Alberta Energy Regulator

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

www.aer.ca

Via Email

February 3, 2022

Mandell Pinder LLP

Attention: Tarlan Razzaghi, Counsel

Bonavista Energy Corporation

Attention: Nicole Mungo

Dear Mesdames:

RE: Request for Regulatory Appeal by the Lac Ste. Anne Métis Community
Bonavista Energy Corporation
Application Nos.: 31287902 & 1933916
Approval Nos.: RTF216384 & F52326
Location: 07-053-19W5M & 12-053-20-W5M
Request for Regulatory Appeal No. 1934267

The Alberta Energy Regulator (AER) has considered Lac Ste. Anne Métis' (LSAM) request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's decision to issue temporary access disposition no. RTF216384 on August 5, 2021 (Temporary Access Disposition), and Licence No. F52326 on August 11, 2021 (Facility Licence), to Bonavista Energy Corporation (Bonavista), on a routine basis. The AER has reviewed LSAM's submissions, and the submissions made by Bonavista.

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

Background

On August 4, 2021, Bonavista Energy Corp. (Bonavista) applied to the Alberta Energy Regulator's (AER) OneStop system for a *Public Lands Act* (PLA) Temporary Field Authorization (TFA). Bonavista's application was registered as Application No. 31287902, and a temporary access disposition was issued on August 5, 2021 (Disposition No. RTF216384).

On August 9, 2021, Bonavista submitted a routine facility licence application pursuant to *Directive 056 Energy Development Applications and Schedules* (Directive 056). On August 11, 2021, the AER approved Bonavista's facility licence application and the Approval No. F52326 was issued (Facility Licence).

On September 10, 2021, the AER's Law Branch (Regulatory Appeals) received a request for regulatory appeal (RRA), including a request for suspension of the approved activities (Stay Request), from the Lac

Ste. Anne Métis (LSAM) in relation to the AER's decision to issue the Disposition No. RTF216384 and the Facility Licence (together, the Approvals) to Bonavista.

During its initial review of the RRA, Regulatory Appeals also identified that the portion of LSAM's RRA related to the Disposition No. RTF216384 was filed outside of the required timeline set out in Section 30(3)(m) of the *AER Rules of Practice* (Rules).

Regulatory Appeals issued correspondence to the parties on September 13, 2021, requesting submissions on the Stay Request and the late portion of LSAM's RRA.

On October 4, 2021, the AER issued a decision to the parties denying LSAM's Stay Request and granting the extension of time for filing of the RRA as it relates to the Disposition No. RTF216384.

On October 7, 2021, the AER issued correspondence to the parties requesting submissions on the merits of the RRA.

Parties' Submissions

LSAM

The Approvals allow for oil and gas development in a key LSAM community and Indigenous use area; thus, the Approvals directly and adversely affect the exercise of LSAM's Aboriginal rights. The proposed site for construction of a multi-well gas battery and the industrial access route are within critically important areas for LSAM members' residences and traditional land and resource use near the historically significant hamlet of Marlboro.

LSAM submitted several maps that show LSAM traditional land and resource use within a 500 m radius of the areas which comprise the subject of the Appealable Decisions (07-053-19W5M, 12-053-20W5M). The information depicted on the maps represent the current use of the area for LSAM's rights-based activities.

Further, the Request for Regulatory Appeal also articulated that:

- The Appealable decisions occur in a culturally important area, with a high potential for heritage resource value;
- Members of LSAM hunt in the area of the TFA and the Facility Licence;
- Members of LSAM also trap for food in proximity to the TFA and the Facility Licence;
- The TFA and the Facility Licence allow oil and gas activity within, and in proximity to areas that are known to LSAM members as critical for food and traditional food and medicinal plant gathering; and
- The TFA and the Facility Licence occur in an area where LSAM is worried about industries' cumulative effects on fishing and domestic water use and air quality.

In its reply submission, LSAM reiterated that Bonavista did not conduct any participant involvement with LSAM before filing the Approvals on a routine and expedited basis.

Bonavista

Bonavista noted that for the RTF approval, #216384, the installation will eventually be removed. Further, Bonavista noted that the RTF approval will only utilize existing clearings for the temporary water line. Therefore, there will be no added impact to indigenous use areas, as no clearing or construction will occur on undisturbed lands for either of the Approvals.

Bonavista also argued that there is no information within the request for regulatory appeal that specifically demonstrates how trapping, harvesting and other activities are or may be affected by the approved multi-well gas battery license. The concerns raised against the multi-well gas battery are general in nature and do not provide information as to the direct and adverse impacts the approval of the multi-well battery license will cause.

Finally, Bonavista submitted that LSAM's assertion that Bonavista did not comply with required consultations and notifications or engage LSAM at the time these projects were proposed, is without merit.

Reasons for Decision

Section 38(1) of the *Responsible Energy Development Act* (*REDA*) sets out the test for eligibility to request a regulatory appeal:

> 38(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]

There are three key components to section 38(1), which are as follows:

1. **"Appealable Decision"** – Subsection 36(a) defines an "appealable decision". For the present purposes, the relevant definitions are contained in subsections 36(a)(iii) and 36(a)(iv). It says an appealable decision includes:

   > a decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 121 of the *Public Lands Act*, if that decision was made without a hearing,

> A decision of the Regulator that was made under an energy resource enactment[1], if that decision was made without a hearing

Thus, to be an "appealable decision" the decision must be made under the *Public Lands Act* or an energy enactment and there cannot have been a hearing.

2. **"Eligible Person**" – Subsection 36(b) defines an "eligible person" under an energy resource enactment. For the present purposes, the relevant definition is contained in subsection 36(b)(ii). It says an eligible person is:

> A person who is directly and adversely affected by a decision referred to in clause (a)(iv) [a decision made under an energy resource enactment, if that decision was made without a hearing].

Subsection 212(1)(b) of the *Public Lands Administration Regulation* defines a "prescribed person" under the *Public Lands Act* as follows:

> a person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision.

Therefore, LSAM must be a person who is directly and adversely affected by a decision.

3. **"In Accordance with the Rules"** – Section 30(3) requires that a request for a Regulatory Appeal be made within 30 days after the making of the decision for which an appeal is sought.

Appealable Decision

The granting of the Facility License is an appealable decision, as the Licence was issued under the *Oil and Gas Conservation Act* – an energy resource enactment – without a hearing.

The granting of the Temporary Field Authorization is an appealable decision, as the licence was issued under the *Public Lands Act* – a specified enactment – without a hearing.

In Accordance with The *Rules*

The portion of the request for regulatory appeal relating to the Facility Licence was filed in accordance with the time requirements under the Rules. The portion of LSAM's request for regulatory appeal, related to Disposition No. RTF216384, was filed outside of the required timeline set out in Section 30(3)(m) of

[1] This includes: the *Coal Conservation Act*, the *Gas Resources Act*, the *Oil and Gas Conservation Act*, the *Oil Sands Conservation Act*, the *Pipeline Act*, the *Turner Valley Unit Operations Act*, a regulation or rule under and of the enactments.

the Rules. However, as part of the stay request decision, the AER granted a time extension as it related to disposition no RTF216384.

It should also be noted that LSAM did not file any Statements of Concern relating to the Facility Licence or the Temporary Field Authorization. The AER notes however, that as the applications were submitted as routine, there was no reasonable opportunity to file an SOC respecting the proposed approvals.

Therefore, the totality of the Request for Regulatory Appeal was filed in accordance with the Rules.

Eligible Person

For LSAM to be eligible for a regulatory appeal, they must demonstrate that they may be directly and adversely affected by the AER's decision to issue the Approvals. The AER acknowledges the submissions provided by LSAM and Bonavista included considerable discussion highlighting concerns regarding the participatory process; however, these submissions did not address the question of whether LSAM met the criteria of an "Eligible Person". As a result of the information provided, the AER is not satisfied that LSAM has demonstrated that they may be directly and adversely affected by the decision to issue the Approvals for the Facility License and the Temporary Field Authorization.

In reaching this conclusion, the AER was guided by the Court of Appeal's decision in *O'Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA 348. In this decision, the Court decided not to overturn a decision of the Regulator that the O'Chiese First Nation was not directly and adversely affected by the three approvals applied for by Shell. In coming to this conclusion, the Court, citing *Dene Tha*, provided guidance on what an aboriginal group must demonstrate to meet the factual part of the directly and adversely affected test:

> [14] It was argued before us that the more recent case law on prima facie infringement of aboriginal or treaty rights changed things. But the Board still needed some facts to go on. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a pose *[sic]* aboriginal or treaty right. **Some degree of location or connection between the work proposed and the rights asserted is reasonable. What degree is a question of fact for the Board**. ...
>
> [18] There had been discussions and provision of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were to be within the reserve. The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta.
>
> [19] The First Nation also contended before us it had no duty to tell the Board specifics, and that the Board should have frozen all development while deciding the question. We cannot agree, and

> have seen no authority, constitutional or otherwise, requiring such a logical impasse. (Emphasis added by Court)

As is clear from the above, there must be some degree of location or connection between the work proposed and the rights asserted.

In this instance, the work proposed is minimal with no discernable impacts to the environment. Bonavista applied to add two (2) separator packages (the "Facility") to an existing pad with two wells that were previously drilled[2].

Further, in the confidential maps provided by LSAM, except for "Gathering – Food and Medicinal Plants (500 m buffer)", there is *no* overlap between the indigenous rights alleged (hunting, trapping and burial sites) and the pad on which the Facility will be installed. Even in the case of the gathering rights asserted, there is no indication of the precise location of the plants, nor what plants are proximate to the proposed Facility.

For the RTF approval, while there will be an overlap between the indigenous rights asserted and the temporary above ground water line, the AER notes that the water line will only utilize existing clearings. Furthermore, as it is an above ground water line, it is noted that the topsoil and subsoil will not be stripped; any areas inadvertently disturbed will be re-contoured at the end of the project. Thus, the impact to burial sites, hunting or gathering will be non-existent.

As both Approvals will occur on pre-disturbed lands, the proposed Facility together with a temporary surface water line do not directly and adversely affect LSAM.

Sincerely,

<Original signed by>

Jeffrey Moore
Associate General Counsel

<Original signed by>

Jennifer Zwarich
Senior Advisor, External Innovation &
Industry Performance

[2] Bonavista originally also proposed the installation of one (1) produced water storage tank; however, that element of their application was dropped from their request when additional storage proved unnecessary.

<Original signed by>

Candace MacDonald
Director, Field Operations North