

Via Email

January 8, 2020

Osler, Hoskin & Harcourt LLP

Alberta Energy Regulator
Subsurface Order No. 6 Panel

Calgary Head Office
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Calgary, Alberta T2P 0R4
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Attention: Martin Ignasiak

Attention: Barbara Kapel Holden, Counsel

Dear Sir and Madam:

**RE: Request for Regulatory Appeal by TransAlta Corporation (TransAlta)
Alberta Energy Regulator Subsurface Order No. 6 Panel
Subsurface Order No. 6 (SSO6)
Request for Regulatory Appeal No.:1922192**

The Alberta Energy Regulator (AER) has considered TransAlta's request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's issuance of SSO6 on May 27, 2019.

The applicable provision of 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.
[emphasis added]

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]...[emphasis added].

The applicable definition for "appealable decision" is set out in section 36(a)(iv) of REDA:

- (a) "appealable decision" means
- (iv) a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing.

In order to be granted an appeal, the requesting party must meet both parts of the applicable test. If a party does not meet both parts of the test, an appeal will not be heard.

Background

TransAlta is the owner and operator of the Brazeau Hydroelectric Dam, and the related infrastructure, which includes earthen power canal dykes, a main dam, a spillway, and a powerhouse (the "Brazeau Infrastructure").

Between February 25, 2013, and August 12, 2013, Lightstream Resources Ltd., now Ridgeback Resources Inc. ("Ridgeback") filed well license applications for 26 horizontal crude oil wells with no H₂S (lead application is 1755890). On July 8, 2013, Westbrick Energy Ltd. ("Westbrick") submitted application 1766936 for a well license in respect of a single horizontal gas well with no H₂S. All locations listed in the applications are approximately 25 km from Lodgepole and a five (5) km radius of the Brazeau Infrastructure. The Brazeau Infrastructure is located within approximately 0 km to 7 km of the surface and/or bottom hole locations of the proposed wells that form the subject of the Ridgeback and Westbrick applications (the "Applications").

TransAlta submitted Statements of Concern in relation to each of the Applications. On January 4, 2014, it was recommended that the Applications proceed to a hearing (Proceeding ID 379) (the "Hearing").

After a lengthy hearing-commissioner-led alternative dispute resolution, a Hearing panel was assigned in January 2016 to conduct the Hearing into the Applications.

On May 27, 2019, Subsurface Order No. 6 ("SSO6") was issued by the AER which established new monitoring, reporting and setback requirements in an effort to manage the potential hazard of induced seismicity from hydraulic fracturing near the Brazeau Reservoir. SSO6 allows hydraulic fracturing in formations above the Duvernay Formation to within 3 km of the Brazeau Infrastructure.

On May 30, 2019, the Hearing panel sent a letter which explained that since the issuance of SSO6, the Applications were no longer compliant with the AER's regulatory framework and, therefore, would be closed. The Hearing would remain open and a process was provided for parties to resubmit applications or apply for new ones. Several applications were resubmitted and a Notice of Hearing was issued by the Hearing panel on November 18, 2019 in relation to the Applications.

TransAlta submitted a Request for Regulatory Appeal (the "Request") on June 25, 2019 in relation to SSO6.

TransAlta's Position

TransAlta alleges that it is directly and adversely affected by SS06, and is therefore an “eligible person”. The reasons it gives are (a) that TransAlta has engaged with oil and gas operators, Government of Alberta and the AER in an attempt to resolve its concerns in the Brazeau area; (b) the increased likelihood of the occurrence of events of M3 or larger close to the Brazeau Infrastructure may impact the hazard analysis and require a detailed review of the Brazeau Infrastructure, which may result in significant financial costs to TransAlta; (c) in that compliance required upgrades or repairs resulting in a temporary shut-down of the Brazeau Infrastructure, TransAlta would be unable to provide black start service during that shut-down. TransAlta is concerned that induced seismicity may impact the integrity of the Brazeau Infrastructure.

In terms of the definition of "appealable decision", TransAlta refers to the above-quoted definition of "appealable decision". It also points us to the definition of "Decision" in paragraph 1(1)(f) of REDA:

- (f) "decision" of the Regulator includes an approval, order, direction, declaration or notice of administrative penalty made or issued by the Regulator.

As well, TransAlta points out that SS06 was made pursuant to the *Oil and Gas Conservation Act* ("OGCA") and section 11.104 of the *Oil and Gas Conservation Rules* ("OGCR") and there was no hearing in relation to the issuance of SS06.

SS06 Panel's Position

The SS06 Panel argues that TransAlta is not an “eligible person” because it is not directly and adversely affected by the issuance of SS06. It is the AER’s position that if TransAlta is affected at all by SS06, it is affected in a positive manner.

In relation to prior oil and gas development in the area of the Brazeau Infrastructure, there were no reports to the AER of induced seismic activity associated with any of the wells.

The SS06 Panel states that SS06 applies to any person that drills and operates a well within the geographic areas outlined in Appendices A, B, and C of SSO6. It does not apply to the Brazeau Infrastructure and further, that TransAlta is not required to do anything under SS06.

The SS06 Panel states that SS06, by itself does not permit any activity, including hydraulic fracturing

operations. Rather, it prohibits activity within certain areas surrounding the Brazeau Infrastructure; prohibitions that did not previously exist. In addition, with the issuance of SS06, the AER established new monitoring, reporting and setback requirements to manage the potential hazard of induced seismicity from hydraulic fracturing near the Brazeau Infrastructure.

The SS06 Panel argues that SS06 is not an “appealable decision” as contemplated by subsection 36(a) of REDA, and rather, it is an instrument of legislative nature that prevails over the *Oil and Gas Conservation Rules*. The AER also states that SS06 is not an appealable decision for the purpose of s. 36(a) of REDA as such types of decisions are reserved for decisions of an administrative or quasi-judicial nature to exercise a statutory power. Further, as part of the definition of “appealable decision” includes the words “if that decision was made without a hearing” and the AER does not hold hearings in relation to the issuance of subsurface orders, the AER concludes that SS06 is not an “appealable decision” within the meaning of REDA.

The SS06 Panel also argues that TransAlta’s Request is not properly before the AER as the appropriate forum for TransAlta to raise its concerns about hydraulic fracturing operations around the Brazeau Infrastructure is in the existing hearing process. Allowing an appeal of SS06 would result in duplicative proceedings resulting in a drain on limited AER resources.

Reasons for Decision

We find that TransAlta is not an “eligible person” for the purposes of s. 38 of REDA.

The Court of Queen’s Bench in *Kostuch v. Alberta (Director, Air & Water Approvals Divisions, Environmental Protection)* reviewed a decision of the Environmental Appeals Board approving a cement plant to determine whether an applicant for Judicial Review had standing on the basis that they were ‘directly affected’ by a decision of the Director. In assessing the ‘directness’ requirement of that test, the Court referenced the following analysis from the EAB decision: ‘

‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other. [26] I am satisfied the E.A.B. applied the correct test. The E.A.B. went on to discuss the particular connection between the Applicant and the cement plant.....’

Applying the court's reasoning in *Kostuch*, it is clear that the cause of the potential harm to the Brazeau Infrastructure that TransAlta is concerned with, is not caused by SS06. Because there is no direct connection between the issuance of SS06 and the potential impacts alleged, TransAlta is not directly affected by SS06. The concerns raised by TransAlta are general in nature, speculative and show no direct link to SS06.

Furthermore, we agree with the SS06 Panel that SS06 does not "adversely" affect TransAlta. SS06 is not specific to TransAlta, nor is TransAlta required to do anything in relation to SS06. While SS06 uses geographic boundaries which are in relation to the Brazeau Infrastructure, the order applies to anyone that drills and operates a well within the geographic areas outlined in Appendices A, B and C. The purpose of SS06 is to place limits on hydraulic fracturing operations near the Brazeau Infrastructure where, previously, none existed. By TransAlta's own admission, SS06 was issued in response to concerns raised by TransAlta regarding hydraulic fracturing operations within the vicinity of the Brazeau Infrastructure. Placing minimum requirements in relation to hydraulic fracturing operations near the Brazeau Infrastructure appears to be a positive measure imposed by the AER in response to TransAlta's raised concerns.

Section 39(4) of REDA states that:

- 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.

As TransAlta is not an eligible person, we find that the Request is not properly before the AER. In addition, TransAlta has filed Statements of Concern in relation to the Applications. A hearing was granted in relation to those Statements of Concern. The Statements of Concern contain almost identical information as the Request and will result in duplicative processes if the Request is granted. Rule 31(3) of the AER *Rules of Practice* state that a "regulatory appeal shall not include any matters already adequately dealt with through another hearing, regulatory appeal or review under any enactment. As a Notice of Hearing has been issued in Proceeding ID 379, allowing a regulatory appeal to proceed on the issues outlined in the Request would result in a breach of this rule.

TransAlta can, and will likely, continue to file Statements of Concern in relation to any hydraulic fracturing operations in the vicinity of the Brazeau Infrastructure, and we suggest that this is the appropriate forum to raise such concerns. If SS06 was rescinded, there would no longer be any limit whatsoever in relation to hydraulic fracturing operations and so, it would be possible for companies to make application to conduct such operations even closer to the Brazeau Infrastructure than currently is allowed for under SS06.

For the reasons above, the AER dismisses the request for regulatory appeal. Given these reasons, it is not necessary to address the arguments of TransAlta and the SS06 Panel with respect to whether or not SS06 is an appealable decision.

Sincerely,

<Original signed by>

Kevin Parks
Chief Geologist

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Dean Rokosh
Advisor, Energy and Mineral Resources

cc: Jessica Kennedy - Osler
Carolyn Dahl Rees - TransAlta