

Via Email Only

June 20, 2019

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Alberta Energy Regulator  
Oil and Gas Northwest

**Attention: Dennis P. Langen/  
Sarah Graham, Legal Counsel**

**Attention: Alana Hall, Legal Counsel**

Dentons Canada LLP

**Attention: Laura Estep**

Dear Sirs and Mesdames:

**RE: Request for Regulatory Appeal by Aqua Terra Water Management Inc. (Aqua Terra)  
Application No.: 1913286;  
Location: 16-32-069-05W6M  
Request for Regulatory Appeal No.: 1916371**

## **Introduction**

The Alberta Energy Regulator (AER) has considered Aqua Terra's request under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER's closure of Application No. 1913286 filed by Aqua Terra (the Application Closure). The AER has reviewed Aqua Terra's submissions and the submissions made by the AER's Oil and Gas Northwest (OGNW) group.

For the reasons that follow, the AER has decided that the Application Closure is not an appealable decision as defined in the *REDA*. Therefore, the request for a Regulatory Appeal is dismissed.

## **Relevant Legislation**

The applicable provision of the *REDA* in regard to regulatory appeals, 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.

The term “appealable decision” is defined in section 36 of the *REDA*. For this regulatory appeal request, the relevant definition is contained in section 36(a)(iv). It says an appealable decision includes:

A decision of the Regulator that was made under an energy resource enactment<sup>1</sup>, if that decision was made without a hearing.

Section 1(1)(f) of the *REDA* states that a decision of the AER includes an approval, order, direction, declaration or notice of administrative penalty made or issued by the Regulator.

Approval is defined in section 1(1)(b) of the *REDA* as the following:

“approval” means, except where the context otherwise requires, a permit, licence, registration, authorization, disposition, certificate, allocation, declaration or other instrument or form of approval, consent or relief under an energy resource enactment or a specified enactment.

The term “eligible” person is defined in section 36(b)(ii) of the *REDA* to include:

a person who is directly and adversely affected by a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing.

The following AER requirements are also at issue and relevant to Aqua Terra’s application for a scheme of fluid disposal under section 39(1) (d) of the *Oil and Gas Conservation Act (OGCA)*:

Section 15.005 (e) of the *Oil and Gas Conservation Rules (OGCR)* states,

15.005 Unless otherwise directed by the Regulator, an applicant must file an application in accordance with Directive 065 and must include any other information that the Regulator requires when filing the following:

(e) an application under section 39(1)(d) of the Act for approval of a scheme for the storage or disposal of any fluid or other substance to an underground formation through a well;

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<sup>1</sup> This includes: the *Coal Conservation Act*, the *Gas Resources Act*, the *Oil and Gas Conservation Act*, the *Oil Sands Conservation Act*, the *Pipeline Act*, the *Turner Valley Unit Operations Act*, a regulation or rule under one of these enactments.

Section 4.1.3 of *Directive 065: Resources Applications for Oil and Gas Reservoirs (D065)* sets out a number of application requirements for a disposal scheme, including the following at page 4-10 under the heading “Notification, Equity, and Safety”:

### Requirements

- 1) Evidence of your right to dispose into the proposed zone.

### Comments

Proof of the right to dispose in a formation is as follows:

- unleased Crown land—a letter of consent from the Crown,
- Freehold lease land—consent from the Freehold mineral holder, and
- leased by other than the applicant—a letter of consent from the lease holder.  
[Underlined Emphasis Added]

Subsections 3(1)(e) and 3(4) of the *Alberta Energy Regulator Rules of Practice (Rules of Practice)*, which deal with the completeness of an application, are also relevant to the regulatory appeal request, and are captured in the body of the decision below.

### Background

On September 13, 2018, Aqua Terra applied to the AER under *D065* and *Directive 051: Injection and Disposal Wells - Well Classifications, Completion, Logging and Testing Requirements (D051)* for approval of a Class II disposal scheme through its 02/16-32-69-05 W6M well (102 well) in the Belloy formation, Application No. 1913286 (the Application). With approval of this Class II disposal scheme, Aqua Terra would further expand the capacity of its B-090 water disposal facility at the existing 16-32-069-05W6M location under AER Licence No F48212.

On October 17, 2018, 1094135 Alberta Ltd. (109 Ltd.) submitted a Statement of Concern (SOC) prior to the Application being decided, stating it had acquired the mineral rights to the base of the Dunvegan and below the base of the Montney to the base of the Banff at 32-069-05W6, and that 109 Ltd. had not provided consent to Aqua Terra to dispose into the Belloy Formation and does not intend to provide it. 109 Ltd. requested that the application be closed because Aqua Terra has not complied with *D065*.

On October 19, 2018, Aqua Terra filed a response to the SOC stating that it acquired consent for disposal in the undisposed Belloy formation from the Crown and that 109 Ltd.’s SOC was filed over 30 days after the application was filed in violation of section 5.3 of the *Rules of Practice*, asking the AER not to consider the SOC and to continue processing the Application.

On October 29, 2018, OGNW issued an Application Closure for Aqua Terra's application stating that the Application had been closed for miscellaneous reasons. The comments/conditions section of the Application Closure document states the following:

The application is considered deficient. The applicant has not obtained sufficient consent in regards to the mineral rights to dispose of in the Elsworth/Belloy formation at the 0/216-32-069-05W6/0 well. The proposed application must meet Directive 065 Resources Applications for Oil and Gas Reservoirs Section 4.1.3 Application Requirements for a Disposal Scheme; proof of the right to dispose in a formation by a letter of consent from the lease holder if leased by other than the applicant.

## Issues

Aqua Terra's request for regulatory appeal raises the following questions to be considered:

1. Is the Application Closure an "appealable decision" pursuant to section 36(a)(iv) of the *REDA*?
2. Is Aqua Terra directly and adversely affected by the Application Closure, so as to qualify as an "eligible person" under section 36(b)(ii) of the *REDA*.

If the answer to the first question above is 'no', then the answer to the second question is moot since the regulatory appeal request would not properly be before the AER.

## Submissions from the parties

Aqua Terra submits that the application was being considered by the AER and it was only following the filing of a SOC, and based on the assertions made in that SOC, that the AER made its decision. The AER made a decision to not conduct a hearing and to not approve the Application pursuant to section 33 of the *REDA* and section 39(1)(d) of the *OGCA*. Aqua Terra submits that the decision to close the application is an "appealable decision" as it was made pursuant to section 39(1)(d) of the *OGCA*, which is an "energy resource enactment", and Rule 15.005 of the *OGCR*. It also notes that the decision was made without a hearing.

Aqua Terra argues that after an SOC is filed pursuant to section 32 of the *REDA*, the AER must issue a decision in accordance with section 33 of the *REDA* on whether or not to hold a hearing on the application. If the AER makes a decision on an application without conducting a hearing, the AER shall publish or otherwise make publicly available the decision. Therefore, on the filing of 109 Ltd.'s SOC the AER was required to make a decision whether to conduct a hearing on Aqua Terra's application. As no hearing on the application was held, when the AER returned its application, it clearly made the decision not to conduct a hearing and not to approve the application and was required to publish or otherwise make publicly available the decision. The decision to refuse to grant Aqua Terra's application for a disposal scheme, by summarily dismissing the application on the receipt of the SOC, is an "appealable decision."

OGNW submits that it did not return Aqua Terra's application pursuant to section 39(1)(d) of the *OGCA* or under any other energy resource enactment. The return of the application is not an appealable decision since it was made under section 3(4)(b) of the *Rules of Practice* and not under an energy enactment, as required by section 36 of the *REDA*.

In addition, OGNW states that the return of the Application was not a "decision" within the meaning of section 36(a)(iv). The return does not meet the definition of a "decision" in s. 1(1)(f) of the *REDA* since it is not an approval, order, declaration or notice of administrative penalty. OGNW did return Aqua Terra's application for being incomplete, without any consideration of the merits and without prejudice to Aqua Terra's ability to re-apply in the future. Accordingly, the request for regulatory appeal should be dismissed as the return of the Application is not an appealable decision under section 36(a)(iv) of the *REDA*.

109 Ltd. stated that it does not take a position on the merits of Aqua Terra's regulatory appeal request. If the AER decides to consider the regulatory appeal request, 109 Ltd. intends to participate fully in any further process the AER may establish to consider the Appeal request.

## **Reasons for Decision**

### **i. The Closure of the Application**

Section 15.005(e) of the *OGCR* requires that an applicant must file an application in accordance with *D065* and must include any other information that the Regulator requests when filing an application under section 39(1)(d) of the *OGCA* for approval of a scheme for disposal of any fluid or other substance to an underground formation through a well.

Section 4.1 of *D065* sets out the application requirements for a disposal scheme. The miscellaneous reasons in the Application Closure document explain that Aqua Terra's application is deficient as it had not provided 'proof of the right to dispose in a formation by a letter of consent from the lease holder if leased by other than the applicant' as required by section 4.1.3 of the *D065* application requirements.

Section 3(1) of the *Rules of Practice* prescribes what the contents of an application should include. Of note is Section 3(1)(e), which provides:

3(1)An application must be in writing and must contain the following:

(e) any other information required by the relevant statutory provisions or publication;

Section 3(4)(b) of the *Rules of Practice* provides the AER with the discretion, in case of an incomplete application, to return the application to the applicant as incomplete:

3(4) If an application is not complete in the opinion of the Regulator, the Regulator may

(b) return the application to the applicant as incomplete.

Section 3(4)(b) of the *Rules of Practice* has not been judicially considered. However, the AER notes that the Courts and other tribunals have upheld the authority of administrative bodies to close and return incomplete or non-compliant applications without processing and assessing them because the basic required components of the application are missing<sup>2</sup>. Based on the parties' submissions, and a review of the Application Closure document, the AER finds that the decision to close and return the application was done under section 3(4)(b) of the *Rules of Practice*.

The Application Closure document makes no mention of a denial of the application under section 39(1)(d) of the *OGCA*. While there is also no specific mention of the application being returned for incompleteness under section 3(4)(b) of the *Rules of Practice*, the Application Closure document uses words such as “deficient,” “closure” and “closed.” The use of the term “deficient” in the Application Closure’s miscellaneous reasons is clearly conveying the AER’s opinion that the application is incomplete, the specific deficiency being the missing information required under section 4.1.3 of *D065*. By extension, this information was also required under section 3(1) (e) of the *Rules of Practice*. Without the information required by *D065*, the application was, in fact and under the *Rules of Practice*, incomplete. The fact that Aqua Terra had previously obtained Crown consent does not change the fact that once the Crown land was leased by a third party, Aqua Terra was required under *D065* to obtain the consent of that third party.

Section 3(4) does not contain anything that suggests the discretion to return an application is lost if an SOC is filed on an application. There are no provisions in the *REDA* or the *Rules of Practice* to this effect, or that speak to an incomplete application being made complete by the filing of an SOC.

Regarding the return of the application, in practice, applications are submitted electronically to the AER, often through multiple separate submissions over a period of time, and can be several hundreds of pages. Applicants have access to their filed applications through the AER’s electronic registry systems, even after applications have been closed. Given these factors, the AER finds that providing an applicant with

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<sup>2</sup> *Gennai v. Canada (Minister of Citizenship and Immigration)*, 2017 FCA 29 [Gennai], *Aqua Properties Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, 2016 Alta. Environmental App. Bd. 21, *Beaverlodge River Arctic Grayling Renewal Society v. Director, Peace Region, Alberta Environment and Parks*, 2018 Alta. Environmental App. Bd. 8.

an ‘Application Closure’ document, such as the one provided to Aqua Terra, that provides a basic summary of the application and indicates that it has been “closed” for specified reasons means that the application has been closed and is being returned. The AER closes a number of applications every year. Requiring the actual return of pages and pages of documents that an applicant already has, or has ready access to, is impractical, laborious, and an unnecessary use of AER and applicant resources. The practical result in the present case is that Aqua Terra’s application was returned to it due to incompleteness in accordance with section 3(4)(b) of the *Rules of Practice*.

ii. Is the Application Closure an Appealable Decision?

In order for the AER’s Application Closure to be an “appealable decision” it must be a decision that was made under an energy resource enactment and without a hearing.

Section 1(1)(f) of the *REDA* sets out the definition of “decision.” While the definition uses the word ‘includes’ and describes certain types of decisions, the closure and return of a deficient application is not similar to the classes of decisions referred to in section 1(1)(f) (i.e. an approval, order, direction, declaration or notice of administrative penalty), all of which appear to grant or impact rights or impose obligations. The closure and return of an application does not prejudice an applicant’s right to reapply with complete information, nor does it obligate an applicant to do so. It does not grant or impact any other right, as there is no right to have a public authority exercise its discretion in a manner that yields a favorable result<sup>3</sup>. The Application Closure does not appear to fall under the definition of “decision” and by extension cannot be an ‘appealable decision’ under section 36 of the *REDA*.

Even if the Application Closure could be considered a decision under the *REDA* definition, it is not an ‘appealable decision’ as required by section 38(1) of the *REDA*. This is because OGNW’s decision to close and return Aqua Terra’s application was made under section 3(4) of the *Rules of Practice*. The *Rules of Practice* are not an energy resource enactment as required by section 36(a)(iv) of the *REDA*. Therefore, the Application Closure is not an appealable decision, and the request for a regulatory appeal is not properly before the AER under section 38(1) of the *REDA*.

## Conclusion

For the reasons above, the AER dismisses the request for regulatory appeal pursuant to section 39(4)(c) of the *REDA* as it is not properly before it.

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<sup>3</sup> *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)* 2001 SCC 41 @ para 13.

Given the above determination, it is unnecessary to address Aqua Terra’s submissions that it is directly and adversely affected by the Application Closure, so as to qualify as an “eligible person” under section 36(b)(ii) of the *REDA*. Similarly, it is unnecessary to address OGNW’s arguments that the regulatory appeal request is “without merit” under section 39(4)(a) of the *REDA*. It is also unnecessary to address Aqua Terra’s arguments regarding section 33 of the *REDA*, given that an application closure is not the type of decision that is referred to in section 33 of the *REDA* as it does not meet the definition of ‘decision’ in the *REDA*. Lastly, in its request for regulatory appeal, Aqua Terra raised a number of grounds on which it challenged the Application Closure, alleging errors of law or jurisdiction by the AER. These submissions go to the merits of the regulatory appeal, and also do not need to be considered in light of the fact that the Application Closure is not an appealable decision.

Sincerely,

<Original signed by>

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