energy Board

Reasons for Decision

Manito Pipelines Ltd.

MH-1-96

July 1996

Facilities Abandonment

National Energy Board

In the Matter of

Manito Pipelines Ltd.

An Application dated 31 January 1996 by
Murphy Oil Company Ltd. on Behalf of Manito
Pipelines Ltd. to Abandon Certain Facilities.

MH-1-96

July 1996

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Abbreviations

NEB or the Board	National Energy Board
CCME	Canadian Council of Ministers of the Environment
CCME guidelines	Interim Canadian Environmental Quality Criteria for Contaminated Sites
CEAA	the <i>Canadian Environmental Assessment Act</i> .
EC	Electrical Conductivity
EPEA	Environmental Protection and Enhancement Act
Guidelines	The Board's Guidelines for Filing Requirements
Husky	Husky Oil Company Ltd.
IPL	Interprovincial Pipe Line Inc.
km	Kilometre
m	Metre
mm	Millimetre
m ³	Cubic Metre
m ³ /day	Cubic Metres Per Day
Manito	Manito Pipelines Ltd.
Morgan	Morgan Hydrocarbons Inc.
Murphy	Murphy Oil Company Ltd.
NEB Act or the Act	the <i>National Energy Board Act</i>
Notice	Notice of Hearing
O.D.	Outside Diameter
Pipeline System	Blackfoot/Dulwich Pipeline System
ppm	Parts Per Million
SAR	Sodium Adsorption Ratio
Sceptre	Sceptre Resources Limited
Station	Blackfoot Receipt and Pump Station

Recital and Appearances

IN THE MATTER OF the National Energy Board Act and the regulations made thereunder;

AND IN THE MATTER OF an Application by Murphy Oil Company Ltd. on behalf of Manito Pipelines Ltd. dated 31 January 1996 pursuant to section 74 of the Act, for Leave to Abandon the operation of the portion of the pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

AND IN THE MATTER OF Hearing Order MH-1-96;

HEARD at Calgary, Alberta on 21, 22, 23 and 24 May 1996.

BEFORE:

K.W. Vollman	Presiding Member
R. Illing	Member
R.L. Andrew	Member

APPEARANCES:

L.G. Keough	Morgan Hydrocarbons Inc.
F.M. Saville, Q.C. B. Roth	Manito Pipelines Ltd.
S.H. Castonguay	Amoco Canada Ltd.
G. Bunz	Cactus Lake Owners (Petro-Canada, CS Resources, Murphy Oil Company Ltd., and Wascana Energy Inc.)
W.J. Hope-Ross	Canadian Occidental Petroleum Ltd.
W.F. Muscoby	Imperial Oil Limited
K.L. Meyer	Novagas Clearinghouse Ltd.
H.R. Huber	SaskEnergy Incorporated
C. Berry	Sceptre Resources Limited
A. Reid	Alberta Department of Energy
T. Irvine	Saskatchewan Energy and Mines

Overview

(NOTE: This summary is provided for the convenience of the reader and does not constitute part of this Decision or the Reasons, to which the readers are referred for detailed text.)

The hearing was initially set down to consider two separate applications relating to the Manito pipeline. Morgan Hydrocarbons Inc. filed a complaint and application dated 21 December 1995 asking the Board to, among other things, assert its jurisdiction over certain facilities owned by Murphy Oil Company Ltd. and set new tolls for the Manito pipeline. On 31 January 1996 Murphy, on behalf of Manito Pipelines Ltd., applied to the Board for authorization to abandon a 21 kilometre portion of its pipeline between the terminus of the pipeline at Blackfoot, Alberta and Dulwich, Saskatchewan.

Manito subsequently requested that its abandonment application be considered before the issues raised in the Morgan complaint. Manito argued that if the Board approved the abandonment it would cease to have jurisdiction over the Manito pipeline. After allowing parties to comment on the merits of Manito's request, the Board decided to hear and decide on the abandonment application before considering the issues raised in the Morgan complaint.

A four day hearing was held in Calgary commencing on 21 May 1996. Based on the evidence presented in this proceeding, the Board approved the applied-for abandonment of Manito's pipeline facilities between Blackfoot, Alberta and Dulwich, Saskatchewan. The Board also found that the Abandonment Order, when effective, would cause the pipeline to no longer be under the jurisdiction of the National Energy Board.

In considering the abandonment application the Board performed an environmental screening as required pursuant to the requirements of the *Canadian Environmental Assessment Act* and the Board's own regulatory process. The Screening Report was released to the public on 14 June 1996. No parties submitted comments. The Board found that, subject to the performance of the mitigative measures prescribed by the Board in these Reasons For Decision, the proposed pipeline abandonment will not cause any significant adverse environmental effects.

The Board has concluded that once Manito has complied with the mitigative environmental measures and conditions set out in the Screening Document and these Reasons for Decision, the abandonment order will go into force and the Board will cease to have jurisdiction over both the abandoned line and the remaining portion of the Manito pipeline.

Chapter 1

The Applications

On 21 December 1995, Morgan Hydrocarbons Inc. ("Morgan") filed a complaint and application with the National Energy Board ("NEB" or "the Board") requesting that the Board assert its jurisdiction over certain facilities owned by Murphy Oil Company Ltd. ("Murphy"), establish terms for access to such facilities and set tolls for their use. The submission also constituted a complaint in respect of the tolls charged on the Manito system. Additionally, Morgan requested that the Board regulate Manito Pipelines Ltd. ("Manito") as a Group 1 pipeline.

On 4 January 1996, the Board issued Order TOI-1-96 making the tolls of Manito interim from that date pending investigation of the complaint.

On 31 January 1996, Murphy on behalf of Manito, filed an application under section 74 of the *National Energy Board Act* ("NEB Act" or the "Act") requesting authorization to abandon a 21 kilometre portion of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan. Manito maintained that this portion of its pipeline was no longer economically viable to operate. The original construction of the extension to Blackfoot in 1976 brought the pipeline under the Board's jurisdiction as an interprovincial work. Manito asserted that the granting of the applied-for abandonment would remove the pipeline from the Board's jurisdiction.

The Board decided to join the two applications and hear both cases in one proceeding. The Board's Directions on Procedure issued pursuant to Hearing Order MH-1-96, dated 1 March 1996, provided for an oral hearing which would commence on 21 May 1996.

On 15 March 1996, Murphy, on behalf of Manito, filed a Notice of Motion with the Board in which it requested that the Board hear and decide its section 74 abandonment application before the Board considered the issues raised in the Morgan complaint. Manito reasoned that if the Board found it no longer had jurisdiction over Manito there would be no need to provide commercial information considered to be of a confidential nature. In Manito's view the disclosure of such information would cause irreparable commercial prejudice and harm.

The Board allowed Parties one week to comment on the Notice of Motion. After considering the views of Morgan, Saskatchewan Energy and Mines and the Province of British Columbia, the Board decided to grant the Motion and to hear evidence on the abandonment application and the related jurisdictional issues and release its decisions on these matters before considering the issues raised in the Morgan complaint.

An oral hearing was held on 21, 22, 23 and 24 May 1996, in the Board's hearing room in Calgary, Alberta. As part of the hearing, the Board conducted an environmental screening of the applied-for abandonment in compliance with the *Canadian Environmental Assessment Act* ("CEAA"). The Board ensured there was no duplication in requirements under the CEAA and the Board's own regulatory process.

The Board determined that, taking into account the implementation of Manito's proposed mitigative measures and the conditions required by the Board, the project is not likely to cause significant adverse environmental effects. This represents a decision pursuant to paragraph 20(1)(a) of the CEEA.

Chapter 2

Submissions and Findings

2.1 The Board's Regulation of the Manito Pipeline

The Manito pipeline, which runs from Blackfoot, Alberta to Kerrobert, Saskatchewan, is a dual pipe system with a 273.1 mm (10") outside diameter blended crude oil line moving blended heavy crude southbound and a 114.3 mm (4") outside diameter line moving condensate northbound. In order to make the heavy crude oil produced in the areas serviced by Manito suitable for transportation by pipeline, condensate, obtained primarily from Interprovincial Pipe Line Inc. ("IPL") at Kerrobert, is pumped north and blended with heavy crude oil at various injection points. The heavy crude blend is then pumped south through the blend line to Kerrobert where it enters the IPL system. Condensate is typically mixed at a concentration of approximately three tenths of the volume of the unblended heavy crude oil. A map of the Manito pipeline is provided at Figure 2-1.

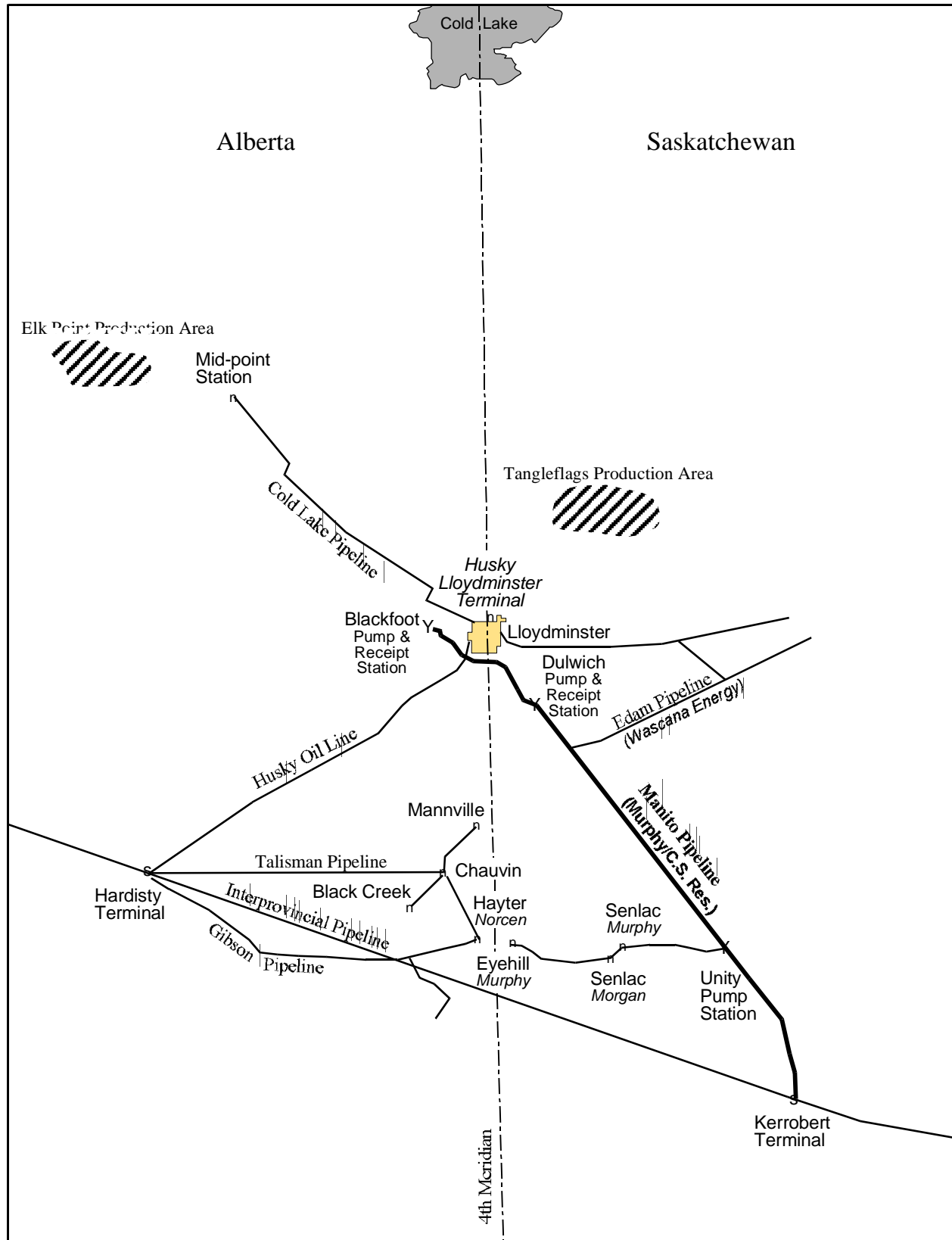
The original pipeline system ran from Dulwich to interconnect with the IPL line at Kerrobert. It has been operational since March 1971 and was built entirely within, and under the jurisdiction of, the province of Saskatchewan.

In January of 1975, Murphy applied to the NEB to construct a 21 kilometre extension from Dulwich, Saskatchewan to Blackfoot, Alberta. Murphy had proposed that only the applied-for extension would be under the Board's jurisdiction. After due consideration, the Board dismissed Murphy's application. In a letter to Murphy dated 17 March 1975, the Board indicated it would give early consideration to a new application for a certificate of public convenience and necessity for the entire pipeline from Blackfoot, Alberta to Kerrobert, Saskatchewan.

An amended application was submitted to the Board in September 1975 and a hearing was held in August 1976. The resulting decision brought the pipeline system from Blackfoot to Kerrobert under NEB jurisdiction. Manito was formed to hold the operating certificate and assets of the pipeline with Murphy operating the pipeline for Manito under an operating agreement.

Manito explained that the extension to Blackfoot was built for two reasons. The first reason was to tie in Murphy's production facilities at Blackfoot to the Manito pipeline in order to take advantage of government administered regional pricing of oil in effect at that time and therefore save trucking costs. The second reason was to position the pipeline to capture growing heavy oil supplies being developed by Murphy and others at that time in the Hazeldine, Morgan, Lindbergh and Cold Lake areas northwest of Blackfoot. While production in the Blackfoot area has remained stable, deliveries to Manito's Blackfoot station have declined due to competition from Husky's Blackfoot terminal, which is eight kilometres north of Manito's Blackfoot terminal, and due to construction of the Husky Bi-provincial Upgrader at Lloydminster.

Figure 2-1
Manito Pipeline System and Other Pipelines in Vicinity



2.2 Supply of Oil Available to Pipeline

When the Blackfoot extension commenced operation in 1977, the vast majority of volumes delivered to Manito's Blackfoot terminal came from production in the Blackfoot area. Supply from this area increased into the mid-1980s, peaked at an annual average rate of 1 466 m³/day in 1985, and then declined to an average rate of 688 m³/day by 1991. Since 1991, production levels in the Blackfoot area have remained relatively constant. Supply is expected to remain near the current level in the short term and then decline as activity in the area levels off.

By the late 1980s, over half the volumes delivered to the terminal came from areas northwest of the Blackfoot area. These additional volumes were at their highest level between 1986 and 1989 when Elk Point production was being trucked to Blackfoot. Following construction of facilities to connect Elk Point to the Husky system in late 1989, deliveries to Manito's Blackfoot terminal dropped by half from an average of 2 262.6 m³/day in 1989 to 1 126.6 m³/day in 1990.

Murphy maintained volumes at its Blackfoot station by trucking Sceptre/Murphy production from the Tangleflags area of Saskatchewan which is located to the northeast of Blackfoot. Supply from this area has been increasing steadily since the mid-1980s. The Tangleflags production area is approximately equal distance from Blackfoot and Dulwich. In 1995, approximately 530 m³/day of Sceptre/Murphy Tangleflags raw crude oil was delivered to the Blackfoot terminal. However, as of February 1996, following Murphy's decision to close its cleaning facilities at Blackfoot, these volumes have been delivered to Manito's Dulwich terminal in Saskatchewan.

The portion of oil delivered to Blackfoot that is Murphy's proprietary crude had increased from 18% in 1989 to 76% in 1995. In late 1995 Murphy disposed of its production assets in the Morgan area. The new owners are not delivering those volumes to the Manito pipeline. Murphy is currently trying to dispose of its remaining properties in the Blackfoot area.

2.3 Continuing Economic Feasibility

In January 1996, Manito decided that the continued operation of the extension of the pipeline between Blackfoot and Dulwich was no longer economical. Future volumes available to this segment of the pipeline are forecast to be in the range of only 190 to 225 m³/day. The primary reason for the reduced throughput forecast is Murphy's decision to rationalize its cleaning plant operations in response to low utilization levels at both its Blackfoot and Dulwich plants. The Company decided to close its oil cleaning plant at Blackfoot at the end of January 1996 and to redirect all volumes to Dulwich because, in its view, it was no longer economical to operate and the same basic services are available at Dulwich.

At the time of Murphy's decision to close its Blackfoot facilities, all oil received at Blackfoot had to be delivered by truck. Evidence was presented that generally, delivering oil to Dulwich by truck produces better returns for producers than delivering to Blackfoot. The average additional trucking costs to Dulwich are \$0.80/m³ which is close to the pipeline toll of \$0.754/m³ for diluted crude oil. Raw crude must be processed in a cleaning plant, before it can be delivered to the pipeline. It was established that charges for cleaning dirty oil are between \$1.50/m³ and \$2.50/m³ lower at Murphy's

Dulwich cleaning plant because that station has an atmospheric cleaning process, whereas the Blackfoot treatment plant operates with a pressure treating facility.

The current toll from Blackfoot to Dulwich is \$0.58/m³. Heavy crude must be mixed with an additional 30% volume of condensate before it can be transported by pipeline. Therefore the actual cost of transporting a cubic metre of heavy crude is 30% higher (i.e.: \$0.58 x 1.3 = \$0.754/m³). Based on the current toll, daily volumes of 200 m³/day would yield an annual revenue of \$55,044 which would not cover the annual operating costs for the Blackfoot to Dulwich section of the pipeline, estimated to be \$230,000 for 1996. Closing the pipeline is expected to reduce annual operating costs by \$124,750. The remaining costs of \$105,250 relate to ongoing depreciation expense, allocated head office costs, cathodic protection and inspection costs.

With a throughput of only 200 m³/day, the basic toll would need to be raised from \$0.58 to \$1.31/m³ in order to recover the variable operating costs of \$124,750. After adjusting for the inclusion of the 30% condensate volume increase the effective toll would need to increase from \$0.754 to \$1.703. At the current toll, deliveries of 454 m³/day of undiluted crude would be required to cover the forecast 1996 variable operating costs of \$124,750. In addition to variable operating costs, the pipeline is aging and will require ongoing maintenance, repair and replacement to keep it operational in the future. In 1995, Manito spent \$217,000 on repairs to the pipeline between Blackfoot and Lone Rock.

Morgan argued that current tolls on the pipeline are too high and that lower tolls would result in higher throughput levels. While Manito acknowledged that lower tolls would make the pipeline more attractive to area shippers, it noted that if tolls were set lower, the competition might also lower its tolls. The pipeline would need to attract most of the production forecast for the Blackfoot area, estimated to be approximately 700 m³/day, in order to break even. This was not considered likely to happen with the Husky pipeline and Lloydminster upgrader also competing in the area.

During the hearing, reference was made to the Board's November 1976 Decision approving the original construction of the extension to Blackfoot. In that proceeding, the Board heard evidence that the extension to Blackfoot was not economic on an incremental basis. At that time, the Board found it appropriate to assess the economic feasibility of the pipeline as a whole, noting that the extension to Blackfoot was a modest addition to the pipeline.

Morgan argued that the economics of the entire pipeline should continue to be considered in assessing the ongoing economic feasibility of the extension to Blackfoot. However, Manito noted that the economic environment for the pipeline has changed considerably since the pipeline extension was built. At the time of the original construction, the industry was operating under a different oil pricing regime under which the tolls were the same at both Blackfoot and Dulwich. Construction of the pipeline extension allowed shippers to obtain the same oil price at Blackfoot while saving the trucking costs to Dulwich. Commencing with the Board's RH-6-82 Decision, a higher toll was charged for Blackfoot, based on a volume-distance calculation. The evidence also showed that, at the time of the original construction, Manito had expected to extend the pipeline to areas Murphy was developing to the northwest of Blackfoot. Notwithstanding the current and forecast unfavourable economic prospects for the Blackfoot to Dulwich portion of the pipeline, the Manito pipeline, as a whole, was shown to currently be profitable and financially strong.

All of the volumes previously delivered to Blackfoot are now being delivered to Dulwich. As a result the toll from Dulwich to Kerrobert is expected to remain unchanged.

2.4 Impact of Abandonment on Shippers, Producers and Other Parties

No evidence was presented to suggest that the closure of the extension to Blackfoot would have any detrimental impact on crude oil producers in the area. In addition, Murphy stated that they had received no complaints concerning the closing of its Blackfoot cleaning facilities. No party other than Morgan registered an objection to the abandonment of the pipeline facilities.

Morgan maintains that the only reason for Manito's abandonment application is to avoid NEB jurisdiction and render Morgan's complaint moot. Morgan stated that it would be contrary to the public interest to allow the abandonment because if the NEB relinquishes jurisdiction there is no regulator to which Morgan can turn for consideration of its complaint (this matter is discussed further in Chapter 4). It is Morgan's view that Murphy has made Manito's Blackfoot extension uneconomical by diverting its Tangleflags' production to Dulwich and closing its cleaning plant.

Manito made no secret of the fact that the timing of the application to abandon the pipeline is no coincidence. Manito admits that the receipt of Morgan's complaint caused it to accelerate its assessment of the economic viability of the extension. However, Manito maintains that the economics of the Blackfoot to Dulwich section of the pipeline has been under examination for some time and that neither the jurisdictional issues raised by the abandonment application, nor the issues raised by the Morgan complaint, should be relevant to a determination of whether or not the abandonment should be approved on its own merits. It is Manito's position that, because Murphy's cleaning plants are not regulated by the NEB, the closing of Murphy's Blackfoot plant is a business decision that Murphy is free to make.

Several other facilities in the area, including the Manito Dulwich terminal, are competitive alternatives to Blackfoot. Following the closure of the Murphy cleaning plant at the Blackfoot terminal, all volumes previously delivered to the Blackfoot terminal were redirected to Dulwich within one month. Manito stated that it was not aware of any difficulties experienced by producers as a result of this change. Morgan was the only producer in the area served by the Blackfoot extension that actively participated in this proceeding. Morgan asserted that it would be harmed by the abandonment of the Blackfoot extension because it would eliminate one of the transportation alternatives for its production. However, Morgan's production in the area is limited to approximately 60 m³ per month from one well, which has always been delivered to Husky's Blackfoot terminal. Morgan's production has never been delivered to Manito's Blackfoot terminal. A schedule titled "Comparative Analysis of Trucking and Other Costs" filed by Morgan and subsequently revised by Morgan's witness, illustrated that oil delivered to Manito's Dulwich terminal would produce a greater net back to producers than oil delivered to Manito at Blackfoot or to Husky's Blackfoot terminal.

Views of The Board

The Board recognizes that Morgan's complaint may have been a catalyst to Manito's filing of its application to abandon these facilities and that a decision to allow the abandonment will have an impact on the Board's jurisdiction over the Manito pipeline. Nevertheless, the Board must judge an application on the facts of the case. It is not appropriate for the Board to colour its judgment with an interpretation of the applicant's motives or the impact its decision may have on its jurisdiction.

The supply of oil available to be shipped on the Blackfoot extension has been decreasing in recent years. Production in the area has fallen to about half the peak levels achieved in the mid 1980's. In addition, competition from the Husky pipeline and the bi-provincial upgrader at Lloydminster has reduced the volumes historically delivered to Manito. The connection of the production areas to the northwest of Blackfoot to competing pipelines has limited the prospects for market growth in that area.

In recent years, Sceptre/Murphy production from the Tangleflags area of Saskatchewan has been delivered to Blackfoot to take advantage of facilities at that location. Murphy has decided to rationalize its cleaning plant operations in the area by upgrading its facilities at Dulwich and closing its facilities at Blackfoot. With the closing of the Blackfoot cleaning plant, no significant volumes can be delivered to the pipeline at that location.

The Board accepts that without the Murphy Tangleflags production, insufficient volumes of oil are available for delivery to the Blackfoot terminal to make operation of the extension economically viable. Further, there is no evidence to suggest that supply in the immediate area will increase significantly in the future.

No party, other than Morgan, came forward in this proceeding to object to the discontinuance of pipeline service at Blackfoot. While Morgan has a small amount of production in the area which could be delivered to Manito's Blackfoot terminal, the evidence was that Morgan's production has always been delivered to Husky. Further, it was shown that delivery to Manito at Dulwich would provide Morgan with a higher net back price than it would achieve if its production were delivered to Manito's Blackfoot terminal.

Based on the facts of this application, it is the view of the Board that the Dulwich to Blackfoot portion of the Manito pipeline is not economical to operate and is no longer required by producers in the area.

Chapter 3

Abandonment of the Facilities

3.1 Overview

Manito proposes to abandon its Blackfoot Receipt and Pump Station (the "station") and the Blackfoot/Dulwich Pipeline System (the "pipeline system"). The Blackfoot Receipt and Pump Station is located west of Lloydminster, Alberta and is adjacent to Murphy's Blackfoot Terminal. The pipeline system runs from the Blackfoot Receipt and Pump Station to Manito's Dulwich Receipt and Pump Station in the Province of Saskatchewan. Figure 3-1 provides a detailed map of the specific applied-for facilities. The pipeline system consists of two pipelines: a 273.1 mm (10") outside diameter ("O.D.") blend pipeline; and a 114.3 mm (4") O.D. condensate pipeline within an existing 15.2 m (50') wide right-of-way for a distance of approximately 21.9 km (13.6 miles).

Manito proposed to purge the pipeline system of product and to abandon the pipelines in place. With respect to the Blackfoot Receipt and Pump Station, Manito proposed that it would dismantle and remove all structures and reclaim the property.

3.2 Consultation

In accordance with section 14 of Hearing Order MH-1-96, Manito published a Notice of Hearing ("Notice") in eight community newspapers. In addition, Manito submitted that the Notice was also published in the Canada Gazette and the Daily Oil Bulletin. Manito distributed the application for abandonment to all Parties to the MH-1-96 proceeding. Manito also stated that it met with all affected producers and parties in the Lloydminster area.

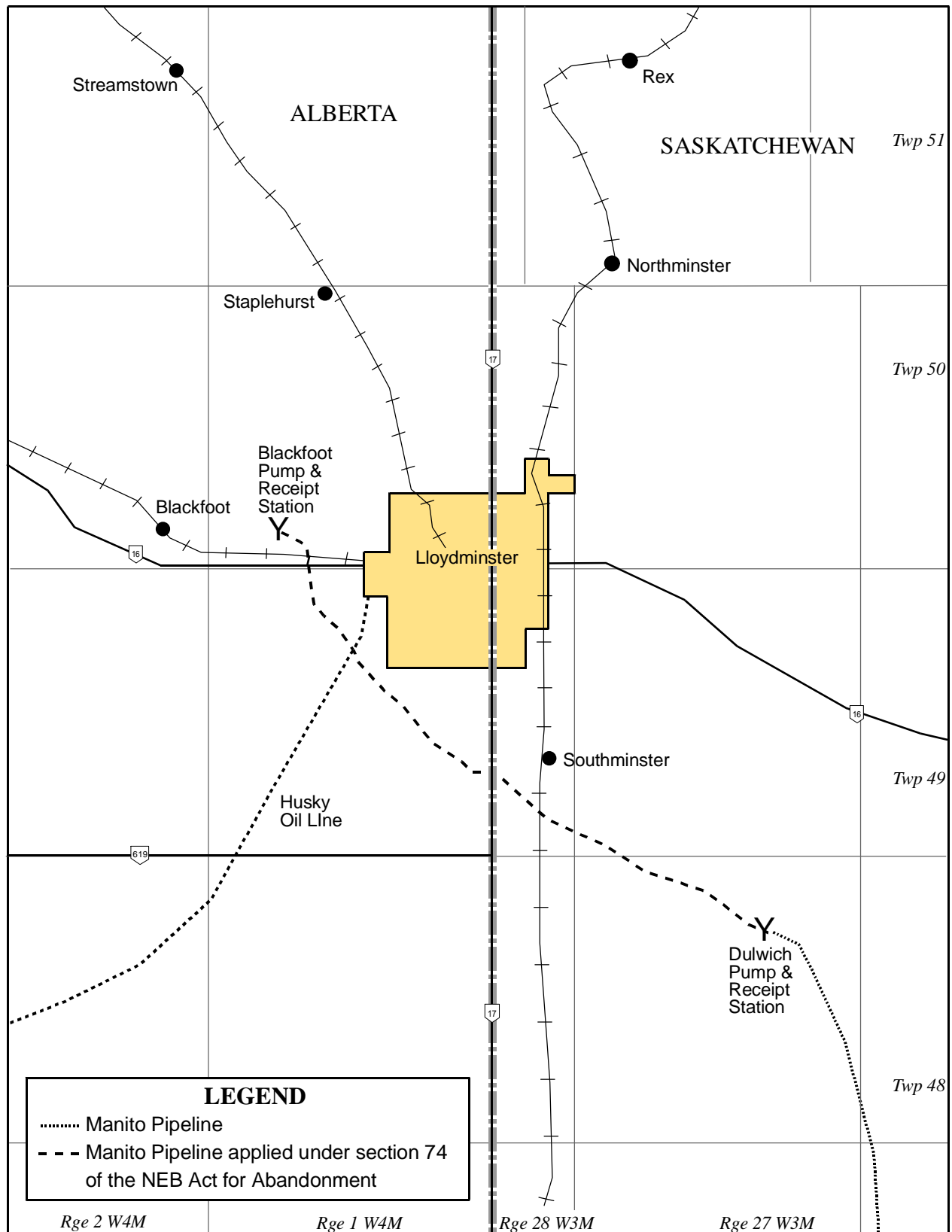
With respect to landowner notification, Manito acknowledged that although the Company did not seek input from landowners prior to the filing of the application, Manito undertook to contact all landowners to request their consent to surrender Manito's existing easement rights. Manito also undertook to give notice of the abandonment to the owners of any facilities crossed by the Manito pipeline between Blackfoot and Dulwich and to resolve all issues raised.

Manito stated that as a result of its consultation process no concerns were expressed with respect to the environment or its decision to abandon the pipeline in place.

Views of the Board

The Board notes that pursuant to section 1 of Part II of the Board's Guidelines for Filing Requirements ("Guidelines") a company applying to abandon a pipeline pursuant to section 74 of the Act is not required to implement an early public notification program. The Board is satisfied that Manito has notified and discussed the proposed abandonment with the affected producers and parties in the Lloydminster area. The Board notes, however, that parties which could reasonably be expected to have an interest in the proposed abandonment, such as landowners, occupants, and the owners of facilities crossed by the pipeline, should be contacted as early as possible to ensure that public concerns are adequately addressed within the planning stage of the abandonment.

Figure 3-1
Map of the Immediate Area of the
Proposed Pipeline Abandonment



3.3 Land Matters

Manito indicated that the proposed section of pipeline to be abandoned is contained within a 15 m wide right-of-way upon lands owned by a variety of private, commercial, and institutional landowners. All pipeline rights-of-way are held by easement agreements that have been granted in favour of Murphy. Land rights for both the Blackfoot and Dulwich plant sites are held by surface lease agreements. Manito further indicated that the predominant land use along the right-of-way is agricultural and that this land use is likely to continue following the proposed abandonment. Manito stated that the company, by resolution, has determined that the property associated with the facilities to be abandoned are no longer required for the purpose of the Manito pipeline.

With respect to land use, Manito committed to ensure that, in accordance with the Canadian Council of Ministers of the Environment ("CCME"), "Interim Canadian Environmental Quality Criteria for Contaminated Sites" (the "CCME guidelines") and relevant provincial requirements, the lands would be safe for a return to agricultural use. Manito indicated that the pipeline is buried a minimum of one metre below grade level and that based on the existing agricultural use, no adverse effects should arise. Manito acknowledged that the potential for contact with the pipe might cause some inconvenience or additional costs to parties working on or excavating the abandoned right of way in the future.

With respect to land rights, under the existing easement agreements, Murphy has the right to quit-claim or surrender the easement rights back to the fee simple landowner. Manito indicated that as a matter of policy rather than legal requirement, the Company would contact landowners to request voluntary consent to quit-claim or surrender the easement rights. In this regard, Manito would also explain the procedures to be used for abandonment in place and would acknowledge and accept environmental liabilities associated with the pipeline.

In the event that leave to abandon is granted, Manito submitted that for the near future Murphy would retain all existing easement agreements. Manito was of the view that since Murphy and Manito would, under provincial law, retain liability for the pipeline well into perpetuity, it would be premature at this point in time to enter into discussions with landowners to surrender easement rights. Manito did note, however, that in the more distant future, the pipeline would decompose to the extent that easement agreements would no longer be necessary.

Manito maintained that the process to be implemented to revert easement rights to landowners would be governed by Alberta and Saskatchewan legislation. Under Alberta law, the surrender of an easement would have no legal effect unless and until a reclamation certificate was issued pursuant to section 122 of the *Environmental Protection and Enhancement Act* ("EPEA"). Manito stated that it would apply for reclamation certificates prior to the surrender of the easement agreements. In Saskatchewan, notice would be provided to the Saskatchewan Surface Rights Board of Arbitration. Absent any complaint by the owners or occupants, the Board of Arbitration would issue Manito a certificate pursuant to sections 53-59 of the *Surface Rights Acquisition and Compensation Act*.

Manito indicated that upon the surrender of an easement, the ownership of the pipeline would revert to the fee simple landowner. Liability for future environmental matters, however, would remain with Manito. Manito further indicated that both the EPEA and the Saskatchewan *Environmental Management Act* contain provisions extending liability for releases to the environment to the previous facility owner.

Views of the Board

Taking into account Manito's undertakings and proposed conditions, the Board is of the view that the potentially adverse effects to existing land uses would be insignificant. The Board notes that under the terms and conditions of its existing easement agreements, Murphy has the right to quit-claim or surrender easement rights back to the fee simple landowner. Should Murphy decide to revert its easement rights back to the landowners, the Board expects Manito to contact all landowners to request voluntary consent to quit-claim or surrender the easement rights. The Board notes that upon the surrender of easement rights, the ownership of the pipeline would revert to the fee simple landowner. A certified true copy of the resolution of the directors of Manito, declaring that the property which is associated with the abandoned facilities is surplus to the requirements of Manito, should be filed with the Board.

3.4 Crossings

The proposed abandonment would have the potential to affect road, rail, utility and other pipeline crossings. With respect to road and rail crossings, it was noted that special consideration should be given to the sensitivity of these crossings to slight ground depressions that could result from abandonment related activities. Likewise, other pipeline companies and utilities may have a concern with respect to the potential for interference by the abandonment activities, or the abandoned pipeline, with the operation of the crossed utility or pipeline.

With respect to road and rail crossings, Manito said that it could install solid plugs under highways and roads with significant traffic, such as Highways 16 and 17 and Marshall Road, as well as any railway crossings. Manito noted that grout or concrete would provide a suitable solid plug to ensure the structural integrity of the crossing. With respect to rural secondary roads, Manito was of the view that concrete plugs were not necessary and that no further mitigative action was required, Manito did suggest however, that if required, filling the pipeline crossings of rural secondary roads with sand would be a suitable alternative.

Manito submitted that the existing crossing agreements do not address the issue of abandonment. Manito further submitted that it would retain responsibility for the pipeline as long as the crossing agreements, or any amendments that may be added to address the abandonment, remain in effect. Alternatively, Manito undertook to negotiate with crossing owners for release from any and all obligations related to the abandonment of the pipeline. Manito indicated that while at this point in time, it has not discussed the abandonment with road, rail or utility authorities, Manito will notify the owners of any facilities crossed by the Manito pipeline between Blackfoot and Dulwich, and will resolve all issues raised.

Views of the Board

The Board notes that while the terms and conditions of the existing crossing agreements may not necessarily address abandonment related issues, the Board expects Manito to notify the owners of all facilities crossed by pipeline between Blackfoot and Dulwich to discuss the proposed abandonment and to resolve all issues raised. Based on Manito's undertakings and its compliance with the Board's proposed conditions, the

Board is of the view that potentially adverse effects of the proposed abandonment upon existing crossings would be insignificant.

3.5 Pipeline Abandonment Procedures

Manito indicated that it would clean the pipeline system to ensure that any liquid had been removed and that the pipeline would be free and clear of hydrocarbons. A specialized plan was submitted by Manito that outlined the steps to be taken in cleaning the pipeline. The first step consisted of a multiple-pig run with condensate to wash any solids or liquids from the pipeline, using nitrogen to propel the pigs. Manito would then install a tap on the bottom of the pipeline in a topographically low portion of the pipeline route. A week after the pig run, a vacuum truck would be connected to the tap to remove any fluids that may have accumulated. Manito submitted that the pipeline cleaning program would be considered complete if no fluids had accumulated. If liquids were found, then additional pig runs would be undertaken. This procedure would be repeated by Manito as many times as would be required to ensure that the pipe was free of any remaining internal residues. Manito further indicated that the accumulation of liquids would also be checked at the Dulwich location. After this cleaning procedure was implemented, Manito believed that there would be insignificant amounts of hydrocarbon material remaining on the inside surface of the pipeline.

Manito noted that the pipeline is buried one metre below the surface and that, based on experience with smaller diameter pipelines, corrosion of the pipe would be gradual over time and only minimal surface disturbance would result. Manito acknowledged the potential for perforated or corroded pipe to create unnatural drainage, such as draining a slough or wetland or the flooding of an area as a result of water exiting the pipeline. Manito proposed to plug the line at locations likely to cause the pipeline to act as a conduit for groundwater or surface slough water between locations of different elevations. Different materials that could be used for plugs were investigated and Manito concluded that urethane foam would be the most suitable. Two areas with high water tables where the plugs could be installed were identified: the first location would be between the Blackfoot Station and Highway 16; and, the second location would be east of Highway 17. The specific locations would be selected so that access would not result in additional environmental adverse effects.

Manito indicated that it would remove the surface piping associated with the condensate sending trap adjacent to Dulwich Station and the facilities associated with the riser location. Manito identified an area of substandard vegetation growth at the riser location, as a result of trace levels of vegetation sterilant (i.e. atrazine) in the soils, which would require remediation. Both sites would be reclaimed by Manito.

Manito indicated that it would maintain current signage along the right-of-way until the pipeline was abandoned. After the pipeline was abandoned, Manito would alter the signs to indicate that there is a pipeline underground that is abandoned and depressurized.

Manito indicated that it would maintain cathodic protection and would provide protection of the pipeline from corrosion, along the right-of-way for some period after the pipeline was abandoned, if required to do so by the Board. Manito submitted that there may be a need to continue cathodic protection for the portion of the pipeline located within the Province of Saskatchewan.

As a result of Manito's maintenance work undertaken in 1995, one area of ditch subsidence was identified near the Blackfoot Station. Manito submitted that it would consider the addition of fill and topsoil to address the subsidence.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the abandonment of the applied-for pipeline facilities. The Board is of the view that certain measures will be necessary to ensure that the public and environment are protected as a result of the abandonment of the facilities. The Board will require Manito to adhere to those measures and undertakings as set out in the attached conditions, prior to the effective date of an abandonment order issued under section 74 of the Act. The Board is satisfied that cathodic protection is not required as the pipeline will no longer be operated. For the reasons given in Chapter 4, any Board requirements with respect to cathodic protection will lapse upon execution of the abandonment order.

3.6 Blackfoot Receipt and Pump Station Abandonment Procedures

Manito identified a number of solid and liquid wastes located at the Blackfoot Station including drain barrels containing heavy oil, scrap metal and wood, concrete foundations, metal piping and valves, miscellaneous instrumentation equipment, metal buildings, a power pole and a transformer. Manito submitted that the transformer did not contain PCB liquids and showed no evidence of leaking. To address the handling of the remaining wastes, Manito undertook to remove, re-cycle, re-use, disassemble and dispose of the various waste materials in an appropriate manner. Manito noted that a portion of the electrical equipment is actively used for the Murphy production area and continued maintenance of these portions would be warranted.

Manito indicated that any surface runoff or spills originating in the adjacent Murphy Blackfoot terminal would migrate to the station property as long as the terminal was actively used for receiving and disposing of produced water. Continued operation of the Murphy production area would likely result in operational spills and surface runoff, which could re-contaminate any reclaimed soils and render immediate reclamation unwarranted. Manito suggested that it should coordinate future reclamation and decommissioning plans with Murphy's production activities. It was not, however, able to provide an accurate timeframe for Murphy's abandonment. Manito did indicate that it would consider the installation of either a dike or a surface water control and collection system on the Blackfoot Station to limit runoff from migrating to the station. Manito further indicated that collected liquids could be tested and discharged if acceptable, or collected and injected in a downhole disposal.

Manito acknowledged that spilled materials are likely to contaminate soils and groundwater. Manito submitted that any contamination was likely the result of operating spills and surface runoff from the Murphy production area and minor spills from Manito's pigging activities. Manito analyzed soil samples for selected parameters based on a knowledge of the upstream oil and gas industry, as well as the site specific operating history of the Manito facilities. Results of soil analysis were compared against the CCME guidelines for agricultural land, and the Alberta Tier 1 Reclamation Criteria, where applicable. Manito defined contamination as the identification of a level of a parameter above CCME

guidelines or Alberta Tier 1 Reclamation Criteria or levels which significantly exceed Control Site #1 where no criteria were identified by federal guidelines or provincial regulations. The Blackfoot Station had areas of soil contaminated by oil and grease, two metals (i.e., nickel and cadmium), and chlorides. In addition, levels of electrical conductivity ("EC") and sodium adsorption ratio ("SAR") exceeded CCME acceptable levels. Manito submitted that EC and SAR are indicators of saline soils, and that one of the control sites also had elevated levels. Manito undertook to properly remove, treat and/or dispose of any contaminated soils or materials but that reclamation of contaminated soils was not recommended at this time due to Murphy's ongoing adjacent activities.

Manito indicated that there is no evidence of soil contamination beyond the lease road along the southern perimeter of Blackfoot Station. Manito indicated that it would maintain the lease road as the compacted material appeared to be limiting the migration of surface runoff from the Blackfoot Station.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the monitoring of the abandoned facilities. The Board is of the view that certain measures will be necessary to ensure that the public and environment are protected as a result of the abandonment of the facilities. The Board will require Manito to adhere to those measures and undertakings as set out in the attached conditions, prior to the effective date of an abandonment order issued under section 74 of the Act. The Board is cognizant that the continued use of certain electrical equipment for the operation of the Murphy production area is warranted and should not affect the abandonment of the station property.

3.7 Monitoring of Abandoned Facilities

Manito stated that its policy was to be proactive and to voluntarily take responsibility for performing all reasonable steps to ensure the protection of the environment. Manito further submitted that it would comply with all applicable regulations relating to the facilities and consult with affected landowners, occupants and government agencies. Manito acknowledged that liabilities for future environmental matters associated with the facilities would remain with the company.

Manito indicated that following the abandonment of the pipeline, it would continue to monitor the right-of-way for potential environmental issues. Manito indicated that it would consider various monitoring programs, such as the following:

- patrol flights on a regular basis over the right-of-way;
- monitor the wetland areas for evidence of hydrocarbon contamination including hydrocarbon sheen, poor vegetation growth or odour; and
- annual collection and testing of water from the wetland areas.

With respect to potential soil contamination at the Blackfoot Station, Manito indicated it could conduct an annual soil sampling program. Manito further indicated that an annual soil sampling program could be continued until the entire site, including the Murphy production area, is completely reclaimed.

With respect to potential groundwater contamination at the Blackfoot Station, Manito indicated it would consider the following monitoring measures:

- annual surface water monitoring until the entire site, including the Murphy production area, is completely reclaimed;
- in conjunction with the Murphy production area, install three groundwater monitoring wells along the southern perimeter of the lease, south of Blackfoot Station; and
- annual collection and testing of groundwater until the entire site, including the Murphy production area, is completely reclaimed.

Views of the Board

The Board is satisfied with the environmental and engineering information provided by Manito with regard to the abandonment of facilities as applied-for. Since the Board's jurisdiction will end on the effective date of an abandonment order issued under section 74 of the Act, Manito is encouraged to comply with its commitments for the ongoing protection of the environment in consultation with the appropriate provincial authorities.

3.8 Environmental Screening

The Board has completed an Environmental Screening Report pursuant to the *Canadian Environmental Assessment Act* and the Board's own regulatory process. In accordance with Hearing Order MH-1-96, the Environmental Screening Report was released to those parties who requested a copy from the Board, to those federal agencies that had provided specialist advice on the proposed facilities, and to the Applicant.

The Board has considered the Environmental Screening Report and the comments received on the report and is of the view that, taking into account the implementation of the proposed mitigative measures and those set out in the attached conditions, Manito's proposed abandonment is not likely to cause significant adverse environmental effects. This represents a decision pursuant to paragraph 20(1)(a) of the CEAA.

The comments received, and the Board's views, have been added to the Environmental Screening Report as Appendices I and II respectively. Copies of the Board's Environmental Screening Report are available upon request from the Board's Regulatory Support Office.

Chapter 4

Jurisdictional Issues

4.1 Abandonment of the Pipeline Between Dulwich and Blackfoot

Morgan and the Board raised several legal issues with respect to the abandonment of the pipeline between Dulwich, Saskatchewan and Blackfoot, Alberta. These matters were addressed by counsel for the parties in argument.

Counsel for Morgan argued that the Board should assert jurisdiction over facilities owned by Murphy adjacent to the Manito pipeline, the purpose of which was to facilitate the use of the Manito pipeline by the public. Morgan asserted that the exclusion of the Murphy facilities from the jurisdiction of the Board allowed the pipeline to be rendered inoperative by a non-regulated entity and thus frustrated the ability of the Board to determine the public interest in the abandonment of the Dulwich - Blackfoot line. Counsel for Morgan cited *Dome Petroleum Limited v National Energy Board* (1987), 73 N.R. 135 at 139 for the proposition that facilities necessary for transportation form part of the jurisdictional assets of the pipeline. In contrast, Counsel for Manito stated that the cleaning and other production facilities owned by Murphy at Blackfoot had never been considered by the Board to be within its jurisdiction, as part of the Manito pipeline.

Counsel for the Minister of Saskatchewan Energy and Mines ("the Saskatchewan Minister") expressed the view that the degree of pipeline regulation by the Province of Saskatchewan is irrelevant to the abandonment issue before the Board. Pipelines which are subject to the jurisdiction of the Saskatchewan Legislature as a local work and undertaking are regulated pursuant to the *Pipelines Act* but the scheme of regulation provided for under that statute differs from the scheme of pipeline regulation which is established by the NEB Act. According to counsel for the Saskatchewan Minister: "Each level of government is free within its own area of jurisdiction to create the regulatory scheme that it considers appropriate. The fact that one jurisdiction adopts a regulatory system that differs from another cannot be considered a defect or a problem." He relied upon *Commission du Salaire Minimum v Bell Telephone*, [1966] S.C.R. 767 for the proposition that inaction by the legislative body at one level within the federation does not expand the jurisdiction of the other level of government within the federal structure.

Perhaps the most important issue connected with the abandonment of the pipeline between Dulwich and Blackfoot concerned the consequences of an Abandonment Order. Section 74 (d) of the NEB Act does not stipulate the legal consequences of the issuance of an abandonment order. Rather, that provision is merely a bare grant of discretionary authority to the Board, empowering it to permit the abandonment of a pipeline or a pipeline segment. The consequences of an abandonment order fall to be determined according to general principles of law. Counsel for Manito asserted that the key provision is the definition of a "pipeline" contained in section 2 of the Act, which states:

"pipeline" means a line that is used or to be used for the transmission of oil or gas, alone or with any other commodity, and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks reservoirs,

storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith;

Counsel for Manito stated that once the pipeline was abandoned it would not be used to carry oil or gas, nor was there any future possibility that the pipeline would be used again by Manito. Accordingly, he argued that following the issuance of an abandonment order by the Board, the segment of pipeline between Dulwich and Blackfoot would cease to be a pipeline within the meaning of the NEB Act and the jurisdiction of the NEB would lapse, except for its general jurisdiction pursuant to section 12 of the NEB Act to enforce the terms of its orders. Counsel for the Saskatchewan Minister took the view that where an interprovincial pipeline is abandoned and is no longer used to provide an interprovincial transportation service, it becomes a separate undertaking from the pipeline to which it was formerly connected, and may continue to fall under federal jurisdiction for some purposes. That position was echoed by Counsel for Morgan who said that the NEB would retain a supervisory, monitoring and enforcement jurisdiction with respect to environment and safety issues after the execution of an abandonment order. He stated: "... the fact that this Board grants an Order to allow the abandonment of a section of pipeline does not necessarily, in and of itself, mean that the whole Constitutional character of what was the Undertaking the day before the Order was granted changes."

Counsel for Manito argued that the company had taken a *bona fide* corporate decision, by resolution, that the pipeline segment between Dulwich and Blackfoot is no longer required for the purpose of operating the pipeline. He said that exercise of corporate judgment was determinative as to whether or not a pipeline existed within the meaning of the Act. In support of his position, he cited *Canadian Pacific Limited v Saskatchewan Heritage Property Review Board and Kerrobert*, [1984] 6 W.W.R. 210 (Sask. Q.B.). That case dealt with the principle of interjurisdictional immunity. Canadian Pacific, an undertaking subject to the jurisdiction of Parliament, sought to demolish its station building at Kerrobert, Saskatchewan, in order to make way for the construction of operational buildings and a parking lot. The Provincial Board and the Town of Kerrobert attempted to apply Provincial heritage protection law to the site, in order to preserve the station building. The railway company argued that the Provincial law did not apply to it, as it was an interprovincial work and undertaking. The Court of Queen's Bench agreed, holding that:

If it cannot be established that the property of a railway company which may be subject to provincial legislation is but a convenience and not an essential part of the transportation operation, a court should not interfere in a *bona fide* decision of a railway company that the property is required to maintain the operation of its railway system: *Macfie v Callander and Oban Ry.*, [1898] A.C. 270 at 287 (H.L.).

The judgment of the Saskatchewan Court upheld the right of the railway company to declare whether any of its lands were surplus to the requirements of its interprovincial undertaking.

Manito's Counsel also cited *Re Canadian Pacific Limited Fife Lake Subdivision* (unreported, C.T.C. 19 March 1985) a decision of the Canadian Transport Commission. In that case, the Commission had authorized the abandonment of a branch line of railway known as the Fife Lake Subdivision located in southern Saskatchewan. Subsequently, an application was brought by a Member of Parliament to restore service to the branch line under a provision of the *Railway Act*, which authorized a line to be

opened for the carriage of traffic. The Commission referred to the *Kerrobot* case and noted that the courts of law "take the view that recognition should be given to a bona fide declaration by the railway company as to whether certain lands are indeed surplus to railway requirements". The Commission then went on to note:

In the absence of any declaration from Canadian Pacific that the subject lands are no longer required for railway purposes and therefore are no longer considered part of the railway, we find that the subject abandoned branch line segment is "real property and works connected therewith" within the meaning of "railway" contained in section 2 of the Railway Act.

In addressing the Board in argument, Counsel for Manito took the view that the NEB would continue to exercise a residual jurisdiction over terms and conditions it may impose in an abandonment order pursuant to section 12 of the Act. Therefore he sought an exemption from the requirement imposed by section 55(e) of the *Onshore Pipeline Regulations*, which require that cathodic protection be maintained indefinitely in respect of the abandoned pipeline. It is fair to say that all counsel supported the view that at least some residual authority would remain to the Board following the execution of an abandonment order, particularly in relation to environmental and safety matters.

Counsel for the Saskatchewan Minister asserted that environmental jurisdiction was an area of shared jurisdiction between the federal and provincial governments. He cited *Friends of the Oldman River v Canada* (Minister of Transport), [1992] 1 S.C.R. 3, in support of that proposition. He argued that residual Federal environmental jurisdiction over the abandoned pipeline was constitutionally permissible. In addition, counsel for the Saskatchewan Minister advanced a very novel approach to this residual discretion. He suggested that the Board's jurisdiction over the abandoned line would evanesce as environmental concerns attenuated over time. That would occur as the abandoned pipe rotted in the ground. At some point in the distant future, federal jurisdiction would become so attenuated that it would cease and the Province would thereafter exercise exclusive environmental jurisdiction. In the meantime, he argued in favour of a finding that the abandonment order would create two separate undertakings, with Parliament having jurisdiction over the abandoned line and the Province having jurisdiction over the active pipeline undertaking.

Counsel for Morgan argued that the regular and continuous interprovincial trucking of oil between points in Alberta and the new terminus of the Manito pipeline at Dulwich would create a single interprovincial undertaking. In this context, he argued that the actively operated portion of the Manito pipeline which would exist post-abandonment was so closely integrated with the interprovincial trucking of oil as to constitute a single interprovincial undertaking. He also pointed out that much of the trucking of oil would be undertaken by Spur Trucking, a subsidiary of Murphy, which is affiliated with Manito. Essentially, counsel argued that nothing would change as a result of the abandonment because the interprovincial transportation of oil would still occur. Morgan's counsel suggested that Parliament did not intend that its pipeline jurisdiction could be avoided by the mechanism of using an alternative mode of transport to move oil across a provincial boundary.

Counsel for Morgan also argued that different services may be combined into a single undertaking and thus vest continuing jurisdiction in the Board. In support, he cited *Canadian Pacific Railway Co. v A.G. British Columbia* (the Empress hotel case), [1950] A.C. 122 where the Privy Council was asked to determine whether federal labour jurisdiction could be asserted over the Empress Hotel in Victoria,

B.C., by virtue of the fact that the hotel was owned and operated by the Canadian Pacific Railway Company, an interprovincial work and undertaking. Although the Privy Council ruled that the hotel was separate from the railway, it left open the possibility that a service which was not itself a transportation or communications service could form part of an interprovincial work and undertaking, if the service was provided solely for the benefit of those who used the interprovincial work and undertaking. Lord Reid's opinion on this point is instructive. He stated at page 114, as follows:

It may be that, if the Appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the Appellant system may be a part of its railway undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel.

The case of *Cannet Freight Cartage Ltd.* [1976] 1 F.C. 174 (FCA) at 177 was also cited to us in support of this proposition.

Views of the Board

At the outset, the Board has decided that it is not necessary to expand the scope of its jurisdiction over the Manito pipeline to include other facilities owned by Murphy in order to facilitate its consideration of the abandonment application. At present, Manito has an obligation to receive, carry and deliver all traffic offered to it for carriage on the pipeline between Blackfoot and Dulwich. Whether it is currently doing so is a separate issue from the determination of whether or not the public interest warrants continued retention in service of that portion of the pipeline which is the subject of the abandonment application.

The Board concurs with the view expressed by Counsel for the Saskatchewan Minister concerning the implications arising from the lack of provincial economic regulation of pipelines. Within Canada's federal structure of government both Parliament and the Provincial Legislatures are sovereign within their respective areas of constitutional jurisdiction. Both Parliament and the Legislatures make public policy choices in determining the level of regulatory intervention which they interpose into the local and national economies. Thus the Saskatchewan Legislature may choose to change or amend its legislation over any subject within its authority at any time. For this reason it would be unsound for a federal regulator to base the exercise of its own discretionary powers in part on an assessment of the adequacy of any regulatory scheme established by a Province at any particular point in time.

With respect to the issue of the jurisdictional consequences of an abandonment order, the Board has concluded that this aspect of the matter largely falls to be decided according to basic principles of statutory interpretation. The modern exposition of the basic principle was addressed by the late E.A. Dreidger Q.C. in his work entitled "Construction of Statutes, second edition" at page 87, where he states the modern principle of statutory interpretation to be as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The NEB Act vests jurisdiction over pipelines in this Board. A pipeline is defined by that Act to be "a line that is used or to be used for the transmission of oil or gas...". A pipeline which has been abandoned in accordance with the procedures mandated by the law is not used or to be used for the transmission of oil or gas and is therefore not a pipeline within the meaning of the Act. Thus, following the execution of an abandonment order, the NEB will cease to exercise jurisdiction over the abandoned line as a physical pipeline within the meaning of the Act. However, the definition of a pipeline includes "real and personal property and works connected therewith". An abandoned pipeline can thus continue to constitute property connected to a pipeline authorized under the Act and therefore it is possible for the abandoned facility to continue to be regulated by the National Energy Board, so long as it falls within the extended definition of "pipeline" in the NEB Act.

Nevertheless, the Board notes that this situation can be affected by the exercise of the general powers of a pipeline company set out in section 73. In particular, section 73(b) empowers a pipeline company with respect to the administration of the company's property. It states:

73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,
.....

(b) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline and alienate, sell or dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline.

The Board is of the view that the cases cited by Counsel for Manito are directly relevant to the exercise of corporate powers under this provision of the NEB Act. Once a pipeline company has obtained an abandonment order, it is open to that company to determine that the real and personal property upon which the abandoned facilities are located are now surplus to the requirements of the certificated pipeline. Following that determination, the company is free to dispose of its interest in the property containing the abandoned facilities, as it deems appropriate. Thereafter, the abandoned property ceases to form part of the jurisdictional assets of the pipeline company, as it is held by the company as lands outside the statutory definition of a pipeline and is thereafter subject to all applicable provincial laws. At that point, federal jurisdiction over the surplus pipeline property, including the abandoned line, ceases.

The responsibility of the National Energy Board is to ensure that any determination made by the company is *bona fide* ie. that the property which is declared surplus is

neither necessary for the purposes of the pipeline, nor will it continue to be used for the construction, maintenance or operation of the pipeline authorized under the Act. In the case of the Manito pipeline, once the declaration is made that the abandoned property is surplus to pipeline requirements, that property ceases to fall under the jurisdiction of the Board as an interprovincial pipeline.

During argument, a suggestion was made by Counsel for the Saskatchewan Minister that any doubt concerning the presence of a residual federal jurisdiction over the abandoned line could be resolved by the expedient of physically severing the abandoned pipeline at the Saskatchewan/Alberta boundary. The Board does not believe that physical severance of an abandoned pipeline at a provincial boundary is constitutionally required, in order to vacate federal jurisdiction. However, once the pipeline has been abandoned and the property determined to be surplus to pipeline requirements Manito will be free to sever the pipeline at the border if it wishes to do so.

As far as the character of an abandoned pipeline is concerned, the Board has concluded that its character is not that of an interprovincial work and undertaking. The effect of an abandonment order is to legally vitiate the authority originally granted by section 52, or section 58 of the Act, to construct, operate and maintain an interprovincial work and undertaking. Since the original federal aspect of the work and undertaking has been removed, an abandoned and surplus pipeline falls outside of federal constitutional regulation under section 92(10) of the *Constitution Act 1867*. Thereafter it should be viewed in the context of section 92(15) of the *Constitution Act 1867*, as a matter in relation to the Provincial power over property and civil rights within a Province. Essentially, an abandoned and surplus pipeline is a mere fixture to the real property it is associated with, and it is thus subsumed into Provincial constitutional regulation over property.

Furthermore, a careful review of the Board's jurisdiction discloses that the Board lacks a general power to impose terms and conditions in an abandonment order. In light of the lack of such power, the Board can only rely on its power pursuant to section 19(1) of the Act to make the effective date of its abandonment order contingent, or conditional, upon Manito satisfying any mitigative measures identified pursuant to the *Canadian Environmental Assessment Act*. Since all such conditions will, by the terms of any abandonment order, be satisfied prior to the effective date of that order there will be no terms and conditions which will have a continuing force, or effect, beyond the execution date of the Order. Thus, the issue of a continuing residual jurisdiction vested in the Board is, for all practical intents and purposes, moot.

As to the matter of trucking, in theory it is possible for a degree of functional integration to exist between the remainder of the Manito pipeline and Spur Trucking, which would constitute a single extraprovincial undertaking. However, there was insufficient evidence of functional integration between the post-abandonment Manito pipeline and any interprovincial trucking operation. In addition, the concept of functional integration involves an analysis of whether an ostensibly provincial undertaking (in this example, the portion of the Manito pipeline which would continue

to operate following the abandonment of the Dulwich to Blackfoot section) is integrated with a federal work and undertaking (in this example, the interprovincial trucking operation). Assuming that such functional integration exists, it might attract federal jurisdiction in areas such as labour relations but it would not attract the jurisdiction of this Board under the NEB Act. The reason why it would not is that the issue of jurisdiction is not solely one of constitutional jurisdiction but also involves the question of statutory jurisdiction. The NEB Act vests jurisdiction in the National Energy Board to regulate pipelines. The definition of "pipeline" in section 2 of the Act limits the meaning of that word to "a line ... that connects a province with any other province or provinces or extends beyond the limits of a province ...". Thus a pipeline located wholly within the confines of a single province would not fall under the jurisdiction of the Board if it became functionally integrated with an existing federal work and undertaking, unless that work and undertaking was another extra-provincial pipeline.

The Board accepts that extensions or additions may occur to a federal work and undertaking whether or not those additions themselves consist of a transportation and communications function. That is the substance of both the *Empress Hotel* case and the recent judgment of the Federal Court in *Westcoast Energy Inc. v National Energy Board et al* (1996), 193 N.R. 321 (FCA). However, where non-transportation services form part of a federal work and undertaking, there must be a substantial nexus between the service offered and the transportation component of the interprovincial work and undertaking. The example provided by Lord Reid was that of a "hotel solely or even principally for the benefit of travellers" on the railway system to which the hotel belonged. In this case there was no evidence that Manito itself carried on an interprovincial trucking operation for the benefit of shippers on its system.

4.2 Continuing Federal Jurisdiction: The Case For Integration With IPL

The second aspect of the jurisdictional submissions made to the Board concerned the possibility of functional integration between a post-abandonment line between Dulwich and Kerrobert with the main line of the IPL system. Counsel for the Saskatchewan Minister argued that the tests established in the case of *United Transportation Union v Central Western Railway Corp.*, [1990] 3 S.C.R. 1112. should be the basis for a constitutional analysis of this aspect of the jurisdictional question. He argued that neither a physical connection between a local and an interprovincial work and undertaking, nor a mutually beneficial commercial relationship would suffice to bring the local work and undertaking into the federal jurisdictional sphere. Thus, the fact that Manito transferred the commodities it carries to IPL for onward transportation and the fact that condensate necessary for the transportation function on Manito is shipped over the IPL system from Edmonton to Manito at Kerrobert are insufficient to support a finding that one interprovincial work and undertaking existed under the first part of the Central Western test. As to the second part of the test, he argued that the evidence was clear that IPL was not dependent on the Manito system. At best, he asserted that the Manito system might be considered to be dependent on IPL, for its supply of condensate but that would not support an assertion of federal jurisdiction over Manito.

Counsel for Morgan relied on the Central Western test but also cited *Northern Telecom Limited v Communications Workers of Canada*, [1980] S.C.R. 115 for the proposition that one must look for a practical and functional integration between a core Federal work and undertaking and the employees of an ostensibly provincial work and undertaking. In this respect, he argued that it was not sufficient to conclude that the federal work and undertaking was not dependent upon the local work and undertaking. The test was broader than that, in his submission. Counsel for Morgan argued that Manito was functionally integrated with IPL for two reasons. Firstly, he argued that functional integration existed because of the ongoing movement of blended crude oil and condensate in interprovincial transportation and secondly he asserted that the two pipelines "are intimately interwoven with one another, with the Manito system necessarily delivering crude oil bound for interprovincial and international trade solely into the other pipeline, being IPL." Secondly, he argued that IPL itself was dependent on the totality of the feeder pipelines connected to it. He noted that the Board itself in its 1976 decision approving the interprovincial extension from Dulwich to Blackfoot, described Manito as a Saskatchewan gathering system for IPL.

Counsel for Morgan relied on the views expressed by Cory, J.A. in *Re Ottawa-Carleton Regional Transit Commission and Amalgated Transit Union, Local 279 et al* (1983), 44 O.R. (2d) 560 where the *Windsor Airline Limousine Services Ltd.* case was criticized for its reliance on a percentage of business test. In any event, he argued that IPL was dependent on feeder systems for 100% of its feedstock. At the same time he drew back from asserting that all existing feeder pipelines fall within federal jurisdiction. Rather, he suggested that each situation must be assessed on its own facts. Where a conflict developed between provincial and federal jurisdiction, he argued that the doctrine of paramountcy would apply so as to oust provincial jurisdiction in favour of federal jurisdiction. He suggested that a conflict might not develop where a Province had chosen to provide for the active regulation of pipelines, such as exists in Alberta. In such circumstances, the Province may be said to have occupied the field, precluding a mandatory assertion of federal jurisdiction. However, he suggested that a province such as Saskatchewan, which did not provide for active pipeline regulation might well face the intrusion of federal jurisdiction. Due to the possibility of overlapping authority in the pipeline field, he asserted that cases which preclude an intrusion of jurisdiction by one or the other level of government within an area of legislative competence at the opposite level are distinguishable.

Views of the Board

The Board is of the view that this aspect of the case falls to be determined squarely on the principles of the Central Western case. The fact that condensate for use by Manito is transported on IPL from Edmonton to Kerrobert for use on the Manito system and the fact that oil carried by Manito is transferred from Manito to IPL at Kerrobert are not a sufficient basis to warrant the continued assertion of federal jurisdiction over the Manito pipeline. These facts are consistent with the existence of a mutually beneficial commercial arrangement, rather than a single interprovincial work and undertaking. Nor is the fact that both the condensate and the oil move in interprovincial, or international trade, a factor in the Board's assessment. The Courts have consistently analyzed transportation and communications businesses under the works and undertakings clause of the *Constitution Act 1867*, rather than the trade and commerce clause. Counsel for Morgan did not provide case authority for an alternative analysis under the trade and commerce clause. Furthermore, the Ottawa-Carleton case is inapplicable as it deals with the first test set out in the Central Western case.

The impact of the total feeder pipeline network on IPL is not the issue in this case. In information requests posed by the Board, Manito indicated that its proportion of IPL's total supply amounted to no more than 3.75% of the total throughput on IPL. Manito also indicated that there were no operational or commercial agreements between IPL and Manito except for custody transfer arrangements on behalf of shippers pursuant to the public tariffs of the two pipelines. The employees of Manito do not go on to the property of IPL in the normal course of their employment and neither do the employees of IPL venture onto the property of Manito in the ordinary course of their employment. These factors are important indicators of a lack of functional integration between the two pipelines. The record discloses a situation which is consistent with the existence of two separate works and undertakings, each operating within their own spheres.

The Board has concluded that Manito is not functionally integrated with IPL in a manner which would permit the assertion of federal jurisdiction over Manito, subsequent to the execution of an abandonment order in respect of the Dulwich to Blackfoot segment.

4.3 Conclusion

The Board's conclusion is that following the abandonment of the Dulwich to Blackfoot segment of the pipeline, the National Energy Board will cease to exercise jurisdiction over both the abandoned segment and the surviving portion of the Manito pipeline system.

Chapter 5

Disposition

The foregoing, together with Order MO-5-96, constitutes our Decision and Reasons for Decision on this matter.

Leave to abandon the segment of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan is granted 60 days following the date of issuance of our Order in respect of this matter, conditional upon Manito complying with the Board's conditions within that time period.

K.W. Vollman
Presiding Member

R. Illing
Member

R.L. Andrew
Member

Calgary, Alberta
July 1996

Appendix I

Order MO-5-96

MO-5-96

IN THE MATTER OF the *National Energy Board Act* ("NEB Act" or "the Act") and the regulations made thereunder; and

IN THE MATTER OF an application by Murphy Oil Company Ltd. ("Murphy") on behalf of Manito Pipelines Ltd. ("Manito") dated 31 January 1996 pursuant to section 74 of the Act, for leave to abandon the operation of the portion of the Manito Pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

BEFORE THE BOARD on 17 July 1996.

WHEREAS Murphy filed an application on behalf of Manito dated 31 January 1996 pursuant to section 74 of the Act, for leave to abandon the operation of the portion of the Manito pipeline between Blackfoot, Alberta and Dulwich, Saskatchewan;

AND WHEREAS the National Energy Board (the "Board") issued Directions on Procedure in Order MH-1-96, dated 1 March 1996, for an oral hearing to commence 21 May 1996;

AND WHEREAS pursuant to the *Canadian Environmental Assessment Act* ("CEAA"), the Board has performed an environmental screening of the proposal and has considered the information submitted by Manito and others;

AND WHEREAS the Board has determined, pursuant to paragraph 20(1) (a) of the CEAA, that taking into account the implementation of Manito's proposed mitigative measures and those set out in this Order, the applied for abandonment is not likely to cause significant adverse environmental effects;

AND WHEREAS the Board has examined the application to abandon facilities in an oral hearing and considers it to be in the public interest to approve the applied for abandonment;

AND WHEREAS the Board considers that, pursuant to subsection 19(1) of the NEB Act, the effective date of the abandonment order should be made conditional upon the implementation of the mitigative measures set out in this Order;

IT IS ORDERED THAT:

1. Manito Pipelines Ltd. ("Manito") is granted leave to abandon the operation of its pipeline facilities between Blackfoot, Alberta and Dulwich, Saskatchewan, more particularly described as the Blackfoot Pump and Receipt Station, the 12.66 km section of 273.1 mm blended crude pipeline and the 114.3 mm condensate pipeline in Alberta between the Blackfoot Pump Station in the SW 1/4 of Section 7, Township 50, Range 1, West of the Fourth Meridian and the Alberta Border in the NE 1/4 of Section 13, Township 49, Range 1, West of the Fourth Meridian and the adjacent 9.21 km section of 273.1 mm blend crude pipeline and 114.3 mm condensate pipeline in Saskatchewan between the Saskatchewan Border in the NE 1/4 of Section 15, Township 49, Range 28, west of the third meridian and the Dulwich Pump and Receipt Station in the NW 1/4 of Section 33, Township 48, Range 27, West of the Third Meridian.
2. This Order shall come into force 60 days after the date of issuance of this Order, conditional upon Manito's compliance with the following conditions:
 1. Unless the Board otherwise directs, Manito shall implement or cause to be implemented all of the policies, practices, recommendations and procedures for the protection of the environment included in or referred to in its application, its environmental reports filed as part of its application, its responses to the Board's information requests, and any undertakings made to the Board or otherwise adduced in the evidence before the Board in the MH-1-96 proceeding. Federal, provincial and/or local authorities as well as landowners and/or tenants shall be consulted, where their interests are affected.
 2. Unless the Board otherwise directs, Manito shall:
 - (a) demonstrate to the satisfaction of the Board that Manito has obtained consent and any necessary approvals from all regulatory authorities and utilities for the abandonment of the pipeline where it crosses any facility;
 - (b) provide to the Board a summary of all comments and concerns raised by regulatory authorities and utility companies, including all environmental, land use or socio-economic recommendations and/or requirements; and
 - (c) provide the Board with a summary of the measures that Manito has taken, or would undertake to resolve those concerns, and indicate that Manito agrees to adopt the recommendations and/or requirements, including explanations for any recommendations and/or requirements that Manito does not agree to adopt.
 3. Unless the Board otherwise directs, Manito shall implement the following procedures for the cleaning of the Blackfoot/Dulwich Pipeline System:
 - (a) a multiple-pig run with sufficient condensate to wash any solids or liquids from the pipeline shall be sent through the pipeline, using nitrogen to propel the pigs;

- (b) a tap shall be installed on the bottom portion of the pipeline in two locations, as follows: in a topographically low portion of the pipeline route immediately east of the Highway 17 crossing; and at the Dulwich Station at the end of the pipeline system;
 - (c) one week after the pig run, any fluids shall be evacuated from the tap locations, using a vacuum truck connected to the tap/valve;
 - (d) if any liquids are found, then additional pig runs shall be undertaken and step (c) repeated. This procedure shall be repeated as many times as would be required to ensure that no liquids are found at the tap locations;
 - (e) similar measures shall be implemented for the condensate pipeline; and
 - (f) Manito shall ensure that all liquids have been removed and the pipeline is free and clear of hydrocarbons.
4. Unless the Board otherwise directs, in order to ensure the restoration of the riser location to an acceptable level, Manito shall:
- (a) remediate and/or remove and properly dispose of, any soils at the riser location contaminated by vegetation sterilants, such that the remaining soils are returned to a level of 0.1 ppm of atrazine; and
 - (b) ensure that the lands are returned to a level of agricultural capability equivalent to the adjacent agricultural lands.
5. Unless the Board otherwise directs, Manito shall:
- (a) sever the pipelines on either side of Highway 17 and fill the pipeline under the crossing with sufficient grout as to fill the lines;
 - (b) remove the riser and associated facilities to a depth of one metre below the soil surface; and
 - (c) cap the exposed ends of the pipelines.
6. Unless the Board otherwise directs, Manito shall install urethane plugs so as to ensure that the abandoned pipeline will not create the potential for unnatural drainage and/or flooding of an area. This should include but not be limited to the following locations:
- (a) in the wetland area between Blackfoot Station and Highway 16; and,
 - (b) in the wetland area east of Highway 17.

7. Unless the Board otherwise directs, Manito shall install solid plugs to ensure the safety of the public on highways and roads with significant traffic, as well as railway crossings. This should include but not be limited to the following locations:
 - (a) Highway 16;
 - (b) Highway 17;
 - (c) Marshall Road; and
 - (d) all railway crossings.
8. Unless the Board otherwise directs, Manito shall correct the current soil subsidence in the area located immediately adjacent to the road crossing located 400 metres from the Blackfoot Station. This should include but not be limited to the following:
 - (a) the addition of topsoil to ensure a level surface following subsequent subsidence; and
 - (b) the seeding of the disturbed surface with a suitable grass/legume mixture for the establishment of vegetative cover.
9. Unless the Board otherwise directs, Manito shall:
 - (a) remove the surface piping associated with the condensate sending trap adjacent to the Dulwich Station; and
 - (b) restore the disturbed area to an acceptable environmental condition.
10. Unless the Board otherwise directs, Manito shall:
 - (a) remove or treat and/or dispose of any contaminated soils located on the Blackfoot Station property. Soils are defined as contaminated if they demonstrate chemical analytical levels that exceed either the Canadian Council of Ministers of the Environment ("CCME") "Interim Canadian Environmental Quality Criteria for Contaminated Sites" (the "CCME guidelines") for agricultural land, and the Alberta Tier 1 Reclamation Criteria, for the following selected parameters: oil and grease, electrical conductivity, sodium adsorption ratio and nickel and chromium; or
 - (b) demonstrate to the Board's satisfaction that selected soil parameters identified in (a) do not exceed natural background levels. The natural background level shall be determined by analyzing a minimum of five control sites representative of the area.
11. Unless the Board otherwise directs, Manito shall construct an impermeable dike or a surface water control system along the upslope boundary of the Blackfoot Station property, so as to prevent the migration of potential contaminants by surface water movement onto the Blackfoot Station property.
12. Unless the Board otherwise directs, Manito shall ensure that the lease road along the southern perimeter of the Blackfoot Station property remains in place, or that there is an

equivalent feature, to prevent the migration of any potential contamination by surface water movement from the property.

13. Unless the Board otherwise directs, Manito shall remove all solid and liquid wastes and miscellaneous equipment from the Blackfoot Station property, except for the portion of the electrical equipment that will be necessary for the Murphy production area, and dispose of them in an acceptable manner and at approved locations.
14. Unless the Board otherwise directs, Manito shall submit to the Board a report to demonstrate to the satisfaction of the Board that Manito has completed each of the conditions listed above.
15. Manito shall file with the Board a certified copy of any resolution of the Board of Directors of Manito which declares that the abandoned facilities constitutes property which is surplus to the requirements of Manito.