

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 Peter and Teresa von Tiesenhausen
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.: 1949934 (Request)**

The Alberta Energy Regulator (AER) has considered Peter and Teresa von Tiesenhausen (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 Veresen 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 NIA provided by Veresen in dismissing of their SOC and issuing the Licences.
- The Landowners have not been provided a copy of the NIA for their review;
- The 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
- The AER did not consider their concerns related to facility upset events, odour or light pollution when dismissing their SOC without a hearing.

The Landowners submit that their primary residence is located on the NE 17-074-12-W6M and is within 5 km 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 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 eastern 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* sketch shows being located approximately 400m to the east of the existing eastern boundary of the Hythe Gas Plant, they submit that their property boundary is 1.6km to the east of the Hythe Gas Plant.

The Landowners submit that their residence is a dwelling under *Directive 038* as it is a permanently occupied residence, and they live an active outdoor lifestyle on their property including gardening, cross country skiing, hiking on 12 km of maintained trails, foraging and propagating berries, and bird watching,

in addition, Peter von Tiesenhausen is an internationally recognized artist and has many art installations on the property.

The Landowners submit that on November 25, 2023, Veresen provided them with a copy of the NMS, which indicates that the NMS was requested in response to a specific noise complaint filed by the Landowners. The Landowners submit that the 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 submit that the NMS does not clearly explain how the sound levels were calculated from isolated data, how the sounds levels were measured, the methodology used to calculate the Comprehensive Sound Level of 36.2 dBA, and that the NMS fails to define what constitutes an abnormal noise event, etc. The Landowners submit that the NMS did not make a finding if the Daytime Survey of CSL met the AER’s PSL.

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. This 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 and that for this reason, the AER erred in relying on Veresen’s non-binding commitments in issuing of the Approvals.

The Landowners submit that their SOC raised the issue of plant upset events causing flaring up to 300 feet in height and lasting an hour at a time, these events were not accounted for in the NMS, and neither the AER or Veresen has answered their concern raised in the instance of 17 distinct upset events within a 20-day period, nor has the AER addressed the concern raised from the reaction furnace incident that melted the sulphur plant at Hythe Gas Plant.

The Landowners further submit that they are located directly downwind from the Hythe Gas Plant, with the increased volumes of sour gas that will be processed because of the Approvals, there is an increased safety risk.

The Landowners submit that they are eligible persons and are directly and adversely affected by the decision, and they request that the AER set the matter down for a hearing, require binding noise mitigation from Veresen and penalties for non-compliance of the same, an independent expert be hired to review the

NMS and complete an independent Noise Assessment at their residence, or provide an independent expert to test sound levels at their residence.

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 section 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 and impacts on Mr. von Tiesenhausen's art installations, 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*.

Existing Operations

Veresen argues that the concerns regarding the potential for the Project to worsen the alleged adverse effects associated with the Hythe Gas Plant are not supported by any evidence in the Landowners' Request and are speculative. Additionally, Veresen submits that these concerns, and those raised in relation to emissions, flaring and light are in relation to the current operations at Hythe Gas Plant, and are beyond the scope of the Approvals, and cannot form the basis of a request for regulatory appeal of the same.

Veresen submits that the only new issue raised in the Landowners' Request that was not raised in their SOC, is the potential for elevated safety risk given the volumes of sour gas being processed as part of the Debottlenecking Project; Veresen submits that this concern is general in nature, and that it has a comprehensive Emergency Response Plan and facility process safety system which reduces the likelihood of such emergencies that would impact local stakeholders.

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.

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 36.2 dBA at Residence K³ (the Landowners’ dwelling), 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

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

² Veresen Submission, para. 28

³ NMS, page 8

⁴ NIA, page 3

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.

Accordingly, the AER has determined the Landowners are an eligible person for the purposes of section 36(b)(i) and, therefore, they 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

<Original signed by>

Jeffrey Moore
Senior Advisor, Legal/Regulatory

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Tyler Callicott
Director, Enforcement & Orphaning