Alberta Energy Regulator

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Via Email

August 8, 2022

Werner and Sharon Ambros

Attention: Werner and Sharon Ambros

Bennett Jones LLP

Attention: Daron Naffin

Dear Sirs and Madam:

RE: Request for Regulatory Appeal by Werner and Sharon Ambros
Tamarack Acquisition Corp.
Application Nos. 31258979 and 31266586
Licence Nos. 60940 and 0501330, issued September 23, 2021
Location: 03-27-072-09 to 01-02-073-09W6 and 3-27-72-9-W6M
Request for Regulatory Appeal No.: 1934765

The Alberta Energy Regulator (AER) has considered Werner and Sharon Ambros' (Ambroses) request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's decision to issue the above noted pipeline and well licences (the Licences). The AER has reviewed the Ambroses' submissions and the submissions made by Tamarack Acquisition Corp (Tamarack).

For the reasons that follow, the AER has determined that the Ambroses are not, for the purposes of REDA, an "eligible person" to request a regulatory appeal in this matter. Therefore, the request for a regulatory appeal is dismissed.

The applicable provision of REDA in regard to requests for regulatory appeals states:

> 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]

The term "eligible person" is defined in section 36(b)(ii) of REDA to include:

> a person who is directly and adversely affected by a decision [made under an energy resource enactment]…

Reasons for Decision

There are three components to section 38(1) of REDA:

(a) The decision must be an appealable decision;

(b) The request must be filed in accordance with the *Alberta Energy Regulator Rules of Practice* (Rules); and

(c) The requester must be an eligible person.

a) Is the Decision an Appealable Decision

The applicable REDA provision outlining what an "appealable decision" is found under s. 36(a)(iv), which defines an "appealable decision" as a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing.

The decision to issue Licence Nos. 60940 and 0501330 was made under the *Oil and Gas Conservation Act* and the *Pipeline Act*, which are both energy resource enactments, and it was made without a hearing. Therefore, the decision to issue the Licences is an appealable decision.

b) Is the Request filled in Accordance with the Rules?

When filed, the Ambroses' regulatory appeal request did not meet all relevant requirements of section 30 of the Rules: specifically it did not include a copy of the decision being appealed. However, the Ambroses were provided the opportunity to rectify this error and file a copy of the decision being appealed, which the Ambroses did within the provided timeline. Thus, the request for regulatory appeal was filed in accordance with the Rules.

c) Are the Ambroses an "Eligible Person"?

For the purposes of requests for regulatory appeal of decisions made under energy resource enactments without a hearing, an "eligible person" is defined in section 36(b)(ii) REDA as a person who is directly and adversely affected by the decision. Whether the Ambroses are a person directly and adversely affected by the decision to issue Tamarack's Licences is the principal question to be decided in this regulatory appeal request.

In order to establish that they are an eligible person, the Ambroses must show that they are "directly and adversely affected" by the AER's issuance of the Licences. Tamarack and the Ambroses disagree as to the legislative test the Ambroses must meet in this regard.

Legislative Test

The Ambroses cite the Alberta Court of Appeal's decision in *Kelly v Alberta (Energy Resources Conservation Board) (Kelly #1*) for the proposition that an objecting party needs only to establish that it may be affected by a decision, not that it is affected in a different way or to a greater degree than members of the general public.[1]

[1] *Kelly #1,* at para 32.

In response, Tamarack notes that *Kelly #1* was decided under the former ERCA, section 26(2), which required the ERCB to grant a person who established that they may be directly and adversely affected by an application standing to participate in a hearing on the application. Conversely, section 36(b)(ii) of the REDA defines an "eligible person" as someone who is directly and adversely affected by a decision made under an energy resource enactment without a hearing. Tamarack submits, therefore, that in order to establish eligibility for a regulatory appeal, the requester must show they are, in fact, directly and adversely affected by the decision.

The AER's approach in cases such as this, where the development or activity in question has not yet occurred and therefore the actual impacts are not yet known, is to take the position that the phrases "is directly and adversely affected" or "is directly affected" do not require certain proof that the person will be affected. What is required is reliable information in the regulatory appeal request that demonstrates a reasonable potential or probability that the person asserting the impact will be affected.

In *Court v Alberta* (*Environmental Appeals Board*)[2] (**Court**), the Court of Queen's Bench examined the interpretation of the phrase "is directly affected" as it is used in s. 95 of the Environmental Enhancement and Protection Act (**EPEA**). Subsection 95(5)(a)(ii) of EPEA allows the EAB to dismiss a notice of appeal submitted under certain provisions of EPEA if the EAB is of the opinion that the person submitting the notice of appeal is not directly affected by the decision.

The reviewing Justice found that, in order to establish eligibility for appeal, "the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed".[3] Further, the Justice found that "the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the [decision]. The appellant need only prove a 'potential' or 'reasonable probability' for harm."[4] [emphasis added]

Based on the above, the "is directly and adversely affected" requirement under s. 36(b) of REDA does not require a higher standard of demonstrating actual effect than what was required by the "may directly and adversely affect" language in s. 26(2) of the ERCA.

Directly and Adversely Affected

The Ambroses filed statements of concern (SOCs) in regard to the well and pipeline applications. Their concerns related to the proximity of their lands and residence to the proposed infrastructure, including an area of their lands being within the 100-metre emergency planning zone (EPZ) of the proposed pipeline, proliferation of industrial activity in the area, safety, noise, and the potential contamination of their water

[2] 2003 ABQB 456. *Court* was a judicial review of a decision of the Environmental Appeal Board (**EAB**) to dismiss a notice of appeal, a regulatory process very similar to the AER's request for regulatory appeal process.
[3] *Court*, at para 69.
[4] *Court*, at para 71.

supply. On September 23, 2021, the AER considered Tamarack's applications and the SOCs. It determined that the concerns raised did not require a hearing on the applications, and decided to issue the Licences without conducting a hearing. The Ambroses then filed this regulatory appeal request, which raised concerns that are the same or similar to those raised in their earlier SOCs.

Tamarack's pipeline is licensed to carry oil-well effluent with a maximum hydrogen sulphide (H^2S) content of 10 mol/kmol. The corresponding EPZ for the pipeline is 100 metres, or 0.1 km. Tamarack's well is licensed as a crude oil production well with a maximum H^2S content of 2 mol/kmol to be located at 27-072-09W5M. The corresponding EPZ for the well is 30 metres, or 0.03 km.

The Ambroses submit that they are directly and adversely affected by the AER's decision to issue the Licences, made without a hearing, and are therefore eligible persons to request a regulatory appeal. Tamarack disagrees.

The Ambroses submit they are directly and adversely affected because:

- They own the lands and live in close proximity to the proposed sites;
- Their lands are within the 100-metre EPZ of the pipeline and there is a possibility of evacuation from their lands. The EPZ is an infringement on their property;
- They are limited in the use and enjoyment of their lands due to safety concerns because their walking trail is just within their property line and therefore within the pipeline EPZ; and
- There is a potential for increased noise and odours on their lands and home.

When determining whether someone is directly and adversely affected for the purposes of a request for a regulatory appeal, information about how that person uses the area they are concerned about, how the project will affect the environment, and how the effect on the environment will affect the person's use of an area are all important factors. The more closely these elements are connected (*i.e.*, their proximity), the more likely it is that the person is directly affected. Therefore, the Ambroses must demonstrate that there is a potential or reasonable probability that they may be adversely impacted or harmed by the decision to issue Tamarack's Licences in order to be an "eligible person" to request a regulatory appeal.

Close Proximity to the Proposed Sites

The Ambroses own the lands in the NW 1/4 of section 26-72-09 W6M. Both the well and the pipeline are located on lands adjacent to the Ambroses' lands. Previously, the Ambroses lived in a residence on their lands, but they have confirmed that, as of late October 2021, this is no longer the case. As such, although the Ambroses may have lived "in close proximity to the proposed sites" as they submitted at the time that they initially filed their RRA on October 22, 2021, this is no longer accurate.

The Ambroses refer to their new residence as "interim", implying they intend to return to their previous residence, but do not provide any related information or timeframe for their return. The Ambroses still own their lands, and state that their adult child and his family now reside on their lands as caretakers.

Tamarack is required by *Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry* (Directive 071) to calculate an EPZ in respect of both the well and the pipeline using the AER's ERCBH2S computer software. Directive 071 defines an EPZ as "a geographical area surrounding a well, pipeline, or facility containing hazardous products that requires specific emergency response planning by the licensee".[5] Both Tamarack's well and pipeline are to be located on adjacent lands to the Ambroses' lands. As stated, the EPZ for the well is 0.03 km and the EPZ for the pipeline is 0.1 km. No part of the Ambroses' lands is within the EPZ for the well, however the EPZ for the pipeline extends onto the Ambroses' lands. The residence on the Ambroses' lands is not located within the EPZs for the well or the pipeline.

In their regulatory appeal request, the Ambroses raise general safety concerns. These safety concerns are addressed by Directive 071 which include the relevant well and pipeline safety requirements Tamarack must comply with. Directive 071 provides the requirements which Tamarack is required to meet in order to effectively implement its required Emergency Response Plan and respond to an emergency at the well or the pipeline.

In the event of an emergency at the pipeline, if the Ambroses were physically located on the area of their lands that is within the pipeline EPZ, they may be required to evacuate from that area if evacuation were deemed necessary to protect them. But the fact alone that the EPZ for the pipeline covers a portion of the Ambroses' lands does not equate to a direct and adverse effect on the Ambroses: the Ambroses must demonstrate how they use the lands covered by the EPZ, and how that use is affected by the presence of the EPZ. As outlined below, they did not demonstrate this.

The Ambroses submit they are limited in the use and enjoyment of the portion of their lands that the pipeline EPZ covers due to their safety concerns. The Ambroses state that they have a walking trail that traverses the area of their lands covered by the EPZ, and submit that there is a possibility of evacuation from that part of their lands due to the pipeline EPZ. However, the Ambroses do not indicate a direct and adverse connection between their use of that area of their lands as a walking trail and the EPZ, or otherwise provide further context for the AER.

For example, the Ambroses have not submitted that the presence of the EPZ prevents or adversely impacts the use of their walking trail, nor have they raised concerns regarding egress from the area of the EPZ or with Tamarack's ability to carry out its emergency response plan in the event of an emergency. While the Ambroses submit that their FOIP request brought to light issues regarding safety and emergency response that need to be addressed in a hearing, they provide no further detail for the AER to consider when determining whether the Ambroses are an "eligible person" to request a regulatory appeal.

[5] ERCBH2S: A Model for Calculating Emergency Response and Planning Zones for Sour Gas wells, Pipelines, and Production Facilities, Overview, December 2010.

In regard to the Ambroses' submission that the EPZ has limited the use and enjoyment of their lands, the Ambroses did not explain what they mean by "limited the use and enjoyment of their lands". Having lands within an EPZ does not preclude the Ambroses from using that land for activities such as farming or from walking on trails on that land or in the area.

Additionally, the Ambroses submit that although they are not within the EPZ of the well, in the event of an emergency at the well, they could still be affected. The Ambroses raise concerns associated with a fire that occurred in April 2021 at an Anegada site not located in proximity of their lands as an example of how areas of land not covered by an EPZ can still potentially experience impacts from emergency or safety events on lease at an energy resource development site.

The Ambroses concerns in this regard are general in nature, and are not connected to Tamarack's operations. In the event of a fire at the well or pipeline, Directive 071 would provide the requirements and emergency preparedness guidance for Tamarack to follow in response. The Ambroses did not raise concerns regarding the sufficiency of Tamarack's emergency preparedness or response.

Given the general nature of the concerns raised by the Ambroses with respect of safety concerns generally and to their lands covered by the pipeline EPZ specifically, the AER is if the view that the Ambroses have not established sufficient connection between the decision to issue the Licences and the potential impacts they are concerned with. The Ambroses have not demonstrated there may be an adverse impact on their use of their lands where the pipeline EPZ overlaps a portion of their lands, or that they are directly and adversely affected.

Water supply, Contamination and Compliance

The Ambroses raise concerns about impacts to their water supply and contamination. There is a spring located 83.1 meters from the proposed well and a water well 103.8 meters from the proposed well. They are concerned that the spring and water well may be contaminated by the oil well, given the shallow nature of the water well and the proximity of the spring and water well to the oil well. The Ambroses state that they have provided documented incidences of Tamarack's past failures to comply with AER requirements and that the testing of their well water committed to by Tamarack will not ensure compliance by Tamarack in regard to its water-related regulatory requirements.

The AER notes that the Ambroses did not provide information in regard to how the water spring is currently used or has been previously used. Tamarack is required to follow AER requirements that surface casing be set and cemented to a depth that is intended to protect the deepest aquifer. Tamarack has committed to testing the chemistry of the spring and water well in question before and after drilling operations, as well as performing a complete well flow test, which will be performed as a backup mitigation if the testing is not found suitable. The AER is of the view that Tamarack's past noncompliance on other sites is unrelated to the subject Licences, and is not relevant to the question of whether the Ambroses are an "eligible person" for the purposes of a request for regulatory appeal.

Noise and Odours

The Ambroses also raise concerns about noise and odours. They submit that the noise of the drilling at the existing pad site at 3-27-72-9 W6M can be heard at night. These are operational issues, and Tamarack must adhere to the requirements of AER *Directive 060: Upstream Petroleum Industry Flaring, Incineration and Venting* and AER *Directive 038: Noise Control*. Any concerns the Ambroses have about Tamarack's operations should be reported to the AER Grand Prairie Field Centre.

Cumulative Effects and Proliferation

The Ambroses make numerous submissions regarding cumulative effects from development and proliferation in the area of their lands. They state that Tamarack's applications should have been considered using the AER's Integrated Decision Approach, and imply that all applications for energy resource activities in proximity to their lands should be considered using the Integrated Decision Approach and also that the AER should have considered an application by Tamarack for an additional well noted on a sketch in the well application, even though no such application was filed. They submit that the actions of the AER are an infringement of their Charter rights; however they do not explain which right(s) or give further details in this regard.

The Ambroses' submissions regarding cumulative effects and proliferation are general in nature and policy oriented. The AER notes that a regulatory appeal request is not the forum for the Ambroses to argue Alberta government policy in respect of the cumulative effects of energy resource development.

The Ambroses submissions in respect of the Integrated Decision Approach mischaracterize the AER's legal authority and jurisdiction. It is available for applicants to choose to submit an integrated application to the AER for consideration using the Integrated Decision Approach, but while some applicants may choose to do so based on the nature of their specific projects, the AER cannot require that applicants file all applications in respect of a project at once or file one integrated application—including, as the Ambroses imply, all applications for possible future expansions or connected projects, whether those applications are made or will be made by the same applicant or other applicants.

Subsection 30(2) of REDA provides the AER the authority to combine applications made to it "under an energy resource enactment or a specified enactment in respect of an energy resource activity …with any other application under an energy resource enactment or a specified enactment in respect of an energy resource activity" to be considered by the AER "jointly or separately, as the [AER] considers appropriate." However, the AER's legal authority under s. 30(2) is only in respect of applications that have been filed: it does not provide the AER with the power to compel applicants to file all possibly relevant applications at once, or refuse to consider applications that have been filed until possible future applications are made, whether by the same applicant or other possible applicants who may wish to purse energy resource activities within proximity of each other.

The Ambroses submit that due to the proliferation of energy resource activities in their area, the stresses and safety concerns became too great, so that they had no choice but to move "to preserve some quality of life". The Ambroses submit that they felt they had no choice but to relocate given their specific circumstances, and that their relocation has caused financial and mental distress. The AER notes that the adverse effects that the Ambroses state they have experienced are not direct effects of the decision to issue the Licences. While the reasons the Ambroses provide for making their choice are personal and subjective, the reasons are not the direct result of Tamarack's well or pipeline and the AER's decision to approve the applications, and do not demonstrate that the Ambroses are directly and adversely affected for the purposes of section 36(b)(ii) of REDA.

Overall, the Ambroses raise concerns that are the same or similar to those raised previously in their SOCs filed in respect of the Applications. The AER is of the view that the Ambroses have not demonstrated that they may be directly and adversely affected by the AER's decision to issue the Licences. This is because their concerns are general in nature and they did not provide sufficient information detailing how they may be directly and adversely impacted. As a result, the Ambroses are not an "eligible person" as required by section 36(b)(ii) of REDA, and have failed to meet this requirement to request a regulatory appeal.

Conclusion

For the above reasons, the AER finds the Ambroses are not an "eligible person" as required by section 38(1) and defined in section 36(b)(ii) of the REDA, and the Ambroses have failed to meet all the requirements to request a regulatory appeal of the decision to issue Licence Nos. 60940 and 0501330.

Accordingly, as the Ambroses have not met the requirements for a regulatory appeal, the AER has decided to dismiss the Ambroses' request for regulatory appeal.

Sincerely,

<Original signed by>

Paul Ferensowicz
Principal Regulatory Advisor

<Original signed by>

David Helmer
Senior Advisor, Regulatory

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Isaac Amponsah
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