Alberta Energy Regulator

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March 27, 2014

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 Whitefish Lake First Nation ("WLFN"), 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 WLFN has not demonstrated that it may be directly and adversely affected by the Panel's decision on the application or that WLFN should otherwise be permitted to participate in a hearing. As a result, the Panel has decided that WLFN 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 WLFN's request to participate in the hearing, namely that WLFN 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]

WLFN 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, gathering and camping. It submitted that there is a factual connection between the lands and water that will be impacted by the Project and WLFN's traditional land uses. It also stated that it has concerns about the safety and integrity of CNRL's operating practices, including emergency response plans.

In addition to its written submission and the 22 harvesters' affidavits that it filed in confidence, WLFN relied on statements of concern that it filed before the notice of hearing was issued. It also stated that certain of CNRL's application material acknowledged WLFN's use of lands in the area.

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.

The Panel noted that WLFN is a Treaty 6 First Nation with rights under the treaty and pursuant to the *Natural Resources Transfer Agreement*. The Project would be located on public lands in the Green Area. As a result, WLFN members may be entitled to exercise rights on or in proximity to the 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 is not disputed by CNRL in relation to WLFN's interests and asserted activities in the Project area. The difference of opinion between WLFN and CNRL concerns the degree to which WLFN has demonstrated *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

[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.).

> 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.

In reviewing the harvester's affidavits provided by WLFN, the Panel noted that the affiants each described general harvesting activities taking place within a personal traditional use area that is depicted, in many cases, as being much larger than the Project area. Some of these harvesting areas are hundreds of square kilometres in size and take in the entire Kirby project area (i.e., the Project area and the existing approved Kirby North and Kirby South project lands). In other cases only a portion of the Project area overlaps with the harvester's traditional use areas, and in a few cases there is no overlap between harvesting areas and the Project lands. Each of the maps upon which the harvester indicated his or her traditional use areas is a copy of a map from the Project application that is on the scale of several hundred townships. No harvester's map depicts a specific harvesting location within or near the Project lands. In the Panel's opinion, the harvesters' affidavits did not demonstrate that WLFN traditional land uses at a specific site within or in proximity to the Project could be directly and adversely affected if the Project proceeds, or that a harvester's use of natural resources may be impacted by the Project in a way that results in a direct and adverse effect on the harvester. The 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 is needed to demonstrate a potential for the Project to directly and adversely affect WLFN harvesters.

The Panel also considered the portions of CNRL's application materials that WLFN stated demonstrated the potential for impacts on traditional land uses in the Project area. Figure 10 in the Traditional Land Use Baseline Report dated December, 2011 (the "TLU Report") is a map of the Kirby project lands. No WLFN traditional land use areas are identified on this map. Table 1 in the TLU Report indicates that WLFN activities such as hunting, trapping, fishing and plant harvesting occur in general locations outside the Project area but it does not indicate that WLFN traditional uses occur within the Project area. Table 2 in the TLU Report indicates that WLFN conducts traditional hunting and trapping between Unnamed Lake #1/Muskeg Lake and Winefred Lake, which is an area more than double the size of the Project area, and that moose and caribou tracks indicate that a "general hunting area" exists in the Project's Local Study Area. Specific locations are not, however, identified or mapped within either of these traditional use areas.

WLFN also referred to specific sections of CNRL's Traditional Land Use Update dated December, 2012 (the "TLU Update"). This material states that fishing occurs at Unnamed Lake #1 (which is within the Project area) but that the extent of WLFN's use of this area for fishing is

unknown.[2] It also states that hunting and trapping activities take place at a number of locations within a large area that overlaps the Project area[3] but that additional information is needed to determine the extent of WLFN's members' use of these locations. CNRL identified that increased access to WLFN's members' traditional hunting and trapping areas would be addressed by CNRL with mitigation measures designed to limit new access.[4] Finally, section 5 of the TLU Update referred to two cabins[5] and "approximately" eight WLFN hunting and trapping areas "that may overlap with the Project footprint." Detailed information about these locations was not provided, in particular no information was given about if and how WLFN traditional land uses at these locations might be directly affected by the Project.

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 from the WLFN harvesters does not provide the degree of location or connection between the Project and the traditional land uses that are asserted by WLFN to satisfy the directly and adversely affected test for any of the twenty-two WLFN harvesters, which WLFN stated was a representative sample of the WLFN's membership. The information in the TLU and TLU Update provides only a vague indication of traditional uses in or near the Project area, and it does not locate any WLFN uses within or in specific proximity to the Project area. The Panel is of the opinion that WLFN has not demonstrated that the AER's decision on the Project application may directly and adversely affect the WLFN, and the Panel has decided that WLFN 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.

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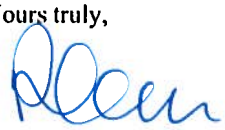
[2] Section 4.7.5 of the TLU Update.
[3] Section 4.9.8 of the TLU Update.
[4] Section 4.9.4 of the TLU Update.
[5] One cabin is described as south of Rat Lake, which is several kilometres west of the Project lands, and the other cabin is described as north-east of Wiau Lake and is attributed to the Horse Lake First Nation.

Yours truly,



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