

Via Email

December 19, 2019

Bennett Jones

Bishop Law

Attention: Tim Myers

Attention: Debbie Bishop

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

Dear Sir and Madam:

**RE: Requests for Regulatory Appeal by Werner Ambros and Sharon Ambros
Encana Corporation
Application Nos.: 1914500, 1914551, 1920992, 1199791, and 338430
Locations: 13-27-072-09W6; 14-27-072-09W6; 15-27-072-09W6; 15-26-072-09W6; 14-
28-072-09W6 to 15-30-072-09W6
Requests for Regulatory Appeal Nos.: 1919768 and 1924228**

The Alberta Energy Regulator (AER) has considered the requests of Werner Ambros and Sharon Ambros (the Ambroses) under section 38 of the *Responsible Energy Development Act (REDA)* for regulatory appeals of the AER's decisions to approve the above-referenced applications. The AER has reviewed the Ambroses' submissions and the submissions made by Encana Corporation (Encana) in response.

For the reasons that follow, the AER has determined the Ambroses may be directly and adversely affected by the AER's approval of Application Nos. 1914551, 1920992, and 338430, and has, therefore, decided to proceed to a hearing on the requests for regulatory appeal as they relate to those applications. However, the AER has determined the Ambroses have not demonstrated that they may be directly and adversely affected by the AER's approval of Application Nos. 1914500 and 1199791, and has decided to dismiss the requests for regulatory appeal as they relate to those applications.

Background

On October 23, 2018, Encana submitted Application Nos. 1914500 and 1914551 for approval to construct two multi-well pads with eight horizontal sour gas wells each, both targeting the Montney Formation (collectively, the First Applications). The wells would have a maximum H₂S content of 73 mol/kmol during completions and a release rate of 0.2687 m³/s.

The pad site for Application No. 1914550 is located at 13-27-072-09W6 and 14-27-072-09W6 (the 14-27 Pad), and the pad site for Application No. 1914551 is located at 15-26-072-09W6 (the 15-26 Pad).

On November 17, 2018, the Ambroses filed a statement of concern (SOC) against the First Applications.

The Ambroses' residence is approximately 1250 metres from the 14-27 Pad and approximately 800 metres from the 15-26 Pad. The emergency planning zones (EPZs) for the pads are 500 metres and 530 metres, respectively. The Ambroses' residence is outside of the EPZs for both pads, but a northeast portion of their lands falls within the completion and servicing EPZ for the 15-26 Pad. According to the Ambroses, Mr. Ambros has a machine shop located within this EPZ. The Ambroses' residence is already located within EPZs for an Encana disposal well facility located at 16-27-072-09W6 and multiple Encana pipelines in the area.

On February 15, 2019, the AER approved the First Applications without a hearing. On March 15, 2019, the Ambroses filed Request for Regulatory Appeal No. 1919768.

On April 24, 2019, Encana submitted the following applications:

- Application No. 1920992 for another multi-well pad of 10 sour gas wells to be located at 15-27-072-09W6 (15-27 Pad);
- Application No. 1199791 for a sour water pipeline at 16-27-72-09W6 to 14-28-072-09W6 (Sour Water Pipeline) and a sweet gas pipeline to be located at 14-27-072-09W6 to 14-28-072-09W6 (Sweet Gas Pipeline); and
- Application No. 338430 for a sour gas pipeline to be located at 14-28-072-09W6 to 15-30-072-09W6 (Sour Gas Pipeline).

(collectively, the Second Applications)

The Ambroses filed an SOC on the Second Applications on May 30, 2019.

On August 6, 2019, and August 8, 2019, the AER approved the Second Applications without a hearing. The Ambroses filed Request for Regulatory Appeal No. 1924228 on September 4, 2019.

The AER determined that it would be most efficient and practical for all concerned for the two requests to be dispositioned and heard together, as they relate to the same parties and issues.

Reasons for Decision

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 term “eligible person” is defined in section 36(b)(ii) of *REDA* to include:

a person who is directly and adversely affected by a decision [made under an energy resource enactment]...

The term “appealable decision” is defined in section 36(a)(iv) of *REDA* to include:

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

Section 38(1) creates a three-part test for a regulatory appeal. First, the requester must be an eligible person as defined in section 36(b) of *REDA*. Second, the decision from which the requester seeks regulatory appeal must be an “appealable decision” as defined in section 36(a) of *REDA*. Third, the request must have been filed in accordance with the *Alberta Energy Regulator Rules of Practice (Rules)*.

1. Appealable Decision

The applications were approved under the *Oil and Gas Conservation Act* and the *Pipeline Act*, which, in accordance with subsection 1(1)(j) of *REDA*, are energy resource enactments. Since the approvals were issued without a hearing, they are appealable decisions under section 36(a) of *REDA*.

2. Eligible Person

In order for the Ambroses to be eligible for regulatory appeal, they must demonstrate that they may be directly and adversely affected by the AER’s decisions to issue the approvals.

i. *Approval of Application Nos. 194551, 1920992, and 338430*

With respect to Application Nos. 194551, 1920992, and 338430, the AER is satisfied that the Ambroses have demonstrated they may be directly and adversely affected by the decisions to

issue the approvals for the 15-26 Pad, the 15-27 Pad, and the Sour Gas Pipeline, because their residence and/or their land is within the EPZs for each of these approvals.

The Ambroses raise concerns about their health and safety living in close proximity and within the EPZs of the approved sour gas sites. The Ambroses state that the only means of egress from their residence, Range Road 92, has been damaged by Encana staff and contractors during drilling and completions of other Encana projects in the area such that it was impassible by car. The Ambroses further state they are not confident that Encana has effectively planned for their safety in the event of a leak.

Encana submits that the Ambroses are not directly and adversely affected by the approvals because their lands are only located within the EPZ of the 15-26 Pad temporarily, during completions and servicing. The Ambroses respond that there is no duration requirement for being directly and adversely affected under *REDA*. The AER agrees. The 15-26 Pad may pose a risk to the Ambroses, even if that risk is not consistent over the life of the wells. The Alberta Court of Appeal stated in *Kelly v Alberta (Energy Resources Conservation Board)*, “[t]he fact that events *could* arise which *could* prejudice the Appellants is enough” to establish that they may be directly and adversely affected.¹

Encana further states that it addressed the Ambroses’ concerns around safety and flaring during its consultation with the Ambroses about the projects. The AER is of the view that consultation is irrelevant to the question of whether a party may be directly and adversely affected. A similar argument was made by the proponent and rejected by the Court in *Kelly*.²

Encana also states that the Ambroses’ concerns were properly considered and addressed by the AER when it dispositioned the applications. The AER notes that neither of the decision letters on the Ambroses’ SOC’s said that the Ambroses were not directly and adversely affected; they simply stated that the AER had determined a hearing was not necessary to further consider the Ambroses’ concerns. The AER has wide discretion when deciding whether to hold a hearing on an application, and whether the person who filed an SOC has demonstrated that they may be directly and adversely affected by the application is only one of many factors the AER *may* consider in making its decision. Conversely, the AER has narrow discretion when deciding whether to allow a regulatory appeal. The AER may only dismiss a request for regulatory appeal from a party who may be directly and adversely affected by an appealable decision in the limited circumstances set out in section 39(4) of *REDA*. This will be addressed further below.

¹ *Kelly v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349 at para 37 (*Kelly*).

² *Ibid* at para 38.

Finally, Encana notes that the Ambroses' residence is located within several pre-existing EPZs, and submits that any incremental risk introduced by the appealed-from approvals is insufficient to establish that the Ambroses are directly and adversely affected by those approvals. The AER has determined that the magnitude of increased risk posed by the addition of 18 new sour gas wells and the expansion of a sour gas pipeline in relatively close proximity to the Ambroses' land and home is sufficient to conclude that the Ambroses may be directly and adversely affected in the circumstances.

ii. *Approval of Application Nos. 194500 and 1199791*

Conversely, with respect to Application Nos. 194500 and 1199791, the AER has decided that the Ambroses have not established they may be directly and adversely affected by the decisions to issue the approvals for the 14-27 Pad, the Sour Water Pipeline, or the Sweet Gas Pipeline.

In *Tomlinson v Director (Environment and Sustainable Resource Development)*,³ the Environmental Appeals Board provided the following guidance for assessing "directly affected" status for the purposes of determining eligibility for appeal under the *Environmental Protection and Enhancement Act* and *Water Act*:

What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.⁴

The Ambroses have not demonstrated that the approvals of the 14-27 Pad, the Sweet Gas Pipeline, or the Sour Water Pipeline would affect their use of the land. None of the approvals are located on the Ambroses' land. Their residence is 1250 m from the 14-27 Pad and outside of its 500 m EPZ, and 550 m from the nearest point of the Sour Water Pipeline and outside of its 150 m EPZ.

Nor have the Ambroses established sufficient connection between the licences and the impacts with which they are concerned. The Ambroses claim Mr. Ambros has asthma or asthma-type symptoms and they submit a report from a pulmonary function assessment Mr. Ambros had done

³ *Re: Evergreen Regional Waste Management Services Commission* (03 April 2013), Appeal No. 12-033-ID1 (AEAB).

⁴ *Ibid* at para 28.

in 2018 as evidence. However, the report is not conclusory, and the Ambroses do not provide any additional evidence to show how Mr. Ambros' symptoms may be affected by activity under the approvals. Accordingly, the AER has determined that this information is insufficient to establish that the Ambroses may be directly and adversely affected.

The Ambroses have also raised concerns about flaring, noise, and odours. There is, however, insufficient proximity between the 14-27 Pad, the Sweet Gas Pipeline, and the Sour Water Pipeline, and the Ambroses' residence and land, to demonstrate that any flaring, noise, or odours at the sites would directly and adversely affect the Ambroses. Further, Encana must comply with the requirements of *Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting* and *Directive 038: Noise Control*. Any concerns the Ambroses have about Encana's operations should be reported to the Grande Prairie Field Centre.

3. In Accordance With The Rules

Encana raised in its responses to both requests for regulatory appeal the Ambroses' non-compliance with section 30(5)(a) of the *Rules*, which requires the requester to serve a copy of the request on the registered owner of the land on which the energy resource activity is or will be located. In reply, the Ambroses stated that they have been unable to determine the mailing addresses for the relevant registered landowners. In addition, the requests involve pipelines that span at least 9 km and the applications do not provide enough information for the Ambroses to obtain the certificates of title for all of the landowners along the rights-of-way.

The AER has discretion to modify the *Rules* in any particular proceeding as required by the circumstances. Section 42 of the *Rules* provides as follows:

The Regulator may dispense with, vary or supplement all or any part of these *Rules* if it is satisfied that the circumstances of any proceeding require it.

Pursuant to section 42, the AER has decided to dispense with the requirement in section 30(5)(a) of the *Rules* for these requests for regulatory appeal. The AER is satisfied that it would be unreasonable in the circumstances to require the Ambroses to serve copies of the requests on all of the registered owners of land on which the well pads and pipelines are or will be located. Moreover, there is no indication on the record that the landowners would object to the Ambroses' requests for regulatory appeal being granted or that any such objections would be determinative. Finally, if the landowners have a position on the merits of the regulatory appeals, they will have an opportunity to request participation in the hearing once the notice of hearing is issued.

Frivolous and Without Merit

Encana submits that, in addition to the requests being not properly before the AER because the Ambroses are not “eligible persons”, the requests are frivolous and without merit. Under section 39(4)(a) of *REDA*, the AER has discretion to dismiss all or part of a request for regulatory appeal if it considers the request to be frivolous, vexatious, or without merit.

The AER is satisfied that the Ambroses requests are not frivolous or without merit. The Ambroses have raised concerns about their health and safety living in close proximity to and within the EPZs of sour gas wells and a sour gas pipeline. The AER has jurisdiction over sour gas development and related emergency response planning, and has strict requirements in place in recognition of the risks associated with sour gas. Based on the AER’s previous decisions and the Alberta Court of Appeal’s direction in the *Kelly* decisions,⁵ the requests raise arguable issues with respect to the 15-26 Pad, the 15-27 Pad, and the Sour Gas Pipeline that justify a hearing. Further, the AER notes that matters raised with respect to those approvals have not yet been considered in a hearing, regulatory appeal or review.

Since the AER has found that the Ambroses are not eligible persons with respect to the 14-27 Pad, the Sour Water Pipeline, and the Sweet Gas Pipeline, it is not necessary to consider whether the requests for regulatory appeal as they relate to those projects are frivolous or without merit.

A Regulatory Appeal Must Be Conducted By Hearing

Encana submits that even where the AER grants a regulatory appeal, it need not conduct it by way of hearing. Encana cites section 40(1) of *REDA*, which states that,

Subject to the regulations, the Regulator may conduct a regulatory appeal with or without conducting a hearing. [emphasis added]

Encana has failed to note, however, that section 40 of *REDA* is qualified by section 4 of the *Responsible Energy Development Act General Regulation* as follows:

For the purposes of section 40 of the Act, the Regulator shall conduct a regulatory appeal with a hearing if it appears to the Regulator that the concerns of the eligible person requesting a regulatory appeal have not been

- (a) addressed through any alternative dispute resolution process the Regulator has used under section 46 of the Act, or

⁵ *Kelly*, *supra* note 1, and *Kelly v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325.

(b) otherwise resolved between the parties.

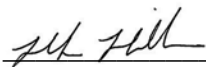
Thus, it is clear the AER is required to conduct a hearing on a regulatory appeal where the eligible person requesting the appeal has outstanding concerns.

Conclusion

In conclusion, the AER has decided to grant the requests for regulatory appeal as they relate to the AER's approval of Application Nos. 1914551, 1920992, and 338430, and will request the Chief Hearing Commissioner to appoint a panel of hearing commissioners to conduct a hearing of the same.

However, the AER has decided to dismiss the requests for regulatory appeal as they relate to the approval of Application Nos. 1914500 and 1199791.

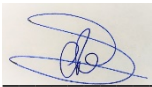
Sincerely,



Mark Miller
Director, Field Operations North



Martin Paetz
Director, Enforcement & Emergency
Response



Gary Neilson
Senior Advisor, Environment & Operational
Performance