

Via Email

March 22, 2021

West Isle Energy Inc.

Alberta Energy Regulator – Compliance &
Liability Management

Calgary Head Office

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Attention: Arthur Skagen

Attention: Kiril Dumanovski, Counsel

Dear Sirs:

**RE: Request for Regulatory Appeal filed by West Isle Energy Inc. (West Isle)
Alberta Energy Regulator – Compliance & Liability Management (CLM)
AD Order 2020-013B
Locations: Multiple
Request for Regulatory Appeal No. 1930443**

The Alberta Energy Regulator (AER) has considered West Isle's request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's decision to issue AD Order 2020-013B on October 20, 2020. The AER has reviewed West Isle's submissions and the submissions made by CLM.

For the reasons that follow, the AER has decided that West Isle's request for regulatory appeal does not have merit and is not properly before it and is therefore dismissed.

The applicable provisions of *REDA* in regard to regulatory appeals state:

Eligibility to Request Regulatory Appeal

Section 38(1) of the *REDA* sets out the test for eligibility to request a regulatory appeal:

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]

Conducting a regulatory appeal

39(4) The Regulator may dismiss all or part of a request for regulatory appeal

(a) if the Regulator considers the request to be frivolous, vexatious or without merit,

...

(c) if for any other reason the Regulator considers that the request for regulatory appeal is not properly before it.

Background

West Isle is the holder of AER well, facility, and pipeline licences.

Between February and March, the AER issued two orders under the *Oil and Gas Conservation Act (OGCA)* and the *Pipeline Act* to the Licensee, West Isle. The net result of the orders was that West Isle's Licences would be reinstated, but West Isle had to submit, to the satisfaction of the CLM, a plan outlining the steps the Licensee will take to return to compliance (Compliance Plan). Between April and June, West Isle submitted several Compliance Plans based on additional feedback and discussions with the CLM.

On August 2, 2020 CLM advised West Isle of its assessment of the Compliance Plan in a letter which advised that: "The AER has reviewed all of the information submitted and finds the following. West Isle does not have valid mineral leases for the wells where it requested to restart operations in the Compliance Plan."

On October 20, 2020 the CLM issued AD Order No. 2020-013B, under sections 25 and 27 of the *OGCA*, and under section 23 of the *Pipeline Act* (the Order). The Order suspended West Isle's Licences, and ordered the abandonment of West Isle's wells and pipelines. On November 17, 2020 West Isle formally requested a regulatory appeal of the Order.

During the administrative review of the Request for Regulatory Appeal, it was determined that an undetermined portion of West Isle's Request was submitted outside of the prescribed 7-day period for the filing of regulatory appeal requests of decisions issued under section 27 of the *OGCA*, and section 23 of the *Pipeline Act*, as set out in section 30(3)(j) and (l) of the *AER Rules of Practice*. On November 18, 2020 the AER issued correspondence to West Isle advising that the Request was late as it relates to s. 27 of the *OGCA* and s. 23 of the *Pipeline Act*, and that the AER could only consider West Isle's Request as it relates to s. 25 of the *OGCA*.

On November 24, 2020 the AER issued correspondence to the parties requesting submissions on the merits of West Isle's Request. In the letter, the AER also asked the parties to provide comments, if any, to state whether West Isle had made a stay request and to specifically address what remained of the Request, considering that appeals under s. 27 of the *OGCA* and s. 23 of the *Pipeline Act* had not been filed in time, but an appeal under s. 25 had been.

A summary of the grounds for West Isle's November 17, 2020 request for regulatory appeal, and CLM's December 7, 2020, are included in the analysis that follows.

Appealable Decision

The Order is an appealable decision, as the Order was issued under the *Oil and Gas Conservation Act* and the *Pipeline Act* without a hearing.

Eligible Person

The AER also finds that West Isle is, *prima facie*, directly and adversely affected by the Order. It is the licensee, listed in the Order and the Order to suspend and abandon West Isle's infrastructure, has more than a reasonable probability of harming West Isle, especially economically.¹

In Accordance with the Rules

The Order was issued, pursuant to section 25 and section 27 of the *OGCA*, and section 23 of the *Pipeline Act*.

However, on November 18, 2020, the AER noted that West Isle's Request was submitted after the prescribed 7-day period for decisions issued under section 27 of the *OGCA*, and section 23 of the *Pipeline Act* as required in section 30 of the *AER Rules of Practice*. Thus, the AER could only consider West Isle's Request as it related to s. 25 of the *OGCA*.

The AER finds that the appeal could continue under s. 25 (but the portions of the request for regulatory appeal, relating to section 23 of the *Pipeline Act* would not be able to continue). An argument could certainly be made that by missing the 7-day deadline under s. 25, that the Order's conditions for suspension and abandonment should stand. The AER notes however, that, in this case, it would likely be too difficult to separate which parts of the Order relied solely on s. 25 or s. 27, or both, and considering the finding below, the AER finds that a conclusive resolution of this issue is not required.

West Isle's Request for Regulatory Appeal Is Without Merit

Parties' Submissions

West Isle submits that it has made a fulsome effort to adhere to the AER's requirements and submits that its obligation to reacquire expired mineral rights is the exception to its full return to compliance. West Isle indicates that it fully intended to reacquire the expired leases, but was delayed because Alberta Energy suspended all land sales early in the pandemic, and that Alberta Energy Tenure would not be open for business again before the end of October 2020. The submission on May 12, 2020 indicates that West Isle understands its responsibility to abandon its mineral lease expired wells on the termination of a surface

¹ *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at para 128
[128] In our view, the decisions of the Board and the reviewing judge that the economic effects of an approval are not enough to ground standing unless the economic effects can be linked back to the environment were unreasonable. The reviewing judge pointed out at paragraph 59 of her decision that the Act does not say that in order to be directly affected, a natural resource or the environment must be directly affected. We agree. Yet the reviewing judge also found that the Board's requirement that the potential for economic harm had to be connected to the environment was reasonable. We disagree

lease and that it cannot produce from expired mineral lease wells; however, West Isle proposes a tiered start up plan to ensure the Company remains economically viable with cash flow while it continues to mitigate and correct its non-compliances.

CLM submitted that West Isle's Request for Regulatory Appeal is without merit and moot. Most notably, CLM argued that section 3.012(a) of the *OGCR* specifically stipulates that West Isle has a legal obligation to abandon its wells (with West Isle having admitted that it that it does not have the required mineral rights), irrespective of the Order:

Section 3.012 (a) of the *OGCR* states that "A licensee shall abandon a well or facility (a) on the termination of the mineral lease, surface lease or right of entry,"

...

CLM also argued that the appeal was meritless and moot as West Isle had submitted an abandonment plan for AER review and that West Isle is in debt to Alberta Energy.

West Isle did not respond to the November 24, 2020 letter from the AER's Regulatory Appeals Coordinator requesting clarification regarding if a stay was being requested.

Legislation and Case Law

Section 39(4) of *REDA* provides the AER with discretion to dismiss all or part of a request for a regulatory appeal in the following circumstances:

- (a) if the Regulator considers the request to be frivolous, vexatious, or without merit,
- (b) if the request is in respect of a decision on an application and the eligible person did not file a statement of concern in respect of the application in accordance with the rules, or
- (c) if for any other reason the Regulator considers that the request for regulatory appeal is not properly before it.

[emphasis added]

Analysis

The AER agrees with CLM's submission that West Isle is in direct contravention of 3.012(a) of the *OGCR*, which states that "A licensee shall abandon a well or facility on the termination of the mineral lease, surface lease or right of entry." Section 28(2)(f) of the *Interpretation Act*, RSA 2000, c I-8 states that "'shall' is to be construed as imperative." The unambiguous nature of this requirement prevents the costs to abandon a well from being borne by the public of Alberta should a licensee become defunct and deterring other operators with the capacity to produce resources from undertaking development. In this case, West Isle has admitted that it does not have the requisite mineral rights and that this is the reason hindering return to full compliance. Considering the clear language of section 3.012(a) and considering the AER does not have the jurisdiction to grant mineral rights, the AER finds West Isle's

Regulatory Appeal of the Order does not have a reasonable chance of success and therefore does not have merit under 39(4)(a) of *REDA*. This requirement must be met and West Isle should return to compliance without further delay.

The AER does not have the jurisdiction to grant the requisite mineral rights and therefore cannot resolve the question of West Isle's expired mineral rights. It is also for this reason that the AER concludes that this matter is not properly before it and can be dismissed under 39(4)(c) of *REDA*.

As West Isle did not clarify if a stay was requested, no stay request has been considered and the AD Order 2020-013B remains in effect, including all timelines such as all abandonments must be planned to completed before March 31, 2021 as per section 8(i) of the Order.

Conclusion

Accordingly, the AER dismisses West Isle's Request. While West Isle is an eligible person, their appeal is without merit, and not properly before the AER.

Sincerely,

<Original signed by>

Paul Ferensowicz
Principal Regulatory Advisor

<Original signed by>

Steve Thomas
Director, Oil & Gas Subsurface, Waste & Storage

<Original signed by>

Jennifer Zwarich
Senior Advisor, External Innovation & Industry
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