

Via Email

July 21, 2022

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Daniel and Denise Edinger

Bob and Judy Nitschke

[www.aer.ca](http://www.aer.ca)

**Attention : Denise Edinger**

**Attention : Judy Nitschke**

Evelyn Presisniuk

Owen Law LLP

**Attention : Tom Owen**

Dear Sir and Madam:

**RE: Stay Request - Request for Regulatory Appeal  
Stacked Energy Ltd.  
Application No.: 31762307  
Well Licence No.: 0504829  
Locations: 09-27-055-26-W4M  
Request for Regulatory Appeal No.: 1938679, 1938682, & 1938683**

The Alberta Energy Regulator (AER) has considered the request of Daniel and Denise Edinger, Bob and Judy Nitschke, and Evelyn Presisniuk (the Requesters) under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the AER's decision to approve application no. 31762307 and issue the well licence no. 0504829 (Well Licence) to Stacked Energy Ltd. (Stacked) on June 24, 2022 (the Decision).

For the reasons that follow, the AER **denies** the Requesters' 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*.<sup>1</sup> The onus is on the applicant for the stay (i.e. the Requesters) to demonstrate that they meet each of the following criteria:

1. Serious question to be tried – Is there is a serious question to be heard at the requested appeal?  
This requires a preliminary assessment of the merits of the requested appeal.
2. Irreparable harm – They will suffer irreparable harm if the stay is not granted.

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<sup>1</sup> *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.<sup>2</sup>

### 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.

All of the Requesters submitted that they would be adversely affected by the wells' operation, In particular, all of the Requesters cited issues stemming from the wells' H2S concentration. Additionally, the landowners stated that they were not notified of the Well application until June 29, 2022.

Stacked acknowledged in their arguments regarding the Edingers' submissions that raising concerns regarding H2S emissions from the subject well would satisfy the first step of the three-part test. Or, to put it another way, the landowners' concerns regarding H2S is not frivolous or vexatious.

On this basis, in addition to the Requesters' proximity to the well, the first part of 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.

While it did not form the basis for the AER's finding that the first part of the test has been satisfied, the AER notes that with respect to notification, the lawyer for the Requestors acknowledged service of the application on May 20, 2022<sup>3</sup> on behalf of the Requestors. Therefore, at this juncture of the proceeding and with the information before the AER, it appears that notice was properly given by Stacked.

### 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.<sup>4</sup> 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."<sup>5</sup>

The Federal Court of Canada has described the onus that rests upon the stay applicant to meet the irreparable harm test as follows:

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<sup>2</sup> *Ibid* at 334.

<sup>3</sup> Nitschke Request for Regulatory Appeal, pages 17-18.

<sup>4</sup> *Ibid* at 341.

<sup>5</sup> *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*.<sup>6</sup>

For this part of the test, the Requesters submit that:

- Their quality of life would be impacted by the noise, traffic, and toxic fumes;
- The resale value of their homes would substantially decrease due to the foul odours, noise pollution, and the destruction of roads; and
- There are individuals living in the area who have chronic health conditions that would be exacerbated by the presence of sour gas.

Stacked argued that the well is not an H<sub>2</sub>S gas well; rather, any H<sub>2</sub>S that is produced will be in solution and that any H<sub>2</sub>S that makes it to the surface will be incinerated. Further, the EPZ (emergency planning zone) resulting from the presence of H<sub>2</sub>S is only 40 meters from the wellhead.

The AER has considered Stacked's arguments of the well's EPZ of 40m, the location of the nearest surface development of 330m, and the on-site incinerator in accordance with the requirements to eliminate any H<sub>2</sub>S that makes it to surface and concurs with Stacked that the chance of a H<sub>2</sub>S release is unlikely. The AER's regulatory requirements further reduce the likelihood of impacts from the wells and non-compliances in accordance with the AER's Integrated Compliance Assurance Framework.

Accordingly, without any evidence to the contrary provided by the Requester, this unlikely chance of a release of H<sub>2</sub>S does not substantiate the assertions of the Requestors that there will be impacts on quality of life, home value or health conditions. The AER finds that the Requesters have failed to demonstrate any *irreparable* harm they *will* suffer because of the stay not being granted.

Accordingly, the Requesters 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 Requesters have failed to satisfy the second part of the test (demonstrating irreparable harm), so consideration of the third part of the test (balance of convenience) is not strictly necessary. However, the

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<sup>6</sup> *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29 and 30 [citations omitted] [emphasis in the original].

AER also finds that in addition to failing to demonstrate irreparable harm, the Requesters have not established that the balance of convenience favours granting a stay. Given that the chance of an H2S release is unlikely the balance of convenience is in favour of Stacked as they have provided some evidence that it would suffer real financial losses by having to cancel its drilling rig; financial losses where there would be little possibility for recuperation. The evidence before the AER thus favours denying the stay.

## **CONCLUSION**

The stay request is dismissed because the Requesters have 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>

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Jennifer Zwarich  
Senior Advisor, External Innovation & Industry  
Performance

<Original signed by>

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Gary Neilson  
Senior Advisor, Crown Liaison

cc: Dave Wandzura, Stacked Energy