

Via Email

May 20, 2021

Calgary Head Office
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Calgary, Alberta T2P 0R4
Canada

Kelvin and Christina Wright

Concourse Petroleum Inc.

www.aer.ca

Attention: Kelvin Wright

**Attention: Tina Fu
Heiju Song**

Dear Sirs et Mesdames:

**RE: Request for Regulatory Appeal by Kelvin Wright and Glenda Wright
Concourse Petroleum Inc. (Concourse)
Location.: 1-21-77-26 W5M
Application No.: 30831584 & 1932074;
Licence No.: 61957 & F52200
Request for Regulatory Appeal Nos.: 1932151 & 1932857**

The Alberta Energy Regulator (AER) has considered the May 6, 2021 stay request of Kelvin Wright and Glenda Wright (the Wrights or the landowners), under section 39(2) of the *Responsible Energy Development Act* (REDA), for a stay of the AER's decision to issue the Pipeline Licence No. 61957 and the Facility Licence No. F52200 (the Approvals). The Approvals are the subject of the above-noted requests for regulatory appeal, filed by the Wrights on February 2, 2021 (RRA 1932151), and on April 19, 2021 (RRA 1932857).

Due to the similar arguments made in the two requests for regulatory appeals, the AER has determined that these two matters will be considered and decided together.

The AER **denies** the Wrights' request to stay the Approvals, for the reasons below.

REASONS FOR DECISION

Under section 38(2) of REDA, the filing of a request for regulatory appeal does not operate to stay an appealable decision. The AER may, however, grant a stay on the request of a party to the regulatory appeal pursuant to section 39(2).

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR MacDonald*.¹ The onus is on the applicant for the stay to demonstrate that they meet each of the following criteria:

- 1. Serious question to be tried** – Based on a preliminary assessment of the merits of the case, they have an arguable issue to be decided at the requested appeal.

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

2. **Irreparable harm** – They will suffer irreparable harm if the stay is not granted.

3. **Balance of convenience** – The balance of convenience favours granting a stay.²

1. Serious Question

The first step in the test requires the stay requester to establish that there is a serious issue to be tried. The requester must demonstrate that there is some basis on which to present an argument on the requested appeal. This is a very low threshold. The stay requester needs only show that the requested appeal is not frivolous or vexatious.

Through several submissions, the Wrights noted several different concerns that they argued rise to the level of a serious question.

1. Housekeeping – The Wrights provided several pictures and comments indicating that a large amount of oilfield and domestic garbage was left on-site, and that several of the pieces of the garbage blew off-site;
2. Weeds - The landowner previously noted weed growth on the land; while a company was brought to spray the weeds, the Wrights noted that the land company did not spray all of the areas of the lease. The Wrights are concerned that in the spring the weeds will seed and this will cause extensive environmental damage
3. Camp - A work camp resided on the site for seven months. The Wrights stated that this introduced new weeds and contributed to the garbage issue, in addition to theft;
4. Builders' liens – Two builders' liens were placed on the land title for approximately 5 months. This was a major inconvenience to the Wrights, as this led to the disruption of its relationship with its financial institution;
5. Unpaid invoices – The Wrights state that Concourse is in arrears to Pride Regulatory Services, the company which the Wrights and Concourse have been communicating through;
6. Pipeline issues – The Wrights argued that a pipeline agreement should be in place as they thought it would be good for both sides to know the details of the project. Further, information including the size of the pipeline, possible presence of H₂S, and other particulars should be accessible to the landowner in case of an incident. The landowner also wanted an Emergency Response Plan in place and a commitment that if the well is abandoned, that the pipeline will be dismantled in a reasonable time. Finally, the landowner would like the pipeline a minimum of two meters deep, as at one-meter, heavy equipment could easily disturb and damage the pipeline.
7. Communication – Finally the Wrights argued that there was a lack of timely communication with concourse on several important matters, such as a second rig was brought in to deepen the existing well. Additionally, the Wrights have had several communications not responded to,

² *Ibid* at 334.

and that they thought that when they signed the surface lease agreement, they understood that there was going to a pad site and an access road, not a pipeline and other facilities.

Concourse strongly disagreed with the Wrights' stay request. It submitted that there is no serious question to be heard in this appeal, as all the operational issues relevant to the Wright's lease, including the weeds, garbage, builders' liens and the campsite have already been addressed. Concourse opined that the appeal is being brought due to the landowners' dissatisfaction with the compensation offered.

Concourse also noted that it has re-routed the proposed pipeline to lessen the disturbance to the landowner. Now, every aspect of the pipeline and facility will exist either on leased land, or land not owned by the landowner. To accommodate for the Wrights' various concerns, Concourse highlighted that it has already delayed the construction of the proposed pipeline and facility to try and come to agreeable terms with the landowner. Finally, Concourse noted that the landowner can bring discussions regarding compensation to the Surface Rights Board.

Analysis

The AER does not find that there is a serious issue to be tried.

First, the AER notes that several of the concerns raised by the Wrights have already been resolved, as the work camp is gone, the weeds have been sprayed, the garbage has been picked up, and the builder's liens have been removed. The AER also highlights that Concourse has committed to a more frequent schedule for monitoring and control of the weeds accordingly. Further, Concourse has a statutory obligation that at the end of the project's lifecycle they will be required to reclaim the site to equivalent land capability which includes the elimination of weeds.

Second, a majority of the Wrights' concerns do not relate directly to the pipeline or facility licences but are existing concerns with the wells Concourse has already constructed, pursuant to previous applications.

Most importantly however, the AER finds that many of the Wright's concerns are outside of its jurisdiction. The AER's duty is to ensure that licensees comply with its regulatory requirements for the safe and responsible development of energy resources in Alberta. However, the *Surface Rights Act*, RSA 2000, c S-24 clearly indicates that disputes regarding proper compensation, and damages, such as weeds, that occur because of surface lease activities, are to be resolved by the Surface Rights Board. Further, the concern regarding future camps falls under the purview of the county or municipality in which the Wrights' lease is located.

Addressing the one matter that falls squarely within the AER's jurisdiction – the pipeline – it is highlighted that many of the details that the Wrights have requested are available in the pipeline license. Further, addressing the Wright's safety concerns, and the need for an Emergency Response Plan, the AER highlights that Concourse is required to comply with *Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry*. Finally, the burial of the pipeline two metres deep is not an AER requirement, pursuant to section 20 of the *Pipeline Rules*.

The AER notes, that even if it had found that there was a serious question to be tried, the Wrights do not meet the test for irreparable harm.

2. Irreparable Harm

The second step in the test requires the requester for the stay to establish that it will suffer irreparable harm if the stay is not granted. Irreparable harm will occur if the stay requester will be adversely affected by the conduct the stay would prevent if the applicant ultimately prevails on the regulatory appeal. It is the nature of the harm and not its magnitude that is considered. The harm must be of the sort that cannot be remedied through damages (i.e., monetary terms) or otherwise cured.³ As noted by the Alberta Court of Appeal, 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.”⁴

The Federal Court of Canada 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.

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*.⁵

The Wrights submitted that Concourse does not understand the AER’s regulatory requirements, surface rights, or County rules and regulations. They believe that if a stay is not granted, Concourse will show a further disregard for the legislation. Finally, the Wrights also argued that the weeds which have set could be very difficult to control and may take years to resolve.

Concourse argued that the Wrights will not suffer any irreparable harm, as the company will adhere to all AER regulations, as it has in its past operations. Further Concourse aims to resolve any outstanding issues stemming from the Wrights’ compensation argument.

Analysis

Throughout the parties’ submissions, it became clear that the thrust of this dispute is monetary. As evidenced in the case law cited above, disputes which can be remedied through damages, is not the sort of harm that triggers the need for a stay. Further, the Wrights were unable to present evidence showing that if Concourse ultimately lost the regulatory appeal, that the construction of the facilities could not ultimately be reversed, and the pipeline abandoned.

³ *Ibid* at 341.

⁴ *Ominayak v Norcen Energy Resources Ltd*, 1985 ABCA 12 at para 31, citing *High on The Law of Injunction*, 4th ed, vol 1 at 36.

⁵ *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29 and 30 [citations omitted] [emphasis in the original].

3. Balance of Convenience

The balance of convenience involves examining which party will suffer more harm from granting or refusing the stay. The AER must weigh the burden the stay would impose on Concourse against the benefit the Wrights will receive from a stay. This requires the AER to consider significant factors and not just perform a cost-benefit analysis.

The Wrights argued that unlike Concourse, which holds over 100,000 acres for its operations, as landowners, they only farm five quarters; so, each acre is crucial for the production and the continuance of their farming operation. The Wrights also suggested that since Concourse has had better landowner relations with other owners, that they should move to adjacent lands to the South

Addressing the balance of convenience, Concourse argued that if a stay was granted at this stage of the process, that Concourse and its partners will be severely impacted. Concourse highlights that it has invested in a multi-well operation on the lease, which the Wrights agreed to. Concourse has already drilled three wells, that have proven production, and that they have restarted a gas facility to process new production in the area. This new gas facility will help another firm decrease its environmental liabilities

Analysis

Considering the AER's analysis on the previous criteria for a stay, the balance of convenience clearly weighs in Concourse's favour. The AER does not have the legal authority to resolve many of the Wright's concerns, including compensation. So, to award a stay would effectively strand Concourse's resources, without a clear avenue for resolving the issue of compensation, amongst others.

CONCLUSION

The Wrights' request for a stay is denied, as they are unable to demonstrate a serious issue to be tried, that they would suffer irreparable harm, or that the balance of convenience favors a stay.

Sincerely,

<Original signed by>

Jeffrey Moore
Associate General Counsel

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Jennifer Zwarich
Senior Advisor, External Innovation & Industry
Performance

cc: Darlene Abbott, ADR
Derry Wright, Pride Regulatory Services