

Via Email

March 18, 2021

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

www.aer.ca

Bennett Jones LLP

Alberta Energy Regulator – Regulatory
Applications Branch

Attention: Daron Naffin, Counsel

**Attention: Barbara Kapel Holden, Counsel
Alana Hall, Counsel**

Dear Sir et Mesdames:

**RE: Requests for Regulatory Appeal or Reconsideration by Rolling Hills Energy Ltd.
Alberta Energy Regulator – Regulatory Applications Branch (Regulatory Applications)
Well Licence Application Nos. 1693513 and 1787590
Location: 13-03-035-02W4M
Request for Reconsideration No.: 1928337**

I. INTRODUCTION

This decision deals with Rolling Hills Energy Ltd.'s (RHE) request for a regulatory appeal filed on March 9, 2020 (Request) of two letters issued by the Alberta Energy Regulator (AER) dated January 27, 2020 and February 25, 2020 (Letters). Alternatively, if the regulatory appeal is denied, RHE requested the AER to exercise its discretion under section 42 of the *Responsible Energy Development Act* (REDA) to reconsider the Letters (more specifically reconsider the letter dated January 27, 2020 since, as described below, it was filed outside of the applicable deadline). For clarity and ease of reference, the reconsideration request is considered as part of the Request.

The AER has considered RHE's request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal or reconsideration of the AER's decision to return the Applications. The AER has reviewed RHE's submissions and the submissions made by Regulatory Applications.

For the reasons that follow, the AER has decided that RHE is not eligible to request a regulatory appeal in this matter. Therefore, the request for a Regulatory Appeal is dismissed. For the same reasons however, the AER has decided to grant the reconsideration request.

II. BACKGROUND

RHE filed with the AER two nearly identical well licence applications numbers 1693513 and 1787590, on November 14, 2019 and February 12, 2020, respectively, to construct and operate multiple wells to be drilled horizontally off the proposed 13-03-035-02W4M multi-well pad site for which site RHE has a

surface lease with the landowner. In its applications, RHE also indicated that it has been unable to acquire a surface disposition from the Special Areas Board (SAB) for an access road approximately 550 m in length from an existing multi-well pad site located in LSD04-03-035-02W4M north through SW¼ 03-035-02-W4M. As a result, both applications were filed with the AER on a non-routine participant involvement basis.

The AER's Regulatory Applications, pursuant to section 3 (4) of the *Alberta Energy Regulator Rules of Practice* (Rules), returned as incomplete the application number 1693513 on January 27, 2020, and the application number 1787590 on February 25, 2020. The grounds for both returns were identical, namely:

“It is missing the following information required by *Directive 056: Energy Development Applications and Schedules*, section 4.9.1.3:

- The freehold surface lease agreement for the proposed access road indicated on the survey. The proposed access road is on public land administered by the Special Areas Board under the *Special Areas Act*, and the AER does not have jurisdiction to grant access or entry to these lands. As such, Rolling Hills Energy Ltd. must obtain a surface lease from the Special Areas Board for the proposed access road prior to application, or propose alternate access.

(Note: as per *Directive 056*, Freehold also includes federal lands and provincial Special Areas Board lands).”

RHE conceded that the 30-day calendar deadline pursuant to section 30(3)(m) of the Rules for filing a regulatory appeal request in respect of the January 27, 2020 letter returning application number 1693513 has passed and has consequently requested an alternative remedy in a form of reconsideration under section 42 of REDA.

III. SUBMISSIONS OF THE PARTIES

1. ROLLING HILLS' REQUEST

In the Request, RHE submitted that the Letters fall within the meaning of an "appealable decision" and that RHE is an "eligible person," as defined in the REDA, for the purposes of this regulatory appeal.

RHE is of the view that issuing the Letters pursuant to section 3(4) of the Rules was based on an incorrect interpretation of that section in the Rules. Any finding by the AER that the applications were incomplete is without foundation because, if the applications are filed on a non-routine basis, there is no requirement for RHE to include a surface lease with the SAB for the access road in question or otherwise provide confirmation of nonobjection from the SAB for the project.

RHE submitted that, where the AER denied the applications notwithstanding they were both complete, the Letters were, in substance, made under the *Oil and Gas Conservation Act* (OGCA), which is an energy resource enactment and as a result, they fall squarely within the meaning of an "appealable decision."

In addition, RHE stated that it is directly and adversely affected by the Letters, which were made without a hearing under section 36(a)(iv) of REDA. Absent legal support, the AER has refused to consider the applications, which has resulted in unjustified delays and increased costs with respect to the project and RHE's broader development in the area. This has resulted in prejudice to RHE, particularly since the SAB has not filed any statements of concern with the AER in connection with the applications.

With regard to the missed 30-day deadline, RHE requested that the AER exercise its discretion to allow the late filing of the within regulatory appeal request as it relates to the January 27, 2020 letter, particularly considering the limited and unintelligible reasons contained in that letter, which did not provide RHE with a fair or reasonable opportunity to understand the basis for the decision until application number 1787590 was denied in the February 25, 2020 letter for identical reasons.

According to RHE, it has undertaken all reasonable efforts to address the concerns of the SAB with respect to the access road, but it has been unable to obtain the SAB's confirmation of nonobjection with respect to the project. Notwithstanding the SAB's refusal to grant RHE a surface disposition for the access road or provide confirmation of nonobjection in respect of the project, to RHE's knowledge, the SAB did not file statements of concern in respect of either of the Applications.

Rolling Hills submitted that it is entitled to file the applications on a non-routine basis in the absence of a surface lease -or confirmation of non-objection from the SAB. The AER was incorrect to deny or "return" the applications based on the vague and limited reasons provided. The Letters inappropriately grant the SAB a veto over the project, notwithstanding no relevant legislation or regulatory requirement, including *Directive 056: Energy Development Applications and Schedules* (Directive 056), the OGCA, REDA, the Rules or the *Special Areas Act* or any regulations thereunder, grant the SAB such authority.

In RHE's view the section of Directive 056 referenced in the Letters is not applicable in circumstances where the applications were submitted on a nonroutine participant involvement basis. Furthermore, the AER stating that it does not have jurisdiction to grant access or entry to lands administered by the SAB exhibits an incorrect understanding of the approval sought in the applications as well as the AER's role in rendering a determination on it.

Assuming Rolling Hills is unable to obtain a surface disposition from the SAB following the issuance of licences for the project by the AER, it could obtain access to the SAB lands by way of right-of-entry order from the Surface Rights Board (SRB) under the *Surface Rights Act* (SRA).¹

¹ In support of this argument Rolling Hills cited *Husky Oil Operations Limited v Her Majesty the Queen in Right of Alberta as represented by the Minister of Municipal Affairs*, SRB Decision No. 2009/0049 and *Apache Canada Ltd v Her Majesty the Queen in Right of Alberta as represented by the Minister of Municipal Affairs*, SRB Decision Nos. 2004/0024 and 2004/0025.

Finally, and in the alternative, RHE requested the AER exercise its authority to reconsider the Letters under section 42 of REDA. RHE submitted that they are legally incorrect, frustrate the AER's application process and unjustifiably grant the SAB a veto over energy resource projects even where the SAB has declined to participate in the AER's process with respect to the applications.

**i. AER REGULATORY APPEALS – SOLICITED COMMENTS ON
THE MOOTNESS AND LATENESS OF THE REQUEST**

On March 18, 2020, AER Regulatory Appeals issued a letter soliciting comments from the parties in this process by asking the following questions:

1. Whether or not the regulatory appeal request of the January 27, 2020 letter is moot?
2. If the answer to the first question is no, whether or not there are special circumstances that would warrant allowing RHE to also file its late request for regulatory appeal of the January 27, 2020 letter?

**2. AER REGULATORY APPLICATIONS' SUBMISSION ON THE MOOTNESS AND
LATENESS OF THE REQUEST**

With respect to the first question, Regulatory Applications submitted that, even if the first request for regulatory appeal is not moot, the second request for regulatory appeal is duplicative because it deals with the same issues. As the only difference between application numbers 1693513 and 1787590, is a checked box on the AER's online filing system, the reasons provided by Regulatory Applications in its January 27, 2020 and February 25, 2020 letters for returning the applications were identical. Further, any decision on the second request for regulatory appeal would render the first request for regulatory appeal moot if it is not already or *vice versa*. That said, RHE should have the burden of demonstrating that its request for regulatory appeal with respect to application number 1787590 is necessary and not duplicative of its request for regulatory appeal with respect to application number 1693513.

With respect to the second question, Regulatory Applications stated that RHE has the onus of establishing that it filed its regulatory appeal in accordance with the Rules, or if it did not, that there are extenuating circumstances that require the AER to vary the filing requirements pursuant to section 42 of the Rules. Regulatory Applications also requested an opportunity to respond to any submissions RHE makes with regard to both questions.

**3. ROLLING HILLS' SUBMISSION ON THE MOOTNESS AND LATENESS OF THE
REQUEST**

RHE submitted that its regulatory appeal request of the January 27, 2020 letter is not moot because it is incorrect and should be rescinded through the regulatory appeal process under REDA and the Rules. While the ultimate relief sought by RHE in its Request could be achieved through regulatory appeal (or alternatively reconsideration) of the February 25, 2020 letter alone, RHE submits that both decisions

should remain within the scope of any regulatory appeal or reconsideration granted by the AER. The January 27, 2020 letter should not be permitted to stand on the public record where it contains obvious errors and where the vague and unintelligible reasons were the primary basis for RHE not filing a request for regulatory appeal in respect of same within the timelines prescribed in the Rules.

According to RHE, the circumstances that warrant the AER allowing RHE to file its request for regulatory appeal of the January 27, 2020 letter outside of the timeline prescribed by the Rules are that the reasons contained in the letter (as well as the February 25, 2020 letter) are vague and did not provide RHE (or any reasonable reader) with a fair or reasonable opportunity to understand the basis for the decision to return the applications. Given that the actual basis for both decisions appears to be Regulatory Applications' incorrect interpretation that the SAB holds a veto over energy activities proposed on the lands it administers, RHE submits that the circumstances warrant the AER accepting RHE's request for regulatory appeal in respect of both letters given that it was filed within 30 days of RHE reasonably being able to glean the actual basis for the decisions.

RHE also stated that Regulatory Applications should not be given further opportunity to respond to RHE with regard to these two questions since it would be both inappropriate and procedurally unfair for Regulatory Applications to attempt to circumvent the clear process established by the AER by filing further submissions outside this process.

i. AER REGULATORY APPEALS – SOLICITED COMMENTS ON SUBSTANTIVE ISSUES

On April 22, 2020, the AER Regulatory Appeals requested further submissions from the parties on the following six questions:

1. Whether or not the Regulatory Applications' return letters are appealable decisions pursuant to sections 1(1)(f) and 36(a)(iv) of REDA, taking into consideration section 3(4) of the Rules and the AER's prior findings on the issue?
2. Whether there are any extraordinary circumstances and, exceptional and compelling grounds warranting the AER to exercise its discretion to reconsider the return letters under section 42 of REDA?
3. Whether reconsideration pursuant to section 42 of REDA is an appropriate relief in cases where a regulatory appeal request was filed in time for the same decision?
4. Whether or not the applications were complete and should have been assessed in accordance with *Directive 056: Energy Development Applications and Schedules* and why or why not?
5. Whether or not Regulatory Applications misconceived the relief requested in the applications as a request by RHE for access or entry onto lands administered by the Special Areas Board?

6. Any other questions and issues the parties consider relevant to the determination of the relief sought in the regulatory appeal request.

The parties were provided with an opportunity to address these questions and the AER has considered their responses in its analysis and decision below.

IV. ANALYSIS

1. Relevant Provisions

The term “appealable decision” is defined in section 36 of *REDA*. For this regulatory appeal request, the relevant definition is contained in section 36(a)(iv). It says an appealable decision includes:

A decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing.

Section 1(1)(f) of *REDA* states that a decision of the AER includes an approval, order, direction, declaration or notice of administrative penalty made or issued by the Regulator.

Approval is defined in section 1(1)(b) of the *REDA* as the following:

“approval” means, except where the context otherwise requires, a permit, licence, registration, authorization, disposition, certificate, allocation, declaration or other instrument or form of approval, consent or relief under an energy resource enactment or a specified enactment.

Subsections 3(1)(e) and 3(4) of the Rules, which deal with the completeness of an application, are also relevant to this regulatory appeal request.

2. Appealable Decision

In addressing this issue, we find that the AER’s decision in *Aqua Terra*² is applicable in the circumstances.

Section 1(1)(f) of the *REDA* sets out the definition of “decision.” While the definition uses the word ‘includes’ and describes certain types of decisions, the return of a deficient application is not similar to the classes of decisions referred to in section 1(1)(f) (i.e. an approval, order, direction, declaration or notice of administrative penalty), all of which appear to grant or impact rights or impose obligations.

The return of an application does not prejudice an applicant’s right to reapply with complete information (as confirmed by Regulatory Applications in this process), nor does it obligate an applicant to do so. The

² AER Disposition Letter Dismissing Request for Regulatory Appeal No. 1916371 by *Aqua Terra Water Management Inc.* (June 20, 2019).

return letters do not grant or impact any other right and, as RHE acknowledged in its submissions, there is no right to have a public authority exercise its discretion in a manner that yields a favorable result. The return letters do not appear to fall under the definition of “decision” and by extension cannot be an ‘appealable decision’ under section 36 of the REDA. Therefore, the request for regulatory appeal is not properly before the AER pursuant to section 39(4)(c) of the *REDA*.

Even if the return letters could be considered a decision under the REDA definition, they are not an ‘appealable decisions’ because the return of RHE’s applications was made under section 3(4) of the Rules, which are not an energy resource enactment as required by section 36(a)(iv) of the REDA. Consequently, the return letters are not appealable decisions. For this reason, it is not necessary to consider whether RHE is an eligible person under section 36(b)(ii) of REDA.

3. Reconsideration

The inquiry, however, does not end here.

The AER has the 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. [Emphasis added.]

As indicated by section 42, it is at the AER’s sole discretion to reconsider a decision made by it. Given the appeal processes available under REDA, and the need for finality and certainty in its decisions, the AER will only exercise its discretion to reconsider a decision under section 42 in extraordinary circumstances and where it is satisfied that there are compelling grounds to do so.

We are of the view that Regulatory Applications made an error by returning the applications as incomplete instead of assessing them on the merits and issuing a decision. We agree with the position taken by RHE that the lack of a freehold lease agreement with the Special Areas Board simply means that the applications should have been processed and decided as ‘non-routine.’ Directive 056 indicates that confirmation of non-objection, a participant involvement requirement, may be demonstrated by providing a surface lease:

4.9.1.3 Confirmation of Nonobjection

87) The AER does not require that confirmation of nonobjection be in writing; however, documentation must be submitted when available.

Confirmation of nonobjection may consist of one of the following documents, depending on the nature of the proposed development:

- a) Freehold lease agreement (Freehold also includes federal lands and provincial Special Areas Board lands)

The definition of a non-routine applications in Directive 056 is as follows:

An application is nonroutine if the applicant cannot meet requirements or chooses to apply for a regulatory relaxation; ***all participant involvement requirements have not been met***; outstanding concerns or objections exist; the applicant proposes to implement new technology; the application is designated nonroutine (i.e., a new category C or D plant, any category E application) [Emphasis added].

The absence of the Freehold lease agreement meant that not all participant involvement requirements could be met. That did not make the applications incomplete; it meant that they were by definition non-routine. Returning them as incomplete under section 3(4) of the AER's Rules was therefore not the correct decision. The effect of that incorrect decision is that RHE now cannot have a regulatory appeal because the incompleteness decisions were not made under an energy or specified enactment, and do not therefore meet the definition of appealable decisions. We find that the lack of availability of the normal appeal mechanism was caused solely by the fact that Regulatory Applications' made incorrect decisions to return the applications under the Rules, and that this is an exceptional and unusual circumstance. Further, the unfairness it creates in RHE's inability to pursue a typical or appropriate remedy provides a compelling reason to allow the decisions to be reconsidered.

In addition, the AER agrees with RHE's submission that the issue of surface access approval is, for the most part, outside the AER's jurisdiction where the proposed AER regulated activity is to be located on either private or public lands which are not administered by the AER, as was the case in RHE's applications. In such cases, it is presumed that an applicant like RHE is sufficiently sophisticated so as to understand the risks of applying for and receiving approvals for AER regulated activity when future surface access has not been secured from a landowner or other approval body. It's not the AER's role to unnecessarily intervene in those business decisions by treating surface access as a mandatory AER requirement where it is not expressly required.

Considering the error made by Regulatory Applications by returning the application for incompleteness and our finding that the Letters are not appealable decisions, making the regulatory appeal mechanism unavailable in the circumstances, the AER has decided to exercise its discretion under section 42 of the REDA to grant a reconsideration of the Letters without a hearing.

V. CONCLUSION

For the reasons above, the AER dismisses the request for regulatory appeal pursuant to section 39(4)(c) of the REDA as it is not properly before it. However, the AER has decided to exercise its discretion to grant the reconsideration, without a hearing.

Procedural directions regarding the process to reconsider the decision will be issued in due course. Given that the applications are currently closed in the AER's system, the parties are encouraged to engage and explore more expeditious solutions than what may be involved in the reconsideration process. For example, there may be significant efficiencies realized if the parties agree that RHE is able to file a new application that will be assessed on its merits, having regard for the findings in this letter.

Sincerely,

< *Original signed by* >

Paul Ferenowicz
Principal Regulatory Advisor

< *Original signed by* >

Steve Thomas
Director, Oil & Gas Subsurface, Waste & Storage

< *Original signed by* >

Sean Sexton
Vice President, Law