

Via Email

March 22, 2018

Maureena LothPetroFrontier Corp.
Attention: Omar El-Hajjar

Dear Sir and Madam:

**RE: Request for Stay by Maureena Loth
PetroFrontier Corp. (PFC)
Application No.: 1904954
Licence Nos.: 0487679, 0487680, 0487681, 0487682, 0487683
Location: 12-29-063-02W4M;
Request for Regulatory Appeal No.: 1907191**

The Alberta Energy Regulator (AER/Regulator) has considered Ms. Loth's request under section 39(2) of the *Responsible Energy Development Act* (REDA) for a stay of the January 17, 2018 decision to approve Application No. 1904954 (Decision). That Decision is the subject of the above-noted request for regulatory appeal.

After considering the parties' submissions, the AER has concluded that it is appropriate to deny the request of Ms. Loth for a stay of the Decision.

The Regulator is empowered to grant a stay pursuant to section 39(2) of the REDA. However, as stated in section 38(2), the filing of a request for regulatory appeal does not operate to stay the appealable decision.

The AER's test for a stay is adapted from the Supreme Court of Canada case of *RJR MacDonald*.¹ The steps in the test are:

1. Serious question – Undertaking a preliminary assessment of the merits of the case to determine if there is a serious question to be heard at the requested appeal;
2. Irreparable harm – Determining if the stay applicant will suffer irreparable harm if the stay request is refused; and

¹ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR MacDonald*)

3. Balance of convenience – Assessing which of the parties would suffer greater harm from the granting or refusal of the requested stay.²

The AER has concluded, after considering the submissions of Ms. Loth and PFC, that Ms. Loth has not satisfied the tripartite test.

a. Serious question

The first question of the tripartite test requires the applicant to show there is a serious meritorious issue to be tried. The applicant has to demonstrate that there is some basis on which to present an argument on the appeal, although this is a very low threshold. The stay applicant need only show that the appeal is not frivolous or vexatious.

The decision that is under appeal is a decision to issue 5 well licenses for a multi well pad on January 17, 2018. A central question is whether PFC was in compliance with D056 notification requirements. Ms. Loth states that there was no public information session held and that she has not been notified, informed and consulted regarding the Licenses. She submitted that PFC has failed to comply with provincial regulatory requirements by disregarding proper notification, providing information and consultation. Ms. Loth also raised concerns regarding water quality, emergency response plans, spill management, levels of H₂S/CO₂/O₂, traditional food source issues, etc.

PFC submitted that that it has fully complied with federal and provincial regulatory requirements regarding notification, provision of information and consultation regarding the issuance of the Licenses. It also notes that Ms. Loth's residence is approximately 2.5 kilometers from the proposed well site. PFC provided some evidence in support of its position that there was no contravention of Directive 056. In regards to Ms. Loth's other concerns, PFC states that it has fully complied with and is governed by the processes and regulations put in place to properly safeguard the concerns raised.

As noted in PFC's submissions, the AER conducted an audit of the subject applications. The result of that audit was a determination that PFC's applications met all requirements including those regarding consultation with the public (including landowners) as required by AER Directive 056: Energy Development Applications and Schedules. Further, the AER has no jurisdiction to conduct or assess the Crown's consultation with Aboriginal peoples. This demonstrates that an appeal request based on concerns with consultation has no prospect of success unless that request is brought by the Crown for the purpose of addressing the impacts of the applications on Aboriginal peoples and the means to mitigate the impacts.

With regard to Ms. Loth's other basis for an appeal, the information provided in the stay submissions does not demonstrate on their face a meritorious appeal. Ms. Loth's February 23, 2018 submission poses a number of questions about the project; however, those do not demonstrate merit. Issues related to impacts to First Nations rights to hunt and other traditional activities are significant and important.

² *RJR MacDonald* at paragraph 43

However, the information provided only expresses concerns and contains statements regarding impacts. That is not sufficient to demonstrate a meritorious appeal.

b. Irreparable harm

Even if the first question in this matter were answered in the positive, the AER is not satisfied that Ms. Loth will suffer irreparable harm should the stay be refused.

The second question of the tripartite test requires a determination of whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted. Irreparable harm will occur if the stay applicant will be adversely affected by the conduct the stay would prevent if the regulatory appeal applicant prevails in the appeal. The type of harm and not the size of the harm must be considered. The harm must not be of the sort that could be remedied through damages (i.e. in monetary terms). As noted by the Court of Appeal of Alberta, irreparable harm is “of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the [stay] would be a denial of justice.”³ The harm must also be unavoidable by the stay applicant.

In *Dreco Energy Services Ltd. v Wenzel*, the Alberta Court of Appeal stated “the test for irreparable harm has a high threshold and only relates to the harm suffered by the party seeking the injunction...”⁴

The Federal Court has described the onus that rests upon the stay applicant to meet the irreparable harm test as follows:

The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd.* 2005 FC 815, (2005), at para. 59, aff’d 2005 FCA390, 44 C.P.R. (4th) 326.

That is, it will not be enough for a party seeking a stay to show that irreparable harm may arguably result if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see: *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.⁵ (Emphasis in the original) [underlining added]

Ms. Loth has alleged that she will suffer harm by:

- a. Decline of water flowing and contaminating the nearby creek;
- b. Noise pollution;
- c. Increase in traffic and dust control;
- d. Remove their subsistence to live peacefully off the land by encroaching and taking away their First Nations rights to hunt and gather;

³ *Ominayak v Norcen Energy Resources*, [1985] 3 W.W.R. 193 (ABCA) at paragraph 30.

⁴ [2008] AJ No. 944 at para. 33

⁵ *Canada (Attorney General) v. Amnesty International Canada* 2009 FC 426, at paras. 29 and 30.

- e. Prevent the preservation of sharing traditional ways by affecting diet and eating of natural foods;
- f. Harmful effect on the decline of moose, ducks, caribou and rabbits;
- g. Struggles to provide for their basic needs, high incidence of diseases, and lack of clean drinking water;
- h. Endangering crane (a species at risk) nesting in area, decline in moose, contamination of plants and rare medicines;
- i. Wildlife sanctuary and threat to sacred plant medicines, woodland caribou and culture.

Ms. Loth further states that the "...the impact for loss of our culture as Indigenous people living on and off reserve will not be measured in monetary values." She also states that the project will use herbicides which are poisonous and pose harmful cumulative effects on exercising treaty and aboriginal rights. In addition, she asserts that the project would disrupt critical moose habitat, cause irreparable harm and interfere with their ability to exercise treaty and aboriginal rights including the right to hunt, trap and gather food for social, cultural and consumptive purposes. She further submits that the AER must also consider other extensive developments on their traditional territory when considering this project.

In response, PFC has recognized some concerns, stating in its reply submission that the well site is over 200 metres from the nearest waterbody, being Marie Creek. No water will be sourced from Marie Creek to conduct any operations under the Licences. Safeguards have been put in place to prevent operations from impacting the natural flow of Marie Creek in any way. The well site will be constructed with an impermeable clay berm to prevent any release of substances from the well site. Production tanks will be placed in secondary containment to prevent potential releases of produced fluid onto the well site, all of which meet or exceed the regulatory requirements to which PFC is subject. Likewise, the proposed development is governed by regulations requiring operations to be conducted in an environmentally and operationally responsible manner. These regulations, as well as CLFN's oversight, are in place to safeguard against impacts (such as those raised in Ms. Loth's letter) that violate CLFN and federal/provincial standards.

Some of the matters presented by Ms. Loth do not demonstrate harm to her. For example, no explanation is provided as to how endangering crane nesting is a harm, never mind an irreparable harm, to Ms. Loth. No explanation is provided as to how matters such as noise pollution, dust, and increased traffic represent harms that cannot be compensated for by monetary means.

The AER also finds that with regulatory compliance by PFC there is elimination or potential mitigation of the alleged harm such that the occurrence of the harm, as demonstrated on the record for this stay request, is at best only a possibility. Such speculative harm is not sufficient to satisfy the AER that the alleged harm from these risks is "irreparable". As stated above by the Federal Court, it is not enough to show that irreparable harm may occur. In this matter, the allegations of harm that may occur are speculative. Further, Ms. Loth does not explain why the harm she alleges would be irreparable.

The AER finds that the second branch of the stay test is not met by Ms. Loth.

c. Balance of convenience

For the reasons given above, it is not necessary to address the balance of convenience in this matter.

The AER would like to make clear that the above decision is not determinative of Ms. Loth's request for a regulatory appeal. The AER's determination on that request will be the subject of a separate decision.

Sincerely,

<original signed by>

David Helmer,
Director, Pipelines, Industry Operations

<original signed by>

Gary Sasseville, M Eng. P. Eng.
Surface Advisor, Authorizations

<original signed by>

Andrew Beaton,
VP, Alberta Geological Survey