

**AER Proceeding 443**

**Hearing Commissioners' Office**  
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July 31, 2024

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By email only

**Blue Smoke Fireworks Ltd. (Blue Smoke)**

Attention: James Allyn, agent for the estate of James Berg/Director

**Re: Application 32526652 (the application)  
Tourmaline Oil Corp. (Tourmaline)  
Hearing Participation Decision for Blue Smoke**

This is the decision of the panel of the Alberta Energy Regulator (AER) hearing commissioners presiding over Proceeding 443 (panel) regarding hearing participation. For the reasons that follow, we grant Blue Smoke participation rights in the hearing.

**Background**

On September 20, 2023, Tourmaline applied to the AER for a licence under the *Pipeline Act* to construct two pipelines; an oil effluent pipeline (with a maximum hydrogen sulphide (H<sub>2</sub>S) content of 40.0 moles per kilomole (4%)) and a natural gas pipeline. The proposed pipelines extend from a satellite at 01-07-079-08W6M to a pipeline at 09-32-078-08W6M (approximately 4.18 km in length) and are located on private land. The Emergency Planning Zone (EPZ) radius for the oil effluent pipeline is calculated at 0.28 km.

On June 12, 2024, the AER issued a Notice of Hearing for this application. It set June 28, 2024, as the date to file requests to participate in the hearing and July 8, 2024, as the date for Tourmaline to respond to any requests to participate.

On June 27, 2024, Blue Smoke wrote to the AER. Blue Smoke owns the southeast quarter of Section 08-079-08W6M, which is adjacent to the lands on which the proposed pipeline would be located. Blue Smoke wrote that it uses, or plans to use, its land for outdoor education, religious, and other activities, and has “smaller teaching, living, cooking and sleeping abodes” on the land. It opposes the application for several reasons. One of the reasons is that Blue Smoke “has only one access and egress route that is in the prevailing downwind area.” In other words, it has no escape route other than through the EPZ in the event

of an H<sub>2</sub>S gas leak. Blue Smoke further indicated that it “conditionally accepts the *invitation contract* (sic) to attend AER proceeding 443.”

In its request to participate, Blue Smoke also alleges that Tourmaline:

- used constant bullying tactics, rejecting Blue Smoke’s attempts to address special and basic safety concerns;
- have shown complete disregard for the destruction of forest and wetlands and animals that will be driven from their homes;
- has not provided full disclosure;
- has not addressed concerns conveyed on their previous application for this route, and questions why the statement of concern filed in that matter was not included as part of the current application;
- has rejected a conditionally accepted route from Blue Smoke, which Blue Smoke alleges has significantly less environmental impact; and
- that “adhesion contract”, “unjust enrichment law”, “intentional trespass law”, “criminal negligence”, and the Charter of Rights and Freedoms” also apply to this matter.

Tourmaline responded on July 8, 2024. According to Tourmaline, the AER should not allow Blue Smoke to participate in the hearing because, in its view, Blue Smoke has not met the requirements for participation set out in section 9(2) of the *Alberta Energy Regulator Rules of Practice (the Rules)*.

Tourmaline does not believe that Blue Smoke has submitted any specific or credible evidence demonstrating how it is directly and adversely affected by Tourmaline’s application, which is a requirement under section 9(3)(b) of *the Rules*. Nor, in Tourmaline’s opinion, has Blue Smoke clearly indicated that it has a tangible interest in the matter and will materially assist the AER in deciding the matter under section 9(3)(d) of *the Rules*. As the requirements have not been met, Tourmaline submits that the AER should apply section 9(3), or the broad authority under 9(3)(e) of *the Rules*, to refuse Blue Smoke’s participation in the hearing.

Tourmaline also submitted that the hearing should be cancelled and the applied-for licences should be issued, because no other party has requested to participate in the hearing.

## **Legal Framework**

Section 9(2) of *the Rules* sets out the requirements persons wishing to participate in a hearing must meet:

### Request to participate

9(2) A request to participate must be in writing and must contain

- (a) a copy of the person's statement of concern or an explanation as to why the person did not file a statement of concern,
- (b) a concise statement indicating
  - (i) why and how the person may be directly and adversely affected by a decision of the Regulator on the application, or
  - (ii) if the person will not be directly and adversely affected by a decision of the Regulator on the application, what the nature of the person's interest in the matter is and why the person should be permitted to participate,
- (c) if the person will not be directly and adversely affected by a decision of the Regulator on the application, an explanation of how
  - (i) the person's participation will materially assist the Regulator in deciding the matter that is the subject of the hearing,
  - (ii) the person has a tangible interest in the subject-matter of the hearing,
  - (iii) the person's participation will not unnecessarily delay the hearing, and
  - (iv) the person will not repeat or duplicate evidence presented by other parties,
- (d) the outcome of the application that the person advocates,
- (e) the nature and scope of the person's intended participation,
- (f) the person's contact information,
- (g) if the person is acting on behalf of a group or association of persons, the nature of the person's membership in the group or association, and
- (h) the person's efforts, if any, to resolve issues associated with the proceeding directly with the applicant.

As set out in section 9(3) of *the Rules*, the AER may refuse to allow a person to participate in the hearing:

9(3) The Regulator may refuse to allow a person to participate in the hearing on an application if the Regulator is of the opinion that any of the following circumstances apply:

- (a) the person's request to participate is frivolous, vexatious, an abuse of process or without merit;
- (b) the person has not demonstrated that the decision of the Regulator on the application may directly and adversely affect the person;
- (c) in the case of a group or association, the request to participate does not demonstrate to the satisfaction of the Regulator that a majority of the persons in the group or association may be directly and adversely affected by the decision of the Regulator on the application;
- (d) the person has not demonstrated that

- (i) the person's participation will materially assist the Regulator in deciding the matter that is the subject of the hearing,
- (ii) the person has a tangible interest in the subject-matter of the hearing,
- (iii) the person's participation will not unnecessarily delay the hearing, and
- (iv) the person will not repeat or duplicate evidence presented by other parties;
- (e) the Regulator considers it appropriate to do so for any other reason.

Section 34(3) of the *Responsible Energy Development Act (REDA)* is also applicable. It reads that: "... a person who may be directly and adversely affected by the application is entitled to be heard at the hearing."

### **Panel's Decision**

When a Notice of Hearing is issued by the AER, it is not an "invitation contract." Rather, a Notice of Hearing is meant to inform the public (in the area where the proposed project is to take place) that a hearing will be held, and to provide details on how to request to participate. When a request to participate is received, the panel assigned to the matter decides who may participate based on the information contained in the request to participate and whether the request meets the legal requirements for participation.

Blue Smoke's request to participate is imperfect. Under section 9(2)(a) of *the Rules*, a request to participate must be in writing and must contain a copy of the person's statement of concern (SOC), or an explanation of why they did not file an SOC. In its request to participate, Blue Smoke said it filed an SOC against the project but did not attach it. Blue Smoke's SOC was actually filed against an earlier version of Tourmaline's application (i.e. application 32342981, not the current application 32526652). While Blue Smoke did attempt to file an SOC against this application, the record shows that it sent its SOC to an AER employee who was on leave, and failed to act on the automatic reply from that employee that correspondence should be sent to the main SOC mailbox.

While Tourmaline suggested that this shortcoming is grounds for not allowing Blue Smoke's request for participation, we believe such an outcome is too harsh, because the record includes an explanation of why Blue Smoke's SOC was not included.

Blue Smoke's request for participation is also not concise. In our view, it contains several vague and confusing references to various legal principles as well as a litany of alleged impacts on land and wildlife falling outside of Blue Smoke's own land. However, included in Blue Smoke's request to participate, there is evidence that Blue Smoke owns lands adjacent to the lands on which the proposed pipeline is

located. While Blue Smoke does not provide the location of its lands in its request to participate, the consultation summary included in Tourmaline's application materials identifies Blue Smoke as a proximity landowner owning SE 08-079-08W6M. We accept that Blue Smoke uses the land, or has plans to use it, and there is evidence that Blue Smoke can only access or exit its lands via a road that runs through the EPZ for this project.

In determining whether one is directly and adversely affected, we take note of *Kelly v Alberta* (Energy Resources Conservation Board), (ERCB, now the AER), 2009 ABCA 349 and *Kelly v. Alberta* (Energy Resources Conservation Board 2011 ABCA 325). These decisions are well established law and relevant to the matter at hand. Through these decisions, the Alberta Court of Appeal clarified that where an ongoing health and safety risk is identified, especially for those within a tertiary evacuation area which reasonably includes those whose egress routes cut through a project's EPZ, applicants who meet these requirements will have a strong prima facie case for standing/participation.

Given the fact that Blue Smoke's only egress from its property cuts through the EPZ, we are of the view that this presents a potential health and safety risk to those who may use Blue Smoke's land. On that basis, we are satisfied that Blue Smoke may be directly and adversely affected by the proposed application. Applying section 34(3) of *REDA* to this finding, it follows that Blue Smoke is entitled to be heard at the hearing for this matter.

With regard to Blue Smoke's other allegations of impacts to wetlands and animals, those concerns appear to apply to the proposed pipeline route, which is located on lands owned by others. As such, we do not see how Blue Smoke may be directly and adversely affected by those alleged impacts. Regarding Blue Smoke's allegations about Tourmaline's behavior and the legal principles it says are applicable to this matter, it will be for Blue Smoke to demonstrate their relevance when this matter is heard.

Taken together, while Blue Smoke's request to participate is imperfect, we find Blue Smoke has demonstrated that it may be directly and adversely affected by Tourmaline's proposed project, and there is no compelling reason under sections 9(2) or (3) of *the Rules* to now refuse Blue Smoke's participation in the hearing.

While Tourmaline submitted that the hearing for this matter should be cancelled because the original SOC filer is not participating in the hearing, we do not agree with Tourmaline's submission. In our view, when a hearing is to be conducted in respect of an application under Division 2 of *REDA* and a panel is appointed under Part 2 of *the Rules* by the Chief Hearing Commissioner to conduct the hearing, a panel can continue the hearing where it determines there is a party that may be directly and adversely and they

have been granted a right to participate, even where the original SOC filer elects not to participate in the hearing.

We note that Blue Smoke has not indicated how it intends to participate in the hearing. As per section 9(2)(e) of *the Rules*, persons requesting to participate in the hearing must indicate the nature and scope of their intended participation. For example, does Blue Smoke intend to make representations orally or by means of written submissions only, and does it wish to question witnesses? We request that Blue Smoke provide a response, regarding the nature and scope of its intended participation, to [hearing.services@aer.ca](mailto:hearing.services@ aer.ca) **within 5 business days of the date of this decision.**

### Next Steps

Parties can expect direction from the panel regarding the hearing process and timelines in due course. If you have any questions, please contact [hearing.services@aer.ca](mailto:hearing.services@ aer.ca).

Alex Bolton, Presiding Member

M.A. (Meg) Barker, Panel Member

Harold Robinson, Panel Member

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