

Proceeding ID 379

September 17, 2020

By email only

Stikeman Elliott LLP
Attention: Dennis Langen

Osler, Hoskin & Harcourt LLP
Attention: Martin Ignasiak

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Attention: Laura Estep

**Re: Ridgeback Resources Inc. and Westbrick Energy Ltd.
Well License Applications near the Brazeau Dam
Panel response to Alberta Environment and Parks August 27, 2020 letter and TransAlta's
request for adjournment**

Dear Counsel:

I am writing on behalf of the Alberta Energy Regulator (AER) panel of hearing commissioners assigned to this proceeding (panel).

The purpose of the proceeding is to determine 10 applications filed by Ridgeback Resources Inc and Westbrick Energy Ltd (the Applicants) to drill wells near the Brazeau hydroelectric facility. TransAlta opposes the applications and is a party to the hearing. The applications are required to satisfy AER requirements, including requirements of the AER's Subsurface Order No. 6, and issues previously outlined in the panel's January 30, 2020, letter.

Disposition

The panel has considered all of the submissions regarding its previous decision to deny TransAlta's request to adjourn the proceeding. For the reasons outlined below, the panel has reconsidered its previous ruling and will adjourn the proceeding until the end of February, 2021.

Background

On February 4, 2020, the panel wrote to Alberta Environment and Parks (AEP) and asked the department whether it had any information related to induced seismicity and potential impacts on the Brazeau Dam that might assist the panel in making its decision on the applications. The panel also provided AEP an opportunity to make submissions or participate in the proceeding pursuant to s. 49 of *REDA*. In inviting submissions from AEP, the panel recognized the department's responsibility for regulatory oversight of the dam and its responsibility for safe operation of the dam and associated infrastructure.

The panel received a response from AEP on June 11, 2020. AEP's response was dated April 30, 2020 but was not received by the panel until June 11th due to an incorrect e-mail address. In its April 30th letter, AEP indicated it believed there was value in initiating an update of the previous technical work regarding the impact of induced seismicity on the Brazeau infrastructure. On June 12th the panel wrote to AEP requesting additional details on the scope and purpose of the proposed work. AEP provided a follow up response on June 19th which provided some of the additional detail requested by the panel.

Request for Adjournment

TransAlta filed an initial request for an adjournment of the proceeding on July 13, 2020, in response to AEP's June 19th letter to the panel. In the June 19th letter AEP informed the panel that it is initiating an update to the 2016 Dynamic Analysis Study regarding the impact of induced seismicity on the Brazeau infrastructure. They also advised that additional induced seismicity data/information had been gathered over the last four years that support an update of the study input and analysis. They said the objective of the study, among other things, is to determine safe hydraulic fracturing activity setback distances from the Brazeau infrastructure.

On July 23, 2020, the panel issued a ruling denying TransAlta's request to adjourn the proceeding until such time as AEP completes its additional technical work and provides its updated assessment regarding the impact of induced seismicity on the Brazeau Dam. That ruling confirmed the procedural schedule established by the AER on March 6, 2020.

In its July 23, 2020 ruling, and based on the information available at that time, the panel found that the parties are in the best position to provide on the record in this proceeding the most current and updated

information that relates to the previous technical work and to the applications in this proceeding. The panel also concluded that there is some uncertainty with regard to the scope of the study that AEP would commission considering that AEP is not a party in the hearing. The panel observed some inconsistency with regard to the updated information that would be available, and noted an earlier letter from AEP to Westbrick, stated that AEP had no new information on TransAlta's studies regarding fracking near the Brazeau Dam. The panel concluded that there are potential procedural fairness issues with regard to the delays that an adjournment would cause considering that AEP has not requested participation and is not a party to this proceeding.

AEP's August 27th Letter

On August 27, 2020, and further to its June 19, 2020 letter, AEP sent another letter to the hearing panel providing an overview of the progress of the updated study work and additional details on the anticipated outcomes.

AEP advised that the study update work had been initiated and would be completed in February 2021. An independent technical panel has been established to ensure oversight and impartial review, which will be led by Dr. Norbert Morgenstern, a recognized global expert on dam safety matters. AEP explained that the main objective of the technical work is to determine risk mitigation and management measures for the Brazeau infrastructure and to review the original recommendation of setback distance for hydraulic fracturing activity. This work would quantify the risks associated with induced seismicity and would recommend appropriate risk management and mitigation measures based on established best practices and risk criteria. The aim would establish target stability and risk criteria for both, natural and induced seismicity cases, and review the seismic time histories to be used in an update of the AEP Dynamic Analysis Study, failure modes and effects analysis of the structures. A complete formal dam safety risk assessment is also a key element of the study update.

According to AEP, additional induced seismicity information has been gathered over the last four years, which together with recent academic community research findings, papers and technical discussions with the AER, supported the AEP's decision to initiate an update of the original study.

AEP submitted that the work underway is intended to assist with understanding the current technical conditions related to induced seismicity and potential specific dam safety impacts at the Brazeau site. AEP stated that this is important work and its completion will support informed AER decision-making on the applications currently before the panel. Accordingly, AEP stated that the hearing scheduled to commence on October 5, 2020, should be adjourned to allow for the updated study to be made available to the panel before making its decision on the applications.

Participant Submissions

In accordance with the submission schedule established by the panel, on September 3, 2020, Westbrick and Ridgeback (collectively, the Applicants), Cenovus and TransAlta all filed submissions with respect to AEP's August 27, 2020, letter.

TransAlta

In its submission, TransAlta supports AEP's position that the hearing should be adjourned until the ongoing technical work to update the findings of the Dynamic Analysis Technical Committee (DATC Update) is complete.

TransAlta stated the AEP letter of August 27, 2020, confirms that the DATC update is intended to inform "the current policy framework governing dam safety" and "Alberta's regulatory framework." TransAlta states this is a much broader initiative than the current proceeding, which is limited to implementing the existing framework. The outcomes of the DATC update, which is supported by the highest levels of government, will have direct impacts on the panel's assessment of, and jurisdiction in relation to, the issues in this proceeding.

TransAlta asserts AEP's letter addresses any uncertainty regarding the scope of the DATC update work and describes the updated information that is available to it. Further, the AEP letter confirms there is no discrepancy between AEP's June 19, 2020 letter to the AER and its July 23, 2019 letter to Westbrick Energy Ltd. AEP's August 27 letter supports the conclusion that AEP is in the best position to provide the most current and updated information in relation to the central issues in this proceeding.

TransAlta requests that the panel reconsider its prior ruling and adjourn the proceeding until the DATC update is complete.

Applicants

The Applicants rely on their submissions leading to the panel's July 23, 2020, decision on TransAlta's adjournment request and assert the proceeding should continue in accordance with the procedural schedule established by the AER on March 6, 2020.

Further, they note that the AEP's letter only confirms that an "independent Technical Panel" has been established and restates the purpose of the study. In this regard there is nothing materially new presented by AEP in the August 27 letter in respect of its planned study that was not before the panel when it considered and issued its decision on July 23, 2020.

The Applicants state that AEP has discretion to consider the policy framework governing dam safety at any time; however, this does not in any way diminish the AER's jurisdiction to consider the applications, and to do so in a timely manner under the current legislative and policy regime.

The Applicants submit that AEP's August 27 letter raises no new material information that should cause the panel to revisit its July 23, 2020, decision in any way. AEP is not a party to the proceeding and for this reason has no standing to request an adjournment.

The Applicants assert the panel should do nothing in respect of AEP's August 27 letter and the proceeding should continue as currently scheduled.

Cenovus

Cenovus stated it supports the Applicants' position. The panel should continue with the remaining steps in the proceeding as currently scheduled.

Participant Reply

On September 8, 2020, TransAlta and the Applicants filed reply submissions in accordance with the schedule established by the panel.

TransAlta

In its reply, TransAlta disagrees with the Applicants' and Cenovus' position and remains of the view that the AER's mandate to process the Applicants' well licence applications in an efficient, orderly and safe manner requires adjournment of the hearing in this case.

TransAlta asserts the AEP August 27 letter contains new information. Specifically, AEP holds the position that the hearing should be adjourned and identifies for the first time that the DATC update is linked to potential statutory amendments.

TransAlta states that AEP's August 27 letter provides additional context and information about the 2019 correspondence referred to in the panel's July 23, 2020, decision. It also provides more detail about what and who the DATC update will involve, which the panel previously found in its decision to be uncertain. The AEP letter confirms that an independent technical panel has been established led by Dr. Norbert Morgenstern, to ensure oversight and impartial review.

TransAlta submits that the new information requires the panel to adjourn the hearing in light of the AER's mandate "to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta."

TransAlta asserts that the Applicants' position that the AER has exclusive jurisdiction over the matters before the panel is not an appropriate or accurate interpretation of the governing legal regime and the panel should reject it. TransAlta asserts that AER's jurisdiction to consider the risks posed by hydraulic fracturing is not exclusive, and the conclusions (of the updated study) as to safe setback distances are directly relevant and essential to the Panel's decision on the applications. They also say that the only information from AEP in this regard is the initial Dynamic Analysis Technical Committee Report, which concluded that there is unacceptable risk posed by hydraulic fracturing within 5 kilometres of the Brazeau Dam.

TransAlta states AEP's participant status is irrelevant and the panel should consider an adjournment request from a directly affected Alberta government ministry and the revised timeline for the DATC update supports granting TransAlta's request for adjournment.

TransAlta requests the panel to exercise its jurisdiction to adjourn the hearing to allow for an efficient, coordinated and responsible approach to resolving this important issue in the public interest.

Applicants

The Applicants state that AEP has discretion to consider the policy framework governing dam safety at any time and this AEP discretion does not in any way diminish the AER's jurisdiction to consider the Applications. The AER must consider the Applications based on the legislative and policy regime that is in force and not on speculation, by AEP or TransAlta or otherwise, that a policy framework "may" be revisited "depending" on the outcome of future study, particularly a policy framework that is not the AER's own.

The Applicants assert there is nothing new in the AEP August 27 letter that can be perceived as suggesting that the work AEP is undertaking will have impacts on the panel's assessment of, and jurisdiction to consider the issues in this proceeding.

Contrary to TransAlta's view, the Applicants maintain the parties are in the best position to provide on the record in this proceeding, the most current and updated information that relates to the previous technical work and to the applications in this proceeding. They also maintain that the record of the proceeding contains a great deal of confidential proprietary information relating to seismic and micro-seismic in the subject formations that is not before AEP and will not be since the AEP process does not involve the AER, the Applicants or any other industry participants.

The Applicants request the panel do nothing in respect of the AEP's August 27 letter and dismiss TransAlta request for adjournment. The proceeding should continue as currently scheduled.

Panel Decision

The panel acknowledges that AEP, as the provider of regulatory oversight that ensures dam owners take active responsibility for the integrity and safe operations of their dams, has concerns with the potential impact of hydraulic fracking in proximity to the Brazeau infrastructure. The AER's mandate, pursuant to the *Responsible Energy Development Act*, is to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta. The panel for this proceeding views the mandates of the two regulators, namely AEP and the AER, as complementing and not conflicting with each other.

The panel is of the view that the additional clarification provided by AEP in its August 27, 2020 letter provides sufficient new information to reconsider its July 23, 2020 ruling, which dismissed the previous adjournment request. The panel continues to be of the view that the parties have relevant, current and updated information to provide on the record in this proceeding. That, however, does not mean that AEP, as the regulator of dam safety, is not in a position to provide additional information, including interpretation and analysis of that information by an independent technical committee. The panel cannot assume that either the applicants or TransAlta have this new information. It is our view that the interpretation and analysis that AEP intends to provide may be directly relevant to this proceeding.

The panel is satisfied with the additional clarification provided with regard to the scope of the study update, the main objective of the technical work to be performed and the establishment of an independent technical panel that will oversee the work. This is new information that was not available previously. An extension of the proceeding to receive the AEP study in February 2021 is reasonable considering the potential benefits from the new information and analysis in the updated study, not just for the parties in this proceeding, but also for potential future energy resources development in the vicinity of the Brazeau infrastructure.

The panel notes that its initial request to AEP on February 4th lead to the events described in this decision. The panel asked AEP if they have any concerns about the applications. It asked if they have any technical or other information related to induced seismicity and potential impacts on Brazeau Dam that might assist the panel in making its decision on the applications. The panel offered AEP the opportunity to participate or make submissions in this proceeding. AEP has told the panel they have new information that is relevant to the proceeding and that they wish to provide it, via an updated dynamic analysis study, to assist the panel in its decision making on these applications.

It is unfortunate that AEP's initial response was not received in a timely manner due to an incorrect email address and their subsequent response lacked sufficient clarity about the nature of the information, and the scope and objective of the updated study. In its latest letter, AEP has adequately answered those questions and we are of the view that the information AEP wishes to provide may assist the panel in making a full and satisfactory determination of the issues in this proceeding.

Given the above, the panel has decided to grant TransAlta's adjournment request. The procedural schedule established by the panel in this hearing is hereby suspended until the end of February 2021. The panel expects AEP to file on the record in this proceeding the updated study resulting from the technical work, as described in its August 27, 2020 letter, by February 26, 2021.

In the meantime, AEP may file on the record of this proceeding information regarding induced seismicity that has been gathered over the last four years, such as recent academic community research findings, papers and technical discussions with the AER. This would provide the parties with the opportunity to review this additional information and make a more efficient use of the adjournment period.

The panel expects AEP to provide the final updated study to all parties in this proceeding. The panel will provide further direction to the parties on the process for responding to the AEP study.

After AEP provides the updated study, the parties will have the opportunity to provide submissions on the appropriate process to resume the hearing.

Sincerely,

Tara Wheaton
Hearing Coordinator

cc:

Jessica Kennedy, Osler, Hoskin & Harcourt LLP
Sarah Graham, Stikeman Elliott LLP
Kiril Dumanovski, AER