Alberta Energy Regulator

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Via email

January 20, 2023

Mavcon Projects Ltd
Attention: Robert Lotoski

Bonavista Energy Corporation
Attention: Colin Hennel
Tara Foster

Alberta Energy Regulator –
Enterprise Reclamation Group
Attention: Meighan LaCasse, Counsel

Dear Parties:

RE: Request for Regulatory Appeal by Mavcon Projects Ltd. (Request)
Bonavista Energy Corporation (Bonavista)
Alberta Energy Regulator – Enterprise Reclamation Group (ERG)
Application No.: 31386842 (Application)
Reclamation Certificate No.: 31386843, issued December 12, 2021 (Reclamation Certificate)
Locations: 1-14-34-4-W5M and 8-14-34-4-W5M
Regulatory Appeal No.: 1935555

The Alberta Energy Regulator (**AER**) has considered the Request by Mavcon Projects Ltd (**MPL**) brought under section 38 of the *Responsible Energy Development Act* (**REDA**) seeking a regulatory appeal of the AER's decision to issue the Reclamation Certificate to Bonavista (**Decision**). The AER has reviewed MPL's submissions and the submissions of Bonavista, and for the reasons that follow, dismisses MPL's Request pursuant to subsections 39(4)(a) and 39(4)(b) of REDA, as MPL's Request is without merit, and the Decision is in respect of an application, and MPL did not file a statement of concern (**SOC**) in respect of the application in accordance with the *Alberta Energy Regulator Rules of Practice* (**Rules**).

Background

The lands located at 1-14-034-04 W5M and 8-14-34-4-W5M in Mountain View County, Alberta (**Lands**) are owned by MPL. In July 1976, the BEC CAROL 1-14-34-4 well (**Well**) was drilled at the Lands (**Site**). It was placed in production in September 1976 and abandoned in June 2000. Bonavista acquired the Well licence in 2019. Site access was provided partially by way of pre-existing access for another energy resource activity located on the Lands, for which Bonavista is not the licensee, and completed by way of an access road branching from the pre-existing access and extending to the Site.

Bonavista made the Application for a reclamation certificate for the Site and associated access road on November 11, 2021. ERG issued the Reclamation Certificate on December 12, 2021.

On January 17, 2021, MPL filed its Request. The AER requested comments and submissions on the Request from Bonavista and ERG, providing deadlines of February 7, 2022 and February 14, 2022, respectively.

Bonavista responded to the Request on February 4, 2022, and requested that the AER hold the regulatory appeal process in abeyance so that the parties could consider alternative dispute resolution (**ADR**) options (**Abeyance Request**). Later on February 4, 2022, MPL filed a reply submission to Bonavista's response.

On February 11, 2022, after requesting comments from the parties regarding the Abeyance request, the Request process was placed in abeyance, prior to ERG's deadline to provide comments on the Request. After subsequent correspondence to and from the parties, the Request process was taken out of abeyance and resumed on September 20, 2022.

The AER provided deadlines for ERG to provide its comments or submissions on the Request, and for Bonavista and MPL to provide updated submissions regarding the Request. No further submissions were received, and the record of the Request proceeding closed on October 21, 2022.

Reasons for Decision

In order for a request for regulatory appeal to be granted, the request must first be eligible. The test for eligibility is set out in section 38 of REDA:

> 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 parts to the test in section 38. If a request for regulatory appeal meets all three parts of the test, it is an eligible request and may be granted: the AER may decide to conduct a regulatory appeal proceeding based on the request for regulatory appeal. Pursuant to section 4 of the *Responsible Energy Development Act General Regulation,* should the AER grant a request for a regulatory appeal, the regulatory appeal must be conducted with a hearing unless otherwise resolved. If a request for regulatory appeal does not meet all three parts of the test, the request is not eligible to be granted, and a regulatory appeal will not be held.

Even if a request for regulatory appeal satisfies all three parts of the test set out in section 38 of REDA, that does not guarantee that the request for regulatory appeal will be granted and a regulatory appeal proceeding held. Under subsection 39(4) of REDA, the AER may dismiss all or part of a request for regulatory appeal that meets the eligibility test if:

(a) the AER considers the request to be frivolous, vexatious or without merit;

(b) 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) for any other reason the AER considers that the request for regulatory appeal is not properly before it.

The three parts of the test in section 38 of REDA are as follows:

1. "Appealable Decision"

Section 36(a) of REDA defines an "appealable decision". In respect of the Request, the relevant definition is contained in section 36(a)(i). It states that an appealable decision means:

> a decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 91(1) of the *Environmental Protection and Enhancement Act,* if that decision was made without a hearing

EPEA is a "specified enactment"[1] for which the AER has jurisdiction to regulate in respect of energy resource activities. Subsection 91(1)(i) of EPEA provides, when regarding the AER, that:

> where the Regulator issues a reclamation certificate under section 138… the operator and any person who receives a copy of the certificate… under [REDA and its regulations and rules] may submit a notice of appeal

Accordingly, for this matter, section 36(a)(i) of REDA reads as:

> an appealable decision means a decision of the Regulator to issue a reclamation certificate under section 138 of EPEA, if that decision was made without a hearing.

2. "Eligible Person"

Section 36(b) of REDA defines an "eligible person". In respect of the Request, the relevant definition is contained in section 36(b)(i), which defines an eligible person as "a person referred to in clause (a)(i)".

As with part one of the test, the relevant provision referenced in section 36(a)(i) of REDA is subsection 91(1)(i) of EPEA:

> where the Regulator issues a reclamation certificate under section 138… the operator and any person who receives a copy of the certificate… under [REDA and its regulations and rules] may submit a notice of appeal

In respect of the Request, any person who, under the provisions of REDA and its regulations and rules, receives a copy of the reclamation certificate that was issued, without a hearing, by the AER under section 138 of EPEA, is an eligible person to request a regulatory appeal.

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[1] REDA, s 1(1)(s)

3. "In Accordance with the Rules"

Subsection 30(3)(h) of the Rules provides that a request for regulatory appeal made in respect of a reclamation certificate issued under section 138 of EPEA must be filed no later than one year after the certificate is issued.

The Request is Eligible

In respect of the test set out in section 38 of REDA, the Reclamation Certificate was issued without a hearing, MPL was provided a copy of the Reclamation Certificate in accordance with the AER's requirements, and MPL's Request was received within one year of the issuance of the Reclamation Certificate. Accordingly, MPL's Request meets all three parts of the test and is eligible to be granted. Bonavista did not suggest otherwise in its submission to the AER.

Should the Request be Dismissed because it is Without Merit or Not Properly Before the AER

An eligible request for regulatory appeal may be dismissed for any or any combination of the reasons set out in subsection 39(4) of REDA. Pursuant to subsection 39(4)(a) of REDA, the AER may dismiss a request for regulatory appeal if the AER considers the request to be frivolous, vexatious or without merit.

MPL's grounds for its Request were, respectively, 1) "[the] reclamation was never completed, there were water issues and other requirements that were never addressed," and 2) "[all] of the reclamation documentation was lost because of the location changing hands a few times, thus, there is no way that Bonavista can say they have completed the reclamation." MPL requested that reclamation be completed, "surface lease payments stay in place until the work is completed", and, after the spring thaw, an on-site meeting be held between MPL, the AER, Bonavista, and the licensee for the pre-existing access to the Lands.

In addition to submitting that the Request should be dismissed due to MPL not filing an SOC in respect of the Application, Bonavista submitted that request should be dismissed because the "[the Application] provided the necessary information for the AER to issue a Reclamation Certificate," and detailed parts of the Application in support of this statement, including requisite professional reports, the record of site condition, and the detailed site assessment report in respect of the relevant reclamation criteria for the site.

In reply to Bonavista, MPL summarized its understanding of a Phase III environmental site assessment (**ESA**) report from 2011 in its possession that was prepared for a previous licensee of the Site. MPL provided this report to the AER and Bonavista over ten weeks later. The Phase III ESA report discussed remediation activities undertaken at the Site in 2008 and 2009, which included the excavation of over 7,000 tonnes of impacted soil from the Site, and subsequent soil and groundwater sampling.

On September 15, 2022, Bonavista submitted that the Phase III ESA report from 2011 had previously been unavailable to it, but that upon review, the report supported that "assessment and remediation work at the site had been adequately completed."

While MPL summarized its understanding of the report for the AER, in its submissions MPL did not discuss the contents of the Application in respect of the Site after 2011, including a subsequent ESA report that references the 2011 Phase III ESA, or the state of the Site at the time of the Request. It did not provide the AER any explanation or context as to how it understood reclamation of the Site to be incomplete at the time of the Application or its submissions, what reclamation requirements it believed to be unaddressed, or whether it believed there to be water issues at the Site at the time of the Application or its submissions.

Without any relevant factual or legal basis on which to assess MPL's Request, the AER is unable to determine the merit of MPL's Request, or whether MPL would have any reasonable chance of success at regulatory appeal. On its face, MPL's ground regarding incomplete reclamation work, water issues and unaddressed requirements is without merit.

MPL's second ground for its Request regarding lost reclamation documentation is equally without merit, and may reflect MPL's misunderstanding of the reclamation and conservation process and requirements in Alberta, and the requirements to obtain a reclamation certificate from the AER.

MPL argues that because Bonavista did not have historic ESA reports that were prepared for previous licensees of the Well, including the 2011 Phase III ESA Report, Bonavista could not demonstrate that the lands were reclaimed. However, whether the lands have been reclaimed is an assessment that is conducted based on the relevant legislative and regulatory requirements and reclamation criteria, not on whether the records of activities undertaken over the life of the underlying energy resource activity site were preserved and available to the operator.

In respect of application requirements, while various relevant historical records are required for a reclamation certificate application, the AER understands that not all historical records will be available to every operator. While the AER expects operators to exercise due diligence and best practices in obtaining and maintaining records, numerous factors may influence what records an operator will have available to it. Where necessary records are unavailable, additional work or explanations may be required for the purposes of determining and demonstrating whether the lands have been reclaimed and to meet the requirements of a reclamation certificate application made to the AER, but a lack of historical records is not fatal to an application. If it were, any lands in respect of which historical records were damaged, misplaced, or never made due to changing practices over the years could never receive a reclamation certificate from the AER.

Were Bonavista in possession of the 2011 Phase III ESA Report at the time of its Application, that report would have been required to form part of the Application, pursuant to Alberta Energy Regulator *Specified Enactment Direction 002: Application Submission Requirements and Guidance for Reclamation Certificates for Well Sites and Associated Facilities*, but it is clear from the submissions of both parties that Bonavista did not have the 2011 Phase III ESA Report in its possession when it made its Application, and only obtained it from MPL over the course of the Request process. MPL has not submitted to the AER that 2011 Phase III ESA report introduces any question regarding the contents of the Application, the assessment of the reclamation of the Site, or ERG's Decision.

For the reasons above, the AER dismisses the Request pursuant to subsection 39(4)(a) of REDA, as it is without merit. Further, the relief requested by MPL regarding surface lease compensation is not within the AER's power to grant, and has no reasonable chance of success at regulatory appeal. When not agreed between the parties, the determination of compensation for surface access to private land is the jurisdiction of the Alberta Land and Property Rights Tribunal, not the AER. This part of MPL's Request has no merit. Additionally, as the AER is not the regulator granted jurisdiction to decide this part of the Request, the AER considers that it is not properly before it. Had the AER not already dismissed the Request, in full, the AER would dismiss this part of the Request pursuant to subsections 39(4)(a) and 39(4)(c) of REDA, as it is without merit and not properly before it.

Should the Request be Dismissed because no Statement of Concern was Filed in Respect of the Application

Pursuant to subsection 39(4)(b) of REDA, the AER may dismiss a request for regulatory appeal 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".

In its response to the Request, Bonavista submitted that the Request should be dismissed because MPL did not file an SOC in respect of the Application. MPL did not reply to Bonavista's submission on this point or otherwise offer explanation as to why it did not file an SOC in respect of the Application in order to raise any concerns it may have had regarding the Application for the AER's consideration at that time.

Statements of Concern

Pursuant to section 32 of REDA, when an application is before the AER, an SOC may be filed by any person who believes they "may be directly and adversely affected by [the] application", in accordance with the requirements set out in the Rules. Under section 5.3 of the Rules, for most applications, including Bonavista's Application, a person who wishes to file an SOC "must do so no later than 30 days from the

date public notice of the application is provided by the AER". The AER cannot issue a decision on most Applications, including Bonavista's Application, until the time period for filing an SOC has passed.[2]

Subsection 6(1) of the Rules sets out that an SOC must be in writing and must contain:

> (a) a concise statement indicating
> (i) why the person believes that the person may be directly and adversely affected by a decision of [the AER] on the application,
> (ii) the nature of the person's objection to the application, and
> (iii) the outcome of the application that the person advocates;
>
> (b) the location of the land, residence or activity of the person in relation to the location of the energy resource activity that is the subject of the application;
>
> (c) the person's contact information.

When the AER receives an SOC in respect of an application, the AER must ensure the applicant receives a copy of the SOC.[3] The AER provides the applicant the opportunity to respond to the concerns raised in the SOC and, depending on the circumstances of a given application, may request additional information of the applicant or SOC filer or engage in further process to understand the SOC filer's concerns and the applicant's response. The AER considers the SOC filer's concerns, the applicant's response, and any other information provided through the SOC process in addition to all other relevant information and requirements when reviewing and deciding the application, including deciding whether it is necessary to hold a hearing on the application.

It is not only the responsibility of licensees, operators, and other regulated parties to adhere to statutory and regulatory requirements: it is incumbent on the person who may wish to raise concerns in respect of an application before the AER that they file an SOC in accordance with the process provided in the Rules so that their concerns may be considered at the time of the application. Without receipt of an SOC, the AER cannot know that the person has concerns in respect of an application, and cannot consider those concerns when deciding the application. The SOC process helps to ensure the AER has all relevant information before it at the time it decides an application and provides the certainty of notice periods to applicants, any persons who believe they may be directly and adversely affected by an application, and the public.

The request for regulatory appeal process is not a substitute for the SOC process. However, the AER's power to dismiss a request for regulatory appeal pursuant to subsection 39(4)(b) of REDA due to the

[2] Rules, s 5.2
[3] Rules, s 6(3)

requester's failure to file an SOC in respect of the underlying application is discretionary. Although an eligible requester bringing a request for regulatory appeal of a decision on an application may not have filed an SOC in respect of the application, the AER recognizes the requester may, for instance, have been unable to file an SOC in accordance with the Rules due to extraordinary circumstances. The AER expects the person who did not file an SOC to inform the AER why they did not so that the AER may choose whether to exercise its discretion under subsection 39(4)(b) reasonably and with consideration of all the relevant circumstances of the request for regulatory appeal before it.

In respect of its Request, MPL did not explain why it did not file an SOC in respect of the Application or otherwise respond to Bonavista's submission that its Request be dismissed for that reason. Without any acknowledgement or explanation as to why MPL did not meet its statutory and regulatory requirements regarding the SOC process, there is no basis upon which the AER might decide not to exercise its discretion to dismiss the Request pursuant to subsection 39(4)(b) of REDA.

Accordingly, the AER dismisses the Request pursuant to subsection 39(4)(b) of REDA as the Decision is in respect of an application, and MPL did not file an SOC in respect of the Application.

Conclusion

For the reasons above, the AER dismisses MPL's Request pursuant to subsection 39(4)(a) of REDA as MPL's Request is without merit, and pursuant to subsection 39(4)(b) of REDA, as the Request is in respect of a decision on an application, and MPL did not file an SOC in respect of the Application in accordance with the Rules.

Sincerely,

<Original signed by>

Jeffrey Moore
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