

Via Email

September 13, 2018

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

Longshore Resources Ltd. Alberta Energy Regulator
Oil and Gas Northwest Staff
Attention: Chris Lamb **Attention: Brent Prenevost, Legal Counsel**

www.aer.ca

Dear Sir and Madam:

**RE: Request for Regulatory Appeal by Longshore Resources Ltd. (Longshore)
LOC 180013
Location: 14-32-076-08W6M, 13-04-077-08W6M
Request for Regulatory Appeal No.: 1907227**

The Alberta Energy Regulator (AER) has considered Longshore's request for regulatory appeal of the AER's decision to refuse to issue Longshore a formal disposition (the Decision) for a Licence of Occupation (LOC180013). The AER has reviewed Longshore's submissions and the submissions subsequently provided by the AER Oil and Gas Northwest staff (OGNW).

For the reasons that follow, the AER has decided that Longshore is eligible to request a regulatory appeal in this matter. Therefore, the request for a Regulatory Appeal is approved.

Longshore is Eligible to Apply for Regulatory Appeal of the Decision

Section 38 of the *Responsible Energy Development Act* (REDA) governs requests for regulatory appeal and provides 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 its response to Longshore's request for regulatory appeal, OGNW state that Longshore is an "eligible person" and that the Decision is an appealable decision" for the purposes of section 38 of REDA. The AER agrees with OGNW and finds that Longshore is eligible to apply for regulatory appeal of the Decision.

Is the Request for Regulatory Appeal "Frivolous" or "Without Merit"?

The OGNW submit that the regulatory appeal request should be dismissed under section 39(4)(a) as the request is "frivolous" or "without merit".

Section 39(4) of the *REDA* states:

39(4) 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,

- (b) if the request is in respect of a decision on an application and the eligible person did not file a statement of concern in respect of the application in accordance with the rules, or
- (c) if for any other reason the Regulator considers that the request for regulatory appeal is not properly before it.

OGNW refer to two decisions to provide background on how the courts have interpreted the terms “frivolous” and “without merit”.

In *Re G.J.W. (Dependant Adult)* the Court of Queen’s Bench judge stated the following,

[18] “Frivolous” is defined in the law, it seems to me, in relation to the simple absence of an air or reality to a position, or the simple lack of any threshold basis on which to put forward an argument. In other words, an argument is frivolous if in fact it simply has no chance or no reasonable chance of success.

[19] An argument does not have to be hilarious in order to be frivolous; it does not have to be offensive in order to be frivolous. It is the law, in my view, that the word “frivolous” connotes an argument which does not have a realistic prospect success.

In *Composite Technologies Inc. v. Shawcor Ltd.* the Court of Appeal dealt with a summary judgement application. The Rule of Court allows a court to summarily dismiss an action that is ‘without merit’. The court said the following about the term “without merit”:

[2] ...A nonmoving party’s position is without merit if the moving party’s position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party’s likelihood of success is very low.

OGNW submit that it refused to issue LOC 180013 because Longshore did not provide adequate justification nor mitigation for the proposal to construct a new connector access road in the applied for location. In its regulatory appeal, Longshore believes that the application was not considered thoroughly and that there are many positive reasons in support of construction of the LOC. However, OGNW submit that Longshore provides no basis for the assertion that the merits of its LOC application have not been thoroughly considered.

OGNW further submit that Standard 1014-AS of the *Master Schedule of Standards and Conditions* (2017) (MSSC) document states that additional applications for access will not be permitted if access under disposition already exists. OGNW provide that preventing duplicative surface disturbances is well-known, longstanding public lands policy. Allowing construction of new access where access already exists would not be considered responsible management of public lands; therefore, the AER has standards in place to ensure this does not occur. OGNW submit that Longshore’s application is not approvable as it does not meet these AER standards and does not provide adequate mitigation. Its application does not address the desired outcome of minimizing footprint. OGNW submit there is no reasonable possibility that the Regulator will vary, suspend or revoke the appealable decision.

The AER notes that it recently considered Section 39(4) of the *REDA* in a regulatory appeal request of the rejection of XTO Energy Canada’s (XTO) applications for a mineral surface lease and a licence of occupation. The applications were rejected on the basis that XTO had not received the required consent from the holder of a Forest Management Agreement (FMA). Section 9(1)(e) of the *PLAR* states that an application for a formal disposition must, if the application relates to public land already subject to a timber disposition, be accompanied with a statement of consent signed by the timber disposition holder, which includes a FMA. Furthermore, section 9(5)(a) of *PLAR* requires the AER to reject an application that does not meet the requirements of the section.

The AER found the following:

In light of the requirements set out in section 9 of *PLAR*, and in the absence of express authority to modify or waive same, the AER dismissed XTO's request for regulatory appeal pursuant to section 39(4)(a) of the *REDA* because the AER considered the request to be without merit. This decision is not intended to reflect on the exasperation expressed by XTO in its submissions in regards to its assessment of Canfor's decision to refuse consent, or to the regulations themselves: it is simply a recognition that the AER cannot lawfully give XTO the relief it seeks.

The AER notes that Standard 1014-AS is a standard based on government policy. Although the standard states that additional applications for access will not be permitted if access under disposition already exists, there can be exceptions. The AER is not prohibited from issuing a second LOC where the circumstances are appropriate. A company, such as Longshore, can apply for a second LOC and include acceptable, alternative mitigation or justification as to why a second LOC is needed for access or mitigation strategies for the proposed new LOC. If the applicant can demonstrate that the mitigation or justification meets the desired outcomes of the MSSC, the application could be approved by the AER. Whether the company has provided sufficient justification or mitigation strategies goes to the merits of the application.

OGNW also submit that Longshore has not provided adequate justification or mitigation in its application and that there is no reasonable possibility that the Regulator will vary, suspend or revoke the appealable decision.

Again this argument goes to the merits of the regulatory appeal and the panel hearing the regulatory appeal will have to decide if it should vary, suspend or revoke the appealable decision. Longshore will have to make its case in the regulatory appeal as to the adequacy of its justification or mitigation strategies. This is not a situation where it is clear that Longshore has no reasonable probability or "low success" that its application will be approved. Nor is it the same situation as in the XTO decision, where a requirement cannot be met so there is no reasonable probability of success.

Given the above, the AER will be asking that the Chief Hearing Commissioner appoint a panel of hearing commissioners to conduct a hearing of the Regulatory Appeal. The AER notes that under section 31.1 of the *Alberta Energy Regulator Rules of Practice* Longshore can apply to submit new information in the regulatory appeal if that information is relevant and material to the decision appealed from and was not available to the person who made the decision at the time the decision was made.

Sincerely,

<original signed by>

Tanis Bryson,
Senior Advisor, Alberta Government Engagement

<original signed by>

Reneé Marx,
Director, Regulatory Management

<original signed by>

Marcus Ruehl,
Senior Advisor, Authorizations