

March 27, 2014

BY E-MAIL ONLY

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Attention: Jennifer Grant

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**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. Grant 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. Grant on behalf of the Oil Sands Environmental Coalition (“OSEC”), 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 OSEC has not demonstrated that it may be directly and adversely affected by the Panel’s decision on the application or that OSEC should otherwise be permitted to participate in a hearing. As a result, the Panel has decided that OSEC 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 OSEC’s request to participate in the hearing, namely that OSEC is a group or association of individuals that asserts it may be directly and adversely affected by the AER’s decision on the application. OSEC also requested participation rights to present evidence in the hearing about habitat disturbance that exceeds the threshold in the federal caribou recovery strategy.

OSEC said it is an unincorporated coalition of Alberta public interest groups and individuals with a longstanding interest in the Athabasca Oil Sands area. Its members include the Fort McMurray Environmental Association, the Pembina Institute, the Alberta Wilderness Association, and individual member Lorraine Pruden who is the holder of Registered Fur Management Area #2334 (the “RFMA”). OSEC stated that its principal objection is the Project’s impact on fur-bearing mammals and trapping activities in the RFMA, and that the Project will directly impact the OSEC member who holds the RFMA, which overlaps the Project area. OSEC also cited the following concerns:

- the construction and operation of the Project will increase local and regional air emissions;

- the Project is within the range of the declining Cold Lake Air Weapons Range Woodland caribou herd, and the regional study area includes the habitat of the declining East Side of the Athabasca caribou herd. OSEC stated the declines result from unconstrained development within caribou ranges and the ongoing failure of the Government of Alberta to adequately manage for caribou habitat needs. It also stated that the federal caribou recovery strategy objective is to maintain a minimum 65% of the area within each caribou range as undisturbed habitat, and it encouraged the AER to consider the need for urgent action to prevent this threshold from being exceeded.

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>

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. In its response to OSEC’s hearing submission, CNRL stated that on December 17, 2013, the holder of the RFMA formally withdrew her support for OSEC’s intervention in the Project. CNRL also stated that less than 1% of OSEC’s 4500 members are located in northern Alberta, and the RFMA holder is the only member located near the Project. It also stated that the potential impacts identified by OSEC in relation to air emissions, furbearers and caribou populations lacked the specificity required for participation in a hearing, are attributable to existing approved activities, and are not helpful in relation to the Project application.

The Panel noted that the holder of the RFMA has withdrawn her support for OSEC’s request to participate in the hearing on her behalf. The Panel has decided that OSEC has not demonstrated that the AER’s decision on the Project application may directly and adversely affect OSEC or any

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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.).

of its members and that OSEC does not appear to have a tangible interest in the subject-matter of the Project application. The Panel also considered that the other concerns raised by OSEC are general in nature and are not related to the Project. As a result, the Panel determined that OSEC has not demonstrated that its participation in hearing will materially assist the AER's decision on the Project application. The Panel has therefore decided that OSEC will not be extended participation rights in a hearing of the Project application.

**inquiries** 1-855-297-8311  
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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,

  
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Gary D. Perkins  
Associate General Counsel