

Via Email

May 14, 2021

Herman, Shirley, and Mark Dorin

Bennett Jones, LLP

Attention: Mark Dorin**Attention: Daron K. Naffin**Alberta Energy Regulator – Enterprise
Reclamation Group**Attention: Kiril Dumanovski, Counsel**

Dear Sirs:

**RE: Request for Review by Herman, Shirley and Mark Dorin (the Dorins)
Whitecap Resources Inc. (Whitecap)
Alberta Energy Regulator - Enterprise Reclamation Group (ERG)
Application No.: 382272; Reclamation Certificate No. 382273 (the Reclamation
Certificate)
Locations: Block 2, Lot 3, Plan 151 2407 or SE 8-18-31-1-W5M (the Dorin Lands)
Regulatory Appeal Request No. 1929316**

The Alberta Energy Regulator (AER) has considered the Dorins' request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal (the Request) of the AER's decision to grant the Reclamation Certificate (the Decision) and in the alternative, a reconsideration of the Decision pursuant to section 42 of REDA. The AER has reviewed the Dorins' submissions and the submissions made by Whitecap in opposition to the Request. The AER Enterprise Reclamation Group, which issued the Decision, did not file submissions in response to the Dorins' request.

For the reasons that follow, the AER grants the request for a regulatory appeal (the RRA) in part. The AER has determined that there is no basis for conducting a reconsideration of the Decision.

A. THE AER'S POWER TO REVIEW ITS DECISIONS**1. Regulatory Appeal**

In relation to who may qualify for a regulatory appeal, section 38 of REDA states:

(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

Thus, only an “appealable decision” can be subject to a regulatory appeal and only an “eligible person” can request a regulatory appeal of such a decision.

However, even if the decision is an appealable decision and the regulatory appeal requester is an eligible person, section 39 (4) of the REDA provides:

The Regulator may dismiss all or part of a request for regulatory appeal

- (a) if the Regulator considers the request to be frivolous, vexatious or without merit,
- (b) if the request is in respect of a decision on an application and the eligible person did not file a statement of concern in respect of the application in accordance with the rules, or
- (c) if for any other reason the Regulator considers that the request for regulatory appeal is not properly before it.

2. Reconsideration

In regard to the AER’s power to reconsider its decisions, section 42 of REDA states:

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

B. RECLAMATION CERTIFICATES

The duty to conserve and reclaim land and obtain a reclamation certificate arises from section 137 of the *Environmental Protection and Enhancement Act* (EPEA). Under section 2 of EPEA’s *Conservation and Reclamation Regulation* (CRR), the objective of conservation and reclamation is to ensure “specified land” has an equivalent land capability.

The definition of specified land under the CRR (section 1(t)(i)) includes “land that is being or has been used or held for or in connection with the construction, operation, or reclamation of a well.” However, importantly for this matter, section 134 (f) of EPEA excludes certain lands from this including subdivided land that is used or intended to be used solely for residential purposes.

C. THE REGULATORY APPEAL REQUEST

This matter relates to the Reclamation Certificate which was issued in relation to a well site and access road(s) located on lands which the Dorins own or have an interest in. Whitecap is the licensee of the associated well and was granted the Reclamation Certificate.

The Dorins seek review of the Decision to issue the Reclamation Certificate and Whitecap opposes any such review, stating that the AER should dismiss the Dorins' application.

The Request and the Dorins' reply (the Reply) are long, dense, sometimes convoluted and repetitive documents. Nonetheless, we have read the entirety of the Dorins' submissions, including attachments to them. The Request and Reply do not lend themselves to summary and it is not necessary to provide such a summary in this letter. The predominant points/grounds in those documents are the following:

- Jurisdiction of the AER - The lands on which the well site and roads are located are subdivided from the original titled quarter section (SE-18-31-1 W5M) and are zoned for future residential purposes. Therefore, they are not "specified lands" as defined in EPEA and are exempt from the requirement for a reclamation certificate. For this reason, the AER had no jurisdiction to issue the Reclamation Certificate.
- Even if the AER had authority to issue a reclamation certificate, the Reclamation Certificate should not have been issued. Amongst other reasons given, the Dorins say this is because of the content of the soil (high salt content, high electrical conductivity, and high Sodium Adsorption Ratio. As well, fencing remains on site and it is unclear whether the Reclamation Certificate covers 3.50 acres, 4.53 acres or any other acreage.

In response, Whitecap has submitted that the Request should be dismissed as it is frivolous, vexatious or without merit on the basis that:

- The site meets all reclamation requirements and criteria, and the Request does not contain any credible information to establish that the Decision was incorrect.
- The Dorins' main grounds for the Request are that the AER lacked jurisdiction to consider the application for the Reclamation Certificate. This is wrong because the subject lands were specified land and the Dorins' arguments that say otherwise are meritless.

- As the primary basis for the Request is fundamentally flawed, the Request is frivolous, vexatious and without merit and should be dismissed without further process.

In their Reply, the Dorins' reiterated many aspects of the Request. However, they also submitted that Whitecap had failed to show that the Request is frivolous, vexatious and without merit. The Dorins asserted they have raised "serious arguable points" on appeal which indicates the Request should not be dismissed.

Do the Dorins satisfy section 38 of REDA – are they eligible to request an appeal of an appealable decision?

The Dorins were provided with the Reclamation Certificate when it was issued. Therefore, by operation of sections 36(a)(i) of REDA and 91(1) of EPEA the Decision is an appealable decision and the Dorins, as recipients of a reclamation certificate, are eligible to request a regulatory appeal of the Decision. Whitecap did not suggest otherwise in its submission to the AER.

Should the Request for Regulatory Appeal be dismissed because it is frivolous, vexatious or without merit?

Whitecap alleges that the Dorins' request for regulatory appeal should be dismissed pursuant to section 39(4)(a) as it is vexatious, frivolous or without merit. The Dorins disagree.

Neither REDA nor the *Alberta Energy Regulator Rules of Practice* (Rules) define "frivolous", "vexatious" or "without merit". Section 23(2) of the *Judicature Act* provides the following definition of instituting vexatious proceedings or conducting a proceeding in a vexatious manner:

- (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
- (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
- (c) persistently bringing proceedings for improper purposes;
- (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
- (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
- (f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

What is significant from this list for present purposes is that persistently trying to relitigate the same matters is an indication of a vexatious action or application.

Black's Law Dictionary, 9th ed, provides the following definitions:

frivolous, adj. Lacking a legal basis or legal merit; not serious; not reasonably purposeful

vexatious . . . adj. (Of conduct) without reasonable or probable cause or excuse; harassing; annoying

These definitions overlap. An action that is "without reasonable or probable cause" (vexatious), is also one "lacking a legal basis or legal merit" (frivolous).

The Alberta Courts have also discussed the meaning of frivolous, vexatious or meritless in the context of determining whether pleadings filed with the Court are on their face hopeless or abusive and therefore should be struck.¹ In addition to the persistence of the kind of conduct described in the *Judicature Act*, the Courts have indicated vexatious matters may be ones where the pleadings are so vague there is no ability for parties and decision makers to reply to them. An application that only contains bald allegations without sufficient detail to allow for response may be vexatious. Another indicium of a vexatious matter is where the facts and issues are not discernable or the document is gibberish.

At the same time, the Courts have indicated striking an action or application on the basis it is frivolous, vexatious or without merit, in other words is abusive, is a blunt instrument to be used only in the clearest cases. To justify striking, the impugned document must, on its face, have no chance of success. Documents being assessed should be read generously to account for drafting weaknesses.

Whitecap says Dorins' position that the subject lands are not "specified land" as contemplated by EPEA, is wrong. Neither Whitecap nor the Dorins provided guidance from previous decision on the interpretation of section 134(f) of REDA. Whitecap simply responds with a different analysis and interpretation and says that as this argument is fundamentally flawed the entire request should be dismissed. Additionally, it says that the lands met all requirements and the Decision doesn't require a review. In Whitecap's view, the Request fails to provide credible information to establish the Decision was deficient in any way.

The Dorins provide a lengthy discussion of the test the AER should apply when considering whether a request for regulatory appeal should be dismissed under section 39(4). They suggest

¹ See for example *Unrau v National Dental Examining Board* 2018 ABQB 874

the test to be applied to determine if the Court of Appeal should grant permission to appeal an AER decision to that Court is the appropriate test. That test contains the following five parts:

1. is the point on appeal significant to the practice (of law);
2. is the point raised of significance to the action itself;
3. is the appeal *prima facie* meritorious;
4. will the appeal unduly hinder the progress of the action; and
5. the standard of appellate review that would be applied if leave were granted.

We have concerns with the suggested approach to section 39(4) of REDA provided by both parties. We appreciate the efforts of the Dorins, who are not represented by counsel, to provide a legal framework for this exercise; Whitecap did not make such an attempt. However, the Court of Appeal's permission to appeal test is not the appropriate means to assess an application made under section 39(4) of REDA. The permission test is very specific to the context of Court's appeal processes and rules which differs from AER regulatory appeals. We do acknowledge, that the question of whether the proposed appeal is *prima facie* meritorious may be relevant to the application of section 39(4).

Employing the guidance from the Courts, we are satisfied section 39(4) of REDA is to be used to strike only appeal requests, or parts of requests, that are fundamentally deficient on their face. Whitecap's approach, to simply argue the merits of the Dorins' jurisdictional position and provide an alternative interpretation, does not demonstrate the appeal is frivolous, vexatious or without merit. The fact Whitecap was able to respond in some detail suggests there could be some merit to the requested review. As noted by the Court, dismissing an application is not for "close calls", but only for very clear cases. Section 39(4) is not the basis to have a mini-hearing on the facts and law at the request stage of the AER regulatory appeal process.

Matters which are not dismissed under section 39(4)(a)

The two main aspects of the Request described above have not been persistently raised with the AER in earlier matters. They are not on their face completely lacking in merit. The Request cannot be characterized as vague and Whitecap has demonstrated it could respond to the merits of the jurisdictional argument made by the Dorins. As suggested by the Courts, we employed a generous approach in reviewing the Request. While the document overall is far too long and confusing in some aspects, it is not gibberish. On this basis, we grant the request for regulatory appeal on the question of whether the Reclamation Certificate was properly issued.

Matters that are dismissed from the Request for Appeal

As permitted by section 39(4)(a), there are a number of matters raised in the Request that we do dismiss from the request for regulatory appeal. They are:

- Matters that do not relate to the issuance of the Reclamation Certificate or have been persistently raised by the Dorins:
 - The circumstances in 1977 surrounding the location of the Well Site;
 - The alleged failure by Dyco to plant trees in 1977;
 - The alleged commitment of Camino in about 1999 to no longer produce the Well and generally the conduct of Whitecap’s predecessor licence holders;
 - The date of suspension and abandonment of the Well and circumstances related thereto; and,
 - The validity of the 2008 Reclamation Certificate
- General challenges to the AER’s processes and authority. - Regulatory appeals are appeals of specific decisions. Appeals are not to be deployed to allow for broad challenges to the AER’s overall processes, statutory authority and policies. Such challenges cannot form the basis of a regulatory appeal and have no chance of success. Appeals made on such a basis are frivolous and vexatious and are abusive. In the Request, such matters include:
 - The jurisdictions of the AER and the Surface Rights Board and how they relate;
 - The AER’s test and processes around reconsiderations;
- The AER’s alleged failure to report the author of certain reports to the Alberta Institute of Agrologists. While the AER is supportive of and cooperates with the regulatory and investigative processes of other agencies, the AER has neither the authority nor the obligation to determine alleged non-compliances with the requirements of other regulators or to take any steps in those circumstances. Even, if the AER did have such an obligation it would be a matter distinct from a review of the Decision done by way of appeal or otherwise.
- The AER’s decision to not hold a hearing before making the Decision. - There is no merit to the allegations regarding the lack of merit of AER’s decision not to hold a hearing before issuing the Reclamation Certificate or the adequacy of the letter dated July 16, 2019 which provided the AER’s reasons for not holding a hearing. The decision not to hold a hearing is not an “appealable decision” and the reasons for such a decision should

therefore not be the subject of a regulatory appeal. As such, the Dorins cannot succeed on this issue.

D. RECONSIDERATION

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.

Given the express wording in section 42 of REDA that the AER has sole discretion to reconsider a decision and given the need for finality and certainty in the AER's decision making, the AER reconsiders its decisions only in extraordinary circumstances where it is satisfied that there are exceptional and compelling reasons to do so.

The Request does not provide information to suggest that there are exceptional or compelling grounds justifying a reconsideration of the Decision. Many of the "grounds" listed are without merit or frivolous or vexatious as described above. Others, to the extent they have merit, will be addressed through the appeal process. Therefore, the AER will not be conducting a reconsideration of the Decision or on any other matters raised in the Request.

E. COOPERATIVE PROCEEDING

The Request asks that any hearing the AER holds be a cooperative proceeding with at least the Surface Rights Board.

Section 18(1) of REDA gives the AER the ability (or obligation where directed by Cabinet) to participate in a joint proceeding with another agency to consider an application, regulatory appeal, or reconsideration. Other than when the AER is requested to conduct a joint proceeding, there is no obligation on the AER to do so. It is in the AER's discretion.

We do not consider this to be an appropriate matter for a joint proceeding with any other body, including the Surface Rights Board. There is no precedent for the AER conducting such a proceeding. As we have dismissed the matters raised in the Request relating to the Surface Rights Board and the Alberta Institute of Agrologists, there is no basis for holding a joint proceeding with those bodies.

F. COSTS

In the Request, the Dorins ask for costs. That request is denied as it is premature.

Only a “participant” in a proceeding may request or apply for costs in an AER proceeding as per sections 59, 61 and 62 of the Rules. At this time, the Dorins are not participants in a proceeding.

The term participant is defined in section 58 (1)(c) of the Rules as follows:

“participant” means a person or a group or association of persons who have been permitted to participate in a hearing for which notice of hearing is issued or any other proceeding for which the Regulator ...

This definition makes clear that only once a hearing panel has been struck and a notice of hearing issued can a claim for costs be made.

G. ALTERNATE DISPUTE RESOLUTION

The Request asks the AER to direct alternate dispute resolution (ADR) take place in this matter. We consider it appropriate to leave it to the panel of hearing commissioners assigned to this matter to determine whether such a direction is appropriate.

H. CONCLUSION

For the above reasons, the AER grants the Request for Regulatory Appeal in part as outlined above.

Sincerely,

<Original signed by>

Sean Sexton
Vice President, Law

<Original signed by>

Evan Knox
Senior Advisor, Regulatory Integration

<Original signed by>

Todd Shipman
Senior Advisor, Induced Seismicity and
Geological Hazards