

Via Email

July 31, 2019

Regulatory Law Chambers

McLennan Ross LLP

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada**Attention: Laura Scott,
John Gormley****Attention: Jo Ann Jamieson**www.aer.ca

Dear Sir and Madam:

**RE: Request for Regulatory Appeal by ISH Energy Ltd. (ISH)
Canadian Natural Resources Limited (CN)
Application No.: 1908028; Approval No.: 11475X
Request for Regulatory Appeal No.: 1910998**

In previous applications related to its Kirby North Phase 1 SAGD Project,¹ CN committed to the drilling and completion of one observation well per drainage box for the first seven drainage boxes. In its *Application to Amend the Commercial Scheme Approval No. 11475W – Kirby North Phase 1 SAGD Observation Wells* (Application No. 1908028) (the “Application”), CN proposed to withdraw its commitment. As a result, on June 6, 2018 the AER issued Commercial Scheme Approval No. 11475X (the “Approval”). On July 3, 2018, ISH submitted a request for regulatory appeal, pursuant to section 38 of *Responsible Energy Development Act (REDA)* and section 30 of the *Alberta Energy Regulator Rules of Practice* (the Rules).

The AER has considered ISH’s request, and has reviewed ISH’s submissions and CN’s reply submissions. For the reasons that follow, the AER has decided there is no ‘appealable decision’ and ISH is not an ‘eligible person’ as it is not directly and adversely affected by the AER’s decision to approve the Application. The request for regulatory appeal is, therefore, dismissed.

Reasons for Decision

Section 38 of the *REDA* governs regulatory appeals. It reads as follows:

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]

In this case, the applicable definition for appealable decision is per section 36(a)(iv) of *REDA*:

(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, or

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]...

¹ Application No. 1712215 (Kirby Expansion Project); Application No. 1799612 (KN01-KN05 Development); Application No. 1891310 (KN05b Development)

ISH Is Not an Eligible Person

ISH submits that it is an “eligible person” because it has rights in the Gas and Gas Over Bitumen Zones (“GOB”) within the Kirby North Phase 1 SAGD Development area and it believes observation wells are necessary to monitor the steam chamber growth and its potential effect on the GOB zones directly above, which in its view are separated by an incompetent layer of shale.

For the reasons below, the AER finds that ISH is not an eligible person.

The adverse impact that ISH alleges (that its rights to the overlying GOB may be impacted by steam chamber growth into the GOB), does not arise from the removal or absence of CN’s proposed observation wells. The risk of this impact relates primarily to CN’s previously approved operations and is based on ISH’s position that a) the GOB and bitumen zones are not isolated by a competent (sufficiently thick and continuous) shale or mudstone, and b) the temporary start-up injection pressure of 7.0 MPa is too high, and creates a risk of fracturing between the McMurray formation and the overlying GOB. However, these perceived risks do not arise out of the current Approval. Previous scheme approvals already provided for the recovery of crude bitumen from the Wabiskaw-McMurray deposit in the current development area and for the maximum operating and initial start-up pressures. None of these provisions changed in the current Approval. ISH should have properly raised these concerns in 2007 in response to CN’s Application No. 1527354 to obtain approval for the Kirby Project, or in 2011 in response to CN’s Application No. 1712215 to amalgamate existing approvals for Kirby North and Kirby South, yet it did not. To allow ISH a regulatory appeal now would amount to a collateral re-examination of the initial approval.

Hence, the impacts to the GOB with which ISH is concerned are tied directly to operating approval conditions that were in existence several iterations prior to the current Approval; they do not arise as a result of the current Approval.

The Court of Queen’s Bench in *Kostuch v. Alberta (Director, Air & Water Approvals Divisions, Environmental Protection)*,² reviewed a decision of the Environmental Appeals Board approving a cement plant to determine whether an applicant for Judicial Review had standing on the basis that they were ‘directly affected’ by a decision of the Director. In assessing the ‘directness’ requirement of that test, the Court referenced the following analysis from the EAB decision:

[25] At p. 13 of the E.A.B. decision is found the following passage:

.....
 ‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

[26] I am satisfied the E.A.B. applied the correct test. The E.A.B. went on to discuss the particular connection between the Applicant and the cement plant.....’

Applying the court’s reasoning in *Kostuch*, it is clear that the cause of the potential harm to the GOB that ISH is concerned with, is not caused by the Approval challenged in this appeal. Because there is no direct connection between the removal of the commitment to drill observation wells and the impacts alleged, ISH is not directly and adversely affected by the Approval, and not an ‘eligible person’ under the *REDA*.

Relatedly, the AER notes that the primary purpose of the observation wells is for process and performance optimization in SAGD operations and to measure and monitor pressure and temperature at different points in the reservoir (i.e. the Basal McMurray formation; at and above the cap rock) . While observational wells can assist in defining steam chamber growth, it is not their primary purpose to monitor for reservoir containment issues and possible impacts to the GOB. Hence, there is no assurance that the

² 1996 CanLII 10565.

presence of the observation wells would have prevented against or mitigated the potential for adverse effects to the GOB. The AER agrees with CN's assessment that the presence of one observational well per pad adds limited value to monitoring steam chamber development and conformance, because a single data point cannot represent a 3-D chamber. In addition, CN has indicated that it will undertake other activities to measure and monitor healthy steam chamber development (i.e. monitoring of cumulative production data of well pairs and pads, and individual horizontal well temperature data) and the AER finds this to be acceptable and consistent with modern methods and industry operations and production practices.

Further, the law in Alberta recognizes that bitumen mineral rights holders can extract minerals pursuant to those rights even if in so doing they interfere with and/or commit waste of another's minerals³. As noted above, the AER is satisfied that CN's modern methods have been adopted and reasonably used by CN in its operations and that the provisions of the relevant statutes and regulations are being observed.

Not an Appealable Decision

ISH has mischaracterized CN's commitment to drill or complete one observation well per drainage box as a requirement of the AER. The drilling of observation wells was the result of a previous commitment by CN and was not a condition of the Approval, or any approval.

The AER hearing panel in *Re Pembina Pipeline Corp.* distinguished commitments from conditions as follows:

Conditions generally are requirements in addition to or otherwise expanding upon existing regulations and guidelines. An applicant must comply with conditions or it is in breach of its approval and subject to enforcement action by the Alberta Energy Regulator (AER). Enforcement of an approval includes enforcement of the conditions attached to that approval...

The AER notes that Pembina Pipeline Corporation (Pembina) has made certain undertakings, promises, and commitments (collectively referred to as commitments) to parties involving activities or operations that are not strictly required under AER requirements. These commitments are separate arrangements between the parties and do not constitute conditions of the AER's approval of the applications...

The AER expects the applicant to comply with commitments made to all parties. However, while the AER has considered these commitments in arriving at its decision, the AER cannot necessarily enforce them. If the applicant does not comply with commitments made, affected parties may alert the AER of such noncompliance. At that time, the AER will assess whether the circumstances regarding any failed commitment warrant a reconsideration of the original approvals.⁴

Notably, there the panel acknowledged its consideration of the proponent's commitments and still concluded that they may not be enforceable. In upholding the AER's decision, the Court of Appeal noted that it is entirely within the purview of a regulatory decision maker to determine what terms to include as binding conditions of an approval, and what not to.

³ *Alberta Energy Company Ltd. v. Goodwell Petroleum Corporation Ltd.*, 2003 ABCA 277 (CanLII), 339 A.R. 201, at paras. 53, 61 and 62. Also affirmed in *Anderson v. Amoco Canada Oil and Gas*, 1998 ABQB 620 at para 149. More recently *Encana Corporation v. ARC Resources Ltd.*, 2013 ABQB 352 at para 48: 'The authorities have repeatedly found that holders of mineral rights are entitled to extract those rights, even if there is interference with and wastage of another's mineral rights'.

⁴ 2016 ABAER 4 at Appendix 2 – Summary of Conditions and Commitments, leave to appeal denied in *Bokenfohr v Pembina Pipeline Corp.*, 2017 ABCA 40

The AER notes that there are conditions in the Approval specifying requirements for observation wells; but these are not the observation wells that are the subject of CN's commitments or this regulatory appeal request. Had the AER felt it was necessary, it could have included the observation wells at issue as a condition of the approval that followed Application No. 1712215. It was entirely within its discretion not to have done so. As CN's Application sought only to withdraw an unenforceable commitment and not to remove or vary any of the conditions of its approval, the Application was not, in fact, necessary. Indeed, there was no actual change to the Approval – Approval No. 11475X is virtually identical to Approval No. 11475W.⁵ A commitment by an operator is not a decision of the AER, and any change to an operator's commitments is not appealable decision.

Conclusion

For the reasons above, the AER dismisses the request for regulatory appeal pursuant to section 39(4)(c) of the *REDA* as it is not properly before it. Given this finding, it is not necessary to address CN's arguments that ISH did not file a statement of concern, or that ISH's request for regulatory appeal is frivolous, vexatious and without merit.

ISH's concerns about CN not notifying it of the Application pursuant to the requirements of *Directive 078* are addressed by the finding above that ISH is not directly and adversely affected by the Approval. In addition, any deficiency in notice regarding the application has been remedied by the fact that ISH has been afforded full opportunity to articulate its concerns with the Application and the Approval through the AER's regulatory appeal request process.

ISH also requested that the AER exercise its discretion to revoke the Approval pursuant to its reconsideration powers under section 42 of *REDA*. The AER notes that its power to reconsider decisions is at its own initiative not through a party's application, and is entirely discretionary. The AER typically only exercises its reconsideration power in the most compelling and exceptional circumstances, none of which exist in the present case. In addition, and as stated above, ISH has been given full opportunity to articulate its concerns with the Application and the Approval through the AER's regulatory appeal request process. A further reconsideration of the same concerns would be duplicative and of no merit.

Sincerely,

<Original signed by>

Kevin Parks,
Chief Geologist, Strategy & Regulatory

<Original signed by>

Scott Fallows,
Senior Advisor, Authorizations

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Elizabeth Grilo,
Senior Advisor, Strategic Delivery

Cc: Chris Grant, Lily Lau-Porta – ISH Energy
Marc Scrimshaw, CN

⁵ The only change is the deletion of the reference in Approval 11475W to the previously rescinded condition 10(d), which in any event is expressly identified as 'rescinded' in Approval 11475W (see Application No. 1905097).