

**Proceeding 409**

July 20, 2021

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By email only

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<b>Attention: Allison Sears</b>	<b>Attention: Evan Dixon</b>	<b>Attention: Sean Parker</b>
		<b>Ron Kruhlak</b>
AER Oil and Gas Subsurface	Cenovus Energy Inc.	
<b>Attention: Danielle Brezina</b>	<b>Attention: Dean McCluskey</b>	
<b>Meighan LaCasse</b>		

RE: Regulatory Appeal by Canadian Pacific Railway Corporation (CPRC)  
Environmental Protection Order dated December 14, 2020  
Regulatory Appeal 1932823  
Hearing Issues, Schedule, and Date

Dear Counsel:

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

The panel issued a letter on June 21, 2021, inviting submissions from the parties in this proceeding on the following three items:

- The issues to be addressed in Proceeding 409;
- The need for an information request process and;
- Hearing date.

The panel has reviewed the submissions received on June 28, 2021, from the AER's Oil and Gas Subsurface Group (OGS), CPRC, City of Medicine Hat (CMH), Cenovus Energy Inc. (Cenovus), and

Ovintiv Canada ULC (Ovintiv), and the reply submission received from CMH on July 5, 2021. CPRC, OGS, Cenovus, and Ovintiv did not file reply submissions.

## Hearing Issues

### Submissions of the Parties

OGS submitted that it did not have comments on the panel's framing of the issues.

CMH proposed that issue #3 be reframed to be consistent with CPRC's request for a regulatory appeal and better reflect the panel's discretion. CMH's reworded issue #3 reads as follows:

Did the AER exercise its discretion unreasonably in not naming any of the City of Medicine Hat, Cenovus Energy Inc., or Ovintiv Canada ULC as a "person responsible" under the EPO?

Cenovus and Ovintiv proposed to rephrase issues #1 through #3:

- I. Did the AER abuse its discretion by choosing to issue the environmental protection order (EPO) under the *Environmental Protection and Enhancement Act (EPEA)*?
- II. If the EPO was an appropriate option, is CPRC a "person responsible" under s. 1(tt) of *EPEA*?
- III. If the EPO was an appropriate option, should any of the City of Medicine Hat, Cenovus Energy Inc. or Ovintiv Canada ULC be named as "persons responsible" under the EPO?

CPRC also proposed reframing and restructuring issues #1 through #3 in the following manner:

1. Did the AER abuse its discretion or otherwise exercise its discretion improperly or unreasonably:
  - a. 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*?
  - b. by issuing the EPO in the name of CPRC as the person responsible?
    - i. Is CPRC a "person responsible" under s. 1(tt) of *EPEA*?
  - c. by failing to name any or all of the City of Medicine Hat, Cenovus Energy Inc. and Ovintiv Canada ULC as persons responsible in the EPO instead of, or in addition to, CPRC?

- i. Are any or all of the City of Medicine Hat, Cenovus Energy Inc. or Ovintiv Canada ULC “persons responsible” under s. 1(tt) of *EPEA*?
- ii. Should any of the City of Medicine Hat, Cenovus Energy Inc. or Ovintiv Canada ULC be named “persons responsible” under the EPO?

In its reply submission, CMH stated that it had no objection to the revisions proposed by either CPRC or Cenovus/Ovintiv with one exception. CMH submitted that the phrase "by failing to name" is inappropriate as it presupposes that the AER's decision not to name CMH, Cenovus or Ovintiv as persons responsible in the EPO was made in error. Should the panel adopt CPRC's reorganization and re-framing of the issues, CMH submitted that CPRC's issue 1(c) should instead read:

by not naming any or all of the City of Medicine Hat, Cenovus Energy Inc. and Ovintiv Canada ULC as persons responsible in the EPO instead of, or in addition to, CPRC?

### Decision

In accordance with section 41(2) of the *Responsible Energy Development Act* the panel determines whether to “confirm, vary, suspend or revoke the appealable decision.” Here, the appealable decision is the issuance of the EPO naming Canadian Pacific Railway Company as the ‘person responsible’. The framing of the issues for an appeal is influenced by the nature of the appeal. In this case the panel is of the view that this regulatory appeal has elements of both a hearing *de novo* and an appeal on the record, given that the panel has before it the record of OGS and may receive any relevant and material new information filed by the parties that was not before OGS. This is reflected in the highly specific wording and restructuring changes proposed in the submissions of the parties.

The panel has decided that, given the early stage of this hearing process and considering our preliminary characterization of the nature of this regulatory appeal, and given the parties’ different positions reflected in their submissions about how the issues should be framed, it would be most appropriate to frame the issues broadly. The panel anticipates the issues or focus may well change over the course of the proceeding following the filing of the parties’ submissions and information request process.

At this point, the panel has decided that the following are the issues for the hearing:

- 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 Ovintiv Canada ULC be named “persons responsible” under the EPO?
- IV. Did the AER breach natural justice in issuing the EPO?

The panel may also consider additional issues that arise during the proceeding, that are relevant and material to the request for regulatory appeal and assist the panel in deciding the regulatory appeal before it.

## **Hearing Schedule, IR Process, and Date Decision**

### Submissions of the Parties

OGS stated it was not able to know whether an information request process would be needed until after the submissions have been filed. OGS also stated that it would not be available for a hearing until mid-November.

CMH confirmed that it is available for a hearing in October and November, with the exceptions of October 25 and November 4, 5, 8 and 15-23. CMH did not believe that an information request process was required at this time, but reserved the right to request an information request process once the parties' submissions have been provided

Cenovus and Ovintiv stated they were available for a hearing in November and that they did not require an information request process. They did reserve the right to request information when submissions have been provided.

CPRC submitted that the lack of clarity around a number of key factual matters central to the regulatory appeal meant that an information request process would be necessary to ensure the completeness of the record.

Regarding its availability for a five-day hearing, CPRC submitted it has a strong preference for the last two weeks of November.

### Decision

The panel notes that CPRC was the only party to indicate that an information request process is required at this time. The other parties in this proceeding suggested an information request process may be required after reviewing the other parties' submissions. To accommodate for this uncertainty, the panel has set the following process schedule which includes a formal information request process, should one

be required. The panel will issue directions later in the proceeding as to whether an information request process will take place.

Given the public safety concerns in this matter, the panel would prefer to hold the hearing sooner than the date provided below, if possible. The panel therefore requests that the parties advise the panel promptly if they become available in late October or earlier in November. If the parties are available earlier, the panel would consider advancing the hearing start date.

August 12, 2021	CPRC submissions due
August 26, 2021	CMH, Cenovus, Ovintiv submissions due
September 9, 2021	OGS submissions due
September 23, 2021	Information Requests due from all parties (if applicable)
October 7, 2021	Information responses due from all parties (if applicable)
October 21, 2021	CPRC final reply submission due
November TBD	Electronic platform practice session if required with all hearing participants (invite will be sent by email in advance)
November 24, 2021	Hearing start

Please note that submissions must be filed with [hearing.services@aer.ca](mailto:hearing.services@aer.ca) by noon on the stated date. Submissions should be in PDF format, page numbered to match the PDF page number, bookmarked and searchable (optimal character recognition). Submissions must meet the requirements of section 9.2(2) of the *Alberta Energy Regulator Rules of Practice*. All submissions that are filed in this proceeding are marked as exhibits and posted in SharePoint. This forms part of the public record of this proceeding.

The panel may direct parties to file additional information that it considers necessary to permit a full and satisfactory understanding of the issues in the proceeding.

Although the schedule provides for an electronic platform practice session if required, the panel has not determined the hearing format (electronic or in-person). Subject to public health considerations, the panel intends to address hearing format in September.

For questions about the above, please contact me at 403-297-3232 or by email at [hearing.services@aer.ca](mailto:hearing.services@aer.ca).

Sincerely,

*Tammy Turner*

Hearing Coordinator, Hearing Services

cc: Jamie Freeman, City of Medicine Hat  
Tammy Cargan, McLennan Ross LLP  
Alison Doebele, AER  
Scott Poitras, AER