

**By e-mail only**

March 15, 2024

**Calgary Head Office**  
Suite 1000, 250 – 5 Street SW  
Calgary, Alberta T2P 0R4  
Canada

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

KMSC Law LLP

Veresen Midstream General Partner Inc.

**Attention: Kristian Toivonen**

**Attention: Hart Proctor**

Dear Parties:

**RE: Stay Request and Request for Regulatory Appeal filed by Justin and Heidi Holm  
Veresen Midstream General Partner Inc. (Veresen)  
Application Nos.: 1948251 & 1948255  
Licence Nos.: F21911 & F53592  
Location: NW 18-074-12 W6M  
Request for Regulatory Appeal No.: 1949916**

The Alberta Energy Regulator (AER) has considered the February 6 and 15, 2024, request of Justin and Heidi Holm (**Holms**), under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the AER's decision to approve Application Nos. 1948251 & 1948255 (**Applications**) and issue the Facility Licence Nos.: F21911 & F53592 (**Licences**) to Veresen on January 9, 2024 (the **Decision**). The Decision is the subject of the above-noted request for regulatory appeal, filed by KSMC Law LLP on behalf of the Holms, on February 6, 2024.

For the following reasons, the AER denies the Holms' request for a stay of the 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*.<sup>1</sup> The onus is on the applicant for the stay to demonstrate that they meet each of the following criteria:

---

<sup>1</sup> *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*)

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.<sup>2</sup>

## 1. Serious Question

The threshold for establishing a serious issue to be tried is generally low. It requires a preliminary assessment of the merits. The issue must be neither frivolous nor vexatious.

The Holms have submitted that the Noise Monitoring Survey (NMS), even prior to the construction of the Deep Cut Expansion and Debottleneck Project, is only 1.1 dBA below the PSL. The Holms cite Veresen's *Directive 056: Energy Development Applications and Schedules (D056)* letter to indicate that the expansion will result in an 81% increase in estimated current production and submitted that Veresen previously stated in correspondence that the expansion of the Hythe Gas Plant will result in 36.1dBA, or 2.8dBA less nighttime noise than that emitted by the current facility as disclosed by the most recent NMS.

Veresen argues that the Holms' position is not supported by evidence, overlooks noise mitigation measures, and is based on a misapprehension that the Deep Cut Expansion will result in a large increase in throughput. According to Veresen, the increased capacity is only a 7.4% increase, not an 81% increase. Veresen relies on the Noise Impact Assessment (NIA) to demonstrate that the licensed facilities will comply with the requirements of *Directive 038: Noise Control (D038)*.

A preliminary assessment of the merits indicates the Holms have established a serious issue of excessive noise based on logical inferences drawn from clear and non-speculative evidence.

The first part of the stay test is met. However, this preliminary assessment of merits in no way pre-determines the result of a regulatory appeal hearing, should one 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. The test is whether "no fair and reasonable redress can be had in a court of law unless the injunction is granted and that its refusal would be a denial of justice." The question is adequacy of damages as compensation, not complete impossibility.<sup>3</sup>

---

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

<sup>3</sup> *May v 1986855 Alberta Ltd.*, 2018 ABCA 94, at para 14

The Holms argue that because the nighttime comprehensive sound level approaches current allowances, it is likely that the permissible noise allowances under Directive 038 will be exceeded following construction. They argue loss of sleep over a protracted period amounts to irreparable harm.<sup>4</sup>

Veresen argues that its projected noise levels are in compliance with D038, and the additional mitigation measures should ensure that the noise allowances are not exceeded following construction. Further, Veresen argues that there is no evidence of additional construction noise, and that, as a result, the harm complained of is unlikely to materialize prior to the resolution of the regulatory appeal process.

The Holms are unable to demonstrate that they will suffer irreparable harm if the stay is not granted. Construction noise is temporary in nature, should only occur during daytime hours, and is not regulated by the AER.

The Holms have not been able to demonstrate irreparable harm that cannot be compensated in monetary damages or additional mitigation, and therefore have not satisfied the second branch of the stay test.

### **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 Holms 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. Nevertheless, we will consider it for the sake of thoroughness.

The assessment of the balance of convenience requires the determination of which of the two parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the merits.

Veresen asks the Delegates to consider the impacts of project delays, which would impose significant costs and inconvenience. The delegates must then consider whether the Holms will suffer any harm if the stay is not granted that could not be compensated in damages.

The Delegates consider the substantial cost and disruption to the construction schedule to be the greater harm when weighed against the absence of clear and non-speculative evidence of irreparable harm. Thus, the balance of convenience favours the denial of the stay of proceedings.

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

---

<sup>4</sup> *Angerer v Cuthbert*, 2017 YKSC 41, at para 38

## CONCLUSION

The Holms have not satisfied the test for granting the stay request.

The Delegates also considered whether there was a lack of procedural fairness because the NIA was allegedly not provided to the Holms. The NIA was filed as part of Veresen's application and was available to the Holms through the information request (IR) process. The Delegates find that there was no breach of procedural fairness, or, in the alternative, there was no prejudice arising.

The AER will issue further correspondence regarding the process for filing submissions on the request for regulatory appeal in due course.

Sincerely,

*<Original signed by>*

---

Jeffrey Moore  
Senior Advisor, Legal and Regulatory

*<Original signed by>*

---

Tyler Callicott  
Director, Enforcement and Orphaning,  
Regulatory Compliance

*<Original signed by>*

---

Elizabeth Grilo  
Senior Advisor, Regulatory