Alberta Energy Regulator

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Via Email

March 17, 2022

Bennett Jones LLP

Attention: Brad Gilmour

Alberta Energy Regulator – Compliance and Liability Management Branch

Attention: Candice Ross, Counsel

Dear Sir and Mesdames:

RE: Stay Request – Request for Regulatory Appeal by Celanese Canada ULC (Celanese)
Alberta Energy Regulator – Compliance and Liability Management Branch (CLM)
Order 2022-011 issued to Eco-Industrial Business Park Inc. on February 14, 2022
Location: 10-17-053-23W4
Request for Regulatory Appeal No.: 1935909

The Alberta Energy Regulator (AER) has considered the request of Celanese, under section 39(2) of the *Responsible Energy Development Act* (*REDA*) for a stay of the AER's decision to require the shut-in/suspension and abandonment of the disposal well licensed as W0028527, with the unique well identifier 00/10-17-053-23W4/0 (the Well) pursuant to Order 2022-011 issued to Eco-Industrial Business Park Inc. (Eco-Industrial) on February 14, 2022 (the Decision).

The Decision is the subject of the above-noted request for regulatory appeal, filed by Celanese on February 18, 2022. For the reasons that follow, the AER denies the Celanese's request for a stay of the Decision.

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 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 need only show that the requested appeal is not frivolous or vexatious.

For this part of the test, both Celanese and CLM have raised concerns regarding risk of harm to the environment and the public. The mandate of the AER is to protect both the environment and the interests of the public; on this basis, the first part of the stay test is 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 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, Celanese submits it will suffer harm by:

a. Breaching its EPEA Approval unless AEP consents to shut-in the system;

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[2] *Ibid* at 334.
[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].

b. Significant damage to the groundwater system from fluids freezing in the collection system requiring extensive repairs and monetary costs;
c. Significant disruption to the collection of contaminated water until it can be repaired and put back into operation;
d. Interruption of environmental protection and remediation for an indeterminate period of time due to contaminated groundwater not being collected; and
e. Risk of harm to the environment and the broader public due to emissions resulting from trucking contaminated groundwater to other sites.

In reference to all concerns raised, Celanese has not provided any concrete information to support these concerns: Celanese has not provided any information to support the allegation the Disposal Well is not classified as high risk, no information has been provided demonstrating the volume of emissions from trucking the groundwater to nearby facilities, and no concrete information has been provided demonstrating the alleged significant financial implications of shutting-in the Disposal Well. It is not within the jurisdiction of the AER to comment on what AEP will or will not consent to.

Further, Celanese has suggested the recourse to the recouperation of costs associated with denying the stay and allowing the continued shut-in of the Disposal Well should be through the AER. Celanese has not provided any information as to why the AER would be the appropriate party to pay these costs.

Thus, the AER finds that Celanese has failed to demonstrate any harm they *will* suffer as a result of the stay not being granted. Accordingly, Celanese has 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 balance of convenience involves examining which party will suffer more harm from granting or refusing the stay. In applying this branch of the test, the Regulator must weigh the burden the stay would impose on CLM against the burden on Celanese if the stay does not issue. This requires the AER to weigh significant factors and not just perform a cost-benefit analysis.

As mentioned previously, both parties have submitted that the AER is charged with the authority of protecting the public interest in the environment and safety of the public. The Disposal Well at issue was identified as a 'Type 3' High-Risk wells pursuant to section 3.3 of *Directive 013: Suspension Requirements for Wells*. There is a risk to both the environment and to public safety in the event that an issue with the Disposal Well arises due to this classification as well as the fact that the Receiver has no knowledge as to the safety or operation of the Well.

Further, Celanese has not provided any documentation to support its allegation that its losses are irreparable. The Disposal Well has been shut-in since mid-February and the groundwater is currently being trucked to alternative sites.

Consequently, the AER finds, in addition to failing to demonstrate irreparable harm, Celanese has not established that the balance of convenience favours the AER granting the stay.

CONCLUSION

The stay request is dismissed because Celanese has failed to demonstrate irreparable harm and that the balance of convenience favours denying the stay.

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

Sincerely,

<Original signed by>

Paul Ferensowicz
Principal Regulatory Advisor

<Original signed by>

Jeffrey Moore
Associate General Counsel

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Niki Atwal
Senior Advisor – Policy Coordination