

## **2018 ABAER 007**

# **Husky Oil Operations Limited and Gibson Energy Inc. Regulatory Appeals of an Environmental Protection Order Issued July 7, 2016 Regulatory Appeals 1866028 and 1866029**

### **Decision**

[1] The panel finds that the regulatory appeals of both Husky Oil Operations Limited (Husky) and Gibson Energy Inc. (Gibson) of the environmental protection order (EPO) issued by the Alberta Energy Regulator, Closure and Liability Branch (C&L), on July 7, 2016, are moot because the EPO has been cancelled. Accordingly, the AER exercises its discretion under section 39(4) of the *Responsible Energy Development Act (REDA)* to dismiss the requests for regulatory appeal filed by Husky and Gibson.

### **Introduction**

#### **Appeals**

[2] Husky and Gibson both filed requests for regulatory appeal of the EPO. Husky filed its request on July 14, 2016, and Gibson filed its request on July 27, 2016. Requests for regulatory appeal fall under the authority of *REDA*, Part 2, Division 3, and the *Alberta Energy Regulator Rules of Practice (Rules of Practice)*, Part 3. C&L is also a party to this proceeding as the issuer of the EPO being appealed.

#### **Background**

[3] Husky operates the Hardisty Bulk Petroleum Storage Facility at Legal Subdivision (LSD) 5, Section 29, Township 42, Range 9, West of the 4th Meridian. Gibson operates the Gibson Hardisty Terminal, Bulk Petroleum Storage Facility at LSD 04-29-042-09W4M and the Hardisty West Bulk Petroleum Storage and Transfer Facility at LSD 08-30-042-09W4M. The facilities are located about 3 kilometres southeast of Hardisty, Alberta.

[4] 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 EPO and sought to have the EPO either varied or revoked.

## Timeline

[5] On March 26, 2015, Gibson reported to the AER the presence of hydrocarbons in groundwater on site. Other reports to the AER of hydrocarbons in groundwater on site were filed by Husky on June 29, 2015, and by Gibson on September 14, 2015.

[6] On October 7, 2015, C&L directed Husky and Gibson to take steps to investigate and contain the hydrocarbons released, and to develop and provide a remediation and risk management plan.

[7] 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.

[8] On July 7, 2016, C&L issued the EPO to Husky and Gibson requiring them to take specific actions.

[9] On July 14, 2016, Husky filed a request for regulatory appeal of the EPO.

[10] On July 27, 2016, Gibson filed a request for regulatory appeal and stay of the EPO.

[11] On August 31, 2016, the AER denied Gibson's stay request.

[12] A hearing was initially scheduled for May 3, 2017. On April 21, 2017, the hearing panel adjourned the hearing at the request of all parties.

[13] The hearing was rescheduled for November 6, 2017. On October 4, 2017, the hearing panel adjourned the hearing at the request of Husky and Gibson. C&L supported the request.

[14] The hearing was rescheduled for March 1, 2018. On February 15, 2018, C&L advised the hearing panel that it had cancelled the EPO effective February 14, 2018. On February 20, 2018, the hearing panel adjourned the hearing to consider a number of matters, including whether the regulatory appeals were concluded because the EPO was cancelled.

[15] As requested by the hearing panel, all parties filed submissions regarding the hearing's status and whether the regulatory appeals were concluded because the EPO was cancelled. 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.

[16] The following events are relevant to Gibson's submissions regarding the hearing's status:

- December 15, 2017: C&L sent Notices of Proposed Action to Husky and Gibson, setting out proposed amendments to their *EPEA* approvals and advising that C&L intended to cancel the EPO. The proposed amendments would incorporate the RAP developed and approved under the EPO into the conditions of the *EPEA* approvals.

- January 17, 2018: Gibson filed a statement of concern with C&L about the proposed approval amendments.
- January 26, 2018: Husky filed a response to Gibson’s statement of concern with C&L.
- February 15, 2018: C&L amended the Husky and Gibson *EPEA* approvals to incorporate the RAP.

## Reasons for Decision

### The AER’s Authority for Regulatory Appeals

[17] *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* indicates how the AER may decide a regulatory appeal: “In its decision on a regulatory appeal, the Regulator may confirm, vary, suspend or revoke the appealable decision.”

[18] Section 39(4) of *REDA* states that 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.

### When is an appeal moot?

[19] The Supreme Court of Canada established a two-step analysis for mootness in *Borowski v. Canada (AG)*.<sup>1</sup> 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.

[20] 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 criteria is 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.

### Parties’ Submissions

[21] As mentioned above, both Husky and C&L submitted that the cancellation of the EPO has rendered these regulatory appeals moot and thus has effectively ended this proceeding. Both parties stated

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<sup>1</sup> [1989] 1 SCR 342.

that there is no longer an appealable decision, as defined by *REDA*, for the panel to consider, and no form of relief that the panel can consequently grant. Husky submitted that the relief sought by it and Gibson—that is, revoking the EPO issued to them—has been granted through the cancellation of the EPO.

[22] Gibson submitted that there is still a live controversy that will affect its rights and that will not be heard if its regulatory appeal is held to be moot. It stated that were it not for the EPO, the RAP added to its *EPEA* approval through amendment would never have been created. Gibson submitted that the EPO has been cancelled only in name and that it effectively continues within the amended approval. Because of this, Gibson’s position is that this regulatory appeal must proceed to determine whether Gibson is a “person responsible” for the hydrocarbons that were the subject of the EPO. Gibson acknowledged that it has filed a request for regulatory appeal of the approval amendments, which is not before this panel. It stated that it seeks to have the matter dealt with in this proceeding to assist it in cost recovery and not prejudice it in a civil court setting.

Has the “tangible and concrete dispute” of these appeals disappeared, making the issues academic?

[23] In these regulatory appeals, the hearing panel’s responsibility is to address the appealable decision, namely the EPO issued to Husky and Gibson. As mentioned above, section 41(2) of *REDA* authorizes a hearing panel to confirm, vary, suspend, or revoke the appealable decision. A panel cannot provide relief beyond the scope of that authority.

[24] In a letter dated March 1, 2017, to the parties regarding this proceeding, the panel set the hearing issue as follows: “Whether the AER exercised its discretion reasonably in naming Husky and Gibson as Persons Responsible in the environmental protection order issued on July 7, 2016 under sections 113 and 241 of the *Environmental Protection and Enhancement Act*.”

[25] Because the EPO has been cancelled, there is no longer an appealable decision for the panel to consider. The issuance of an EPO under *EPEA* is an appealable decision according to section 36(a) of *REDA*, but the cancellation of an EPO is not. The panel cannot give any relief within the scope of its authority under section 41(2) of *REDA* because there is no longer an EPO to confirm, vary, suspend, or revoke. While Gibson has argued that the EPO effectively continues within Gibson’s amended approval, that amendment is not before this hearing panel.

[26] Accordingly, the panel finds that the first part of the mootness analysis has been met; that is, the “tangible and concrete dispute” of these appeals has disappeared, making the issues academic.

Should the panel exercise its discretion to hear these regulatory appeals?

[27] Husky submitted that the cancellation of the EPO has rendered the regulatory appeals moot and that this proceeding should be concluded. Gibson indicated that it did not object to Husky’s regulatory

appeal being concluded as moot. Given these submissions, the panel will not apply the second step of the mootness analysis to Husky's regulatory appeal, but it will do so for Gibson's regulatory appeal.

[28] The panel must consider three criteria in determining whether to exercise its discretion to hear Gibson's case. The panel must consider the extent, if any, to which each of these criteria is present, and weigh the relative significance of each in determining whether to exercise its discretion to proceed with Gibson's regulatory appeal:

- Is 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?

Is there still an adversarial context to Gibson's regulatory appeal?

[29] Gibson's regulatory appeal seeks to have the EPO revoked on the basis that Gibson is not a "person responsible" for the hydrocarbons present in the groundwater and surface water body. While Gibson has vigorously stated the arguments it would make in support of its regulatory appeal, that vigour itself is not sufficient to establish that an adversarial context remains in Gibson's regulatory appeal. The cancellation of the EPO, which effectively grants the relief sought by Gibson's regulatory appeal, has also eliminated the *lis* (dispute) between Gibson and C&L in relation to the EPO.

[30] Gibson submitted that the validity of the amendments to its *EPEA* approval flow from the validity of the EPO as originally constituted, which necessitates continuing this proceeding. An appeal of the approval amendments is not before this hearing panel and can be dealt with through a separate regulatory appeal process for that decision. Gibson has filed a request for regulatory appeal of those amendments, and if a regulatory appeal hearing is conducted, Gibson will have the opportunity to raise its arguments about the origin and validity of the approval amendments in that regulatory appeal.

Does the determination of whether Gibson was a "person responsible" outweigh concerns about judicial economy?

[31] 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?

[32] Proceeding with Gibson's regulatory appeal would not have a practical effect on the parties' rights. The cancellation of the EPO has effectively granted the relief that Gibson has sought in this proceeding. There is no further relief that the panel would have authority to grant. As discussed above in relation to Gibson's submission about the link between the EPO and the approval amendments, Gibson can request and is pursuing a separate regulatory appeal of the amendments to its *EPEA* approval. If such an appeal proceeds, Gibson will be able to provide relevant evidence and submissions to the hearing panel appointed to hear that regulatory appeal.

[33] Gibson's regulatory appeal of the EPO does not fit the description of a case of a recurring nature and brief duration that might otherwise evade review by a hearing panel. As indicated by the timeline of this proceeding, this matter has been ongoing for some time. C&L issued the EPO two years ago. The panel set three separate hearing dates and twice adjourned the hearing at the request of the parties to facilitate dispute resolution discussions. It has been the nature of the relations between the parties and how they have proceeded with these regulatory appeals that has affected the timing of the review of the EPO, rather than the nature of the EPO itself or the issue of whether Husky and Gibson were "persons responsible."

[34] The question of whether Gibson was properly a "person responsible" under the cancelled EPO is not an issue of public importance, where its resolution would be in the public interest. There is not significant uncertainty in the law in relation to the application of "person responsible" to EPOs issued under section 113 of *EPEA*. The Alberta Environmental Appeals Board and Alberta Court of Queen's Bench have dealt with that issue in a number of decisions.<sup>2</sup> Gibson acknowledged in its submission that it seeks to have this issue decided to assist it with determining liability for remediation costs. *EPEA* is clear regarding financial liability related to EPOs. 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. Resolution of such a private dispute between Gibson and other parties is not a matter of public interest that merits determination in this proceeding.

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<sup>2</sup> See, for example: *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, Southern Region, Operations Division, Alberta Environment*, (29 December 2011), Appeal Nos. 10-034, 11-002, 008 & 023-R; *Imperial Oil Ltd. and Devon Estates Ltd. v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*, (21 May 2002), Appeal No. 01-062-R; *McColl-Frontenac Inc. v. Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment*, (7 December 2001), Appeal No. 00-067-R; *McColl-Frontenac Inc. v. Alberta (Minister of Environment)*, 2003 ABQB 303; *Legal Oil and Gas Ltd. v. Director, Land Reclamation Division, Alberta Environmental Protection*, (23 July 1999), Appeal No. 98-009; *Legal Oil & Gas Ltd. v. Alberta (Minister of Environment)*, 2000 ABQB 388.

Might the panel exceed its adjudicative role in proceeding to hear this case?

[35] As discussed above, *EPEA* and related jurisprudence is clear in relation to EPOs issued under section 113 and the scope of “person responsible” under such orders. It would not be appropriate for the panel to rule on the issue of “person responsible” for the purpose of assisting Gibson in other proceedings.

### **Conclusion**

[36] The panel finds that the regulatory appeals of both Husky and Gibson are moot because the EPO has been cancelled. There is no longer an appealable decision before the panel and no remedies that *REDA* authorizes the panel to grant in these regulatory appeals. Gibson’s concerns about the validity of the approval amendments incorporating the RAP must be dealt with in a separate regulatory appeal process, which it is currently pursuing. 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*.

[37] Accordingly, the AER exercises its discretion under section 39(4) of *REDA* to dismiss the requests for regulatory appeal filed by Husky and Gibson. A public hearing will not be held, and the AER closes this file.

Dated in Calgary, Alberta, on July 4, 2018.

### **Alberta Energy Regulator**

<original signed by>

C. Macken  
Presiding Hearing Commissioner

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C.A. Low  
Hearing Commissioner

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C. Chiasson  
Hearing Commissioner