

Via Email

May 21, 2019

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Public Interest Law Clinic

Attention: Sean Assie

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Dear Sirs:

**RE: Request for Regulatory Appeal by Michael Judd
Shell Canada Corporation
Application No.: 1906751
Licence No.: 235273 (the “Resume Drilling Licence”)
Request for Regulatory Appeal No.: 1916724**

The Alberta Energy Regulator (AER) has considered Michael Judd’s request under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER’s decision to approve the Resume Drilling Licence for a resumption of Well CR74. The AER has reviewed Mr. Judd’s submissions and the submissions made by Shell.

The AER notes several statements in Mr. Judd’s reply to Shell’s response that “Judd is requesting that the Regulator reconsider its decision to issue the Licenses without granting him an oral hearing.” However, the current process is a request for regulatory appeal process, not a reconsideration process. This letter deals only with the request for regulatory appeal filed on behalf of Mr. Judd on November 27, 2018 in respect of the Resume Drilling Licence.

For the reasons that follow, the request for Regulatory Appeal is dismissed.

Reasons for Decision

1. Previous Proceedings

The AER notes that Mr. Judd has participated in three hearings held by the AER’s predecessors in relation to Shell’s sour gas operations in the area, all of which addressed issues of safety, emergency planning and emergency response.

In 2000, the Alberta Energy and Utilities Board held a hearing on applications for four horizontal sour gas wells, a pipeline, and related facilities. Two of these horizontal sour gas wells were drilled from the same surface location as the Resume Drilling Licence, which is a re-entry into the existing well bore to drill another horizontal leg. The hearing resulted in *Decision 2000-17* which approved all applications.

In 2010, the Alberta Energy Resources Conservation Board (“ERCB”) held a hearing to consider applications for a sour gas well, fuel gas compressor, gas battery, fuel gas pipeline, and a sour gas production pipeline. This hearing resulted in *Decision 2011 ABERCB 7* which approved the sour gas well and fuel gas compressor but denied the other applications. The

ERCB made a number of recommendations to Shell about its emergency response plans. Shell complied with these emergency response recommendations.¹

Also in 2010, the ERCB issued pre-hearing decision 2010-26 regarding Shell's applications for three Castle River Wells, including a resumption of CR74 for a sidetrack drill, and three compressors. Mr. Judd was granted participation in the hearing, but Shell later withdrew its applications and the hearing did not proceed.

In 2013, the ERCB considered a resubmission of the applications which were denied in *Decision 2011 ABERCB 7*. This hearing resulted in *Decision 2013 ABERCB 9* which approved the applications. In the 2013 hearing, Mr. Judd submitted that Shell's emergency response plan was inadequate and that he did not believe his house would provide sufficient protection in the event of an emergency.² However, the Board was satisfied that Mr. Judd's residence did provide adequate protection for sheltering in place.³ The adequacy of Shell's Emergency Response Plan (ERP) for the area was extensively considered and the Board included approval conditions in the decision that required Shell to keep improving its ERP.⁴

2. Eligibility to Request a Regulatory Appeal

The applicable provision of *REDA* in regard to regulatory appeals, section 38, states:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

The test has three components:

- (a) the request must be filed in accordance with the *Alberta Energy Regulator Rules of Practice (Rules)*;
- (b) the decision must be an appealable decision; and
- (c) the requester must be an eligible person.

(a) In accordance with the Rules

Mr. Judd's request for regulatory appeal was filed in accordance with the Rules.

¹ 2011 ABERCB 7 at Appendix 2; 2013 ABERCB 9 at 18

² 2013 ABERCB 9 at 44 to 45.

³ *Ibid* at 52

⁴ *Ibid* at 80

(b) Appealable Decision

The applicable provision is Subsection 36(a) of *REDA* which states:

36 In this Division,

(a) “appealable decision” means

....

(iv) a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing

The email filing the request for regulatory appeal on behalf of Mr. Judd states that it is a request for regulatory appeal of Shell’s application. However, the request attaches a copy of the decision letter sent to Mr. Judd from the AER which decided not to grant a hearing rather than attaching a copy of the Resume Drilling Licence.

The answer to question 5, “What are your reasons for requesting the regulatory appeal?” on Mr. Judd’s request refers to an appeal of both the decision not to hold the hearing and the decision to grant the application:

The AER granted an application by Shell for a license to drill a new sour gas well near my home, and refused to hold a hearing on the grounds that the AER is satisfied my concerns have been addressed. This is an appealable decision under the *Responsible Energy Development Act*, section 36(a)(iv), and I am an eligible person to bring the request for a regulatory appeal under section 36(b)(ii).

Mr. Judd cannot seek a regulatory appeal of the decision to not go to a hearing as that decision was made under *REDA*. As per sections 36 and 38 of *REDA*, the only decisions that can be regulatory appealed are decisions made under the energy enactments, the specified enactments and any other decision or class of decisions described in the regulations (which does not include decisions as to whether to go to a hearing or not). Accordingly, to the extent the request is a request to appeal the decisions of the AER to not hold hearings, the request is not in respect of an appealable decision and is dismissed.

The decision to issue the Resume Drilling Licence is a decision under the *Oil and Gas Conservation Rules* which is an energy resource enactment and it was made without a hearing. It is therefore an appealable decision.

(b) Eligible person

For energy resource enactment decisions, an eligible person is a person who is directly and adversely affected by a decision made under an energy resource enactment without a hearing (section 36(b)(ii) *REDA*).

As noted above, the decision to issue the Resume Drilling License was made under an energy resource enactment, and it was made without a hearing. The key question then is

whether Mr. Judd is a person who may be directly and adversely affected by the decision to issue the Resume Drilling Licence.

Mr. Judd states that the decision to issue the Resume Drilling Licence increases the risk that he will be harmed by a sour gas leak.

Mr. Judd states that Shell has not provided sufficient evidence for him to determine whether his lands are in fact in the Emergency Planning Zone⁵ (“EPZ”) for the CR74 well, and further that in any event his only route of egress is through the EPZ for the well. He states that because his only route of egress would pass through the EPZ in the event of a sour gas release, he would need to shelter in place in his home. Mr. Judd does not believe that his home would provide him with sufficient protection.

Mr. Judd states that the location of his lands and residence and, in addition or in the alternative, the fact that his only route of egress passes through the EPZ, are sufficient to establish that he is directly and adversely affected by the decision to issue the Resume Drilling Licence.

Shell states that Mr. Judd has not provided specific evidence to demonstrate that he is directly and adversely affected by the AER’s issuance of the Resume Drilling Licence. Shell further states that neither Mr. Judd’s lands nor his residence are within the EPZ for the well

The AER accepts that on the basis of *Kelly #1*, the location of a person’s residence in the EPZ is in itself evidence that that person may be directly and adversely affected. However, this evidence may be rebutted by other evidence that the impact on the individual does not rise to the level of a direct and adverse effect.⁶

The AER has confirmed that neither Mr. Judd’s lands nor residence are within the EPZ for the CR74 well, but that his only route of egress (Seven Gates Road) does pass through the EPZ.

Shell states that the question of whether a party is directly and adversely affected is determined by the AER on a case-by-case basis having regard to the specific information before it.

The AER agrees that it must make a determination based on the specific facts of each case. Whether or not a decision of the AER, as a matter of fact, directly and adversely affects a

⁵ An emergency planning zone (“EPZ”) is defined by Directive 071 as “a geographical area surrounding a well, pipeline, or facility containing hazardous product that requires specific emergency response planning by the licensee.

⁶ *Kelly v. Alberta (Energy Resource Conservation Board)*, 2009 ABCA 349 (“*Kelly #1*”) at 44

person is a question to be considered by the AER in light of the evidence properly adduced before it.⁷

As set out in *Kelly v. Alberta (Energy Resource Conservation Board)* (“Kelly #2”), the AER must consider the facts and decide whether the magnitude of risk is such that an individual has become directly and adversely affected.⁸

Mr. Judd’s residence is approximately 2.57 km from the centre of the well and is not within the EPZ of 2.37 km. Any increase in risk to Mr. Judd must be considered relative to Mr. Judd’s distance from the well. In this circumstance, the decision to issue the Resume Drilling Licence may present an increased risk of a sour gas release which could impact Seven Gates Road. Seven Gates Road itself is currently within a number of existing Shell EPZs for sour gas facilities and any increased risk to Mr. Judd’s route of egress posed by the re-entry of the CR74 well is an incremental risk.

In the circumstances, the magnitude of the incremental increase in risk to Mr. Judd is not sufficient to establish that he may be directly and adversely affected. The Resume Drilling Licence does not approve or change the surface location of the CR74 well which was approved as a result of *Decision 2000-17*. The H₂S release rate is identical to that of the previous 02/05-20-006-02W5/2 well leg drilled from this wellbore. Further, the AER is satisfied that Shell’s emergency planning, including its efforts to ensure viable shelter in place for Mr. Judd, is effective to mitigate risk to residents in the area that might need to use Seven Gates Road as a route of egress in the event of an emergency. The sufficiency of this emergency planning was considered in *Decision 2000-17*, 2011 ABERCB 7 and 2013 ABERCB 9.

For these reasons, the AER finds that Mr. Judd has not established that he may be directly and adversely affected by the decision to issue the Resume Drilling Licence. He is therefore not an eligible person for the purposes of *REDA*.

3. Procedural Fairness

Mr. Judd submits that procedural fairness requires that the AER hold a hearing on the decisions to issue the Resume Drilling Licence.

A person’s entitlement to a hearing in a matter before the AER is set out in *REDA* and the *Rules*. Mr. Judd is being afforded procedural fairness in accordance with the statutory regime by which the AER is governed.

⁷ *O’Chiese First Nation v. Alberta Energy Regulator*, 2015 ABCA 346 at 43

⁸ *Kelly v. Alberta (Energy Resource Conservation Board)*, 2011 ABCA 325 (“Kelly #2”) at 24 -26

4. Frivolous, Vexatious and Without Merit

Shell submits that Mr. Judd's request for regulatory appeal should be dismissed on the basis that it is without merit pursuant to Section 39(4)(a) of *REDA*. Shell argues that the request is without merit because Section 31(3) of the Rules prohibits the AER from considering any of the matters raised in the request for regulatory appeal; therefore it would be an absurd outcome to grant a regulatory appeal. Given the finding above that Mr. Judd is not a person who may be directly and adversely affected by the decision to issue the Resume Drilling Licence, the AER finds that it is not necessary to consider this argument.

Conclusion

The AER has decided that Mr. Judd is not an eligible person as required by the test set out in Section 38 (1) of *REDA*. Therefore, the AER dismisses the request for regulatory appeal of the Resume Drilling Licence.

Sincerely,

<original signed by>

David Helmer,
Director, Industry Performance & Analytics, Strategic Delivery

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Shaunna Cartwright,
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Charles Tamblyn,
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