

Via Email

March 12, 2021

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

KinMerc Oil & Gas Inc.

Alberta Energy Regulator – Compliance and
Liability Management Branch

www.aer.ca

Attention: Barry Boisvert

**Attention: Karen Lilly, Counsel
Scott Poitras, Counsel**

Dear Sirs et Madam:

**RE: Request for Stay by KinMerc Oil & Gas Inc.
Alberta Energy Regulator – Compliance and Liability Management Branch (CLM)
Suspension Order dated February 22, 2021 issued under sections 22, 26.2, and 27 of the *Oil and Gas Conservation Act* (OGCA) and section 22.1 and 23 of the *Pipeline Act*
Locations: Northern Alberta
Request for Regulatory Appeal No.: 1932405**

The Alberta Energy Regulator (AER) has considered the February 24, 2021, request of KinMerc Oil & Gas Inc. (KinMerc), under section 39(2) of the *Responsible Energy Development Act* (REDA), for a stay of the AER's decision to issue the Suspension Order dated February 22, 2021, which was issued under sections 22, 26.2, and 27 of the OGCA and sections 22.1 and 23 of the *Pipeline Act* (Order). The Order is the subject of the above-noted request for regulatory appeal, filed by KinMerc on February 24, 2021. The request for Stay was included in KinMerc's request for regulatory appeal.

For the reasons that follow, the AER **denies** KinMerc's request for a stay of the Order.

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

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

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 has to 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.

For this part of the test, KinMerc has submitted that:

- the Order requiring shut-down of KinMerc’s operations would result in KinMerc having no chance of compliance due to no cash flow;
- the Order would immediately put KinMerc out of business and that KinMerc has no high-risk issues that warrant a shutdown; and
- communications with the AER is part of the problem and that it needs administrative support to help respond to AER requests and OneStop.

CLM submitted that:

- KinMerc has stated that the Order would immediately put KinMerc out-of-business, which is not a valid reason or consideration in any of the legislation in the AER’s jurisdiction when the AER is taking regulatory action to protect the environment and public safety;
- despite KinMerc’s assertion that it has no “High Risk Issues,” KinMerc has several outstanding public and environmental concerns that have not been resolved in accordance with regulatory requirements, which means that there is no merit to this ground of KinMerc’s regulatory appeal;
- KinMerc’s opinion of what constitutes high risk does not align with what CLM considers high risk;
- KinMerc has had numerous opportunities over the last 9 months to avoid this suspension order and was provided several opportunities to conduct its own assessment and create action plans to come into compliance.
- KinMerc continues to refuse to accept responsibility for its operations or obligations to operating with the rules that apply to all licensees with Alberta’s regulatory framework.

Some matters brought up by KinMerc may raise serious questions to be tried and as such the AER is satisfied the first step in the stay test has been met. This conclusion in no way predetermines the disposition of the request for regulatory appeal or the issues that would be the subject of a hearing on the regulatory appeal should it be granted.

² *Ibid* at 334.

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

For this part of the test, the KinMerc submitted that the Order will result in bankruptcy of KinMerc, leaving nine employees out of work, countless vendors unpaid and all property to be designated as orphan under the custody of the Orphan Well Association. KinMerc submitted that the Order is preventing KinMerc from doing important Winter Access Only work that keeps pipeline integrity and safety for the rest of the year and that ultimately, the Order will cause irreparable damage to KinMerc wells, facilities, and pipelines. KinMerc submits that it is not high risk to the public or the environment, and that it does not have any high-risk issues that warrant a shutdown.

CLM submitted that while KinMerc has made an assertion that it will go bankrupt, it has provided no substantive evidence to support its position and therefore it has not met its burden of proof.

KinMerc concedes that it does not have sufficient cashflow and that it struggles financially to maintain its operations. KinMerc also concedes that it will not survive another shutdown and that it does not have funds to comply with the Order. This means that if the stay is not granted, KinMerc will probably go bankrupt.

The requirements, restrictions and obligations set out in the Order are significant and compliance will no doubt require significant resources which will greatly impact KinMerc. Kin Merc has already indicated

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].

that it has been in ‘survival mode’ financially for some time now. Although we agree with CLM that hard evidence has not been provided, it seems very likely based on Kin Merc’s submissions that compliance with the Order may push Kin Merc over a financial threshold that it cannot return from. While recognizing the absence of hard evidence, the AER finds on balance that the requester has demonstrated it will suffer an irreparable harm as a result of the stay not being granted. Accordingly, the requester has satisfied the second branch of the stay test.

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 against the benefit KinMerc will receive from a stay. This requires the AER to consider significant factors and not just perform a cost-benefit analysis.

KinMerc did not file submissions specifically to address balance of convenience but it submitted that it does not pose high-risk to the public or the environment. KinMerc indicated that if it is forced to cease operations under the Order it will go bankrupt, which means that the shut-down is not in the best interest of all concerned, including the province, county, employees and contractors.

CLM submitted that the balance of convenience clearly favours not granting the stay request. The AER is charged with the duty of protecting the public interest with respect to public safety and the environment under REDA, as well as the legislation under which the Order was issued, namely the OGCA. CLM submits that there is greater risk of harm to public safety or the environment than to KinMerc in this situation if a stay of the Order is granted. The Order indicates that the AER has concerns with KinMerc’s ability to provide care and custody of its licensed wells, facilities and pipelines. This concern is substantiated by KinMerc’s failure to comply with regulatory requirements and KinMerc’s stated intent not to comply with the Order. Further, CLM submitted that if a stay was granted, it would significantly harm CLM in carrying out its mandate and duties with respect to ensuring the protection of the environment and public safety. CLM submits this is a greater harm and that a stay is clearly not in the public interest.

In cases involving orders protecting the public and environment, the public interest is a relevant consideration as it is not only the impact to the body issuing the order that needs to be measured, but the potential impact to the public and the environment.

In issuing the Order, CLM is acting pursuant to validly enacted legislation. The Order is intended to ensure and enforce compliance with the requirements in that legislation, the objects of which include securing the observance of safe and efficient operating practices, responsible management of oil and gas infrastructure, pollution control, and the responsible development in the public interest of the oil and gas resources of Alberta⁶. This legislation and actions undertaken to ensure compliance clearly serves the

⁶ Section 4 of the Oil and Gas Conservation Act.

public interest and is assumed to do so, and that is to be factored into the balance of convenience analysis⁷ and weighed against an assessment of KinMerc's position.

While the RJR MacDonald case dealt with suspension of legislation, it's clear that its findings apply to activities (such as enforcement) undertaken pursuant to carrying out public interest responsibilities under legislation:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[emphasis added]

Moreover, though the passage above relates to irreparable harm, it overlaps with and is material to the application of the balance of convenience test to the present matter. Irreparable harm to the public interest is assumed where a stay would have the effect of restraining actions taken pursuant to public interest legislation. From this, it can be taken that there would be irreparable harm to the public interest if the Order is stayed, and this is a significant factor in the balance of convenience test weighing against the granting of a stay.

Recognizing that Kin Merc has shown that it will likely be irreparably harmed financially because of insolvency, this must be weighed against the irreparable harm to the public interest. In this regard, the Supreme Court, in *RJR MacDonald*, has stated that:

In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

In a more recent case, *AC and JF v Alberta*, the Court of Appeal of Alberta emphasized that '*only when the interests protected by the injunction will outweigh the public interest should the injunction be granted*'⁸.

The public interest is critical in this matter. By issuing the Order, CLM is ensuring the AER's public interest mandate is met through the protection of the environment and the public from the effects of a potential substance release, and that reasonable and appropriate care and measures are taken to prevent impairment or damage to well and facility sites. It is often necessary to issue orders of this nature and with short timeframes so as to prevent the environmental impacts of potential releases.

⁷ *RJR MacDonald* at 348-49.

⁸ *AC and JF v Alberta*, 2021 ABCA 24 at 27, citing the findings of the Supreme Court of Canada in *Harper v Canada*, 2000 SCC 57, [2000] 2 SCR 764.

The fact that Kin Merc is at a point where it is not in a position to comply with AER requirements and the Order without becoming insolvent is problematic for Kin Merc. Its overall financial difficulties which form the primary basis of its request for a stay predate and cannot be solely attributed to the Order. Ultimately, it is KinMerc's non-compliance with AER requirements that led to the issuance of the Order which is now said to threaten its solvency; it has had nine months to remedy the identified non-compliances but has not done so. These circumstances also weigh against Kin Merc's stay when factored into the balance of convenience assessment.

In view of the above, the public interest in keeping the Order in effect and requiring Kin Merc to comply with the same outweighs the individual impact of Kin Merc becoming insolvent. Kin Merc has also not adequately demonstrated that a stay in this case would provide a tangible public benefit or be consistent with the public interest.

The public interest would clearly be best protected if the stay is not granted and KinMerc takes the necessary actions required under the Order.

CONCLUSION

The stay request is dismissed because the requester has failed to demonstrate that the balance of convenience favours granting the stay.

The AER will provide its decision on the request for regulatory appeal in due course.

Sincerely,

<Original signed by>

Sean Sexton
Vice President, Law

<Original signed by>

Elizabeth Grilo
Senior Advisor, Regulatory