Alberta Energy Regulator

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

www.aer.ca

December 2, 2020

By email only

Boughton Law Corporation
Attention: James Coady Q.C.

Osler, Hoskin & Harcourt LLP
Attention: Sander Duncanson

JFK Law
Attention: Robin Dean

Alberta Environment and Parks
Attention: Lisa Sadownik

Dear Sirs/Madams:

Re: Proceeding ID 350
Prosper Petroleum Ltd (Prosper) Rigel Project (the "Project")

Decision

The panel has decided that a formal pre-hearing meeting is not necessary. The panel's decisions on hearing scope and related procedural matters are set out below.

The scope of the redetermination is:

> Whether Prosper's application under s.10 of the *Oil Sands Conservation Act* for the Rigel Project is in the public interest after considering:
> i) whether the Moose Lake Access Management Plan process triggered the Honour of the Crown; and

ii) if the answer to i) is yes, would it be consistent with the Honour of the Crown to approve, deny or delay approval of the Rigel Project?

Background

On October 9, 2020 the panel wrote to the parties inviting their input on proposed procedural steps including a pre-hearing meeting (to be held the week of December 7, 2020), and to address:

- The scope of the redetermination hearing;
- nature of the evidence, in particular the form of evidence they expect to provide (e.g. affidavit, in person, documentary), the date range for that evidence, and other matters the parties think we need to consider that relate to the evidence (e.g. written, oral or combination);
- is there an onus/burden of proof and, if so, where does it lie;
- hearing format (electronic, in writing or a combination); and
- dates for the hearing and submission schedule.

In its letter the panel suggested that the question to be decided in the redetermination is:

> Whether approval of Prosper's application made under s.10 of the *Oil Sands Conservation Act* for the Rigel Project is in the public interest after considering the Moose Lake Access Management Plan process and the implications thereof for the Honour of the Crown.

The panel based its interpretation on the Alberta Court of Appeal's decision in *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2020 ABCA 163 (*Fort McKay First Nation appeal*). The panel said it will hear evidence on the Moose Lake Access Management Plan (MLAMP) negotiation process and the implications thereof for the honour of the Crown. Parties were invited to provide comment on the proposed scope of the hearing and the other procedural matters by October 26, 2020. November 16, 2020 was the date set for any reply submissions.

On October 15, 2020, Prosper responded saying it agreed with the panel's proposed scope of hearing, but that a full hearing process with a pre-hearing meeting and an electronic oral hearing is unnecessary and would result in excessive delay to the Project. Prosper said that the scope of the redetermination is limited to:

i. The Alberta Government's commitments to Fort McKay First Nation to develop MLAMP;
ii. the process Alberta has followed to develop MLAMP to date, including its current status; and,

iii. the implications of (i) and (ii) for determining whether the Project is in the public interest and consistent with the honour of the Crown.

In light of Prosper's response, on October 21, 2020 the panel asked the parties to provide their views on whether they agreed with Prosper's scoping of the hearing issues, and the need for a pre-hearing meeting. To avoid confusion about filing deadlines the panel also confirmed the earlier dates for submissions and any reply.

Fort McKay First Nation and Fort McKay Métis Nation (Fort McKay Métis) each responded stating their disagreement with the proposed scope. The participants agreed that the panel must consider the MLAMP process and the implications thereof for the honour of the Crown but, additionally, they say the panel must reconsider all other public interest factors, including the Project's socio-economic and environmental effects.

Fort McKay Métis elaborated on the scope of the public interest consideration saying the panel will have to "properly understand the context in which additional adverse impacts to Fort McKay Métis' rights are proposed". They submitted that since the 2018 AER decision was vacated by the Court of Appeal, evidence that may be submitted is not limited to the issues upon which the decision was overturned. Fort McKay First Nation and Fort McKay Métis said the parties should be allowed to bring new evidence on a broad range of issues.

Discussion

Need for a Pre-Hearing

Having considered all the submissions, the panel finds that a pre-hearing meeting is not needed, nor would it be an efficient use of the parties' time.

We note there is no controversy about the onus/burden of proof, hearing format and hearing dates. There is some difference in views about evidence related mainly to the scope of the redetermination. Our decision about the scope of the redetermination informs our decision on the nature and date range for the evidence. We have enough information from the parties to decide the matters outlined in our October 9, 2020 letter.

In addition to the matters specified by the panel, Fort McKay Métis and Fort McKay First Nation said that a pre-hearing meeting is needed to clarify potential involvement of the Aboriginal Consultation Office (ACO) and Alberta Environment and Parks (AEP) and the timing and process for any submission by AEP. We address this issue below.

Involvement of ACO and AEP

Fort McKay Métis said that a pre-hearing should address how AEP intends to supplement the record, and whether it intends to file evidence and make witnesses available.

The panel received AEP's letter of October 26th, 2020 stating that it does not intend to attend any pre-hearing in this matter and confirming its intention to file an updated written statement in this proceeding closer to the hearing dates. AEP also informed the panel (September 30th, 2020) that it does not intend to appear at the hearing, cross-examine witnesses, have legal counsel attend, or otherwise participate in the redetermination.

We acknowledge Fort McKay First Nation's concern that it should have an opportunity to review any written statement provided by AEP and to prepare evidence, if needed, on the implications thereof for the panel's decision. All parties must be afforded an opportunity to respond to any statement filed by AEP that forms evidence in the hearing.

On the matter of ACO's involvement in the hearing, the ACO wrote, in separate letters, to Fort McKay First Nation and Fort McKay Métis, on September 29th, 2020. In those letters, the ACO said that the *Fort McKay First Nation appeal* does not affect its conclusions about consultation adequacy. It noted that it had revised the language in its consultation adequacy decisions. The ACO removed reference to MLAMP as a LARP implementation item in recognition of the *Fort McKay First Nation appeal*. In addition, the ACO specifically noted that the consultation adequacy decisions pertain to applications under the *Water Act* and the *Environmental Protection and Enhancement Act* and stated its understanding that the redetermination is limited to Prosper's OSCA application.

The ACO further said that consultation with Fort McKay First Nation on the *EPEA* and the *Water Act* applications was determined to be adequate and completed in 2018.

In its letter to them, the ACO addressed Fort McKay Métis' claim that the Crown has a duty to consult Fort McKay Métis within their traditional territory which includes the Project area. The ACO clarified that Fort McKay Métis was determined eligible for consultation on harvesting and traditional use activities beginning March 26, 2020, however, that determination is not retrospective. The ACO also confirmed that while the Rigel Project is near, it is not in Fort McKay Métis' interim consultation area.

The ACO said it would confirm its potential involvement in the redetermination should the scope of the hearing be confirmed to relate to regulatory decisions under *EPEA* or the *Water Act*.

It is clear from the correspondence on the record that neither AEP nor the ACO would participate in a prehearing. Their intentions about the extent and form of their participation in the redetermination proceeding are sufficiently clear for us to establish hearing process steps and submission deadlines. With regards to deadlines, we note that so far AEP has respected various dates set by the panel. We have no reason to expect they will not continue to do so.

Scope of the Redetermination

The panel must decide whether the scope of the redetermination is broad, as suggested by Fort McKay First Nation and Fort McKay Métis, or narrow, as argued by Prosper.

The parties agree that at the core of the redetermination is the Alberta Court of Appeal's direction to the AER to reconsider "whether the Project is in the public interest after taking into consideration the honour of the Crown and the MLAMP process". Beyond this point of agreement, they offer diverging views on whether other public interest factors should also be redetermined.

Fort McKay First Nation and Fort McKay Métis say the scope should include environmental and socio-economic impacts as well as cumulative effects of oil sands development on their treaty and aboriginal rights. They also said that because the original decision was vacated the scope is wide open and not limited to the MLAMP process.

In its October 15, 2020 submission Prosper said the scope of the redetermination is limited to: i) the government of Alberta's commitments to Fort McKay First Nation to develop the MLAMP; ii) the process the Crown has followed to date to develop the MLAMP, specifically including its current status; and, (iii) the implications of i) and ii) for determining whether the Rigel project is in the public interest and consistent with the honour of the Crown.

In support of its claim for a broader scope, Fort McKay First Nation argued that the panel must reassess the evidence about the regional impacts of oil sands development "through the lens of the Crown's obligation to fairly and honourably implement its treaty promises". It pointed to

Decision 2000-59,[1] as support for this panel broadening the scope of our redetermination. Fort McKay First Nation said that the Federal Court overturned the Cheviot Coal mine's original approvals and in the subsequent redetermination the Joint Review Panel (JRP) determined that it was not limited to specific factors identified by the Federal Court as deficient, but could consider related matters and new evidence arising. It also argued that Decision 2000-59 establishes a precedent for a robust approach to new evidence after an initial decision has been quashed or vacated. Fort McKay First Nation submitted that we could rely on the AER's reconsideration powers to establish a broader scope for the redetermination.

In its reply submission Prosper said of the reconvened Cheviot Mine proceeding that, "[c]ontrary to Fort McKay First Nation's characterization, however, the Panel in that case expressly held that its reconsideration process would focus on the specific deficiencies identified in the court decision that overturned prior approval of the project". Prosper says the Joint Review panel did not reassess all of the issues considered in the original hearing and did not invite new evidence on all issues relevant to the public interest.

Prosper also cited the National Energy Board's (NEB)'s reasons for the limited scope of its reconsideration of the Trans Mountain Expansion Project in support of its position that we should focus on the specific deficiency identified by the Alberta Court of Appeal in this case. In the Trans Mountain reconsideration[2], the NEB panel declined to hear new evidence on matters such as need for the project and economic benefits, and focused instead on the specific deficiency identified by the Court of Appeal.

Panel's Conclusions on the Scope of the Redetermination

The panel has considered the parties' submissions on scope. Factors such as environmental impacts including cumulative environmental impacts associated with the Rigel project, air emissions, water impacts and noise, were fully considered in the 2018 hearing in the context of Prosper's *EPEA* and *Water Act* applications, and the panel does not see a justification to re-open the evidentiary records on these issues.

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[1] Decision 2000-59 was a redetermination decision by the Energy Utilities Board (EUB) and the Canadian Environmental Assessment Agency (CEAA) Joint Review Panel regarding the Cheviot Coal Mine (the "Cheviot Joint Review Panel").
[2] Trans Mountain Expansion Project – Reconsideration Report MH-052-2018 at (ii)

The Court of Appeal's reasons for decision must be interpreted in light of the specific question posed in the appeal, and in light of the decisions on Fort McKay First Nation's and Fort McKay Métis' separate permission to appeal applications.

Fort McKay First Nation sought permission to appeal the Prosper decision on the following questions:

> "did the AER commit a reviewable error of law or jurisdiction in its decision to approve the Rigel Project:
>
> (a) In failing to take into account or comply with the honour of the Crown;
>
> (b) In its interpretation and application of Treaty 8 rights; and
>
> (c) In failing to take into account the cumulative effects of development on the First Nation's Treaty 8 rights?"[3]

The application for permission to appeal was granted on only one question - as phrased by the Court:

> "Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the MLAMP are completed?"[4]

Fort McKay Métis sought permission to appeal on the following grounds:

> (a) the AER erred in law and breached procedural fairness when it misapprehended the legal test to assess potential adverse impacts on rights protected by s 35 of the Constitution Act, 1982;
> (b) the AER erred in its application of the test for assessing the public interest;
> (c) the AER erred in law in reversing the burden of proof; and
> (d) the AER erred in law in concluding that the Project was in the public interest due to Prosper's commitment to meet or exceed the minimum regulatory requirements.[5]

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[3] *Fort McKay First Nation v Prosper Petroleum Ltd*., 2019 ABCA 14 at paragraph 17.
[4] *Ibid* at para 60.
[5] *Fort McKay Métis Community Association v Alberta Energy Regulator*, 2019 ABCA 15 at paragraph 15.

The Court denied permission on all four grounds. Fort McKay Métis subsequently sought leave to the Supreme Court of Canada to appeal the lower Court's decision on its permission to appeal application and that application was dismissed.[6]

We find that after reading the Court of Appeal's reasons in the Fort *McKay First Nations appeal* and the permission to appeal applications, the Court of Appeal's language points to a narrower more focussed scope than what is advocated by Fort McKay First Nation and Fort McKay Métis.

Specifically, while the Court of Appeal in the *Fort McKay First Nations appeal* acknowledged the AER's broad mandate to determine whether a project is in the public interest, the Court also said "[t]o the extent the MLAMP negotiations implicate the honour of the Crown and therefore need to be considered *as part of* the "public interest", the AER was under a statutory duty to consider *that issue*". [emphasis added]

There is a specificity to the Court's language. It did not say the panel should reconsider each element of the public interest. Rather, it said the AER should consider a specific issue that was deemed out of scope in the 2018 hearing process: the MLAMP process and how that impacts our decision about whether the Rigel Project is in the public interest. Our interpretation is further supported at the conclusion of the Court's reasons in which the Court says that the public interest in this case "will include the state of negotiations between the Fort McKay First Nation and the Crown".

On appeal, Fort McKay First Nation asked that the matter be remitted back to the AER to consider *this issue*. [emphasis added] The Court agreed and said that "as the AER declined to consider this issue a full evidentiary record *relating to this matter* is not available. We are therefore of the view that *the issue* should be determined by the AER on an appropriate record" [emphasis added by panel].

In keeping with the direction provided by the Court of Appeal and interpreted in the context of the two permission to appeal application decisions, the panel finds that in the redetermination the AER is to:

i) develop a full evidentiary record specific to the matter of the MLAMP process;

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[6] *Fort McKay Métis Community Association v. Alberta Energy Regulator, et al.*, 2019 CanLII 53421 (SCC)

ii) assess that evidence to determine whether the MLAMP process has triggered the Honour of the Crown; and

iii) determine whether, in light of the answer to ii) it would be consistent with the honour of the Crown and in the public interest to approve, deny or delay approval of the Rigel Project.

Fort McKay First Nation provided evidence about the MLAMP process in the 2018 hearing. Fort McKay Métis did not. Fort McKay Métis now says that its constitutional rights are impacted by the MLAMP process. Fort McKay Métis may submit evidence on its involvement in the MLAMP process to show whether the process triggered the honour of the Crown in its relations with Fort McKay Métis Nation.

Finally, we have considered the parties arguments regarding the Cheviot Mine decision and the scope of this redetermination. Fort McKay First Nation argued that the JRP's decision to consider a broader range of matters is precedent for us to broaden our scope. We disagree. While the JRP did say that it would accept new evidence about changes in activities that had happened since the original review, if it was relevant and germane to the issues it had to consider in the redetermination, it did not open up the process to relitigating issues it had previously determined.

In our view the purpose of the JRP reconsideration was to remedy specific deficiencies in the Environmental Impact Assessment (EIA) for that project. We find that the JRP was acting in the context of the Federal Court's detailed direction to remedy deficiencies that included consideration of cumulative effects and completion of the EIA for the Cheviot Mine. We also note that the JRP limited evidence in the redetermination to information needed to complete the EIA available since its initial 1997 decision. Our task is to complete the record on the matter of the MLAMP process and to redetermine whether the project is in the public interest after taking into consideration the honour of the Crown.

Panel's Conclusions on the Scope of the Redetermination (Specifically relating to economic conditions)

Finally, Fort McKay First Nation asserted that Prosper is unlikely to develop the project because of market conditions. To this end, Fort McKay First Nation submitted an affidavit from Brad Gardiner, President and CEO of Prosper, which was originally filed by Prosper with the Court of Queen's Bench of Alberta, for an order of mandamus compelling the Cabinet to decide whether to approve the Rigel Project. Notably, the affidavit asserted that the health of Prosper was a going concern. Fort McKay First Nation also asserted that the Project will not produce

significant economic benefits as anticipated in the 2018 decision. They maintain this is a material change in facts, which warrants reconsideration by the panel.

In its November 9th, 2020 reply submission Prosper said that should the Project be approved, it will proceed only when it has obtained financing that ensures all liabilities will be fully and appropriately addressed. They say there is no evidentiary justification to include this issue within the scope of the redetermination hearing. Prosper also maintains that economic benefits of the Project are not a factor affected by the decision in *Fort McKay First Nation appeal* and should not be added to the scope.

Prosper repeated its earlier statement that the scope of the redetermination is restricted to a consideration of the MLAMP process and the honour of the Crown, as directed by the Alberta Court of Appeal.

In arriving at its decision, the panel finds the following passage from the National Energy Board's reasons for declining to accept new evidence regarding the economics of the Trans-Mountain pipeline to be relevant and helpful:

> The Board accepts that, as time passes, there will always be some changes in facts and short-term changes in markets. However, the need for the Project is not negated by short-term market fluctuations. As the Board stated in its OH-001-2014 Report, "[t]here is always a degree of uncertainty in projecting the long term utilization of transportation facilities since utilization is influenced by many variables, including supply, market development and the evolution of transportation infrastructure overall."[7]

The panel also finds that Mr. Gardiner's affidavit, submitted as evidence in a different legal matter, for a different purpose, is not sufficient to convince us that economic impacts are a factor for the reconsideration. The future of the Project may indeed turn on market conditions, but as Prosper points out, the company has always required project financing to proceed with construction of the Project. That is a decision Prosper will have to make regardless.

The Panel is not persuaded that new evidence regarding the economic impact of the Rigel Project should be within the scope of the redetermination.

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[7] October 29, 2018 National Energy Board, Appendix 2 – Trans Mountain Expansion – Reconsideration – reasons to the List of Issues and Hearing Process at pgs 11-12

Nature and timeframe of the evidence

Fort McKay First Nation said that affidavit evidence, with the affiant made available for a brief statement and questioning, would be the most efficient. Prosper did not specifically address the nature of the evidence for the redetermination but did refer to the evidence about MLAMP already on the record, which is in affidavit form.

Prosper's submissions make it clear Prosper is of the view that Fort McKay First Nation and Fort McKay Métis may provide evidence on the MLAMP process, including its current status, up to the present.

Fort McKay Métis said it would rely on the record and submit affidavit evidence, expert reports and witness statements and cross-examination.

In light of the focussed nature of the redetermination and the ongoing uncertainty and limitations imposed by the COVID pandemic, the panel has decided that any additional evidence from Fort McKay First Nation, Fort McKay Métis and Prosper is to be submitted in affidavit form, unless prior approval is obtained from the panel. Evidence may be provided about the MLAMP process from its inception to the present. AEP has advised it expects to file an updated written statement.

In light of our decision about the scope of the redetermination we are of the view that there is no need for expert reports. Finally, we will not be seating witness panels to give direct evidence at the hearing that is additional to the affidavit evidence. Witnesses who swore affidavits may give a brief statement introducing themselves and the basis for their knowledge about the matters in their affidavit evidence prior to answering questions about that evidence.

In keeping with our decision on scope, new evidence filed in the redetermination is to be limited to completing the record about the MLAMP process.

To be clear, the parties may choose to rely on evidence about the MLAMP process that was on the record at the time of the 2018 hearing. As noted above, the panel will also consider new evidence about the MLAMP process prior to and subsequent to the 2018 hearing.

The panel will not entertain new evidence regarding the other public interest factors.

Onus/Burden of Proof

The parties agree that Prosper bears the ultimate burden to show that the Project is in the public interest. The panel concurs. We are also of the view that the other parties have the burden to establish the facts that support their positions on the redetermination.

Hearing Format

The parties agree on holding the oral portion of the hearing electronically. The parties also agree that closing argument can be conducted in writing. AER's hearing services will host the electronic platform, manage the technology and associated issues. Hearing Services will be in contact with the parties regarding logistics for the electronic hearing and a prehearing practice session for all parties will be scheduled closer to the hearing.

Should circumstances change significantly in the coming months, the panel may re-examine the possibility of holding an in-person public hearing.

Hearing Dates

The parties confirmed their availability for an electronic hearing during the week of March 15th, 2021. A schedule setting out hearing steps, timeline and hearing dates will be provided shortly.

AER Hearing Panel

Cecilia A. Low (Chair)

Christine Macken

cc: M. LaCasse, B. Kapel Holden, S. Poitras, AER
J. Langlois, JFK Law
K. Buss, Boughton Law Corporation
R. Kopecky, S. Foisy, E. Davy, ACO
Y. Guertin, AEP