

Via Email

June 24, 2024

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KMSC Law LLP

Bennett Jones LLP

Attention: Kristian Toivonen

Attention: Daron K. Naffin

Dear Sirs:

**RE: Request for Regulatory Appeal by Brennan Zurock & Rachel Smith
Tourmaline Oil Corp. (Tourmaline)
Application Nos.: 32573426 and 32576312 (Applications)
Well Licence Nos.: 0513070 and 0513071 (Licences)
Surface Location: 9-22-079-07 W6M (Surface Location)
Request for Regulatory Appeal No.: 1950546 (Regulatory Appeal)**

The Alberta Energy Regulator (AER) has considered the request of Brennan Zurock and Rachel Smith (Zurock & Smith) made under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER's decision to approve the Applications and issue Tourmaline the Licences. The AER has reviewed Zurock & Smith's submissions dated April 3, April 4, and April 4, 2024, and the submissions made by Tourmaline on April 25, 2024. Zurock & Smith did not submit a reply to Tourmaline's responses.

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

Legislative Framework

With regard to a regulatory appeal, the applicable provision of *REDA* is section 38, which 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]

There are three components to subsection 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.

All three components must be met in order to be eligible to request a regulatory appeal under subsection 38(1).

The term “eligible person” is defined in subparagraph 36(b)(ii) of *REDA* to include:

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

Interpretation of the Legislative Framework

The AER typically applies a “may be directly and adversely affected” test when determining eligibility to request a regulatory appeal under section 38 of *REDA*. To do otherwise would be to impose a near impossible threshold on requesters, since the actual effects resulting from a decision, especially to issue an approval which authorizes an underlying physical activity, often cannot be known with any certainty in advance.

In *Court v Alberta (Environmental Appeals Board)*¹, the then Court of Queen’s Bench of Alberta examined the interpretation of the phrase “is directly affected” as it is used in section 95 of the *Environmental Protection and Enhancement Act (EPEA)*. Subparagraph 95(5)(a)(ii) of *EPEA* allows the Environmental Appeals Board (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”.² Further, the Justice found that “the appellant need not prove, by a preponderance of evidence, that he or

¹ *Court v Alberta Environmental Appeal Board*, 2003 ABQB 456 [Court]. *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.

² *Ibid* at para 69.

she will in fact be harmed or impaired by the [decision]. The appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm.”³ [emphasis added]

Based on the above, the “is directly and adversely affected” requirement under subparagraph 36(b)(ii) of the *REDA* does not require a higher standard of demonstrating actual effect.

Background

Tourmaline intends to drill and complete the wells from the Surface Location. Both Licences state an emergency planning zone (EPZ) of 320 metres.

Zurock & Smith’s submissions

Zurock & Smith submit that they reside approximately 610 metres from the Surface Location where the Licences authorize Tourmaline to drill and complete two sour gas wells. Zurock & Smith submit that their residence is a specified area under *Directive 038: Noise Control*; and is within the notification zone specified in *Directive 056: Energy Development Applications and Schedules*. By considering the location, the directives, and the issues raised in their statement of concern, Zurock & Smith argue the Licences will directly affect them “in an adverse fashion”, as set out by the Court of Appeal of Alberta in *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*.⁴ Zurock & Smith reference a previous AER decision as authority that certain proof that they will be affected is not required, but rather the AER requires reliable information demonstrating a reasonable potential or probability that they will be affected.⁵ Zurock & Smith argue that the test in *Court* is appropriate to determine if they may be directly and adversely affected.

Zurock and Smith rely on a previous AER decision as authority that “*REDA* and the *Responsible Energy Development Act*, SA 2012, c R-17.3 grant a clear right of regulatory appeal; only in extraordinary and obvious circumstances should a request for regulatory appeal not be granted.”⁶

³ *Ibid* at para 71.

⁴ *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at para 79.

⁵ AER letter denying Ambros Request for Regulatory Appeal No.: 1934765 against Tamarack Acquisition Corp.’s pipeline and well licences nos. 60940 and 0501330 (8 August 2022) [AER dismisses Ambros Request for Regulatory Appeal].

⁶ AER letter granting Trenchie Request for Regulatory Appeal No.: 1941706 against Imperial Oil Resources Limited’s reclamation certificate no.: 30672381 (8 May 2023) [AER grants Trenchie Request for Regulatory Appeal].

Zurock & Smith argue that they have always held themselves out to be an affected party when communicating with Tourmaline. Zurock & Smith further argue that the *Coulas v Ferus Natural Gas Fuels Inc.* case is similar.⁷ Noting “Ms. Coulas, resided within 1.5 km of an existing Ferus facility [and] ... the AER “may have acted unreasonably or unlawfully in holding that this level of interest was insufficient to make the applicant “directly and adversely affected” by the licensing decision made without a hearing” and overturned the AER’s decision” to dismiss Ms. Coulas’ request for regulatory appeal. Zurock and Smith cites from an AER decision that considers “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” as important factors, and that “[t]he more closely these elements are connected (i.e., their proximity), the more likely it is that the person is directly affected.”⁸

Zurock & Smith stated that a suspected flare stack burp at a Tourmaline operated wellsite in the area caused a wildfire in the summer of 2023. Zurock & Smith submit the Licences will have similar infrastructure installed on site.

Although not including the argument above, the concerns Zurock & Smith raised and the impacts they have submitted in their regulatory appeal request are substantially the same as those raised previously in their statement of concern (SOC) submitted against the Applications.⁹

In fact, Zurock & Smith include the SOC that they had submitted along with a third person (the SOC Requesters) on November 21, 2023, as evidence that they are directly and adversely affected, as well as the AER’s decision that a hearing is not required to consider the concerns outlined in their SOC. The AER acknowledges the concerns put forward by the SOC Requesters, include but are not limited to:

- safety concerns about the proximity of Zurock & Smith’s residence to Tourmaline’s sour gas wells;
 - noting the H₂S release rate is ≥ 0.01 m³/s and < 0.3 m³/s, with a maximum concentration of 15.9 moles H₂S per 1 kilomole of sour gas;

⁷ *Coulas v Ferus Natural Gas Fuels Inc.*, 2016 ABCA 332 at para 10 [*Coulas*].

⁸ AER dismisses Ambros Request for Regulatory Appeal, *supra* note 5.

⁹ AER letter to KMSC Law LLP (Brennan Zurock, Rachel Smith, and Dwayne Drzewecki) – Statement of Concern No. 32417 on Application Nos. 32573426 and 32576312, dated March 4, 2024.

- describing three malfunctions in the area on wells that are now operated by Tourmaline, where Zurock & Smith state there was “extensive sour gas drift ...(far in excess of the emergency protection zone)”:
 - two malfunctions resulted in a release of gas;
 - one malfunction released sour gas, crude oil, and produced water — and Zurock & Smith noticed a strong smell of condensate out their front door that burned their eyes;
- a lack of detail on the proposed surface infrastructure for the Licences;
- Tourmaline’s commitment to fire safety and prevention and whether it has appropriate mitigation measures,
 - recounting an example from 2023 of a fire caused by equipment malfunction at a site leased by Tourmaline;
- noise concerns during construction and operation;
- water quality including concerns with:
 - the quality of the water well serving Zurock & Smith’s residence,
 - surface runoff with contamination from the project draining into Zurock & Smith’s dugout,
 - the risk of aquifer contamination during hydraulic fracturing, and
 - Tourmaline not committing to setting surface casings using potable water during proposed drilling operations thereby creating a risk that non-potable water may contaminate the aquifer as Tourmaline drills through same.
- a diminution in land value, alleging the Licences will compromise the salability of Zurock & Smith’s home quarter.

The SOC Requesters desire Tourmaline to re-route the Licences away from their residences. In the request for regulatory appeal Zurock & Smith seek (1) an AER order overturning its decision dismissing the SOC without a hearing, and remitting a determination of the issues raised in the SOC to a hearing; and (2) reimbursement of Zurock & Smith’s reasonable legal fees, disbursements and GST.

Tourmaline's submissions

Tourmaline submits that Zurock & Smith's request for regulatory appeal is not properly before the AER as (1) it seeks an appeal of the AER's decision not to hold a hearing on their SOC — which is not an appealable decision pursuant to *REDA* — Zurock & Smith's request does not seek a regulatory appeal of the AER's decision to grant the Licences to Tourmaline; and (2) the appealable decisions were not filed within the 30-day time limit pursuant to the *Alberta Energy Regulator Rules of Practice (Rules)*, as they were not provided until day 31.¹⁰

Tourmaline submits that Zurock & Smith's concerns were adequately considered and addressed through the *Directive 056* consultation package and subsequent communications, including a detailed response provided by Tourmaline on December 8, 2023, to each of the concerns the SOC Requestors raised.

Tourmaline argues Zurock & Smith are not directly and adversely affected and are therefore not “eligible persons”. In response to the proposition that *REDA* grants a clear right to a regulatory appeal and should only be dismissed in “extraordinary and obvious circumstances”, Tourmaline notes that the decision relied upon was one where the requester had a specific right of appeal under section 91 of Alberta's *EPEA*.¹¹ Zurock & Smith do not have a specific right of appeal and therefore Tourmaline need not show that there are “extraordinary and obvious circumstances” which warrant dismissal of the request. Tourmaline agrees that the *Court* decision explains the test for “is directly affected”.

However, Tourmaline argues that Zurock & Smith do not demonstrate there is any reasonable likelihood that they will be harmed by the wells, or Tourmaline's drilling or operation thereof. Rather the concerns provided are general in nature or beyond the scope of the Licences — such as referencing “wildfire concerns” or “other oil and gas infrastructure in the area”. Tourmaline submits that Zurock & Smith failed to put forward “reliable information” that demonstrates a reasonable potential for harm resulting from the wells.¹²

Tourmaline distinguishes from the facts in the *Coulas* case, as that requester lived within 1.5 km of a liquid natural gas processing facility, an area which permissible sound levels must be satisfied through a noise impact assessment under *Directive 038*. Tourmaline points out that section 1.8.1 of *Directive 038* states “[c]ompliance regarding drilling and servicing activity noise is evaluated on a complaint basis only

¹⁰ *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013, s 30(3)(m).

¹¹ AER grants Trenchie Request for Regulatory Appeal, *supra* note 6; *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 91(1)(i).

¹² AER dismisses Ambros Request for Regulatory Appeal, *supra* note 5.

and is initially assessed by the local AER field centre.” Further, Tourmaline has committed to conducting its operations in compliance with the permissible sound levels specified under *Directive 038*. Tourmaline notes that *Directive 038* does not govern wells the same as facilities.

Tourmaline submits that the fact Zurock & Smith’s residence is outside the boundary of the applicable emergency planning zone indicates they are not directly and adversely affected.

Tourmaline cites a previous AER decision as authority that an operator’s compliance with regulatory requirements is sufficient grounds for finding a person will not be directly and adversely affected by the issuance of a licence, and is not entitled to a regulatory appeal.¹³

Tourmaline submits Zurock & Smith’s request for regulatory appeal is without merit as it is devoid of any credible argument that warrants a regulatory appeal and fails to provide any evidence in support of their concerns. Tourmaline argues that Zurock & Smith’s reliance on alleged gas releases from other oil and gas infrastructure and a “suspected flare stack burp in the summer of 2023” are not relevant to the Licences.

Tourmaline submits that the AER’s decision on the SOC explains that Tourmaline satisfied the *Directive 056* requirements and is expected to comply with other regulatory requirements set out under *Directive 060* and *Directive 071*.

AER findings or Reasons for Decision

Appealable Decision

The granting of each well licence is an appealable decision, as the Licences were issued under the *Oil and Gas Conservation Act*, which is an energy resource enactment, without a hearing.

In Accordance with the Rules

Although filed in accordance with the time requirements, Zurock & Smith’s Regulatory Appeal request did not meet all relevant requirements of section 30 of the *Rules*: specifically, it was missing information.

¹³ AER letter denying Winchester Request for Regulatory Appeal No.: 1872471 against Petrus Resources Corp.’s facility and two wells licence nos.: 0481082, 0481083, 49411 (27 February 2017).

The AER notes that refusing to hold a hearing on an SOC is not an appealable decision. However, Zurock & Smith had defined Decision broadly in their request for regulatory appeal to include the AER granting the Licences. Zurock & Smith were asked to provide the missing information, including the Licences that are an appealable decision, as outlined in the deficiency letter, by April 5, 2024. This information was filed outside of the required timeline set out in paragraph 30(3)(m) of the *Rules*, however, Zurock & Smith provided it on April 4, 2024, within the deadline requested by the AER in its deficiency letter.

Accordingly, for the purpose of this decision only, the Regulatory Appeal shall be deemed to have been filed in accordance with the *Rules*.

Eligible Person

The substantive issue in this matter is whether Zurock or Smith is an eligible person. To be eligible for a regulatory appeal, Zurock & Smith must demonstrate that they may be directly and adversely affected by the AER's decision to issue the Licences.

The authority that Zurock & Smith rely on that they claim grants them a “clear right of regulatory appeal” that should only be dismissed in “extraordinary and obvious circumstances” is not applicable to the Licences. That authority was with regard to challenging a reclamation certificate — where *EPEA* and *REDA* did grant that requester a “clear right of regulatory appeal”.¹⁴

Zurock & Smith do not reside within the EPZ of the Licences. Zurock & Smith did not provide an authority supporting the proposition that a party holding itself out as directly and adversely affected makes it the same.

The AER finds that the *Coulas* case is not similar. The *Coulas* case involved a requester residing within an area where *Directive 038* required a noise impact assessment to ensure that permissible sound levels were not exceeded, due to her proximity to a liquid natural gas processing plant. Furthermore, the Court of Appeal of Alberta did not make a finding on the merits, but rather provided permission for Ms. Coulas to appeal the AER's decision to dismiss her request for regulatory appeal of a decision by the AER to grant a facility licence.¹⁵

¹⁴ *AER grants Trenchie Request for Regulatory Appeal*, *supra* note 6; *EPEA*, *supra* note 11.

¹⁵ *Coulas*, *supra* note 7.

The Regulatory Appeal included the SOC. The AER has addressed those concerns, and no further evidence or reliable information was provided with Zurock & Smith's Regulatory Appeal.

Tourmaline must comply with the relevant legislation and directives. Zurock & Smith have not provided evidence suggesting that Tourmaline has not, or will not, act in accordance with all applicable regulatory requirements.

Zurock & Smith have not established a sufficient connection between the Licences and the impacts with which they are concerned. Zurock & Smith have not provided evidence that the Licences will directly affect them in an adverse fashion or that they may be directly and adversely affected.

The AER encourages stakeholders and industry to establish and maintain neighbourly relationships and is hopeful that any meaningful concerns which may arise in relation to the Licences can be addressed through continued communication between the parties.

Conclusion

The AER has determined that Zurock & Smith are not eligible persons since they have not demonstrated a direct and adverse effect by the Licences. Accordingly, this request for regulatory appeal is dismissed, pursuant to paragraph 39(4)(c) of *REDA*.

Sincerely,

<Original signed by>

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