

COURT OF APPEAL OF ALBERTAForm AP-5
[Rule 14.87]

COURT OF APPEAL FILE NUMBER: 2301-0144AC
TRIAL COURT FILE NUMBER: N/A
REGISTRY OFFICE: CALGARY
PLAINTIFF/APPLICANT: MICHAEL JUDD
STATUS ON APPEAL: APPELLANT
DEFENDANT/RESPONDENT: ALBERTA ENERGY
REGULATOR and PIERIDAE
ALBERTA PRODUCTION LTD.
STATUS ON APPEAL: RESPONDENTS
DOCUMENT: **EXTRACTS OF KEY EVIDENCE**



Appeal from the Decision of
the Alberta Energy Regulator
Dated the 19th day of May, 2023

EXTRACTS OF KEY EVIDENCE OF THE APPELLANT

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TABLE OF CONTENTS

	PAGE
AER Letter Decision to the Appellant (19 January 2022)	4-9
Appellant's Motion	10-13
Sample Licensee Capability Assessment from AER	14

Via Email

January 19, 2022

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Public Interest Law Clinic

Pieridae Alberta Production Ltd.

www.aer.ca

Attention: Drew Yewchuk, Counsel
Shaun Fluker, Counsel

Attention: Thalia Aspeslet

Dear Sirs and Madam:

RE: Request for Regulatory Appeal by Michael Judd
Pieridae Alberta Production Ltd. (Pieridae)
Application No.: 31097955; Licence No.: 62559
Location: NE 6-6-2-W5M
Regulatory Appeal No.: 1934303 (Regulatory Appeal)

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

For the reasons that follow, the AER grants the request for regulatory appeal.

Background

On February 19, 2021, Pieridae Alberta Production Ltd. (Pieridae) submitted an application to the Alberta Energy Regulator (AER), under Part 4 of the *Pipeline Act*, and in accordance with *Directive 056: Energy Development Applications and Schedules* (Directive 056), for a two-year licence to construct and operate a pipeline on private land from an existing wellsite located at 10-07-006-02W5M to an existing pipeline tie-in-point at 07-07-006-02W5M (Application No. 31097955). The proposed pipeline is approximately 0.64 km long with a maximum outside diameter of 168.3 mm and would transport sour natural gas with an H₂S concentration of 320 mol/kmol (32%). The maximum calculated EPZ for the project is 0.7 km, with the nearest resident approximately 0.6 km SE located at SW-08-006-02W5M.

On March 20, 2021, Michael Judd (Mr. Judd) filed a Statement of Concern (SOC) in relation to Pieridae's Application No. 31097955. Mr. Judd's SOC was registered by the AER as SOC No. 31920, and submitted concerns related to the pipeline's EPZ boundary, H₂S release, Flaring, Noise and Future Applications.

On August 16, 2021, the AER dispositioned SOC No. 31920, and Application No. 31097955 was approved and Pipeline Licence No. 62559 (Licence) was issued to Pieridae.

On September 12, 2021, Mr. Judd submitted a Request for Regulatory Appeal of the AER's decision to issue the Licence to Pieridae. The Request argued that the approval posed a risk to Mr. Judd's health and that there was the possibility that the pipeline would not be reclaimed if Pieridae became insolvent. Mr. Judd also asserted that the pipeline approval was granted in violation of his rights to procedural fairness. More specifically, Mr. Judd's safety concerns were as follows:

- “[His] land should have been included in the Emergency Protection Zone for the pipeline. When Shell applied for the same pipeline in 2018 (Application No. 159466) the EPZ was larger and included [his] home. Pieridae has re-calculated the size of the EPZ for their new application and reduced the size of the EPZ, without providing any explanation for why.”
- Further, if a sour gas release from the pipeline required an evacuation, Mr. Judd's only route of egress would pass through the EPZ. Thus, his only option would be to shelter in place.

On September 16, 2021, Regulatory Appeals issued correspondence to the parties requesting comments on the merits of Mr. Judd's RRA.

On September 29, 2021, Pieridae responded to the Request for Regulatory Appeal arguing that Mr. Judd's concerns could be viewed as vexatious and that they had already been considered by the AER when it issued its SOC disposition letter. Responding to Mr. Judd's claims that an explanation was not given for the reduction in the size of the EPZ, Pieridae noted that it had made multiple attempts to provide an explanation for the reduction of the EPZ to Mr. Judd and his representative.

Addressing Mr. Judd's safety concerns, Pieridae noted that “...in the unlikely event of an emergency that Mr. Judd is affected, sheltering in place is an approved protection measure for residents...”.

On October 14, 2021, Mr. Judd's counsel reiterated that he has never been provided with an explanation for the reduced size of the EPZ, noting that Pieridae had only communicated the following to Mr. Judd's representative:

- “The only difference is that the EPZ has been reduced from a 1.58 km radius and now it is 0.70 km.”
- “The EPZ was calculated with the refined inputs from detailed engineering completed since last application. These inputs include the lined pipeline specification and well site emergency shutdown trip setpoint.”

It was argued that, to deny Mr. Judd a regulatory hearing would mean that Mr. Judd would not even be given an explanation as to why the EPZ changed, a change which directly impacts his personal safety and indirectly impacts his procedural rights.

Reasons for Decision

The applicable provision of *REDA* regarding regulatory appeals, section 38, states:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

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

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

The term “appealable decision” is defined in section 36(a)(iv) of *REDA* to include:

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

Section 38(1) creates a three-part test for a regulatory appeal. First, the requester must be an eligible person as defined in section 36(b) of *REDA*. Second, the decision from which the requester seeks regulatory appeal must be an “appealable decision” as defined in section 36(a) of *REDA*. Third, the request must have been filed in accordance with the *Alberta Energy Regulator Rules of Practice (Rules)*.

Appealable Decision

The granting of the pipeline license is an appealable decision, as the licence was issued under the *Pipeline Act* – an energy resource enactment – without a hearing.

In Accordance with The Rules

The request for regulatory appeal was filed in accordance with the time requirements under the rules.

Eligible Person

For Mr. Judd to be eligible for a regulatory appeal, he must demonstrate that he may be directly and adversely affected by the AER’s decision to issue the approvals. The AER is satisfied that Mr. Judd has demonstrated that he may be directly and adversely affected by the decision to issue the approval for application 31097955.

In reaching this conclusion, the AER was guided by the Court of Appeal’s decision in *Kelly v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325. In this decision, the Court examined whether a landowner who falls outside of the EPZ (EPZ was 2.11 km and the landowners resided 6.5 km and 5.4

km from the well site) could still be directly and adversely affected. The Court concluded that the landowners were directly and adversely affected. The Court found that the "...the very fact that a plan is required which contemplates evacuation in some circumstances must demonstrate that there is some lurking risk. It is the lurking risk which is "adverse", not the evacuation plan itself." Thus, in Mr. Judd's circumstance, where there exists the possibility that he may have to shelter-in-place – as his residence is approximately 1.02 km from the project location, and the EPZ is 0.7 km – there is a "lurking risk" sufficient to make a finding of directly and adversely affected.

The Court also went on to state that:

... At some point the Board must decide whether the magnitude of the risk is such that the applicant has become "directly and adversely affected". But the applicant need not demonstrate that the perceived risk is a certainty, or even likely. Nor need the applicant prove an adverse effect greater than that suffered by the general public, nor that any adverse effect would be life-threatening. Those in the tertiary evacuation area may not have an absolute right to standing in all cases, but they have a strong *prima facie* case for standing. The right to intervene in the Act is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource development (but no "right" that is engaged), and true "busybodies". [emphasis added]

In Mr. Judd's unique case, the fact that he would have to shelter-in-place should an emergency come to pass, highlights that he has more than a generic interest in resource development.

Peridae argues that sheltering in place is an approved protection measure for residents under Directive 071. However, "sheltering indoors" under Directive 071 is intended to be a temporary protection measure and it may be that evacuation would ultimately be required for Mr. Judd. As indicated by Mr. Judd, his evacuation route passes through the EPZ which may put him in harm's way in the event of a release.

In Directive 071, Section 3.1 Emergency Planning Zone, it is stated that the EPZ must ensure that the actual size and shape of the final EPZ reflect the following:

- site-specific features of the area,
- information gathered during the public involvement program, and
- factors such as population density, topography, and access/egress routes, which may affect timely implementation of emergency response procedures in the EPZ. [emphasis added]

To ensure that Mr. Judd's lack of egress was considered, the final EPZ should have been modified to include Mr. Judd's residence.

Further, Section 4.3 Table 3 also indicates that permanent and part-time residents, including those residing on dead-end roads beyond the EPZ where occupants are required to egress through the EPZ, are required to be notified and consulted.

All the foregoing factors indicate that Mr. Judd may be directly and adversely affected and accordingly, is an eligible person for the purpose of appeal.

Mr. Judd's Request is not Vexatious

Pieridae submitted that Mr. Judd's request could be viewed as vexatious, noting that:

- Shell had applied for the project as far back as 2017;
- Mr. Judd appealed the project in 2018, only for the project to be withdrawn in 2020; and
- Pieridae reapplied in 2021 with an extensive Public Involvement program, technical review and audit.

Mr. Judd responded to Pieridae's assertion that his claim was vexatious by noting that there is no basis in law for finding that Mr. Judd's request was vexatious. Mr. Judd noted that he was not re-litigating Shell's project, as Shell's previous regulatory appeal was cancelled.

Under section 39(4)(a) of *REDA*, the AER has discretion to dismiss all or part of a request for regulatory appeal if it considers the request to be frivolous, vexatious, or without merit. The AER treats these as high standards for the party alleging the deficiency to meet.

The AER is satisfied that Mr. Judd's request is not vexatious. While Mr. Judd submitted a wide range of issues, Mr. Judd's safety concerns about potentially having to shelter--in-place and the fact that his only route of egress is covered by the pipeline's EPZ, raise an arguable issue that supports the granting of the request for regulatory appeal.

Conclusion

In conclusion, the AER grants the request for regulatory appeal as it relates to the AER's approval of Application No. 31097955. Accordingly, the AER will request the Chief Hearing Commissioner to appoint a panel of hearing commissioners to conduct a hearing.

Sincerely,



Sean Sexton
Vice President, Law

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April 13, 2023

Alberta Energy Regulator
Suite 1000, 250 – 5th Street
Calgary, AB T2P 0R4

Attention: Hearing Services

**RE: Regulatory Appeal of Application No. 31097955 and Pipeline Licence No. 62559
Regulatory Appeal 1935549
AER Proceeding 417**

Motion pursuant to section 44 of *Alberta Energy Regulator Rules of Practice, Alta Reg 99/2013*

TAKE NOTICE THAT an application in writing is hereby made on behalf of Michael Judd (the Applicant) before the Alberta Energy Regulator (**AER**), for an Order granting the Applicant disclosure and access to all information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management*, in relation to Application No. 31097955 and Pipeline Licence No. 62559 and in relation to a holistic licensee assessment of Pieridae Alberta Production Ltd. and its associated companies (**Pieridae**) and its eligibility to acquire and hold a licence for energy development in Alberta.

AND FURTHER TAKE NOTICE THAT in support of this application the Applicant has filed an Affidavit of Michael Judd dated October 11, 2022;

AND FURTHER TAKE NOTICE THAT the Applicant relies on the following:

- (a) *Responsible Energy Development Act*, SA 2012, c R-17;
- (b) *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013;

- (c) *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013;
- (d) AER Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals*;
- (e) AER Directive 088 - *Licensee Life-Cycle Management*;

together with such further and other material as counsel may advise or the AER may require.

AND FURTHER TAKE NOTICE THAT the grounds upon which the Applicant makes this Motion are the following:

- (a) The Applicant is directly and adversely affected by Application No. 31097955 and Pipeline Licence No. 62559, pursuant to the *Responsible Energy Development Act*, SA 2012, c R-17.3 and AER letter decision dated January 19, 2022;¹
- (b) Alberta courts have interpreted Alberta legislation to clearly establish that a person who is directly affected by a resource development decision is provided with an enhanced suite of procedural rights to facilitate natural justice and procedural fairness in the context of a regulatory hearing;²
- (c) The common law imposes a duty of procedural fairness on the AER when making a decision which affects the rights, privileges or interests of an individual;³
- (d) The duty of procedural fairness requires the AER to implement a fair, open, and transparent process which provides a directly affected person with a full and complete opportunity to know and meet the case against them, with disclosure that enables a

¹ AER letter decision dated January 19, 2022 is attached as Exhibit A to the Affidavit of Michael Judd dated October 11, 2022 filed in support of this Motion.

² *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, at paras 33 - 34, attached as Exhibit 1 to this Motion.

³ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20, attached as Exhibit 2 to this Motion.

- directly affected person to review and consider the relevant facts, and prepare to challenge those facts with evidence, questioning or otherwise;
- (e) The duty of procedural fairness is heightened in cases where the decision-making process resembles an adversarial, trial-like process, is determinative such that further requests for review cannot be submitted, and has a significant and adverse impact on a directly affected person;⁴
 - (f) The Applicant does not have access to information that is essential to fully evaluate the extent of the direct and adverse impact of Application No. 31097955 and Pipeline Licence No. 62559 on him, and therefore the Applicant cannot fully exercise his procedural rights in this hearing without full disclosure of the information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management* in relation to Application No. 31097955 and Pipeline Licence No. 62559 and in relation to a holistic licensee assessment of Pieridae;
 - (g) AER Directive 067 sets out requirements on financial, capability and compliance information which must be provided to, and collected by, the AER for assessment on financial status, magnitude of environmental liabilities, and other factors, which are considered by the AER under AER Directive 088 in relation to a holistic licensee assessment of Pieridae and its eligibility to acquire and hold a licence for energy development in Alberta;
 - (h) The AER has received financial and capability assessment information from Pieridae in the AER's consideration of Applications 1931841, 1931842 and 1931843 et al made by Shell Canada Limited, which was the subject of AER Proceeding 410;
 - (i) The legal obligation of the AER to ensure that its decisions are reasonable and justifiable within a given legal and factual context requires the AER to assess and evaluate all evidence relevant to the matter before it in an open and transparent manner,

⁴ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 - 25, attached as Exhibit 2 to this Motion.

and this obligation is heightened in cases where the decision has a significant and adverse impact on a directly affected person;⁵

- (j) The Notice of Hearing for this Regulatory Appeal 1935549 states that the purpose of this hearing is to determine whether the AER should confirm, vary, suspend, or revoke its decision to approve Application No. 31097955 and issue Pipeline Licence No. 62559, and accordingly all financial, capability, and compliance information collected, received, assessed, compiled or produced by the AER in relation to its holistic licensee assessment of Pieridae and its eligibility to acquire and hold a licence for energy development in Alberta, is relevant information in this hearing;
- (k) All information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management* in relation to Application No. 31097955 and Pipeline Licence No. 62559 and in relation to a holistic licensee assessment of Pieridae and its eligibility to acquire and hold a licence for energy development in Alberta, is relevant information in this Appeal and accordingly must be disclosed to the Applicant in order to enable him to fully understand the direct and adverse impact of Application No. 31097955 and Pipeline Licence No. 62559 on his rights, privileges or interests;
- (l) The *Alberta Energy Regulator Rules of Practice* set out a framework under which confidential information can be disclosed in the context of a regulatory proceeding.

Sincerely,



Shaun Fluker
Legal counsel to Michael Judd

cc. Hayduke & Associates (sawyer@hayduke.ca)
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⁵ *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at paras 129 - 137, attached as Exhibit 3 to this Motion.



Licensee Capability Assessment

Report Date [REDACTED], 2022

Special Notification Going Concern Uncertainty	Peer Group Producer - Junior - Gas	Eligibility Facility, Well or Pipeline
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Company Name [REDACTED]

Licensee Assessment Profile

Risk Group		Performance Group			
Financial Distress High	Liability Magnitude High	Resources Lifespan Tier 3	Operations Tier 2	Closure Tier 1	Administration Tier 3

Risk Group Assessment

Financial Distress Parameters			Net Profit Margin (3-Year Average)		Current Ratio		Debt To Equity		Interest Coverage Ratio		Cash Flow From Operations To Debt		
Weighting			30%		30%		10%		20%		10%		
Year	Financial statement date	Period (months)	Value	Risk level	Value	Risk level	Value	Risk level	Value	Risk level	Value	Risk level	Total risk level
2022	2022-03-31	3	-68%	High	33.2%	High	0.00	High	-197.35	High	Null	High	High
2021	2021-12-31	12	-75%	High	38.6%	High	0.00	High	-115.11	High	Null	Low	High
2020	2020-12-31	12	-85%	High	27.7%	High	-0.03	High	-318.48	High	38%	Low	High
2019	2019-12-31	12	-47%	High	49.3%	High	-0.04	High	43.32	Low	80%	Low	Medium
2018	2018-12-31	12	-1744%	High	88.3%	Medium	0.00	High	-30.15	High	Null	High	High
2017	2017-12-31	12	-2569%	High	112.1%	Low	0.00	High	Null	Low	Null	High	Medium

Current Estimated Magnitude of Liability \$268,499,134 as of 2022-07-02	Year	Liability estimate date	Liability estimate	Risk level
	2022	2022-03-07	\$268,929,459	High
	2021	2021-12-06	\$269,343,659	High
	2020	2020-12-05	\$240,310,068	High
	2019	2019-12-07	\$252,582,301	High
	2018	2018-12-01	\$303,767,722	High
	2017	2017-12-02	\$58,951,779	Medium

Performance Group Assessment

Factor Name	Factor Tier	Factor Percentile	Parameter Name	Parameter Weight	Parameter Value	Peer Comparison Percentile	Peer Comparison Tier
Resources lifespan	Tier 3	3%	Production Trend	25%	-0.1004	23%	Tier 3
			Inactive Well Ratio	25%	60.41 %	23%	Tier 3
			Marginal Well Ratio	25%	73.44 %	21%	Tier 3
			Inactive Facility Ratio	15%	59.38 %	17%	Tier 3
			Crossover Timeline	10%	Far	100%	Tier 1
Operations	Tier 2	43%	Directive 013 Noncompliance Rate	25%	16.67 %	71%	Tier 2
			Inspection Noncompliance Follow-Up Rate	10%	41.72 %	35%	Tier 2
			Inspection Noncompliance Rate	15%	2.48 %	21%	Tier 3
			Pipeline Incident Rate	25%	0.0168	55%	Tier 2
			Release & Spill Rate	25%	0.0025	50%	Tier 2
Closure	Tier 1	87%	Closure Spend Rate	20%	2.66 %	52%	Tier 2
			Inactive Liability Trend	20%	-0.0594	83%	Tier 1
			Abandonment Rate, Produced Well	10%	14.50 %	77%	Tier 1
			Abandonment Rate, Non-produced Well	5%	18.41 %	48%	Tier 2
			Reclamation Rate, Produced Well	10%	1.11 %	11%	Tier 3
			Reclamation Rate, Non-produced Well	5%	6.03 %	50%	Tier 2
			Facility Abandonment Rate	10%	0.00 %	0%	Tier 3
			Facility Reclamation Rate	10%	0.71 %	25%	Tier 3
			Pipeline Abandonment Rate	10%	1.50 %	65%	Tier 2
Administration	Tier 3	0%	Orphan Fund Levy Compliance	33%	All Paid	100%	Tier 1
			Administration Fund Levy Compliance	33%	All Paid	100%	Tier 1
			Mineral Lease Expiries	33%	0.0531	0%	Tier 3

Confidential; Security Classification: Protected B – Available to specified groups or roles