

Via Email

January 29, 2018

Bishop Law

Attention: Debbie Bishop

Value Creation Inc.

**Attention: Nazeef Muhammad,
Counsel**Calgary Head Office
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Calgary, Alberta T2P 0R4
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Dear Ms. Bishop and Mr. Muhammad:

**RE: Request for Reconsideration by George Percy and Barbara Percy (Percys)
EUB Decision 2005-079, OSCA Approval No.10330A
Value Creation Inc., Heartland Upgrader
Reconsideration Request No. 1903669**

The Alberta Energy Regulator (AER) has considered the Percys' request under section 42 of the *Responsible Energy Development Act (REDA)* for reconsideration of Alberta Energy and Utilities Board (EUB or Board) Decision 2005-079, and of Commercial Scheme Approval No. 10030A issued to Value Creation Inc. (VCI) for the Heartland Upgrader project. The AER has reviewed the submissions filed by the parties in this proceeding, in particular Decision 2005-079 and the documents included in Appendix 2 thereof.

The AER has decided to deny the request for reconsideration because the Percys have not demonstrated extraordinary circumstances exist that give rise to exceptional and compelling grounds for the AER to undertake the reconsideration. In addition, even if such circumstances did exist, the AER has already scheduled a hearing (commencing February 6, 2018) to consider the Percys' concerns about the Heartland Upgrader project.

Reasons for Decision

Section 42 of the REDA provides the AER's authority to reconsider a decision:

42 The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision.

The AER has stated, in relation to requests to conduct a reconsideration, that it will do so only when compelling circumstances warrant. For example, the AER stated recently:

As indicated in section 42, it is at the AER's sole discretion whether to reconsider a decision made by it. That section does not provide an appeal mechanism to be utilized by industry or members of the public. Other provisions of REDA are available for that purpose. Given the appeal processes available under REDA, and the need for finality and certainty in its decisions, the AER will only exercise its discretion to reconsider a decision in extraordinary circumstances and where

it is satisfied that there are exceptional and compelling grounds to do so. Mere disagreement with a decision is not sufficient.¹

The question that arises in this proceeding is whether the Percys have demonstrated that extraordinary circumstances exist that provide exceptional and compelling reasons for the AER to reconsider Decision 2005-079 and the subsequent history of approvals issued in relation to the Heartland Upgrader.

Background and the Percys' Request

The EUB issued Decision 2005-079 on July 19, 2005. The Board approved BA Energy Inc.'s (BA Energy) application for approval to construct and operate the Heartland Upgrader in Strathcona County, near Fort Saskatchewan. The application had been scheduled for a hearing by the Board in order to consider, *inter alia*, the concerns of residents and landowners in the vicinity of the project. Most of the landowners and residents participating in the proceeding were members of one of two intervener groups: the Northeast Strathcona County Residents and the Astotin Creek Residents' Coalition (ACRC).

The Percys own and reside on a 30 acre parcel of land located approximately 2 km northeast of the upgrader site. They participated in the 2005 proceeding as a member of the ACRC. The Board's hearing in 2005 was cancelled after the two residents' associations withdrew their objections to the project. In doing so the parties submitted to the hearing panel copies of documents that described the *Voluntary Purchase and Resident Relocation Proposal* (VPRRP) entered into between BA Energy and the two residents' associations. The VPRRP documents form part of Appendix 2 of Decision 2005-079.

After the issuance of Decision 2005-079, BA Energy's progress on the Heartland Upgrader stalled. By 2007/2008 BA Energy was in financial difficulty, and in 2015 BA Energy amalgamated with VCI. In 2014, VCI applied to the AER for an amendment to the Heartland Upgrader Approval. On March 6, 2015, the AER issued Approval No. 10330A, which designated VCI as the operator of the Heartland Upgrader. The amendment also approved changes to the project that were entirely within the approved project area and were expected to result in significant reductions in overall emissions from the facility.

In June 2016, VCI applied for a further amendment of its approval. It proposed to remove one of the three approved development phases, and in its place to add a clean oil refining unit to further process product into high quality diesel, hydrotreated naphtha and a premium synthetic crude oil. The Percys filed a statement of concern in relation to this application. The AER directed the application to a hearing by AER hearing commissioners (Proceeding ID 356). The hearing commissioners have set February 6, 2018 as the start date for the hearing.

In a decision letter dated October 31, 2017, the hearing commissioners ruled that a reconsideration of Decision 2005-079 or an inquiry into the terms of the VPRRP and commitments made in relation to it was outside the panel's authority. In a notice of motion dated November 30, 2017, the Percys asked the hearing panel to reverse its October 31, 2017 decision and to reconsider Decision 2005-079 and all of the amendments and approvals subsequently issued in relation to the Heartland Upgrader. In response, by letter dated December 7, 2017 the hearing panel advised the Percys that it did not have authority to reconsider Decision 2005-079; however, the AER (Regulatory Appeals Coordinator) advised the Percys that the AER had decided to treat and process the notice of motion as a request for reconsideration. The AER agreed to consider the request because the Percys asserted that a fundamental commitment made to them by the project proponent in 2005 was not fulfilled, and they suffered severe detriment as a result.

¹ AER Reconsideration Application No. 1905404, letter decision dated January 24, 2018.

VCI responded to the Percys' request in a submission dated December 22, 2017 and a supporting affidavit dated December 19, 2017. The Percys replied in a submission dated January 12, 2018.

Grounds for Request – the VPRRP

The Percys' request is based primarily on their assertion that BA Energy made a commitment, as part of the VPRRP, to ensure the Percys' property would be purchased so that they could relocate outside the Industrial Heartland². They stated they relied on this commitment when they withdrew their objection to the Heartland Upgrader application in 2005. They claim BA Energy (and by extension its successor, VCI) did not honour this commitment and therefore the Board's original decision to approve the Heartland Upgrader should be reconsidered, allegedly contemplated in the text of Appendix 2 of the decision report. The AER has concluded that these claims are not made out, for the following reasons.

When the VPRRP documents appended to Decision 2005-079 are examined, it is clear BA Energy did not make a commitment to the Percys, or to any other individual landowner for that matter, to purchase, or guarantee the purchase of, their property. The commitment that was actually made by BA Energy in relation to resident relocation is detailed in Mr. Fitch's letter to the Board dated May 26, 2005, a copy of which forms part of Appendix 2 of Decision 2005-079. The portion of that letter that is particularly relevant to this reconsideration request is reproduced in the attached Appendix. In addition, the introductory paragraph of the VPRRP document itself, which was attached to Mr. Fitch's letter, describes the VPRRP as "a proposed framework for establishing a relocation purchase plan for the residents of 'Alberta's Industrial Heartland' (AIH)." It also states "What follows are concepts and objectives to be met in any such proposal as well as a suggested mechanism to implement those concepts and meet the various objectives."

Also apparent from an examination of Appendix 2 to Decision 2005-079 is that the VPRRP would be administered by an independent agency, which would decide whether to grant applications made to it by area landowners. In fact, following Decision 2005-079, in 2006 the Land Trust Society was established as an independent body exactly for the purpose of administering a voluntary residential property purpose program in the Industrial Heartland area of the province and to make decisions on applications by area landowners under the program. Financial supporters included a number of area operators (including energy, agricultural, industrial, and refinery/chemicals). Municipal partners include Sturgeon County, Strathcona County, the City of Fort Saskatchewan, and Lamont County.

The Percys are mistaken in their characterization of the both the intent of the VPRRP and of the commitment made by BA Energy to the ACRC. At the time it was accepted by the ACRC members, the VPRRP was a proposal for a framework/program that would facilitate the purchase of lands from area residents who wished to leave the Industrial Heartland and a mutual pledge to establish a process that treated departing landowners fairly and equitably. Nothing in the VPRRP committed BA Energy (or anyone else) to buyout specific landowners (including the Percys) or to guarantee they were bought out. BA Energy committed support for the initiative (which involved operators from several industries [including energy], including other operators and the local municipality) to relocate residents. It did not make a commitment that all or any of the residents would be assured of that outcome. Further, it was not BA Energy's decision whether a landowner was eligible to participate in the VPRRP – that decision is made by the Land Trust Society. However, that is how the Percys' reconsideration request portrays it.

² The term "Industrial Heartland" in this letter has the same meaning as the phrase "Alberta Industrial Heartland" and the acronym "AIH", used in the VPRRP document.

The Percys also assert BA Energy failed to honour its commitment to support the VPRRP and that the Percys' efforts to engage the relocation program were unsuccessful because BA Energy failed to financially support the program that was established. The evidence submitted by the Percys in support of that is twofold: (1) the fact that more than twelve years has passed since Decision 2005-079 was issued and they have not relocated; and (2) an email message dated October 25, 2013 from an official with the Land Trust Society, stating "you are more than 4.5km from a capital contributor to the Land Trust Society and therefore would not qualify with the Land Trust Society's Voluntary Property Purchase program at this time." The AER notes that none of the emails provided by the Percys to show their interaction with the relocation program is dated prior to September, 2010, and therefore the AER has no specific information about the Percys' attempts (if any) to access the relocation program in the first five years following Decision 2005-079.

Evidence submitted by VCI contradicts the Percys' assertion that BA Energy failed to honour its commitment to financially support the VPRRP. In his affidavit filed with VCI's response submission, David Searl of VCI states that BA Energy contributed \$300,000 to the Land Trust Society, which was established to administer the relocation program. Attached as an exhibit to the affidavit is a copy of an invoice from the Alberta Industrial Heartland Land Trust Society to BA Energy, indicating that between 2005 and 2007, BA Energy paid \$300,000 to the land bank. Also, attached as an exhibit to the affidavit is a copy of a December 2004 letter from BA Energy to the Executive Director of Alberta's Industrial Heartland, in which BA Energy sets out its position regarding participation in and funding for the regional land bank. The conclusion the AER draws on this point is that BA Energy in fact supported the resident relocation program that was ultimately created, and it contributed \$300,000 to the Land Trust Society that was established to fund the program. In short, as the AER interprets the commitment made by BA Energy as evidenced in Decision 2005-079, BA Energy complied with its commitment under the VPRRP.

The Percys' claim that BA Energy failed to honour a commitment made to them is not made out. The commitment BA Energy made to the ACRC collective was to support the initiative to establish—together with several other operators in the Industrial Heartland, municipal governments, and the provincial government—a fair and equitable resident relocation program. The information provided to the AER indicates that BA Energy supported the program, including but not limited to making a \$300,000 contribution to the land bank. The Percys' own evidence is that they are the last family remaining in the Industrial Heartland of all the families that wished to be relocated.

Other Grounds for Request

The Percys also state there has never been a hearing on the Heartland Upgrader project, and so their concerns over the project have never been considered. This claim is disingenuous. The EUB scheduled a hearing in 2005 but cancelled it after the residents withdrew their objections to the project. Documents outlining the terms of the resolution of landowners' objections were provided to the Board, and the Board included copies of those documents in Appendix 2 of Decision 2005-079. The documents include a letter from counsel for BA Energy to counsel for the ACRC that details the commitments made by BA Energy in relation to:

- emissions
- water issues
- rail and truck traffic
- noise, and
- fire hazard in the Astotin Creek Natural Area.

Also attached as part of Appendix 2 of Decision 2005-79, is a copy of a consultant's letter addressed to counsel for the ACRC that details the resolution, or remaining differences, between BA Energy and landowners on the following topics of concern:

- plant integration
- feedstock
- diluent recovery unit
- ADC unit
- USP unit
- gas treating
- sulfur recovery
- product delivery systems
- LPG product
- vent gas from liquid sulfur
- waste water processing
- flaring
- fugitive emissions
- sample points for gases, volatile liquids and odour-causing streams
- open vents from volatile sources, and
- noise.

The EUB's practice then, as it is the AER's practice now, was to encourage hearing participants to resolve on their own as many of the differences between them as possible. When there is complete or near complete resolution, as appears to have occurred in relation to Decision 2005-079, public hearings are often cancelled and decisions are issued that have regard for the points of agreement that are communicated to the decision makers. The Percys' assertion they have never had the opportunity of a hearing before the Regulator in relation to the Heartland Upgrader is contradicted by the facts of the BA Energy proceeding in 2005.

In addition, the Percys stated that they received no notice of previous amendment applications filed by VCI and approved by the AER, and no opportunity to have their concerns about those applications considered. The AER has not investigated whether VCI complied with the AER's participant involvement requirements in relation to prior amendment applications filed by VCI. However, the AER believes there is no need to determine if the Percys were denied notice to which they were entitled. The AER has already scheduled a hearing (commencing February 6, 2018) to consider the Percys' concerns about the Heartland Upgrader project. In fact the Percys are the only landowner participants in the upcoming hearing. That hearing is imminent and will consider the potential impacts of the project as it is presently designed to be constructed and operated, and not the facility as it was originally or formerly conceived, which would be the case if the Regulator decided to hold a reconsideration hearing on previous amendment applications or on the applications before the Board in Decision 2005-079. Given that, even if exceptional circumstances were shown to exist in this reconsideration request, which they are not, the hearing the Percys want—to consider the impacts of the Heartland Upgrader on them – is scheduled to commence within the next week and there would be no logical reason for the AER to interfere with that by making other arrangements at this late stage of Proceeding ID 356.

For the reasons noted above, and most importantly, the AER's finding that VCI's predecessor did not make a commitment to purchase the Percys' property and has not breached any commitments made under the VPRRP, and the fact the Percys will be participating in the upcoming (and imminent) hearing regarding the Heartland Upgrader and will be afforded an opportunity to have their concerns considered by the hearing panel in that proceeding, the AER has decided not to reconsider Decision 2005-079.

Sincerely,

<original signed by>

Patricia Johnston, Q.C., ICD.D.
Executive Vice President, Law and General Counsel

<original signed by>

Paul Ferensowicz, M.A.
Senior Advisor, Operations Division

Appendix to the AER's letter dated January 29, 2018

Excerpted from the letter dated May 26, 2005, from Gavin Fitch as counsel for the Astotin Creek Residents Coalition to Tamara Bews and Bob Germain of the Alberta Energy and Utilities Board, commencing on page 2 thereof

.... The Residents' agreement to withdraw their objections based on the development of the Relocation Proposal is an act of good faith that there will be concerted follow-up actions by the appropriate parties. The residents appreciate BA Energy's advocacy and effort in creating momentum for the creation of a property purchase/resident relocation program for residential properties in Alberta's Industrial Heartland. We note, however, that cooperation and action will be required for a number of parties to establish a land trust agency to implement this program in a timely fashion and for it to have the financial sustainability to deal fairly with all residents as their need for relocation arises.

Specifically, the Residents have withdrawn their objections based on the following commitments and/or assumptions:

- BA Energy will continue with their advocacy of the property purchase/resident relocation initiative so that momentum for implementation is continued.
- The Companies operating in the region that have participated in the ICARI process (Industry Collaboration to Address Resident Issues) will support the creation of a property purchase/resident relocation program and will follow through with financial commitments to fund the program.
- Strathcona and Sturgeon Counties actively support the process, including providing meaningful financial participation.
- Alberta's Industrial Heartland Association will continue their sponsorship role in bringing the various stakeholders together to achieve consensus on the program parameters and building a shared commitment to move forward.
- The government of Alberta, who wish to facilitate the growth of the oil sands industry with added value in Alberta, and who directed the concentration of new refining and upgrading to the area north of Fort Saskatchewan away from its original base on the eastern edge of Edmonton, will:
 - Respond to the recommendations made by several independent tribunals—including the EUB—to resolve the land-use conflicts between residents and heavy industry in the [Alberta Industrial Heartland] in a fair and equitable manner.
 - Expeditiously commit financial support to the establishment of the land trust mechanism that will provide fair and equitable treatment to affected rural landowners and will facilitate value-added oil sands projects and other heavy industrial operations without the conflicts that have impeded expeditious regulatory decisions on projects and approval renewals.

For their part, the Residents commit to participate constructively in the ICARI consultative process to complete the framework and operating criteria for the property purchase/resident relocation program. The Residents sincerely wish to be in a position where it is not necessary to oppose projects in the Heartland that are in the economic interest of Alberta. However, they believe the burden of industrialization of the area has been disproportionately placed upon the residents who live in the area designated for heavy industry and promoted as such by Alberta and the participating municipalities. They are acting in good faith at this juncture that they will be dealt with in a fair manner. If this good faith and trust is not appropriately honoured, it is likely that there will be a return to confrontational strategies as the only option perceived to be available to the residents.

In providing you with this letter, BA and the Residents entreat the Board to take every conceivable step to support this important initiative and advocate for this longer-term solution. As a logical starting point, we trust that the Board will appropriately communicate this information to government so as to promote long-term success for property purchase/resident relocation initiative, and include this information in any Decision Report that the Board may issue with respect to BA's application.