

Via Email

November 26, 2021

Calgary Head Office
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Canada

Mike and Faye Partsch

Tidewater Pipestone Infrastructure Corp.

www.aer.ca**Attention: Mike Partsch****Attention: Ryan Connery**

Dear Sirs:

**RE: Stay Request – Request for Regulatory Appeal by Mike and Faye Partsch (Partsches)
Tidewater Pipestone Infrastructure Corp.
Application No.: 1932929; Licence No.: F21177
Locations: 00/05-36-071-07-W6M
Request for Regulatory Appeal No.: 1934382**

The Alberta Energy Regulator (AER) has considered the October 27, 2021 request of the Partsches under section 39(2) of the *Responsible Energy Development Act* (REDA) for a stay of the AER's decision to approve Application No. 1932929 and issue the facility licence amendment No. F21177 (Licence) to Tidewater Pipestone Infrastructure Corp. (Tidewater) on September 16, 2021. The Licence is the subject of the above-noted request for regulatory appeal, filed by the Partsches on September 23, 2021.

For the reasons that follow, the AER denies the Partsches' request for a stay of the Licence.

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

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

² *Ibid* at 334.

The AER notes that the Partsches did not specifically address the stay test even though, on November 1, 2021, Regulatory Appeals sent a letter to the Partsches stating the stay test and asking the Partsches to provide additional information to address the three stay questions.

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, in the submissions filed in support of the stay request, 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 need only show that the requested appeal is not frivolous or vexatious.

For this part of the test, the Partsches reiterated their concerns with regard to noise, nonproduction of legal documents, odor and the emergency plan and submitted that the regulatory appeal has merits because these concerns have not been addressed by Tidewater.

After considering the submissions filed in support of the stay request, the AER is of the view that the regulatory appeal request does not seem to be frivolous or vexatious. On this basis, the first part of the stay test may have 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. Irreparable Harm

The second step in the test requires the applicant for the stay to establish that they 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.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

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.

not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*.⁵

As stated above, the Partsches did not specifically address this test. The AER has reviewed the parties' submissions on the stay request and notes that the approved project does not involve construction of a new facility but an addition of equipment to an existing facility. Based on the submissions made with respect to the stay request, the AER has concluded that additions to the existing facility will not result in irreparable harm to the Partsches if the stay is not granted.

Tidewater submitted that it would be able to restore any consequences resulting from the additional equipment, should an appeal be granted and that the stay would result in a substantial material loss of revenue to Tidewater.

Since the Partsches have not addressed this test specifically and taking into account the nature of the project that was approved by the Licence, the AER finds that the Partsches have not demonstrated any irreparable harm that they will suffer as a result of the stay not being granted. Accordingly, the Partsches have not satisfied the second branch of the stay test and the request for a stay is denied.

3. Balance of Convenience

As explained above, an applicant for a stay must satisfy each element of the three-part test for the stay to be granted.

The Partsches have not satisfied the second part of the test (demonstrating irreparable harm), and consideration of the third part of the test (balance of convenience) is not necessary.

CONCLUSION

The stay request is dismissed because the Partsches have not demonstrated irreparable harm if the stay is not granted.

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

Sincerely,

<Original signed by>

Jeffrey Moore
Associate General Counsel

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

<Original signed by>

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

<Original signed by>

Gary Neilson
Senior Advisor, Crown Liaison