

Via Email

November 14, 2022

**Calgary Head Office**  
Suite 1000, 250 – 5 Street SW  
Calgary, Alberta T2P 0R4  
Canada

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

Qualico Development West Ltd.  
**C/O: McLennan Ross**  
Gavin S. Fitch, K.C.

Alberta Energy Regulator –  
Regulatory Applications Branch  
**Attention: Barbara Kapel-Holden, Counsel**

Pembina Pipeline Corporation  
**C/O: Bennett Jones LLP**  
Shawn Munro

Plains Midstream Canada ULC  
**C/O: Bennett Jones LLP**  
Daron Naffin

Dear Counsel:

**RE: Reconsideration of the Alberta Energy Regulator’s Decision Dated April 20, 2022  
Amended Application No.: 1932335 by Qualico Development West Ltd. dated January 14, 2022  
(Application)  
Location: Northeast Edmonton  
Alberta Energy Regulator – Regulatory Applications Branch (Regulatory Applications)  
Pembina Pipeline Corporation (Pembina)  
Plains Midstream Canada ULC (Plains)  
Reconsideration No.: 1940992 (Reconsideration)**

For the reasons that follow, the AER has decided to exercise its authority under section 42 of the *Responsible Energy Development Act (REDA)* to reconsider its Decision dated April 20, 2022 (**Decision**). As a result of the reconsideration process, the AER will confirm, vary, suspend or revoke the Decision.

The AER will conduct the Reconsideration, without a hearing,<sup>1</sup> on the basis of the written submissions and correspondence of Qualico, Pembina, Plains, and Regulatory Applications received in respect of regulatory appeal no. 1938103 by Qualico (**Request for Regulatory Appeal**) and the written submissions and correspondence of Qualico and the filers of statements of concern (**SOCs**) received in respect of the Application, including regarding the supplemental information requests issued to Qualico by the AER. Additionally, the AER will conduct the Reconsideration on the basis of any new written submissions, as set out below.

Separate correspondence regarding the Request for Regulatory Appeal will follow.

---

<sup>1</sup> Under section 43 of REDA, the AER may conduct a reconsideration with or without a hearing.

## Background

In its Application, Qualico requested that the AER exercise its discretion pursuant to subsection 33(1)(a) of the *Pipeline Act*,<sup>2</sup> which states:

When in its opinion it would be in the public interest to do so, the Regulator may, on any terms and conditions it considers proper, direct a licensee... to alter or relocate any part of the licensee's pipeline.

In order to accommodate crossings by new or upgraded arterial roadways that are proposed as part of Qualico's development of a neighbourhood in northeast Edmonton, following unsuccessful negotiation with each of Pembina and Plains, Qualico requested that the AER direct Pembina to alter a part of its pipeline operating under Licence 6926-16, located in the City of Edmonton, and direct Plains to alter parts of its pipeline operating under Licence 6001-01, also located in the City of Edmonton (together, the **Pipelines**).

Additionally, Qualico requested that the AER exercise its discretion pursuant to subsection 33(2) of the *Pipeline Act*, which states:

Where the Regulator directs the alteration or relocation of a pipeline... it may order by whom and to whom payment of the cost of the work and material, or either, shall be made.

Qualico requested that the AER order that the cost of the work to alter the Pipelines (**Work**) be shared, with each of Qualico and the applicable licensee bearing 50% of the cost of the Work to alter the licensee's respective Pipeline.

## *The Decision*

Following its consideration of the Application and the submissions of Qualico and four SOC filers, the AER issued the Decision, which declined to decide the requests made pursuant to subsection 33(1)(a) of the *Pipeline Act* on the basis that "[s]ection 33 does not come into play here, as there is no dispute regarding whether the work should be done, and thus no basis upon which the AER would order the work to be done."<sup>3</sup> The Decision found that the Application "[was] not properly made under section 33(1), as there is no dispute respecting the work that needs to be done that would necessitate the issuance of an order".<sup>4</sup> The Decision explained that "[s]ection 33 is only to be used in a situation where the alteration or relocation work needs to occur because it is in the public interest and the pipeline licensee is unwilling or unable to apply under section 11, and thus the only mechanism for ensuring the work is done is for the AER to issue an order or direction."<sup>5</sup>

The Decision further found that, even if bringing an application pursuant to subsection 33(1) of the *Pipeline Act* "was the appropriate mechanism, an order would not be in the public interest"<sup>6</sup> because "[the] nature of Qualico's application is a request to have the AER settle a private business dispute respecting the costs of the Work, which

---

<sup>2</sup> RSA 2000, c P-15

<sup>3</sup> Decision, page 9

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

is an inappropriate use of section 33(1).”<sup>7</sup> The Decision found that section 33(1) “is to be used when it is the only mechanism available to ensure work that is necessary for the public interest is done,” and there was “no public interest basis [in] this matter upon which the AER could justify granting the application.”<sup>8</sup> The Decision concluded that, “[t]herefore, even if the application fell within the scope of Section 33, the AER has determined that it is not in the public interest to grant the application, and it is not an appropriate circumstance to exercise discretion and grant the application.”<sup>9</sup>

Having declined to decide the request that it issue directions to Pembina and Plains under subsection 33(1)(a) of the *Pipeline Act* to carry out the Work, the AER could not issue an order in respect of by whom and to whom the cost of the Work would be paid.

### **Reconsideration Power**

The AER has authority to reconsider its decisions pursuant to section 42 of REDA. That section states:

The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision.

As section 42 makes clear, it is solely within the AER’s discretion to reconsider its decisions. The AER will only exercise this discretion under the most extraordinary circumstances, where it is satisfied there are exceptional and compelling grounds to do so. Due to the discovery of a *prima facie* error in the Decision in the application of subsection 33(1) of the *Pipeline Act*, the AER has determined such circumstances exist here.

In the Decision, the AER declined to decide the Application made to it under subsection 33(1) of the *Pipeline Act* on the basis that there was no dispute that the Work should be done. However, the legislative test set out in subsection 33(1) requires, in respect of subsection 33(1)(a), that direction to a licensee to alter its pipeline must be in the public interest; it does not require dispute regarding the alteration. Failing to apply the legislative test set out in subsection 33(1) constitutes a *prima facie* error.

The AER notes that after declining to decide the Application made to it under subsection 33(1) of the *Pipeline Act*, the Decision found that, even if an application under subsection 33(1) “was the appropriate mechanism” to use to request the AER direct that the Work be carried out, there was no public interest basis on which it could grant the Application, and accordingly, the requested directions would not be in the public interest. However, to reach this conclusion, the AER did not consider whether the Pipeline alterations would be in the public interest but based its determination instead on characterizing the motivation behind the Application. Without considering whether the Pipeline alterations would be in the public interest, it could not determine whether it would be in the public interest to direct Pembina and Plains to carry out the Work. Failing to decide directly on the issue of public interest, the main issue in the Application before the AER, constitutes a *prima facie* error.

These *prima facie* errors satisfy the exceptional and compelling grounds threshold pursuant to which the AER will, in its sole discretion, reconsider its decisions under section 42 of REDA. The AER has decided to exercise that discretion and reconsider the Decision, without a hearing.

---

<sup>7</sup> *Ibid*, page 10.

<sup>8</sup> *Ibid*, page 9.

<sup>9</sup> *Ibid*, page 10.

## Submissions

As stated above, the AER will conduct the Reconsideration, without a hearing, on the basis of the written submissions and correspondence received in respect of the Request for Regulatory Appeal and the Application. The AER will also conduct the Reconsideration on the basis of new written submissions regarding:

1. The nature of the requested pipeline alterations, whether the pipeline alterations are in the public interest, and why; and
2. Should the AER direct the Work, the cost of the Work and by whom and to whom it should be paid, and why.

In that regard, **Qualico** may provide **by 4:00 pm on December 12, 2022**, any submissions regarding the two issues identified above that it considers necessary and material.

**Pembina** and **Plains** may respond to Qualico and may make submissions regarding the two issues identified above that it considers necessary and material **by 4:00 pm on January 23, 2023**.

**Qualico** may reply to Pembina and Plains **by 4:00 pm on February 6, 2023**.

Given the volume of written materials already filed to date, submissions should be brief and concise, and solely address the identified issues.

If the parties have any concerns with the foregoing process, they must immediately notify the AER. The parties are requested to direct all communications relating to the Reconsideration to the Regulatory Appeals Coordinator by e-mail at [RegulatoryAppeal@aer.ca](mailto:RegulatoryAppeal@aer.ca). Further, the parties are requested to copy each other on all communications with the Regulatory Appeals Coordinator relating to the Reconsideration.

Please be aware that, pursuant to section 49 of the *Alberta Energy Regulator Rules of Practice*, all documents filed will be placed on the public record.

Sincerely,

<Original signed by>

Laurie Pushor, CEO  
Alberta Energy Regulator

cc: Lane Peterson, Regulatory Applications  
Keyera Corporation (Sander Duncanson – Osler, Hoskin & Harcourt LLP)  
Canadian Energy Pipeline Association (Chris Bloomer)