

Via Email

October 11, 2016

KMSC Law

Attention: Timothy Bayly

Regulatory Law Chambers

Attention: Rosa Twyman

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Dear Counsel:

**RE: Request for Regulatory Appeal and Stay by Mike Richard
Grizzly Resources Ltd. (Grizzly)
Application Nos.: 1843024,1843026,1850163 and 1850167
Licence Nos.: 479936,479937,F49250 and F49251 (Licences)
Location: LSD 09-30-078-07W6M
Request for Regulatory Appeal No. 1865544**

The Alberta Energy Regulator (AER) has considered Mr. Richard's request under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER's decision to approve the Licences. The AER has also considered Mr. Richard's request under section 39(2) of *REDA* for a stay of the Licences. The AER reviewed Mr. Richard's submissions dated August 19, 2016 and September 16, 2016. The AER also reviewed Grizzly's revised submissions filed on September 8, 2016 (dated September 7, 2016), which replaced its earlier submission.¹ It also reviewed Grizzly's submission dated September 26, 2016.

For the reasons that follow, the AER has decided that Mr. Richard is eligible to request a regulatory appeal in this matter. Therefore, the request for a Regulatory Appeal is granted.

The applicable provision of *REDA* in regard to regulatory appeals, section 38, states:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

The term "eligible person" is defined in section 36(b)(ii) of *REDA* to include:

a person who is directly and adversely affected by a decision [made under an energy resource enactment]...

The term "appealable decision" is defined in section 36 of *REDA*. Specifically relevant to this regulatory appeal request is section 36(a)(iv)

The AER notes the request for regulatory appeal was filed within 30 days of issuance of the Licences. Grizzly concedes that the decision to issue the Licences is an appealable decision within the meaning of section 36(a)(iv) of *REDA*. Grizzly does not oppose Mr. Richard's assertion that he is an "eligible person" within the meaning of section 36(b)(ii) of *REDA*.

¹ Pursuant to Section 7.7 of the *Rules* Grizzly was asked to refile its submission.

Reasons for Decision

The decision to issue the Licences is an appealable decision as the decision was made under the *Oil and Gas Conservation Act* without a hearing. In order for Mr. Richard to be an "eligible person" to request a regulatory appeal of the Licences, he must demonstrate that he is a person who is directly and adversely affected by the AER's decision to issue the Licences.

Mr. Richard owns the land on which the wells and facilities will be located. Even though the wells and facilities are to be located on existing surface leases, Mr. Richard's land will be impacted by the drilling of new holes, as well as the location of new infrastructure on his land. The AER finds that Mr. Richard is directly and adversely affected by the decision to approve the Licences and therefore is an "eligible person".

Grizzly submits that the AER should dismiss the request for regulatory appeal because it is without merit and not properly before the AER for failing to allege any appealable ground pursuant to section 39(4)(a) of REDA.

Section 39(4)(a) provides:

- 39(4) The Regulator may dismiss all or part of a request for regulatory appeal
 (a) if the Regulator considers the request to be frivolous, vexatious or without merit,

It is not enough to merely allege the appeal is without merit; Grizzly must satisfy the AER that there is good reason to believe the appeal is without merit. The determination whether an application should be dismissed as "without merit" is a screening or gatekeeping function. This function should be used in very clear cases where this is no reasonable basis in the evidence for proceeding to the next stage², which is the regulatory appeal.

The test for "without merit" is similar to the test for an application for summary judgement in the courts. In *P. (W.) v. Alberta*³, the Court of Appeal commented on the state of the law on summary judgements applications:

Summary judgment is therefore no longer to be denied solely on the basis that the evidence discloses a triable issue. The question is whether there is in fact any issue of "merit" that genuinely requires a trial, or conversely whether the claim or defense is so compelling that the likelihood that it will succeed is very high such that it should be determined summarily.

In his request Mr. Richard raises noise and environmental concerns, such as water pooling, calcium pooling with respect to the new wells, which have not yet been drilled. He also raises concerns with past failures by Grizzly to honour verbal and written commitments. He bases his concerns on the experience he has had with the existing wells on his lands and submits that he is attempting to protect his lands from being damaged, protect the health of himself and his family and protect the diminution in value of his home quarters. Mr. Richard further submits that the AER committed a number of errors, including issuing the Licences without imposing any conditions on Grizzly to ensure that it fulfills its commitments in accordance with its responses to his statement of concerns and by failing to properly consider that Grizzly's Noise Impact Assessment (NIA) was not completed as required under *Directive 038:Noise Control*.

Grizzly responds that Mr. Richard's assertions are unfounded and that throughout the AER's application process, Grizzly has maintained compliance with all regulatory requirements and made extraordinary efforts, at significant costs, to address Mr. Richard's concerns.

The AER is of the view that Grizzly has not met the threshold in order for it to dismiss Mr. Richard's request for a regulatory appeal under section 39(4)(a) of the *Rules*. It finds that Mr. Richard has raised

² *Mis v. Alberta (Human Rights & Citizenship Commission)* 2011 ABCA 212

³ 2014 ABCA 404 at paragraph 26.

issues that have some merit for review at a regulatory appeal, specifically whether the AER should have issued the Licences without imposing any conditions to mitigate Mr. Richard's noise and environmental concerns with respect to the new wells and facilities. Therefore, the AER is not prepared to dismiss the request for regulatory appeal.

Grizzly also makes the submission that the request for regulatory appeal should be dismissed because the "eligible person", Mr. Richard, did not file a statement of concern in respect of the application in accordance with the Rules. As outlined in the public notice of application, the deadline for filing of a statement of concern (SOC) in relation to the facility licences was February 18, 2016. Grizzly submits that Mr. Richard's SOC was filed late as it was filed on March 15, 2016 and therefore is not a proper SOC under the Rules.

Section 39(4)(b) states:

- 39(4) The Regulator may dismiss all or part of a request for regulatory appeal
 (b) if the request is in respect of a decision on an application and the eligible person did not file a statement of concern in respect of the application in accordance with the rules,

Section 45 of the *Rules* explains how the AER is to treat a late filed SOC:

- 45 Unless the Regulator permits otherwise, no party may file a document, statement of concern or submission after the time limit set out by the Regulator has elapsed.

The decision under section 39(4)(b) is discretionary and therefore, even if an SOC was not filed on an application, the AER is not required to dismiss all or part of the request for a regulatory appeal on this basis.

Mr. Richard's March 15, 2016 SOC was submitted on all four applications, as opposed to his earlier SOC which was submitted on the two well applications. The AER notes that it requested Grizzly's response to Mr. Richard's March 15, 2016 SOC and that Grizzly had the opportunity to object to the late filing of the SOC, but did not. Rather, it filed a response to Mr. Richard's SOC. The AER further notes that although it appears only one SOC reference number was given, both SOCs filed by Mr. Richard were considered together by the AER when approving the four applications. This is evident by the AER's considerations outlined in its letter of July 20, 2016.

The AER is of the view that as soon as the AER solicited a response from Grizzly to Mr. Richard's SOC it was implied that the AER had permitted the late filed SOC. Since the AER had permitted the filing of the late SOC, the March 15, 2016 SOC was considered a valid SOC in respect of the original applications. Therefore, there is no need for the AER to make a decision under section 39(4)(b) of the *Rules* as the AER finds that Mr. Richard filed an SOC in respect of the applications in accordance with the *Rules*.

Stay Request

Section 39(2) provides the AER the authority to grant a stay. It states:

The Regulator may, on the request of a party to a regulatory appeal, stay the appealable decision or part of it on any terms or conditions that the Regulator determines.

Section 38(2) indicates that the mere 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*.⁴ The three questions within the test are:

⁴ *RJR MacDonald Inc. v Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR MacDonald*)

1. Serious question – Is there is a serious question to be heard at the requested appeal? This requires a preliminary assessment of the merits of the requested appeal.
2. Irreparable harm – Will the stay applicant suffer irreparable harm if the stay request is refused?
3. Balance of convenience – Which of the parties would suffer greater harm from the grant or refusal of the requested stay?⁵

The *RJR MacDonald* decision makes it clear that the onus is on the stay applicant, in this case Mr. Richard, to satisfy the AER that he has satisfied each element of the three-part test.

1. Serious Issue

The first question in the test requires the applicant to show there is a serious meritorious issue to be tried. The applicant has to demonstrate that there is some basis on which to present an argument on the appeal. The *RJR MacDonald* decision provides guidance on how to assess whether the applicant has satisfied the first test, indicating that “a preliminary assessment of the merits of the case” is required but that “the threshold is a low one.” The court stated:

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial⁶.

Mr. Richard submits that the questions in issue are not frivolous and are seriously arguable before the AER. Grizzly submits that there are no serious questions raised by the regulatory appeal request.

As discussed above, the issues raised by Mr. Richard have merit and the AER has already found that Mr. Richard is entitled to a regulatory appeal. Furthermore, the AER finds his issues to be neither frivolous nor vexatious. Given the low threshold for this part of the three-part test, the AER is satisfied that Mr. Richard raises serious issues to be argued.

2. Irreparable Harm

The second question 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 prevails in the appeal. 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) or cannot be cured.⁷ Harm that can be quantified monetarily or cured is not, by definition then, irreparable. 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.”⁸

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...”⁹

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.

⁵ *RJR MacDonald* at paragraph 43

⁶ *RJR MacDonald* at paragraph 50

⁷ *RJR MacDonald* at paragraph 64

⁸ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (ABCA) at paragraph 30.

⁹ [2008] AJ No. 944 at para. 33

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.¹⁰ (Emphasis in the original.)

In relation to the second part of the test, whether Mr. Richard will suffer irreparable harm, the AER finds the test is not met. Mr. Richard submits that “the potential for irreparable harm arises because there may be no recourse to damages due to the potential ill health effects suffered by the Applicant, some of these may be long-lasting (as stated in the Leventhall report)”. The report that Mr. Richard refers to and includes in his submission is authored by Dr. Geoff Leventhall entitled, “A Review of Published Research on Low Frequency Noise and Effects”.

Grizzly submits that Mr. Richard has provided no evidence or information as to any irreparable harm he might suffer should the requested stay be refused. With respect to the Leventhall report, Mr. Richard did not provide a statement setting out the qualifications of the person who prepared the documentary evidence or under whose direction or control the evidence was prepared as required under Section 53(2) of the *Rules*.

Grizzly further submits the report be afforded no weight by the AER. It argues that even if the report turned out to be accurate (which Grizzly in no way concedes), Mr. Richard failed to provide any evidence about how the information contained in that report applies to his circumstances. Grizzly is of the view that Mr. Richard’s concerns relate to monetary compensation. Therefore any potential harm Mr. Richard may suffer (if any at all) is not irreparable harm.

The AER notes that the Leventhall report appears to have been written for the United Kingdom’s Department for Environment, Food and Rural Affairs in May 2003. The report does not make specific mention of Mr. Richard or his family.

In his request for a regulatory appeal, Mr. Richard refers to concerns that can be addressed after the new wells and facilities are completed. He does not raise concerns in relation to the drilling of the new wells, but rather to the state of things after the drilling is completed. Mr. Richard refers to the potential for irreparable harm arising during the operation of the new wells and facilities. As outlined in the *RJR MacDonald* decision, it is not enough for Mr. Richard to allege potential harm, he must show irreparable harm will result. Furthermore, Mr. Richard does not outline how the Leventhall report applies to him or his family. The AER finds that Mr. Richard has not provided evidence sufficient to demonstrate a connection between the drilling and operations of the wells and facilities and the harm he and/or his family may suffer, not to mention whether that harm will be irreparable, if the stay is denied. As a result, Mr. Richard has failed to meet the second part of the *RJR MacDonald* test.

3. Balance of Convenience

As explained above, an applicant for a stay must satisfy each element of the three-part test set out in the *RJR MacDonald* decision if it is to be successful in its request to stay an AER decision. In light of the finding that Mr. Richard has failed to satisfy the second test (demonstrating irreparable harm), a consideration of the third test (balance of convenience), is therefore not necessary.

For the above reasons, Mr. Richard’s request for a stay is denied.

Given the above, as the AER has found that the requirements for a regulatory appeal have been met, it hereby grants the regulatory appeal. The AER will request the Chief Hearing Commissioner to appoint a panel of hearing commissioners to conduct a hearing of the regulatory appeal.

¹⁰ *Canada (Attorney General) v. Amnesty International Canada* 2009 FC 426, at paras. 29 and 30.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Smith', with a horizontal line extending to the right from the end of the signature.

Stephen Smith
Sr. Advisor

A handwritten signature in black ink, appearing to be 'K. Fisher'.

K. Fisher
Manager Regulatory Effectiveness

A handwritten signature in black ink, appearing to be 'Nancy Barnes'.

Nancy Barnes
Director Oil and Gas