Polluter Pay Federation

Polluterpayfederation.ca

February 14, 2021

Alberta Energy Regulator
Suite 1000, 250 – 5 Street SW
Calgary, Alberta, T2P 0R4 ***Via E-mail to: Directive067@aer.ca***

Dear Sir or Madame:

Re: Feedback on Proposed Rules - Draft Directive 067
Comments on the New or Proposed Liability Management Framework

It has been abundantly clear for years that the Courts, the Government of Alberta, the Alberta Energy Regulator (the "**AER**"), landowners and other stakeholders view the Licensee Liability Rating ("**LLR**") program to be an inadequate measure of licensees' financial health and eligibility to hold, continue to hold, or accept transfers of well, facility, pipeline licenses, and other AER permits and approvals.

The Polluter Pay Federation (the "**Federation**") holds that the AER's failure to observe the rules it made to manage upstream oil and gas end-of-life liabilities has adversely impacted the rights of landowners and taxpayers and put the orphan fund at risk. This is contrary to the stated intent of Directive 006, *Licensee Liability Rating (LLR) Program and License Transfer Process.*

The AER's website reads as follows on the topic of Liability Management Systems and Processes:

> **Our approach to managing liability was built to balance multiple interests: environmental protection, public safety, landowner interests, investment, royalties, jobs, and market volatility.**

Aspects of the AER's approach as stated are flawed. The AER is, among other things, a regulator with a quasi-judicial adjudicative function, both of which functions involve:

a) the making of rules to the extent that the AER is authorized to do so by statute;[1]

b) observance of its own rules as well as other laws of Alberta in its decision-making processes and strict compliance enforcement as per its law enforcement mandate;[2] and,

c) working together with the Surface Rights Board without duplication of effort,[3] including to ensure that compensation for specific landowner's risks, which cannot be mitigated by the terms and conditions of a license, permit, or other approval or any AER decision, is adequate to render the landowner whole for the use of his or her land for an upstream oil and gas activity.

When seeking to balance the interests of a licensee with those of the public or other interests in decision making and activity approval processes, the AER is simply not authorized to contravene or ignore the law or to be

[1] In terms of liability management including deposits and security, section 10(1) of the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (the "***OGCA***"). See subsection 10(1)(a) and 10(1)(b) in particular.
[2] Section 2(2) of the *Responsible Energy Development Act*, SA 2012 c R-17.3 (the "***REDA***").
[3] *Togstad v. Alberta (Surface Rights Board)*, 2015 ABCA 192 (CanLII) at para. 7 (leave to appeal to the Supreme Court of Canada denied).

influenced by government, industry, or other forces. The AER, particularly in performing its adjudicative functions and in deciding when hearings are required, must be truly fair and independent.

I. Feedback on Amendments to Directive 067

Attached in the prescribed format is the submission of the Polluter Pay Federation on proposed amendments to AER Directive 067, *Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals*. As discussed in Section II of this cover letter, our submission goes beyond the scope of D-067.

Legislation and Related Commentary

We note that "eligibility" to hold a well or facility license, called "capacity" when referring to a pipeline license, are governed by the same factors to be considered at law, which are set out in section 20 of the *Oil and Gas Conservation Act* (the "***OGCA***") and section 16 of the *Pipeline Act.* Section 20 of the *OGCA*, which refers to additional – or a second set of - requirements of a well or facility licensee, reads as follows:

> **Additional requirements of licensee**
>
> **20 No person shall acquire or hold a licence or approval unless the person meets the eligibility requirements set out in the regulations or rules and, in the case of a corporation, is**
>
> **(a) registered, with an active status, under the *Business Corporations Act*,**
>
> **(b) incorporated by or under an Act of the Legislature, other than the *Business Corporations Act*, and approved by the Regulator as a corporation that may acquire or hold a licence,**
>
> **(c) incorporated under the *Bank Act* (Canada),**
>
> **(d) a railway company incorporated under an Act of the Parliament of Canada,**
>
> **(e) registered under the *Loan and Trust Corporations Act*, or**
>
> **(f) an insurer licensed under the *Insurance Act*.**
>
> [Underline emphasis added]

AER Directives constitute rules referred to in section 20 of the *OGCA*. The power or authority (statutory jurisdiction) and discretion to make rules governing the management of liabilities associated with wells and facilities is granted to the AER pursuant to section 10(1) of the *OGCA*, which reads in part as follows:

> **Rules**
>
> **10(1) The Regulator may make rules**
>
> **(a) prescribing the information that is to be included in or is to accompany any application under this Act or the rules;**
>
> **(b) requiring licensees and approval holders to provide to the Regulator deposits or other forms of security to guarantee the proper and safe suspension, abandonment and reclamation of wells and facilities and the carrying out of any other activities necessary to ensure the protection of the public and the environment, including rules respecting the amount and form of those deposits and security and how they may be used, retained, forfeited and returned;** [Underline emphasis added.]

Contravention of the Statute

The Federation notes that many licensees of wells in particular do not meet the above-quoted eligibility requirements in that they are not registered, active corporations in good standing. This contravention of the provisions of section 20 of the *OGCA* appears to be a direct result of adherence to provisions of Appendix 2 to AER Directive 006, which forms part of the AER's so called Liability Management rules.

This aspect of Directive 006 states that once a reclamation certificate has been issued, the AER will not transfer a well license. This rule or practice is inconsistent with the provisions of section 20 of the *OGCA* quoted above, as well as the first requirement of a well or facility licensee set out in sections 16(1) and 17(1) of the *OGCA.*

Entitlement to Hold a Well License

To obtain, receive by transfer, hold, or continue to hold a well license, all well licensees must meet the criterion set out in two sections of the *OGCA* as follows:

1. The entitlement requirements of section 16(1) of the *OGCA*; and,

2. The additional eligibility requirements of section 20 of the *OGCA* quoted above, which mirror the ineligibility factors to enter into a mineral agreement set out in section 23(2) of the *Mines and Minerals Act* and the provisions of section 27 of the *Land Titles Act*.

One must be a "working interest participant" to hold a well or facility licence, which term is defined as follows in section 1(1)(fff) of the *OGCA* as follows:

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

Put another way, once a person or corporation ceases to be a "working interest participant" in the minerals, the well licence must be transferred to a person or corporation (including Her Majesty in Right of the Province of Alberta or the "Crown") that is entitled to hold the licence.

This is clear on a plain reading of the provisions of section 16(1) of the *OGCA* quoted below.

> **Entitlement for well licence**
>
> **16(1) No person shall apply for or hold a licence for a well**
>
> **(a) for the recovery of oil, gas or crude bitumen, or**
>
> **(b) for any other authorized purpose**
>
> **unless that person is a working interest participant and is entitled to the right to produce the oil, gas or crude bitumen from the well or to the right to drill or operate the well for the other authorized purpose, as the case may be.**

Section 4.1 of AER Directive 056 includes a brief and oblique reference to the "right to produce the oil, gas, or crude bitumen" or the entitlement to hold a well licence:

> **When conducting an audit, the AER relies upon the representations made and documents submitted by the applicant or licensee. The AER does not verify legal or beneficial title. The issuance of a license or conducting of an AER audit is not to be relied upon by the licensee or third parties as a legal determination or confirmation of entitlement. Audits are conducted for AER internal purposes only.**

Subsection 16(2) of the *OGCA* sets out a simple procedure for the AER to verify legal or beneficial entitlement to hold a given well licence, and reads as follows:

> **(2) If, after 30 days from the mailing of a notice by the Regulator to a licensee at the licensee's last known address, the licensee fails to prove entitlement under subsection (1) to the satisfaction of the Regulator, the Regulator may cancel the licence or suspend the licence on any terms and conditions that it may specify.**

There are consequences associated with a well license being held by a party that is not entitled to hold the license by virtue of being a "working interest participant" in the minerals, which is clear on a plain reading of subsection 16(3) of the *OGCA*:

> **(3) Where a licence is cancelled or suspended pursuant to subsection (2),**
>
> **(a) all rights conveyed by the licence are similarly cancelled or suspended, and**
>
> **(b) notwithstanding the cancellation or suspension of the licence, the liability of the licensee to complete or abandon the well and reclaim the well site or suspend operations as the Regulator directs continues after the cancellation or suspension.**
>
> [Underline emphasis added.]

Entitled Persons: To be eligible to apply for, hold, or continue to hold a well license, one must possess the right to access and work the related minerals (be a "working interest participant" as defined in the *OGCA*) by way of:

- registered ownership of (title to) the subject minerals (a real interest in properly of a possessory nature or a corporeal heriditament); or,
- a *profit-à-prendre* claim (a real interest in properly of a non-possessory nature or an in corporeal heriditament), which usually takes the form of a Petroleum and Natural Gas Lease agreement.

A well bore (effectively a mine shaft) must provide access only to those minerals that the owner of the well bore may legally access or produce. Otherwise, there is potential or actual theft of real property in the form of minerals (petroleum and natural gas) as to producing wells, and other problems related to disposal or injection wells. Moreover, the party with the right to the minerals has certain public safety, surface land use, land remediation, and land reclamation responsibilities.

The well license is a means of identifying who is legally responsible to others.

Moreover, as confirmed by the Supreme Court of Canada,[4] when the right to a mineral or to the surface terminates, the well must be abandoned (meaning safely plugged or decommissioned as per AER Directive 020).[5] The liability to do so remains with the licensee or more properly with the person who is entitled and eligible to hold the well license, who must also compensate the landowner for ongoing losses:

- in the event the surface of the land in use is "specified land";[6]
- until any "specified land" is certified as reclaimed.[7]

Well licenses must be held by a correct party at law (a party that is both entitled pursuant to S. 16 of the *OGCA* and eligible pursuant to S. 20 of the *OGCA*) for many public safety, land use, landowner compensation, and land remediation and reclamation reasons.

As such, the Polluter Pay Federation respectfully suggest s that Directive 067 should reflect both the entitlement and eligibility requirements of the *OGCA* rather than just eligibility requirements.

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[4] *Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5 (CanLII)* at para. 17.
[5] Section 3.102(a) of the *Oil and Gas Conservation Rules*, AR 151/1971.
[6] See the definition of "specified land" in Part 6, section 134(f) of the *Environmental Protection and Enhancement Act.*
[7] See section 144 of the *Environmental Protection and Enhancement Act.*

II. Related Directive 006 Feedback

Directive 067 rues are inexplicably intertwined with other AER Liability Management Directive rules including those set out in AER Directive 006, *Licensee Liability Rating (LLR) Program and License Transfer Process.* Appendix 2, Section 8, of Directive 006, to be observed by the AER in considering a license transfer application, reads as follows:

> **8 License Transfer LMR Assessments—Security Deposit Requirements**
>
> **On receipt of a license transfer application, the AER will conduct an LMR assessment of both the transferor and the transferee. The license transfer LMR assessment is conducted as if the transfer were approved (post-transfer LMR).**
>
> **If both the transferor and transferee have a post-transfer LMR equal to or exceeding 1.0, a security deposit will not be required from either party.**

The two purposes of Licensee Liability Rating ("**LLR**") system and rules governing the license transfer process are clearly stated in section 1 of Directive 006, quoted below:

> **1. Purpose of the LLR Program**
>
> **The purpose of the Alberta Energy Regulator (AER) LLR Program and license transfer process as set out in this directive is to**
>
> - **prevent the costs to suspend, abandon, remediate, and reclaim a well, facility, or pipeline in the LLR Program from being borne by the public of Alberta should a licensee become defunct, and**
> - **minimize the risk to the Orphan Fund posed by the unfunded liability of licensees in the program.**

On a plain reading of section 10 of the *OGCA*, the purposes of rules such as those set out in Directive 006 and Directive 067 is to "guarantee the proper and safe suspension, abandonment and reclamation of wells and facilities and the carrying out of any other activities necessary to ensure the protection of the public and the environment" (underline emphasis added) so that (a) the public of Alberta bears no cost; and (b) risks to the Orphan Fund are minimized.

Our attached submission that is feedback on proposed amendments to Directive 067 also deals with issues of deposits or security that are directly related but separately dealt with by way of Directive 006.

III. Feedback on the New Liability Management Framework

The AER's new Liability Management Framework is said in an AER video to be comprised of five elements:

1. **Licensee capability assessment** (LCA) - to replace the existing LLR system
2. **Licensee special action**
3. **Inventory reduction program**
4. **Addressing legacy and post closure sites**
   a) A panel will be established
5. **Expanding the mandate of the Orphan Well Association** (the "**OWA**")

In addition to requesting a seat on the legacy well (or site) panel, the Federation respectfully submits the following feedback on the proposed new Framework outlined in said video in addition to the D-006 and D-067 changes outlined in the attached document.

Because it is an urgent matter to ensure that the Orphan Fund it not put at risk and that no Albertan bears the costs of end-of-life obligations that all well and facility licensees have at law, we also point out that the review and amendment of AER Directive 011 said to be associated with the new Framework can be expedited because Federation Members have completed certain work that the video implies still must be done by the AER.

1. Licensee Capability Assessment

At slide 18 of the AER video two elements of LCA are discussed:

- Financial distress based on the licensee's financial statements
- Liability assessment based on Directive 011

Replacing the Licensee Liability Rating (LLR) System

The Federation notes that AER Directive 011, *Licensee Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs* sets out the LLR system to be replaced by the LCA. Slide 14 in the video clearly states that Directive 011 requires "assessment and changes".

The Federation submits that the LLR calculation set out in Directive 011 is pseudo-math underpinning a pseudo-financial security program. Using deemed assets and deemed liabilities, to be calculated as per Directive 011, to decide when to require security or a deposit to cover end-of-life costs when these factors are equal (LLR is 1.0 or less), or when liabilities exceed assets, has not been an effective means to manage liabilities. Companies with LLR of 2.0 or higher have failed with no security or deposits to cover end-of-life costs.

Commentary associated with Slide 18 in the video states that LLR "liability estimates will be improved over time as we [the AER] incorporate the industry submitted closure spend data".

Members of the Polluter Pay Federation obtained the "industry submitted closure spend data" from the AER via freedom of information requests, entered such data into a data base, and developed software that can calculate the estimated abandonment and reclamation costs for any well and its associated site in Alberta. In other words, private citizens completed the AER's work required to improve LLR estimates now as opposed to improving them over time.

The AER's December 2020 LMR Report shows that 358 licensees have an LLR of 1.0 or lower, where 244 of these licensees have an LLR of 0.00 (are without question insolvent and incapable of covering the costs of end-of-life obligations). 38,000 licenses are involved.

The video strongly suggests that these activities shall be designated by the AER as "orphans".

2. Licensee Special Action

Insufficient information has been provided by the AER to evaluate what special action is, let alone its appropriateness or effectiveness. Some information suggests that the AER will somehow assist individuals or financially stressed operators in managing their assets through practical guidance and proactive support, which is not a regulatory, adjudicative, or enforcement function.

The Federation notes that if any segment of society is in need of practical guidance, facts, and support from the AER, it is not financially stressed operators. Rather it is the members of industry that pay the Orphan Fund levy, landowners, and taxpayers who will bear the related costs of financial failure of a licensee or the AER's failure

to assess the Orphan Fund levy and ensure the levy each year is sufficient to retire all "orphans" in a timely manner.

3. Inventory Reduction Program

The Federation notes that the *Oil and Gas Conservation Rules* have been amended to provide that a landowner can have the licensee of well, which has been inactive for more than five years, to develop a closure plan that is potentially enforceable. This is a positive change.

However, the problem is the AER unwillingness to (1) accept or act on applications filed with the AER by landowners, (2) enforce the laws and regulations it is charged with administering; and (3) conduct participatory rights having regard to the undeniable rights of freehold landowners (surface and minerals).

4. Legacy Wells and Post Closure Sites

So-called legacy wells, which need to be re-abandoned because they are in urban areas in proximity to proposed development (AER Directive 079), are a serious problem for which remedies at law have long been ignored.

The solution, notwithstanding any rule in Directive 006 to the contrary that is inconsistent with prevailing regulations or statutes, is to transfer licenses for abandoned (sealed or plugged) wells to a party that is both eligible (*OGCA* section 16) and entitled (*OGCA* section 20) to hold the well license as clearly required by law.

The Polluter Pay Federation is aware and has documentary evidence to show that:

- certain landowners have formally requested the AER to follow the procedure in section 16(2) of the *OGCR* and transfer licenses for so-called legacy wells to the correct party as required by law;
- the AER did not consider the application or given it an application number.

The Federation notes that the AER's video indicates that future consultation will occur (Slide 23) and that a panel will be established to deal with Legacy issues. Ongoing industry consultation is also contemplated. The Federation hereby formally requests:

- at least one seat on such panel; and,
- that no consultation with industry WHATSOEVER occurs without a representative of a landowner and taxpayer group such as the Federation is present or involved.

5. Expanding the Mandate of the Orphan Well Association

The Federation submits that, via red tape reduction laws (Bill 12, 2020), the OWA's mandate has already been expanded. It is going to take additional funding for the OWA to take on a larger role and to deal with the massive number of wells and facilities that will inevitably be named as "orphans". Soon at least 38,000 upstream oil and gas activities shall be orphaned or are already effectively unnamed orphans.

The Federation also submits the following:

- That there needs to be other "designates" in addition to the OWA to carry out abandonment and/or reclamation work funded by the Orphan Fund as contemplated by the *OGCR*.

- That as contemplated by the *OGCA*, an agency or agencies other than the AER can and should decide, pursuant to quasi-judicial processes, whether a well or facility should be named an "orphan". The Federation also aware of wells where the licensee is no longer a corporation, or the licensee is not a corporation in good standing, some related wells have been named orphans, but others have not. This is unacceptable as is any significant delay in naming wells as "orphans" when this required by law.

- The amount of the Orphan Fund levy must drastically increase (as required by law) because of the high number of well and facility licensees that are clearly insolvent with insufficient deposits having been made or insufficient security lodged because of ineffective AER-made rules and the AER's failure to follow them.

The Federation submits that the three items bulleted above are among the most significant actions that can be taken and should be taken to manage upstream oil and gas liabilities in accordance with Alberta law.

IV. Concluding Remarks

Three of the Directors of the Polluter Pay Federation participated in Alberta Government Liability Management Review sessions (six days) in 2017. Nothing has changed but these Directors are informed and qualified to meaningfully consult to on how to achieve liability manage that conforms to Alberta law, rather than simply reflecting any policy of the day that can change.

The existing liability management system is clearly flawed and has been used for far too long. The AER should either take a holistic approach to consultation or consult with no industry or other stakeholders and use its expertise to develop and amend new rules. The Federation can make significant contributions.

Above all, the AER must make portals open to landowner to seek remedies contemplated by law pursuant to formal applications filed with the AER. This includes applications for license transfers made by landowners, particularly when the licensee is a corporation that no longer exists or is inactive with no employees.

The provisions of Directive 006 that seek to preclude well license transfers when a reclamation certificate has been issued must be amended, removed, and replaced with instructions that any person can follow, with references to sections 16, 17, and 20 of the *OGCR*.

All of which is respectfully submitted.

Yours truly,
Polluter Pay Federation

Dwight Popowich
Director and Chair