BRITISH COLUMBIA

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DECISION NOS. 2017-OGA-005(a)-008(a) & 2017-OGA-028(a)-032(a)
[Group File: 2017-OGA-G01]

In the matter of nine appeals under section 72 of the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36.

BETWEEN:	Penalty Ranch Ltd.	**APPLICANT**
AND:	Oil and Gas Commission	**RESPONDENT**
AND:	Crew Energy Inc.	**THIRD PARTY**
BEFORE:	A Panel of the Oil and Gas Appeal Tribunal Norman Yates, Panel Chair	
DATE:	Conducted by way of written submissions concluding on November 24, 2017	
APPEARING:	For the Applicant:	Johann (Hans) Kirschbaum
	For the Respondent:	Dorothy Foster, Counsel
	For the Third Party:	Rick Williams, Counsel Tim Pritchard, Counsel

STAY APPLICATIONS

[1] Penalty Ranch Ltd. ("Penalty Ranch" or the "Applicant") has appealed nine permits (collectively, the "Permits") issued to Crew Energy Inc. ("Crew") by the Oil and Gas Commission (the "OGC"), and also applied to stay the Permits pending a decision by the Tribunal on the merits of the appeals. The Permits authorize the drilling and operation of nine natural gas wells from a single well pad designated as 12-09-82-10 (referred in this decision as the "12-09 well pad").

[2] The Applicant runs a cattle ranching operation. Johann (Hans) Kirschbaum owns and operates the company. The permitted activities are authorized on Crown land that is subject to an agricultural lease held by the Applicant (the "Agricultural Lease"). The leased land is adjacent to private land (the "home ranch") that is owned by either Penalty Ranch or the Kirschbaum family. Mr. Kirschbaum and members of his family reside on the home ranch. The home ranch is in excess of two kilometres in a southerly direction from the 12-09 well pad.

[3] Of note, the Applicant has also appealed five other permits issued to Crew for natural gas wells at two other well pads, namely 15-09 and 15-10, located on, or in

the general vicinity of, the Agricultural Lease (the "Prior Appeals"). The Prior Appeals were heard together in 2017.

[4] In addition, two stay applications by the Applicant were heard in respect of the permits that were dealt with in the Prior Appeals, both of which were denied: *Penalty Ranch Ltd. v. Oil and Gas Commission,* Decision No. 2016-OGA-001(a); and Decision No. 2016-OGA-002(a), 003(a) and 006(a) (the "Prior Stay Applications").

[5] The present appeals and the stay applications in respect of the Permits were filed at different times. The first four appeals (Appeal Nos: 2017-OGA-005 to 008) were filed on May 15, 2017 against four permits that were issued from determinations dated May 1, 2017 (the "May Permits"). Penalty Ranch applied for a stay of the May Permits on October 10, 2017, after being given notice that Crew intended to construct the 12-09 well pad and commence drilling before the related appeals were heard. The Tribunal set a schedule for written submissions from the parties on that stay application, with final submissions due in November 2017.

[6] On October 24, 2017, the OGC issued determinations authorizing five more natural gas well permits (the "October Permits"). Penalty Ranch appealed the October Permits on November 9, 2017 and applied for a stay at the same time (Appeal Nos: 2017-OGA-028 to 032). At the Applicant's request, the Tribunal joined the stay applications for all nine permits to be dealt with together, and modified the original submission schedule accordingly. The hearing of these applications was conducted solely on the basis of written submissions.

[7] No date has yet been set to hear the appeals of the Permits (collectively, the "Related Appeals").

BACKGROUND

General

[8] The May Permits authorize Crew to drill and operate four wells at the 12-09 well pad. Although not particularly germane, the permit numbers and names are as follows:

- 30784 - Crew HZ Wilder 12-09-082-20 (also authorizes construction of the 12-9 well pad);
- 30785 - Crew HZ Wilder A12-09-082-20;
- 30786 - Crew HZ Wilder B12-09-082-20;
- 30787 - Crew HZ Wilder C12-09-082-20.

[9] The October Permits authorize five more wells at the 12-9 well pad, as follows:

- 34222 - Crew HZ Wilder D12-09-082-20;
- 34223 - Crew HZ Wilder E12-09-082-20;
- 34224 - Crew HZ Wilder F12-09-082-20;
- 34225 - Crew HZ Wilder G12-09-082-20; and

- 34226 - Crew HZ Wilder H12-09-082-20.

[10] Four unnamed natural springs, and a wetland area known as Worth Marsh, are on or near the Agricultural Lease in the vicinity of the 12-09 well pad. For ease of reference, the parties' submissions refer to the springs by numbers. Spring 1 is the nearest spring to the well pad (located approximately 2.2 kilometres from the well pad and a short distance uphill – north – of the main driveway access to the home ranch). The flow from spring 1 is used by the Applicant for drinking water, domestic and livestock needs. It is the Applicant's principle source of potable water. The other springs are also, or may potentially be, used for watering livestock or other ranching activities. Worth Marsh is located approximately one kilometer southeast of the 12-09 site. It is owned by an organization known at the Nature Trust of BC.

[11] As noted above, Penalty Ranch has previously appealed some of Crew's other permits authorizing natural gas wells on the Agricultural Lease, and has applied for stays in respect of those other permits on two prior occasions. Relevant to this application, the Tribunal previously denied the Applicant's application to stay a permit authorizing a well at Crew's 15-10-082-20 well pad (known as "well pad 15-10") in *Penalty Ranch v. Oil and Gas Commission*, (Decision No. 2016-OGA-001(a), June 27, 2016), its application to stay two permits authorizing wells at the 15-09-082-20 well pad (known as "well pad 15-09"), along with four other wells at well pad 15-10, in *Penalty Ranch v. Oil and Gas Commission*, (Decision Nos. 2016-OGA-002(a), 003(a) and 006(a), March 2, 2017), (collectively, the "Previous Stay Decisions").

[12] A hearing of the merits of the Prior Appeals was held between September and November of 2017, in respect of which the Tribunal issued its decision on June 22, 2018: see *Penalty Ranch v. Oil and Gas Commission*, (Decision Nos. 2016-OGA-001(b), 002(b), 006(b) and 2017-OGA-004(a)). That decision had not been released prior to the submission deadlines for the present stay applications.

[13] Whereas Penalty Ranch's stay applications and appeals have identified concerns with flaring, dust, noise, and other disturbances stemming from the permitted activities, including disturbing the tranquility of the area and air pollution, the focus has consistently been the potential impact to groundwater from drilling and hydraulic fracturing (fracking).

The Permitting Process for the 12-09 Permits

[14] The *Oil and Gas Activities Act* (the "*OGAA*") regulates BC's natural gas industry, including permits for exploration, drilling, and production. As lessee under the Agricultural Lease, Penalty Ranch is a "land owner" as defined in section 1 of the *Oil and Gas Activities Act* (the "*OGAA*"): it is "a person to whom a [deemed] disposition of Crown land has been issued under the *Land Act*". As a "land owner", Penalty Ranch must be invited to consult on permit applications for activities on that land regulated by the *OGAA*, and has a right to appeal any permit decisions by the OGC in relation to the Agricultural Lease (but not relative to the home ranch). Further, although Mr. Kirschbaum and his wife act as representatives

of Penalty Ranch regarding Crew's activities on the leased lands they do not, themselves, have standing to appeal the Permits.

[15] The following consultation process occurred with Penalty Ranch prior to the May Permits being issued:

- Crew provided Penalty Ranch with a formal invitation to consult on the proposed permits on September 12, 2014.
- On October 3, 2014, Penalty Ranch provided a written submission to the OGC objecting to the proposed permits and raising several concerns, including: concerns about the potential impact on fresh water aquifers from drilling and hydraulic fracturing, specifically sour gas and other contaminants finding their way into the aquifer and the spring used for its domestic water and livestock needs; pollution from flaring and sumps. Crew provided a written response to Penalty Ranch on October 20, 2014. Penalty Ranch provided three further written submissions to the OGC objecting to the proposed permits (October 27, 2016, January 13, 2017 and February 7, 2017).
- The OGC issued the May Permits based on an 8-page Decision Rationale contained in the Record of Decision.

[16] The following consultation process occurred with respect to the October Permits:

- Crew applied for five additional natural gas wells at the 12-09 well pad.
- Notification and consultation commenced in June 2017.
- On June 24, 2017, Penalty Ranch provided a written submission objecting to the proposed permits. It identified a number of concerns, including: earthquakes (seismic events) caused by hydraulic fracturing; the potential for contaminants to migrate along fault lines and impact Worth Marsh and the spring(s) used for domestic water needs and cattle; flaring and C-ring emissions. Specific incidents related to drilling and fracking were used to highlight risks associated with fracking and drilling.
- On June 29, 2017, Crew provided a written reply to that submission. In addition, the OGC's Community Relations group facilitated information sharing meetings between the parties concerning these and previous applications involving similar issues.
- The OGC issued the October Permits based on a 7-page Decision Rationale contained in the Record of Decision.

The Appeals of the 12-09 Permits

[17] Penalty Ranch appealed the May Permits to the Tribunal on May 15, 2017, asserting that the 12-09 well pad is located too close to Worth Marsh, that the marsh feeds the aquifer below it, and that the aquifer feeds the natural springs used for the Kirschbaum family's drinking water and ranching operation. It states that the OGC did not properly consider "the imperative need of the water produced

by our spring for the daily needs of our family and ranching operation". In keeping with concerns raised during the consultation process, Penalty Ranch has asked the Tribunal to order a one mile "no drill or frack zone around Worth Marsh".

[18] Penalty Ranch appealed the October Permits on November 9, 2017. It submits that the OGC failed to consider all available information before it issued those permits, and that it has failed to adequately protect the health and well-being of the operators of Penalty Ranch who tend to the cattle in the vicinity of the wells. Penalty Ranch has asked the Tribunal to order the same remedy as above, namely: a one mile "no drill and frack zone around Worth Marsh".

The Current Stay Applications

[19] The Applicant applies for a stay of all nine Permits at the 12-09 well pad. To summarize, Penalty Ranch submits that, if Crew undertakes the activities under the Permits, there may be irreparable harm to the environment, and specifically to Worth Marsh and the aquifer(s) that feed the springs that have been identified. The Applicant argues that Crew has many, less risky, alternative locations where it can operate.

[20] Both the OGC and Crew oppose the stay applications and submit that the stay applications should be denied. The central theme is that the issues raised by Penalty Ranch in the applications are substantially similar to those addressed by the Tribunal in the Previous Stay Decisions in which stays were denied. Crew further emphasizes that all of the Permits include conditions to protect the groundwater and to minimize, or prevent, other environmental issues from arising.

ISSUES

[21] The sole issue arising from these applications is whether the Tribunal should grant a stay of any or all of the Permits.

APPLICABLE LEGISLATION AND LEGAL TEST

[22] Section 72(3) of the *OGAA* grants the Tribunal authority to order a stay:

> **72**(3) Subject to subsection (4), the commencement of an appeal does not operate as a stay or suspend the operation of the determination or decision being appealed, unless the appeal tribunal orders otherwise. [Of note, subsection (4) is not relevant to this decision.]

[23] The Tribunal's *Practice and Procedure Manual* mandates that the Tribunal's practice, when considering an application for a stay, is to apply the three-part test in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.); [1994] S.C.J. No. 17 ["*RJR-MacDonald"*]. More particularly, an applicant for a stay must demonstrate the following:

> (a) there is a *serious issue* to be tried;
>
> (b) the applicant will suffer *irreparable harm* if the stay is not granted; and

(c) the "balance of convenience" test, namely: whether the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted. (pages 23-24)

[24] The Tribunal applied this test in the Prior Stay Applications. As pointed out in Crew's submissions, it is the test used by the BC Court of Appeal, see for example *Halalt First Nation v North Cowichan) District*, 2011 BCCA 544 (at paragraph 17).

[25] A stay would put a stop to Crew's activities in respect of the Permits pending the outcome of these appeals. A stay is considered to be an extraordinary remedy. The onus is on the Applicant to demonstrate good and sufficient reasons why a stay should be granted. The Tribunal is required to apply the balance of probabilities standard of proof.

DISCUSSION AND ANALYSIS

The Panel has considered each part of the *RJR-MacDonald* test.

Serious Issue

[26] In *RJR-MacDonald*, the Court stated as follows:

> 49. … What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. …

[27] The Court pointed out that – as a general rule – the first premise has a low threshold, and the inquiry should proceed to the next stage of the test unless the application is viewed as being frivolous or vexatious or deals with a pure question of law. Given the low threshold, both the OGC and Crew accept that Penalty Ranch's appeals, on their face, raise serious issues. The Panel agrees: among other things, the initiating documents raise issues related to the potential contamination of groundwater sources and health concerns from the permitted activities. Those issues raised are not frivolous, vexatious nor pure questions of law.

Irreparable Harm

The second stage of the *RJR-MacDonald* test requires an applicant to demonstrate that his or her interests will suffer irreparable harm if a stay is not granted. The Court put it this way, at page 405:

> At this stage the only issue to be decided is whether a refusal to grant relief *could so adversely affect the applicants' own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application*.
>
> *"Irreparable" refers to the nature of the harm suffered* rather than its magnitude*. It is harm which either cannot be quantified in monetary terms or which cannot be cured,* usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer

> permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); *or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined* (*MacMillan Bloedel Ltd. v. Mullin,* [1985] 3 W.W.R. 577 (B.C.C.A.)). [Emphasis added]

Penalty Ranch's Submissions

[28] The Applicant submits that, if the Permits are not stayed, the permitted activities may result in irreparable harm to the groundwater – the aquifer(s) – supplying the spring(s) used for human consumption and for the operation of the ranch. The essence of the submission is that, even if the risk is low, seismicity is a potential factor in groundwater contamination and, because contamination from fracking would happen underground, it would be irreversible and "it should therefore be considered irreparable harm." Further:

> … if our water was to be contaminated or stop flowing our life and livelihood would be seriously impacted.

[29] The Applicant disagrees with the OGC's hydrogeologist who has assessed the risk level of groundwater contamination as "low" based on knowledge of the area and her own hydrogeological review (referenced in the November 8, 2017 affidavit of Dr. Laurie Welch contained in the OGC's submissions, and the Decision Rationale) for the following reasons:

- Fracking uses large volumes of frack fluid injected under high pressure, and some recent studies indicate that 49% of active oil and gas wells leak.
- Fracking can induce earthquakes.
- There have been many frack-induced earthquakes in close proximity to Worth Marsh. This indicates the presence of fault lines in the underground formations.
- Fault lines and vertical drill paths can act as conduits and pathways for frack fluids, and other hazardous fluids, to migrate to drinking water zones and to the surface. This concern is exacerbated by seismic events.
- At the hearing of the Prior Appeals the OGC hydrogeologist, Dr. Welch, agreed that seismicity and earthquakes are a factor in groundwater contamination.
- According to the Applicant's hydrogeologist, whom the Applicant consulted, "it can take months and years for toxic fluids to show up in our water that have been released and been pushed to migrate by hydraulic frackturing [sic]."
- Some springs on Haida Gwaii have stopped flowing due to earthquakes.

[30] Penalty Ranch has pointed to a number of examples of earthquakes induced by fracking to support of its belief that there are fault lines underlying the area, and that the risk of irreparable harm is *not* low:

- In 2014, "the 4-24-82-20 (3,000 meters east of 15-10) had an uncontrolled communication incident with 14-7-82-19 and 400,000 litres of frack fluid was spilled underground."
- In August 2015, fracking on the 9-17 (1.5 kilometres northeast of the 12-09 well pad) caused damage to surface casing and triggered seven earthquakes that were logged on the Natural Resources Canada earthquakes registry website. Surface casing is located down to 500 meters below the surface, such that the damage to surface casing coincides with "the drinking water zone" with "possibly negative effects to the ground water because of a frack stimulation …".
- There was fracking at 4-34-81-20 on September 23, 2016 (4 kilometers south of 12-09) between 5:00 am and 6:10 am, and an earthquake shook the Kirschbaum family's home at 6:10 am "and then drilling went quiet".
- Foul odor or gasoline-like fumes emanate from open C-ring tanks, notwithstanding Crew's assurances that they contain "only water" and, after fracking at 4-34 in December 2016, fluid collected in a C-ring tank ignited and burned for hours.
- In January 2017 there was a wellhead failure at the 5-24 well pad, resulting in an extensive spill of frack fluid.
- Crew drilled and fracked from the 15-09 well pad into a zone that had experienced "a cluster of earthquakes" two years previously.
- In April 2017, fracking at the 15-09 well pad (800 meters east of 12-09) caused five earthquakes (and there was a subsequent – short-term and unexplained – temperature increase at spring 1).
- 10 earthquakes were triggered in June 2017 from wells at well pad 15-09, two of which were felt 2,000 metres away at the Kirschbaum family's home.
- Crew lost over one million litres of oil-based drill fluid down a well at the 15-10 well pad, and drill paths from the 12-09 go under Worth Marsh towards the 15-10, and within 1,500 meters of the lost fluids. A communication incident between 12-09 and the abandoned 15-10 could result in the lost fluids migrating along fault lines and into potable aquifers.

[31] Penalty Ranch points to the following to show that the permitted activities can negatively impact groundwater:

- After the seismic events associated with fracking at 15-09 in early April 2017 induced five earthquakes (referred to above), water samples at spring 1 taken in May showed an unexplained water temperature increase – albeit the temperature apparently dropped back to normal in successive months.
- After the earthquake when the well at 4-34 was being drilled, turbidity at spring 2 rose from "2" to "21" then rose to "34" after it was fracked. The

explanation offered was that there must have been dirt in the sampling containers. Additionally, the flow at spring 2 – which emerges from bedrock – doubled for October and November.

- After the 10 earthquakes triggered in June 2017 by fracking at the 15-09 well pad, and another associated to the 4-22 well pad, water samples taken on August 24, 2017 from spring 2 showed the chemistry of total metals had increased "dramatically".
- By reference to the problems at well pad 9-17 in August 2015, noted above, if the aquifer and spring are contaminated, it would be "impossible to repair" and "would render the infrastructure of our ranching operation useless", noting that it "could take generations for the aquifer to clean itself".

The OGC's Submissions

[32] The Respondent argues that the Applicant has not established that it will suffer irreparable harm if a stay is not granted pending a hearing and decision on the merits of its appeals. The OGC points out that the Applicant's case is, essentially the same as it was in the Prior Stay Applications. The essence of the OGC's argument is that the Applicant has made assertions that are not supported by the information that has been provided to the Panel.

[33] In response to Penalty Ranch's submissions regarding incidents of spills or lost fluid at other locations, the OGC relies on the November 8, 2017 affidavit of Kevin Parsonage, Supervisor of Field Engineering and Technical Investigations, contained in the OGC's submissions. Mr. Parsonage discussed the OGC's investigations into each matter referred to by the Applicant, and the status of, and conclusions in respect of, the investigations. He categorically states that the spills were either cleaned up or that the incident or loss of fluid did not otherwise put groundwater at risk. He noted that one investigation into a surface spill of fluid is ongoing, but that the spill had been contained on-site and cleaned-up "to agricultural land-use standards". He also said that a "pinhole leak" in the production casing of a well at the 9-17 well pad – referred to in the Applicant's submissions – did not pose a risk to groundwater because the integrity of the surface casing was not impaired.

[34] In regards to the incident resulting in "loss of circulation" at the 15-10 well pad, surface casing had been installed and tested to a depth of 503 metres, and the well was abandoned (along with others at that well pad) after it was determined that the fluid loss had occurred at depth in a formation that "was hydraulically isolated from usable groundwater" and the well was cemented such that it was no longer a "vertical flow path". Further, in addressing the Applicant's concern about "wellbore communication events", Mr. Parsonage deposed that such events in the Montney formation do not put groundwater at risk (noting that "the Montney" is the stratum targeted by the wells at issue).

[35] Further, the Respondent acknowledges that seismic events are linked to drilling and fracking, and also that fault lines underlie the area, including extensive faulting at the depth of the Belloy and Taylor Flat formations which lie beneath the

Montney formation. This faulting exists across an extensive area from northeastern BC into Alberta. The Respondent pointed out that scientists understand this is where the underground movement that causes the seismic activity associated with hydraulic fracturing occurs, but argues that the Applicant has not provided any evidence to support the assertion that fault lines could facilitate the contamination of groundwater.

[36] According to the OGC, the formations from which the seismic movement originates are at a considerable depth, namely 2,000 to 2,500 metres below the surface, and do not extend through the entire stratigraphic column. The OGC emphasizes that the decision-maker relied on the information provided by an OGC geologist: there is nothing to indicate that hydraulic fracturing activity at the Montney level is likely to connect with overlying strata, let alone with the shallow, unconsolidated, potable water-bearing sediments that concern the Applicant. Further, according to the various Decision Rationales, there are "significant natural seals" (known as aquatards) in the strata overlying the Montney formation.

[37] In sum, the OGC submits that there is no reason to believe that fault lines could act as a conduit between the Montney and the groundwater zone of concern to the Applicant. Further, the OGC argues that, although the Applicant has explained its concerns (and given examples in an effort to validate them) there is no actual evidence before the Panel to substantiate those concerns.

[38] Dealing with induced seismicity, the OGC acknowledges the link to oil and gas activities and says that it monitors and studies these occurrences. In this regard, the OGC has undertaken two studies: one focused on the Montney formation and is described in a December 2014 publication titled, "Investigation of Observed Seismicity in the Montney Trend", which concluded, amongst other things, that events with an acceleration of less than 0.039 g[1] have no potential to cause damage.

[39] The OGC points out that the Permits each have a condition whereby Crew must implement adequate ground motion monitoring to track seismic events associated with the permitted activities, and must provide a tracking report to the OGC within 30 days after completing fracking activities. In addition, the *Drilling and Production Regulation,* B.C. Reg. 282/2010, requires that Crew cease operations in the event of a seismic event with a magnitude 4.0 or greater. Similarly, section 21.1 of that Regulation requires that events felt on the surface within a three kilometre radius must be reported to the OGC immediately. A permit holder is not required to stop drilling, however, unless the seismic event has a magnitude of 4.0 or greater. [The OGC also required Crew to file similar reports for the 15-09 and 15-10 permits. The OGC points out that the largest event recorded had a magnitude of 1.98, with a corresponding acceleration of 0.025 g, which is well below the level that has the potential to cause damage.]

[40] Regarding the complaint of an early morning earthquake on September 23, 2016, Mr. Parsonage deposed that there was no drilling or fracking associated with the 4-34 well pad which might accord with Mr. Kirschbaum's observations. Put

[1] "g" is the acceleration of gravity 9.8 (m/s^2).

differently, there is no evidence that what he heard or felt was somehow associated with Crew's activities.

[41] In response to Penalty Ranch's submissions that fault lines can act as conduits or pathways for the migration of frack fluids and other potentially hazardous substances, the OGC reiterates that the OGC geologist who advised the decision-maker was of the view that there is nothing to indicate that hydraulic fracturing in the Montney formation is likely to connect with the overlying strata let alone with the unconsolidated sediments nearer to the surface where potable water is found, and that there are aquitards that prevent migration of gases and fluids throughout the geologic column above the Montney.

[42] Addressing concerns expressed by Penalty Ranch in relation to Worth Marsh and the springs, the OGC points to five reports by Gemini Environmental Solutions Ltd. that consolidate the results of Crew's water testing program that commenced in May 2014 (the "Gemini Reports"). These reports were previously provided to Penalty Ranch (and a copy was provided for the Panel to review). Notwithstanding the discrepancies noted by the Applicant, the OGC submits that the reported results have been "consistent over time" and that there is no evidence linking drilling activities to flow changes or contamination concerns.

[43] Dr. Laurie Welch is a hydrogeologist employed by the OGC with a geological sciences degree, a diploma in waste management and groundwater contamination, and a Masters and Ph.D. in hydrogeology. She was qualified as an expert witness during the hearing of the Prior Appeals. The OGC's submissions refer to a "desktop hydrogeological review" conducted by Dr. Welch regarding the potential for the permitted activities to impact groundwater, including the springs. The review was completed before any of the Permits (and others, for example at the 15-09 and 15-10 well pads) were issued. As part of the OGC's submissions, Dr. Welch's affidavit attached a copy of her desktop review, along with portions of her evidence from the Prior Appeals, maps, and a study by researchers participating in a Simon Fraser University study dated July 31, 2017 (the "SFU Study"). The SFU Study resulted in the compilation of a database on known and licensed springs within part of the Peace Region of northeast BC which encompassed the springs of concern to Penalty Ranch. Dr. Welch was an advisor/consultant in the SFU Study. [The Panel takes notice that that the October Permits were not appealed until November 9, 2017, but that Dr. Welch's November 8, 2017 affidavit is relevant to the Permits, generally.]

[44] Dr. Welch reviewed the data available for spring 1 and another designated spring 2 (from sampling in accordance with Crew's permits at the 15-09 and 15-10 well pads) and other water testing done by, or on behalf of, Crew between May 2014 and August 2017. She also reviewed the Gemini Reports and other available data. She deposed that she is confident in her opinions.

[45] In response to the applications to stay the May Permits, Dr. Welch made the following observations, in part:

- Flow measurements are generally consistent over the monitoring period (Spring 2014 to August 2017) and were consistent with variability "that would be expected for this sampling environment" and "research does not suggest aquifer contamination is a concern associated with induced

seismicity." Further, research indicates that seismic events could result in some temporary variability in groundwater flow – which could affect springs – but she did not observe any adverse effects to flow for the springs in question.

- By reference to the SFU Study, analytical results for the identified springs (temperature, pH, and dissolved oxygen) were consistent with those parameters for spring water across the Region.
- The water temperature increase in May of 2017, and the turbidity anomaly in August 2017 (noted in the Applicant's submissions), are not worrisome in the context of this sampling environment. Temperature can be affected by various factors, and a water temperature of 12^0 C meets the "aesthetic objective" for drinking water, which is 15^0 C according to the Canadian Water Quality Guidelines.
- Field observations documented in a report by Matrix Solutions Inc. (the "Matrix Report") that was put into evidence in the Prior Appeals, account for the inconsistent turbidity measurement at spring 2. Specifically, the sample was apparently collected from the ponded water at the base of the spring, rather than at the discharge point near the bank, when the spring was seasonally low and likely contained more sediment than usual. The elevated total metals shown in the August 2017 sample would be expected for a sample of high turbidity that contains sediment.
- There is no evidence to link the water chemistry changes complained of with the permitted activities. Further, in her opinion, it was highly unlikely that, if a contamination event did occur in the vicinity of the 12-09 well pad, it would affect the springs.

[46] Dr. Welch also commented on Penalty Ranch's submissions regarding her expert evidence given in the Prior Appeals. While acknowledging her testimony that seismic activity could theoretically affect groundwater flow, she also testified that, given the low magnitude of induced seismicity events in the area and the consistency of the chemistry and flow at the springs over that period, the potential effects are "unlikely to be significant."

[47] Finally, the OGC points out that there are protective measures in the legislation and regulatory scheme that are intended to protect groundwater and that, because of Penalty Ranch's concerns about groundwater contamination, it has included permit conditions requiring Crew to monitor and do periodic sampling at the springs, and to report the results to the OGC. These conditions were also integral to the permits that were the subject of the Prior Appeals (which were similarly in the vicinity of Worth Marsh). The data indicates that the activities complained of are not having adverse consequences to groundwater or the springs. The OGC submits that this is "the best evidence", demonstrating that the Applicant's concerns about irreparable harm to water sources are "purely speculative".

[48] The OGC asks the Panel to find that the Applicant has not established irreparable harm, nor the potential for irreparable harm, and argues that the stay applications should be denied.

Crew's Submissions

a. Standing

[49] Crew starts off by pointing out that many of the submissions made by Penalty Ranch relate to the potential for harm to potable water used by the Kirschbaum family, or pertain to private land adjacent to the Crown land covered by the Agricultural Lease. Crew emphasizes that neither Penalty Ranch, nor the Kirschbaum family, has "standing" under the *OGAA* to make these arguments in regards to that neighboring private land, and that the Panel has no jurisdiction in relation to those things.

[50] Crew notes that the Applicant's standing to appeal the Permits, and to make these stay applications, is based strictly on Penalty Ranch's status as a legal entity and as the lessee of Crown land on which the "operating area" for the permitted activities is located. Crew submits that neither the Applicant, nor the Kirschbaum family, is otherwise eligible to make submissions in regards to the home ranch. Crew specifically asserts:

> As a result of amendments to the *OGAA* following the Tribunal's decision in *Bell v. Oil and Gas Commission*, 2012-OGA-003(a), the definition of an "eligible person" with standing to appeal a decision of the OGC was restricted to (among other things) "a land owner of land *on which an operating area is* located" (emphasis added). As a result of this amendment, Mr. Kirschbaum and Ms. Hutgens [the Kirschbaum family] do not have standing in this appeal – or on this application – in their capacity as owners of the adjacent Private Land.

b. Irreparable Harm

[51] On the question of irreparable harm, Crew submits that Penalty Ranch has not provided sufficient evidence to satisfy the test. More particularly:

- Crew has been voluntarily testing the water flow and quality since 2014 at the springs identified by Penalty Ranch (noting that this was canvassed at some length in the Prior Appeals). In addition, Crew retained Matrix Solutions to conduct a hydrogeological risk assessment in response to the concerns raised by Penalty Ranch. This resulted in the Matrix Report in December of 2015, updated and revised in March 2016. The assessment concluded that there is a low to negligible risk that Crew's operations will impact the identified water sources as long as Crew complies with the legislated requirements and responds appropriately to any surface spills resulting from the permitted activities.
- Crew did baseline and periodic testing at the springs before and after drilling and completion of the wells at issue in the Prior Appeals (which are similarly proximal to Worth Marsh) and concluded that the quality and quantity of the water at these springs has remained consistent. Water testing results from October 2016 to August 2017 were appended as an exhibit to the October 26, 2017 affidavit of Paul Dever, Crew's Director of Government and Stakeholder Relations. In addition, ongoing water sampling is required under

the Permits (as was the case with the permits dealt with in the Prior Appeals).

- Addressing the Applicant's concerns about the temperature increase at spring 1 and the increase in dissolved metals at spring 2, Mr. Dever deposed that he was informed by Matrix Solutions' Senior Hydrogeologist, Dr. Bill Wilmot, that "neither of these test results indicates any potential risk to the spring water or any impact on the springs as a result of Crew's activities" and that, according to Mr. Wilmot:
    - temperature variances in water from shallow running springs like spring 1 are normal; and
    - the increase in dissolved metals observed in the August 2017 samples was due to sediment being introduced into the sample rather than an actual increase of dissolved metals.
- Mr. Dever further deposed that, on October 23, 2017, he received a copy of an email from Dr. Welch (attached as an exhibit to his affidavit) wherein Dr. Welch confirmed (for the permits dealt with in the Prior Appeals) that the OGC was satisfied – consistent with Dr. Wilmot's conclusion – that the chemistry of the August 2017 samples had been "affected by entrainment of sediment in the sample."
- Regarding the Applicant's concern that the proposed wells authorized by the Permits will travel under Worth Marsh, Mr. Dever consulted Ian Mills, Crew's Drilling and Completions Manager, in order to respond. Mr. Dever deposed that, according to Mr. Mills, "the location of the horizontal drill path for these wells will be within the Montney formation – a deep formation approximately 1850 metres below surface that is separated from usable groundwater by impermeable formations of rock and sediment" whereas "[u]sable groundwater in the area is at depths of approximately 50-350 metres below surface." According to Mr. Mills, the risk to Worth Marsh from drilling natural gas wells under the marsh is "very low to negligible."

[52] Crew also notes that Penalty Ranch's central concerns about the potential for contaminating groundwater appear to reflect the direct evidence of an expert witness, Dr. Gilles Wendling who testified at the hearing of the Prior Appeals as an expert in hydrogeology including the distribution of water through rock and soil. Crew points to limitations and apparent errors in Dr. Wendling's testimony and that, in addition to offering opinions that went beyond his expertise (after being cautioned by the Panel not to do so) Dr. Wendling acknowledged that he was advocating on behalf of Penalty Ranch, rather than simply offering objective evidence consistent with what is expected of an expert witness. Crew attached transcript evidence from the hearing to illustrate and support this contention. Crew submits that, although the Applicant has not specifically named Dr. Wendling as the subject-matter expert on whose opinions it is relying, the Applicant ought not refer to his evidence as factual assertions in the context of these stay applications. [The Panel notes that the decision in the Prior Appeals discusses Dr. Wendling's testimony in some detail and is in keeping with Crew's assertion: limited weight was given to Dr. Wendling's testimony.]

[53] Crew further notes that all of the Permits being considered in these applications are subject to the regulatory framework of the *OGAA*, plus they have the following specific conditions for the protection of groundwater (the "Supplemental Water Protection Conditions"):

- baseline testing of the water quality and flow at the springs that Penalty Ranch is concerned about;
- Crew must do annual sampling of water quality and flow at the springs;
- Crew is required to develop and maintain approved emergency response protocols in relation to Worth Marsh and the springs; and
- Crew is required to monitor seismicity and, if it is responsible for a seismic event that has a magnitude of 4.0 or greater, it must stop operations immediately and test water quality and flow at the springs.

[54] The Supplemental Water Protection Conditions were included in the 15-09 and 15-10 permits and were canvassed, in considerable detail, in the Prior Appeals. Crew argues that the Applicant's concerns about water and seismicity have been adequately addressed. Further, it states that it has complied, and will continue to comply, with the conditions in those permits as well as with the conditions in the Permits.

[55] In addition, Crew emphasizes that the legislative scheme includes safeguards that should mitigate Penalty Ranch's concerns, such as those found in the *Drilling and Production Regulation* and the *Environmental Protection and Management Regulation,* B.C. Reg. 200/2010. The latter deals with riparian considerations. The former specifically requires that all wells be built to specified standards, such as casing and cementing of all wells at least to the underground depth of potable groundwater (which is intended to isolate a well from any aquifer it intersects and prevents the aquifer from interacting with substances introduced by - or within - the well, or in deeper formations). Amongst other things, the *Drilling and Production Regulation* also mandates strict requirements for drill casing and requires that Crew use non-toxic drilling fluids when drilling above the base of usable groundwater.

[56] Finally, Crew refers to the Tribunal's decisions on the Prior Stay Applications. In discussing whether the Applicant had established that there would be irreparable harm in the context of the first stay decision, the Tribunal concluded, in part:

> 53. The Tribunal finds that the Applicant has raised concerns about potential harm to groundwater and surface water resources, but has provided no information or evidence to support a finding that there is a reasonable likelihood of such harm if a stay is denied. For example, *there is no evidence or information that would lead the Tribunal to conclude that the legislative requirements together with the Permit conditions that apply to the permitted activities may be insufficient to protect water resources, or that Crew may not comply with those requirements and conditions, pending a decision on the merits of the appeal, such that permanent harm to water resources is a reasonable possibility.* In these circumstances, *the Tribunal finds that the Applicant's concerns are too speculative* to support a finding that the

> Applicant's interests are likely to suffer irreparable harm if a stay is denied. [Emphasis added]

[57] In its decision on the second stay application (March 2, 2017), the Tribunal similarly found, in part:

> 64. …. The Tribunal finds that *Applicant has provided insufficient information or evidence for the Tribunal to conclude that denying a stay, and allowing the permitted activities to proceed, is likely to result in permanent contamination or other harm to natural resources such as the groundwater aquifer, the four springs, or Worth Marsh*, which the Applicant relies on. …. [Emphasis added]

[58] Crew's submission is that nothing has changed in the present applications: Penalty Ranch is making the same assertions and pointing to the same concerns that were raised on the first two stay applications – and that were canvassed during the Prior Appeals. Moreover, in the time since those previous applications were decided – and denied - Crew has drilled and completed the wells dealt with in the Prior Appeals without having impacted the water resources of concern to the Applicant.

[59] In summary, Crew submits that Applicant has not adduced any evidence of irreparable harm to its interests as the holder of the Agricultural Lease (a lease which limits Penalty Ranch's use of the land to agricultural purposes). Crew argues that Penalty Ranch's applications should be denied for failure to satisfy this branch of the test: *Canada (Public Works and Government Services) v. Musqueam First Nation*, 2008 FCA 214 at paragraph 4; *Janecki v. British Columbia (Superintendent of Motor Vehicles*, 2017 BCSC 1405, at paragraph 21.

Penalty Ranch's Reply

[60] The Applicant submits that its Agricultural Lease carries the right to "quiet enjoyment of the land" which is impacted by Crew's activities "with over 1,000 trucks creating big dust clouds and depositing dust on grass and half-way up the trees beside the road." The Applicant says that its quiet enjoyment has also been impacted by a fire at the 4-34 well pad on December 17, 2016, and that "emissions from C-rings making a person downwind feel sick if working downwind". It further refers to two incidents in which drill fluid was lost or spilled at the 15-10, 4-34 and 5-24 well sites. The Applicant also accuses Matrix Solutions of making mistakes in its risk assessment study, including "not taking seismicity into account at all."

[61] The Applicant reiterates that Crew's activities since the Prior Stay Applications have resulted in unacceptable seismic activity, reasserts the need for more information about fault lines in the area, and refers to the "Horn Rim Basin investigation" wherein it was observed that if fault movement is indicated then operators should "identify pre-existing faulting. If induced seismicity is detected, the active fault could be located and avoided in subsequent well bores."

[62] The Applicant's reply also criticized the assertions by Crew and the OGC that nothing harmful has happened to the springs over the three years that they have

been periodically sampled, because most of the testing took place before any drilling; therefore, the results, as presented, should be considered to be unreliable.

[63] Finally, the Applicant points to a verbal agreement that Crew would not drill under Worth Marsh from the 15-10 well pad, and "calls foul" because the drill paths for four of the wells authorized by the October Permits will do just that, albeit from the opposite direction. The Applicant says that, by approving the Permits, the OGC is knowingly helping Crew circumvent the agreement – and cautions that there is a risk that fracking fluid lost down a well at the 15-10 site will eventually end up in "the fresh water zone".

Crew's Sur-Reply

[64] Crew takes issue with this allegation regarding whether the parties had an agreement about drilling under the marsh, asserting that this was canvassed when Crew's witnesses testified at the hearing of the Prior Appeals and it was explained that, notwithstanding discussions with Penalty Ranch, no such agreement exists.

The Panel's Findings

a. Standing issue

[65] The Panel agrees with Crew's assertion that the only harm to be assessed in this case is harm to Penalty Ranch in its capacity as a land owner in respect of the Agricultural Lease over Crown land on which the permitted activities have been authorized. The *OGAA* does not provide a right of appeal to the owner or occupants of the neighbouring property. This means that the Kirschbaum family does not have standing, nor is the home ranch (regardless of who owns it) part of the Panel's consideration. This is apparently the legislative intent.

b. Irreparable harm

[66] According to *RJR-MacDonald*, *supra*, the term "irreparable harm" refers to the nature – rather than the magnitude – of the harm suffered:

> It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. (page 405)

[67] In keeping with the *RJR-MacDonald* rationale, and previous decisions of the Tribunal, it could constitute irreparable harm if there is a reasonable possibility, or likelihood, of a "permanent loss of natural resources" resulting from the activities under review; for example, if the springs became irreparably contaminated or ceased to flow as a result of the permitted activities. As has been noted, the Applicant has the onus of establishing that irreparable harm to the Applicant's interests is likely to occur if a stay is not granted.

[68] The Applicant's case is that if Worth Marsh or the underlying aquifer(s) become contaminated, or the flow to the spring(s) gets interrupted, this would constitute irreparable harm because that is the source of potable water for the

ranching operation and the Kirschbaum family. The Panel notes that this is, essentially, the same premise on which the Prior Stay Applications were argued. Although a good deal of the information provided by Penalty Ranch in the present stay applications is the same as for the Prior Stay Applications, there are differences.

[69] Penalty Ranch has clearly been gathering information in an effort to bolster its position since those prior applications, and has tried to directly address the irreparable harm test with more information. Amongst other things, having participated in and heard the evidence and submissions during the Prior Appeals, the Applicant has attempted to add "more arrows to its quiver". Without being exhaustive, examples include: Dr. Welch's testimony during the Prior Appeals that seismicity can be a factor in groundwater contamination; the water testing anomalies in May 2017 and August 2017; that fracking associated with the 15-09 well pad triggered a number of earthquakes – at least a couple of which were felt at the home ranch; and that drill paths from the 12-09 well pad are approved to go under Worth Marsh – albeit into the Montney formation – in the vicinity of where Crew had technical issues with a natural gas well at the 15-10 well pad leading to the loss of a significant volume of fluid deep underground, a problem that was sufficiently serious that several wells were subsequently abandoned.

[70] In addition, the Applicant also argues that Crew has breached an agreement that wells would not be drilled under the marsh, and there is reference to surface casing in a well located 1.5 kilometres northeast of the 12-09 well pad having been damaged due to fracking. The Applicant also drew the Panel's attention to a study which concluded that nearly half of the active wells in northeastern BC are prone to methane gas leaks. The Panel was also told that there has been a considerable amount of noise and dust from Crew's activities, which disturbs the quiet tranquility of the area.

[71] The additional evidence notwithstanding, the Panel finds that Penalty Ranch has failed to establish that it is likely to suffer irreparable harm to its interests as a "land owner" if a stay is denied. Crew may, therefore proceed with the permitted activities pending a final decision on the merits of the appeals of the Permits. All of the Applicant's assertions, and any evidence in support of its appeals, can be fully canvassed during the hearing of the appeals on the merits.

[72] After considering the "new evidence" and arguments, the Panel is satisfied that the legislative and regulatory scheme pertaining to Crew's activities, supplemented by permit conditions specifically designed to address the Applicant's concerns, are sufficient to protect water resources in the area pending a hearing on the merits. Consistent with the second of the Previous Stay Decisions, and with the test in *RJR-MacDonald,* the Panel is of the view that the harm suffered by the Applicant (or that the Applicant fears that it will experience) is *not* irreparable – or, at least, there is insufficient evidence before the Panel to conclude otherwise.

[73] The Panel is cognizant of how upsetting Crew's activities have become to the Applicant – and to Mr. Kirschbaum and his family – but emphasizes that the outcome of these applications cannot be based on speculation without evidence of cause and effect sufficient to tilt the scale. For example, there is no evidence of any known problems caused by fault lines in the area, let alone caused by drilling

for, and production of, natural gas. Nor, is there evidence to support the assertion that any of Crew's activities have resulted in unacceptable seismic events, or have had any undesirable impact on groundwater. Rather, the evidence is to the contrary. Even the complaint of contaminants being collected in C-rings or spilled onto the land has been addressed by the Respondent. The Applicant's assertions are inadequate to satisfy the Panel beyond the first part of the *RJR-MacDonald* test: the Applicant appears to have raised some potentially serious issues, however, the evidence does not support a finding of irreparable harm.

[74] More specifically, and notwithstanding the matter of standing, *per se*, there is no evidence before the Panel that any of the permitted activities have affected the quality or quantity of water supplying the springs. Further, albeit that mapping fault lines and aquifers in the area seems a sensible thing to do, there is no evidence that the process of drilling and fracking, or the introduction of contaminants through the wellbores, could adversely affect potable groundwater on which the Applicant relies. It is apparent that there are risks associated with the permitted activities; however, the related science and technology, bolstered by the regulatory framework and the permitting process, address the Applicant's concerns for the purpose of these applications. Further, there is no evidence from which to conclude that Crew will be out of compliance – certainly not in a manner that satisfies the irreparable harm test. Neither can the Panel reasonably conclude that the types of "accidental" events referred to by the Applicant are the sort of thing for which any harm caused cannot be remediated or compensated.

[75] As an aside, the Panel finds that the parties had a "handshake agreement" that no wells would be drilled under Worth Marsh from the 15-09 or 15-10 well pads. The Panel is not able to comment regarding discussions as to whether drilling could occur from other locations, except to say that there is no evidence of such an agreement before the Panel.

[76] For the reasons given, the Panel finds that the Applicant has not established a likelihood of irreparable harm to its interests if a stay is denied. The Panel points out that this decision has been made for the limited purpose of deciding the present stay applications. The findings have no bearing on the merits of the appeals.

Balance of Convenience

[77] The third aspect of the three-part test in *RJR-MacDonald* requires a determination of which of the parties will suffer greater harm if a stay is – or is not – granted pending a final decision on the merits of the appeals. The Panel arguably need not address this question, having already determined that the Applicant's concerns are speculative in that the evidence falls short of establishing that the Applicant will suffer irreparable harm if is stay is not granted. That said, it is worthy of comment to note that the balance of convenience favours *denying* a stay.

Penalty Ranch's Submissions

[78] Penalty Ranch argues that the harm that it will suffer if a stay is not granted is greater than any harm that Crew will suffer if a stay is granted. It states that the ranch is not movable and that, if its water supply became contaminated or

disappeared, then the ranch could not operate: "Our winter feeding facilities would be rendered useless if the water would disappear or become contaminated." Mr. Kirschbaum asserted that it would spell the end of "a life's accomplishment" and the family's livelihood. By way of comparison, the Applicant points to Crew's website which claims that Crew has thousands of drilling locations available, the inference being that it has many other options to utilize until the appeals of the Permits are heard and decided. Penalty Ranch submits that Crew should be required to drill in less sensitive (and less controversial) locations until more is known about the stratigraphic geology of the area, and the potential impacts and safety of hydraulic fracturing processes.

[79] Crew notes that, in the Previous Stay Decisions, the Tribunal found that the potential harm to Crew's financial interests accompanying a stay, resulting from the delay in commencing the permitted activities, would not likely be compensable as damages or as costs if the subject appeals of the Permits are unsuccessful. Crew relies on Mr. Dever's affidavit in support of its assertions about the balance of convenience, which is essentially a projection of the financial consequences in terms of revenue stream and operational inefficiencies if a stay is granted. By way of example, Mr. Dever describes the various aspects of planning and the arrangements that Crew has made to bring the permitted 12-09 wells into production, the timing and logistics involved, and the number of people expected to be employed each day. He states that these arrangements would be frustrated, with considerable disruption to Crew's operations notwithstanding the financial impacts, if the Permits are put on hold until the appeals are heard and decided.

[80] Further, Crew submits that this likelihood of harm is even worse than expected in the Previous Stay Decisions because Penalty Ranch did not apply to stay the May Permits until five months after the appeals were filed, during which period Crew was planning its operations at the 12-09 well pad (as it was entitled to do).

[81] Crew explains that it needs to constantly bring new wells into production because production from existing wells gradually declines. If it is not able to bring on new wells because of a stay, the lost production might never be recovered. Related to that, Crew states that the gas from these wells is an integral part of its ongoing contractual obligations to supply the market, and a delay in achieving production could result in a breach of its agreements to supply third parties. It faces financial penalties if it cannot do so.

[82] Further, Mr. Dever deposed that production from each well is anticipated to be 5,000,000 cubic feet per day. If the stay applications are granted, and it takes three months for the appeals to be heard and decided, Mr. Dever calculates that the lost gross revenue from these wells would be approximately $370,000 per month per well, for a total loss of $1,480,000 per month of gross revenue. In addition, Crew submits that it has other projects that tie into the timeline planned for the activities authorized under the Permits. If the Permits are stayed, those other projects will foreseeably be delayed and will result in a snowball effect of sorts. Equipment would need to be relocated, employees would foreseeably be impacted, and the Crown would not receive the associated royalties.

[83] Crew points out that the situation has not changed in any meaningful way since the Tribunal denied the Prior Stay Applications. It argues that the same rationale that applied in the Previous Stay Decisions should be applied to the present stay applications. For example, in the first of the Previous Stay Decisions (June 27, 2016), the Tribunal accepted that "a delay of even a few months would cause some harm to Crew's financial interests" which "is unlikely to be compensable." That rationale was applied in the second stay decision (March 2, 2017). Further, a stay would likely lead to a lengthy delay. [The Panel notes that approximately a year and a half elapsed between the decision on the first of the Prior Stay Applications and the hearing of the Prior Appeals. That hearing was prolonged and, had a stay been granted, it would still have been in effect when the submissions on the current stay applications were made. The Panel also notes that a hearing date has not yet been set for the present appeals].

[84] In sum, Crew submits that the balance of convenience weighs against granting a stay: any harm that Penalty Ranch may suffer if a stay is denied is speculative and does not outweigh the significant, demonstrable, financial and operational harm to Crew should the stay be granted.

The OGC's Submissions

[85] The Respondent did not make any submissions about the balance of convenience. The OGC points out that the Panel need not proceed to this stage of the inquiry because Penalty Ranch did not establish irreparable harm.

The Panel's Findings

[86] The Panel has already found against the Applicant for failing to establish that it will suffer irreparable harm if a stay is denied. From the foregoing discussion, the Panel also concludes that the balance of convenience favours Crew. More particularly, the concerns raised, the situation at hand, and the evidence in support are essentially the same as, or consistent with, those addressed in the Previous Stay Decisions: a stay would foreseeably result in greater harm to Crew than to the Applicant. The Panel is not about to second-guess the Tribunal's findings in the Previous Stay Decisions, and no submissions have been made to the contrary.

[87] As was pointed out in the Previous Stay Decisions, Crew will be taking a calculated risk if it chooses to proceed with its operational plans to develop the 12-09 well pad and the associated wells before the appeals of the Permits are heard and decided, because any of the Permits could be rescinded or varied in some significant way.

DECISIONS

[88] In making this decision, the Panel of the Oil and Gas Appeal Tribunal has considered all of the relevant documents and evidence, whether or not specifically reiterated herein.

[89] In conclusion, the stay applications in respect of the Permits are denied. For clarification, this includes the stay applications for both the May Permits and the October Permits.

"Norman Yates"

Norman Yates, Panel Chair
Oil and Gas Appeal Tribunal

August 30, 2018