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 Mr. McElhanney 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 Mr. McElhanney on behalf of his client Fort McMurray #468 First Nation ("FMFN"), 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 FMFN has not demonstrated that it may be directly and adversely affected by the Panel's decision on the application or that FMFN should otherwise be permitted to participate in a hearing. As a result, the Panel has decided that FMFN will not be permitted to participate in a hearing of the application. The Panel has in fact determined that none

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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;
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> (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 FMFN's request to participate in the hearing, namely that FMFN 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]

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FMFN stated that it is a Treaty 8 First Nation and it has been pursuing a treaty land entitlement claim since 1980. It said that half its members live on two reserves on the south side of Gregoire Lake, which is about 30 km south of Fort McMurray, and the other half live off-reserve or on one of two other FMFN reserves. FMFN said it has statutory and common law rights as well as treaty and other constitutional rights. FMFN stated it is still in the process of identifying all of its traditional territory but there is no doubt that lands downstream from the Project are within its traditional territory. FMFN stated the following concerns in relation to the Project:

- the Project would contribute to the existing oil sands development that already infringes FMFN's rights, and will increase the risks to FMFN's members' livelihood, well-being, health and safety;
- FMFN members practice Aboriginal and treaty rights that are integral to their culture on the lands within and surrounding the Project area, and the Project will impact FMFN's traditional harvesting practices;
- the Project will dramatically increase CNRL's footprint in the area and will reduce FMFN's members' access to the area; and
- CNRL has failed to meaningfully consult with FMFN about the Project and has failed to link the Project's effects to the FMFN. As a result, the application materials are insufficient to allow the AER to determine if the Project is in the public interest.

FMFN stated that no action has been taken to justify the infringement of FMFN's constitutional rights and that the provincial Crown has not consulted FMFN about the Project, and therefore approval of the Project would violate section 35 of the *Constitution Act, 1982*. FMFN indicated it intended to raise the following constitutional law questions:

1. Does the prohibition against considering the adequacy of Crown consultation in section 21 of the REDA breach the *Constitution Act, 1982* by denying FMFN an independent forum to address unjustified infringements of FMFN's constitutionally-protected rights?

2. Does the prohibition against considering the adequacy of Crown consultation in section 21 of the REDA breach the Constitution Act, 1982 by denying FMFN an opportunity to address unjustified infringements of its Aboriginal and Treaty Rights, of which Crown consultation is only one element?

CNRL summarized the steps it had taken since 2006 to engage FMFN on the Kirby South project, and subsequently on the Project, and stated that despite its efforts CNRL was not made aware of

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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.).

any Project-specific concerns that FMFN had until FMFN filed its request to participate in the hearing. 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.

FMFN stated it is a Treaty 8 First Nation with Aboriginal rights, including those under the treaty as modified by the *Natural Resources Transfer Agreement*. The Project would be located on public lands in the Green Area. The Panel accepted that FMFN 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, which acknowledges that the Project is located within FMFN's traditional territory approximately 93 km from the closest FMFN reserve. CNRL states, however, that FMFN has failed to demonstrate *actual* use of lands and other 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.

FMFN stated that the Project will impact its members' traditional harvesting practices on the Project lease and the lands surrounding the Project. The Panel reviewed the FMFN's submissions and considered that no site-specific information was provided by FMFN to indicate where traditional harvesting practices took place upon or in proximity to the Project lands, or how a site-specific activity might be affected if the Project proceeds. The Panel concluded that FMFN's submissions in relation to project-effects are general in nature and are not supported by specific examples, reports or studies.

The Panel also referred to Figure 10 in the Traditional Land Use Baseline Report dated December, 2011 (the "TLU Report") that was filed by CNRL. Figure 10 is a map that identifies traditional use locations within or in proximity to the Project lands. The Panel noted that a caribou calving

area attributed to FMFN is plotted in the Project's local study area, and that this is confirmed in Table 2 of the TLU Report which also identifies hunting, trapping, and plant harvesting locations in the local study area that are associated with FMFN. The Panel determined that there is no other information to indicate if or how FMFN uses these areas or what affect the Project might have on FMFN's use of the areas. The Panel decided that it could not infer the potential for a direct and adverse effect on FMFN based only on general information about the existence of a caribou calving area or harvesting areas in the local study area. The Panel also reviewed Table 1 of the TLU Report, which is a summary of traditional land use information within the Project's regional study area. The Panel noted that it identifies FMFN hunting, trapping, fishing and harvesting to the north and north-east of the Project lands, in the vicinity of Christina Lake and Winefred Lake, but there is no other information about the nature or extent of those activities, or how the Project might impact them.

The Panel reviewed CNRL's description of its consultation with FMFN and was satisfied that CNRL had met the AER's consultation requirements. The Panel wishes to confirm that the question whether the Crown has met its consultation obligation to an Aboriginal group is not one that the AER can consider in a hearing of the Project application, and therefore it was not prepared to grant hearing participation rights to FMFN for that purpose.

The Panel also considered whether the constitutional law questions posed by FMFN, i.e., whether section 21 of REDA breaches the constitution by denying the FMFN "an independent forum" (question 1) or "an opportunity" (question 2) to address unjustified infringements "of FMFN's constitutionally-protected rights" (question 1) or "of [FMFN's] Aboriginal and Treaty Rights, of which Crown consultation is only one element" (question 2), were matters that should be considered in a hearing of the Project application. The Panel noted that each question presumes that FMFN's constitutional rights will be infringed or have already been infringed—the submission is not clear which is the case. As stated in this letter, the Panel has concluded that the information provided in this proceeding does not demonstrate a potential for FMFN to be directly and adversely affected by the Project. Accordingly, if the premise for the proposed questions of constitutional law is that the Project will infringe the FMFN's constitutional rights, the premise fails and the questions do not arise from the application. Alternatively, if the premise for the proposed questions of constitutional law is that existing oil sands development has infringed the FMFN's constitutional rights, the questions do not arise from this application and would need to be considered in a different kind of proceeding by a different decision-maker; the Project application does not have (and does not need to have) sufficient information about the impact of existing oil sands development on FMFN's constitutional rights to complete the justification analysis. The Panel therefore decided that it was not appropriate to grant FMFN participation

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rights in a hearing for the purpose of considering FMFN's proposed questions of constitutional law.

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 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 FMFN to satisfy the directly and adversely affected test. The Panel is of the opinion that FMFN has not shown that the AER's decision on the Project application may directly and adversely affect the FMFN, and the Panel has decided that FMFN 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