

Via Email: rblock@blgcanada.com

June 23, 2010

Borden Ladner Gervais LLP
1000, 400 Third Avenue SW
Calgary, Alberta T2P 4H2

Attention: Randall W. Block, Q.C.

Dear Sir:

RE Section 39 Review Request by Talisman Energy Inc. & OMERS Energy Inc. (collectively “Talisman”) on ERCB Decision 2009-050: *Pool Delineation Application: Redesignation of the Lower Mannville C Pool to Rock Creek, Wilson Creek Field* Request for Review of Redesignation Decision Request for Removal of Suspension Review Application No. 1626260 (Review Application)

Talisman Application under Section 33 of the *Oil and Gas Conservation Act* for a Redesignation Order (Redesignation Application)

Talisman has applied under section 39 of the *Energy Resources Conservation Act* (ERCA) for a review of *ERCB Decision 2009-050: Pool Delineation Application: Redesignation of the Lower Mannville C Pool to Rock Creek, Wilson Creek Field* (Decision 2009-050). Decision 2009-050 was issued following a hearing that was initiated by a review application from Nexxtep Resources Ltd. (Nexxtep). In the decision the Board redesignated the Wilson Creek Lower Mannville C Pool in Sections 16 and 21 of Township 43, Range 4, West of the 5th Meridian, to the Jurassic Rock Creek Formation (Rock Creek). The Board also suspended Talisman’s well licence No. 0084269, for the well designated as 00/02-16-43-4 W5M (00/2-16 Well).

Talisman requested that the review proceed in two stages. Talisman asked the Board to immediately lift the suspension of the 00/2-16 well’s licence. Talisman also asked the Board to review the decision to redesignate the Lower Mannville C Pool. Nexxtep and Talisman made submissions in accordance with a process outlined in correspondence from the Board.

For the reasons that follow, the Energy Resources Conservation Board (Board/ERCB) has decided to dismiss the Review Application. The Board has asked me to communicate to the parties the following reasons for its decisions. Unless otherwise indicated, references in this decision to “the Board” are to the Board Members that considered the Review Application and references to the “hearing panel” are to the two Members and one Acting Member who considered the redesignation application and issued Decision 2009-050.

THE TEST - APPLICATION FOR A REVIEW HEARING UNDER SECTION 39

In order to trigger a review of a decision of the Board under section 39 of the ERCA in the case where the applicant has alleged an error of law or jurisdiction or an error of fact, the Board must be of the opinion that the applicant has raised a substantial doubt as to the correctness of the Board's order, decision or direction. In the case where the applicant has alleged new facts, a change in circumstances or facts not previously placed in evidence, the Board must be of the opinion that the new information raises a reasonable possibility that the new facts, change in circumstances or facts not previously placed in evidence, as the case may be, could lead the Board to materially vary or rescind the Board's order, decision or direction.

In Decision 2000-75, the Alberta Energy and Utilities Board provided the following clarification of the criteria to be used to assist in determining whether a review applicant has established substantial doubt as to the correctness of a decision for the purposes of section 39:

- where new evidence, which was not known or not available at the time evidence was adduced and which may have been a determining factor in the decision, became known after the decision was made;
- where a decision is based on an error of law or fact, if such error is either obvious or is shown on a balance of probabilities to exist, and if correction of such error would materially affect the decision;
- where correction of a clerical error or clarification of an ambiguity is required; or
- where other criteria, particular to a given case, are shown to be valid.

Subsection 48(5) of the *Energy Resources Conservation Board Rules of Practice* (Rules) refers to this as the "preliminary question". Talisman's review request alleges errors and also raises new information.

In considering what constitutes an error of law, jurisdiction or fact, the Board was guided by the following principles of judicial review or appeal¹. The hearing panel's duty is to consider all the evidence. An error of law occurs if the hearing panel comes to a conclusion on the basis of no evidence, fails to consider relevant evidence, or relies on non-existent evidence. These kinds of mistakes are errors of analysis, not factual errors, and are reviewed on the correctness standard. Where the weight assigned to the evidence is at issue, a reviewing court will give deference to the Board's decision, provided that there is no palpable and overriding error. The palpable and overriding standard will apply when a finding of fact, or the drawing of an inference of fact, is being challenged. Although it is open to a review court to find that an inference of fact made by the Board is clearly wrong, where evidence exists to support such inference the review court will be reluctant to find a palpable and overriding error. Similar to trial courts, the hearing panel is in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the hearing panel must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the hearing panel to the various pieces of evidence.

¹ Summarized by the Court of Appeal of Alberta in *Ball v. Imperial Oil Resources Ltd.* [2010] A.J. No. 379

REVIEW APPLICATION

In deciding the preliminary question raised in the Review Application, the Board considered each of the grounds for review that were set out in Talisman's submissions. The Board also considered the responses contained in Nexxtep's submissions. The Board has decided that Talisman has not demonstrated the hearing panel made an error of law, jurisdiction or fact that raises a substantial doubt as to the correctness of Decision 2009-050, and therefore the preliminary question on review is not satisfied.

Specifically with respect to Talisman's first category of grounds for review, the Board has found that Talisman's assertions the majority of the hearing panel made decisions based on no evidence, failed to consider relevant evidence, or relied on non-existent evidence, are not borne out by the hearing record that was available to the hearing panel, nor were any such errors indicated in the reasons contained in the decision report. During the proceeding that culminated in Board Decision 2009-050, the Board received much evidence on the question of the correct designation of the zone from which the 00/2-16 well was producing. Nearly the entire decision report is dedicated to discussing the evidence and arguments on the issue and providing the hearing panel's analysis of the designation question. The hearing panel relied extensively on evidence in the nature of expert opinion, for which conflicting interpretations were offered by the hearing participants. In deciding the designation question, the hearing panel was tasked with sorting all the evidence into a cohesive and consistent conclusion of what was the productive formation in the 00/2-16 well. This is reflected in the section headings listed in the Table of Contents for Decision 2009-050, and in the reasons that appear in the decision report under those headings. In the Board's view, no singular piece of information was absolutely determinative of the issue and the multidisciplinary approach to interpreting the evidence as presented by Nexxtep was favoured by the hearing panel majority. Generally speaking, where conflicting expert or interpretive evidence was provided, the hearing panel majority preferred Nexxtep's interpretation of the evidence over Talisman's. While it may disagree with the result, Talisman has not demonstrated that the hearing panel made an error in determining the age of the disputed interval that raises a substantial doubt as to the correctness of Decision 2009-050.

With respect to Talisman's assertion that the Board erred in exercising its authority under section 33 of the *Oil and Gas Conservation Act* (OGCA) to redesignate the disputed zone in the 00/2-16 well, the Board notes that Talisman is essentially re-arguing a point that was addressed by the hearing panel in its ruling on a preliminary matter made prior to the hearing and in Decision 2009-050. In Decision 2009-050 the hearing panel majority found that the interval being produced by the 00/2-16 well was in fact completed in the Jurassic Rock Creek, and not the Lower Mannville as the parties had previously understood or assumed. The Board alone has authority to make that finding, and the resulting pooling correction, under section 33 of the OGCA. The Board understands that those findings have significant consequences for the parties. However, the Board does not believe that ignoring or perpetuating an incorrect pooling designation is justifiable for the reasons argued by Talisman. The Board has therefore decided that the preliminary question is not satisfied on the grounds asserted by Talisman, namely, that the hearing panel erred in exercising the Board's jurisdiction to redesignate the zone in dispute.

With respect to Talisman's assertions of lack of procedural fairness, the Board reviewed the three grounds advanced by Talisman under this heading and has decided that Talisman has not demonstrated a procedural error or unfairness in the proceeding that casts a substantial doubt on the correctness of Decision 2009-050.

Based on the foregoing, the Board decided to deny the Review Application.

TALISMAN'S REQUEST TO REVIEW THE SUSPENSION DECISION

Having found that the 00/2-16 well was producing from the Rock Creek and not producing from the Lower Mannville, the hearing panel decided to suspend the well. It relied upon the evidence in the hearing, including Talisman's and Nexxtep's respective submissions, that ownership of the Rock Creek was in dispute and was the subject of litigation. The Board has decided that Talisman has not demonstrated the hearing panel made an error in deciding to suspend the licence for the 00/2-16 well. The parties themselves appear to be in agreement that ownership of the Rock Creek in section 16 is unclear. Ownership remains to be decided by a legal interpretation of the various grants and agreements between Talisman and other parties, including some who did not participate in the hearing.

In the Review Application Talisman made further submissions concerning ownership of rights in section 16. Notwithstanding those additional submissions, the Board is of the view that until the ownership of the Rock Creek in section 16 is resolved, whether by agreement or via litigation, Talisman does not meet the applicable requirements to produce the Rock Creek from the 00/2-16 well. The Board has therefore decided that Talisman has not raised a substantial doubt as to the correctness of the decision to suspend the licence for the 00/2-16 well. Accordingly, the ERCB has decided to deny the request to remove the suspension.

REDESIGNATION APPLICATION

In addition to Review Application, Talisman applied under section 33 of the OGCA for a redesignation of the pooling in section 16. The Board considers the application to be in substance the same as Talisman's request to review Decision 2009-050. Having decided that it will not review Decision 2009-050, the Board has directed that the Redesignation Application be denied.

If you have any questions in relation to this letter please feel free to contact me or Gary Perkins of the ERCB's Law Branch.

Yours truly,

Patricia M. Johnston, Q.C.
General Counsel

cc: B. Roth (via email)