Alberta Energy Regulator

By e-mail only

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June 5, 2024

Normtek Radiation Services Ltd.

Attention: Cody Cuthill

Fasken Martineau DuMoulin LLP

Attention: Allison Sears

Dear Parties:

RE: Stay Request filed by Normtek Radiation Services Ltd.
SECURE Energy Services Inc. (Secure)
Application No.: 1943077
Approval No.: Amendment L to Approval WM 122 (Approval)
Locations: 06-36-068-06-W6M
Request for Regulatory Appeal No.: 1949706

The Alberta Energy Regulator (AER) has considered the January 11, 2024, request of Normtek Radiation Services Ltd. (Normtek), under section 39(2) of the *Responsible Energy Development Act* (*REDA*) for a stay of the AER's decision to issue Amendment L to Approval No. WM 122 on December 14, 2023, to SECURE (the Approval). The Approval is an AER decision and is the subject of the above-noted request for regulatory appeal, filed by Normtek on January 11, 2024.

The submissions made in this matter are extensive, exceeding 1000 pages. Nonetheless, they have all been carefully considered in arriving at the decision on Normtek's stay request. The absence of a specific reference in this decision to a particular fact or allegation contained in the submissions is not an indication that information was not considered.

For the reasons that follow, the AER denies Normtek's request for a stay of the Decision pending the outcome of the request for regulatory appeal.

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). A stay is a high threshold to meet. Courts have applied this high threshold because "the suspension of a legally binding and effective matter...is a most significant thing [sic]."[1]

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR MacDonald*.[2] 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.[3]

The legal test is conjunctive or requires all three parts to be answered in the affirmative.[4] If any one part of the test is answered in the negative, then the application for a stay fails.

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. In a stay application it is an irrelevant consideration whether or not the party seeking the stay will succeed on appeal. The stay applicant need only show that the requested appeal is not frivolous or vexatious.

On this basis, the first part of the stay test **may have** been met. Normtek raises a question on various mechanisms in relation to the Approval, including but not limited to radioactive measurement, which are not vexatious or frivolous. 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 the applicant, in this case Normtek, will suffer irreparable harm if the stay is not granted. 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.,

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[1] *Western Oilfield Equipment Rentals Ltd. V M-I.L.L.C.,* 2020 FCA 3 at paragraph 20 [*Western Oilfield*].
[2] *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*).
[3] *Ibid* at 334.
[4] See for example *Janssen Inc v Abbvie Corporation et al,* 2014 FCA 112 at paragraphs 19-20.

monetary terms) or otherwise cured.[5] 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."[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]

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.

Application of the law to the facts submitted

Normtek's submission that employees will suffer irreparable harm

Normtek raised various concerns regarding risk to employees. Normtek argued irreparable harm exists to SECURE's employees. Assuming that harm to one's employees is legally considered harm to the employer as suggested by Normtek, SECURE's employees are not Normtek's employees, nor is any contact between SECURE's employees and Normtek employees sufficiently anticipated. Normtek must demonstrate it will suffer harm, not that SECURE will.

Normtek also detailed an incident that occurred on October 31, 2023 which Normtek referred to in its request for regulatory appeal and a stay pending the outcome of the request for regulatory appeal as the Dangerous Occurrence. Normtek appears to argue that this incident demonstrates likelihood of harm such that it is certain and irreparable. Normtek submitted that its employees recognized and addressed the Dangerous Occurrence properly and that exposure to the material itself "did not exceed Health Canada's dose constraint limit". The AER notes that this incident occurred ***prior to the issuance of the Approval*** in

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[5] *Ibid* at 341.
[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].

its submissions to prove irreparable harm**.** There has been no other occurrence. The AER further notes that *Directive 058: Oilfield Waste Requirements for the Upstream Petroleum Industry* and the expressed provisions of the Approval require SECURE to comply with federal transportation regulations and current categorizing standards that mitigate if not remove the likelihood of this event during the regulatory appeal process. As such, any future harm that Normtek employees may face is not certain and does not meet the requirement that the irreparable harm alleged is specific and likely to occur.

Normtek's submissions that "out of regulatory control" is irreparable harm

Normtek provided submissions at significant length on "out of regulatory control". Normtek appears to argue that it will suffer irreparable harm because Albertan and Canadian regulatory environments are incomplete or inappropriate, and/or that if SECURE "followed the PTNSR" then the industry would not be "out of regulatory control". The AER notes that Normtek's use of the term "out of regulatory control" suggests both policy (or the lack thereof) and improper application of policy by private actors. Even if "out of regulatory control" is within the AER's jurisdiction, which is not at all clear, this alleged harm is not sufficiently certain to meet the test for irreparable harm.

Normtek will suffer financially if the stay is not granted

Normtek provided submissions at significant length on its viability and the impact of SECURE on its ability to operate. Financial viability and impact is quantifiable and therefore can be remedied by a regulatory appeal, should one be granted and Normtek succeed. Therefore, any harm that may occur, if in fact it does, is reparable.

Thus, the AER finds that Normtek has failed to demonstrate *irreparable* harm that it *will* suffer that cannot be quantified as a result of the stay not being granted. Accordingly, Normtek 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.

Normtek has 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 necessary.

CONCLUSION

The stay request is dismissed because Normtek has failed to demonstrate irreparable harm.

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

Sincerely,

<Original signed by>

Todd Shipman
Senior Advisor, Induced Seismicity and Geologic Hazards

<Original signed by>

Dustin Shauer
Senior Advisor, Closure Policy

cc: Candice Ross, AER