Alberta Energy Regulator

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BY E-MAIL ONLY

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Attention: Lewis L. Manning

CANADIAN NATURAL RESOURCES LIMITED (CNRL)
APPLICATION NO. 1712215
KIRBY IN SITU OIL SANDS EXPANSION PROJECT
WABISKAW-MCMURRAY DEPOSIT/ATHABASCA OIL SANDS AREA
ALBERTA ENERGY REGULATOR (AER)

Dear Ms. Conroy and Mr. Manning:

On November 13, 2013, the Alberta Energy Regulator (AER) issued a notice of hearing in relation to the above application by CNRL for approval of its Kirby Expansion Project (the "Project"). The notice asked parties who wished to participate in the hearing to file a written submission stating:

- why the party believed it may be directly and adversely affected by the AER's decision on the application, or why the party believed it should be permitted to make representations on the matter to assist the AER;
- the nature and scope of the party's intended participation;
- the disposition of the application the party advocates and the reasons therefor;
- a brief description of the evidence the party intends to present; and
- the party's efforts to resolve issues directly with the applicant.

The AER hearing panel assigned to this proceeding (the "Panel") received written submissions from Ms. Conroy on behalf of her client Beaver Lake Cree Nation ("BLCN"), and a written submission dated January 24, 2014, from counsel for CNRL. The Panel has considered those submissions in the context of subsection 9(3) of the *Alberta Energy Regulator Rules of Practice* (the "Rules") and has decided that BLCN has not demonstrated that it may be directly and adversely affected by the Panel's decision on the application or that BLCN should otherwise be permitted to participate in a hearing. As a result, the Panel has decided that BLCN will not be permitted to participate in a hearing of the application. The Panel has in fact determined that none of the parties that filed a submission in response to the notice of hearing will be permitted to

participate in a hearing and therefore the AER will not be scheduling a hearing of the application but will instead disposition the application without a hearing as provided under subsection 34(1) of the *Responsible Energy Development Act* ("REDA"). The Panel has asked me to communicate the following reasons for its decision under subsection 9(3) of the Rules.

Subsection 9(3) of the Rules states:

> **(3)** The Regulator may refuse to allow a person to participate in the hearing on an application if the Regulator is of the opinion that any of the following circumstances apply:
>
> (a) the person's request to participate is frivolous, vexatious, an abuse of process or without merit;
>
> (b) the person has not demonstrated that the decision of the Regulator on the application may directly and adversely affect the person;
>
> (c) in the case of a group or association, the request to participate does not demonstrate to the satisfaction of the Regulator that a majority of the persons in the group or association may be directly and adversely affected by the decision of the Regulator on the application;
>
> (d) the person has not demonstrated that
>
> (i) the person's participation will materially assist the Regulator in deciding the matter that is the subject of the hearing,
> (ii) the person has a tangible interest in the subject-matter of the hearing,
> (iii) the person's participation will not unnecessarily delay the hearing, and
> (iv) the person will not repeat or duplicate evidence presented by other parties;
>
> (e) the Regulator considers it appropriate to do so for any other reason.

The Panel noted that subsection 9(3) of the Rules applies to BLCN's request to participate in the hearing, namely that BLCN asserts it may be directly and adversely affected by the AER's decision on the application. Counsel for CNRL cited the factual part of the test set out in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* as guidance on what indicates that a party may be directly and adversely affected. The Panel agreed that the statement from *Dene Tha'* that "some degree of location or connection between the work proposed and the right asserted is reasonable" remains a valid consideration when the AER assesses the potential for a direct and adverse effect. The statement is also consistent with decisions of Alberta courts and the Alberta Environmental Appeals Board ("EAB") that describe the "directly affected" test applied by the EAB. One recent EAB decision summarized the test:

> 28] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their

proximity), the more likely the person is directly affected. The onus is on the appellant to present a prima facie case that he or she is directly affected. [1]

BLCN stated that its members exercise treaty rights and carry out traditional activities on lands within and adjacent to the Project area. These activities include hunting, fishing, trapping, and gathering. BLCN also stated that the southern portion of the Project lease area overlaps with Registered Fur Management Area (RFMA) #2304, which is held by a BLCN member and gives that individual a statutory right to commercially harvest fur. BLCN further stated that the impacts and potential impacts of the Project are numerous and include:

- elimination or restriction of access to the Project lands;
- use of the Project lands in a matter incompatible with traditional harvesting both on and near the lease area;
- adverse impacts on listed species of significance to the BLCN;
- adverse impacts on water, fish habitat, and fish in and downstream from the Project area;
- elimination of traditional plants in the Project area which cannot be reclaimed; and
- the Project's contribution to the already unacceptable cumulative impacts of resource development projects in the region on BLCN's constitutionally protected rights.

In addition to its written submission and the nine members' questionnaires or affidavits that BLCN filed in confidence, BLCN relied on statements of concern that it filed before the notice of hearing was issued. It also stated that CNRL's application material confirms the Project is within BLCN's traditional territory.

BLCN also stated that the federal and provincial Crowns have not adequately consulted the BLCN and this constitutional duty must be met in advance of Project approvals being issued.

CNRL stated that a party seeking to participate in a hearing must provide specific information that demonstrates a direct connection between the Project and demonstrated land use in proximity to the Project site. It referred to previous decisions in which the AER found that Aboriginal groups had not demonstrated a direct connection between projects and traditional land uses in proximity to a project that was substantiated by evidence of a degree and frequency of use. It also stated that RFMA #2304 is held personally by an individual who has not indicated he has concerns with Project effects on his commercial trapping, and in any event the rights under the RFMA belong to that individual and BLCN cannot assert that it is directly affected based on potential impacts on the RFMA holder's interests or activities.

[1] *Tomlinson v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Evergreen Regional Waste Management Services Commission* (03 April 2013), Appeal No. 12-033- ID 1 (A.E.A.B.).

BLCN stated it is a Treaty 6 First Nation with unextinguished Aboriginal rights, including those under the treaty and pursuant to the *Natural Resources Transfer Agreement*. The Project would be located on public lands in the Green Area. The Panel accepted that BLCN members may be entitled to exercise rights on or in proximity to Project lands that are public lands and have not been put to a use that is incompatible with the exercise of Aboriginal rights. This conclusion does not appear to be disputed by CNRL; rather, CNRL states that BLCN has failed to demonstrate *actual* use of lands and other natural resources in the Project area by its members and a potential for those to be directly affected by the Project.

In *Dene Tha*, the court indicated that an Aboriginal group that asserts it may be directly and adversely affected by development or activity proposed in an application before the Regulator needs to provide "hard information" to the Regulator about locations where rights are exercised and how the members may be affected:

> [18] There had been discussions and provision of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were to be within the reserve. The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta.

BLCN stated that the six questionnaires and three affidavits from BLCN members, and the environmental impact assessment (EIA) for the Project, demonstrate a degree of location or connection between the Project and BLCN's Aboriginal and treaty rights (as expanded by the NRTA). In reviewing the members' questionnaires and affidavits, the Panel noted that five of the maps depict the member's harvesting activities taking place within a personal traditional use area that is much larger than the Project area: ranging between approximately one-half of the area shown on the map to the entire area shown on the map. Each map is a copy of Figure 1 of the Project application and the area displayed on the map is approximately 800 townships in eastern Alberta and western Saskatchewan. Another map depicts the member's personal traditional use area as being the same width as the entire Kirby project lands (east to west), and approximately three times longer (north to south) than the entire Kirby project lands. The other three maps identify numerous smaller personal traditional use areas that range in size between a fraction of a township to a full township. None of the nine BLCN members who provided a map of his or her personal traditional use areas plotted a specific location that is within the Project lands. None of the statements contained in the questionnaires and affidavits identifies that a traditional land use activity occurs at a specific location within the Project lands. In the Panel's opinion, the members' questionnaires and affidavits do not demonstrate that BLCN traditional land use at a specific site within or in proximity to the Project could be directly and adversely affected if the Project

proceeds, or that a member's use of natural resources may be impacted by the Project in a way that results in a direct and adverse effect on the member. The questionnaires and affidavits did not have the detail that is needed to show the degree of location or connection between the Project and the asserted impacts on traditional land users that demonstrates a potential for the Project to directly and adversely affect a BLCN member.

BLCN's statement that CNRL's application indicates Aboriginal groups may be affected by the Project is accurate; however, the Aboriginal groups that are identified as potentially being affected do not include BLCN. Figure 10 in the Traditional Land Use Baseline Report dated December, 2011 (the "TLU Report") is a map that identifies traditional use locations within or in proximity to the Project lands and it does not include any BLCN traditional use locations. Table 2 of the TLU Report is a summary of traditional land use information within the local study area and it does not identify any BLCN uses in or near the Project lands. BLCN stated in its submissions that the TLU Report fails to consider or analyze any traditional uses or impacts on the BLCN, and that the application "totally omits any reference to BLCN activities in the area."[2] BLCN asserts that additional work is needed to better determine and document potential impacts of the Project on the BLCN. On page one of its Traditional Land Use Update dated December, 2012, CNRL indicated that capacity funding was offered to BLCN (and others) for the completion of TLU/Traditional Ecological Knowledge studies but the offer was not accepted by most of the groups to which it was offered, including BLCN. CNRL's written response to BLCN's request to participate in the hearing provides a history of CNRL's engagement with BLCN. The Panel was satisfied that CNRL has provided adequate opportunities for BLCN to participate in a process to identify whether the Project may directly and adversely affect BLCN or its members.

BLCN stated that one of its members is the holder of RFMA #2304 and would be directly and adversely affected by the Project. The Panel noted that the RFMA holder has not indicated he has concerns with the Project. In any event, the Panel also noted that the right to harvest fur commercially under an RFMA is a personal right that belongs to the holder. The RFMA does not extend rights to or engage the rights of the Aboriginal group to which an RFMA holder belongs.

The Panel also noted the current approved land uses in the area of the Project, in particular that the Project proposes to amalgamate existing approvals held by CNRL for the Kirby North Project (Approval No. 11472B) and the Kirby South Project (Approval No. 11475H). As a result, much of the public land in the Project area has already been approved for development as an in-situ oil sands project and some of that development has been constructed and is operating (CNRL is currently operating 7 well pads at the Kirby South Project).

[2] BLCN's statement of concern dated September 27, 2013, at page 13.

BLCN stated that the federal Crown and provincial Crown each have a duty to consult with BLCN that has not been satisfied. The Panel noted that section 21 of the REDA states that the AER has no jurisdiction to assess the adequacy of Crown consultation associated with the rights of Aboriginal peoples. The Panel decided that it would not be appropriate to allow BLCN to participate in a hearing of the application for the purpose of assessing whether the Crown had a duty to consult with BLCN or if any such duty had been met.

In conclusion, the Panel has decided that the information available to it does not demonstrate the degree of location or connection between the Project and the rights or traditional land uses that are asserted by BLCN to satisfy the directly and adversely affected test. The information in CNRL's application does not locate any BLCN uses within or in specific proximity to the Project area. The Panel is of the opinion that BLCN has not demonstrated that the AER's decision on the Project application may directly and adversely affect the BLCN, and the Panel has decided that BLCN will not be extended participation rights in a hearing of the Project application.

If you have any questions in relation to this letter or the Panel's decision please feel free to contact me at gary.perkins@aer.ca, or direct phone (403) 355-4292.

Yours truly,

Gary D. Perkins
Associate General Counsel