ERCB

West Energy Ltd./Daylight Energy Ltd.

Review Application No. 1647499

A Section 39 Review of Linda McGinn's Status under Section 26 of the *ERCA* re Hearing of Application No. 1623169
Pembina Field

February 2, 2011

Energy Resources Conservation Board

ENERGY RESOURCES CONSERVATION BOARD
2011 ABERCB 002: West Energy Ltd./Daylight Energy Ltd.,
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Energy Resources Conservation Board
Suite 1000, 250 – 5 Street SW
Calgary, Alberta
T2P 0R4

Telephone: 403-297-8311
Fax: 403-297-7040
E-mail: Hinfoservices@ercb.caH
Web site: Hwww.ercb.caH

ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

WEST ENERGY LTD./DAYLIGHT ENERGY LTD.
A SECTION 39 REVIEW OF LINDA MCGINN'S STATUS
UNDER SECTION 26 OF THE *ERCA* RE HEARING
OF APPLICATION NO. 1623169 **2011 ABERCB 002**
PEMBINA FIELD **Review Application No. 1647499**

DECISION

[1] Having carefully considered the submissions of West Energy Ltd./Daylight Energy Ltd. (West/Daylight) and Linda McGinn, the Energy Resources Conservation Board (ERCB/Board) has determined that Ms. McGinn has not met the test under Section 26 of the *Energy Resources Conservation Act* (*ERCA*) to trigger a hearing of Application No. 1623169. The Board hereby reverses the panel's decision communicated by letters dated January 19, 2009 [*sic*—should be 2010] and February 1, 2010.

INTRODUCTION

Background

[2] On September 4, 2009, West Energy Ltd. (West) filed Application No. 1623169 seeking approval for a crude oil well with 21.15 per cent hydrogen sulphide (H_2S) content and a calculated emergency planning zone of 2.11 kilometres (km). The proposed location was Legal Subdivision 16, Section 5, Township 50, Range 6, West of the 5th Meridian.

[3] By letters dated May 25 and July 13, 2009, Ms. McGinn objected to Application No. 1611364 (the original application for the well, now designated Application No. 1623169). Ms. McGinn owns and resides on lands located at SE 18-050-06W5M, which is about 2.70 km from the proposed well; her residence is about 2.95 km from the proposed well.

[4] The panel appointed to hear Application No. 1623169 concluded that Ms. McGinn may be directly and adversely affected by its decision on the application and, by way of letters dated January 19, 2009 (*sic*) and February 1, 2010, advised West and Ms. McGinn accordingly.

[5] By letter dated April 14, 2010, West applied to the ERCB under Section 39 of the *ERCA* requesting a review of the panel's decision.

[6] Effective on or about May 14, 2010, West amalgamated with Daylight Energy Ltd.

[7] On September 20, 2010, the Board (excepting members of the panel who recused themselves from the decision on the review application) concluded that West/Daylight met the test to trigger a review of the panel's decision under Section 39 of the *ERCA*. The Board directed that a new panel be assigned to the review and that the review be conducted as a written proceeding.

Written Review Hearing

[8] The Board considered the review application by way of written hearing in Calgary, Alberta, before Board members G. Eynon, P.Geol. (Presiding member); J. D. Dilay, P.Eng.; and T. L. Watson, P.Eng.

[9] The written hearing began with West filing the review application dated April 14, 2010. The hearing closed on December 13, 2010, following receipt by the Board of the final submissions of West/Daylight. Those who participated in the written hearing are listed in the Appendix.

ISSUES

[10] In connection with the review application, the Board considered

- whether the panel erred in finding that the applicable flaring notification radius for the well proposed in Application No. 1623169 was 3.0 km and
- whether the panel erred in finding that Ms. McGinn met the test under Section 26 in respect of the hearing of Application No. 1623169 of the *ERCA* because she resides within the flaring notification radius for the proposed well.

[11] In reaching its decision on the review application, the Board considered all relevant materials and submissions constituting the record of this proceeding, including the evidence and argument provided by each party. Accordingly, references in this decision to specific parts of the record are intended to help the reader understand the Board's reasoning relating to a particular matter and should not be taken as an indication that the Board did not consider all relevant portions of the record with respect to that matter.

ANALYSIS

Flaring Notification Radius

[12] West/Daylight submitted that the panel erred in issuing its decision because Ms. McGinn did not reside within the appropriate flaring notification radius for the proposed well. West/Daylight asserted that the proposed well is an oil well, not a gas well, and that the applicable flaring notification radius is 1.5 km. As Ms. McGinn did not reside within 1.5 km of the proposed well, West/Daylight submitted that she was not entitled to receive flaring notification in respect of the proposed well. West/Daylight relied on Section 7.060(9.5) of the *Oil and Gas Conservation Regulations* (*OGCR*), which provides that the flaring notification radius for an oil well is 1.5 km.

[13] Ms. McGinn submitted that because the proposed well would be capable of producing and flaring gas, it should be characterized as a gas well and the flaring notification radius should be 3.0 km. Ms. McGinn relied on Section 3.9 of *Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting*, which provides that the flaring notification radius is 3.0 km for a well that produces gas containing more than 10 per cent H_2S.

[14] There was much debate in the submissions filed by West/Daylight and Ms. McGinn regarding whether the proposed well should be characterized as a gas well or an oil well. Natural gas can be encountered during drilling of and produced from either a gas well or an oil well. The Board finds that, for the purposes of its decision on the review application, whether the proposed well is properly categorized as an oil well or a gas well is not important.

[15] The Board finds that the expected H_2S content, the duration of flaring, and the gas volume are what determine the flaring notification zone for the proposed well. As per Application No. 1623169, the proposed well is expected to contain up to 21.15 per cent H_2S.

[16] The Board finds that the flaring notification requirements in the *OGCR* are clearly stated as minimums only. The *OGCR* bases minimum flaring notification requirements on the well type (gas or oil). *Directive 060* bases minimum flaring notification requirements on H_2S content of the gas produced from the well, the volume of the gas, and duration of the testing. The Board finds that Section 3.9 of *Directive 060* clarifies and amplifies the minimum flaring notification requirements in the *OGCR*. The Board also finds that the flaring notification requirements applicable to the well proposed in Application No. 1623169 are found in Section 3.9 of *Directive 060*.

[17] Given that the expected H_2S content of the proposed well is 21.15 per cent**,** the duration of the flaring is likely to be more than four hours, and the gas volume flared is likely to be more than $10 \times 10^3 m^3$, the flaring notification zone radius is 3.0 km. As Ms. McGinn resides within that area, she is entitled to notice of flaring activities at the proposed well. The issue is whether this fact confers any rights on Ms. McGinn and/or is evidence that she meets the test under Section 26 of the *ERCA* to trigger a hearing of Application No. 1623169.

Purpose of Flaring Notification

[18] The primary purpose of *Directive 060* is to reduce or eliminate flaring, incinerating, and venting of solution or associated gas produced during drilling, completion, and production. Operators use flaring, venting, and incinerating as means of disposing of such gas. As with all energy resources within its jurisdiction, the ERCB prefers that such gas be conserved, as it is a valuable resource, and mandates its conservation when it is economical to do so. To the extent that conservation of solution or associated gas is not possible or economical, *Directive 060* permits it to be disposed of in compliance with that directive (i.e., via flaring, incinerating, or venting).

[19] If a licensee finds it necessary to vent, flare, or incinerate solution or associated gas, it must do so in a manner that complies with *Directive 060*. Unless specifically exempted under *Directive 060*, flaring must be approved by the ERCB before it occurs. The requirements in *Directive 060* were developed by the ERCB in consultation with the Clean Air Strategic Alliance (CASA). *Directive 060* prescribes the requirements and the application and approval process applicable to the flaring of solution gas.

[20] During its review of a flaring application for testing and/or completion of a well, the ERCB examines the amount of gas proposed to be flared, and if applicable, it looks at sulphur emissions, potential health and environmental impacts, economic alternatives to flaring, and any other regulatory requirements that must be considered and addressed before it permits flaring. The ERCB also decides whether the proposed flaring activity can comply with the Alberta

Ambient Air Quality Objectives (AAAQO). If the proposed flaring cannot meet the AAAQO, if there are safety concerns, or if viable economic alternatives to flaring or venting are available, an operator will not be permitted to flare or vent solution or associated gas.

[21] In other words, concerns about public health and safety and any potential impacts of flaring are addressed by the requirements under *Directive 060*, which must be met before flaring will be permitted. In all cases any concern would have been addressed at the well licensing stage before notification of future flaring activities occurs. The issuance of the flaring permit is evidence that the flaring meets the AAAQO and economic hurdles. It is also evidence that the operator proposes to conduct flaring in a manner that complies with all applicable regulatory requirements, is safe, and is protective of the environment and human health.

[22] The ERCB's flaring regulatory requirements and approval process take into account and address public safety and health. The subsequent flaring notification requirements in *Directive 060* and *OGCR* are intended to avoid surprises for local residents and are not based on concerns about public health and safety or potential adverse effects of the activities. The notification requirements are intended as a courtesy to area residents so that they are informed, 24 to 72 hours in advance, that flaring is about to occur. Further, under ERCB requirements operators are not required to get consent from residents in the flaring notification radius before they conduct flaring.

[23] While the ERCB investigates all flaring related complaints, it will permit an operator to conduct flaring activities in the face of a complaint if the activities are in compliance with *Directive 060*. Once flaring is approved, notification of the pending activity to persons residing in the flaring notification radius in *Directive 060* is conducted. Notification is a courtesy only. Based on this, the Board finds that, as was the case in the Court of Appeal decision in *Cheyne* v. *Alberta Utilities Commission*[1] (*Cheyne Decision*), residence in the flaring notification zone is "no evidence of anything" and is certainly not evidence of any direct and adverse impact that may be suffered as a result of flaring.

[24] West/Daylight submitted that the panel erred in finding that Ms. McGinn's residence in the flaring notification zone for the proposed well formed the basis of its decision that she met the test under Section 26 in respect of a hearing of Application No. 1623169. West/Daylight submitted that the panel erred in law by incorrectly interpreting the Court of Appeal decision in *Kelly v. Alberta (Energy Resources Conservation Board)*[2] (*Kelly Decision*) as conferring a legal right and evidencing a potential direct and adverse impact on legal rights and using that interpretation as the basis for its decision. West/Daylight also submitted that the panel erred in law by incorrectly interpreting the *Cheyne Decision*.

[25] The Board agrees that the Court's comments in the *Kelly Decision* about the effect of residing in the flaring notification zone for a well are *obiter dicta*[3] and that the Court made no binding determination that residence within a flaring notification zone, in itself, evidences potential direct and adverse effects.

1 2009 ABCA 348
2 2009 ABCA 349
3 *obiter dicta* is Latin for a statement that is an incidental and collateral opinion by a judge but is not binding; literally, something said in passing

[26] The Board finds that the panel, in making its decision, relied on the fact that Ms. McGinn resided in the 3.0 km flaring notification radius of the proposed well. The panel concluded that, based on the *Kelly Decision*, this fact alone was evidence that her rights may be directly and adversely affected by its decision on Application No. 1623169. The Board finds that, in doing so, the panel erred in failing to consider that the comments of the Court in the *Kelly Decision* regarding the flaring notification requirements in *Directive 060* were *obiter dicta*, not the *ratio decidendi*[4] of that decision. This error was material to the panel's decision.

[27] The Board also finds that the panel erred in its finding that the rule under consideration in the *Cheyne Decision*[5] differed so significantly from the flaring notification requirements in *Directive 060* and the *OGCR* as to make that decision inapplicable to the facts before it. In its decision, the panel found that the *OGCR* is silent on the reasons for the flaring notification requirements. However, the panel also found that because *Directive 060* makes indirect references to health and safety (though not in Section 3.9, which is the provision that contains the flaring notification requirements), the facts in the *Cheyne Decision* differed and were distinguishable from the facts before it.

[28] The Board finds that the provisions of the *OGCR* (Section 7.060[9.5]) and *Directive 060* (Section 3.9) that prescribe flaring notification requirements do not mention health, safety, or danger and are therefore directly comparable to the rule under consideration by the Court in the *Cheyne Decision*. In that respect, the Board finds that, like the notification requirement under consideration in the *Cheyne Decision*, the flaring notification requirements in *Directive 060* and the *OGCR* are "no evidence of anything" and are therefore not, in themselves, evidence that residents within that area may be directly and adversely affected by flaring. The Board therefore finds that the panel incorrectly distinguished the *Cheyne Decision* from the facts before it. This error was material to the panel's decision.

FINDINGS

[29] On the basis of the foregoing, the Board finds that:

- The flaring notification radius for the well proposed in Application No. 1623169 is 3.0 km;
- Ms. McGinn resided within the flaring notification radius for the well proposed in Application No. 1623169;
- The regulatory requirements applicable to flaring and the approval process itself take into account any health and safety effects of flaring. When flaring is approved, the ERCB has satisfied itself that any potential health and safety impacts associated with flaring have been addressed by the applicant;
- Notification to nearby residents of flaring activity under *Directive 060* and the *OGCR* occurs following the flaring approval. Flaring notification is a courtesy only, and is

[4] *ratio decidendi* is Latin for the reasoning or rationale for the decision; those parts of legal reasoning within a decision on which the outcome of the case depends

[5] Section 7.1, Paragraph TS 11 of Alberta Utilities Commission Rule 007

no indication of any potential impacts resulting from the flaring activity that has been approved;

- The panel erred in its interpretation and application of both the *Kelly Decision* and the *Cheyne Decision*; and
- The panel's erroneous interpretation of those decisions was material to and formed the basis of its finding that Ms. McGinn's residence within the flaring notification radius was sufficient to meet the test under Section 26 of the *ERCA*.

[30] The Board has therefore determined that Ms. McGinn does not meet the test under Section 26 of the *ERCA* to trigger a hearing of Application No. 1623169. The Board therefore reverses the panel's decision.

[31] Notwithstanding its decision the Board notes that it is within the panel's discretion as to whether and to what extent Ms. McGinn may participate in the hearing of Application No. 1623169.

Dated in Calgary, Alberta, on February 2, 2011.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

G. Eynon, P.Geol.
Presiding Member

<original signed by>

J. D. Dilay, P.Eng.
Board Member

<original signed by>

T. L. Watson, P.Eng.
Board Member

APPENDIX HEARING PARTICIPANTS

Principals and Representatives (Abbreviations used in report)	Witnesses
Linda McGinn J.Klimek	None
West Energy Ltd./Daylight Energy Ltd. G. Fitch	None
Energy Resources Conservation Board staff P. Johnston, Board Counsel B. Hurst G. McLean J. Vaughan	