

Via Email

June 10, 2019

Bishop Law

Attention: Debbie Bishop

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

www.aer.ca

Dear Madam:

**RE: Request for Regulatory Appeal by Werner and Sharon Ambros
Encana Corporation (Encana)
Application Nos.: 1914500 and 1914551;
Locations: 13-27-072-09W6; 14-27-072-09W6; 15-26-072-09W6
Request for Regulatory Appeal No.: 1919768**

The Alberta Energy Regulator (AER) has considered the May 30, 2019, request of your clients, Werner Ambros and Sharon Ambros (the Ambroses), under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the AER's decision to approve Application Nos. 1914500 and 1914551, and issue to Encana Corporation (Encana) 16 well licences on 2 multi-well pads at 13-27-072-09W6 and 14-27-072-09W6 (Application No. 1914500) and 15-26-072-09W6 (Application No. 1914551), in the Wembley Field (the Decision). The Decision is the subject of the above-noted request for regulatory appeal, filed by the Ambroses on March 14, 2019.

In addition to requesting a stay, the May 30, 2019, letter and accompanying submissions refer to a number of other applications that are currently before the AER. Those applications are outside the scope of the stay request and will be addressed in due course by the AER's Authorizations Branch.

For the reasons that follow, the AER denies the Ambroses' request for a stay of the Decision.

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.

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

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, the Ambroses have submitted that they have not had the opportunity to:

- know the case they have to meet with respect to Encana's applications,
- understand the scale of Encana's proposed development and make submissions on the development as a whole,
- understand the AER's reasoning in dismissing their concerns,
- access funding under Directive 31,
- be heard in a timely manner.

The above submissions relate more to the Ambroses' desire for a hearing than the actual issue to be decided at an appeal. The Decision was to issue the well licences on land adjacent to the Ambroses' land. The request for regulatory appeal is still under consideration, but assuming it were granted, the question on the appeal would be whether the well licences should have been issued in light of the factors set out in section 3 of the *Responsible Energy Development Act General Regulation*, including the impacts, if any, on the Ambroses. Given the AER's mandate, whether the licences should have been issued is a significant question within the AER's jurisdiction. On this basis, the first part of the stay test may have been met. 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 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 Alberta Court

² *Ibid* at 334.

³ *Ibid* at 341.

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.”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

For this part of the test, the Ambroses allege Encana has proceeded with its “licensed activities” without the Ambroses having had an opportunity to be heard, even though they own land within the emergency planning zone and, they submit, are directly and adversely affected. The Ambroses state that they have provided “herein” photographs of “current” flaring from the subject sites and that the flaring is concerning, especially during a time of high fire risk and poor air quality in the Grande Prairie area. There were, however, no photographs attached to the stay request itself. The only photographs the AER could identify in the Ambroses’ May 30, 2019, submissions were attached to a statement of concern the Ambroses filed on three other applications, which have not yet been dispositioned and are not the subjects of the request for regulatory appeal.⁶ Moreover, in the statement of concern, the Ambroses indicate the flaring occurred in December 2017 at 16-27-72-9W6M, which is not the site of any of the licences at issue in the request for regulatory appeal. Therefore, it is not clear how these photographs are relevant to the Ambroses’ stay application.

The Ambroses have not stated specifically in their stay application what harm they would experience from Encana proceeding with activities under the well licenses. Thus, the AER finds that the Ambroses have failed to demonstrate any harm they *may* suffer, let alone any *irreparable* harm that they *will* suffer as a result of the stay not being granted. Accordingly, the Ambroses have 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. The Ambroses 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.

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 Attachment 3 to Bishop Law’s letter dated May 30, 2019, with respect to Application Nos. 338430, 1199791, and 1920992.

Nonetheless, even if the AER were to consider this branch of the test, the only submission the Ambroses made on the balance of convenience relates to the credibility of the AER's decision making process rather than any harm the Ambroses would suffer from refusal of the stay. Consequently, the AER finds, in addition to failing to demonstrate irreparable harm, the Ambroses have not established that the balance of convenience favours the AER granting the stay.

CONCLUSION

The stay request is dismissed because the Ambroses have failed to demonstrate irreparable harm and that the balance of convenience favours granting the stay.

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

Sincerely,



Jennifer Fitzgerald,
Senior Advisor, Science, Evaluation & Innovation



R.G. Keeler, P.Eng., P.Geol,
Senior Advisor, Authorizations

cc: Darin Naffin, Encana
Tim Myers, Encana