

The Alberta Energy Regulator Grants Rare Participation Rights to Three Indigenous Groups

By: Amy Matychuk

Decision Commented On: [The Alberta Energy Regulator decision on participation in the hearing of Prosper Petroleum Ltd.'s Rigel Project, March 16 2017](#)

On March 16, 2017, the Alberta Energy Regulator (AER) held that three indigenous communities were directly and adversely affected by the Prosper Petroleum Rigel Oil Sands Project and granted these groups participation rights in the hearing on Prosper's project application.

The AER has been publishing its participation and procedural decisions since September 2015. Since then, there have been 42 decisions dealing with claims by First Nations or Métis communities that they are directly and adversely affected by a proposed project. The AER has denied every claim until now. This decision only gives the three indigenous communities the right to participate in the hearing where the AER will decide whether to green light Prosper's applications. It does not ensure that their lands or traditional activities will actually be protected, only that they will have the opportunity to explain how the project will affect them. However, given the pattern of decisions since 2015, this is a significant development.

The directly and adversely affected test comes from s 32 of the *Responsible Energy Development Act*, [SA 2012, c R-17.3 \(REDA\)](#), which states that those who believe that they may be directly and adversely affected may file a statement of concern with the AER explaining why they should be able to participate in decisions about a given energy project. In previous decisions, the AER has provided some clarity on what type of effect is required to meet the test. It often repeats a proposition from *Dene Tha' First Nation v. Alberta*, [2005 ABCA 68 \(Can LII\)](#) at para 14, that an argument for a direct and adverse effect requires some degree of location or connection between the proposed project and the asserted right. It adds, from the *Tomlinson* decision of the Alberta Environmental Appeals Board, that a party must present evidence that a project individually and personally affects it. Thus the AER considers how the land around the project was used, how the project would affect the environment, and how the effect on the environment would impact use of the land. The more closely these elements are connected, the more likely is the AER to find a direct and adverse effect (*Tomlinson* at para 28).

In the context of First Nations or Métis claims, the test is especially difficult to meet. First Nations or Métis groups make up about 30% of claimants arguing a direct and adverse effect at the AER. According to *O'Chiese First Nation v Alberta Energy Regulator*, [2015 ABCA 348 \(CanLII\)](#) at para 44, if a First Nation hopes to establish a direct and adverse effect, it is not sufficient to show merely that its reserve or its traditional lands overlap with a project area. Indeed, in a decision involving the [Fort McMurray Metis Local 1935](#), the AER relied on *Dene Tha'* to establish that the evidence required is "reliable information indicating that the lands proximate to the program footprint are actually being used by [band members] for particular

purposes, and those land uses will not be possible if the projects proceed.” (at 4) These decisions confine those who can claim a direct and adverse effect to those who have specific, concrete, factual information about the project at issue which demonstrates its effect on them. A general claim of a treaty based hunting right is not sufficient.

Why, then, has Prosper’s Rigel Project triggered a direct and adverse effect on indigenous groups when no other post-2015 AER decision has? Unfortunately, the AER’s decision does not give enough specifics to determine exactly what was different about this situation. However, using information from other sources about the location of Prosper’s Rigel Project and its effect on indigenous groups, it is possible to make a few educated guesses.

The Fort McKay First Nation (FMFN) is a Treaty 8 nation located approximately 60km west of Fort McMurray. The AER held that “the proximity of the FMFN’s Moose Lake Reserves to the Rigel Project leases, nearest well pad and central processing facility demonstrate that FMFN could be directly and adversely affected by the Rigel Project” (Prosper decision at 2). The exact proximity of the project to the Moose Lake Reserves is not evident from the AER’s decision. However, according to [FMFN’s website](#), the “culturally sacred Moose Lake Reserves are within 2 km of the first phase of Prosper’s project.” In 2014, FMFN also provided a [map](#) of its reserves and traditional lands with energy projects marked.

Most First Nations and Métis groups who claim a direct and adverse effect do not have reserve lands in such immediate proximity to an energy project. There is only [one post-2015 decision](#) in which a reserve was located as close to a project as this one. In October 2016, Kehewin First Nation (KFN) failed to establish a direct and adverse effect on an amendment application for a facility 500 m from its reserve boundary. However, that decision can be distinguished because KFN was asserting that changes to an existing facility affected its rights, not that the development of a new project affected its rights. In all other cases where a First Nation or Métis group claimed a direct and adverse effect, the reserve land in question was at least 10km from the project, and in some cases over 100km away. This close proximity is the best explanation for the AER’s decision to grant participation rights to FMFN.

In [a 2014 AER decision](#) also involving Prosper Petroleum and FMFN, FMFN submitted very similar evidence about an earlier Prosper project’s location in relation to the Moose Lake Reserves. It also gave evidence about its traditional land use in the project area, but included maps that only indicated general areas in which traditional activities took place to avoid disclosing site-specific land use data. The AER held that the evidence, which was “broad in nature and provided little detail, such as site-specific locations of activities,” made the panel unable to conclude that Prosper’s project would directly affect FMFN (at para 133). It noted that if FMFN had provided evidence of the program’s specific effect, that information would have been useful for the panel. Given that the AER did find FMFN directly and adversely affected in the current case, perhaps FMFN submitted the kind of site-specific data that the AER requires, at the expense of its own concerns about keeping land use information confidential.

In the case of the Fort McKay Métis (FM Métis), they filed an affidavit with specific evidence of the Rigel Project’s potential impacts to trappers and trap lines. As a result, the AER held, “members of FM Métis conduct traditional activities in areas which may be impacted by the Rigel Project” (Prosper decision at 2). A 2010 [report](#) on land disturbance and access from Fort McKay Industry Relations Corporation provides a map of relevant trap lines, which shows some trap lines in the Moose Lake area. This is the first published post-2015 decision in which the AER has concluded that trappers are directly and adversely affected. There are not many

previous decisions in which trapping was an issue. In two, the AER noted that concerns were overly “general in nature” ([here](#) and [here](#)). In others, it held that no specific location information had been included to demonstrate a direct and adverse effect ([here](#), [here](#), and [here](#)). In a few cases, it also dismissed the applications in part because the environmental effect of a given project would be too negligible to impact wildlife ([here](#), [here](#), and [here](#)). None of these decisions referenced affidavit evidence. In this case the FM Métis’ evidence of the Prosper project’s impact on trappers and traplines must have been much more specific.

This is a positive development but it does pose a dilemma for those indigenous groups, such as FMFN in the 2014 Prosper decision, who prefer not to disclose detailed information like maps. The AER may be willing to respect indigenous’ groups desire for confidentiality in a limited sense, such as in [Gunn Métis Local 55/Pembina Pipeline Corporation](#), but those applying for confidentiality must meet the test in s 49 of the Alberta Energy Regulator Rules of Practice, [Alta Reg 99/2013](#), which specifies that if the confidential information is not personal, it must have potential to cause significant harm or financial loss that is “commercial, financial, scientific or technical in nature.” It is not clear that every First Nation or Métis Local who merely wishes to keep information about its traditional land use private would meet this test.

Finally, the Mikisew Cree First Nation (MCFN), also a Treaty 8 nation, provided information about family burial areas around Moose Lake, Moose Lake’s spiritual importance to the community, and its status as part of a traditional route for MCFN members. MCFN also raised concerns about the adequacy of the Lower Athabasca Regional Plan (LARP). In its decision, the AER granted MCFN participatory rights but only “to address specific impacts of Prosper’s Rigel Project on its aboriginal rights and traditional land use” (at 3). It concluded that it does not have jurisdiction to assess the LARP’s adequacy. As with the two other groups, the AER only commented in general and vague terms as to the level of detailed information that MCFN provided. The AER concluded that MCFN had included “enough information in its submission to demonstrate that its use of and relationship to Moose Lake and immediate area may be directly and adversely affected by a decision to approve the applications” (at 3). The issue of burial grounds has only been raised in [one other post-2015 AER decision](#). But in that application, brought by the Kehewin Cree Nation (KCN), the AER mentioned that the applicant had the authority to use the land under the Historical Resources Act, [RSA 2000, c H-9](#), and did not otherwise address KCN’s concern.

I have not been able to identify extrinsic information to shed more light on exactly what kind of evidence MCFN provided to convince the AER that it was directly and adversely affected. This information would provide useful guidance to other indigenous groups hoping to successfully claim a direct and adverse effect at the AER.

In April 2016 [the FMFN protested](#) that the Alberta Government was breaking its promise to preserve Moose Lake, the “last and best remaining area in which Fort McKay can preserve its heritage and cultural activities.” Indeed, former Premier Jim Prentice [initiated the development of the Moose Lake Access Management Plan \(MLAMP\)](#) and indicated that he supported the preservation of Moose Lake for the FMFN community. However, [FMFN argues](#) that the MLAMP “will protect the ecology and natural features of the area enough to enable traditional activities, including hunting and trapping, to continue. But it will also permit the oil sands resource to be extracted over time with controls on the pace, proximity and density of projects.” Although it is a positive development that these three indigenous groups will be able to present

their perspectives at the Prosper Rigel Project hearing, the likelihood that the AER will deny Prosper permission to carry on with the Rigel Project based on objections from indigenous communities seems, unfortunately, very low.

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