

Bulletin 2016-16

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Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision

On May 19, 2016, the Alberta Court of Queen’s Bench issued its decision in a matter involving a dispute between the receiver of Redwater Energy Corporation (Grant Thornton Limited), the Alberta Treasury Branches, the Alberta Energy Regulator (AER), and the Orphan Well Association (OWA) (the Redwater decision).¹

The Court found that receivers and trustees of AER licensees may selectively disclaim unprofitable assets (and their associated abandonment and reclamation obligations) under section 14.06 of the federal *Bankruptcy and Insolvency Act (BIA)*. The Court also found that provincial legislation, in particular AER requirements that mandate compliance with AER licensee liability rating (LLR) program and related closure, abandonment, reclamation, and remediation obligations, are inoperative to the extent that they conflict with the *BIA*.

The impacts of the decision are significant, especially to the extent that they permit receivers and trustees to avoid the licensee’s abandonment, reclamation, and remediation obligations under AER-administered legislation. As recognized by the Court in the decision, and in subsequent commentaries published by numerous law firms and media outlets, the Redwater decision is likely to result in significant impacts to stakeholders, including industry and landowners. Of note is paragraph 133 of the decision:

In this case, public interest is at stake if the licensee, who is also part of the public, does not fulfil its environmental duties. The potential financial and environmental repercussions are very real.

The AER and OWA have appealed the decision. The AER is also working on appropriate regulatory measures to address the decision’s impacts and ensure that statutory environmental liabilities associated with energy development in Alberta are adequately and appropriately addressed.

Effective immediately, and pending the earlier of the outcome of the Redwater litigation or the implementation of appropriate regulatory measures, the AER has implemented the following changes to minimize risks to Albertans.

¹ *Redwater Energy Corporation (Re)*, 2016 ABQB 278 (<http://canlii.ca/t/grvgf>).

- 1) The AER will consider and process all applications for licence eligibility under *Directive 067: Applying for Approval to Hold EUB Licences* as nonroutine and may exercise its discretion to refuse an application or impose terms and conditions on a licence eligibility approval if appropriate in the circumstances.
- 2) For holders of existing but previously unused licence eligibility approvals, prior to approval of any application (including licence transfer applications), the AER may require evidence that there have been no material changes since approving the licence eligibility. This may include evidence that the holder continues to maintain adequate insurance and that the directors, officers, and/or shareholders are substantially the same as when licence eligibility was originally granted.
- 3) As a condition of transferring existing AER licences, approvals, and permits, the AER will require all transferees to demonstrate that they have a liability management ratio (LMR) of 2.0 or higher immediately following the transfer.

The AER will work with industry and other stakeholders and the Government of Alberta to develop broader and more permanent regulatory measures in accordance with government policy in response to the Redwater decision.

The AER recognizes that requiring purchasers of AER-licensed assets to have an LMR of 2.0 or higher post transfer is a significant change. However, this change will only apply to licensees that wish to acquire AER-licensed assets. The AER has observed that some licensees that maintain an LMR at the minimum level required (i.e., 1.0) purchase AER-licensed assets only to find themselves in financial difficulty within weeks or months following the acquisition. For this reason, the AER will only permit licensees to acquire additional AER-licensed assets if the acquisition will improve their LMR to a state of 2.0 or higher. Licensees can achieve an LMR of 2.0 or higher in a number of ways, including posting security, addressing existing abandonment obligations, or transferring additional assets.

The interim measures above have been taken by the AER in furtherance of its mandate under section 2 of the *Responsible Energy Development Act* and will enable the AER to re-evaluate its licensing requirements to ensure that existing and future licensees fulfil their environmental duties. The AER realizes that these measures may inconvenience some stakeholders. However, the interim measures are necessary to ensure the continued protection of Albertans and their confidence in both the regulatory system and AER licensees.

If you have any questions about this bulletin, please contact inquiries@ aer.ca.

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