

Proceeding 409

January 31, 2022

By email only

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RE: Regulatory Appeal by Canadian Pacific Railway Corporation (CPRC)
Environmental Protection Order dated December 14, 2020
Regulatory Appeal 1932823
CPRC Motion for Full and Adequate Responses to Information Requests

Dear Counsel:

As part of this regulatory appeal proceeding, the panel of hearing commissioners (the panel) established a formal information request (IR) process and set a process schedule by letter dated October 15, 2021. On November 2, 2021, the panel agreed to suspend the process schedule and the hearing date, with the agreement of all parties, to provide further time for parties to answer the extensive IRs and to discuss a revised process schedule. On November 19, 2021, having considered dates proposed by the parties, we established an updated process schedule with all parties providing their IR responses by December 3, 2021, which they did.

On December 23, 2021, CPRC filed a motion under sections 14(2) and 44 of the *Alberta Energy Regulator Rules of Practice (Rules)* requesting the panel to compel Alberta Energy Regulator Oil and Gas Subsurface (OGS) and Cenovus Energy Inc. and Oviniv Canada ULC (Cenovus/Oviniv) to provide full and adequate responses to certain information requests. OGS and Cenovus/Oviniv filed responses to CPRC's motion on January 14, 2022. CPRC filed a reply to those responses on January 21, 2022.

This letter provides our decision on CPRC’s motion, which we have denied.

Proceeding 409 Background

On December 14, 2020, the Alberta Energy Regulator (AER) issued an environmental protection order (EPO) pursuant to sections 112, 113, and 241 of the *Environmental Protection and Enhancement Act (EPEA)*. The EPO named CPRC as the “person responsible” to undertake remedial measures regarding the presence of methane gas in proximity to the well with licence WX0000225 located at LSD 02, Section 31, Township 12, Range 5, West of the 4th Meridian within the city boundaries of Medicine Hat (Medicine Hat 18 well).

On April 14, 2021, the AER granted CPRC’s request for a regulatory appeal of the AER’s decision to issue the EPO. The purpose of the appeal is to determine whether the AER should confirm, vary, suspend, or revoke the decision to issue the EPO.

On July 20, 2021, the panel set the hearing issues for this proceeding:

- I. Did the AER abuse its discretion or otherwise exercise its discretion improperly or unreasonably by choosing to issue the environmental protection order (EPO) under the *Environmental Protection and Enhancement Act (EPEA)* rather than pursuing well abandonment under the *Oil and Gas Conservation Act*?
- II. Is Canadian Pacific Railway Company a “person responsible” under s. 1(tt) of *EPEA*?
- III. Should any of the City of Medicine Hat, Cenovus Energy Inc. or Oviniv Canada ULC be named “persons responsible” under the EPO?
- IV. Did the AER breach natural justice in issuing the EPO?

AER’s Authority re: Information Requests

Sections 12-14 of the *Rules* set out the IR process requirements. The purposes of an IR are to seek information necessary to:

- Clarify evidence filed by a party,
- Simplify issues in the proceeding,
- Permit a full and satisfactory understanding of the matters to be considered in the proceeding, or

- Expedite the proceeding.

A party may decline to provide an IR response if it believes the IR is not relevant; the necessary information is unavailable or cannot be provided with reasonable effort; or the information is confidential. In any of these circumstances, the party must file a response with specific reasons for its refusal to provide the information sought.

Section 14(2) enables a party dissatisfied with the response to its information request to file a motion requesting the hearing panel to settle the matter. Section 44 of the *Rules* applies to all motions in hearing proceedings.

Because this proceeding is a regulatory appeal, section 31.1 of the *Rules* dealing with additional information is also relevant. It enables a hearing panel to allow new information to be submitted in a regulatory appeal “if the information is relevant and material to the decision appealed from and was not available to the person who made the decision at the time the decision was made.”

CPRC’s Motion re: OGS Responses

CPRC’s motion requested the panel to order OGS to provide full and adequate responses to three IRs, referred to as 2(d), 7(a) and 8(h). The OGS response to the motion provided additional information and context about these three IRs, and CPRC advised in its reply that it considered IRs 7(a) and 8(h) to be adequately answered. We will therefore not address IRs 7(a) and 8(h) in this decision.

In IR 2(d), CPRC requested that OGS provide all licence transfer records in the AER’s possession or control relating to historic licence transfers from CPRC to Canadian Pacific Oil and Gas Limited (CPOG) and from CPOG to any PanCanadian Petroleum entities. OGS’ original response was that the information was not relevant and not readily available.

In its motion, CPRC submitted that the information requested is relevant to the issue of whether Cenovus/Ovintiv should have been named as a person responsible under the EPO. CPRC’s view was that when it divested its oil and gas business in the 1960s, it may have made well transfers on a block or large-volume basis, and that the requested records may provide information on ownership of the Medicine Hat 18 well. CPRC stated that the information is necessary to permit a full and satisfactory understanding of the matters to be considered in this proceeding, and that it had exhausted other channels for obtaining the information.

In its response to the motion, OGS indicated that IR 2(d) could not be answered with reasonable effort. It explained that it does not have a list or means to identify all wells that were drilled by or licenced to CPRC, and well licence transfer records prior to 2002 must be searched manually for each well. OGS provided a detailed estimate indicating that to search the AER records to answer IR 2(d) would take two full-time staff up to four years.

OGS also submitted that the information sought was neither relevant nor material to the issues, and referred to section 31.1 of the *Rules*, which addresses relevance and materiality of new information in regulatory appeals. OGS stated that any additional information brought into this proceeding must be relevant and material to the decision to issue the EPO, and that the information sought cannot be reasonably expected to significantly help determine any of this proceeding's issues. OGS indicated that it is the Medicine Hat 18 well that is the subject of this proceeding and that all records related to it have been produced.

In its reply, CPRC accepted OGS' submission that a review of all historic licence records for CPRC could not be provided with reasonable effort. It suggested that a reasonable alternative would be for the panel to compel OGS to review a sample of six well files identified by CPRC in the reply and provide the historical transfer records for those wells. CPRC submitted that the issue of whether Cenovus/Ovintiv owns the Medicine Hat 18 well is of primary relevance to who should be named a person responsible under the EPO, and that the six well files requested in the reply could reasonably be expected to lead to a fact of primary relevance. CPRC stated that the issue of ownership of the Medicine Hat 18 well cannot be resolved solely with reference to the Medicine Hat 18 well's records.

Analysis

CPRC accepted OGS' position that IR 2(d) could not be answered with reasonable effort and reduced the scope of IR 2(d) in its reply, seeking instead the historical transfer records for six specific wells. We will only consider the relevance of the information sought.

In earlier submissions in this proceeding, Cenovus/Ovintiv pointed to other wells to show that we cannot assume that just because CPRC drilled a well in the Medicine Hat region it would be licensed to a certain entity now or at any other time.

CPRC's submissions on this motion have not shown how historical records related to the six specific wells would assist us in addressing the issues. In particular, we are not persuaded that there is a sufficient

nexus between the history of licensing of the six wells and the methane release that was detected near the Medicine Hat 18 well. The panel is not satisfied that the information requested will simplify the issues in this proceeding, provide for a full and satisfactory understanding of the issues or expedite the proceeding. We are also not persuaded that allowing new information about wells with no demonstrated nexus to the substance release at issue will clarify the evidence.

The EPO being appealed in this proceeding was issued under *EPEA*, and we referred to the applicable *EPEA* provisions in considering the relevance of the information requested under IR 2(d) and CPRC's motion. Section 113 of *EPEA* enables the AER to issue an EPO dealing with a substance release to the person responsible for the substance. It focuses on directing the person responsible for the substance to prevent, stop and remedy the substance release. Section 1(tt) of *EPEA* defines who is a "person responsible" in relation to a substance, with a primary focus on current or previous ownership of the substance and current or previous charge, management or control of the substance. The key consideration under these provisions is the substance, which in this case is methane gas escaping in the area of the Medicine Hat 18 well.

Neither section 113 nor section 1(tt) refer to wells, ownership of wells, or charge, management or control of wells. It is possible that in some circumstances, well ownership or licensing may be relevant to a substance release EPO under *EPEA*, and we make no findings at this stage of this proceeding in relation to these matters. However, in our view the primary focus of a section 113 EPO, and responsibility for carrying it out, is in relation to the substance itself.

The panel finds that the relevance of the historical transfer records for the six wells in relation to the methane in the area of the Medicine Hat 18 well and the Medicine Hat 18 well itself is weak at best, as is the relevance of the historical chain of ownership of those wells. We are not convinced that the requested information would simplify the issues in this proceeding, nor do we believe that these records would provide probative value. Accordingly, we dismiss CPRC's motion in relation to OGS IR 2(d).

CPRC's Motion re: Cenovus/Ovintiv Responses

CPRC's motion requested the panel to order Cenovus/Ovintiv to provide full and adequate responses to five IRs, referred to as 1(d), 1(g), 3(b), 3(c) and 3(d). The Cenovus/Ovintiv response to the motion provided additional information and context about these five IRs, and CPRC advised in its reply that it considered IRs 1(d) and 1(g) to be adequately answered. We will not address IRs 1(d) and 1(g) in this decision.

IRs 3(b), 3(c) and 3(d) deal with ownership and licence transfers for two wells described as 100/08-10-013-09 W4M and 102/08-10-013-09 W4M (08-10 wells). IR 3(b) requested an explanation of how and when Cenovus became licensee of the 08-10 wells and production of all related records possessed or controlled by Cenovus/Ovintiv. IR 3(c) requested production of the 08-10 well files. IR 3(d) requested an explanation of how Cenovus became the owner and licensee of the 08-10 wells if certain circumstances specified in the IR did not apply. In its original response, Cenovus/Ovintiv declined to answer IRs 3(b), 3(c) and 3(d), confirmed that Cenovus is the current licensee of the 08-10 wells, and stated that these wells are not at issue in this proceeding and are not relevant.

In its motion, CPRC submitted that the information requested is relevant to the issue of ownership of the Medicine Hat 18 well and the issue of whether Cenovus/Ovintiv should have been named as a person responsible under the EPO. CPRC indicated that it sought information about the 08-10 wells because they are referenced in the January 13, 1910, document that OGS relied upon in issuing the EPO; are of the same vintage as the Medicine Hat 18 well; were abandoned prior to the enactment of legislation supporting CPRC's divestiture of its oil and gas business; and are licenced to Cenovus. It suggested that the information will assist the panel in gaining a full and satisfactory understanding of the issues in this proceeding.

In its response to the motion, Cenovus/Ovintiv maintained that information about the 08-10 wells is not relevant because these wells are not at issue in this proceeding but did provide further information. Cenovus/Ovintiv indicated that it had made significant efforts but had found no documents or records to explain how and when Cenovus became the licensee of the 08-10 wells. It submitted that the information sought by CPRC would have marginal relevance at best, that there is already a fulsome record in this proceeding, and that granting CPRC's requests would create additional cost but no benefit. Cenovus/Ovintiv contended that it has satisfactorily responded to the IRs and that CPRC's motion should be denied.

In its reply, CPRC submitted that Cenovus/Ovintiv continues to decline to respond to IRs 3(b), 3(c) and 3(d). It stated that it had established the relevance of the requested information in its motion, such that the panel should compel Cenovus/Ovintiv to provide the information.

Analysis

IRs 3(b) and 3(d) are very similar in nature, seeking explanation and records related to the circumstances in which Cenovus became licensee of the 08-10 wells. Cenovus/Ovintiv's response to the motion indicated that it had made significant efforts but had not located any documents to explain those circumstances, and that it had expended significant resources and funds searching for historical records in this proceeding. The panel accepts Cenovus/Ovintiv's response and is satisfied with the effort expended on IRs 3(b) and 3(d). It does not appear that any relevant information would be provided by continued searches. We believe that to require Cenovus/Ovintiv to make further efforts on these IRs would be unreasonable and we dismiss CPRC's motion in relation to IRs 3(b) and 3(d).

IR 3(c) requested production of the 08-10 well files. At Tab 2 of CPRC's motion is a correspondence trail between CPRC and AER Information Services in relation to information searches made by CPRC in August 2021. An email from AER Information Services to CPRC dated September 9, 2021, stated that it attached the well files and transfer document for the 08-10 wells. These documents are included in the Tab 2 materials and on the record of this proceeding, thus there is no need to compel Cenovus/Ovintiv to provide them. We dismiss CPRC's motion in relation to IR 3(c).

Conclusion

CPRC's motion requested that the panel compel OGS to provide full and adequate responses to IRs 2(d), 7(a) and 8(h) and compel Cenovus/Ovintiv to provide full and adequate responses to IRs 1(d), 1(g), 3(b), 3(c) and 3(d). Through the exchange of submissions on the motion, CPRC accepted that OGS had provided adequate responses to IRs 7(a) and 8(h) and Cenovus/Ovintiv had provided adequate responses to IRs 1(d) and 1(g).

CPRC has not convinced us that the information sought from OGS satisfies the purposes set out in the *Rules*, nor are we persuaded of the relevance or materiality of the information sought from OGS in IR 2(d) and we deny CPRC's request to compel OGS to provide further response to IR 2(d).

We are satisfied that Cenovus/Ovintiv has expended significant effort in attempting to respond to IRs 3(b) and 3(d). We believe it would be unreasonable to require Cenovus/Ovintiv to undertake further effort and therefore deny CPRC's request to compel Cenovus/Ovintiv to provide further response to IRs 3(b) and 3(d). The documents requested from Cenovus/Ovintiv by CPRC in IR 3(c) are part of this proceeding's record, in Tab 2 of CPRC's motion, and we deny CPRC's request to compel Cenovus/Ovintiv to provide further response to IR 3(c).

Cindy Chiasson, LL.B.
Hearing Commissioner (Chair)

Cecilia Low, B.Sc., LL.B., LL.M.
Hearing Commissioner

Claire McKinnon, LL.B.
Hearing Commissioner

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