

Via Email

April 1, 2022

Kim Paynter

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Attention: Dennis Langen

Dear Sirs:

**RE: Stay Request - Request for Regulatory Appeal by Kim Paynter
Westbrick Energy Ltd.
Application Nos.: 31580192 & 31580198
Licence Nos.: 0503390 & 0503391
Location: 16-12-54-16-W5
Request for Regulatory Appeal No.: 1936115**

The Alberta Energy Regulator (AER) has considered the request of Kim Paynter (Mr. Paynter), under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the AER's decision to issue Approval Nos. 0503390 & 0503391 (Well Licences) to Westbrick Energy Ltd. (Westbrick) on February 17, 2022. The Well Licences are the subject of the above-noted request for regulatory appeal which was filed in two parts by Mr. Paynter on March 11 and March 17, 2022.

For the reasons that follow, the AER denies Mr. Paynter's request for a stay of the Well Licences.

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.
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.

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.

The AER finds that there is a serious issue to be tried.

Mr. Paynter has raised concerns of lack of notification and consultation regarding Westbrick's Applications prior to the Applications being made. Both Mr. Paynter and Westbrick have submitted that consultation has commenced since Mr. Paynter became aware of the decision to issue the Well Licences, however Mr. Paynter's submissions on this issue demonstrate that he feels the time available for consultation now that the Well Licences have been issued is inadequate.

While Mr. Paynter's residence does not appear to the AER to be within the radii for required inclusion in Westbrick's participation involvement program, as set out in *AER Directive 056: Energy Development Applications and Schedules (Directive 056)*, his residence is in close proximity of Westbrick's project site. The participation involvement radii set out in Directive 056 are minimum distances; in some instances, it may be appropriate for applicants to notify or consult with parties outside of the required notification and consultation radii for their proposed project.

Accordingly, the AER is of view that Mr. Paynter's claim in regard to lack of notification and consultation raises a serious question to be tried on appeal, and that Mr. Paynter has satisfied this step of the test. This conclusion does not predetermine the disposition of the Requests 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:

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.

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, Mr. Paynter has alleged that he and his family will suffer the following harms:

- a. Health issues caused by increased noise, light, and traffic;
- b. Loss of enjoyment of life and property caused by increased noise, light, and traffic;
- c. Depreciation of property value; and
- d. Disallowing a fair discussion of the matter with Westbrick “as equals”.

In reference to all concerns raised, Mr. Paynter has not provided concrete information to support his concerns; his submissions are speculative and based on his skepticism regarding Westbrick’s project, including but not limited to the proposed timelines and Westbrick’s ability to adhere to the relevant AER Directives. The AER has numerous requirements applicable to Westbrick’s project that are protective of human health and safety. These requirements must be complied with and adequately address the health and safety related concerns raised by Mr. Paynter. Westbrick is obligated to address any operational complaints, should they arise.

Mr. Paynter acknowledged Westbrick’s offer to relocate he and his family during the drilling of the Wells, at full cost to Westbrick, in order to mitigate Mr. Paynter’s concerns and any disruption to he and his family until completion. Mr. Paynter argued against the effectiveness of this offer to remedy the disruption from construction, noise, and traffic, despite submitting that he and his family independently took similar measures previously in response to well construction by a different company.

Mr. Paynter argued against Westbrick’s submission that, following close of construction of the wells, there will be no increase to traffic accessing the well site, however he did not provide any submissions as to how a possible increase in overall traffic due to “additional maintenance and services associated” with the new wells will cause him irreparable harm.

Further, Mr. Paynter has suggested his property value will decrease if this project moves forward, however he has not provided evidence to this claim beyond his speculation, and his claims are general in nature. It is unclear how the presence of the wells would decrease the value of his property when the wells are licenced to be constructed on an existing well site. Further, Mr. Paynter proposed that Westbrick

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

purchase his property from him, which demonstrates that monetary compensation is a possible remedy for the harm Mr. Paynter submits he and his family will suffer.

Thus, the AER is of the view that Mr. Paynter has not satisfied the second branch of the stay test demonstrating he will suffer irreparable harm as a result of the stay not being granted.

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 AER must weigh the burden the stay would impose on Westbrick against the burden on Mr. Paynter if the stay was not issued. This requires the AER to weigh significant factors and not just perform a cost-benefit analysis.

Both parties have submitted that the AER is charged with the authority of protecting the public interest in the environment as well as the safety of the public. Given that the Well Licences are for additional wells to be constructed at an existing well site, it is difficult to see how the proposed drilling and fracturing operations, pending the disposition of the Requests or the issues that would be the subject of a hearing on the regulatory appeal should it be granted, will substantively affect Mr. Paynter's rights as they were immediately prior to the decision to issue the Well Licences.

Both parties have conceded the increase in traffic, noise, and light during construction will be temporary (although they disagree on the exact timelines), and that the disruption to Mr. Paynter and his family could be mitigated by having them relocated during the temporary period, the cost of which Westbrick has offered to fund. Mr. Paynter has not provided any documentation to support his allegation that similar losses to those he submits he incurred when independently undertaking temporary relocation during previous well construction work carried out by a different company would be incurred during the construction of the new wells.

Alternatively, Westbrick has suggested it will most likely lose its construction window for the year if the Well Licences are stayed pending the disposition of the Requests and during any hearing on the regulatory appeal should it be granted. While the loss of revenue stemming from such a construction delay is speculative, it is not unlikely should one or both of the wells prove productive. The loss of a year of operating time to Westbrick is a significant burden.

Additionally, the AER notes that the relief sought in the underlying request for regulatory appeal is for Westbrook to be required to consult with Mr. Paynter prior to re-application for the Well Licences, and necessarily contemplates the possibility of Westbrick's project ultimately continuing in future.

Consultation is not accommodation, nor does consultation guarantee agreement as to what accommodation measures may be necessary or desired. As demonstrated by the submissions of the Parties on this stay request, consultation between Westbrick and Mr. Paynter was initiated following Mr. Paynter becoming aware of Westbrick's project, however the parties have differing opinions as to what, if any,

accommodation they will privately agree between them. The AER is of the view that the balance of convenience weighs in favour of Westbrick and refusing the stay request.

CONCLUSION

The stay request is denied because Mr. Paynter has not met the three-pronged test for a stay as articulated in *RJR MacDonald*. While there is a serious issue to be tried, Mr. Paynter has not demonstrated irreparable harm and that the balance of convenience favours granting the stay. Further correspondence will be issued to the parties regarding written submissions on the merits of the request for regulatory appeal in due course.

Sincerely,

<Original signed by>

Sean Sexton
Vice President, Law Branch

<Original signed by>

Todd Shipman
Senior Advisor, Induced Seismicity and Geologic
Hazards

<Original signed by>

Michael Bevan
Senior Advisor, Water

cc: Misty Kabanuk, Westbrick