

Via Email

September 23, 2022

**Calgary Head Office**  
Suite 1000, 250 – 5 Street SW  
Calgary, Alberta T2P 0R4  
Canada

[www.aer.ca](http://www.aer.ca)

Osler, Hoskin and Harcourt LLP

Borden Ladner Gervais

**Attention: Martin Ignasiak, KC**

**Attention: Karen A. Salmon**

Dear Sir and Madam:

**RE: Request for Regulatory Appeal by TransAlta Corporation  
Bonterra Energy Corp. (Bonterra)  
Application Nos.: 31574361 and 31574401 (Applications)  
Licence Nos.: 0503320 and 0503321 (Well Licences)  
Location: 1-23-47-11W5  
Request for Regulatory Appeal No.: 1935997 (Request for Regulatory Appeal)  
Decision on Request**

The Alberta Energy Regulator (AER) has considered TransAlta Corporation's (TransAlta) request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's decision to issue the Well Licences and the AER's decision to amend one of the Well Licences to change the name of one of the wells (together, Decisions). The AER has reviewed TransAlta's submissions and the submissions made by Bonterra Energy Corp. (Bonterra).

For the reasons that follow, the AER has determined that TransAlta is 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 subsection 36(b)(ii) of REDA to include:

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

## **Preliminary Issue**

Where new information or evidence is filed in a reply submission, principles of procedural fairness support giving the responding party the ability to file sur-reply to any new evidence or information.

On May 26, 2022, after noting that TransAlta's April 22, 2022, reply submissions included new information or evidence, specifically a report written by the KGS Group for Alberta Environment and Parks (AEP) entitled *Brazeau Development – Induced Seismicity Assessment and Risk Mitigation, February 26, 2021* (AEP Report), the AER gave Bonterra the opportunity to file an additional response, or sur-reply, to the new evidence filed by TransAlta. The AER also gave TransAlta the opportunity to reply to Bonterra's sur-reply.

In its sur-reply, Bonterra made submissions not only regarding the AEP report but other matters, including raising for the first time the issue of mootness of TransAlta's request for regulatory appeal since the underlying wells for which TransAlta is seeking regulatory appeal of the decision to licence had been drilled and fractured. TransAlta responded that Bonterra's argument was improperly raised for the first time in sur-reply, and submitted that the AER should disregard this argument, as well as any of Bonterra's sur-reply submissions on issues not related to the AEP Report.

The AER notes that Bonterra was provided the opportunity to make additional response submissions only in respect of the AEP Report, which was new information or evidence filed in TransAlta's reply. Although the issue of mootness may be relevant in this proceeding, the AER is of the view that Bonterra's mootness argument was not properly raised for consideration by the AER. Therefore, this issue has been disregarded.

## **Reasons for Decision**

### ***Background***

#### *Regulatory Requirements - Hydraulic Fracturing Near the Brazeau Dam*

The AER is the expert technical regulator of energy resource development in Alberta. On May 27, 2019, the AER issued Subsurface Order No. 6 ([SSO6](#)), which establishes monitoring, reporting and setback requirements for all oil and gas operators operating or seeking to operate in identified zones near the Brazeau Dam. The requirements include a "traffic light protocol" that outlines under what monitored conditions hydraulic fracturing operations can proceed, continue, or must be suspended within the identified area near the Brazeau Dam where hydraulic fracturing operations are permitted.

SSO6 prohibits hydraulic fracturing operations within 3 km of the Brazeau Dam if operations are targeting formations from the surface down to the Duvernay Formation. It also prohibits hydraulic fracturing

operations within 5 km of the Brazeau Dam if operations are targeting the Duvernay Formation. Hydraulic fracturing outside of the 5 km zone is not prohibited under SSO6.

Neither the AER's decision to issue SSO6 or the provisions of SSO6 are the subject of this request for regulatory appeal.<sup>1</sup>

#### *Applications, Request for Regulatory Appeal and Stay Request*

On February 10, 2022, Bonterra applied under the provisions of the *Oil and Gas Conservation Act* (OGCA) (Application No. 31574361) for licences to:

- construct and operate a crude oil production well with a maximum hydrogen sulphide (H<sub>2</sub>S) concentration of 0 mol/kmol on the surface location of 01-23-047-11W5M and a bottom hole location of 01-24-47-11W5, (1-24 well); and
- construct and operate a crude oil production well with a maximum hydrogen sulphide (H<sub>2</sub>S) concentration of 0 mol/kmol in the surface location of 01-23-047-11W5 and a bottom hole location of 09-24-47-11W5 (9-24 well; together with the 1-24 well, the licenced wells).

On February 10, 2022, the AER approved Application No. 31574361. Well Licence No. 0503320 was issued for the 1-24 well, and Well Licence No. 0503321 was issued for the 9-24 well.

Also on February 10, 2022, Bonterra applied under the provisions of the OGCA to amend the details of Well Licence No. 0503321 to change the name of the 9-24 well<sup>2</sup> (Application No. 31574401). Amendment Application No. 31574401 was approved later that day on February 10, 2022. While the name of the 9-24 well changed, the licence number of Well Licence No. 0503321 remained the same.

On March 2, 2022, the AER received a request for regulatory appeal from TransAlta, with respect to the AER's Decisions to issue the Well Licences and approve the request to amend Well Licence No. 0503321 to change the name of the 9-24 well. TransAlta's request for regulatory appeal included a request for an immediate stay of the Well Licences pursuant to subsection 39(2) of REDA, pending the outcome of the

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<sup>1</sup> In a separate proceeding, TransAlta requested regulatory appeal of SSO6, which was denied by the AER on January 8, 2020. TransAlta has sought permission to appeal that decision to the Court of Appeal of Alberta. TransAlta's permission application is adjourned *sine die* pending the outcome of AER Proceeding 379, which involves well applications filed by various oil and gas operators near the Brazeau Dam. TransAlta filed statements of concern in respect of those applications and is a participant in the hearing. Together, these two proceedings provide avenues for TransAlta to challenge the existing regulatory scheme and SSO6.

<sup>2</sup> The well name was amended from BONTERRA HZ PEMBINA 9-24-47-11 to BONTERRA **102** HZ PEMBINA 9-24-47-11 [emphasis added].

regulatory appeal process (Stay Request). On March 21, 2022, after consideration of submissions from TransAlta and Bonterra, the AER denied TransAlta's Stay Request (Stay Disposition).<sup>3</sup>

The Stay Disposition also communicated the following:

The AER takes compliance seriously, and as a result of TransAlta's submissions, an audit was conducted on Licence Nos. 0503320 and 0503321 by the AER's Application Integrity group. The audit was found satisfactory and met the AER's Directive 056 Participant Involvement requirements. It was noted that the surface and bottomhole locations [of the wells] are outside the 10 km radius of the Brazeau dam...

Application audits are an AER compliance process that is distinct from the request for regulatory appeal process.

TransAlta and Bonterra were provided the opportunity to make submissions on the above statement communicating the audit findings for the purposes of the request for regulatory appeal.

### ***Decision on TransAlta's Request for Regulatory Appeal***

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).

### ***Is the Decision an Appealable Decision***

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

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<sup>3</sup> TransAlta has sought permission to appeal the Stay Disposition to the Court of Appeal of Alberta. TransAlta's permission application is adjourned *sine die*.

The decision to issue Well Licence Nos. 0503320 and 0503321 was made under the OGCA, which is an energy resource enactment, and it was made without a hearing. Therefore, the decision to issue the Well Licences is an appealable decision.

The decision to approve the request to amend Well Licence No. 0503321 to change the name of the 9-24 well was also made under the OGCA, and it was also made without a hearing. Therefore, the decision to amend Well Licence No. 0503321 is also an appealable decision.

### ***Was the Request filed in Accordance with the Rules***

Subsection 30(3) of the Rules requires that a request for regulatory appeal be made within 30 days after the making of the decision for which an appeal is sought. TransAlta's request for regulatory appeal was submitted within 30 days as required.

Subsection 30(2) of the Rules requires that the request for regulatory appeal must include a copy of the statement of concern (SOC) filed by the requester, or an explanation as to why the requester did not file a SOC. TransAlta did not file an SOC and explained that it did not have an opportunity to do so because the Well Licences were issued the same day that Bonterra filed its Applications. TransAlta did not file an SOC in respect of Application No. 31574401 and did not explain why it had not done so. However, as Application No. 31574401 was also decided the same day it was made, the AER understands that TransAlta also did not have an opportunity to do so, as it explained regarding Application No. 31574361 for the Well Licences.

The AER finds that the request for regulatory appeal was filed in accordance with the Rules.

### ***Is the Requester an Eligible Person***

The remaining and deciding component of the test to request a regulatory appeal under subsection 38(1) of REDA is the question of whether TransAlta is an "eligible person" according to the definition in subsection 36(b)(ii) of REDA.

In order to establish that it is an eligible person, TransAlta must demonstrate that it is "directly and adversely affected by the" AER's decision to issue the Well Licences or the AER's decision to amend Well Licence No. 0503321 to change the name of the 9-24 well.

### ***Legislative Test***

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)*,<sup>4</sup> the 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 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”.<sup>5</sup> 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.”<sup>6</sup> [emphasis added]

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

### ***Directly and Adversely Affected***

#### *TransAlta’s Submissions*

TransAlta has stated that it has concerns about any hydraulic fracturing and fluid injection operations within 10 km of the Brazeau hydroelectric facility, including the Brazeau dam and associated canal and powerhouse infrastructure (Brazeau Dam). It has correspondingly defined for its own purposes a 10 km zone or buffer zone around the Brazeau Dam, which it refers to throughout its submissions.

In its request for regulatory appeal, TransAlta submits it is directly and adversely affected by the Decision to issue the Well Licences because:

- It owns and operates the Brazeau Dam;
- Since 2013 it has spent considerable time and money to study and monitor issues related to induced seismicity in the vicinity of the Brazeau Dam, including within a 10 km zone around the Brazeau Dam;

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<sup>4</sup> 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.

<sup>5</sup> *Ibid.*, at para 69.

<sup>6</sup> *Ibid.*, at para 71.

- AEP, the regulator of the Brazeau Dam, has initiated studies to assess the issue of induced seismicity near the Brazeau Dam including with the 10 km zone;
- TransAlta's position is that it, in exchange for TransAlta not filing an SOC in respect of their applications, it requires oil and gas operators who propose hydraulic fracturing and fluid injection activities within 10 km of the Brazeau Dam to enter into its Seismic Monitoring System Website Agreement (Agreement) with it and to fully participate in TransAlta's seismic monitoring program (Monitoring Program);
- Numerous operators within the 10 km zone are part of its Agreement and Monitoring Program;
- Bonterra did not enter into TransAlta's Agreement and is not fully participating in TransAlta's Monitoring Program;
- Other oil and gas operators in the area may choose to not enter into its Agreement or participate fully in the Monitoring Program because of Bonterra's example; and
- At one time the AER's OneStop mapping tool explicitly referenced a 5-10 km zone around the Brazeau Dam as being a recognized area where concerns exist regarding induced seismicity from hydraulic fracturing.

In its reply submissions, TransAlta submits the issue in this proceeding is whether it was deprived of its basic procedural rights and that its request for regulatory appeal should be approved because:

TransAlta was never provided notice of Bonterra's well applications. This failure, by Bonterra, circumvented TransAlta's right to have its concerns related to the risks to the Brazeau hydroelectric facility, which includes a main dam, associated canal and powerhouse, and other associated infrastructure, considered by the AER before the Well Licences were issued.<sup>7</sup>

TransAlta further replies that "the harm to it arises due to the increased risk posed to the Brazeau Dam"<sup>8</sup> caused by other operators potentially choosing in the future not to enter into TransAlta's Agreement or participate fully in its Monitoring Program, and not as a result of it being likely that Bonterra's operations at the licenced wells will result in an induced seismic event that damages the Brazeau Dam. [emphasis in original]

TransAlta submits that studies commissioned by AEP have determined that induced seismic events from subsurface activities within 5 kms beyond the 5 km zone identified in SSO6 pose a risk to the Brazeau Dam that warrants mitigation measures, and that allowing Bonterra to conduct hydraulic fracturing without requiring it to be part of TransAlta's Monitoring Program risks upsetting the Agreement TransAlta reached in 2013 with various other operators regarding their operations in the 10 km zone. TransAlta submits that,

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<sup>7</sup> TransAlta's Reply Submissions, April 22, 2022, page 1.

<sup>8</sup> *Ibid.*, page 6.

over many years, AER staff, AEP, TransAlta and numerous producers have devoted an immense amount of time and resources to assessing the seismic risk of hydraulic fracturing near the Brazeau Dam.

In its submissions, TransAlta refers to the test regarding whether a person may be directly and adversely affected that was set out in *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*<sup>9</sup> and notes that the Court in that decision stated that "...a constitutional, a legal or an equitable interest would suffice" for the test. TransAlta submits that its interest in this matter clearly satisfies this threshold.

TransAlta also claims that the AER has long acknowledged that TransAlta may be directly and adversely affected by the subsurface activities within the 10 km zone. Mistaking it for the AER's decision on TransAlta's request for regulatory appeal of SSO6, TransAlta points to the original AER decision maker's response submission to its request, which noted that TransAlta has the ability to raise its concerns within a larger area than those areas in which hydraulic fracturing is prohibited under SSO6.

#### *Bonterra's submissions*

Bonterra submits that TransAlta must satisfy a two-part test as noted in the *Dene Tha' First Nation* decision:<sup>10</sup>

...First is a legal test and the second is a factual one. The legal test asks whether the ...right or interest being asserted by the person is known to the law. The second branch asks whether the Board has the information which shows that the application before the Board may direct and adversely affect those interests or rights. The second test is factual.<sup>11</sup>

Bonterra submits that in order to meet the factual stage of the test, TransAlta must point to "reliable information in the regulatory appeal request that demonstrates a reasonable potential probability that the person asserting the impact will be affected."<sup>12</sup>

Bonterra notes that TransAlta, in its submissions, states that it will be directly and adversely affected by the Well Licences "[i]n the absence of Bonterra entering into the Agreement and fully participating in the Monitoring Protocol." Bonterra also states that:

According to TransAlta it is not enough that Bonterra complies with the AER's requirements such as SSO6. It must also comply with TransAlta's additional, unilaterally imposed requirements. Put

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<sup>9</sup> 2005 ABCA 68 (*Dene Tha' First Nation*).

<sup>10</sup> *Ibid.*, at para 10.

<sup>11</sup> Bonterra Response Submission, April 8, 2022, page 3.

<sup>12</sup> *Ibid.*, page 3, referencing the AER's May 13, 2020, decision on a request for regulatory appeal, Regulatory Appeal No.: 1924230.



another way, it is the inadequacy (according to TransAlta) of SSO6 that allegedly directly and adversely interferes with TransAlta's interests. This is a collateral attack on SSO6, and an attempt to re-litigate previous proceedings and replace the AER's authority with its own.<sup>13</sup> [citation omitted]

Bonterra confirms that the licenced wells are located outside of the 5 km restriction zone set out in SSO6. Bonterra notes that the AER, through SSO6, has considered TransAlta's concerns and placed restrictions on hydraulic fracturing within 5 kms of the Brazeau Dam. Bonterra submits that TransAlta's 10 km zone is not relevant to the AER's processes and is a reference to an area in which signatories to the Agreement with TransAlta have to engage in certain additional monitoring practices. The Monitoring Program was created by TransAlta, who enforces the program by contract between the private parties, and not by the AER or pursuant to an enactment.

Bonterra further submits that TransAlta generically asserts that the Well Licences will increase the risk of induced seismicity and risk the safe and reliable operations of the Brazeau Dam, but leads no evidence in support of this position. In regard to the AEP Report, Bonterra states that the report has no direct relevance to Bonterra's operations or to the Well Licences and was not prepared for this request for regulatory appeal. The report does not alter the AER's finding in the Stay Decision, that Bonterra relied on the existing regulatory scheme in applying for the Well Licences and is entitled to act on the Well Licences so long as it remains in compliance with that regulatory scheme.

Bonterra notes the speculative effect of the example Bonterra might set in not entering into the Agreement is not a direct result of the Well Licences:

...The direct result of the Well Licences is that Bonterra may drill a pair of wells more than 10km from the Brazeau Dam. The indirect results is that other operators, noting that Bonterra did not enter into the Seismic Agreement before seeking the Well Licences, may, possibly, choose not to enter the Seismic Agreement either. Bonterra notes that this result would not be a result of the Well Licences at all. This speculative result could possibly follow if Bonterra is successful in the appeal or the Appeal Request is dismissed. It would be an effect of the appeal that TransAlta set in motion, not of the Well Licences. This is not an "uninterrupted chain" of causation, and the harm complained of is remote and speculative.<sup>14</sup> [emphasis in original]

Bonterra submits that TransAlta's assertion that Bonterra's operations carried out pursuant to the Well Licences and in accordance with all relevant regulatory standards could harm the Brazeau Dam is not

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<sup>13</sup> *Ibid.*, page 4.

<sup>14</sup> *Ibid.*, page 4.

“reliable information” demonstrating a “probability” of adverse effect, and that, as such, TransAlta is not an “eligible person” and the request for regulatory appeal should be dismissed.

### ***AER Findings***

As the requester of a regulatory appeal, TransAlta bears the onus of showing that it meets the requirements set out in section 38 of REDA in order for its request to be granted.

#### *Proximity of the Brazeau Dam to the Licenced Wells*

As set out above, SSO6 prohibits hydraulic fracturing operations within 3 km of the Brazeau Dam if operations are targeting formations from the surface down to the Duvernay Formation. It also prohibits hydraulic fracturing operations within 5 km of the Brazeau Dam if operations are targeting the Duvernay Formation. Hydraulic fracturing outside of the 5 km zone is not prohibited under SSO6.

TransAlta has raised concerns about hydraulic fracturing within 10 km of the Brazeau Dam. However, to show that it may be directly and adversely affected by the AER Decisions for which TransAlta requests regulatory appeal, it is not enough for TransAlta to simply state that it has concerns. TransAlta must provide evidence in support of its request to establish a connection between the Decisions and the potential direct and adverse effects it is concerned about. Speculation is not enough.

TransAlta’s concerns appear to be that it is adversely affected by the operation of the existing regulatory requirements, mainly SSO6, which do not prohibit hydraulic fracturing beyond the 5 km zone extending from the Brazeau Dam, and therefore did not prohibit Bonterra from applying for the 1-24 well or the 9-24 well, both located outside of the 5 km zone.

TransAlta has chosen to pursue contractual agreements with various oil and gas operators operating within 10 km of the Brazeau Dam. TransAlta also wishes to reach a contractual agreement with Bonterra. TransAlta’s concerns are that because the AER decided to issue the Well Licences to Bonterra despite Bonterra not having chosen to enter into a contractual agreement with TransAlta, there is the possibility that other operators considering hydraulic fracturing and fluid injection activities in proximity of the Brazeau Dam may also choose not to enter into contractual agreements with TransAlta in future. TransAlta’s submission is that, consequentially, there is also the possibility of a general increase in risk to the Brazeau Dam, which may directly and adversely effect TransAlta.

In order to demonstrate this alleged direct and adverse effect, TransAlta referenced and, in its reply submission, provided a copy of the AEP Report. The AER notes that AEP is the regulator of the Brazeau Dam, while the AER regulates the oil and gas operations in the area of the Brazeau Dam.

### The AEP Report

The AEP Report notes that “AEP retained the KGS Group in August 2020 to work with a panel of experts to evaluate the safety of the Brazeau Structure with respect to induced seismicity from Hydraulic fracturing activities based on recent improvements in the knowledge and science regarding induced seismicity”.<sup>15</sup> The report was not prepared for this specific request for regulatory appeal and does not consider the licenced wells.

The AEP Report discusses Induced Seismicity Assessment and Risk Mitigations, and includes a brief review of SSO6. It notes the main factors influencing the probability of exceeding a number of fatalities (referred to as the F-N curve) are the seismic inputs and the fragility of the North Power Control Dyke (PCD) of the Brazeau Dam, which dictates the probability of a geotechnical failure and breach of the dyke. The AEP Report focuses on the risk assessment of the North PCD.

The AEP Report provides suggestions for additional controls and risk reduction measures for consideration by AEP. One such suggestion includes enhancing the stability of the Brazeau Dam. It also discusses the traffic light protocol in SSO6 and a case study that considered the scenario of a combination of a setback of 5 km with a traffic light protocol in a further 5-10 km zone which it concluded reduced ground motions at low probabilities by approximately 30%.<sup>16</sup>

The AEP Report does not consider Bonterra’s wells and the case study referred to by TransAlta considers a scenario that, in effect, proposes an extension of the monitoring requirements of SSO6 beyond the 5 km zone set out in the order. As noted previously, neither the AER’s decision to issue SSO6 or the provisions of SSO6 are the subject of this request for regulatory appeal. TransAlta submits that the AEP Report is “directly relevant to this Regulatory Appeal because it demonstrates that TransAlta’s concerns about unmitigated activities in the 5-10 km Zone are neither frivolous nor without merit”<sup>17</sup> and demonstrates why “it is reasonable for TransAlta to have concerns about Bonterra” choosing not to enter into TransAlta’s Agreement or participate in TransAlta’s Monitoring Program.<sup>18</sup> TransAlta submits that its Monitoring Program establishes a traffic light protocol for participating operators in the 5 km zone beyond the requirements of SSO6.

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<sup>15</sup> AEP Report, Executive Summary, page ii.

<sup>16</sup> *Ibid.*, page 30.

<sup>17</sup> TransAlta Reply to Bonterra Sur-Reply, June 9, 2022, page 2.

<sup>18</sup> *Ibid.*, page 2.

The AER finds that the AEP Report does not provide sufficient evidence to establish a connection between the decision to issue the Well Licences and the alleged direct and adverse effect on TransAlta, *i.e.*, that the decision will have the consequential result of potentially influencing other operators operating outside the 5 km zone set out in SSO6 to not enter into TransAlta's Agreement or participate in TransAlta's Monitoring Program.

#### Audit Findings and the Location of the Wells

With respect to the AER's Application Integrity group's audit findings that the licenced wells' surface and bottom holes are located outside of the 10 km zone around the Brazeau Dam, TransAlta submitted that the statement appears to be based on a measurement from the Brazeau main dam. TransAlta maintains that the wells are within 10 km of the Brazeau infrastructure beyond the main dam, although it did not provide further information or evidence to support its position, and submits that, in any event, whether the wells at issue are 9.9 km or 10.1 from the Brazeau infrastructure is irrelevant for the purposes of determining whether TransAlta may be directly and adversely affected by the Well Licences.

TransAlta's concerns, as stated in its request, are regarding the possibility of the Brazeau Dam being affected by hydraulic fracturing within a 10 km zone around it. After the AER noted in its Stay Disposition that the surface and bottom holes of Bonterra's wells are located outside of the 10 km zone, TransAlta's response appears to be to extend its area of concern. Although it speculates the AER's audit finding may be incorrectly calculated, TransAlta provides no evidence to dispute the AER's audit finding that the wells' surface and bottom holes are outside the 10 km zone.

The AER notes that TransAlta has not provided any evidence in support of its concern that oil and gas operators within the 10 km zone may choose not to participate in its Agreement and Monitoring Program and upset the protocol TransAlta seeks to maintain in the area as a result of Bonterra not participating, and which, in turn, leads to increased risk to the Brazeau Dam. It has only provided speculation.

The AER is not satisfied that TransAlta has demonstrated that it may be directly and adversely affected by the decision to issue the Well Licences due to the proximity of the licenced wells to the Brazeau Dam. The AER's determination on whether TransAlta may be directly and adversely affected is not dependant on whether the licenced wells are located within or beyond the 5-10 km zone.

The AER notes that, as noted by Bonterra in its sur-reply, hydraulic fracturing of the wells was completed on June 2, 2022. The AER is unaware of any adverse impacts on the Brazeau Dam as result of Bonterra's hydraulic fracturing operations, and did not receive any notice or correspondence from TransAlta as a result of those operations.

### *Procedural Rights*

TransAlta additionally submits that it has been deprived of its procedural rights and denied procedural fairness because it was not given notice of the Applications, and thus it has been directly and adversely affected. TransAlta's submissions relate to both an alleged failure by Bonterra to notify it of the proposed Applications, as well as not having the opportunity to file SOC's in respect of the Applications. As previously stated, in response to TransAlta's submissions regarding lack of notice from Bonterra, an audit was conducted on Well Licence Nos. 0503320 and 0503321 by the AER's Application Integrity group. The audit was found satisfactory and met the AER's Directive 056 Participant Involvement requirements.

Bonterra's Applications were filed through OneStop and approved on the same day. Section 31 of REDA requires that, on receiving an application, the AER is to ensure that public notice of the application is provided in accordance with the Rules. Section 5 of the Rules sets out what must be included in a public notice of application, including either the time period for filing an SOC,<sup>19</sup> or "in the case of an application referred to in section 5.2(2) [of the Rules], a statement that a decision on the application may be made immediately or on an expedited basis, but a person who believes that the person may be directly and adversely affected by the application may nevertheless file a statement of concern with the [AER] in respect of the application".<sup>20</sup> The standard period for filing an SOC in respect of applications other than those referred to in subsection 5.2(2) of the Rules is set out in section 5.3 of the Rules.

Subsection 5.2(2)(a) of the Rules permits the AER to decide "routine" applications before the time period for filing an SOC has elapsed. Bonterra's Applications meet the definition of "routine" applications: the AER could decide Bonterra's Applications before the time period for filing an SOC had elapsed and within which TransAlta may have chosen to file an SOC. TransAlta was not deprived of any procedural rights due to the timing of the AER's Decisions.

Although the legislative scheme operated so that TransAlta did not have the opportunity to file an SOC before decisions were made on Bonterra's Applications, it also operates to provide TransAlta the opportunity to file a request for a regulatory appeal, which TransAlta has done. As noted by subsection 30(2) of the Rules, a request for regulatory appeal must include a copy of the SOC filed by the requester *or* an explanation as to why the requester did not file an SOC: the Rules contemplate a situation like the one before us where a requester was unable to file an SOC before a decision on an application was made, but the requester still has the right to have their concerns reviewed by the AER through a separate process.

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<sup>19</sup> Rules, Alta Reg 99/2013, s 5(1)(d).

<sup>20</sup> *Ibid.*, s 5(1)(e).

TransAlta has, and exercised, its right to raise the same concerns in this request for regulatory appeal that it would have raised in an SOC. TransAlta's concerns are still before the AER, as is the evidence TransAlta submitted regarding its concerns. Should TransAlta meet the requirements to request a regulatory appeal under subsection 38(1) of REDA, and should its request not be otherwise dismissed under subsection 39(4) of REDA, the legislative framework provides that TransAlta's request for regulatory appeal should be granted. If a request for regulatory appeal is granted and the concerns of the requester not otherwise resolved, a regulatory appeal hearing must be conducted.<sup>21</sup>

If TransAlta had filed SOCs in respect of the Applications, the AER would have considered the SOCs in accordance with the legislative framework, and, as outlined in section 7 of the Rules, it would have been in the AER's discretion to decide whether to conduct a hearing into the Applications. There is no legislative requirement that the AER must conduct a hearing on an application when an SOC is filed. In other words, there is no guarantee a hearing would have been held had TransAlta filed SOCs. The AER could have decided the Applications without holding a hearing, even if it had been in receipt of an SOC in respect of the Applications from TransAlta, or any other person. In that event, TransAlta would have the opportunity decide whether to request a regulatory appeal of such a decision, a procedural right that is available to any other person in the same situation.

#### ***Application No. 31574401***

As noted above, TransAlta also requests regulatory appeal of the decision to amend Well Licence No. 0503321 to change the name of the 9-24 well from BONTERRA HZ PEMBINA 9-24-47-11 to BONTERRA 102 HZ PEMBINA 9-24-47-11. TransAlta did not make submissions on or provide evidence as to how it may be directly and adversely affected by the AER's approval of Bonterra's amendment Application No. 31574401.

#### **Conclusion**

After reviewing the submissions of both parties, and for the reasons noted above, the AER finds that TransAlta has failed to show a connection between the decision to issue the Well Licences or the decision to amend Well Licence No. 0503321 and the concerns it has raised in its request for regulatory appeal. TransAlta has not demonstrated that it may be directly and adversely affected by the AER's Decisions. As a result, TransAlta cannot be considered an "eligible person" as required by subsection 36(b)(ii) of REDA, and TransAlta has failed to meet all the requirements to request a regulatory appeal of the Decisions.

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<sup>21</sup> *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013, s. 4.

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

***Frivolous, Vexatious and Without Merit***

Bonterra argued that TransAlta's request for regulatory appeal was frivolous, vexatious and without merit and should be dismissed pursuant to subsection 39(4)(a) of REDA. TransAlta provided submissions in response to these arguments.

Given that the AER has already determined that the test to request a regulatory appeal has not been met by TransAlta and has dismissed the request for regulatory appeal, it is not necessary for the AER to consider whether the request for regulatory appeal should be dismissed pursuant to subsection 39(4)(a) of REDA.

Sincerely,

<Original signed by>

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Isaac Amponsah  
Senior Advisor, Regulatory

<Original signed by>

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Paul Ferenowicz  
Principal Regulatory Advisor

<Original signed by>

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Stephanie Latimer, KC  
Vice President, Law and Associate General  
Counsel