

July 11, 2018

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By e-mail only

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JFK Law Corporation

Attention: Mark Gustafson and Mae Prince

Dear Mr. Gustafson and Ms. Prince:

**Re: Decision on Participation, Mikisew Cree First Nation
Proceeding 361, Syncrude Canada Ltd. – Mildred Lake Extension Project
Applications 1820856, 00263298-005, 00363203-001, 00000026-034, MSL0352, MSL170423
and MSL170430**

On May 25, 2018, the Alberta Energy Regulator (AER) issued a notice of hearing, setting out the process for filing a request to participate in the hearing of Syncrude's applications for the Mildred Lake Extension Project (the project). I am writing to communicate the panel's decision regarding a request to participate filed on June 14, 2018 by JFK Law Corporation on behalf of Mikisew Cree First Nation (Mikisew).

Section 34(3) of the *Responsible Energy Development Act* states that: "...a person who may be directly and adversely affected by the application is entitled to be heard at the hearing." In addition, the *Alberta Energy Regulator Rules of Practice* (Rules) give the hearing panel discretion to grant participation status to persons whose participation will materially assist the panel in deciding the matter that is the subject of the hearing, who have a tangible interest in the matter and whose participation will not materially delay the proceedings or repeat or duplicate evidence.

Mikisew's Request

Mikisew's June 14th request to participate states that its rights and interests may be directly and adversely affected by the AER's decisions on the applications for the following reasons:

- Mikisew holds constitutionally protected rights under Section 35 of the Constitution Act, 1982, including Treaty 8 rights, as a successor to an Aboriginal group that adhered to Treaty 8.
- The project, if approved, would be located within Mikisew's traditional lands.

- The project will adversely impact Mikisew's Treaty 8 rights and contribute to adverse cumulative effects which are impacting Mikisew's ability to practice its Treaty rights.
- The project is proposed to be located in close proximity to the Athabasca River, which Mikisew members have historically used and continue to use for the exercise of their Treaty 8 rights, and that is vital to the ability of Mikisew members to pass down their distinct culture and livelihood to younger Mikisew generations, as promised in Treaty 8.
- The project will be located in the southern portion of Mikisew's traditional territory. The southern portion of the territory is particularly important for Mikisew members living in Fort McKay and Fort McMurray, as this area provides an accessible forum for those members for the practice of rights. Given that approximately half of Mikisew members reside in and around Fort MacKay or Fort McMurray, this area is of critical importance for many Mikisew members ability to practice their rights and maintain their way of life.
- Undisturbed areas within Mikisew's traditional lands are particularly important given the high levels of industrial disturbance around this area. The area that will be taken up by the proposed project represents some of the last undisturbed land on Syncrude's Mildred lake lease. The taking up of this land will eliminate Mikisew's ability to exercise its Treaty and Aboriginal rights within this area for the next several decades, if not indefinitely.

Mikisew indicated that some of the rights based activities that its members practice in and around the project area include:

- Harvesting moose along the Athabasca, MacKay and Dover Rivers. Moose provide an important source of food and other resources for Mikisew members. Moose habitat has been rapidly diminishing in Mikisew's traditional lands.
- Fishing, hunting and accessing traditional lands west of the Athabasca River, which is also an important wildlife travel corridor used by Mikisew members. The Athabasca and Mackay Rivers occupy a central role in the culture and livelihood of Mikisew and are critical to the ability of Mikisew members to hunt, trap, fish, and otherwise practice their Aboriginal and Treaty rights in a preferred manner.
- Collecting medicinal plants in the muskeg along the Athabasca and MacKay Rivers in the vicinity of the project.
- Gathering plants in the project area, including berry picking.

- Use of main traditional travel routes, including the Athabasca River, for the exercise of Treaty rights through the project footprint.
- Traditionally trapping.

Mikisew members have also identified habitation areas, including cabins, and areas of cultural and spiritual significance in and around the project area.

Mikisew identified potential direct and adverse impacts, including to its Treaty rights, from the project in its Statement of Concern, including:

- Limitations on the ability of Mikisew members in Fort MacKay and Fort McMurray to exercise rights in the southern portions of Mikisew's traditional lands.
- The taking up of some of the last undisturbed land in and around Mildred Lake, thereby eliminating Mikisew's ability to exercise its Treaty and Aboriginal rights in the area.
- The taking up of areas that are important wildlife habitats within Mikisew's traditional lands and the destruction of animal habitats due to habitat fragmentation.
- The taking up of an area that Mikisew has requested be designated as a conservation area due to the importance of the current and future exercise of their rights.
- Limitations on the ability of Mikisew harvesters to hunt in the area due to habitat loss and fragmentation, access restrictions, changes to animal movement patterns, safety and security related concerns, negative perceptions about the health of animals harvested in and around the project footprint, and environmental concerns around water quality and quantity.
- The impact on water quantity and quality as a result of the project.
- The construction and use of a 45.5 meter wide bridge over the MacKay River which will directly and adversely impact fish, aquatic and other life in and around the bridge and downstream towards the Peace-Athabasca delta.
- The impact of increased noise levels on wildlife such as moose, caribou, birds and waterfowl as well as impacts from the removal of a sense of solitude and connection to the land and water that underpins Mikisew's harvesting rights.
- Lower water levels on the MacKay and Athabasca Rivers which will impact river navigation as well as fish and other resources relied upon for the exercise of Treaty rights.

- Concerns regarding decreased air quality, and the impacts this can have on health, vegetation, and wildlife.
- The impact of the project on vegetation, wetlands and riparian areas.
- Disruption of cultural continuity due to altered or lost sense of place.
- Disruptions to Mikisew's way of life, or sakaw pimacihwin, and the ability of present and future Mikisew generations to live and learn their way of life.
- Concerns regarding Mikisew members' health and well-being as a result of industrial contaminants, and reduction in confidence in traditional resources as a result of real or perceived contamination.
- Concerns with respect to safety as a result of increased human presence in and around the project footprint.
- Degradation of environmental conditions that support the exercise of Mikisew's rights.
- The project's contribution to existing levels of cumulative, industrial effects in the vicinity of the project, and downstream along the MacKay, Dover, Beaver, and Athabasca Rivers and extending into the Athabasca Delta.

Mikisew noted in its submission that Syncrude's application materials acknowledge that the project may adversely impact traditional land use activities of Aboriginal peoples, including Mikisew, as a result of a number of factors including:

- Loss of wildlife habitat;
- Loss and changes to access to the area;
- Increased traffic;
- Additional workers and increased population; and
- Potential environmental impacts.

Mikisew also stated that the proposed mitigation measures currently described by Syncrude do not eliminate all potential direct and adverse impacts to its traditional land use or Treaty rights.

Mikisew submitted that its participation will materially assist the Regulator in dealing with matters that are the subject of the hearing, including:

- the historical and current importance of the project area to groups holding rights under Treaty 8;
- the Aboriginal perspective of the meaning of Treaty 8;
- project effects on Treaty 8 and the environmental and other conditions that support the exercise of rights;
- the lack of measures for mitigating impacts to Treaty rights, including direct and cumulative effects;
- the interpretation and application of indigenous knowledge provided at the hearing; and
- the lack of effective measures in the Lower Athabasca Region to address the cumulative effects of oil sands development, including in relation to the project, on Treaty rights and the environment.

Mikisew submitted that it has a direct and tangible interest in the subject matter of the hearing by virtue of the project being located in Mikisew's traditional lands and in an area where Mikisew holds rights under Treaty 8. As well, Mikisew submitted it has significant experience participating in written and oral hearings of the AER and its predecessor, the ERCB. Mikisew has provided valuable submissions regarding the direct, indirect and cumulative effects of similar developments in previous hearings and these previous interventions have not unnecessarily delayed those hearings.

Syncrude's Response

In its June 28th response to the requests to participate, Syncrude acknowledged that Mikisew is an Indian Band registered in accordance with the Indian Act, is a signatory to Treaty 8, and holds constitutionally protected rights under section 35 of the Constitution Act, 1982. However, Syncrude argues that Mikisew has failed to provide sufficiently detailed information to establish the degree of location or connection between the project and the rights or traditional land uses that are asserted to satisfy the directly and adversely affected test under the *Responsible Energy Development Act*. As a result, Syncrude argues that Mikisew should not be granted standing to participate in the hearing.

Syncrude states that it initially offered to provide funding for Mikisew to prepare a project-specific traditional land use study in 2015 but that Mikisew indicated a preference to conduct an avoidance study because their members do not use the project area. Mikisew did not agree to prepare a study that would provide project specific land use information until February 2017. Syncrude confirmed that the project-specific Mikisew Cree Land Use Study was provided to Syncrude in June 2017 and that Syncrude reviewed and responded to the Mikisew Cree Land Use Study in October 2017.

Syncrude said that it compared the valued components from the Mikisew Cree Land Use Study to those considered in the preparation of the EIA and confirmed strong alignment between the two, allowing a comparison of findings from the two documents. The valued components reflected in the EIA were: hunting; trapping; fishing; plant gathering; and cabin sites, burial sites and other significant areas.

Syncrude noted that the eastern area of the project (MLX-E PDA) is currently contained entirely within the existing Syncrude Mineral Surface Lease (MSL) 352 and as such, the MLX-E PDA and a significant portion of the LSA are not currently available for the practice of traditional activity.

In reviewing the Mikisew Cree Land Use Study, Syncrude said it found that of the 30 participants:

- 28 have hunting experience and 21 of those assert current hunting activity. Mikisew Cree hunters assert strong preference to hunt in Wood Buffalo National Park ("WBNP") and/or on family affiliated trap lines. Three Mikisew members assert current hunting activity within the LSA and PDA. Syncrude asserts that under current use and project-specific analysis, the impact of the project on Mikisew Cree hunting activities is likely low.
- 22 have trapping experience and 12 of those assert current trapping activity. Mikisew Cree trappers assert strong preference to trap in WBNP and/or away from developed areas. None of the Mikisew members assert current trapping activity within the LSA or PDA. There is no overlap between the PDA and identified trapping areas.
- 26 have fishing experience and 25 of those assert current fishing activity. One Mikisew member asserts current fishing activity within the LSA and PDA. The EIA identifies a low effect on fishing arising from the project. The Mikisew Cree Land Use Study does not include information that would challenge this statement.
- Of 29 members with gathering experience, 27 currently gather berries, plants and trees, and 14 currently gather eggs. The majority of gatherers express a preference for gathering away from development. Eight Mikisew members assert gathering activity within the LSA and RSA. The EIA identifies a moderate effect on gathering arising from the project. The Mikisew Cree Land Use Study does not include information that would challenge this statement.
- Approximately half of the participants reported attendance to ceremonial or cultural activities at sites off reserve, such as trap lines or Crown Land. While 28 Mikisew members advised that there are "lots of sacred sites and places to pray within the MLX-W LSA and PDA", only one respondent asserted participation in such activity. The EIA report identifies a low effect on

cultural activities arising from the project. The Mikisew Cree Land Use Study does not include information that would challenge this statement.

Syncrude said that ongoing engagement between Syncrude and Mikisew after Syncrude's receipt and review of the Mikisew Cree Land Use Study did not result in any further, site-specific information or potential adverse impacts being identified or specified by Mikisew. The Mikisew Cree Land Use Study and Syncrude's response to that study were included in the extensive engagement record that Syncrude provided to the Aboriginal Consultation Office (ACO) when Syncrude submitted its request for consultation adequacy. Syncrude submits that the February 23, 2018 Mikisew Cree ACO Report (which forms part of Syncrude's June 28th submission) summarizes Mikisew's concerns and Syncrude's responses to those concerns regarding: reclamation and monitoring; access; impacts to wildlife habitat and populations; cumulative effects of development on TLU; potential impacts to groundwater, surface water and fish; process concerns; and air and odours. Syncrude notes that after reviewing this information, the ACO concluded that Mikisew's information "is not spatially specific enough to constitute a site-specific concern". Syncrude argues that the panel should come to the same conclusion as the ACO based on the Mikisew Cree ACO Report.

Syncrude noted that Mikisew's request to participate asserts that Mikisew's participation will materially assist the AER in dealing with matters that are the subject of the hearing. Syncrude submits that Mikisew has merely asserted but has not demonstrated how its evidence will materially assist the AER, how it will not unnecessarily delay the hearing, and how it will not repeat or duplicate evidence presented by other parties. Syncrude therefore submits that Mikisew's request to participate provides no alternative basis to allow participation and the panel should decline to do so.

The Panel's Decision

Having regard for the submissions of Mikisew and Syncrude, the panel finds that Mikisew may be directly and adversely affected by the project and is entitled to participate in the hearing. The panel's reasons are as follows:

- The panel accepts that Mikisew holds constitutionally protected rights under Section 35 of the Constitution Act, 1982, and Treaty 8 rights. The project is located with the Treaty 8 area and Mikisew's traditional territory.
- Mikisew members currently reside in the Fort McKay and Fort McMurray areas.
- Syncrude's environmental impact assessment concludes that some traditional uses will be adversely affected by the project.

- Syncrude's argument that Mikisew should not be provided participation rights for the hearing relies largely on the view that the information provided by Mikisew is not sufficient to satisfy the second branch of the test resulting from *Dene Tha' First Nation v Alberta (Energy and Utilities Board)* whereby First Nations must demonstrate "[s]ome degree of location or connection between the work proposed and the right asserted....". Mikisew did not provide a map showing the location of reported traditional land use values relative to the project footprint or a copy of the 2017 Mikisew Land Use Study to support its participation request. While inclusion of these documents may have made the panel's assessment easier, the panel finds that the information provided by Mikisew is sufficient to demonstrate a degree of connection between its reported use and the proposed project which leads the panel to conclude Mikisew may be directly affected by the project. The information provided by Mikisew indicates that some current land use by Mikisew members occurs within the regional study area, local study area and project development area associated with the project
- Syncrude's own analysis of the Mikisew Cree Land Use Study results supports the panel's conclusions above. While Syncrude has provided its analysis to demonstrate that the effects of the project on Mikisew traditional use are low, the analysis also confirms that there is some ongoing use of the project area and therefore this use may be directly and adversely affected by the project.
- Under the AER's *Rules of Practice*, the test for participation is whether there **may be** direct and adverse effects, not whether such effects are certain.
- The panel cannot simply adopt the ACO's conclusions and use them as the basis for denying participation rights to Mikisew. The panel does not know what information the ACO relied on to make its determination. Furthermore, the panel must make its participation decision based on all of the information before it when deciding if a requester may be directly and adversely affected. For the reasons outlined above, the panel found that some of the information provided indicates ongoing use of the project area by Mikisew members and the potential for the project to directly and adversely affect this use. The panel notes that the ACO report identified a number of comments or concerns provided by Mikisew that the ACO found to be suggestive of site-specific concerns regarding potential impacts of the proposed project on the continued exercise of Treaty rights and traditional uses, but that the ACO found these concerns were not spatially-specific enough to constitute site-specific concerns. Finally, the panel notes that the ACO determined that consultation was adequate pending the outcome of the AER process. The ACO confirmed that in the event the AER calls a hearing, the ACO intends to attend and observe the hearing.

The panel also finds that Mikisew has a tangible interest in the subject matter of the hearing by virtue of the project being located in Mikisew's traditional lands and in an area where Mikisew holds rights under Treaty 8. Mikisew has stated that it intends to work cooperatively with the other parties to the hearing to accommodate the hearing schedule proposed by the panel and to fully comply with the AER's Rules and directions from the panel. Mikisew also said it intends to present important and unique evidence at the hearing. Mikisew confirmed that while it may share similar underlying interests as other Aboriginal groups participating in the hearing, Mikisew's evidence will be based on its own distinct experiences and submissions. As a result, the panel believes Mikisew's participation in the hearing may materially assist the panel with matters that are the subject of the hearing including the following:

- The assessment of potential project effects on traditional land use and on Aboriginal and Treaty rights: The assessment provided by Syncrude in its EIA is based on third party studies developed for other purposes and not project-specific assessments involving potentially affected Indigenous groups. Mikisew's participation in the hearing will provide the panel with a more complete understanding of the nature and scope of potential project effects on traditional land use and Aboriginal and Treaty rights.
- Potential project effects on various environmental resources important to Indigenous communities: Mikisew has been participating in the review of the project for several years and has completed and submitted a technical review of the project. Mikisew's participation in the hearing will provide the panel with additional insights into the potential environmental effects of the project.

Subject to directions or rulings issued by the panel, Mikisew has been granted full participation rights in the hearing

Sincerely,



Elaine Arruda
Hearing Coordinator

cc: Bernard Roth and Laura Estep, Dentons LLP
Vince Biamonte, Sarabpreet Singh and Stephen McCarthy, ACO
Meighan LaCasse and Alison Doebele, AER