REGULATORY LAW CHAMBERS

Regulatory Law Chambers *is a Calgary-based boutique law firm dedicated to excellence in energy regulatory matters. We have expertise in oil and gas, electricity, including renewable energies and commercial matters, tolls and tariff, compliance and environmental related matters. We frequently represent clients in proceedings before the Alberta Energy Regulator ("AER"), the Alberta Utilities Commission ("AUC"), the National Energy Board ("NEB"), all levels of the Courts, and in energy related arbitrations and mediations.* ***Our advice is practical and strategic. Our advocacy is effective.***

This monthly report summarizes matters under the jurisdiction of the AER, the AUC and the NEB and proceedings resulting from AER, AUC and NEB decisions. For further information, please contact Rosa Twyman at Rosa.Twyman@RLChambers.ca or John Gormley at John.Gormley@RLChambers.ca.

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ALBERTA ENERGY REGULATOR

Imperial Oil Resources Limited - Application for Kearl Mine's Tailings Management Plan - (Decision 20180716A

Tailings Management Plan - Water-capping Technology

In this decision, the AER considered Imperial's application pursuant to section 13 of the *Oil Sands Conservation Act* ("*OSCA*") for approval of its tailings management plan ("TMP") for the Kearl Mine.

The application sought approval for Imperial's TMP from the present until 2066.

For the reasons summarized below, the AER approved Imperial's application, subject to terms and conditions (the "Approval Conditions").

Background

Imperial Oil Resources Limited's ("Imperial") Kearl oil sands mine site (the "Kearl Mine") received approval through a joint Alberta Energy and Utilities Board and Government of Canada panel in 2007. The Kearl Mine started production in April 2013, and tailings placement began at that time in the external tailings area ("ETA")

Thickened tailings ("TT") are created by processing tailings in a thickener, which results in the removal of water. This increases the density and reduces the volume of the fluid tailings. Imperial commenced tailings treatment in 2016 using its thickeners.

Approval Conditions

The Approval Conditions imposed by the AER addressed the following:

- stakeholder and indigenous community engagement;
- project-specific thresholds for new fluid tailings;
- tailings treatment technology and deposit performance plans and updates, including mitigation measures and research, monitoring, evaluation, and reporting; and
- environmental effects and implications.

Kearl Mine's TMP Approval and Conditions

The AER had concerns about the uncertainties of Imperial's tailings treatment technology and deposit performance. In the AER's view, its approval of the TMP, together with the Approval Conditions, reflected the *Lower Athabasca Region: Tailings Management Framework for Mineable Athabasca Oil Sands'* ("TM Framework") outcomes. The AER considered that the Approval Conditions would ensure appropriate information was captured in a timely manner to manage risk and facilitate appropriate regulatory decision-making regarding tailings management at the Kearl Mine.

Regulatory Scheme

The Government of Alberta regulates tailings under the TM Framework.

Tailings are a by-product of the process used to extract bitumen from mined oil sands and consist of water, silt, sand, clay and residual bitumen.

The AER regulates tailings from oil sands mining operations to ensure that the tailings are managed in an efficient, safe, orderly and environmentally responsible manner over their entire life cycle.

The AER applies a risk-based approach to regulating, where higher-risk activities receive the greatest regulatory oversight. Given the nature and scale of fluid tailings generated by oil sands mine operations and the ongoing research and development of tailings treatment technology, fluid tailings management is one of Alberta's higher-risk industrial activities.

The AER noted the following regarding the TM Framework:

- The TM Framework's objective is to minimize fluid tailings accumulation by ensuring that fluid tailings are treated and reclaimed progressively during the life of a project, and all fluid tailings associated with a project are ready-to-reclaim ("RTR") within ten years of the end of mine life.
- The TM Framework establishes four outcomes: land use must be returned to Albertans, sustainable ecosystem, liability is minimized to Albertans, and environmental effects are managed.
- As part of the implementation of the TM Framework, the AER released *Directive 085: Fluid Tailings Management for Oil Sands Mining Projects* ("*Directive 085*"), which sets out requirements for all fluid TMPs, including both existing fluid tailings (i.e., legacy) and new fluid tailings.

Tailings Treatment Technology

Use of Thickeners

Imperial was placing TT treated by secondary chemical treatment in the East ETA. Imperial proposed to commence placement of TT in the in-pit area 2 ("ITA2") in 2028.

The AER authorized Imperial to continue to use thickeners with secondary chemical treatment, subject to the following conditions:

(a) that the thickeners with secondary chemical treatment or other selected treatment technologies achieve performance parity with other comparable technologies;

(b) Imperial provides the AER with assurance that the TM Framework's objective and outcomes can be met where water-capping technology is not permitted; and

(c) Imperial ensures compliance with *Directive 085* by providing an updated TMP by December 31, 2020. The TMP must describe how it will develop alternative tailings treatment technologies and an implementation plan to treat the volume of fluid tailings that Imperial plans to water cap.

The AER was concerned that the thickeners, secondary chemical treatment, and East ETA might not perform as expected due to the stage of the Kearl Mine operations and the limited performance data. The AER anticipated that Imperial would be in a position to employ mitigation measures (e.g., re-handling, additional treatment, capping with additional material) should the East ETA underperform or Imperial fail to achieve long-term reclamation outcomes.

Water-capping technology

Directive 085 requires that, where water-capped fluid tailings technology is used to forecast tailings inventory profiles, an alternative tailings treatment technology must be provided, including timeframes for implementation.

The AER required Imperial to provide an updated TMP by December 31, 2020, describing how it will develop alternative tailings treatment technologies and an implementation plan to treat the volume of fluid tailings that Imperial plans to water cap.

The AER was concerned with Imperial's proposed use of water-capping technology, noting that water-capping was subject to further assessment, research, and future policy. The AER required Imperial to provide an updated TMP by September 30, 2027, that included Imperial's decision on water-capping technology.

Imperial was waiting for the results of Syncrude's Base Mine Lake ("BML") water-capping technology demonstration, however, has not provided sufficient information for the AER to determine if BML research will address Kearl Mine site-specific uncertainties such as the end-pit lake deposit and water cap design, including physical, chemical, and biological components.

The AER required Imperial, under its *Environmental Protection and Enhancement Act* ("*EPEA*") approval, to provide the following:

- the applicability of Syncrude's BML research to Imperial's circumstances;
- how Imperial will address uncertainties and risks where BML research is not applicable; and
- the research related to human health risk assessment and long-term chemistry and minerology for end-pit lakes.

Capping Material Availability

The AER found that Imperial's ability to meet TM Framework outcomes and future reclamation outcomes would be compromised if there was insufficient capping material. Therefore, the AER imposed conditions to ensure that Imperial had adequate coarse sand tailings, or other suitable capping material, available to support its activities.

Adequate capping material, such as coarse sand tailings, is necessary for landform contouring and stability. It provides, among other things, increased tailings deposit strength and trafficability, manages settlement, controls the location of the groundwater table, controls surface water drainage, and prevents tailings pore water from contaminating reclaimed areas.

Imperial requires capping material for the following activities:

- infill beaching;
- construction for the purposes of building dams and tailings containment structures; and
- capping tailings deposits.

As part of the Approval Conditions, the AER required Imperial to provide the following information as part of its *EPEA* life of mine closure plan and/or mine reclamation plan:

- capping material types, objectives, and implications;
- material balances for coarse sand and any other suitable capping materials; and
- contingency plans for capping material shortages.

The AER also required Imperial to submit a capping research plan by December 31, 2020, for its TT deposits. Imperial's research must provide timely and site-specific information concerning capping material needs and availability. If there were a capping material shortage, Imperial would need to adjust its tailings treatment technology selection to ensure the TM Framework's and long-term reclamation outcomes can be achieved.

Imperial is also required to continue to report on capping and stability as part of its tailings research report required under its *EPEA* approval.

Fluid Tailings Treatment Technology

To address the concerns related to technology and deposit performance, the AER required Imperial to report annually on the technology performance and the East ETA deposit performance, including:

(a) providing mitigation measures to rectify technology that is not performing as expected;

(b) assessing the performance and benefits of secondary chemical treatment; and

(c) providing information confirming technology continuous improvement and development.

To understand if segregation of TT is occurring and whether mitigation measures need to be implemented, the AER required Imperial to monitor, on a quarterly basis, solids content and sands-to-fine ratio of the TT following secondary chemical treatment. Imperial is required to provide a summary of these monitoring results annually.

The AER expressed concern about Imperial's treatment technology capacity being sufficient to treat tailings at the Kearl Mine. The AER noted that the Kearl Mine was currently producing 220,000 barrels per day ("bpd"). Under existing *OSCA* and *EPEA* approvals, Imperial could increase production to 345,000 bpd by 2027, followed by stable production thereafter.

As part of the updated 2020 TMP, the AER required Imperial to assess, describe, and propose the selected treatment technologies that ensure the treatment capacity of the selected technologies would be equal to or greater than the production rate of fluid tailings.

Fluid Tailings Profile and Project-Specific Thresholds

The fluid tailings profile represents the volume of fluid tailings that are not RTR.

Legacy Fluid Tailings Profile

Legacy fluid tailings are fluid tailings that existed before January 1, 2015. All legacy fluid tailings must be RTR by end of mine life.

The AER accepted Imperial's request to deem all fluid tailings as new fluid tailings, based on the following:

(a) the volume of legacy fluid tailings was small (5 million m^3);

(b) the Kearl Mine was at an early stage of operations; and

(c) the legacy and new fluid tailings being placed in the ETA were indistinguishable from one another.

Therefore, the AER did not require Imperial to provide a legacy fluid tailings profile.

New Fluid Tailings Profile

New fluid tailings are fluid tailings that are produced after January 1, 2015. All new fluid tailings must be RTR within ten years of end of mine life.

Based on Imperial's technology and deposit performance assumptions, the AER found that its new fluid tailings profile met the TM Framework's objective, as all new fluid tailings were predicted to achieve RTR status by 2066, within ten years after the end of mine life. Imperial's new fluid tailings profile is authorized.

Nevertheless, the AER addressed these issues with respect to Imperial's new fluid tailings profile:

(a) the profile was based on Imperial's conservative assumptions regarding treatment technology performance and tailings deposit performance, as Imperial needed more time to verify its tailings treatment technology and deposit performance;

(b) as operations progressed, the new fluid tailings profile might not represent the actual performance of the Kearl Mine's treatment technology and tailings deposit; and

(c) Imperial's end of mine life target appeared to be more than the five years of fluid tailings accumulation, contrary to the requirement

under the TM Framework and *Directive 085* that the end of mine life target be equivalent to five years or less of fluid tailings accumulation.

To address these issues, the AER required Imperial to submit an updated new fluid tailings profile in the updated 2020 TMP by December 31, 2020. The updated new fluid tailings profile must:

- incorporate current tailings treatment technology and tailings deposit performance data;
- incorporate predicted tailings treatment technology and tailings deposit performance; and
- have an end of mine life target that is no greater than five years accumulation of fluid tailings production.

Thresholds

With respect to thresholds, the AER explained that:

- The volume of accumulated fluid tailings is the primary indicator in the TM Framework used to manage and decrease liability and environmental risk resulting from the accumulation of fluid tailings.
- Triggers and a limit (thresholds) are set relative to the fluid tailings profiles.
- The thresholds are intended to ensure that fluid tailings are not accumulating beyond a volume or at a rate that precludes operators from meeting the TM Framework's objective.

The three thresholds are the profile deviation trigger, the total volume trigger, and the total volume limit:

(a) Profile deviation trigger

(i) occurs when the volume of fluid tailings is growing 20 percent faster than that approved for the profile;

(ii) is based on when the fluid tailings volume growth is 20 percent higher than that in the approved profile; and

(iii) allows a five-year rolling average to account for year-over-year variability.

(b) Total volume trigger

(i) occurs when the volume of fluid tailings has exceeded its approved maximum accumulation and requires additional management action; and

(ii) is based on a level equal to 100 percent of the greater of the maximum approved fluid tailings volume profile or the end of mine life target.

(c) Total volume limit

(i) is the volume of fluid tailings above which it presents an unacceptable risk to the environment and potential long-term liability; and

(ii) is based on 140 percent of the greater of the maximum approved fluid tailings volume profile or the end of mine life target.

To allow for year-over-year variability, the AER set the profile deviation trigger for Imperial as a five-year rolling average of the annual profile deviation.

The total volume trigger and limit are based on the greater of the maximum approved fluid tailings volume profile or end of mine life target, as per the TM Framework and *Directive 085*. As Imperial's maximum approved fluid tailings volume was 180 million m^3, which was greater than the end of mine life target, the AER set the total volume trigger at 180 million m^3 and the total volume limit at 252 million m^3.

Tailings Solvent Recovery Unit Tailings

The AER did not permit Imperial to place tailings solvent recovery unit ("TSRU") tailings in any deposit except the West ETA at this time. Because the location of TSRU tailings was restricted, Imperial's measurement system plan is required to include identification of substances of concern in TSRU tailings, and measurement location and measurement methodology for the substances of concern. Given limited data, the AER was uncertain how Imperial would manage the risks to the surrounding environment and long-term reclamation outcomes from TSRU tailings placed in the West ETA.

Storage

With respect to storage of tailings deposits, the AER required Imperial to report annually on the available storage capacity of each tailings deposit or pond that contained water or tailing and to estimate the storage volume requirements for the next five years.

Ready-to-Reclaim Criteria

Under the TM Framework and *Directive 085*, fluid tailings are considered RTR when they have been processed with an accepted technology, placed in their final landscape position, and meet RTR criteria.

RTR criteria are used to track the performance of a tailings deposit toward its ability to be reclaimed as predicted.

RTR criteria are intended to support the objective of reclaiming oil sands mining projects to self-sustaining locally common boreal forest ecosystems that are integrated with the surrounding area and consistent with the values and objectives identified in local, sub-regional and regional plans.

The TM Framework and *Directive 085* allow operators to develop RTR criteria that are suitable for their type of tailings, technology, deposit and future reclamation activities.

In this case, the AER did not accept Imperial's proposed RTR criteria. The AER found that Imperial's proposed RTR criterion:

(a) did not provide assurance that the deposit's physical properties were on a trajectory to support future stages of activity in an appropriate timeframe;

(b) did not consider the characteristics of the TT that would be placed in the tailings deposit, as the criterion was proposed prior to secondary chemical treatment; and

(c) was not time bound with respect to the trajectory to 65 percent solids content.

Sub-objectives

Two sub-objectives address different aspects of performance:

- Sub-objective 1: The deposit's physical properties are on a trajectory to support future stages of activity.
- Sub-objective 2: To minimize the effect the deposit has on the surrounding environment and ensure that it will not compromise the ability to reclaim to a locally common, diverse and self-sustaining ecosystem.

Under *Directive 085*, treated tailings that meet their applicable RTR criteria can be removed from the fluid tailings inventory because they are on a trajectory to meet long-term reclamation outcomes. In circumstances where RTR criteria are no longer met, or there is a deviation from the expected trajectory, Imperial must identify the volume not meeting the RTR criteria and the degree of non-performance.

Sub-objective 1: Solids Content

Imperial proposed to use solids content as a sub-objective 1 RTR criterion.

The AER required Imperial, for each treated tailings deposit, to monitor and report annually, sands-to-fine ratio, effective stress, deposit consolidation, pore water pressure, clay types and percentage, and any other parameters considered relevant by the AER or Imperial.

The AER determined that, given the additional monitoring and reporting required, the use of the solids content by weight of a deposit was an acceptable sub-objective 1 RTR criteria measure.

The AER directed Imperial to update the RTR trajectory and criteria for each type of deposit, including the East ETA TT deposit in the updated 2020 TMP.

Sub-objective 2

Imperial proposed the following sub-objective 2 RTR criteria for the East ETA:

- the groundwater monitoring program conducted as per the *EPEA* approval;
- industrial wastewater control systems have been constructed to capture potentially process affected surface water and return it to the ETA; and
- design reports and annual performance reports for each structure (i.e., dams).

The AER approved Imperial's proposal to use its existing groundwater monitoring program as a sub-objective 2 RTR criterion for the East ETA.

The AER did not approve:

(a) Imperial's proposed use of the industrial wastewater control system as a sub-objective 2 RTR criterion, based on the AER's finding this would only mitigate risks to the surrounding environment while the control systems were actively operating; and

(b) Imperial's proposed sub-objective 2 RTR criterion of design reports and annual performance reports for each structure (i.e., dams). Imperial did not describe a clear

relationship between design reports and annual performance reports and sub-objective 2.

Measurement and Averaging

Each treated tailings deposit must be measured to determine if the RTR criteria have been achieved. *Directive 085* requires operators to submit a measurement system plan six months from the date of an approved TMP.

The AER required Imperial to develop a measurement system plan that included the following:

- definitions of parameters for fluid tailings and RTR criteria measurements;
- reference to standards and procedures used to measure fluid tailings and treated tailings and RTR criteria;
- an explanation of and justification for measurement procedures that are unique to Imperial and its plan;
- evidence that the plan will address the measurement outcomes as per section 5 of Directive 085;
- an explanation of how each of the deposit's RTR criteria will be measured using deposit sampling, calculated, and reported;
- a description of the tailings deposit sampling, measurement, and survey program; and
- a justification of how measurement, sampling, and spacing intervals will:

  (a) show the variation of the tailings deposit properties,

  (b) verify that the tailings deposit is achieving RTR criteria, and

  (c) identify if any material in the tailings deposit is not achieving RTR criteria.

The AER required Imperial to measure the volume of treated tailings that met the RTR criteria based on deposit sampling. The AER expected deposit sampling to be sufficient to identify variability within the entire deposit. The AER prohibited Imperial from using an annual average for the entire deposit to determine the volume of treated tailings meeting RTR criteria.

Stakeholder and Indigenous Community Engagement

The TM Framework and *Directive 085* describe the importance of transparency, engagement, and enhancing stakeholder and indigenous community understanding of fluid tailings management.

To ensure continued transparency, information sharing and involvement in tailings management, the AER required Imperial to engage stakeholders and indigenous communities on tailings management activities undertaken pursuant to the approval.

The AER also required Imperial to:

(a) hold an annual forum with stakeholders and indigenous communities regarding tailings management activities; and

(b) report to the AER annually on its engagement efforts.

Summary

The AER approved Imperial's TMP for the Kearl Mine, subject to the Approval Conditions.

Husky Oil Operations Limited and Gibson Energy Inc. - Regulatory Appeals of an Environmental Protection Order Issued - (Decision 2018 ABAER 007)
Regulatory Appeal - Environmental Protection Order

Background

Husky Oil Operations Limited ("Husky") and Gibson Energy Inc. ("Gibson") both filed requests for regulatory appeal of the environmental protection order ("EPO") issued by the AER, Closure and Liability Branch ("C&L").

C&L issued the EPO under sections 113 and 241 of the *Environmental Protection and Enhancement Act* ("*EPEA*"). The EPO required Husky and Gibson to take remedial action in relation to hydrocarbons released into groundwater and a surface water body at the Hardisty terminals. Husky and Gibson were also directed to submit a remediation action plan ("RAP") for approval. Both companies disputed that they were the "persons responsible" under the order and sought to have the EPO either varied or revoked.

For the reasons summarized below, the AER dismissed the requests for regulatory appeal filed by Husky and Gibson pursuant to section 39(4) of *Responsible Energy Development Act ("REDA").*

Timeline

On March 26, 2015, Gibson reported to the AER the presence of hydrocarbons in groundwater on site. On June 29, 2015, Husky filed other reports of hydrocarbons in groundwater on site to the AER. On September 14, 2015, Gibson filed other reports of hydrocarbons in groundwater on site to the AER.

On October 7, 2015, C&L directed Husky and Gibson to take steps to investigate and contain the hydrocarbons released and provide a remediation and risk management plan. On April 5, 2016, C&L confirmed that the hydrocarbons present in the groundwater on site had migrated and were discharging into a surface water body. C&L issued the EPO to Husky and Gibson on July 7, 2016, requiring them to take specific actions.

On February 15, 2018, C&L advised the hearing panel that it had cancelled the EPO effective February 14, 2018.

C&L and Husky both submitted that the cancellation of the EPO rendered these appeals moot. Gibson submitted that its appeal is not moot and that the hearing should proceed.

Regulatory Appeal Test

The *REDA* sets out the scope of the AER's authority for regulatory appeals. The AER conducts regulatory appeals to review appealable decisions, as defined in section 36 of *REDA*. The definition includes EPOs issued under section 113 of *EPEA*, such as the EPO in this proceeding. Section 41(2) of *REDA* provides that: "in its decision on a regulatory appeal, the [AER] may confirm, vary, suspend or revoke the appealable decision."

Section 39(4) of *REDA* states the AER may dismiss all or part of a request for regulatory appeal in certain circumstances, including if it considers the request to be frivolous, vexatious, or without merit, or for any other reason it considers that the request for regulatory appeal is not properly before it.

In this case, the AER had to decide whether it should dismiss the requests for regulatory appeal on the basis that the issues subject to the appeal had become moot.

Test for Mootness

The AER explained that the Supreme Court of Canada ("Supreme Court") established a two-step analysis for mootness in *Borowski v. Canada* (*AG*)[1]. Under the first step, the decision maker must determine whether the required "tangible and concrete dispute" before it has disappeared and if the issues have become academic. If the decision maker determines that this has occurred, it must then apply the second step.

The second step involves applying three criteria to decide whether the decision maker should exercise its discretion to hear the case. The decision maker must consider the extent to which each of the following criteria are present and the weight to be given to each. The criteria are:

- the requirement for an adversarial context;
- the concern for judicial economy; and
- the proper role of the adjudicative branch.

Application of First Step: "Tangible and Concrete Dispute"

The AER panel found that the first part of the mootness analysis had been met; that is, the "tangible and concrete dispute" of these appeals had disappeared, making the issues academic.

The AER determined that because the EPO had been cancelled, there was no longer an appealable decision for it to consider. The issuance of an EPO under *EPEA* was an appealable decision according to section 36(a) of *REDA*, but the AER found that a cancellation of an EPO was not. The AER panel found that to grant the request would be beyond the scope of its authority under section 41(2) of *REDA* because there was no longer an appealable decision, namely the EPO, to confirm, vary, suspend, or revoke.

The AER noted Husky's submission that the cancellation of the EPO rendered the regulatory appeals moot and the proceeding should be concluded. Gibson did not object to Husky's regulatory appeal being concluded as moot. Given these submissions, the AER decided it was not necessary to apply the second step of the mootness analysis to Husky's regulatory appeal, but it would do so for Gibson's regulatory appeal.

Application of Second Step of Mootness Test

The AER panel had to consider the extent to which each of the following criteria was present and weigh the relative significance of each in determining whether to exercise its discretion to proceed with Gibson's regulatory appeal:

- Was there still an adversarial context to this case?
- Does the determination of a now-academic issue outweigh concerns about judicial economy?
- Might the panel exceed its adjudicative role in proceeding to decide this case?

[1] *Borowski v. Canada (AG),* [1989] 1 SCR 342.

Adversarial Context

Gibson's regulatory appeal sought to have the EPO revoked on the basis that Gibson was not a "person responsible" for the hydrocarbons present in the groundwater and surface water body. The cancellation of the EPO, which effectively granted the relief sought by Gibson's regulatory appeal, had also eliminated the dispute between Gibson and C&L in relation to the EPO.

Judicial Economy

In setting this criterion in *Borowski v. Canada (AG)*, the Supreme Court identified three factors to consider:

- Would deciding the case have some practical effect on the parties' rights, regardless that the decision would not determine the controversy that gave rise to the action?
- Is the case one of a recurring nature but brief duration that raises an important question that might otherwise evade review?
- Is there an issue to be decided of public importance where resolution is in the public interest?

The AER found that the above factors did not support the AER exercising its discretion to decide Gibson's appeal, based on the following:

- Proceeding with Gibson's regulatory appeal would not have had a practical effect on the parties' rights, since:
  - (i) the cancellation of the EPO effectively granted the relief that Gibson sought; and
  - (ii) there was no further relief that the AER panel would have authority to grant.
- Gibson's regulatory appeal of the EPO did not fit the description of a case of a recurring nature and brief duration that might otherwise evade review by a hearing panel.
- The question of whether Gibson was properly a "person responsible" under the cancelled EPO was not an issue of public importance. The AER found that there was not significant uncertainty in the law in relation to the application of "person responsible" to EPOs under section 113 of *EPEA*, noting that the Alberta Environmental Appeals Board and Alberta Court of Queen's Bench had dealt with that issue in a number of decisions.

Adjudicative Role of AER Panel

The AER found that it would not be appropriate for it to rule on the issue of "person responsible" for the purpose of assisting Gibson in other proceedings.

Gibson acknowledged in its submission that it sought to have this issue decided to assist it with determining liability for remediation costs. The AER considered that the *EPEA* was clear regarding financial liability related to EPOs and the scope of "person responsible" under such orders. The AER noted allocation of financial liability for remediation costs is a private dispute that is not within the scope of regulatory appeals; it can be dealt with through the civil court system.

Summary

The panel found that the regulatory appeals of both Husky and Gibson were moot because the EPO was cancelled. There was no longer an appealable decision before the panel and no remedies under *REDA* that authorized the panel to grant these regulatory appeals. The AER stated that the proper venue for any dispute about allocation of financial liability for remediation costs is the civil court system, not the regulatory appeal process under *REDA*.

Change to Reclamation Application Pre-Submission Requirements (Bulletin 2018-17)
Statement of concern

In this bulletin, the AER announced the release of a new edition of *Application Submission Requirements and Guidance for Reclamation Certificates for Well Sites and Associated Facilities* ("*SED 002*").

The main change is to landowner notification requirements. The AER stated that these changes are consistent with the process under the *Responsible Energy Development Act* and *Alberta Energy Regulator Rules of Practice*. These changes clarify when to file a statement of concern.

Applicants no longer need to provide affected parties a copy of the application package a minimum of 30 calendar days before they intend to submit the application to the AER. Instead, as described in section 6.2.3 of *SED 002*, the same day an application has been submitted, the applicant must also provide all affected parties with a copy of the application package, including a copy of the public notice of application from the AER's website.

SED 002 is available on the AER website, www.aer.ca.

New Alberta Environment and Parks Directive About Scour Protection for Pipelines, (Bulletin 2018-18)
Scour protection - Armour - Water Act

Effective March 1, 2018, Alberta Environment and Parks ("AEP") issued a directive titled *Directive on Use of Approvals to Allow Riverbed Armouring to Provide Scour Protection for Pipelines* (AEP 2018 Conservation #1). Under this new directive, operators can apply for a *Water Act* approval to "armour" pipeline crossings that meet the criteria outlined in the directive. Operators of AER-regulated pipelines must submit their applications to the AER.

For questions about the directive, contact AEP at AEP.WaterPolicy@gov.ab.ca. For application-related questions, contact the AER at IndustryRelations@aer.ca.

Clarifying the Difference between the Transfer of an AER Licence and the Sale or Transfer of the Contractual Right to Operate Wells and Facilities, (Bulletin 2018-16)
Licensee - Operator

In this bulletin, the AER clarified that contractual agreements purporting to sell or otherwise transfer the right to operate wells or facilities do not transfer the associated AER licences unless a licence transfer application is submitted to the AER and approved.

In order to become the licensee of a well or facility under the *Oil and Gas Conservation Act* ("*OGCA*"), a person must apply and qualify for licence eligibility pursuant to *Directive 067*: *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals*. If granted eligibility, that person can then apply for a licence or apply to have a licence transferred to them. A licence cannot be transferred without the AER's consent, which, if granted, may be subject to certain terms, conditions, and restrictions.

The term "operator" is defined in section 1(1)(kk) of the *OGCA* as follows:

> with respect to a well or facility, means a person who
>
> (i) has control of or undertakes the day to day operations and activities at a well or facility, or
>
> (ii) keeps records and submits production reports for a well or facility to the Regulator, **whether or not that person is also the licensee or approval holder in respect of the well or facility.** [emphasis added]

A licensee may operate a well or facility itself, in which case it is both the licensee and the operator. But often a licensee contracts with others to operate the well or facility on the licensee's behalf. These contracted operators are *not* licensees. They do not of themselves have authority to develop the resources. They do so under the auspices of the licensee.

The AER noted that, as stated in section 9 of the *OGCA*, terms or conditions of any contract or other arrangement that attempt to override the AER's statutory discretion regarding licence transfers, or otherwise conflict with the *OGCA*, are unenforceable.

ALBERTA UTILITIES COMMISSION

FortisAlberta Inc. - Compliance Filing to Decision 22741-D01-2018 (Decision 23372 - D01-2018)
K factor - Performance-based regulation - AESO contributions

In this decision, the AUC considered FortisAlberta Inc.'s ("FortisAlberta") compliance filing to Decision 22741-D01-2018 (the "Original Decision"). In the Original Decision, the AUC considered FortisAlberta's application for approval of its 2016 performance-based regulation ("PBR") capital tracker true-up and directed FortisAlberta to provide additional information and calculations in a compliance filing.

Background

On February 28, 2018, FortisAlberta filed an application with the AUC requesting approval of its compliance filing. Due to adjustments made as a result of directions in the Original Decision, FortisAlberta revised its requested refund in K factor revenue from $10.8 million to $11.3 million.

Projects or programs are eligible for capital tracker treatment, provided that they meet the following three criteria:

(a) the project must be outside the normal course of ongoing operations ("Criterion 1");

(b) ordinarily, the project must be for replacement of existing capital assets or the project must be required by an external party ("Criterion 2"); and

(c) the project must have a material effect on the company's finances ("Criterion 3").

For the reasons further summarized below, the AUC made the following determinations:

(a) The AUC relieved FortisAlberta of its obligation to comply with certain directions (5, 8, and 9) pending the AUC's consideration of the review and variance application in Proceeding 23505.

(b) The AUC found that FortisAlberta had complied with all other AUC directions as they pertain to the compliance filing.

(c) The AUC directed FortisAlberta to refund $11.3 million in K factor revenue related to the true-up of the 2016 capital tracker, subject to treating $3.3 million of this refund as a placeholder pending the AUC's decision in Proceeding 23505 in relation to the Alberta Electric System Operator ("AESO") Contribution Program. FortisAlberta was further directed to include this refund with any associated carrying costs in its 2019 annual PBR rates filing due on September 10, 2018.

Load Settlement Replacement Project

In the Original Decision the AUC found it could not make a determination on the reasonableness of treating the Load Settlement Replacement Project as a separate capital tracker project without further information. As a result, the AUC directed FortisAlberta to:

- explain the activities that justify the historical capital additions (from 2005 to 2012) included in the accounting test for the Load Settlement Replacement Project;
- identify all projects in its accounting test that included historical capital additions associated with the old Energy Vision Enterprise ("EVE") and/or Post Final Adjustment Mechanism ("PFAM") applications; and
- explain why it did not group all of its expenditures related to load settlement together under the Load Settlement Replacement Project.

The AUC found that FortisAlberta's explanations regarding why the Load Settlement Replacement Project was included as a separate project grouping to be reasonable. FortisAlberta relayed that the indicative service life for the Load Settlement Replacement Project is determined using a weighted calculation of the asset classes involved because it consists of both hardware and software asset classes. FortisAlberta noted that while the weighted calculation resulted in the same indicative service life for 2016, as the weightings change so will the indicative service life, which will not always be equal to the Software - Load Settlement group.

The AUC found that the Load Settlement Replacement Project and the Software - Load Settlement groupings were sufficiently different that they both could exist on their own. The AUC approved the K factor revenue of $1.6 million for the Load Settlement Replacement Project.

AESO Contributions Program

In the Original Decision, the AUC rejected FortisAlberta's proposal that AESO contributions be deemed to be final each year. The AUC further rejected FortisAlberta's

related proposal that the 2016 AESO contribution capital tracker be considered final upon the issuance of the AUC's Original Decision. In Direction 5 of the Original Decision, the AUC directed FortisAlberta to recalculate AESO contributions for all projects to reflect the AESO contribution refund. This would reflect the AESO contribution refund FortisAlberta would be eligible for under the ISO tariff if it immediately increased demand transmission service to the amount of the maximum capacity of the project.

In the compliance filing, FortisAlberta declined to comply with Direction 5. FortisAlberta stated it believed that the AUC had signalled "an intention to embark on an overarching reassessment of the fundamentals of the AESO Tariff's contribution policy as applied to distribution facility owners ("DFOs") and customers, and the ways in which DFOs are permitted a reasonable opportunity to recover capital that they invest in accordance with that policy."

The AUC assigned Proceeding 23505 to review Direction 5 with respect to the AUC's determination of how to finalize the AESO Contributions Program (the "Contributions Program") amounts to enable FortisAlberta's transition to the next generation PBR. The Contributions Program recognizes the cost to FortisAlberta of contributions paid to the AESO for the construction of transmission facilities and are required to supply aggregate load growth in Fortis' distribution area. That proceeding is ongoing.

In Direction 8 of the Original Decision, FortisAlberta was required to file a report for each project showing whether FortisAlberta intended to seek a refund, the date by which the refund was expected, and the amount of the contribution refund in each case. FortisAlberta explained that the contribution adjustment amount and date of adjustment for each of the system access service requests are pending the outcome of the AESO assessments and, therefore, the timing and estimated contribution adjustment, if any, were not determinable.

Direction 9 of the Original Decision directed FortisAlberta to provide its view and potential recommendations on the finalization of 2017 AESO contribution amounts. FortisAlberta was of the view that the requirements of second generation rebasing cannot be fairly addressed by using notional demand transmission service contract levels to adjust actual AESO contribution amounts. Instead, FortisAlberta submitted that any consideration of AESO contribution amounts should be guided by the following:

(a) general concerns relating to policies implemented under that tariff are most properly considered within the context of the pending AESO 2018 ISO Tariff proceeding, where impacts on all stakeholders may be assessed; and

(b) to the extent that the AUC determines that FortisAlberta's historical AESO customer contributions should be examined for the purpose of rebasing for the second term of PBR, such assessment should take place in the appropriate PBR rebasing proceeding, where all potential impacts of adjustments can be understood.

Summary

The AUC found that FortisAlberta complied with all AUC directions as they pertain to the compliance filing, with the exception of directions 5, 8 and 9, for which the AUC made no specific determination pending the AUC's consideration of its review and variance application in Proceeding 23505. FortisAlberta was consequently relieved of its obligation to comply with these directions at this time.

FortisAlberta was directed to:

(a) refund $11.3 million in K factor revenue related to the true-up of the 2016 capital tracker, subject to treating $3.3 million of this refund as a placeholder until such time that the AUC makes its determinations in Proceeding 23505; and

(b) include this refund with any associated carrying costs in its 2019 annual PBR rates filing due on September 10, 2018.

FortisAlberta Inc. - Application for Orders Confirming Boundaries of FortisAlberta Inc. Exclusive Municipal Franchise Areas (Decision 22164-D01-2018)
Rural Electrification Associations

Application

For the reasons summarized below, the AUC altered rural electrification associations ("REAs") service areas that overlapped with the municipal franchise areas granted to FortisAlberta. However, the AUC decided not to order an immediate transfer of existing REA facilities and customers in the annexed (formerly overlapping) areas in the absence of a municipal bylaw requiring those customers to connect to FortisAlberta. In the AUC's view, in the absence of such a bylaw, existing REA facilities in the formerly overlapping areas would eventually transition to FortisAlberta because of the altered service areas.

Issues regarding overlapping service areas arose under circumstances where the corporate boundaries of a municipality had expanded through annexation and now overlapped with areas served by existing REAs.

In this decision, the AUC considered FortisAlberta Inc.'s ("FortisAlberta") application under section 29 of the Hydro and Electric Energy Act ("HEEA") FortisAlberta requested:

(a) Confirmation of the current limits of FortisAlberta's exclusive service areas as determined by the applicable municipal franchise agreements ("MFAs") between FortisAlberta and various municipalities.

(b) Alteration, as required, of rural electrification associations ("REAs") service area boundaries to prevent incursion into exclusive service areas governed by the applicable MFAs.

(c) Transfers of facilities and customers coincident to the realignment of service areas, as required.

Legislative Scheme

The AUC explained that the municipalities' authority, including that relating to the purported grant of exclusivity in the MFAs, was conferred under the provisions of the *Municipal Government Act* ("*MGA*"). The AUC's authority relating to the approval of such agreements is founded in the provisions of the *Electric Utilities Act* ("*EUA*"), and its authority relating to service area designations is conferred by the provisions of the *HEEA*.

Municipalities' authority to govern

The AUC provided an overview of the following relevant provisions of the *MGA* dealing with municipalities' authority to govern:

- *MGA* section 3 sets out the purposes of a municipality, including subsection 3(b): "to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality."
- *MGA* sections 5 and 6 set out the general powers, duties, and functions of a municipality.
- *MGA* section 7 provides the municipal council its general jurisdiction to pass bylaws, including with respect to:

  (a) the safety, health and welfare of people and the protection of people and property;

  …

  (f) services provided by or on behalf of the municipality; and

  (g) public utilities.

- *MGA* section 8 sets out further specific municipal powers under bylaws.
- *MGA s*ection 9 provides guidance in interpreting the broad power to pass bylaws, including:
  - to give broad authority to municipal councils and to respect their right to govern in whatever way they consider appropriate; and
  - enhance the ability of councils to respond to present and future issues in their municipalities.

Municipalities' authority relating to non-municipal utility service

Section 45 of the *MGA* allows a municipality to, by agreement, grant a right to provide a "utility service" within the municipality.

Where a utility service is provided under section 45 of the *MGA*, section 46 authorizes a municipality to prohibit other persons from providing the same or a similar utility service.

Section 1(1) of the *MGA* defines "public utility" as follows:

> 1(1)(y) "public utility" means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:
>
> …
>
> (vii) electric power;
>
> …
>
> and includes the thing that is provided for public consumption, benefit, convenience or use;

The AUC explained that the definition of "public utility" in Section 1(1) of the *MGA* applies throughout the *MGA*. Division 3, Section 28 defines the following terms for the purposes of that division only:

> 28 In this Division,
>
> (b) "municipal public utility" means the system or works of a public utility operated by or on behalf of a municipality or a subsidiary of a municipality within the meaning of section 1(3) of the *Electric Utilities Act* other than under an agreement referred to in section 45;
>
> (c) "municipal utility service" means a utility service provided by a municipal public utility;

> (d) "non-municipal public utility" means the system or works of a public utility operated by or on behalf of a person under an agreement referred to in section 45;
>
> (f) "utility service" means the thing that is provided by the system or works of a public utility.

Commission's authority relating to municipal grants of rights to distribute electricity

MGA section 45 allows a council to grant a right to a person to provide a utility service in the municipality for up to 20 years. Under *MGA* Section 45(3), before such an agreement is made, amended or renewed, it must be approved by the AUC.

Section 139 of the *EUA* likewise provides that the right to distribute electricity granted by a municipality has no effect unless approved by the AUC, except where made to a municipal subsidiary.

Subsection 139(2) of the *EUA* provides that the AUC may approve the granting of such a franchise where the AUC "… determines that the grant is necessary and proper for the public convenience and to properly serve the public interest."

Section 140 of the *EUA* places specific limits on the Commission's approval of grants under Section 139, namely:

> 140 The Commission shall not approve a grant under section 139 unless
>
> (a) it is a term of the grant that the grant does not prevent the Crown from exercising that right,
>
> (b) the person seeking the grant has satisfied the Commission that the proposed scheme for the distribution of electricity is reasonable and sufficient, having regard to the general circumstances, and
>
> (c) the Commission is satisfied that the grant is to the general benefit of the area directly or indirectly affected by it.

Service area boundaries

Section 101 of the *EUA* grants an exclusive right to the owner of an electric distribution system in whose service area a property is located to serve persons wishing to obtain electricity for use on their property.

Under section 29(1) of the *HEEA*, the AUC has authority to alter the boundaries of an electric distribution system service area "… when in its opinion it is in the public interest to do so."

Subsections 29(2) and 29(3) of the *HEEA* impose constraints on the Commission's authority to alter service area boundaries where the owner of the electric distribution system is a local authority. The Commission cannot reduce the service area of a local authority without its consent, and it must grant an application to enlarge the service area unless it finds compelling reasons in the public interest not to do so.

Section 26 of the *HEEA* authorizes the Commission to approve the operation of an electric distribution system in the service area of another electric distribution system in certain circumstances, as follows:

> 26 Notwithstanding section 25, the Commission may approve the construction or operation of an electric distribution system in the service area of another electric distribution system if the Commission is satisfied that it is for the purpose of providing service to a consumer in that service area who is not being provided service by the distribution system approved to distribute electric energy in that service area.

Section 32 of the *HEEA* sets out the Commission's authority to, among other things, order the transfer of facilities associated with an REA's electric distribution system where that REA has its service area reduced by an order under section 29.

Contract Law Principles Not Determinative

The AUC rejected arguments that contract law principles and more particularly, the provisions of the wire owner agreements entered into by REAs and FortisAlberta, were determinative of this application.

The AUC explained that:

(a) section 7 of the *Roles, Relationships and Responsibilities Regulation* (the "*Regulation*") provides the framework to facilitate the overlapping provision of electric distribution service to customers in a single geographic region;

(b) the *Regulation* provides that owners of electric distribution systems with overlapping service areas, such as FortisAlberta and an REA, must integrate operations under a contract; and

(c) the *Regulation* creates a legislatively mandated contract that must be in place between owners of electric distribution systems if they operate in overlapping service areas.

In this case, the AUC found that there was nothing in the *Regulation* that ousted or limited the AUC's statutory responsibility to determine an application made under section 29 of the *HEAA* based on public interest considerations. Parties cannot contract out of legislation,

and more particularly cannot, by agreement, preclude or limit the AUC's consideration of the public interest in its determination of an application made under section 29 of the *HEEA*.

The AUC concluded that the terms of relevant agreements might be a factor considered by the AUC in its assessment of the public interest, but are not determinative of that assessment.

Public Interest Considerations

Under *HEEA* section 29, the AUC may alter the boundaries of the service area of an electric distribution system or order that an electric distribution system cease to operate in a service area when, in its opinion, it is in the public interest to do so.

The AUC determined that the alteration of the REA service areas as requested by FortisAlberta was in the public interest. This was because, in the AUC's opinion, granting the applied-for alteration of boundaries:

(a) harmonized the service areas to reflect the boundaries governed by the MFAs and was consistent with the AUC's previous approval of those agreements;

(b) best supported the public policy objective of avoiding unnecessary duplication of facilities;

(c) was most consistent with the legislated purpose of municipalities and REAs; and

(d) best supported or gave effect to the broad public policy goals of the *MGA* as a whole and the intent of the legislature in establishing and empowering municipalities.

The AUC explained that its determination of the public interest in any proceeding is dependent on the specific circumstances. In this case, the AUC took guidance from Decision 2012-181 and Decision 2009-062, in which it articulated the public interest test in similar circumstances. The AUC found the following considerations relevant to its general public interest determination:

(a) whether the application is in the public interest by having regard to its social and economic effects; and

(b) assessment of the public interest requires it to have regard for the statutory context under which the application has been brought in order to determine whether the requested relief "benefits the segment of the public to which the legislation is aimed" while minimizing or mitigating any potential adverse effects to an acceptable degree.

Consideration of Applicable Transitional Provisions

The AUC was not satisfied that it was necessary or in the public interest to effect an immediate transfer of the subject facilities and customers.

The AUC was satisfied that it was in the public interest to align the REA service area approvals with the applicable MFAs and the associated municipal boundaries. However, the AUC found that it was not clear that the intention of the affected municipalities was to effect an immediate transfer of all affected facilities and REA customers to FortisAlberta.

The AUC supported this conclusion based on the following:

(a) no municipality actively intervened in this proceeding;

(b) there was no evidence that the affected municipalities required or even supported the immediate transfer of existing facilities and customers; and

(c) there was no evidence that any of the affected municipalities had sought to enforce FortisAlberta's exclusivity through the passing of a bylaw under section 46 or any other provision of the *MGA*.

The AUC considered if no bylaw were passed by an affected municipality requiring existing REA members in its boundaries to connect to FortisAlberta. The AUC noted under such a scenario, each of those existing REA members would, in any event, cease purchasing electric distribution service from the REA at the earliest of:

(a) the existing REA member electing to transfer to FortisAlberta;

(b) a change in customer (for example, there is a change in ownership at the site, and the existing customer is no longer the same REA member who originally required electric distribution service at the site);

(c) the affected REA requesting the transfer of facilities and REA customer to FortisAlberta; or

(d) the affected REA refusing to continue to serve the existing REA member.

The AUC, therefore, approved the affected REAs' ability to continue to provide electric distribution service to the existing REA members with existing facilities in the annexed (formerly overlapping) areas. The AUC granted this approval until one of the events contemplated above

necessitated the transfer of facilities and customers to FortisAlberta.

Revision of AUC Rule 017: Procedures and Process for Development of ISO Rules and Filing of ISO Rules with the Alberta Utilities Commission (Bulletin 2018-11)
Rule 017 - ISO Rule Development

In this bulletin, the AUC announced that it approved amendments to AUC Rule 017: *Procedures and Process for Development of ISO Rules and Filing of ISO Rules with the Alberta Utilities Commission* ("*Rule 017*"). The amended *Rule 017* is effective as of August 1, 2018.

The revisions to *Rule 017* were required as a result of the passage of Bill 13, *An Act to Secure Alberta's Electricity Future* by the Legislative Assembly of Alberta and the amendments to the *Electric Utilities Act* (the "*EUA*") in that bill. All amendments to the *EUA* will be in force as of August 1, 2018.

As next steps, the AUC will initiate further consultation on *Rule 017* to develop *Rule 017* provisions for the consultation on, and yearly application of, ISO rules that pertain to the demand curve and related elements of the capacity market.

The AUC's consultation page containing all stakeholder comments, AUC responses and the revised *Rule 017* can be accessed here.

A blacklined version of *Rule 017* and this Bulletin 2018-11 can be found here.

Commission veteran Mark Kolesar appointed AUC Chair (AUC Announcement 2018-07-24)
AUC Announcement - Appointment of new Chair

The AUC announced that Mark Kolesar was appointed as the permanent chair of AUC for a five-year term. Mr. Kolesar, previously the AUC's vice-chair and acting chair since April, was appointed by the Alberta cabinet on the recommendation of Minister of Energy Margaret McCuaig-Boyd. His term began July 23, 2018.

The AUC also announced that Commissioner Anne Michaud was reappointed as a member and became vice-chair.

NATIONAL ENERGY BOARD

NOVA Gas Transmission Ltd. Application for construction and operation of the Northwest Mainline Loop - (Hearing Order GHW-001-2018)
Natural Gas Pipeline Application - Indigenous Consultation - Environmental Matters

Background

On December 15, 2017, Nova Gas Transmission Ltd. ("NGTL") applied to the National Energy Board ("NEB") pursuant to section 58 of the *National Energy Board Act* ("*NEB Act*"), for authorization to construct and operate 23 kilometres of new pipeline within Clear Hills County, Alberta to transport sweet natural gas (the "Project").

For the reasons summarized below, the NEB determined that it was in the public interest to approve NGTL's application to construct and operate the Project.

The NEB Process

On January 5, 2018, the NEB issued notification letters to Indigenous peoples potentially affected by the Project.

On May 4, 2018, the NEB issued its completeness determination, which established a written hearing process and set a 15-month time limit for the NEB to complete its assessment and issue a decision. The NEB simultaneously issued Hearing Order GHW-001-2018 ("Hearing Order") for the Project.

The NEB notified Natural Resources Canada, Crown-Indigenous Relations and Northern Affairs Canada that the NEB had received the Project application and that Indigenous matters may need to be considered.

Indigenous Consultation

The NEB noted that in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40, and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.,* 2017 SCC 41, the Supreme Court of Canada confirmed that the Crown could rely on a regulatory assessment process to fulfill its duty to consult where the agency has the requisite statutory powers to do so. The NEB was found to generally possess the requisite authorities, in light of its technical expertise, its broad procedural powers to implement consultation and its broad remedial powers to impose and enforce conditions.

As part of the NEB's assessment process, the applicant, NGTL, was required to make all reasonable efforts to consult with potentially affected Indigenous peoples and to provide information about those consultations to the NEB. This included information on the nature of the interests potentially affected, the concerns Indigenous communities raised and the manner and degree to which those concerns were addressed.

NGTL engaged with the 11 Indigenous communities and heard concerns from the Dene Tha' First Nation ("DTFN"), the Doig River First Nation ("DRFN") and, the Tallcree First Nation ("TCFN") regarding:

- traditional practices and cultural use not being reflected in the application;
- the effectiveness of NGTL's proposed mitigation measures;
- NGTL's willingness to consider and incorporate findings from Traditional Use Studies;
- impacts to the use and occupancy of traditional territory and any potential or established Treaty or Indigenous rights; and
- the impact of land disturbance, noise, traffic and pollution from the Project on the spiritual connection to the land.

The NEB was satisfied with the overall design and implementation of NGTL's Project-specific consultation activities to date. Nevertheless, the NEB imposed Condition 4, which required NGTL to file, for approval, Outstanding Traditional Use Studies/Traditional Knowledge ("TK") Reports and a description of how the information would be considered and addressed by NGTL. The NEB also imposed Condition 6, requiring NGTL to file an updated Environmental Protection Plan, 14 days prior to commencing construction, indicating how results of Traditional Use Studies and TK reports were considered and incorporated into the Environmental Protection Plan. The NEB stated that NGTL's outlined mitigation measures, in combination with Conditions 4 and 6 would adequately address the potential impacts to cultural, heritage and traditional land use sites.

Environmental Matters

NGTL prepared an Environmental and Socio-economic Analysis ("ESA") for the Project in accordance with the NEB Filing Manual and summarized all potential effects, proposed mitigation and predicted residual effects. NGTL filed the ESA with its application, proposing the following mitigation measures regarding the Project's impact to caribou:

- pipeline routing parallel to existing disturbances for 100% of the pipeline route and use of shared workspace by overlapping existing adjacent disturbances; and

- minimize clearing and construction of the Project within critical timing periods for caribou.

The NEB acknowledged NGTL's routing of the pipeline along existing linear disturbances to avoid and minimize disturbance to caribou habitat. NGTL's ESA relies on the Caribou Habitat Restoration and Offset Measures Plan ("CHR & OMP"). The NEB acknowledged DTFN's concern that NGTL's ESA does not provide sufficient baseline information to assess the adequacy of mitigation or offsetting required to address the potential impacts on the Project to the Chinchaga herd. However, the NEB found that the baseline information provided by NGTL was sufficient, and NGTL's ESA methodology was acceptable.

After assessing the overall effects of the Project on the environment, the NEB found that the mitigation proposed and commitments made by NGTL would minimize the environmental effects of the Project. The NEB noted NGTL's commitment to conduct post-construction environmental monitoring. Post-construction monitoring is key to ensuring that potential adverse effects will be effectively mitigated and where issues are identified, adaptive management is employed to address them.

To ensure that post-construction environmental monitoring is thorough and effective, the NEB imposed Condition 9. Condition 9 sets out requirements for NGTL to implement a post-construction environmental monitoring program and submit Post-Construction Environmental Monitoring Reports. To verify the appropriateness of the restoration implemented, the NEB imposed Condition 10, and Condition 11. Conditions 10 and 11 require NGTL to file, for approval, a Caribou Habitat Restoration Implementation Report and Status Update and a Caribou Habitat Offset Measures Implementation Report.

To ensure that the assumptions NGTL made in its preliminary CHR & OMP were correct, that restoration would be effective and, if not, that adaptive management is implemented, the NEB imposed Condition 12. Condition 12 required NGTL to develop a Caribou Habitat Restoration and Offset Measures Monitoring Program. To assist its oversight of ongoing monitoring, the NEB also imposed Condition 13, which requires NGTL to file, for approval, Caribou Monitoring Reports with the NEB.

Engineering Matters

The NEB uses a risk-informed lifecycle approach to ensure that NEB-regulated facilities and activities are safe and secure from their initial construction through to their abandonment. In consideration of the safety and security of proposed facilities, the NEB assesses whether the applicant has appropriately designed facilities for the properties of the transported product, the range of operating conditions, and the human and natural environment where the facilities would be located. Specific considerations include a company's approach to engineering design, integrity management, security, emergency preparedness, and health and safety.

When a company designs, constructs, or operates facilities, it must do so in accordance with the *NEB Act* and its regulations, including the *NEB Onshore Pipeline Regulations* (*OPR*), its commitments made during a proceeding, and the terms and conditions the NEB attaches to any approval.

The NEB was satisfied that the general design of the Project is appropriate for the intended use. The NEB is further satisfied that the Project would be designed, located, constructed, installed, and operated in accordance with the *OPR*. The NEB imposed Condition 2 requiring NGTL to construct, install and operate the Project in accordance with the specifications, standards, and other information referred to in its application, or as otherwise agreed to.

DTFN expressed concerns with respect to the impacts of NGTL's proposed open-cut technique to fish and fish habitat at the Chinchaga River crossing. DTFN noted their members' reliance on fish in this area. DTFN stated their preference for a less impactful method of crossing, such as a trenchless technique. NGTL argued that trenchless crossing techniques would necessitate a larger construction footprint and that it had chosen an isolated open-cut crossing to reduce the Project footprint.

The NEB found that open-cut can be an effective technique for the installation of pipelines in sensitive areas. The success of an open-cut installation for pipeline construction depends on proper design and planning, and adaptation to the actual conditions encountered during the execution of the crossing. The NEB accepted NGTL's view that constructing an open-cut crossing in the winter under frozen conditions will minimize the Project footprint and, therefore is an acceptable technique.

Summary re Decision and Order

The NEB determined that it was in the public interest to approve NGTL's application to construct and operate the Project, pursuant to section 58 of the *NEB Act*.