

Via Email

May 21, 2019

Bennett Jones LLP

Public Interest Law Clinic

**Attention: Sean Assie**

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

Dear Sirs:

**RE: Request for Regulatory Appeal by Michael Judd  
Shell Canada Corporation  
Application No.: 159466  
Licence No.: PL23800-99 (the “Pipeline Licence”)  
Request for Regulatory Appeal No.: 1916723**

The Alberta Energy Regulator (AER) has considered Michael Judd’s request under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER’s decision to approve the Pipeline Licence. The AER has reviewed Mr. Judd’s submissions and the submissions made by Shell.

For the reasons that follow, the AER has decided that Mr. Judd is eligible to request a regulatory appeal in this matter. Therefore, the request for Regulatory Appeal of the Pipeline Licence is granted.

### **Reasons for Decision**

1. Eligibility to Request a Regulatory 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]

The test has three components:

- (a) the request must be filed in accordance with the *Alberta Energy Regulator Rules of Practice (Rules)*;
- (b) the decision must be an appealable decision; and
- (c) the requester must be an eligible person.

**(a) In accordance with the Rules**

Mr. Judd's request for regulatory appeal was filed in accordance with the Rules.

**(b) Appealable Decision**

The applicable provision is Subsection 36(a) of *REDA* which states:

36 In this Division,

(a) "appealable decision" means

....

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

The email filing the request for regulatory appeal on behalf of Mr. Judd states that it is a request for regulatory appeal of Shell's application. However, the request for regulatory appeal of the Pipeline Licence attaches a copy of the decision letter sent to Mr. Judd from the AER which decided not to grant a hearing rather than attaching a copy of the Pipeline Licence.

The answer to question 5, "What are your reasons for requesting the regulatory appeal?" on Mr. Judd's request refers to an appeal of both the decision not to hold the hearing and the decision to grant the application:

The AER granted an application by Shell for a license to construct a new sour gas pipeline near my home, and refused to hold a hearing on the grounds that the AER is satisfied by concerns have been addressed. This is an appealable decision under the *Responsible Energy Development Act*, section 36(a)(iv), and I am an eligible person to bring the request for a regulatory appeal under section 36(b)(ii).

Mr. Judd cannot seek a regulatory appeal of the decision to not go to a hearing as that decision was made under *REDA*. As per sections 36 and 38 of *REDA*, the only decisions that can be regulatory appealed are decisions made under the energy enactments, the specified enactments and any other decision or class of decisions described in the regulations (which does not include decisions as to whether to go to a hearing or not). Accordingly, to the extent the request is a request to appeal the decision of the AER to not hold hearing, the request is not in respect of an appealable decision and is dismissed.

The decision to issue the Pipeline Licence is a decision under the *Pipeline Act* which is an energy resource enactment and it was made without a hearing. It is therefore an appealable decision.

### **(b) Eligible person**

For energy resource enactment decisions, an eligible person is a person who is directly and adversely affected by a decision made under an energy resource enactment without a hearing (section 36(b)(ii) *REDA*).

As noted above, the decision to issue the Pipeline License was made under an energy resource enactment, and it was made without a hearing. The key question then is whether Mr. Judd is a person who may be directly and adversely affected by the decision to issue the Pipeline Licence.

Mr. Judd states that the decision to issue the Pipeline Licence increases the risk that he will be harmed by a sour gas leak. He states that in the event of a sour gas release from the pipeline, his only route of egress would pass through the Emergency Planning Zone<sup>1</sup> (“EPZ”), and consequently he would need to shelter in place in his home. Mr. Judd does not believe that his home would provide him with sufficient protection.

Mr. Judd submits that the location of his residence within the EPZ for the proposed pipeline segment is sufficient to establish that he is directly and adversely affected by the decision to issue the Pipeline Licence. Mr. Judd relies on the decision of the Court of Appeal in *Kelly v. Alberta (Energy Resource and Conservation Board (“Kelly #1”))*.<sup>2</sup>

Shell states that the question of whether a party is directly and adversely affected is determined by the AER on a case-by-case basis having regard to the specific information before it.

The AER agrees that it must make a determination based on the specific facts of each case. Whether or not a decision of the AER, as a matter of fact, directly and adversely affects a

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<sup>1</sup> An emergency planning zone (“EPZ”) is defined by Directive 071 as “a geographical area surrounding a well, pipeline, or facility containing hazardous product that requires specific emergency response planning by the licensee.

<sup>2</sup> *Kelly v. Alberta (Energy Resource Conservation Board)*, 2009 ABCA 349 (“*Kelly #1*”).

person is a question to be considered by the AER in light of the evidence properly adduced before it.<sup>3</sup>

The Pipeline Licence is for a 638 metre, new build pipeline (the “Pipeline”). The Pipeline will carry gas with 320 mol/kmol H<sub>2</sub>S. Mr. Judd’s residence is located approximately 1.45 km from the Pipeline right-of-way.

Having considered the specific facts of this case, the AER finds that Mr. Judd is a person who may be directly and adversely affected by the decision to issue the Pipeline Licence. Mr. Judd is therefore an eligible person for the purposes of the *REDA*.

## 2. Frivolous, Vexatious and Without Merit

Shell submits that Mr. Judd’s request for regulatory appeal should be dismissed on the basis that it is without merit pursuant to Section 39(4)(a) of *REDA*. Shell argues that the request is without merit because Section 31(3) of the *Rules* prohibits the AER from considering any matters raised in the request for regulatory appeal; therefore it would be an absurd outcome to grant a regulatory appeal.

Section 31(3) of the *Rules* states:

31(3) The regulatory appeal shall not include any matters already adequately dealt with through another hearing, regulatory appeal, or review under any enactment.

The AER has considered this argument. However, it finds that Shell has not established that all matters raised in the request for regulatory appeal have been already been adequately dealt with through another hearing, regulatory appeal or review. The Pipeline has not previously been the subject of a hearing, regulatory appeal, or review.

## **Conclusion**

The AER has decided that Mr. Judd is an eligible person as required by the test set out in Section 38 (1) of *REDA* in respect of the decision to issue the Pipeline Licence. Therefore, the AER grants the request for regulatory appeal of the Pipeline Licence. The AER will

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<sup>3</sup> *O’Chiese First Nation v. Alberta Energy Regulator*, 2015 ABCA 346 at 43

request the Chief Hearing Commissioner to appoint a panel of hearing commissioners to conduct a hearing of the regulatory appeal.

Sincerely,

*<original signed by>*

David Helmer,  
Director, Industry Performance & Analytics, Strategic Delivery

*<original signed by>*

Shaunna Cartwright,  
Director, Mining Policy Alignment, Closure & Liability

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Charles Tamblyn,  
Director, Subsurface & Economic Eval, Science & Evaluation