Alberta Energy Regulator

Via Email

October 15, 2015

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

www.aer.ca

Prowse Chowne LLP

Attention: Paul Barrette

Dear Sir:

Re: Request for Regulatory Appeal by Elsie & Henry Neumann; Ken & Dianna Mattson, Holly Boles and Allen & Dianne Pukanski (Landowners)
NEP Canada ULC (NEP)
Application Nos. 1833476 and 1836640;
Lic Nos. 476016-476019
Location: NE 4-51-26-W4M
Regulatory Appeal No. 1838579

The Alberta Energy Regulator (AER) has considered the Landowners regulatory appeal request under section 38 of the *Responsible Energy Development Act* (*REDA*) for a regulatory appeal of the AER's decision to issue Licences 476016 - 476019. The AER has reviewed the Landowners submissions and the submission made by NEP.

For the reasons that follow, the AER has decided that the Landowners are not eligible 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 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.

Section 30 of the AER *Rules of Practice* (*Rules*) sets out the requirements for a request for regulatory appeal including, in this case, a request for a regulatory appeal must be no later than 30 calendar days after the notice of decision is issued.

Section 36(a) of *REDA* defines an "appealable decision". For the present purposes, the relevant definition is contained in subsection 36(a)(iv). It says an appealable decision includes:

> (iv) a decision of the Regulator that was made under an energy resources enactment, if that decision was made without a hearing.

"Eligible person" is defined in section 36 (b)(ii) as:

> A person who is directly and adversely affected by a decision referred to in clause (a)(iv).

Reasons for Decision

On July 6, 2015, NEP filed the Application for four well licences routine. Licences for the four 7-4 Wells were granted on July 7, 2015. On August 14, 2015, NEP filed an amendment application to one of the four licences. That application was approved on August 14, 2015. NEP did not notify the Landowners of the Applications. The decisions to approve the applications were made pursuant to an energy enactment (*OGCA*) and were made without a hearing. The Landowners have met the requirement of the first component that the decision in question is an "appealable decision".

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A regulatory appeal request must be made within 30 days after the decision was made. The initial approval of the 4 well licences (under one application) was made on July 7, 2015. An amendment application for one of the licences was approved on August 14, 2015. NEP did not take issue with the timing of the filing of the regulatory appeal request. Given that the decisions were made without a hearing and that the August 14, 2015 application was an amendment to the original July 6, 2015 application, the AER is considering the regulatory appeal request to have been filed in time.

The next part of the test is to determine whether the Landowners are an "eligible person". The Landowners submit that it is unfair for the test on a regulatory appeal request to be "is directly and adversely affected", whereas the test at the SOC consideration stage is "may be directly and adversely affected". The Landowners submit that it is unfair to have a higher standard for a request for regulatory appeal.

In *Court v. Alberta Environmental Appeal Board*[1] the Court of Queen's Bench (QB) examined the interpretation of "is directly affected" as it related to Linda Court's judicial review of the EAB's decision not to determine whether Ms. Court had standing in an appeal into Lafarge's approval for a gravel pit operation under the *Environmental Protection and Enhancement Act (EPEA)* prior to commencement of the appeal. The EAB said that it would allow Ms. Court to participate in the appeal by filing written submissions only and would decide whether Ms. Court was "directly affected" as part of the hearing of the appeal. When the EAB rendered its final decision it found that Ms. Court was not directly affected by the Lafarge Approval and dismissed her notice of appeal.

Section 95 (5) of *EPEA* states:

> (5) The Board
>
> (a) may dismiss a notice of appeal if ...
>
> (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i)..., the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,...

The QB Justice determined that "to achieve standing under the Act, an appellant is required to demonstrate, on a prima facie basis, that he or she is "directly affected" by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project.

In *Tomlinson*[2], which is a decision of the Environmental Appeal Board (EAB), the EAB said the following with respect to "directly affected":

> [28] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a prima facie case that he or she is directly affected.

The *Court* and *Tomlinson* decisions provide guidance in the interpretation of s. 36(b) of *REDA* and that a higher standard of demonstrating actual effect is not required when determining "is directly and adversely affected". In order to be an "eligible person", the Landowners simply have to show that there may be a potential or reasonable probability that they may be harmed by NEP's well licences. If it is determined that the Landowners are directly and adversely affected by the decisions, the regulatory appeal must proceed as contemplated by *REDA* and the regulations.

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[1] 2003 ABQB 456

[2] *Tomlinson v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Evergreen Regional Waste Management Services Commission*, (03 April 2013), Appeal No. 12-033-ID 1 (A.E.A.B.).

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As indicated in the AER's September 17, 2015 letter, the AER reviewed NEP's applications after the regulatory appeal request was filed and determined that NEP met Directive 056 requirements. The Landowners have presented a number of arguments regarding why they should have been notified by NEP of the project and also request the AER reconsider its conclusion that NEP met Directive 056 requirements.

When notification or consultation is required by Directive 056, this is not an acknowledgement that the person getting notice may be directly and adversely affected, nor does the requirement to give notice impart any procedural rights other than an entitlement to notice:

> Section 2.3.1 of ERCB *Directive 056: Energy Development Applications and Schedules* (*Directive 056*) states that personal consultation is intended to inform parties whose rights may be directly and adversely affected by the nature and extent of the proposed application. Through the information exchanged and the discussion that occurs during personal consultation, potentially affected parties are able to make an informed decision about objecting to proposed development. The various personal consultation radii established by the Board are intended to identify all persons for whom there is a reasonable prospect of direct and adverse effect from the proposed development or activity, including individuals with heightened sensitivities. The Board is inclined to agree with Compton and Darian that notification, on the other hand, is generally provided as a courtesy between neighbours so that the public is kept informed of developments or activities that will be taking place in the community. A notification obligation on the part of the application does not normally imply any right on the part of the recipient, other than the right to the notification itself. More specifically, a right to notification is not an acknowledgment that the recipient may be directly and adversely affected. Given the different purposes that are served by consultation and notification, it follows that an applicant's personal consultation obligations are more onerous than what is required for notification. For example, notification can be done through written correspondence and confirmation of non-objection is not required, while personal consultation requires a face-to-face meeting or a telephone discussion and in most cases confirmation of non-objection must be obtained before an application can be filed as routine.[3]

While a potential failure to notify is relevant to the AER in terms of compliance by companies with AER requirements, it is not relevant to the questions on a regulatory which are:

1. Was the regulatory appeal request filed within the time set out in the *Rules of Practice*.

2. Is the decision in question an "appealable decision" according to *REDA*?

3. Is the party requesting the regulatory appeal an "eligible person" according to *REDA*. An "eligible person" is a person who is directly and adversely affected by the decision in question.

Therefore, the AER need not consider the question of whether the Landowners were or were not entitled to notice.

The Landowners state that the Mattson's previously filed an SOC on a NEP well (referred to as the West Well) in proximity to the 7-4 Wells so NEP ought to have known of the Mattson's concerns.

NEP noted that subsequent to becoming aware of the concerns of the Landowners it filed applications with the AER for four additional wells at the same location. It filed these applications non-routine. In the reply submission, the Landowners state these applications should also form part of this application. That is not possible as those applications have not yet been dispositioned by the AER.

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[3] *Compton Petroleum Corporation and Darian Resources Ltd.*, 2011ABERCB008, para 64

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Mr. Mattson refers to the "West Well" and states that he previously filed an SOC so NEP ought to have known of Mr. Mattson's concerns and consulted on the 7-4 Wells. In response NEP stated it has commenced consultation for the West Well, however, this is on a separate padsite located at 11-4-51-26-W4M and NEP has yet to file any applications in relation to this proposed padsite. It appears there may be some confusion between the West Well for which NEP has not filed an application, and the four additional wells at the 7-4 site which NEP filed non-routine in September and Mr. Mattson filed an SOC. The AER has no record of any previous SOCs filed by Mr. Mattson in this area prior to NEP filing its application for the 7-4 Wells on July 6, 2015. The AER concludes there is nothing to suggest that the NEP ought to have known of Mr. Mattson's concerns prior to filing its July 6, 2015 application.

The Landowners argue they are directly and adversely affected because there may be contamination or destruction of their water wells, there may be potential adverse health effects from flaring or possible contamination of their wells, there is interference with the quiet enjoyment of their property, negative effects on property values, and impacts from noise and vibration.

The Landowners state their properties are over a large aquifer so they are concerned about contamination or destruction of their wells because the 7-4 Wells will be fracked. As NEP has tested their wells prior to drilling the Landowners say this demonstrates that NEP believes the Landowners may be directly and adversely affected. NEP included a map of where it conducted water well testing. It states this was done to address the contamination and aquifer integrity concerns of certain of the Landowners and that NEP plans to conduct water well post-completions testing once fracking of the subject wells is complete. NEP does not anticipate any impacts to the Landowners water wells given the depth of the wells and the fact that any fracking will occur east of the Landowners' properties.

The AER received drilling notification from NEP for Licence 0476017 on August 20, 2015, and for Licence 047016 on August 31, 2015. The Landowners state that they only learned of the Licences when NEP commenced drilling (August 20, 2015), and then contacted NEP to discuss their concerns. NEP stated that it conducted water well testing on August 27, 2015[4] "to address the contamination and aquifer integrity concerns of certain of the Landowners". This indicates that NEP conducted the water well testing in response to the concerns raised by the Landowners after NEP commenced drilling activities on August 20, 2015. The fact that NEP conducted water well testing does not indicate NEP believes the Landowners may be directly and adversely affected.

Water well testing prior to and after drilling is not uncommon and is often done in response to landowner concerns. NEP references Directive 083 and Directive 044 as addressing the Landowners concerns about water sources. The AER notes that NEP applied to set 600m of surface casing which exceeds AER requirements to protect groundwater, and that none of the NEP wells are completed above the base of groundwater. The AER is satisfied that NEP has met regulatory requirements and that water well concerns have been addressed.

On the issue of noise and vibration, the Landowners state that noise or vibration from NEP's operations broke a window of the Neumann's property. As a result, NEP conducted a Comprehensive Sound Survey and stated that it has implemented noise mitigation measures. The Comprehensive Sound Survey indicated noise exceedances the night of September 7, 2015. The AER issued a low risk enforcement action to NEP for these contraventions. NEP stated it has subsequently installed, and will install additional, sound attenuation walls and has committed to undertake fracking operations only during daylight hours. Based on this mitigation, NEP states it does not anticipate any further exceedances of D038.

The AER is satisfied the concerns about noise and vibration have been addressed by NEP installing noise mitigation measures. Any further noise concerns by the Landowners should be directed to the local AER field office.

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[4] NEP's submission states it conducted water well testing on September 2, 2015 but the map NEP attached indicating the locations states testing was conducted on August 27, 2015.

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The Landowners state they have health concerns. They do not provide any other detail than to say they have health concerns from flaring. They also state that the lands of the Mattsons, Boles and Newmanns are within the EPZ. The AER notes the 160 m EPZ just includes a corner of the Mattson's and Boles land (and their residences are approximately 297m and 310m away from the 7-4 Wells, respectively), but does not reach either the Neumann or Pukanski land. Regardless, the Landowners have not cited any concerns related to the EPZ and the health concerns cited are general nature. They do not provide sufficient information to establish that they may be directly and adversely affected.

The other concern raised by the Landowners, of impact to property values, is outside the scope of the AER and the concern of interference with the quiet enjoyment of their property is also general in nature.

The AER does not consider the Landowners have established that they may be directly and adversely affected, and dismisses the regulatory appeal request.

Stay Request

Having determined that the Landowners are not directly and adversely affected, and therefore not an "eligible person" for the purpose of a regulatory appeal request, it is not necessary to consider the Landowners request for a stay.

Sincerely,

Greg Gilbertson
Sr. Advisor Industry Operations

Doug Boyle, P.Eng.
Chief Operations Engineer

Stephen Smith
Senior Advisor

cc: NEP Canada ULC – Counsel Daron K. Naffin