

Proceeding ID 372

May 17, 2019

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By email only

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Bennett Jones LLP

Attention: Blake Williams

AER Authorizations

Attention: Karen Lilly

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Attention: David Tupper

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Attention: Kimberly Howard

Re: Decision on Hearing Scope

Gibson Energy Inc.

Dear Counsel:

The Alberta Energy Regulator (AER) held a prehearing meeting in Calgary, Alberta on April 4, 2019, to further assist the panel of hearing commissioners in this proceeding (the panel) in determining the scope of the hearing. The purpose of the prehearing meeting was to hear further submissions from the parties on whether the panel should examine the source of the released hydrocarbons. The meeting was attended by Gibson Energy Inc. (Gibson), Husky Oil Operations Ltd. (Husky), Suncor Energy (Suncor) and AER Authorizations Group (Authorizations).

This letter is the panel's decision on the matters heard at the prehearing meeting and in the submissions on scope.

Background

On March 16, 2018, Gibson Energy Inc. (Gibson) filed a request for a regulatory appeal under Part 2 Division 3 of the *Responsible Energy Development Act* and Part 3 of the *Alberta Energy Regulator Rules of Practice*. The appeal relates to the decision of February 14, 2018, by Authorizations to amend approvals 246980-00-03 and 10801-02-02 under section 70(3) of the *Environmental Protection and Enhancement Act (EPEA)*. The question before the panel is whether the decision to amend the approvals should be confirmed, varied, suspended or revoked.

On January 21, 2019, the panel issued a letter seeking comments from the parties on the draft scope for the hearing. The parties all commented on the draft scope and Gibson was given the right to reply to the other parties' comments. The draft issues proposed by the panel were:

1. Whether the AER correctly applied section 70(3) of the *Environmental Protection and Enhancement Act (EPEA)* in making the amendments to Gibson's *EPEA* approvals 246980-00-03 and 10801-02-02.
2. Interpretation and application of section 2 of *EPEA* to the amendments.
3. Whether the amendments relate to the activity/activities and facilities regulated by Gibson's *EPEA* approvals 246980-00-03 and 10801-02-02.
4. The process by which the amendments were made.

Gibson asked the panel to consider a number of additional issues, including the source of the hydrocarbons and the polluter pays principle. Suncor, Husky, and Authorizations also provided submissions on the draft issues. Suncor supported Gibson's proposed additions to the hearing scope. Husky agreed with the panel's draft issues, with the proviso that any consideration of the polluter pays provision in section 2 of *EPEA* should be limited to whether the AER properly considered the various factors listed in section 2 and that there should be no substantive investigation into the cause of the hydrocarbon plume. Authorizations expressed concerns with the wording of draft issue 1, arguing that the panel would be applying an incorrect standard of review given that section 70(3) expressly provides discretion to the decision maker. With respect to issue 4, Authorizations argued that any actual or perceived procedural unfairness is remedied through the appeal process and is irrelevant to the appeal process. Authorizations agreed with issues 2 and 3.

In a letter dated March 8, 2019, Authorizations stated that the source of the original release of hydrocarbons seemed to be at the heart of this appeal and proposed that if the panel decides to hear evidence and argument on source of the hydrocarbons, it should do so as a preliminary issue.

On March 12, 2019, the panel advised the parties that it would seek additional written and oral argument on the question of whether the panel should examine source of the hydrocarbons either as a preliminary matter or as part of the appeal. The oral portion of the submissions by all parties took place on April 4, 2019.

The panel has carefully considered all of the written and oral arguments of the parties in respect of the scope of the appeal, including the issue of the source of the hydrocarbons, and has amended the list of issues in this proceeding.

Decision

The amendments to Gibson's approvals were made pursuant to section 70(3)(a) of *EPEA*, which states:

(3) If the Director considers it appropriate to do so, the Director may on the Director's own initiative in accordance with the regulations

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an approval

(i) if in the Director's opinion an adverse effect that was not reasonably foreseeable at the time the approval was issued has occurred, is occurring or may occur,

(ii) the term or condition relates to a monitoring or reporting requirement,

(iii) where the purpose of the amendment, addition or deletion is to address matters related to a temporary suspension of the activity by the approval holder, or

(iv) where the approval is transferred, sold, leased, assigned or otherwise disposed of under section 75

Section 2 of *EPEA* states that the purpose of the Act is to support and promote the protection, enhancement and wise use of the environment, while recognizing a number of factors in paragraphs (a) to (j). The first of those listed factors is that protection of the environment is essential to the integrity of ecosystems, human health and the wellbeing of society. Paragraph (j) sets out the important role of comprehensive and responsive action in administering this Act. The principle of "polluter pays" in paragraph (i) is one factor of ten that is recognized in section 2. According to *Sullivan on the Construction of Statutes*¹: "...purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation are

¹ Sullivan, R., (2008). *Sullivan on the Construction of Statutes* (5th edition) Markham, Ont.: LexisNexis Canada.

to be interpreted and applied.” (page 388). The authority of the Director in section 70(3) is therefore to be interpreted with regard to the overall purpose of *EPEA* and with a view to the relevant factors set out in section 2.

The principal issue in this appeal is one of interpretation of the scope and nature of the power conferred on the Director in section 70(3) and whether it was within the jurisdiction of the AER to amend Gibson’s *EPEA* authorizations. Under the scheme of *EPEA*, the AER must consider the whole of section 2 in interpreting its responsibilities and authority under section 70(3). No single principle in section 2, including polluter pays, carries more legislative weight than the others, though the factual circumstances may dictate that some provisions are more pertinent than others in a given situation. Further, the panel does not believe that any of the principles in section 2 should be considered to be “threshold issues” that must be determined before the Director or the AER can exercise discretion under the provisions of *EPEA*. Rather, the exercise of the decision-making authority under *EPEA* should be carried out with the purpose and principles outlined in section 2 in mind.

The panel cannot conclude that the principle of polluter pays or the source of the hydrocarbons should be decided as separate or preliminary matters in this proceeding. Instead, polluter pays is one of the section 2 factors that we may consider in determining whether the AER properly exercised its discretion under section 70(3) of *EPEA*.

The parties have made extensive written and oral submissions on the scope of this hearing. The panel has found the submissions to be of assistance in helping to focus the issues in this appeal so that the appeal may proceed efficiently.

The panel has revised the hearing issues as follows:

1. In view of the purposes of the *Environmental Protection and Enhancement Act (EPEA)* as set out in section 2, and the authority conferred on the Director in section 70(3), did the AER properly exercise its discretion in amending *EPEA* approvals 246980-00-03 and 10801-02-02 without knowing if Gibson was the source of the pollution?
2. Do the amendments relate to an activity regulated by Gibson’s *EPEA* approvals 246980-00-03 and 10801-02-02?
3. If the amendments to the approvals were within the discretionary authority of the AER under section 70(3), should the amendments be varied, suspended or revoked on the grounds that the process that led to the amendments was procedurally unfair?

As set out in the panel's March 12, 2019, letter to the parties, the panel has determined that apportionment of costs is outside the scope of this proceeding or the AER's jurisdiction and will not form part of the issues in the hearing. The panel will not hear evidence or submissions on this matter.

Hearing Date

The panel is considering next steps in the hearing process for this regulatory proceeding and asks parties to submit their availability for a hearing for the week of October 15, 2019 and October 21, 2019, to hearing.services@aer.ca **by noon on May 24, 2019.**

C. Chiasson
Presiding Hearing Commissioner

C. McKinnon
Hearing Commissioner

J. Daniels
Hearing Commissioner

cc: C. Boyle, Bennett Jones LLP
D. Brezina, AER Authorizations
M. LaCasse, AER Legal Counsel
A. Doebele, AER Legal Counsel