

**Via Email**

**March 2, 2020**

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Canada

Canadian Natural Resources Limited      Marlboro Energy Ltd.

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

**Attention: Arly Castillo**

**Attention: Bruce Curlock  
James Olesko**

Dear Sirs/Madam:

**RE: Request for Regulatory Appeal by Canadian Natural Resources Limited (CNRL)  
Marlboro Energy Ltd. (Marlboro)  
Application No.: 1920815; Approval No: 12888  
Location: 4-4-39-16W4  
Regulatory Appeal No.: 1925150**

## **I. INTRODUCTION**

This decision deals with a request for a regulatory appeal filed by CNRL, under section 38 of the *Responsible Energy Development Act* (REDA), of the Enhanced Oil Recovery Approval No. 12888 made by the AER on June 10, 2019, pursuant to the *Oil and Gas Conservation Act* (OGCA). For the reasons that follow, the AER has decided to dismiss the regulatory appeal request.

## **II. THE LAW**

The applicable provision of REDA with 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 36(a) of REDA defines an “appealable decision.” For the present purposes, the relevant definition is contained in section 36(a)(iv), which states that an appealable decision includes:

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

The phrase “eligible person” is defined in section 36(b)(ii) of REDA to include:

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

The applicable deadline in the circumstances for filing a request for regulatory appeal is provided in section 30(3) the *Alberta Energy Regulator Rules of Practice* (Rules):

(m) in the case of a regulatory appeal in respect of any other appealable decision, no later than 30 calendar days after notice of the decision is issued.

CNRL filed its regulatory appeal request on October 2, 2019, which was outside of the 30-day deadline since the decision was issued on June 10, 2019.

### III. SUBMISSIONS OF THE PARTIES

#### *CNRL's Request*

With regard to the late filing, CNRL acknowledged that its request was outside of the deadline in section 30(3)(m) of the Rules and submitted that, because Marlboro did not issue CNRL a public notice of application, as required by the AER's Bulletin 2014-39, CNRL did not file a statement of concern to be considered as part of the application review.

Alternatively, and in case the AER decided not to consider the request for regulatory appeal, CNRL requested a reconsideration of the decision under section 42 of REDA. As part of the relief, CNRL also requested the AER to stay the decision under section 39 (2) of REDA until the matter is resolved.

In support of its request for regulatory appeal, CNRL stated that the decision is an appealable decision under section 36(a)(iv) of REDA since the approval was granted under the OGCA, which is an energy resource enactment, and without a hearing. In addition, CNRL submitted that it is an eligible person under section 36(b)(ii) of REDA because it is directly and adversely affected by the approval as a joint interest holder of the associated petroleum and natural gas (PNG) rights with 8% share within the project section 04-039-016W4M and 21% share within the adjoining section 32-039-016W4.

According to CNRL, the approved waterflood scheme is contrary to the AER's mandate because it does not support efficient or responsible development of the resource and it is not a wise allocation or use of water. CNRL is concerned with the continued action by Marlboro within the joint lands, which has the potential for adverse impacts on its existing and future production, and with Marlboro's complete disregard for the regulatory requirements and its joint ownership agreements. CNRL expressed significant technical concerns with the approved enhanced oil recovery, especially the proposed injection interval in the 100/04-04 well because there is no communication with the Lower Mannville PPP pool.

With respect to connectivity, CNRL stated the following:

Further to this, Canadian Natural submits that there is no evidence, of connectivity between the injection well and those wells which are proposed to result in enhanced production. Based on petrophysical analysis and comparison of structural elevations of the Ellerslie formation within the 100/04-04, 100/06-04 and 100/11-04 wells, it is Canadian Natural's conclusion that the proposed injection interval is not in the Lower Mannville PPP pool. The 100/04-04 well has 4 ohm.m resistivity with a calculated water saturation between 70-90% indicating that the zone is wet. At equivalent structural elevations, the Lower Mannville PPP pool wells (100/06-04 and 100/11-04) have resistivities of 30-40 ohm.m resulting in water saturations of 20-25% which

would indicate no hydraulic connection to the 100/04-04 well. CNRL also expressed significant concerns with Marlboro's continued action within the joint lands, which creates a potential for adverse impacts to existing and future production. According to CNRL, Marlboro has demonstrated a complete disregard with respect to following AER requirements and joint ownership agreements, which may result in escalated liability and irreparable harm to the reservoir for future production potential.

In support of its request, CNRL provided a chronology document describing its interactions with Marlboro leading up to the application.

### ***Marlboro's Response***

In its response submission, Marlboro argued that there are no circumstances present in this case that would warrant allowing CNRL to file a late regulatory appeal and that to allow this regulatory appeal would amount to an abuse of process by CNRL to the prejudice of Marlboro.

According to Marlboro, the main disagreement between the parties was the sale of CNRL's working interest in this pool to Marlboro, on which sale the parties were not able to agree. Marlboro submitted that it was in constant communication with CNRL providing it with all of the relevant data prior to submitting the application. During the period leading up to the application the parties held substantive meetings and calls during which CNRL did not present any of the technical concerns that are alleged in the regulatory appeal request.

Nevertheless, Marlboro agreed to voluntarily stay the decision and suspend all activities until the decision on this request is issued.

### ***CNRL's Reply***

In its reply to Marlboro's response, CNRL disputed that its concerns with the application were solely financial. CNRL originally contacted Marlboro with sound technical concerns, specifically in relation to the lack of evidence for connectivity between the injection well and those wells that were propose to result in enhanced production. In fact, the February 21, 2019 meeting between CNRL and Marlboro was held to discuss these technical concerns, which were not resolved at that meeting.

CNRL submitted that, since Marlboro did not address the outstanding technical concerns, it did not demonstrate that CNRL is not an eligible person and it did not demonstrate that the decision is not an appealable decision, the regulatory appeal should be granted.

## **IV. REASONS FOR DECISION**

The request for regulatory appeal raises the following issues:

1. Whether or not to allow CNRL to file late the regulatory appeal request?

2. If the answer to the first issue is no, whether or not there are exceptional circumstances that warrant a reconsideration of the decision in question?
3. Whether the AER should stay the decision?
4. If the answer to the first issue is yes, whether or not to grant the regulatory appeal and refer the matter to a hearing?

### *Analysis*

#### **1. Whether or not to allow CNRL to file the late regulatory appeal request?**

In this regulatory appeal process, and in response to the request, the AER issued a letter dated October 4, 2019, soliciting submissions from CNRL and Marlboro on whether or not there are special circumstances that would warrant allowing CNRL to file the late regulatory appeal request.

By a letter issued on October 25, 2019, and after reviewing the parties' submissions with regard to the late regulatory request, the AER determined that Marlboro did not provide CNRL with a public notice of application or otherwise advise CNRL that it was going to or had filed an application with the AER. As a result, CNRL was unaware of the application and was not able to file a statement of concern in accordance with the prescribed deadline. Consequently, the AER decided to accept CNRL's late filing of the request for a regulatory appeal.

On October 25, 2019, having accepted the late filing and prior to making a decision on whether a regulatory appeal hearing should be held, the AER afforded CNRL and Marlboro another opportunity to provide fulsome comments or submissions in response to the regulatory appeal request.

The AER considers the procedural steps described above as adequate to meet the procedural fairness requirements in the circumstances. CNRL has been provided with sufficient opportunity to express its concerns with the application, which it initially missed as a result of Marlboro's failure to provide CNRL with notice at the application stage.

#### **2. If the answer is no to the first issue, whether or not there are exceptional circumstances that warrant a reconsideration of the decision in question?**

Since the answer to the first issue was in the affirmative i.e. the late filing of the regulatory request was allowed, there is no need to consider this issue.

#### **3. Whether the AER should stay the decision?**

Given the fact that Marlboro agreed to voluntarily stay the approval subject matter of this regulatory appeal and all of the associated activities until this decision is issued, there is no need to address the stay issue.

#### **4. If the answer to the first issue is yes, whether or not to grant the regulatory appeal and refer the matter to a hearing?**

Since the answer to the first issue is in the affirmative i.e. the late filing of the regulatory request was allowed, the AER will deal with the legal test for a regulatory appeal request. As noted above, pursuant to section 38(1) of REDA, an eligible person may request a regulatory appeal of an appealable decision.

### Appealable Decision

The decision that is the subject matter of this appeal request is an approval issued pursuant to the OGCA, which is, in accordance with section 1(1)(j) of REDA, an energy resource enactment. And since the decision was made without a hearing, it is an appealable decision under section 36(a) of REDA.

### Eligible Person

In this particular case, CNRL would be an eligible person to request a regulatory appeal if it is or may be directly and diversely affected by the enhanced oil recovery approval issued to Marlboro.

CNRL's main ground for requesting a regulatory appeal is that, as a joint interest holder of 8% of the associated PNG rights within the project section 04-039-016W4M and a 21% interest holder in the adjoining section to the south 32-039-16W4, it will be directly and potentially adversely impacted by the activities approved in the decision. CNRL has also provided some technical concerns with regard to the approved scheme and made general claims about the potential for adverse impacts to its existing and future production, as well as raising significant concerns with Marlboro's complete disregard for AER requirements and its joint ownership agreements.

The factual part of the test set out by Court of Appeal in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*<sup>1</sup> provides guidance on what indicates a person may be directly and adversely affected. In particular, the AER must consider the "degree of location or connection" between the project or its effects and the person, and whether that connection is sufficient to demonstrate the person may be directly and adversely affected by the proposed activity. Reliable information is required that demonstrates a reasonable potential or probability that the person asserting the impact will be affected.

There is no dispute that CNRL is a joint interest holder of the PNG rights within relevant sections that are subject to the approval. The joint nature of CNRL's PNG rights, the percentage of its share in the rights, and the existence of commercial joint ownerships that regulate those rights are acknowledged. That, however, is not sufficient to meet the factual part test. CNRL must provide sufficient evidence to show a degree of connection that is satisfactory to demonstrate that it is directly and adversely affected by the decision issued to Marlboro, aside from any commercial disagreements that the parties may have. In this case, CNRL has not provided the AER with sufficient information to establish that it will or may be directly and adversely affected by the approval despite being provided with the opportunity to do so.

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<sup>1</sup> 2005 ABCA 68

Apart from its general claims, CNRL has provided limited evidence and explanation that describes how its existing and future production is directly and adversely affected by the approved enhanced oil recovery scheme.

In relation to the technical concerns, CNRL did not submit sufficient or reliable technical information in support of its connectivity concerns. The technical information provided in Marlboro's application (including net pay map) indicates that the structural elevation of the Ellerslie interval is similar within the 100/04-04, 100/06-04 and 100/11-04 wells. The net pay map submitted with the application shows that the Ellerslie sands are connected and in communication with each other, indicating that there is connectivity between the wells. The limited petrophysical analysis provided by CNRL on the other hand, includes only water saturation comparisons. For the 100/04-04 well, CNRL uses a much greater water saturation value (70-90%) than what was Marlboro arrived at based on the technical information in its application (30%), but it does not explain why its value should be preferred over Marlboro's. Moreover, water saturation is only one element of a petrophysical analysis, and CNRL did not address other components in its analysis such as pressure comparisons, permeability and porosity. CNRL did not submit any evidence beyond its limited petrophysical analysis and comparison of structural elevations to support its allegations. The information and analysis CNRL provided does not substantiate its conclusion that there is a lack of connectivity between the wells or that the injection interval in the 100/04-04 well is not in the Lower Mannville PPP Pool, nor is it sufficient to demonstrate that the information Marlboro submitted in support of the initial application, which was reviewed and assessed by AER before issuing the decision, was incorrect or deficient.

Given the foregoing, the AER finds that CNRL is not directly and adversely affected by the decision. Consequently, CNRL is not an eligible person under section 36(b)(ii) of REDA and the request for a regulatory appeal is hereby dismissed.

Sincerely,

<Original signed by>

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Steve Thomas  
Director, Oil & Gas Subsurface, Waste & Storage

<Original signed by>

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Paul Ferensowicz  
Senior Advisor, Regulatory Enhancement Branch

<Original signed by>

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Sean Sexton  
VP, Legal