

Via Email

July 9, 2019

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Attention: Shailaz Dhalla

Attention: Bernard J. Roth

Dear Sir and Madam:

**RE: Request for Regulatory Appeal by Suncor Energy Inc.
Pure Environmental Waste Ltd.
Application No. 1910942; Approval No. WM 211
Location: 10-25-085-10 W4M
Request for Regulatory Appeal No.:1919369**

The Alberta Energy Regulator (AER) has considered the request made by Suncor Energy Inc. (Suncor) pursuant to section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's decision to grant application No.1910942 and issue Approval No. WM 211 approving the Hangingstone oilfield waste management facility (the Decision). In coming to this decision, the AER has reviewed Suncor's submissions and the submissions made by Pure Environmental Waste Ltd. (Pure).

The AER has determined that Suncor is eligible to request a regulatory appeal in this matter. Further, Suncor's request is properly before the AER. Therefore, the request for a Regulatory Appeal is granted for the reasons given below.

The applicable provision of REDA, 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. [underlining added]

This section sets out a three part test for standing for a regulatory appeal. The components of the test are:

1. the requester must be an "eligible person";
2. the decision from which an appeal is sought must be an "appealable decision"; and,
3. the request must have been made in accordance with the requirements of the *Alberta Energy Regulator Rules of Practice* (the Rules).

Further, where a requester meets the tests set out in section 38(1) of REDA, the AER has the discretion pursuant to section 39(4) of REDA to dismiss a request for regulatory appeal if the AER considers that for any reason the request is not be properly before it, including where it concludes the request is without merit.

Application of the Test to this Matter

In this matter, there is no suggestion the request was not made pursuant to the Rules.

Further, there is no dispute that the Decision is an appealable decision. It was made pursuant to the *Oil and Gas Conservation Act* (OGCA), an energy enactment, without a hearing and therefore, pursuant to section 36 (a) (iv) of REDA, is an appealable decision.

The contentious issue is whether Suncor meets the definition of an “eligible person” in this matter. As the decision appealed from was made under an energy enactment, eligible person in this instance is defined, as per section 36(b) (ii) of REDA, to be:

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

While Suncor asserts that it is directly and adversely affected by the Decision, Pure says it is not.

Further, Pure suggests Suncor’s request for regulatory appeal of the Decision is without merit and the AER should dismiss the request. Suncor says its request is meritorious.

Eligible Person

The approval granted relates to Pure’s Hangingstone oilfield waste management facility (the Waste Facility). The Waste Facility is a new stand-alone cavern oilfield waste processing and disposal facility. Waste products received at the Waste Facility will be pumped into two underground salt caverns and displaced brine from the caverns will be re-injected into disposal wells. The Waste Facility is one component of a larger integrated series of facilities for which Pure has applied to the AER.

The basis for Suncor’s claim that it is directly and adversely affected by the Decision is that as the oil sands lease holder in the area, its ability to recover bitumen will be directly impacted by the Decision. The Decision allows Pure to construct the Waste Facility on a 10.46 acre surface disposition directly above oil sand rights held by Suncor¹ and which involve the development of Suncor’s in situ operations which are or will be part of its Meadow Creek project which involves steam assisted gravity drainage or SAG-D operations.² Suncor says the fact the Waste Facility will overlie the oil sands in respect of which it holds the extraction rights will directly and adversely restrict its ability to extract the resources in the vicinity and also contribute to resource sterilization.

For its part, Pure says that Suncor has failed to demonstrate direct adverse effect and therefore is not an eligible person because the information provided is too vague and does not provide enough details and

¹ Suncor Oil Sands Lease No. 7401100020

² Meadow Creek East has been approved by the AER and Meadow Creek West has been applied for and is being considered by the AER.

specifics to meet the burden on Suncor of proving it is adversely affected. Pure says Suncor must demonstrate how it plans to recover resources directly beneath or in the immediate vicinity of the Waste Facility or how operation of the Waste Facility could reasonably interfere with or hinder Suncor's mineral interests in connection with Meadow Creek. Pure says because Meadow Creek West is not yet approved Suncor has not demonstrated direct and adverse impact. Pure also suggests that the distance of the Waste Facility from the nearest well pad, 6 kilometres, demonstrates Suncor will not be impacted by the Decision.

Pure says in reaching its decision on Suncor's eligibility for a regulatory appeal, the AER must consider the degree of location or connection between the project or its effects on the person alleging harm and whether that connection is sufficient to demonstrate the person may be directly and adversely affected by the proposed activity. Reliable information is required that demonstrates a reasonable potential or probability that the person asserting the impact will be affected.

Pure is correct that the AER must consider the degree of location or connection between the project and the party claiming to be directly and adversely affected by the proposed activity and that the onus is on Suncor to provide information with which establishes this connection.³ Reliable information is required to show a reasonable potential that party will be affected. It is also the case that the AER must make a determination based on the specific facts of each case. As set out in *Kelly v. Alberta (Energy Resource Conservation Board)*, the AER must consider the facts and decide whether the magnitude of risk is such that an individual has become directly and adversely affected.⁴ What type and the extent of information required to demonstrate impact will vary depending on the facts of each matter.

In this matter, Suncor has met the onus on it. SAG-D development involves horizontal wells the impact of which extends beyond the wells. Steam from the wells' steam chambers exits and expands into the geological formation being accessed. The steam allows the bitumen with the force of gravity to then flow into the lower production wells draining the bitumen.

Pure acknowledges that the waste products received at the Facility will be pumped into nearby salt caverns and that displaced brine from the cavern mining operation will be re-injected into disposal wells. Disposal of waste at the Waste Facility into caverns will impact geological pressure distributions in the area which will directly impact recovery of resources in the area, including recovery by Suncor. On this basis, we conclude there is a reasonable prospect Suncor is directly affected by the Decision which approved the Facility.

The nature and function of Meadow Creek and the Waste Facility and their relative locations provides sufficient information to demonstrate that there is reasonable potential for Suncor to be directly and adversely affected by the Decision.

³ *Dene Tha' First Nation v Alberta (Energy & Utilities Board)*, 2005 ABCA 68 at para 14

⁴ *Kelly v. Alberta (Energy Resource Conservation Board)*, 2011 ABCA 325 ("Kelly #2") at 24 -26

Pure says that if the AER were to grant a regulatory appeal to Suncor when Meadow Creek West has not yet been approved, the AER would be required to grant participatory rights or regulatory appeals to any person or industry participant who expresses concerns about a project. It is not clear how Pure reaches that conclusion, but in any event every time the AER considers whether a person is directly and adversely affected by one of its decisions, the determination is a factual one which is entirely dependent on the specific facts of the matter under consideration and is not predetermined by any one fact. Suncor possesses the rights to the bitumen to be extracted, has approvals for Meadow Creek East, and the AER is currently considering the applications associated with Meadow Creek West.

Without Merit

Pure has submitted that Suncor's request for regulatory appeal should be dismissed because the appeal is without merit and not properly before the AER. It says this is the case because Suncor has not provided new factual information to necessitate a regulatory appeal and was adequately consulted with by Pure.

Section 39(4) of REDA states in part:

The Regulator may dismiss all or part of a request for regulatory appeal

(a) if the Regulator considers the request to be frivolous, vexatious or without merit,

Pure suggests that Suncor has failed to provide new information in regard to this matter and therefore the appeal is without merit. It is not the case that a regulatory appeal request can only succeed if new information is provided. The considerations in deciding to have a hearing at the statement of concern stage and whether to hold a regulatory appeal hearing are, as the Rules demonstrate, not the same. Further, the AER has broad discretion in both circumstances. Contrary to the suggestion made by Pure, Suncor's statement of concern was not disregarded or dismissed by the AER. Rather than disregarding or dismissing that statement of concern, the AER considered it when making the Decision, though the AER chose not to hold a hearing to consider the matters raised in the statement of concern.

The AER's consideration of a regulatory appeal request is not an appeal or reconsideration of the AER's decision not to have a hearing to consider the Application in the first instance. Thus, the content of the AER's letter of January 30, 2019 is not determinative of Suncor's request for regulatory appeal. There was lengthy discussion in the submissions regarding Pure's consultation with Suncor and whether it was adequate. That is not a matter that determines whether Suncor should be granted a regulatory appeal of the Decision.

Pure's submissions do not persuade the AER that Suncor's request for regulatory appeal should be dismissed because it lacks merit. In addition to other matters, the issues related to resource sterilization and conservation make the appeal meritorious.

Consideration of the Appeal with Other Matters

In its request for regulatory appeal, Suncor requests that its appeal be considered in a hearing along with Pure's other applications currently before the AER. That request and the submissions regarding the other applications are not determinative of this matter. Whether Suncor's appeal of the Decision should be

heard with other Pure applications being considered in a hearing is a matter for the AER Hearing Commissioners to determine.

Conclusion

For the reasons given above, the AER grants Suncor's request for a regulatory appeal.

Sincerely,

<Original signed by>

Terence Ko, P. Eng
Senior Advisor, Insitu, Authorizations

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Frances J. Hein, Ph. D., P. Geol., FG
Senior Advisor, Alberta Geological Survey