

March 27, 2014

E-MAILED AND MAILED

**Kehewin Cree Nation**

c/o Chief and Council of Kehewin Cree Nation

P.O. Box 220

Kehewin, AB T0A 1C0

Mailed and emailed to: [dragonfly.resources.ltd@gmail.com](mailto:dragonfly.resources.ltd@gmail.com)

Attention: Chief Eric Gadwa and Annette Ozirny

**Lawson Lundell LLP**

3700, 205 – 5<sup>th</sup> Avenue SW

Calgary AB T2P 2V7

Email: [lmanning@lawsonlundell.com](mailto:lmanning@lawsonlundell.com)

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 Chief Gadwa, Ms. Ozirny 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 a written submission from Ms. Ozirny on behalf of Chief and Council of Kehewin Cree Nation (“KCN”), 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 KCN has not demonstrated that it may be directly and adversely affected by the Panel’s decision on the application or that KCN should otherwise be permitted to participate in a hearing. As a result, the Panel has decided that KCN will not be permitted to

Calgary Head Office  
Suite 1000, 250 – 5 Street SW  
Calgary, Alberta T2P 0R4  
Canada

[www.aer.ca](http://www.aer.ca)

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 KCN’s request to participate in the hearing, namely that KCN 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.<sup>1</sup>

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KCN stated that it is a Treaty 6 band and it indicated that the Project is located 125 kilometres from the KCN's band office. It stated that the Project is located within its traditional territory and that its members have a long history of traveling through the region, which means they camped, hunted, trapped, gathered foods and medicines, had ceremonies and buried their loved ones in the area of the Project. KCN stated it was not consulted by CNRL or the Crown in relation to the Project, and that the effects of the Project on KCN have not been studied or taken into consideration in any way. KCN provided a list of members who had, since 1960, exercised some form of Aboriginal or traditional rights near the Project area. KCN also cited the following "General Concerns" with the Project:

- cumulative impacts on the landscape from projects and developments affect KCN's ability to continue traditional pursuits;
- flora—herbs and medicines need to be protected;
- cumulative and direct impacts from development on animals relied on by KCN for hunting and trapping; and
- landscape and ecology-landscape features have names and stories associated with them that hold important cultural values.

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. In its response to KCN's hearing submission, CNRL stated that KCN was not identified for consultation in the approved Consultation Plan for the Project. CNRL said it was surprised to learn in a meeting with KCN on November 20, 2013, that KCN intended to expand its traditional territory and that the Project would be included in the expansion area. CNRL stated that the impacts asserted by KCN in relation to harvesting, hunting and gathering are broadly and vaguely stated and are not supported by evidence. The Panel noted that the information in CNRL's application does not locate any KCN uses within or near to the Project area.

The Panel accepted that KCN is a Treaty 6 band with Aboriginal rights, including those under the treaty and pursuant to the *Natural Resources Transfer Agreement*, and noted that the Project would be located on public lands in the Green Area. The Panel also accepted that KCN members

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<sup>1</sup> *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.).

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, although the Panel noted that the Project lands have not historically been within the KCN'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.

KCN said that its members still have a significant presence in the Project area. It stated that its Aboriginal Impact Assessment indicated that since 1960, a minimum of 25 members exercise some form of Aboriginal or traditional rights near the Project area in any given year. KCN included a "Tracking Map for the Conklin Corridor", which placed stars at two locations east of secondary highway 881 and nine locations west of the highway. KCN stated that each star represented an area visited more than 25 times, within a radius of 25 km, during the period 1960 to 2013.

The Panel also noted the current approved land uses in the Project area, 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).

The Panel considered that the concerns raised by KCN about cumulative impacts are general in nature and are not related to the Project or the Project lands. KCN asserted that its members have a history of moving through the Project area but it did not identify specific locations at which traditional land use activities currently occur, nor did it state how such locations or activities may be affected by the Project. The information provided does not establish any degree of location or connection between the Project and KCN's current use of lands within or near the Project. The Panel has decided that KCN has not demonstrated that it may be directly and adversely affected if the Project proceeds, or that a KCN 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

KCN or the member. The Panel has therefore decided that KCN will not be extended participation rights in a hearing of the Project application.

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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](mailto:gary.perkins@aer.ca), or direct phone (403) 355-4292.

Yours truly,



Gary D. Perkins  
Associate General Counsel