By e-mail only

July 31, 2024

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

www.aer.ca

Topanga Resources Ltd.

Attention: John Zang

Alberta Energy Regulator – Regulatory Compliance

Attention: George Wong
Candice Ross

Dear Sirs and Madam:

RE: Stay Request by Topanga Resources Ltd. (Topanga)
Alberta Energy Regulator – Regulatory Compliance Branch
Alberta Energy Regulator's decision to issue an order to Topanga, pursuant to section 26.2 and 104 of the *Oil and Gas Conservation Act* (OGCA) and section 22.1 of the *Pipeline Act* on June 6, 2024
Location: 06-18-074-12W6
Request for Regulatory Appeal No.: 1952282

The Alberta Energy Regulator (**AER**) has considered the request of Topanga, under section 39(2) of the *Responsible Energy Development Act* (***REDA***) for a stay of paragraphs 4 and 9 of the AER's decision to issue a reasonable care and measures order (**Order**) to Topanga pursuant to sections 26.2 and 104 of the OGCA and section 22.1 of the *Pipeline Act* on June 6, 2024 (**Decision**).The Decision is the subject of the above-noted request for regulatory appeal, filed by Topanga on June 13, 2024.

Paragraphs 4 and 9 of the Order require Topanga to pay certain costs (**Costs**) as follows:

> 4. Topanga will be responsible for all costs and expenses incurred by the Orphan Well Association in relation to completing the steps required to provide reasonable care and measures for the Well and the Well site.
>
> 9. Topanga must, in accordance with section 104(3) of the OGCA, reimburse the AER for all costs incurred by the AER or its authorized representative for all operations conducted in respect of the Escaped Substance within 60 days of the date of the invoice for such costs.

Regulatory Compliance did not consent to Topanga's stay request, but otherwise made no submissions with respect to its merits.

For the reasons that follow, the AER denies Topanga's request for a stay of paragraphs 4 and 9 of the Order.

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. 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, Topanga submitted that the AER had no authority to issue the decision, the decision was procedurally unfair, and the AER is making Topanga pay costs to which it has objected.

We find that these appear to be arguable issues and, given the low threshold that must be met for this step, we find Topanga has met the first step of the test. This conclusion in no way predetermines the

[1] *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*).
[2] *Ibid* at 334.

disposition of the request for regulatory appeal or the issues that would be the subject of any hearing on the request for 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 Court of Appeal of Alberta, 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]

The Court of King's Bench of Alberta has recently stated that "in relation to irreparable harm the party seeking the stay must present concrete evidence of the harm that would result if a stay was not granted; it must be definite and unavoidable, and non-compensable in monetary damages or costs."[6] The harm cannot be speculative and only based on assertions.[7] Whether or not it is difficult to obtain alternative financing to comply with a cost order is not part of the test.[8]

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[3] *RJR MacDonald*, supra note 1 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].
[6] *420 Investments Ltd v Tilray Inc*, 2024 ABKB 210 (CanLII) at para 26, citing *Domenic Construction Ltd v Primewest Capital Corp*, 2019 ABQB 430 at para 20.
[7] *Ibid* at paras 28 and 29.
[8] *Ibid* at para 41.

For this part of the test, Topanga submits that if ordered to pay the Costs to the AER, it will have no money for returning wells to production, suspending wells, abandoning wells, paying other AER dues, paying Orphan Well funds, and avoiding penalties. In addition, it submits that Topanga's current lenders have advised that their loans will be called and enforced if Topanga pays dues to the AER under the Order before the regulatory appeal is heard. The regulatory appeal will become moot because the payment to the AER will cause Topanga's insolvency. It further submits that it will have no means to recover the funds paid to the AER under the Order if these paragraphs of the Order are not stayed.

Topanga does not appear to take issue with the fact that the work needed to be done, rather its objection is the cost of the work. At paragraph 56 of the Zang affidavit it asserts that it would have performed the work far cheaper than Vertex, the company engaged by the Orphan Well Association. However, it offers no evidence in support of this assertion, such as a detailed estimate or explanation of the costs it would incur as compared to that charged by Vertex.

Similarly, Topanga asserts that it does not have sufficient income to pay the Costs arising from enforcement of paragraphs 4 and 9 of the Order. In support of this assertion, Topanga provides only limited evidence of its current financial situation. It did not, for example, provide financial statements or other concrete evidence of its overall financial situation. Rather, Topanga provided copies of purchase statements showing gross production revenues for the 5-month period of January to May 2024 and asserts that based on this revenue stream it does not have sufficient net income to pay the costs incurred. Not only does the evidence fail to give a concrete picture of Topanga's financial situation, it also does not support why this revenue stream could not be used, for example, towards a payment plan to pay the costs incurred over time.

Topanga has also failed to demonstrate that the requirement to pay the Costs set out in the Order would render it insolvent. Mr. Zang deposes that if required to pay the Costs, Topanga will become insolvent; but, as discussed in the preceding paragraph, Topanga offers no concrete evidence that the business is currently profitable. In support of this submission, Mr. Zang's affidavit includes a copy of a debt instrument and an indenture agreement but he merely asserts, with no supporting evidence, that Topanga's creditors will call their loan and appoint a receiver if required to pay the Costs before the appeal.

Further, Topanga's statements at paragraph 61 of the Zang affidavit that it will "likely be able to raise the necessary funds" to operate after the appeal is decided, is speculative at best. In support of this assertion, a heavily redacted Funding Agreement is attached as an Exhibit to the Zang affidavit. It does not appear that this agreement is currently in place, and it is not possible to determine if it has been signed. In fact,

Topanga confirms that it cannot be completed in the face of the appeal but offers no evidence to support its assertions that additional financing is conditional on the outcome of the appeal.

In addition, Topanga relies on s. 27 of the *REDA* and the *Proceedings against the Crown Act* to assert that it will have no means to recover the funds paid under the Order if it is successful on appeal.

However, this reasoning fails on two fronts. First, the *Proceedings Against the Crown Act* does not apply to the AER. Second, while s. 27 of the *REDA* protects the AER from an action or proceeding against the AER in respect of any act, thing or omission done in good faith under an enactment, this does not mean that if Topanga is successful on appeal there would be no mechanism for it to recover the costs paid pursuant to the Order. Section 41(2) of the *REDA* provides that, on a regulatory appeal, the AER may confirm, vary, suspend or revoke the appealable decision. As the costs form part of the Order, a variation or suspension of the Order would be sufficient authority for any costs paid pursuant to the Order to be repaid to Topanga. Unlike the decision in *King and Kingdom Properties Ltd. v Director Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*, 2020 ABPLAB 12, it is not the case where any funds advanced would be paid into the Treasury Board.

Accordingly, Topanga has not met its burden to demonstrate through concrete evidence that irreparable harm will result if the stay is not granted. It has failed to satisfy 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 AER must weigh the burden the stay would impose on Regulatory Compliance against the burden on Topanga if the stay does not issue.

For this part of the test, Topanga submits that the stay application only relates to the provisions of the Order that require Topanga to pay costs to the AER and that this does not give rise to any public interest, environmental, or safety issue. Allowing Topanga to maintain its available funds and avoid insolvency protects the public interest, environment, and safety as Topanga will have the funds to perform its obligations. On the other hand, if the stay is denied Topanga will have to make efforts to raise the funds required under the Order.

As Topanga has failed to satisfy the second part of the test (demonstrating irreparable harm), consideration of the third part of the test (balance of convenience) is not necessary in the determination of this stay request.

CONCLUSION

The stay request is dismissed because Topanga has failed to demonstrate irreparable harm if paragraphs 4 and 9 of the Order are not stayed.

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

Sincerely,

< Original signed by >

Kevin Ball
Senior Advisor, Product Business Delivery

< Original signed by >

Jennifer Zwarich
Senior Advisor, Mandate Expansion

< Original signed by >

Jeff Moore
Senior Advisor, Legal/Regulatory

cc: Lars DePauw, Orphan Well Association