

Proceeding 390
July 17, 2020

By email only

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

www.aer.ca

My Landman Group Inc.
Attention: Daryl Bennett

Burnet Duckworth & Palmer LLP
Attention: Evan Dixon

Alberta Energy Regulator
Reclamation Program Group (RPG)
Attention: Sean Sexton

**Re: Reconsideration 1916224; Dennis Murphy and Bonny Carson; Sitka Exploration Ltd.
and Bonavista Energy Corporation;
Reclamation Certificate 00340419-00-00 (the Reclamation Certificate)
Prehearing Decision**

Dear Sirs:

I am writing to you on behalf of the Alberta Energy Regulator (AER) hearing panel (the panel) assigned to the above-referenced reconsideration proceeding. From February 6, 2020, through June 29, 2020, the panel conducted a prehearing process to assist it in defining hearing issues and establishing process for the reconsideration hearing. In its January 14, 2020 letter, the panel asked for the parties' comments on the following matters:

1. Which party bears the onus of proof in this reconsideration proceeding; and
2. The following proposed hearing issues:
 - a. Was reclamation work at the site completed in accordance with and to the standards specified in the Resolution Agreement between the AER's Closure and Liability Branch and Bonavista Energy Corporation, which incorporated requirements from the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Land (the Reclamation Criteria)*?
 - b. Did the site meet the applicable reclamation requirements, including the *Reclamation Criteria*, at the time the Reclamation Certificate was re-issued?
 - c. Does the site currently meet the applicable reclamation requirements, including the *Reclamation Criteria*?

Following postponements of the prehearing meeting due to AER restructuring and COVID-19 restrictions, the panel confirmed in its April 8, 2020, letter that the prehearing process would be completed by written submissions. In further correspondence dated May 25, 2020, the panel directed questions to the parties based on their earlier prehearing submissions, and also asked the parties whether a formal information request process is needed in this proceeding. This letter sets out the panel's decision on the above matters.

Onus of Proof

In its February 6, 2020, prehearing submission, Sitka Exploration Ltd. (Sitka) suggested that it is unnecessary to impose an onus of proof in this proceeding. It argued that the reconsideration involves the panel determining whether the AER “made a substantial error or mistake that affected the outcome of its decision”, and that such determination can be made by reviewing the record that was before the AER decision-maker and inviting submissions on any perceived error or mistake. Sitka submitted that such a determination does not require any party to prove anything. In the alternative, Sitka argued that Mr. Murphy and Ms. Carson (the Landowners) should bear the onus of proof because their request for regulatory appeal of the re-issuance of the Reclamation Certificate ultimately led to this reconsideration proceeding thereby placing them in the role of complainants. In its June 22, 2020, submissions replying to the panel's questions, Sitka reiterated its position that no onus of proof is necessary in this proceeding.

In its June 29, 2020, reply submission, Sitka addressed the Landowners' June 22, 2020, submission that the operator always bears an onus to show that its reclamation activities meet legal and regulatory requirements and that the AER bears an onus to show that it had proper oversight of those activities. Sitka submitted that the re-issuance of the Reclamation Certificate raised presumptions that Sitka completed the required reclamation work and that the AER administered proper oversight, and that this results in a burden on the Landowners to rebut these presumptions by showing that the AER made “a substantial and overriding error”.

In their February 6, 2020, prehearing submission, the Landowners argued that the regulatory framework for reclamation certificates, and particularly provisions for extended operator liability post-certificate and reclamation audits by the AER, imposes an ongoing onus of proof on operators to show that sites meet the *Reclamation Criteria* until the end of the liability period. They also submitted that because Part 4 of the *Alberta Energy Regulator Rules of Practice* (the *Rules*) directs that Part 2 of the *Rules* applies to reconsiderations, section 7.2 of the *Rules* clearly indicates that Sitka should be considered the applicant and should bear the onus of proof. The Landowners also referred to the *Rules'* costs provisions and references to the applicant or approval holder as further authority that Sitka should bear the onus of proof in this proceeding.

In their June 22, 2020, submissions replying to the panel's questions, the Landowners submitted that they have claimed that the *Reclamation Criteria* and Resolution Agreement were not followed and that they have supporting evidence. They argued that this has shifted any onus of proof to Sitka and the AER's Reclamation Programs Group (RPG) to explain whether the site meets the *Reclamation Criteria* and whether the regulatory framework was followed. The Landowners also suggested that the fact that no party requested this reconsideration proceeding should give the panel "wider latitude to investigate the matter and to request any evidence that it deems material".

In its February 6, 2020, prehearing submission, RPG submitted that the Landowners bear the onus of proof in this proceeding on the basis that a person who asserts a proposition bears the burden of proving it. RPG argued that the Landowners are in such a position because they are challenging the re-issuance of the Reclamation Certificate and whether the requirements of the Resolution Agreement and the *Reclamation Criteria* were met. In its June 22, 2020, submissions replying to the panel's questions, RPG repeated its position as set out in its February 6 submission. It also argued that the Landowners effectively initiated this reconsideration proceeding by challenging the re-issuance of the Reclamation Certificate, regardless of the fact that they filed a request for regulatory appeal of that decision and did not specifically request that the AER carry out a reconsideration under section 42 of the *Responsible Energy Development Act (REDA)*.

In its June 29, 2020, reply submission, RPG suggested that the Landowners' June 22, 2020, submission supports the proposition that the Landowners bear the onus of proof. It referred to statements made in that submission that the Landowners claim the Resolution Agreement and *Reclamation Criteria* were not followed and that they have and will provide evidence to support this claim. RPG also submitted that this proceeding has not yet received hearing evidence, and as such there is no evidence on the proceeding record that would shift the onus of proof from the Landowners to Sitka and RPG.

Panel Decision on Onus

The panel has decided that it will not assign an onus of proof to any party. All parties' submissions on onus spoke, in part, to the nature of this proceeding and we agree that the nature and purpose of a reconsideration proceeding is key to the question of onus of proof.

Sitka described this proceeding in a manner analogous to an appeal, suggesting a limited review with a high standard to be met. The Landowners referred to the fact that none of the parties directly requested a reconsideration proceeding and submitted that this spoke to the proceeding being a broader investigation with wider latitude to seek and review information. RPG's position characterized this proceeding as being tantamount to an appeal, as it referred to

the Landowners' request for regulatory appeal of the re-issuance of the Reclamation Certificate as effectively initiating this reconsideration and making the Landowners complainants.

The AER's authority to reconsider its decisions is set out in Part 2, Division 4 of *REDA*. Section 42 of *REDA* provides that "(t)he Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision", and section 43 of *REDA* allows the AER to conduct a reconsideration with or without holding a hearing. While section 42 sets out the same task as that for regulatory appeals, namely to "confirm, vary, suspend or revoke" a decision, section 34(2) of the *Rules* directs that Part 2 of the *Rules* (i.e. hearings on applications) applies to a reconsideration hearing and section 42 of the *Rules* enables the AER to vary the *Rules* as required by a proceeding's circumstances. The result is that neither regulatory appeal nor application hearing requirements appear to apply exclusively to reconsideration proceedings. The panel therefore sees reconsiderations as a unique process, where the AER has broad discretion to tailor a proceeding to suit the circumstances of each particular case.

In this proceeding, the reconsideration is a means for the panel to seek the best factual information available from the parties in examining and reconsidering the decision to re-issue the Reclamation Certificate. To obtain and consider such information, the panel will receive, weigh and draw inferences from all parties' evidence. As such we do not feel it is necessary to assign an onus of proof to a particular party.

Hearing Issues

In its February 6, 2020, prehearing submission, Sitka suggested that only proposed hearing issue (a) is relevant to this proceeding and that proposed hearing issues (b) and (c) should not be included. It based the suggestion on its position that this reconsideration proceeding should be narrowly scoped to focus on whether the terms of the Resolution Agreement had been met, arguing that the agreement was designed to address outstanding reclamation deficiencies. In their February 6, 2020, prehearing submission, the Landowners effectively suggested that proposed hearing issues (a), (b) and (c) should be included in this proceeding. They submitted that the Resolution Agreement was not meant to be a simple checklist, that one should look to determine what the prescribed actions accomplished, and made several references to the *Reclamation Criteria*.

In its February 6, 2020, prehearing submission, RPG suggested that proposed hearing issues (a) and (b) are within scope for this proceeding. It submitted that including proposed hearing issue (c) would have no bearing on this proceeding and that evidence about the current state of the site would have little value.

The panel has determined that the focus of this reconsideration proceeding is whether the Reclamation Certificate should have been re-issued. To that end, the issues to be addressed at the hearing will be as follows:

- a. Was reclamation work at the site completed in accordance with and to the standards specified in the Resolution Agreement between the AER's Closure and Liability Branch and Bonavista Energy Corporation, which incorporated requirements from the *2010 Reclamation Criteria for Wellsites and Associated Facilities for Cultivated Land* (the *Reclamation Criteria*)?
- b. Did the site meet the applicable reclamation requirements, including the *Reclamation Criteria*, at the time the Reclamation Certificate was re-issued?

All parties agreed that issue (a) should be included. The panel is of the view that issue (b) is relevant because the aim of reclamation under the *Environmental Protection and Enhancement Act* is to obtain equivalent land capability and requirements such as the *Reclamation Criteria* are used to evaluate whether a site has met equivalent land capability.

We have not included proposed issue (c) because the focus of our inquiry is whether the Reclamation Certificate was properly re-issued at the time in question and nearly 3 years has passed since that re-issuance.

Formal Information Request Process

There will not be a formal information request process between the parties under sections 12-14 of the *Rules*, given the parties' consensus on this point in their prehearing submissions.

Future Steps

The panel will contact the parties in due course to determine hearing dates, hearing format (including order of presentation) and submission deadlines. Hearing format will be subject to all current government and AER requirements and restrictions in relation to COVID-19. In the interim, the panel wishes to revisit with the parties whether they are interested in alternative dispute resolution (ADR) by Hearing Commissioner, which would involve assignment of a Hearing Commissioner not involved in this hearing panel to carry out ADR. Please provide your response about the possibility of ADR to hearing.services@aer.ca by **4:00 pm on July 24, 2020**.

If you have any questions, please contact me at hearing.services@aer.ca.

inquiries 1-855-297-8311
24-hour
emergency 1-800-222-6514

Sincerely,
Tammy Turner
Hearing Coordinator, Hearing Services

cc: Colin Hennel, Bonavista Energy Corporation
Meighan LaCasse and Francco DeLuca, AER