

By email only

July 12, 2024

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KMSC Law LLP

Veresen Midstream General Partner Inc.

Attention: Kristian Toivonen

Attention: Hart Proctor

Dear Parties:

**RE: Request for Regulatory Appeal filed by Justin and Heidi Holm
Veresen Midstream General Partner Inc.
Application Nos.: 1948251 & 1948255 (Applications)
Licence Nos.: F21911 & F53592
Location: NW 18-074-12 W6M
Request for Regulatory Appeal No.: 1949916 (Request)**

The Alberta Energy Regulator (AER) has considered Justin and Heidi Holm's (the Landowners) Request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's January 9, 2024 decision to approve the above noted Applications and issue the following approvals to Versen Midstream General Partner Inc. (Veresen):

- Facility Licence Amendment F21911, and
- Facility Licence F53592

(together, the Approvals or Licences)

The AER has reviewed the Landowners' submissions and the submissions made by Veresen.

For the reasons that follow, the AER has decided that the Landowners are eligible to request a regulatory appeal in this matter. Therefore, the request for a Regulatory Appeal is granted.

Legislative Authority for Appeal

The applicable provision of REDA in regard to regulatory appeals, section 38, 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]

In order to be granted a regulatory appeal, the Landowners must meet each of these elements.

Submissions of the Landowners

The Landowners' Request submits:

- that the AER placed an improper reliance on the Noise Impact Assessment provided by Veresen in dismissing of their SOC and issuing the Licences.
- they have not been provided a copy of the Noise Impact Assessment (NIA);
- the Noise Monitoring Survey (NMS) prepared by Patching Associates Acoustical Engineering Ltd. has multiple issues that cast doubt on its finding of the Hythe Gas Plant's compliance with Permissible Sound Levels; and
- in the alternative, taking the NMS at face value, the nighttime comprehensive sound level of the Hythe Gas Plant is 1.1dB below the Prescribed Sound Levels (PSL) prior to almost doubling gas processing capacity, which the Approvals allow.

The Landowners submit that their primary residence is located on the SE 17-074-12-W6M and is within 5km radius of the Hythe Gas Plant, which is a specified area under AER *Directive 038: Noise Control* (Directive 038).

The Landowners submit that they are also located within the Emergency Protection Zone (EPZ) for the existing sour gas facility, which is a 3.32km radius, and that the residence is located approximately 2.2km from the current southeastern boundary of the Hythe Gas Plant.

The Landowners submit that they have not been provided a detailed survey for the precise new boundary of the Deep Cut Expansion to the Hythe Gas Plant, which a *Directive 056: Energy Development Applications and Schedules* (Directive 056) sketch shows being located approximately 400m to the east of the existing eastern boundary of the Hythe Gas Plant.

The Landowners submit that their property line boundary is 1.6 km to the east of the Hythe Gas Plant and that their residence is considered to be a dwelling under Directive 038 as it is a permanently occupied residence. The Holms submit that their close physical proximity to the Hythe Gas Plant, they regularly experience adverse impacts, including Noise, which negatively impacts their enjoyment of their property.

The Landowners submit that on November 27, 2023, Veresen provided them with a copy of the NMS, which indicates that it was requested in response to a specific noise complaint. The Holms submit that that NMS “does not mention, or analyze any additional sound anticipated from the Deep Cut Expansion or debottleneck project...” and that the “...survey is riddled with lack of clarity in methodology, undefined terms and vague statements.”

The Landowners’ Request states that:

“25. Critically, the NMS did not make a finding if the Daytime Survey of CSL met the AER PSL. The NMS only presents a conclusion on half of the noise issues in this respect.

26. The NMS also identified a night (night 21) where the Residual L_{eq} was 38.9dB, or only 1.1dB below the PSL. Multiple other nights recorded the residual L_{eq} in excess of 38dB.

27. In addition, the NMS calculated the CSL at 38.9dB for nighttime conditions, or only 1.1dB below the PSL...”

[emphasis in the original]

The Landowners submit that Veresen has acknowledged that non-compliance with *Directive 038* is a factor that may warrant a hearing to consider noise concerns raised in the SOC and that the AER ignored evidence disclosed in the NMS showing noise levels above PSLs on multiple days and nights for extended periods of time. They suggest that this fact alone justifies a hearing to allow the issues raised in the SOC to be heard.

The Landowners submit that the AER relies on Veresen’s commitments to noise mitigation for the new projects were also relied on in issuing the Approvals, but that the commitments are non-binding and general in nature. The Landowners submit that for this reason, the AER erred in relying on Veresen’s non-binding commitments in issuing of the Approvals.

The Landowners further submit that considering the AER’s reliance on the findings of the NIA as a reason to dismiss the SOC, and the Landowners’ direct and adversely affected status, refusing to provide the NIA to the Appellants offends the laws of natural justice, and as the Landowners’ residence is only 2.2km from

the existing Hythe Gas Plant boundary line, this will decrease if the new facility is constructed, and they have already experienced adverse sound levels in excess of PSLs on an on and off period for multiple years.

Submissions of Veresen

Veresen submits that the Landowners' Request seeks to overturn the SOC Decision, which is not an appealable decision under REDA, and submits that the AER may dismiss the Landowners' Request on this basis alone. Veresen also provides submissions on the merits of a request for regulatory appeal of the AER's decision to issue the Licences.

Veresen submits that it has made extensive efforts to consult and engage with the Landowners regarding the Deep Cut Expansion and Debottleneck Project which are the subject matter of the Licences. Veresen submits that its NIA was prepared in accordance with Directive 038, and that it included predicted cumulative sound levels at three separate residences located within 1500 metres of the Hythe Gas Plant. Veresen submits that the Landowners' residence is approximately 2400 metres from the Hythe Gas Plant, and that the results of the NIA indicate that with the proposed noise control measures in place, the expanded Hythe Gas Plant is expected to comply with daytime and nighttime PSLs following completion.

Veresen submits that the AER's decision to issue the Licences is an "appealable decision" under s. 38 of REDA but submits that the Landowners' Request is not properly before the AER on the basis that the Landowners are not "eligible persons" under section 38 of REDA as they have not demonstrated that they are directly and adversely affected by the issuance of the Licences. Veresen further submits that the Landowners' Request is without merit as it is based on a number of alleged deficiencies in the NMS, that it is based upon concerns in relation to the current noise conditions of the Hythe Gas Plant and not with the Applications, and it repeats the concerns filed in the SOC which were already considered and addressed by the AER.

Not Eligible Persons

Veresen submits that the Landowners are not "eligible persons" and there is nothing in the Landowners Request that demonstrates that they are likely to be harmed by the Project. Veresen submits that the Landowners' residence is approximately 2400 metres away from the Hythe Gas Plant, which is almost twice the distance of the farthest residence that was included in the NIA. Veresen notes that Directive 038 is based on a 1.5 km threshold, and the Landowners' assertions that their residence is located within a "specified area" under Directive 038 are inconsistent with the Directive 038 requirements.

Veresen submits that the location of the Landowners' residence being within the Emergency Planning Zone (EPZ) is not relevant to the issues raised in the Landowners' Request which relates primarily to concerns regarding noise and procedural fairness.

Regarding the concerns raised in the Landowners Request related to the enjoyment of other areas of their property for gardening, hunting, etc., Veresen submits that *Directive 038* does not guarantee that noise from a facility will not be heard by nearby residents, rather it aims to not adversely affect indoor noise levels for residents that live near a facility. Veresen further submits that the Landowners' have not provided any evidence to support these concerns and the concerns are general in nature.

Veresen submits that the Landowners have failed to establish that they are directly and adversely affected by the decision to issue the Licences and that the AER was entitled to rely on the NIA in issuing the Licences.

Without Merit

Even if the Landowners are eligible persons, Veresen submits that the Landowners' suggestion that the AER improperly relied on the NIA is without merit. Veresen states that the Landowners' Request conflates the purposes of the NIA and the NMS. It further submits that the NMS was not prepared for the purposes of the Applications and did not consider noise from the proposed projects as those were out of its scope. Veresen submits that the NMS confirms that the existing Hythe Gas Plant meets the daytime and nighttime PSLs per *Directive 038*.

Veresen argues that the Landowners' Request incorrectly asserts that the proposed projects will double the gas processing capacity at the Hythe Gas Plant. Veresen submits that the proposed projects will increase the capacity by 7.4%. Veresen states:

“In this respect, it is important to note that sound power levels follow a logarithmic rather than a linear scale. Increasing cumulative sound levels from 38.9 dB to 40 dB would require an approximately 29% increase in perceived sound compared to an approximately 2.8% increase in perceived sound that a linear scale would require. Even if the AER accepts the methodology relied on in the Appeal Request (i.e., that increased processing capacity equals increased sound power levels), given the relatively small increase in gas processing capacity (and equipment installed) associated with the Projects, a 29% increase in perceived sound is highly unlikely (which is shown in the completed NIA).”

Veresen submits that the NIA was prepared in support of the Applications, not the NMS, and the AER confirmed that the NIA is technically complete and demonstrates that the Projects will comply with *Directive 038*.

Veresen submits that the Landowners' Request is based on speculative and unsupported statements regarding the noise levels of the existing Hythe Gas Plant and the assumption that increased production will lead to noise levels in excess of those permitted under *Directive 038*. Veresen submits that the Landowners' Request does not relate to any meritorious grounds that require a regulatory appeal to be held.

Reasons for Decision

Appealable Decision

The granting of the Applications are appealable decisions, as the Licenses were issued under the *Oil and Gas Conservation Act* – an energy resource enactment – without a hearing.

In Accordance with the Rules

The Request relating to the Applications was filed in accordance with the time requirements set out in Section 30(3)(m) of the Rules. Therefore, the totality of the Request was filed in accordance with the Rules.

Eligible Person

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]...

To be eligible for a regulatory appeal, the Landowners must demonstrate that they are directly and adversely affected by the AER's decision to issue the Licenses.

The courts have held that the appellant must prove on a balance of probabilities that he or she is personally, directly affected by the approval being appealed.¹

The Landowners have submitted that they are directly and adversely affected in their daily lives by the noise which emanates from the Hythe Gas Plant, even under current conditions. The NIA and NMS both confirm that the nighttime noise levels are not insignificant.

¹ Court v. Alberta (Environmental Appeals Board). 2003 ABQB 456, at para. 71

Veresen submits that the NMS is not relevant as it was prepared in response to concerns about the current conditions existing at the Hythe Gas Plant (in response to a complaint), whereas the NIA was prepared in support of the Applications. Whether or not it was prepared for the purpose of the Applications, the NMS constitutes new information which was not available to the SDM who dismissed the SOC of the Landowners. Furthermore, the NMS, which demonstrates current noise levels, is clearly relevant as it gives a baseline for actual noise levels, prior to the installation of additional equipment which undoubtedly will increase the noise emanating from the facility.

Veresen also submits that the NMS confirms that the existing Hythe Gas Plant meets the daytime and nighttime PSLs per *Directive 038*.² However, the NMS indicates that the comprehensive sound level (CSL) is at 38.9 dBA for Residence J (the Landowners' dwelling),³ which is very near the allowable limit. It is also reasonable to conclude that an expansion of the facility will create additional noise, in circumstances in which there is virtually no remaining buffer in the noise limit. In short, there is a reasonable possibility that the expansion will cause noise levels to exceed *Directive 038* requirements for the Landowners' dwelling.

Even in reviewing the NIA, it is interesting to note that the NIA appears to estimate that nighttime noise at residence 3 (1270 metres from the facility site)⁴ will be more or less the same as the current measured nighttime noise at the Landowners' dwelling which is more than 1000 m away. This raises questions as to the validity of the NIA.

Based on the foregoing, the Landowners have demonstrated that they are directly and adversely affected by the Approvals.

² Veresen Submission, para. 28

³ NMS, page 8

⁴ NIA, page 3

Accordingly, the AER has determined the Landowners are an eligible person for the purposes of section 36(b)(i) and they, therefore, have met each of the requirements of section 38 of REDA. Their Request is hereby granted.

Sincerely,

<Original signed by>

Elizabeth Grilo
Senior Advisor, Regulatory Enhancement

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Jeffrey Moore
Senior Advisor, Legal/Regulatory

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Tyler Callicott
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