

Via Email

May 14, 2021

Carscallen LLP

Alberta Energy Regulator – Compliance and
Liability Management

Calgary Head Office

Suite 1000, 250 – 5 Street SW

Calgary, Alberta T2P 0R4

Canada

www.aer.ca

Attention: Glenn Blackett, Counsel

Attention: Candice Ross, Counsel

Dear Sir and Madam:

**RE: Mojek Resources Inc.
Request for Stay of Alberta Energy Regulator Order AD 2021-004
Request for Regulatory Appeal No.: 1932652**

The Alberta Energy Regulator (AER) has considered the request of Mojek Resources Inc. (Mojek), under section 39(2) of the *Responsible Energy Development Act (REDA)*, for a stay of the decision of the AER's Compliance and Liability Management Branch (CLM) to issue Order AD 2021-004, dated March 16, 2021 (Abandonment Order), under sections 22, 25, 26.2, and 27 of the *Oil and Gas Conservation Act (OGCA)* and sections 12, 22.1 and 23 of the *Pipeline Act*. The Abandonment Order is the subject of the above-noted request for regulatory appeal, filed by Mojek on March 23, 2021. The request for a stay was included in Mojek's request for regulatory appeal, and additional submissions regarding the Stay were filed by Mojek and CLM.

For the reasons that follow, the AER grants a 90-day stay of the provisions of the Abandonment Order that require abandonment of Mojek's licensed wells, facilities, and pipelines. Further details on the stay are provided below.

BACKGROUND

Mojek holds various well, facility and pipeline licences granted by the AER (collectively, the Mojek Licences). Mojek is the operator of the wells, facilities and pipelines associated with the Mojek Licences (the Mojek Sites).

On May 14, 2020, CLM issued an environmental protection order (EPO) to Mojek, pursuant to section 29 of the *Pipeline Act* and sections 113 and 241 of the *Environmental Protection and Enhancement Act*, related to the release of a substance into the environment.

On August 20, 2020, the AER limited Mojek's licence eligibility status under *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* based on a finding that Mojek posed an unreasonable risk due to its poor compliance history, outstanding debts and security funds owing, and outstanding non-compliances, including two notices of non-compliance and the EPO that had not been fully addressed.

On January 4, 2021, CLM issued an order requiring Mojek to suspend its wells and facilities, discontinue its pipelines, and demonstrate that reasonable care and measures were being provided at all Mojek Sites (the Suspension Order). The Suspension Order stated that failure to comply could result in an abandonment the AER ordering abandonment of the Mojek Sites.

On February 3, 2021, Mojek submitted an action plan, as required by the Suspension Order, to address its outstanding non-compliances (Action Plan). Mojek stated in the Action Plan that it expected to mobilize an environmental company to remediate the 15-18 site by the week of March 4, 2021.

CLM accepted the Action Plan on February 9, 2021, with the requirement that Mojek implement a filed remedial action plan at the 15-18 site, as well as initiate the final clean up of two other spill sites by March 4, 2021.

On March 5, 2021, Mojek confirmed that it had failed to comply with the Suspension Order by failing to implement the Action Plan by the March 4, 2021, deadline.

On March 16, 2021, CLM issued the Abandonment Order to Mojek as licensee, Baytex Energy Ltd. (Baytex) and Whitecap Resources Inc. (Whitecap) as working interest participants (WIPs) in some of the Mojek Licences,¹ and the Orphan Well Association (OWA).²

The Abandonment Order requires the WIPs and the OWA to provide reasonable care and measures to prevent impairment and damage at the Mojek Sites, and Mojek and the WIPs to submit abandonment plans and then implement those plans as authorized in writing by the AER.

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*.³ The onus is on the applicant for the stay to demonstrate it meets 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 CLM clarified in its submission that the Baytex interest was sold to Whitecap, so Whitecap is the only WIP in the Mojek Licences.

² Pursuant to section 26.2 of the *OGCA* and section 22.1 of the *Pipeline Act*, the AER may order a WIP or the OWA to provide reasonable care and measures to prevent impairment and damage in respect of a well, facility, well site or facility site, if reasonable care and measures to prevent impairment and damage are not being provided in a manner satisfactory to the AER.

³ *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.⁴

1. **Serious Question**

The first step in the test requires the stay applicant to establish that there is a serious issue to be tried. The applicant 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 applicant only needs to show that the requested appeal is not frivolous or vexatious.

Mojek submits that the Abandonment Order was an unnecessary, disproportionate response to its non-compliances, in light of the nature and extent of those non-compliances, Mojek’s demonstrated good faith efforts to come into compliance, low commodity prices, and the fact that Mojek’s primary non-compliance relates to clean up of a release caused by a previous licensee. In addition, Mojek alleges the Abandonment Order was issued without due process.

CLM submits that Mojek has acknowledged its unsatisfactory compliance history and has not provided any information to support a reason for not issuing the Abandonment Order. CLM states it is authorized to take enforcement steps in response to licensee non-compliance, so there is no arguable question of fact or law to be considered on appeal. CLM further submits that Mojek was provided with due process for nearly 20 months before the Abandonment Order was issued, while CLM worked with Mojek to try to get it into compliance, including at a “due process meeting” on March 16, 2021, just before the Order was issued.

Mojek responds that the mere existence of non-compliance does not necessitate an abandonment order, and reiterates that the Order was unnecessary in the circumstances. Mojek also submits that prior procedural fairness cannot compensate for later procedural fairness deficiencies, and that calling the March 16 meeting a “due process meeting” actually misled Mojek as to the purpose of the meeting and undermined procedural fairness.

The AER has determined Mojek’s claims raise serious questions to be considered on appeal. Accordingly, Mojek has satisfied the first step of the stay test. This conclusion does not in any way predetermine 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. **Irreparable Harm**

The second step in the test requires the stay applicant to establish that it will 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 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.⁵ As noted by the Alberta Court of

⁴ *Ibid* at 334.

⁵ *AC and AF*, 2021 ABCA 24 at 31 (*AC and AF*).

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.”⁶

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*.⁷

Mojek submits that, if the Abandonment Order is not stayed, it will lose its assets and business. It states that, since it has no revenue due to the Suspension Order, it needs third-party funding to implement its action plan and comply with its regulatory requirements. Mojek further submits that, without its licensed assets as security or equity, it is totally unable to obtain third-party funds.

Mojek submits that it is unaware of any means by which it could obtain damages from the AER should it succeed on appeal.

CLM submits that, given the amount of time that has lapsed since the Abandonment Order was issued, Whitecap and the OWA have provided all reasonable care and measures required to prevent impairment of or damage to the Mojek Sites. Further, neither Whitecap nor the OWA is in a position to abandon the assets in the near future, so there is little-to-no risk of abandonment occurring before the appeal process could run its course.

It is not clear that the stay would enable Mojek to obtain third-party funding, so as to allow it to comply with the Suspension Order and avoid insolvency. Mojek states the Suspension Order had already made it far more difficult to obtain third-party financing. Mojek has not provided any evidence to suggest the required third-party funding is guaranteed or even likely if the Abandonment Order were stayed. Mojek simply states that it was “making substantial progress”⁸ and was “in the final stages of getting funding for the cleanup of the 15-18 and was intending to request a short extension to meet its regulatory requirements,” when the Abandonment Order was issued.⁹

Nonetheless, the AER accepts that while the Suspension Order likely made it very difficult for Mojek to obtain third-party funding, the Abandonment Order probably makes it nearly impossible. In other words,

⁶ *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.

⁷ *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29 and 30 [citations omitted; emphasis in the original].

⁸ Mojek Stay Request (April 22, 2021) at PDF page 5, para 19.

⁹ Mojek Request for Regulatory Appeal (March 23, 2021) at PDF page 5.

the Abandonment Order increases Mojek's risk of insolvency. And although both Mojek and CLM agree it is unlikely abandonment would occur before a regulatory appeal hearing process could be concluded, it certainly is possible and the Order does, presumably, contemplate timely abandonment. Moreover, the Abandonment Order imposes abandonment obligations on Mojek, which are in effect unless and until a stay is granted or the decision to issue the Order is revoked. Should Mojek's business fail, or any of its wells, pipelines, or facilities be abandoned as a result of the Abandonment Order, and then the request for regulatory appeal be granted and Mojek be successful on appeal, it would have no effective redress for the harm it suffered. Accordingly, the AER has determined Mojek has satisfied the second step of the stay test by demonstrating it will suffer irreparable harm as a result of the stay not being granted.

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

Mojek states that its objective in requesting the stay is to permit it to become compliant with the Suspension Order. Doing so would allow Mojek to restore itself as a compliant licensee and would prevent its business from failing.

CLM submits there is greater risk of harm to public safety or the environment than of any harm to Mojek if the stay is granted. CLM states it has concerns about Mojek's ability to provide reasonable care and measures for the Mojek Sites, and these concerns have been substantiated by Mojek's failure to comply with regulatory requirements and AER orders, as well as a lack of custody and care found by the OWA when fulfilling its obligations under the Abandonment Order. Further, CLM states a stay would seriously and significantly hinder it in carrying out its mandate and duties with respect to ensuring the protection of the environment and public safety. CLM lists several risks to the environment and public safety if the Order were stayed, including a loss of confidence in the regulatory process, Mojek's lack of financial capacity to provide reasonable care and measures or respond to a release, and a lack of incentive for Mojek to comply. CLM also submits that granting a stay would create a dangerous precedent in which other licensees may believe it is acceptable to act in contravention of regulatory requirements, or it may create a situation where licensees will weigh the monetary benefits of non-compliance against compliance.

CLM submits the primary reason for issuing the Abandonment Order was to ensure reasonable care and measures for the Mojek Sites after numerous failures by Mojek to carry out compliance measures. CLM further states that Whitecap and the OWA have done work to properly suspend the wells and facilities, discontinue the pipelines, and address the non-compliances that were impacting or posing a risk of impacting the environment. CLM submits it now has assurance that responsible parties are providing reasonable care of the licensed assets and could respond to any release or other incident that could occur in the future.

Mojek submits that its wells have been shut-in and granting the stay would not allow it to resume production, so a release is highly unlikely. Mojek further submits it has consistently demonstrated a willingness and ability to resolve its non-compliances, and that it is very motivated to come into and remain in compliance, because a failure to do so has and would lead to a catastrophic loss of its business.

In issuing the Abandonment Order, CLM was acting pursuant to validly enacted legislation. The Order was 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 Alberta.¹⁰ The legislation serves the public interest, and actions undertaken to ensure compliance with the legislation are presumed to serve the public interest as well. That is to be factored into the balance of convenience analysis,¹¹ and weighed against an assessment of Mojek's position.

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 assessed, but also the impact to the public and the environment.

Harm to the public interest is to be considered when assessing the balance of convenience. Irreparable harm to the public interest is presumed where a stay would have the effect of restraining actions taken pursuant to the public interest legislation.

In *RJR MacDonald*, the Supreme Court stated:

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.¹²

In short, it is presumed that there would be irreparable harm to the public interest if the Abandonment Order were stayed, and this is a significant factor weighing against the granting of a stay.

The public interest is critical in this matter. By issuing the Abandonment Order, CLM was ensuring the AER's public interest mandate was met through the protection of the environment and the public from the effects of a substance release, and that reasonable and appropriate care and measures are taken to prevent impairment of or damage to well, facility, and pipeline sites.

¹⁰ *Oil and Gas Conservation Act*, s 4.

¹¹ *RJR MacDonald* at 348-49.

¹² *Ibid* at 346.

The fact that Mojek is at a point where it is not financially capable of complying with AER requirements is problematic. Mojek's financial difficulties, which form the basis of its request for a stay, predate the Abandonment Order. Ultimately, Mojek's non-compliance with AER requirements led to the issuance of the Suspension Order, which limited Mojek's revenue stream, and the Abandonment Order, which now threatens Mojek's solvency. Mojek had time to remedy the identified non-compliances, but failed to do so satisfactorily. These circumstances also weigh against Mojek's stay when factored into the balance of convenience assessment.

The Alberta Court of Appeal recently held that "only when the interests protected by the injunction will outweigh the public interest should the injunction be granted."¹³ Mojek has shown that it will likely be irreparably harmed if the stay is not granted. This must be weighed against the irreparable harm to the public interest if the stay is granted. However, Mojek has also raised potential harms to the public interest if the stay is not granted. In this regard, the Supreme Court stated in *RJR MacDonald* 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.¹⁴

Although the Court was referring to the suspension of legislation in the above passage, based on a reading of the decision as a whole, the principle can be understood to also apply to the suspension or restraint of action taken pursuant to legislation.

Mojek submits that its compliance with AER requirements would facilitate protection of the environment and public safety. Mojek believes it is in the best position to affect timely resolution of its various regulatory non-compliances, including completion of its remediation efforts at the high-risk wells. Mojek submits that it is difficult to discern any real benefit to public safety or the environment that would be gained from the Abandonment Order between now and disposition of the appeal. Further, Mojek states that, if the Abandonment Order is not stayed, Mojek will be financially unable to comply with the Order and will have to cease business operations; its employees and contractors will be terminated; its trade creditors will remain unpaid; its shareholders and creditors will lose their savings; its directors will lose their investments; oil and gas resources will be wasted; and, lessors will lose the value of their mineral rights – none of which is in the public interest.

Mojek's wells, facilities, and pipelines, have already been suspended by Mojek, pursuant to the Suspension Order, or Whitecap and the OWA, pursuant to the Abandonment Order. Mojek submits that it is not high risk to the public or the environment, and that it does not have any high-risk sites that warrant abandonment. CLM has conceded that the Mojek Sites have been left in a safe state in accordance with AER requirements, and CLM has no concerns with those sites remaining suspended for the period of time required by either Whitecap or the OWA to begin the closure process.

¹³ *AC and AF* at 27, citing the Supreme Court of Canada in *Harper v Canada*, 2000 SCC 57.

¹⁴ *RJR MacDonald* at 349.

The AER is satisfied the public interest would be served if Mojek were able to remain in business and carry out the Action Plan; however, this is contingent on Mojek obtaining third-party funding, which is not guaranteed. The AER is also satisfied the public interest would be harmed by abandonment of the Mojek Sites before the regulatory appeal (if granted) is decided, if that could be avoided by Mojek having a reasonable amount of additional time to obtain the funding it requires to implement the Action Plan. CLM argues the AER should only consider the harm to Mojek of not granting the stay, but Mojek states the impact to its directors, employees, creditors, and shareholders should also be considered. The AER agrees that it would be inappropriate, and inconsistent with the direction from the Supreme Court,¹⁵ to focus only on the harm to Mojek when considering the balance of convenience.

In view of the above, the AER has determined that Mojek has demonstrated the balance of convenience favours a short stay of the provisions of the Abandonment Order that require abandonment of the Mojek Sites to provide Mojek additional time to secure financing that will enable it to carry out the Action Plan. Based on the parties' submissions, particularly those of CLM, there seems to be little risk to the environment and public safety at this point from staying the abandonment provisions of the Order, and doing so could prevent Mojek from becoming insolvent and the Mojek Sites from being orphaned, neither of which is in the public interest.

CONCLUSION

The AER grants a 90-day stay of sections 5 and 13 of the Abandonment Order, the provisions that require abandonment of the Mojek Sites pursuant to the abandonment plans. This should provide Mojek with a reasonable opportunity to seek to obtain sufficient funding to implement the Action Plan. If Mojek demonstrates to the AER by **August 12, 2021**, that it has obtained financing in an amount equal to or greater than that quoted by Enviromarc Services Ltd. in its Release Remediation Cost Estimate for remediation of the 15-18 site,¹⁶ the stay will automatically be extended until this regulatory appeal request is dismissed or withdrawn, or if a regulatory appeal hearing is conducted, until the hearing decision is issued.

The AER is not satisfied the balance of convenience would favour a continued stay if Mojek is unable to secure the required funding by the date above. As such, the stay will expire on August 13, 2021 if Mojek does not secure the required financing. Written confirmation that Mojek has obtained sufficient financing can be sent to RegulatoryAppeal@aer.ca, with a copy to CLM's counsel.

The AER cannot and does not grant a stay of the other provisions in the Abandonment Order, because the OWA and Whitecap have already complied with many of their obligations under it (i.e., to provide reasonable care and measures to prevent impairment or damage at the Mojek Sites, and for Whitecap to submit an abandonment plan for the wells in which it has a working interest). In addition, Mojek failed to

¹⁵ *Ibid* at 344: “‘Public interest’ includes both the concerns of society generally and the particular interests of identifiable groups. We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application.”

¹⁶ Mojek Reply Submission (April 30, 2021) at PDF page 65.

comply with the requirement that it submit an abandonment plan by March 22, 2021. Section 38(2) of *REDA* clearly states that a request for regulatory appeal does not operate to stay an appealable decision, and the AER reminded Mojek several times that the Abandonment Order was in effect and had to be complied with unless and until a stay was granted or the order was revoked.¹⁷ A stay is intended to suspend the occurrence of an ongoing or future activity required or permitted under an AER decision. As the time for compliance with the abandonment plan provisions of the Abandonment Order has come and gone, the AER cannot now suspend or stay compliance with that requirement. Accordingly, the AER has decided not to stay the requirement under section 4 of the Abandonment Order for Mojek to submit an abandonment plan.

The AER has sole discretion to reconsider this stay decision at any time should the circumstances require; for example, if, despite demonstrating it has acquired financing Mojek does not take prompt and reasonable steps to implement the Action Plan.

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

<Original signed by>

Jennifer Zwarich
Senior Advisor, External Innovation and Industry
Performance

¹⁷ AER Letters (March 26, 2021, March 29, 2021, and April 8, 2021).