

Via Email

July 25, 2019

Blake, Cassels & Graydon LLP Wilson Law Office

Attention: Lars Olthafer Attention: Keith Wilson

Dear Sirs:

**RE: Request for Regulatory Appeal by TAG Developments Ltd. (TAG)
Obsidian Energy Ltd. (Obsidian) and Cedar Creek Energy Ltd. (Cedar Creek)
Licence Transfer Application No.: 1880489
Location: 05-02-053-26-W4M
Request for Regulatory Appeal No.:1917180**

Introduction

The Alberta Energy Regulator (AER) has considered TAG's request under section 38 of the Responsible Energy Development Act (*REDA*) for a regulatory appeal of the AER's decision to approve Obsidian's application to transfer Facility Licence Nos. F23470 (the Sour Gas Plant), F12256 (a battery), and F23470 (a sweet gas plant) (collectively, the Facilities) to Cedar Creek (the Licence Transfer). The AER has reviewed TAG's submissions and the submissions made by Cedar Creek.

For the reasons that follow, the AER has decided that TAG is not eligible to request a regulatory appeal in this matter. Accordingly, the request for a regulatory appeal is dismissed and the AER will not reconsider its decision to approve the Licence Transfer.

Background

On February 23, 2017, Obsidian submitted Application No. 1880489 to transfer to Cedar Creek the licences for the Facilities.

A licence transfer under section 24 of the *Oil and Gas Conservation Act (OGCA)* transfers a licence, with all its terms and conditions, from one licensee to another.¹

¹ Subject to any conditions, restrictions and stipulations that the AER may prescribe on the transfer.

TAG filed a statement of concern (SOC) on the transfer application on April 7, 2017.

The AER approved the Licence Transfer on November 9, 2018, without holding a hearing. TAG filed this request for regulatory appeal on December 10, 2018.

Reasons for Decision

Eligibility for Regulatory Appeal

Section 38 of *REDA* governs regulatory appeals. It provides that:

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]

Therefore, the test for eligibility for a regulatory appeal has three parts:

- 1) the request must be filed in accordance with the *Alberta Energy Regulator Rules of Practice (Rules)*,
- 2) the decision must be an “appealable decision”, and
- 3) the requester must be an “eligible person”.

1) *In Accordance with the Rules*

TAG filed its request for regulatory appeal in accordance with the *Rules*.

2) *Appealable Decision*

Section 36(a) of *REDA* defines an “appealable decision” as including:

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

The AER approved Obsidian’s application to transfer the licences for the Facilities to Cedar Creek under section 24 of the *OGCA* (an energy resource enactment) without a hearing (the Licence Transfer). The Licence Transfer is, therefore, an “appealable decision” for the purposes of section 38(1) of *REDA*.

3) *Eligible Person*

The term “eligible person” is defined in section 36(b)(ii) of *REDA* as including:

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

The question, then, is whether TAG may be directly and adversely affected by the Licence Transfer.

Summary of Decision

Cedar Creek submits that, to be found directly and adversely affected by a decision of the AER, the requester must establish that the decision will have a recognizable impact on a right that is known to law. That requirement refers to the *Dene Tha'* test for standing, under which the requester had to show that they had a claim, right or interest known to law that might be directly and adversely affected by the regulator's decision.² However, as TAG points out in its submissions, that test was in respect of section 26(2) of the *Energy Resources Conservation Act*, the former Energy Resources Conservation Board's governing legislation, which granted participation where a "decision on an application may directly and adversely affect the rights of a person" [emphasis added]. Section 36(b)(ii) of *REDA* has no such reference to rights. Accordingly, the AER has decided that a finding of eligibility under section 36(b)(ii) does not require a rights determination.³

Cedar Creek also submits that in order to establish eligibility for a regulatory appeal, the requester must show they are, in fact, directly and adversely affected and not just potentially directly and adversely affected. Although section 36(b) of *REDA* defines an eligible person as "someone who is directly and adversely affected", the AER typically applies a may be directly and adversely affected test. To do otherwise would be to impose a near impossible threshold, since so often the actual effects of a decision, especially an approval, cannot be known with any certainty in advance.

In *Court v Alberta (Environmental Appeals Board)*,⁴ a judicial review of a decision of the Environmental Appeal Board (EAB) to dismiss a notice of appeal, the Court of Queen's Bench 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 the Act if the EAB is of the opinion that the person submitting the notice of appeal is not directly affected by the decision.

The 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".⁵ 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".⁶

² *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para 10.

³ See also *NEP v Neumann* (15 October 2015), Request for Regulatory Appeal No. 1838579 at 2.

⁴ 2003 ABQB 456.

⁵ *Ibid* at para 69.

⁶ *Ibid* at para 71.

Based on the above, the AER finds that the “is directly and adversely affected” requirement under section 36(b) of *REDA* does not impart a higher standard of demonstrating actual effect than section 32 does with respect to eligibility to file a statement of concern.

In *Tomlinson v Director (Environment and Sustainable Resource Development)*,⁷ a later decision of the EAB, the Board provided the following guidance for assessing “directly affected” status for the purposes of determining eligibility for appeal:

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.⁸

In *Kelly v Alberta (Energy Resources Conservation Board)*,⁹ the Alberta Court of Appeal found that “adverse effect is a matter of degree” and the question is whether “the magnitude of risk is such that the applicant has become ‘directly and adversely affected’”.¹⁰

In short, to establish that it is an “eligible person”, TAG must demonstrate that the magnitude of risk is such that there is a potential or reasonable probability that it may be directly and adversely affected by the AER’s decision to approve the Licence Transfer. The AER has determined that TAG has failed to do so.

In its request for regulatory appeal, TAG raises many of the same concerns it raised in its SOC on the application, which did not demonstrate that TAG may be directly and adversely affected by the approval of the transfer application. The majority of concerns identified are out of scope or are general in nature and do not speak to how TAG is directly and adversely affected by the Licence Transfer.

In support of its argument that it is an eligible person, TAG submits that:

- TAG’s lands surround the Facilities;
- TAG’s lands are located within the emergency planning zone (EPZ) for the Sour Gas Plant; and
- The Facilities are associated with a disposal pipeline and disposal well that are necessary for the safe operation of the facilities and are located on TAG’s lands.

⁷ (03 April 2013), Appeal No 12-033-ID 1 (AEAB).

⁸ *Ibid* at para 28.

⁹ 2011 ABCA 325.

¹⁰ *Ibid* at para 26.

The AER acknowledges that the Facilities are located on land adjacent to TAG's lands and that TAG's lands are within the EPZ for the Sour Gas Plant. The Licence Transfer does not, however, impact operations at the Facilities or alter the emergency response plan (ERP) for the Sour Gas Plant, and Cedar Creek is required to implement the ERP that was in place for Obsidian. Cedar Creek has not proposed any amendments to the ERP or the licences themselves. Any amendment to the licences would require a separate application and TAG would have an opportunity to submit an SOC on that application. The proximity of TAG's lands to the Facilities is not, therefore, sufficient to support a finding that TAG is directly and adversely affected by the Licence Transfer.

TAG further submits that proper consideration of the application to transfer the licences for the Facilities must or should include consideration of the associated disposal pipeline and disposal well located on TAG's lands. TAG's submissions also suggest a safety concern with the licences for the Facilities being held by a different licensee than the licences for the disposal pipeline and well. The disposal pipeline and well, however, were not the subject of the Licence Transfer and are out of scope of the request for regulatory appeal. Moreover, there is no regulatory requirement that the licences for the disposal pipeline and the disposal well be held by the licensee of the Facilities. And, the Facilities and disposal pipeline and disposal well all have the same operator (Tidewater Midstream and Infrastructure Ltd.). Finally, the licensees of the Facilities and the disposal pipeline and disposal well must comply with *Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry*, and the AER can order that operations at the Facilities be suspended under subsection 27(3) of the *OGCA* if, at any time, the AER considers it necessary to protect the public or the environment.

The AER also acknowledges that TAG has wells, pipelines, and facilities on its land that are currently licensed to Obsidian. However, those licences were not the subject of the Licence Transfer and are, therefore, out of scope of this request for regulatory appeal. TAG's concerns will be considered on Obsidian's applications to transfer those licences to Cedar Creek and Tidewater.¹¹

TAG's primary concern appears to be its alleged inability to develop its lands as a result of the energy resource activity on and around it. For example, TAG states that:

By virtue of having the Disposal Well and Disposal Pipeline on TAG Lands, there is a significant and real impact on TAG's ability to use and develop its land:

- a. A 500 metre development setback from either side of the Disposal Pipeline;
- b. Approximately 20 acres of TAG Lands cannot be used for any purpose, as long as the Disposal Well and Disposal Pipeline are on TAG Lands in their current configuration.¹²

¹¹ Application to transfer licences from Obsidian to Cedar Creek, Application No. 1920557, TAG SOC No. 31526; Application to transfer licences from Obsidian to Tidewater, Application No. 1920568, TAG SOC No. 31525.

¹² TAG Reply Submissions (February 8, 2019) at para 36.

Again, the disposal pipeline and disposal well are not within the scope of this request for regulatory appeal. Moreover, the presence of the disposal pipeline and disposal well on TAG's lands is not affected by the Licence Transfer. The disposal pipeline and disposal well were on TAG's lands before the transfer was approved and they would continue to be on TAG's lands even if there were no transfer or the transfer were revoked and the licences for the Facilities reverted back to Obsidian.

TAG also identified general concerns about offsite contamination that is not connected to the Facilities and Obsidian's and Cedar Creek's entitlement to apply for and hold licences under sections 16 and 17 of the OGCA and section 16 of the *Pipeline Act*, all of which is outside the scope of this request for regulatory appeal.

Given the above, the AER finds that TAG has not demonstrated there is a potential or reasonable probability that it may be directly and adversely affected by the Licence Transfer. Accordingly, the request for regulatory appeal is dismissed on the basis that TAG is not an eligible person.

The Reconsideration Power

As an alternative to granting a regulatory appeal, TAG has asked the AER to reconsider its decision to approve the Licence Transfer.

Section 42 of *REDA* sets out the authority for the AER to reconsider its decisions:

The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision. [emphasis added]

The AER has previously stated that:

Given the appeal processes available under REDA, and the need for finality and certainty in its decision, the AER will only exercise its discretion to reconsider a decision under the most extraordinary circumstances where it is satisfied that there are exceptional and compelling grounds to do so. The reconsideration power in section 42 of REDA should be used sparingly, and only in the most compelling cases where no other review power exists to address a situation that is in obvious need of remediation.¹³

Essentially, the AER will only reconsider a decision when the problems with it, either because of an error or new information, are so profound that to not reconsider the decision would make it without any value or merit and it would be absurd not to reconsider it. The AER finds that TAG has not raised any new or compelling information to suggest that there are extraordinary circumstances here that warrant the AER exercising its discretion to reconsider its approval of the Licence Transfer.

¹³ *Weber v Four Winds Energy Services Ltd* (22 July 2014), Request for Regulatory Appeal No. 1797095 at 4.

The basis of TAG's request for reconsideration appears to be the alleged non-compliance of Obsidian and Cedar Creek with the WIP requirements in the *OGCA* and *Pipeline Act*. In that regard, TAG includes submissions regarding the WIP status of the disposal pipeline and the disposal well, as well as other wells, facilities, and pipelines on TAG's lands, none of which are relevant to the Licence Transfer. With respect to the Facilities, TAG submits that Cedar Creek is or was non-compliant with section 17 of the *OGCA*, which states that, "No person shall apply for or hold a licence for a facility unless that person is a working interest participant." This requirement is reiterated in *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*.¹⁴

TAG submits that Cedar Creek did not hold a working interest in the Facilities on the date of transfer because it had sold its interest to Tidewater two years prior, on August 30, 2016. Cedar Creek submits that, pursuant to its purchase and sale agreement with Obsidian, Cedar Creek held a beneficial interest in the Facilities from August 30, 2016, when it entered into the agreement, until November 9, 2018, when the transfer application was approved and its legal interest in the Facilities crystallized. Similarly, Cedar Creek submits that, pursuant to its purchase and sale agreement with Tidewater, Cedar Creek sold its beneficial interest in the Facilities on August 30, 2016, which it will continue to hold until the AER approves a transfer of the licences from Cedar Creek to Tidewater (at which time Tidewater's legal interest in the Facilities would crystallize). Accordingly, Cedar Creek submits that, at all material times, it was and continues to be a working interest participant in accordance with the definition of "working interest participant" in the *OGCA*, which provides that:

1(ff) "working interest participant" means a person who owns a beneficial or legal undivided interest in a well or facility under agreements that pertain to the ownership of that well or facility;

Cedar Creek refers to Black's Law Dictionary, which defines beneficial interest "as a right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing" or "the profit, benefit or advantage derived from a thing which arises from a contract, as distinguished from legal ownership of that thing".¹⁵

The AER agrees with Cedar Creek's submission and notes that if this were not a satisfactory interpretation of "working interest participant" for the purpose of section 17 of the *OGCA*, all licence transfers involving 100 percent WIP ownership would result in either the transferor being non-compliant with its licence or the transferee being ineligible to apply for the licence, since it is impossible for both parties to hold 100 percent of the legal interest in a facility. It would also make the inclusion of "beneficial interest" in the *OGCA*'s definition of "working interest participant" meaningless.

In short, the AER finds that TAG has not raised any compelling reasons why the AER should exercise its discretion under section 42 of *REDA* for a reconsideration of the decision.

¹⁴ (February 17, 2016), Appendix 2: Licence Transfer Process and LMR Assessments, s 5.

¹⁵ Cedar Creek, Response to Request for Regulatory Appeal No. 1917180 (January 18, 2018) at para 23.

Conclusion

TAG's request for regulatory appeal is dismissed and the AER will not reconsider its decision to approve the Licence Transfer.

Sincerely,

<Original signed by>

Erin Maczuga,
Director, Regulatory Efficiency & Continuous Improvement, Strategic Delivery

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Cc: Shane Southerland, Cedar Creek Energy Ltd.
David Barva, Tidewater Midstream and Infrastructure Ltd.