

May 11, 2018

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By e-mail

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Dear Sir and Madam:

**RE: Request for Regulatory Appeal by XTO Energy Canada (XTO or the Company)
MSL180201 and LOC180235
Request for Regulatory Appeal No.: 1907920**

The Alberta Energy Regulator (**AER** or **Regulator**) has considered XTO's request for regulatory appeal of the AER's decision to reject the Company's applications (the **Decision**) for a Mineral Surface Lease (**MSL180201**) and License of Occupation (**LOC180235**), and the submissions subsequently provided by AER Oil and Gas Northwest staff (**OGNW Staff**) and XTO in response to same. For the reasons that follow, the AER has concluded that the request for regulatory appeal asks the AER to exercise legal authority that it does not in fact have, and therefore the request is without merit and is dismissed.

XTO is Eligible to Apply for Regulatory Appeal of the Decision

Section 38 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (**REDA**) governs requests for regulatory appeal and provides as follows:

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.

In its response to XTO's request for regulatory appeal, OGNW Staff states that XTO is an "eligible person" and that the Decision is an "appealable decision" for the purposes of section 38 of the *REDA*. The Regulator agrees with OGNW Staff and finds that XTO is eligible to apply for regulatory appeal of the Decision.

XTO's Request for Regulatory Appeal is Without Merit

That being said, section 9(1)(e) of the *Public Lands Administration Regulation*, Alta Reg 187/2011 (***PLAR***) provides as follows:

9(1) An application to the director for a formal disposition

...

(e) must, if the application relates to public land that is already the subject of a disposition under the Act or a timber disposition, be accompanied with a statement of consent, in a form acceptable to the director, that is signed by the disposition holder or timber disposition holder,

....

Section 1(1)(o) of the *PLAR* defines the term “formal disposition” to include Mineral Surface Leases and Licenses of Occupation. The term “timber disposition” is defined through the combined effect of sections 1(1)(ee) of the *PLAR* and 1(m) of the *Forests Act*, RSA 2000, c F-22 (***Forests Act***) to include a Forest Management Agreement (***FMA***).

The public land for which XTO is seeking formal dispositions is already subject to Canadian Forest Products Ltd.'s (***Canfor***) FMA (***FMA9900037***), which is a timber disposition under the *Forests Act*. XTO acknowledges in its submissions that the Company applied for MSL180201 and LOC180235 without Canfor's consent, and that the Company's applications were therefore not in compliance with the requirements of section 9(1)(e) of the *PLAR*. In its reply submission, OGNW Staff states that section 9(5)(a) of the *PLAR* requires the AER to reject an application that does not meet the requirements of that section. Accordingly, OGNW Staff was required to reject XTO's applications.

In its response to OGNW Staff's reply submission, XTO states that Canfor is acting outside the scope of its business as set out in a Memorandum of Agreement (***MOA***) between the Government of Alberta and Canfor and is unreasonably withholding consent for environmental and water reasons rather than forestry management reasons. The Company also cites a provision from the MOA that appears to give the Minister responsible for the *Forests Act* the discretion to withdraw lands required for commercial or

industrial purposes from FMA9900037. However, the AER is not a party to the MOA nor does it have delegated authority under the *REDA* to exercise the authority of the Minister or officials under the MOA or the *Forests Act*. The AER only exercises certain powers and duties of officials under the “specified enactments”.¹ The *Forests Act* is not a specified enactment under the *REDA*.²

XTO also points to sections 14(b) and 15(4) in the *Public Lands Act*, RSA 2000, c P-40 (*PLA*), section 6(a) of the *Forests Act*, and sections 4(1)(a) and (2) of the *PLAR* as evidence that “it is within the AER’s jurisdiction and duty to make a decision and preside over the lands in question.” However, these legislative provisions do not empower the AER to modify or waive the requirements set out in section 9 of the *PLAR*. Sections 14(b) and 15(4) of the *PLA* do not apply to an FMA entered into under the *Forests Act* because an FMA is not a “disposition” as defined in section 1(e) of the *PLA*. Further, and as stated, the AER does not exercise the authority of the Minister under section 6(a) of the *Forests Act*. Lastly, section 4 of the *PLAR* provides for agreements between holders of dispositions respecting the same land and holders or owners of adjoining land. This provision therefore does not apply in this case because Canfor is the holder of an FMA rather than a disposition issued under the *PLA*.

XTO has not identified any authority the AER has that would enable the Regulator to grant consent on behalf of Canfor or process XTO’s applications without Canfor’s consent. As such, the AER agrees with OGNW Staff in finding that XTO’s quarrel in this case is with the *PLAR*.

Section 39(4)(a) of the *REDA* provides as follows:

39(4) The Regulator may dismiss all or part of a request for regulatory appeal

(a) if the Regulator considers the request to be frivolous, vexatious or without merit,

....

In light of the requirements set out in section 9 of the *PLAR*, and in the absence of express authority to modify or waive same, the AER hereby dismisses XTO’s request for regulatory appeal pursuant to section 39(4)(a) of the *REDA* because the Regulator considers the request to be without merit. This decision is not intended to reflect on the exasperation expressed by XTO in its submissions in regards to its assessment

¹ *Responsible Energy Development Act*, SA 2012, c R-17.3, s 24(a).

² *Ibid*, s 1(1)(s).

of Canfor's decision to refuse consent, or to the regulations themselves: it is simply a recognition that the AER cannot lawfully give XTO the relief it seeks.

As noted by OGNW Staff, XTO has the option to apply for the well licenses it seeks non-routinely pursuant to *Directive 056: Energy Development Applications and Schedules*. The AER can then assess those applications, including wellsite locations, on their merits through the Regulator's process.

Sincerely,

<original signed by>

Gary Perkins,
VP Law & Associate General Counsel

<original signed by>

Tanis Bryson,
Senior Advisor, Government Engagement

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Steven Stryde,
Advisor, Authorizations

cc: David Heatherington, AER