

Via Email

May 16, 2017

Calgary Head Office
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Stikeman Elliott LLP

Alberta Energy Regulator,
Closure and Liability Group**Attention: Allison M. Sears****Attention: Danielle Brezina and
Karen Lilly****Counsel:****RE: West Isle Energy Inc. (West Isle)
Request for Regulatory Appeal, Reconsideration and Stay of Closure and
Abandonment Order dated April 17, 2017 (the Order)
Regulatory Appeal No. 1887883 (Regulatory Appeal)
Request for Stay of the Order**

The Alberta Energy Regulator (AER/Regulator) has considered West Isle's request under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the Order. That order is the subject of the above-noted request for regulatory appeal and reconsideration.

The AER denies West Isle's request for a stay of the Order.

The Regulator is empowered to grant a stay pursuant to section 39(2) of the *Responsible Energy Development Act (REDA)*. However, as stated in section 38(2), the filing of a request for regulatory appeal does not operate to stay the appealable decision.

The test for a stay is adapted from the Supreme Court of Canada case of *RJR MacDonald*.¹ The steps in the test are:

1. Serious question - Undertaking a preliminary assessment of the merits of the case to determine if there is a serious question to be heard at the requested appeal;
2. Irreparable harm - Determining if the stay applicant will suffer irreparable harm if the stay request is refused; and,
3. Balance of convenience - Assessing which of the parties would suffer greater harm from the granting or refusal of the requested stay.²

The AER has concluded after considering the submissions of West Isle and of the AER Closure and Liability Group that West Isle has not satisfied the tripartite test.

With regard to West Isle's request for an extension, that relief must be addressed with the AER Closure and Liability Group.

¹ *RJR MacDonald, supra*

² *RJR MacDonald* at paragraph 43

The AER will provide its further reasons for its decision on the stay request in the near future. A decision on the request for regulatory appeal and reconsideration will be provided in due course.

Sincerely,

<original signed by>

Karine Fisher
Manager, Regulatory Effectiveness

<original signed by>

Stephen Smith
Senior Technical Advisor, ICORE

Via Email

May 24, 2017

Calgary Head Office
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Canadawww.aer.ca

Stikeman Elliott LLP

Alberta Energy Regulator,
Closure and Liability Group**Attention: Allison M. Sears****Attention: Danielle Brezina and
Karen Lilly**

Dear Counsel:

**RE: West Isle Energy Inc. (West Isle)
Request for Regulatory Appeal, Reconsideration and Stay of Closure and
Abandonment Order dated April 17, 2017 (the Order)
Regulatory Appeal No. 1887883 (Regulatory Appeal)
Request for Stay of the Order**

This letter provides the reasons for the Alberta Energy Regulator's (AER/Regulator) May 16, 2017 denial of West Isle's request for a stay of the Order. The request for a regulatory appeal, reconsideration and stay of the Order was made on May 10, 2017.

As noted in the AER's May 16, 2017 letter, the AER considered West Isle's request under section 39(2) of the *Responsible Energy Development Act* (REDA) for a stay of the Order. After considering the parties' submissions, the AER concluded that it was appropriate to deny the stay request.

The Order was issued on April 17, 2017. It suspends various wells, pipelines and facilities and requires abandonment of the same pipelines and facilities by May 17, 2017 and the majority of the subject wells by May 17, 2017. The Order indicates West Isle failed to submit its security deposit as required by the *Oil and Gas Conservation Rules* and by *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* and that the AER has concerns about the ability of West Isle to provide care and custody of these wells, pipelines and facilities.

As stated in section 38(2) of REDA, the filing of a request for regulatory appeal does not operate to stay the appealed decision. However, the Regulator does have the discretion under section 39(2) of REDA to stay a decision if it meets the test for a stay. The test for a stay is adapted from the Supreme Court of Canada case of *RJR MacDonald*.¹ The steps in the test are:

1. Serious question - Undertaking a preliminary assessment of the merits of the case to determine if there is a serious question to be heard at the requested appeal;
2. Irreparable harm - Determining if the stay applicant will suffer irreparable harm if the stay request is refused; and,

¹ *RJR MacDonald*, [1994] 1 SCR 311 (RJR MacDonald)

3. Balance of convenience - Assessing which of the parties would suffer greater harm from the granting or refusal of the requested stay.²

West Isle has not satisfied this test.

a. Serious Issue.

West Isle took the position that there was a serious case to be considered if this matter moved to appeal; it said the threshold for meeting this test is low. Its submissions on the “serious question” can be broken into three bases for demonstrating the appeal is meritorious. First, West Isle asserted its operations in the Bittern Lake field are inactive through no fault of West Isle, but because a third party terminated its processing agreement with West Isle without providing West Isle with notice. Second, West Isle said it did not receive the notices advising of the security deposits issued in advance of the Order being made. Third, West Isle alleged the Order is substantially different (broader and more severe) than the notices of non-compliance issued prior to the order being made and it was unfair and contrary to natural justice to issue the Order prior to granting West Isle an opportunity to “show cause” why the Order should not be issued.

The AER Closure and Liability Group (C&L) submitted a serious arguable question is not raised by West Isle’s requested appeal because it is uncontested that West Isle did not submit the required security deposit. According to C&L, the AER is entitled by legislation to take enforcement steps in this situation, including making an order, and so there can be no arguable question of law or fact.

West Isle is correct that the threshold for meeting the serious question test is a low one. Some matters raised by West Isle raise serious questions and as such the Regulator is satisfied the first step in the stay test has been met.

b. Irreparable harm

West Isle’s submission on why it will suffer irreparable harm if the stay is not granted states:

As it is not possible to complete the work set out in the Order by May 17, 2017, if the stay is not granted West Isle will be in breach of the Order. Further steps may be taken by the AER or other third parties which would result in West Isle being forced into receivership and dissolved. West Isle submits that this constitutes irreparable harm and meets the second part of the test.

In their submissions, both C&L and West Isle discussed how harm could be avoided if an extension of the time for West Isle’s compliance with the order were granted to West Isle by C&L. An extension might be helpful to West Isle in the circumstances; however, there is no indication an extension was actually granted.

The second question of the tripartite test requires a determination of whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted. The type of harm and not the size of the harm must be considered. The harm must not be of the sort that could be remedied through damages (i.e. in monetary terms). As noted by the Court of Appeal of

² *RJR MacDonald* at paragraph 43

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.”³ The harm must also be unavoidable by the stay applicant.

In *Dreco Energy Services Ltd. v Wenzel*, the Alberta Court of Appeal stated “the test for irreparable harm has a high threshold and only relates to the harm suffered by the party seeking the injunction...”⁴

The Federal Court 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: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd.* 2005 FC 815, (2005), at para. 59, aff'd 2005 FCA390, 44 C.P.R.(4th) 326.

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*: see: *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.⁵ (Emphasis in the original) [underlining added]

The evidence of West Isle on the harm it may suffer is very speculative. To accept West Isle's position on irreparable harm it must be accepted that: 1) West Isle could not comply with the Order; 2) as a result, the AER or an unnamed third party will take some further step against West Isle; 3) that step will place West Isle into receivership; and, 4) receivership will result in the company being dissolved. This chain of events leading to the alleged harm is hypothetical and not sufficient to demonstrate irreparable harm.

Further, this scenario is dependent on West Isle not complying with the bulk of the Order by May 17, 2017. The AER must consider if compliance was in fact impossible. West Isle submitted that compliance with the Order by May 17, 2017 was “unachievable” because of the magnitude of the abandonment program required; however, it did not say why or if it had made any efforts to comply. The bald assertion that compliance is impossible does not satisfy the AER that is the case. West Isle has failed to explain why 30 days, the time between issuance of the Order and when the bulk of the necessary work was to be completed, was insufficient. It is not enough to say there is too much work and that compliance is “obviously unachievable”. The work required in the given time frame is not on its face impossible to achieve in 30 days. Without further information, the AER cannot conclude compliance with the Order was impossible. As such, non-compliance is a choice West Isle made and any harm flowing from that choice cannot be the basis for irreparable harm.

Further, even if it is accepted that all the components of West Isle's alleged harm will in fact occur, West Isle fails to explain why the harm is irreparable and something for which there could be no redress from a court.

³ *Ominayak v Norcen Energy Resources*, [1985] 3 W.W.R. 193 (ABCA) at paragraph 30.

⁴ [2008] AJ No. 944 at para. 33

⁵ *Canada (Attorney General) v. Amnesty International Canada* 2009 FC 426, at paras. 29 and 30.

The AER finds that the second branch of the tripartite test is not met by West Isle.

c. Balance of convenience

As West Isle has not demonstrated that it will suffer irreparable harm if the stay is not granted, it is not necessary to address the balance of convenience in this matter.

Sincerely,

<original signed by>

K. Fisher
Manager, Regulatory Effectiveness

<original signed by>

Stephen Smith
Senior Technical Advisor, ICORE