

Via Email only

September 20, 2018

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Carscallen LLP

Suncor Energy Inc.

www.aer.ca**Attention: Michael B. Niven, Q.C.****Attention: Jason Heisler**

Dear Sir:

**RE: Request for Regulatory Appeal by Joslyn Energy Development Incorporated (JEDI)
Suncor Energy Inc. (Suncor)
Application Nos.: 1857270, 1890348; Commercial Scheme Amending Approval No.: 8535N
Location: 13-091-09W4M
Request for Regulatory Appeal No.: 1903068**

The Alberta Energy Regulator (AER) has considered JEDI's request under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER's decision to issue *Oil Sands Conservation Act (OSCA)* Commercial Scheme Approval No. 8535N, which was granted in response to Suncor's Millennium Operational Amendment Application Nos. 1857270 and 1890348 (MOA Application). The AER has reviewed all submissions from both JEDI and Suncor.

For the reasons that follow, the AER has determined that JEDI is not eligible to request a regulatory appeal in this matter. Therefore, the AER dismisses JEDI's request for a regulatory appeal.

Background

JEDI is seeking a regulatory appeal of the AER's decision dated October 25, 2017 to issue Commercial Scheme Approval No. 8535N under *OSCA* (Amending Approval). The Amending Approval is an amendment to the existing Suncor *OSCA* Amending Approval No. 8535. The scope of the Amending Approval is limited to terms and conditions relating to Suncor's tailings management plan (TMP) and modification to Suncor's Millennium mining operation arising from the TMP. The Amending Approval indicates that the AER "is confining substantive changes in this Scheme Approval No. 8535N to those arising from the Operator's Tailings Management Plan applications".

JEDI argued that in granting the Amending Approval, the AER failed to consider certain submissions made by JEDI and erred in its interpretation of certain submissions made by Suncor and JEDI. However, prior to embarking on an analysis of the grounds of appeal, JEDI must first establish that it is eligible to request a regulatory appeal.

The applicable provision of *REDA* in regard to regulatory appeal requests is section 38, which 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.

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

The Amending Approval was issued under *OSCA*, which is an energy resource enactment, and made without a hearing. There is no issue regarding the timing of filing the request for regulatory appeal or its form. Accordingly, the key issue is whether JEDI is an “eligible person” under *REDA*.

Preliminary Issue - Additional Information

As part of JEDI’s request for regulatory appeal, it submitted two reports not previously provided to the AER. These reports are entitled:

- “Evaluation of the SAGD Contingent Bitumen Resources in Section 13-91-9W4 in the Athabasca Oil Sands Region of Alberta of Joslyn Energy Development Incorporated (As of February 28, 2014)” (prepared by Sproule between July 2013 and March 2014); and
- “Joslyn Energy lease 428 Surface Movable Bitumen Estimate Report May 2015” (prepared by Norwest Corporation and dated May 5, 2015) (together, the “Reports”).

JEDI indicated that relevant information from the Reports, including information regarding the recoverable resources in Oil Sands Lease No. 7407090428 (OSL 428 or lease), was included in its statement of concern (SOC) in relation to the MOA Application. Further, JEDI asserts that it has consistently argued in its SOC and throughout the MOA Application process that the known presence of resources must be considered by the AER to avoid resource sterilization. Given the AER’s conclusion in its letter dated October 25, 2017 that JEDI’s SOC lacked sufficient information, JEDI sought consent from the authors to release the Reports.

Suncor submits that JEDI should not be permitted to file the Reports. The introduction of the Reports at this stage is improper, prejudicial and unfair to Suncor. To decide otherwise, according to Suncor, would allow JEDI to split its case and use the regulatory appeal process as a forum for re-trying issues that were decided based on the evidence before the AER. Suncor indicates that the Reports pre-date Suncor’s MOA Application and JEDI’s related SOC and that JEDI was free to file them with its SOC.

In the event the AER decides to consider the Reports, Suncor submits that the additional information does not demonstrate that JEDI is directly and adversely affected by the Amending Approval. The Reports provide estimates as to the amount of oil recoverable from OSL 428, but do not demonstrate that in situ development will occur or any alleged impact of the MOA Application on such development.

Those seeking to participate in the AER’s consideration of application should file an SOC explicitly referencing any information relevant to the issues in the SOC, including information that demonstrates they may be directly and adversely affected by the proposed development. While the AER may consider new information at the regulatory appeal stage, it is improper to save such information for this process. To do so results in a situation that is unfair to project proponents, an abuse of the AER’s regulatory appeal provisions and a waste of the AER’s resources in considering information that should have been referenced or provided at the SOC stage.

JEDI did not explicitly reference the Reports in its SOC. However, given JEDI's use of and reference to information contained in the Reports during the SOC process, the AER has considered the Reports. However, as set out below, even with consideration of the Reports JEDI has not demonstrated that it is directly and adversely affected by the Amending Approval.

Submissions

JEDI asserts that it will be directly and adversely affected by the execution of the mine plan described in the MOA Application and accepted in the Amending Approval. In particular, Suncor's proposed mine bench construction and overburden removal which extends past the northern boundary of OSL 428. JEDI submits that this activity will result in disturbance of Clearwater caprock, which will permanently impair JEDI's ability to recover such resources using in situ methods (as pressure and fluid containment would be precluded) and sterilize valuable bitumen resources in the northern portion of OSL 428. JEDI also asserts that water seepage from Suncor's operations will negatively affect the performance of thermal recovery processes (e.g. steam assisted gravity drainage).

JEDI submits that the Amending Approval includes relevant changes not previously taken into account by the AER, including a mine pit boundary extension resulting in greater intrusion onto OSL 428 (as compared to when JEDI acquired the lease in 2007 and Suncor's 2009 application related to the Millennium mine), significant delay in the reclamation timeline for the area overlying OSL 428 and earlier overburden removal due to an increased rate of mining and an accelerated mine plan.

JEDI indicates that it plans to develop OSL 428 using in situ methods (the only feasible recovery method given the lease's small scale) and that it is actively moving through the development process. The following steps are highlighted: the amount of money spent on OSL 428, its 2011/12 drilling program, conducting studies to investigate feasible recovery methods, providing a development process schedule to Suncor in 2016 (including additional core holes in 2018 and project application in 2020), engaging Suncor in planning during 2017 (including negotiations to acquire surface access). JEDI asserts that the known presence of recoverable resources in the northern part of the lease must be a consideration for the AER in deciding whether there is a direct and adverse effect. Further, JEDI indicates that it is not reasonable in the circumstances to require regulatory approvals for development to show such effect as JEDI must gain Suncor's permission for surface access (which it has failed to co-operate in providing).

Suncor submits that JEDI failed to demonstrate that it is directly and adversely affected by the Amending Approval, and has provided no new information that necessitates a regulatory appeal. Suncor's project boundaries do not present a larger intrusion onto OSL 428 than originally contemplated. The MOA Application did not propose a change to Suncor's approved project boundaries, the mine pit, or the South Tailings Pond Boundaries. With respect to water seepage, JEDI has failed to provide geologic information, viable operating pressure and other information required to understand whether OSL 428 is suitable for in situ operations. Suncor indicates that without concrete development plans, JEDI has failed to show how water seepage would directly and adversely affect it.

Suncor asserts that JEDI failed to demonstrate how JEDI's resources will be sterilized by the Amending Approval. It indicates that the MOA Application proposes no changes to existing rights to remove overburden in the area of OSL 428. The plan for the Millennium Mine to include overburden removal in the area overlying OSL 428 has been included in project plans since 1999, prior to the 2007 acquisition of OSL 428 by JEDI. Furthermore, the MOA Application does not preclude future recovery of resources within OSL 428, provided appropriate recovery methods are used.

Suncor maintains that JEDI has conducted no notable operations relating to OSL 428 since 2012, and has not filed any regulatory applications or received any approvals. The development design and feasibility studies are not concrete plans for development and no such plans have been developed as a result of these studies. JEDI has not provided concrete plans outlining its method, location or manner of development. Suncor submits that concluding that JEDI is directly and adversely affected would involve guesswork as development remains speculative, vague and aspirational.

Decision

As set out in section 36(b)(ii) of *REDA*, an “eligible person” is a person who is directly and adversely affected by a decision of the AER.

The factual part of the test set out by the Court of Appeal in *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*¹ provides guidance on what indicates a person may be directly and adversely affected. In particular, the AER must consider the “degree of location of connection” between the project or its effects and the person, 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. The AER also considers how the person will be individually and personally affected. Information about 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, are important factors.

The question for the purposes of section 36(b)(ii) of *REDA* is whether JEDI is directly and adversely affected by the Amending Approval.

JEDI holds the right to explore and work oil sands minerals under OSL 428, which was obtained in 2007. Suncor's approved project boundary under its *OSCA* scheme approval has included the area overlying OSL 428 since 2005. Under its *OSCA* approval, Suncor is authorized to construct facilities and commence and continue a scheme to recover oil sands. Further, the mineral surface leases (MSLs) associated with Suncor's approved project have been in place in the area overlying OSL 428 since 2005 and 2011. The MSLs give Suncor the right to enter on and occupy land for the purposes of oil sands mining and development and a tailings pond and related infrastructure. As a result, JEDI requires Suncor's consent to access the area overlying OSL 428. Under its approvals, Suncor has the right to conduct overburden removal.

The Amending Approval authorizes implementation by Suncor of its TMP and deals with how tailings are managed on the existing approved mine site footprint, including modifications to Suncor's Millennium mining operation arising from its TMP. Contrary to the assertions of JEDI, intrusion onto OSL 428 has not increased as a result of the Amending Approval.

Specifically, the MOA Application includes no changes to Suncor's previously approved project boundary, final pit highwall design or the mine pit limits or boundaries, and thus setbacks from lease boundaries remain unchanged from those shown in previous applications. These matters were all previously approved in response to Suncor's prior Millennium Mine related applications. JEDI had an opportunity to raise concerns in relation to Suncor's previously approved applications when those matters arose. It did not do so. Accordingly, JEDI failed to raise these concerns at the appropriate time.

¹ 2005 ABCA 68.

In any event, for the AER to determine whether overburden removal and its timing, water seepage, the mining rate, mine plan acceleration and reclamation timelines might impact JEDI would require further information regarding the proposed in situ development. This information would typically be provided to the AER in an application for such development, including geological and hydrogeological information (e.g. resource characterization, hydrogeological characteristics, location of aquifers, cap rock integrity and effectiveness for steam containment), viable operating pressure (depth dependent) and chosen technology for in situ extraction. JEDI currently has no applications before the AER or AER approvals in relation to its proposed in situ development, and this information is not otherwise before the AER in this matter, including within the Reports.

JEDI has expressed its intention to drill additional core holes in 2018, submit a project application in 2020, construct in 2022 and begin in situ operations in 2023, and outlined that there are known resources on OSL 428. However, there is insufficient information before the AER to demonstrate such development is feasible or that it will even occur. Without information regarding the particulars of JEDI's development, the AER is unable to determine that there is a reasonable potential or probability that JEDI will be affected by the Amending Approval.

Given the foregoing, the AER finds that JEDI is not directly and adversely affected by the decision to issue the Amending Approval. JEDI is therefore not an "eligible person" under section 36(b)(ii) of *REDA*. Accordingly, the AER dismisses the request for regulatory appeal.

Sincerely,

<original signed by>

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Director, Environment & Operational Performance

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Luis Grilo,
Senior Advisor, Industry Operations

Cc: Carscallen LLP – Carrie Akister
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