Alberta Energy Regulator

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BY FAX AND E-MAIL

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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 Councilor Janvier, Ms. Lambert, Ms. Clark 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 Councilor Cecil Janvier on behalf of Cold Lake Frist Nations ("CLFN"), 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 CLFN has not demonstrated that it may be directly and adversely affected by the Panel's decision on the application or that CLFN should otherwise be permitted to participate in a hearing. As a result, the Panel has decided that CLFN 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 CLFN's request to participate in the hearing, namely that CLFN 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]

CLFN stated that it is a Treaty 6 First Nation and that the Project is located approximately 100 kilometres northwest of its reserves, within its traditional territory along the northwest border of the Cold Lake Air Weapons Range. It stated that its members have practiced and continue to practice their treaty and Aboriginal rights in the Project area and it has concerns that the Project will impact their ability to use the Project area for those purposes. It also stated that the Project area has many natural resources and it estimated that twenty or more families will be affected by the Project. CLFN also cited the following concerns with the Project:

- impacts on the Cold Lake woodland caribou herd, which is already facing extirpation;
- loss or alteration of 1,602 hectares of traditional use plants, with residual effects and environmental consequences for wildlife abundance;
- CNRL's record as a safe operator, in particular how it has dealt with the reported bitumen releases at its Primrose-Wolf Lake site. CLFN also stated that CNRL's emergency response plan and spill response plan are not effective to protect CLFN; and
- CLFN's lack of faith in CNRL's reclamation and remediation plans.

CLFN asked the AER to impose the following conditions in any approvals it may grant to CNRL for the Project:

1. Development of a mutually acceptable ongoing communication plan between CNRL and CLFN in respect of routine operations for the life of the Project, to be approved by the AER prior to construction;

2. Development of a mutually acceptable emergency response communication and action plan between CNRL and CLFN in respect of any spills, releases, blow-outs or any other emergency event, to be approved by the AER prior to construction; and

3. Development of a mutually acceptable plan between CNRL and CLFN for meaningful engagement in any and all remediation and reclamation related to the Project, to be approved by the AER prior to construction.

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[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.).

CLFN submitted that an open, transparent and public hearing by the AER is necessary to understand the impacts of the Project on the treaty and Aboriginal rights exercised by CLFN and its neighbouring First Nations.

In its response to CLFN's hearing submission, CNRL summarized its consultation history with CLFN in relation to the Project. CNRL stated that it was told at different times by CLFN that the Project was within or alternatively outside of CLFN's traditional territory. CNRL wrote in its submission:

> 38. Despite the inconsistent information received by CLFN, Canadian Natural acknowledges that the Project does overlap with a very small portion of CLFN's traditional territory. However, the Project is approximately 85 km from the closest CLFN reserve (IR 149C) (252 km by road). In addition, in order to access the area of the Project, CLFN is required to go around the Cold Lake Air Weapons Range.

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. CNRL submitted that CLFN has not identified any Project-specific issues or concerns, nor has it worked with CNRL to address concerns. CNRL also stated that it received no information from CLFN demonstrating that CLFN members actually frequent or use the area of the Project, or to what degree, if any, CLFN members may be affected or even value the area. In response to CLFN's statement that 1,602 hectares of traditional use plants would be affected by the Project, CNRL stated that the presence of traditional plants varies within that area, and in any event only 46 hectares are within CLFN's traditional territory. CNRL's belief is that CLFN's request to participate is almost entirely founded on its concerns related to CNRL's activities in the Primrose and Wolf Lake areas that involve different geological conditions and resource recovery methods (Cyclic Steam Stimulation as opposed to Steam Assisted Gravity Drainage).

CLFN stated it is a Treaty 6 First Nation with 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 CLFN 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. The Panel noted that CNRL and CLFN's respective maps of CLFN's traditional territory coincide, and that only a small fraction of the south-east corner of the Project lands fall within CLFN's traditional territory.

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.

CLFN stated that twenty or more families may be affected by the Project but it does not identify those families or indicate where their interests or activities are located in relation to the Project lands, or how they may be affected if the Project proceeds. CLFN also stated that with resources from CNRL to complete a traditional land use study for the area it would be in a better position to provide specific details of names, dates and seasonal harvesting activities. In its submission and its Traditional Land Use Update, CNRL indicated that it consulted with CLFN and offered capacity funding for the completion of traditional land use/traditional ecological knowledge studies but CLFN did not accept the offer and did not identify concerns with the Project until it filed its request to participate in the hearing. The Panel considered that the concerns raised by CLFN about Project effects on the airshed, woodland caribou, traditional plants and other species are general in nature and are not related to the Project or the Project lands. Given the efforts made by CNRL to engage CLFN in a process to identify any Project-related effects on CLFN's members or interests, the Panel is satisfied that the AER's consultation requirements have been met and that CLFN has had a reasonable opportunity to identify specific concerns with the Project.

The Panel also considers that CLFN's concerns about CNRL's operations at Primrose and Wolf Lake should be addressed in the context of the ongoing investigation of those incidents and not in a hearing of the Project application, which involves different geological conditions and a different resource recovery method.

In considering CLFN's proposed approval conditions the Panel noted that each of them requires CNRL and CLFN to arrive at a mutually acceptable communication or engagement plan. The Panel considered that requiring two independent parties to come to a mutual agreement about how they will interact and engage with each other is not an appropriate condition to impose in a regulatory decision. Nevertheless, the Panel encourages the parties to continue their efforts to work towards agreement on those matters.

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).

In conclusion, the Panel has decided that CLFN has not demonstrated that it may be directly and adversely affected if the Project proceeds, or that a CLFN member's use of lands or natural resources in or near the Project lands may be impacted by the Project in a way that results in a direct and adverse effect on CLFN or the member. The information in CNRL's application does not locate any CLFN uses within or in specific proximity to the Project area. The Panel has therefore decided that CLFN 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