

**Via Email**

August 31, 2016

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Bennett Jones LLP

Alberta Energy Regulator, Closure  
and Liability Group**Attention: Blake Williams****Attention: Karen Lilly****Counsel:****RE: Request for Regulatory Appeal by Gibson Energy Inc.  
Environmental Protection Order dated July 7, 2016  
Regulatory Appeal No. 18641859 (Regulatory Appeal)  
Request for Stay of Order**

The Alberta Energy Regulator (AER/Regulator) has considered Gibson Energy Inc.'s request under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the July 7, 2016 Environmental Protection Order (the EPO), issued against it and Husky Oil Operations Limited (Husky). That order is the subject of the above-noted request for regulatory appeal (Regulatory Appeal No. 18641859) and of a regulatory appeal request made by Husky (Regulatory Appeal No. 1863309).

For the reasons that follow, the AER denies the request of Gibson Energy Inc. (Gibson) for a stay of the EPO.

**Parties' Submissions**

In its request for regulatory appeal, Gibson also requested that the EPO be stayed. The request contained no submissions addressing why a stay should be granted. In its August 23, 2016 submission, made in reply to the submission of the Alberta Energy Regulator Closure and Liability Group (C&L) on the regulatory appeal request, Gibson noted that the EPO includes a requirement for the parties to the order to submit a Remediation Action Plan (RAP). Gibson submitted that:

“...the production of an appropriate RAP will be informed by and benefit from the requested regulatory appeal and/or ADR process. Therefore, Gibson submits that such a request is reasonable in the circumstances and reiterates its request.”

C&L provided a submission, addressed below, that applied the *RJR MacDonald*<sup>1</sup> stay test to Gibson's stay request. While Gibson was given the opportunity to reply to C&L's submission,

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

the AER received nothing further from Gibson. No submissions have been made by Gibson on the common law test for a stay as articulated in *RJR MacDonald*.

### Reasons for Decision

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 Regulator's test for a stay is adapted from the Supreme Court of Canada case of *RJR MacDonald*.<sup>2</sup> 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.<sup>3</sup>

#### a. Serious Issue

The first step of the test requires the applicant to show 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 appeal.

Gibson made no submissions on this issue.

Alberta Energy Regulator Closure and Liability (C&L) has submitted that there is no merit to Gibson's position on the regulatory appeal that it is not a "responsible person" within the meaning of *Environmental Protection and Enhancement Act* and therefore the EPO was wrongly issued against it. However, the question of whether Gibson is a responsible person is a significant issue that relates directly to the issuance of the EPO and is an issue within the Regulator's jurisdiction. On this basis, the first step in the stay test may have been met. This conclusion in no way determines the issues that will be the subject of the sought regulatory appeal should a hearing occur.

#### b. Irreparable Harm

The second step in the test requires the decision maker to decide whether the applicant seeking the stay would 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 regulatory appeal applicant is prevails in the appeal and the harm is not of the sort that could be remedied through damages (i.e. monetary terms). As noted by the Court of Appeal of Alberta irreparable

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<sup>2</sup> *RJR MacDonald, supra*

<sup>3</sup> *RJR MacDonald* at paragraph 43

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>4</sup>

Gibson made no submissions on this issue.

C&L submitted that Gibson will not suffer irreparable harm. It says the costs associated with Gibson complying with the EPO are easily determined. Further, there is another party named in the EPO from which Gibson could seek recovery of those costs.

The Regulator concludes that irreparable harm from complying with the EPO has not been demonstrated. The EPO requires containment of contamination and preparation of a remediation action plan. The harm to Gibson from completing these two tasks if it is ultimately successful in an appeal of the EPO, is incurring the cost of doing these tasks. This harm does not fall within the meaning of irreparable harm. Gibson will not suffer any losses, costs or impacts that cannot be evaluated monetarily. In addition, given that Husky is named in the EPO, there is another party from whom Gibson can seek compensation for such costs.

Gibson has not satisfied the second branch of the stay test and the request for a stay is denied.

#### c. Balance of Convenience

While it is not necessary to address the third prong of the stay test, the Regulator considers it useful to do so in this instance. 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 Regulator must weigh the burden the stay would impose on C&L against the burden on Gibson if the stay does not issue. This requires the AER to weigh significant factors and not just perform a cost-benefit analysis.

Gibson has made no submissions directly on the balance of convenience. As noted above, the losses Gibson would suffer are strictly financial in nature.

C&L submits that the AER is charged with the authority of protecting the public interest in the environment and safety of the public. In this matter, the safety of the environment requires that the substances that were released be contained and the affected area be remediated. It notes that this matter has been ongoing since March of 2015 that hydrocarbons have been detected in groundwater monitoring wells and in water body and hydrocarbons continue to migrate. The EPO requires containment of the release and provision of a plan to remediate the effects of the release. The granting of a stay will delay containment of the substances, may cause further adverse effect to the environment and delay remediation.

In cases involving environmental protection orders, it is not impact to the body issuing the order that needs to be measured, but the impact to the environment. The timing of the actual appeal is a consideration because it must be assessed who will suffer greater harm until the appeal is decided. At this stage, it is necessary to assess any alleged harm to the public.<sup>5</sup>

In this matter, AER Closure and Liability is representing the public interest and this requires an assessment of the Gibson's position and a comparison of that position with the public's position.

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<sup>4</sup> *Ominayak v Norcen Energy Resources*, [1985] 3 W.W.R. 193 (ABCA) at paragraph 30.

<sup>5</sup> Stay Decision: *1370996 Alberta Ltd v Director, South Saskatchewan Region, Alberta Environment and Parks* (14 October 2015, Appeal No. 15-020-ID1, ) paragraphs 92 and 93 2015 AEAB 15 at

The Supreme Court has stated that:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility.

The public interest is critical in this matter. By issuing the EPO, C&L was attempting to protect the environment and the public from the effects of a hydrocarbon release. It is often necessary to issue EPOs with short timeframes so as to minimize the environmental impacts of the releases.

The purpose of the EPO is to ensure the environment is protected. Given the potential for the substance entering the groundwater, the protection of the public from potentially adverse impacts caused by the subject release is of major importance. The public interest would be best protected if the stay was not granted and the Gibson and Husky take the necessary actions required under the EPO.

d. Reasonableness of request for a stay

As noted above, Gibson has suggested it should be granted a stay because the request for one is reasonable. The test for a stay is not whether the request is reasonable; the test is as described above. While reasonableness may factor into some aspects of the test such as the merit of the sought appeal, the submissions made by Gibson do not demonstrate Gibson satisfies the tripartite stay test.

### **Conclusion**

The stay request is dismissed because Gibson has not demonstrated it will suffer irreparable harm. Additionally, the public interest favours the stay request being refused.

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

Sincerely,

*<original signed by>*

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Executive Vice President Law and  
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*<original signed by>*

Stephen Smith  
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