

Via Email

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**February 11, 2020**

Regulatory Law Chambers

McLennan Ross LLP

[www.aer.ca](http://www.aer.ca)

**Attention: Rosa Twyman**

**Attention: JoAnn Jamieson**

Dear Mesdames:

**RE: Request for Regulatory Appeal by ISH Energy Ltd.  
Canadian Natural Resources Limited  
Application No.: 1909395; Approval No.: 11475EE  
Request for Regulatory Appeal No.:1919287**

The Alberta Energy Regulator (AER) has considered the request of ISH Energy Ltd. (ISH) under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER's decision to approve Application No. 1909395 (the Application) and issue Approval No. 11475EE (the Amended Approval). The AER has reviewed ISH's submissions dated February 21, 2019, March 14, 2019, November 7, 2019, and December 11, 2019, and the submissions made by Canadian Natural Resources Limited (Canadian Natural) dated March 7, 2019, March 26, 2019, and October 31, 2019, and November 22, 2019, in response.

For the reasons that follow, the AER has determined that the Amended Approval is an appealable decision and that ISH has established it is an eligible person. The AER has also determined there is some merit to ISH's request for regulatory appeal. Accordingly, the AER has decided to grant the request and proceed to a hearing on the regulatory appeal.

## **Background**

On May 11, 2018, Canadian Natural submitted the Application to amend its approval for recovery of crude bitumen from the Wabiskaw-McMurray Deposit at its Kirby North project in the Athabasca Oil Sands Area. The proposed amendment was to allow the drilling and operation of a sixth steam assisted gravity drainage box (KN06) to be located at 01-075-09W4M. The AER approved the Application and issued the Amended Approval on January 24, 2019.<sup>1</sup>

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<sup>1</sup> The AER's letter to ISH dispositioning SOC No. 31196 and advising that the approval had been issued was dated January 23, 2019, but the Amended Approval itself was dated January 24, 2019.

ISH holds all petroleum and natural gas rights in the KN06 development area. ISH filed its request for regulatory appeal on February 21, 2019. The request raises concerns about the potential for Canadian Natural's operations at KN06 to result in contamination of ISH's resources in the overlying zones. In particular, ISH refers to a decision of the AER's predecessor, the Alberta Energy and Utilities Board, to shut in the gas over bitumen (GOB) in the Kirby North area due to the potential absence of a sealing layer between the bitumen and the GOB.<sup>2</sup> Further, ISH states that, even if the sealing mudstone/shale layers are intact, the approved initial start-up injection pressure risks fracturing the barrier, resulting in direct communication between the bitumen and the overlying gas.

## Reasons for Decision

### 1. Eligibility for a Regulatory Appeal

Section 38 of *REDA* sets out the test for eligibility for a regulatory appeal. It provides that:

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]

There are three parts to the test. First, the requester must be an eligible person as defined in section 36(b) of *REDA*. Second, the decision from which the requester seeks a regulatory appeal must be an "appealable decision" as defined in section 36(a) of *REDA*. Third, the request must have been filed in accordance with the *Alberta Energy Regulator Rules of Practice (Rules)*.

There is no dispute here as to whether the request for regulatory appeal was filed in accordance with the *Rules*, so the key questions to be answered are whether the AER's issuance of the Amended Approval is an appealable decision and whether ISH is an eligible person.

#### *(a) Appealable Decision*

The term "appealable decision" is defined in section 36(a)(iv) of *REDA* to include:

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

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<sup>2</sup> *EUB Decision 2005-122 Addendum: Phase 3 Final Proceeding Under Bitumen Conservation Requirements in the Athabasca Wabiskaw-McMurray* (December 21, 2005).

The application was approved under the *Oil Sands Conservation Act*, which, pursuant to subsection 1(1)(j)(iv) of *REDA* is an energy resource enactment. Since the Amended Approval was issued without a hearing, it is an appealable decision under section 36(a) of *REDA*.

(b) *Eligible Person*

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 [made under an energy resource enactment]...

Therefore, in order for ISH to be eligible for regulatory appeal, it must demonstrate that it may be directly and adversely affected by the AER’s decision to issue the Amended Approval.

Canadian Natural submits that there must be a demonstrated degree of location or connection between the proposed activities and the impacts to the requester’s rights. It further submits that the use of the word “is” rather than “may” in section 36(b)(ii) suggests a higher standard for eligibility for regulatory appeal than other parts of *REDA*. Although section 36(b)(ii) defines an eligible person as “someone who is directly and adversely affected”, the AER typically applies a may be directly and adversely affected test. To do otherwise would be to impose a near impossible threshold, since so often the actual effects of a decision, especially an approval, cannot be known with certainty in advance.

In *Court v Alberta (Environmental Appeals Board)*,<sup>3</sup> a judicial review of a decision of the Environmental Appeals Board (EAB) to dismiss a notice of appeal, the Court of Queen’s Bench examined the interpretation of the phrase “is directly affected” as it is used in section 95 of the *Environmental Protection and Enhancement Act (EPEA)*. Subsection 95(5)(a)(ii) of *EPEA* allows the EAB to dismiss a notice of appeal submitted under certain provisions of *EPEA* if the EAB is of the opinion that the person submitting the notice of appeal is not directly affected by the decision.

The Justice found that, in order to establish eligibility for appeal, “the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed”.<sup>4</sup> Further, the Justice found that the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the [decision]. The appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm”.<sup>5</sup>

Based on the above, the AER finds that the “is directly and adversely affected” requirement under section 36(b) of *REDA* does not impart a higher standard for demonstrating actual effect than section 32 does with respect to eligibility to file a statement of concern.

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<sup>3</sup> 2003 ABQB 456.

<sup>4</sup> *Ibid* at para 69.

<sup>5</sup> *Ibid* at para 71.

The AER is satisfied that ISH has demonstrated it may be directly and adversely affected by the issuance of the Approval. ISH holds the petroleum and natural gas rights directly above the KN06 development area. ISH has provided information that indicates there is some risk of Canadian Natural's operations at the KN06 Pad interfering with ISH's rights to the natural gas in the drainage area. In particular, there is a risk that the approved start-up injection pressure will fracture the McMurray shale and Wabiskaw GOB zones overlying Canadian Natural's bitumen, resulting in direct communication between the McMurray sand and the GOB zone. Such communication could impair ISH's ability to recover the gas in the GOB zone.

## 2. Merit

The AER has discretion under section 39(4)(a) of the *Rules* to dismiss a request for regulatory appeal if the AER "considers the request to be frivolous, vexatious or without merit". Canadian Natural submits that the request for regulatory appeal should be dismissed "on the basis of no merit", and refers to the same reasons it provides in support of its contention that ISH is not directly and adversely affected by the Decision.

The AER has determined that ISH has an arguable appeal on the merits, given the potential risk of the approved start-up injection pressure fracturing the McMurray shale and Wabiskaw GOB zone resulting in contamination of ISH's resources.

Canadian Natural also refers to a comment in the AER's dismissal of Request for Regulatory Appeal No. 1910998 that "the law in Alberta recognizes that bitumen mineral rights holders can extract minerals pursuant to those rights even if in so doing they interfere with and/or commit waste of another's minerals."<sup>6</sup> This reference is to several decisions from Alberta courts on the incidental production of evolved gas<sup>7</sup> and initial gas-cap gas<sup>8</sup> in the production of bitumen, and on the ownership of coalbed methane.<sup>9</sup>

The AER is of the view that those cases address the situation where interference with or wastage of another's minerals is reasonably necessary to "win, work, recover and remove" one's own minerals.<sup>10</sup> Further, the cases have their genesis in an early decision of the Alberta Court of Appeal on a split-title dispute between holders of petroleum rights and natural gas rights,<sup>11</sup> where the Court held that "the [petroleum rights holders] are entitled to extract all the petroleum from the earth, even if there is interference with and a wastage of [the natural gas rights holders'] gas, so long as in the operations modern methods are adopted and reasonably used."<sup>12</sup> An essential question here, then, is whether the approved start-up injection pressure for KN06 is reasonable in the circumstances.

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<sup>6</sup> AER Disposition Letter dismissing ISH Request for Regulatory Appeal No. 1910998 (July 31, 2019) at 3.

<sup>7</sup> *Anderson v Amoco Canada Oil and Gas*, 1998 ABQB 352.

<sup>8</sup> *Alberta Energy Company Ltd v Goodwell Petroleum Corporation Ltd*, 2003 ABCA 277 [*Goodwell*].

<sup>9</sup> *Encana Corporation v ARC Resources Ltd*, 2013 ABQB 352.

<sup>10</sup> *Goodwell*, *supra* note 8 at para 80.

<sup>11</sup> *Borys v CPR and Imperial Oil Ltd*, [1952] 3 DLR 218 (Alta CA) [*Borys*], *aff'd* [1953] 2 DLR 65 (PC).

<sup>12</sup> *Borys* at 237 [emphasis added].

## Conclusion

The AER has determined that ISH may be directly and adversely affected by the Approval and there is some merit to the requested appeal. Accordingly, the AER has decided to grant the request for regulatory appeal. The AER will request that the Chief Hearing Commissioner appoint a panel of hearing commissioners to conduct a hearing of the regulatory appeal.

Sincerely,

*<Original signed by>*

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R.G. Keeler, P.Eng., P. Geol.  
Senior Advisor, Regulatory Applications

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Dr. Dean Rokosh, P. Geol.  
Senior Advisor, Alberta Geological Survey

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Todd Shipman  
Senior Advisor, Alberta Geological Survey

cc: Lily Lau-Porta, ISH  
Marc Scrimshaw, Canadian Natural  
Maude Ramsay, Canadian Natural