

July 11, 2018

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By e-mail only

www.aer.ca

Clear Water River (Paul Cree) Band #175 and Original Fort McMurray Band

Attention: John Malcolm

Dear Mr. Malcolm:

Re: Decision on Participation of Clear Water River (Paul Cree) Band #175 and Original Fort McMurray Band
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 AER issued a notice of hearing explaining how to file a request to participate in the hearing of Syncrude Canada Ltd.'s (Syncrude) applications associated with 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 the Clear Water River (Paul Cree) Band #175 and Original Fort McMurray Band (collectively, the Fort McMurray Band).

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.

The Fort McMurray Band's Request

In its June 14th participation request, the Fort McMurray Band submitted they have recognized Aboriginal rights under section 35 of the Constitution Act, 1982. The request to participate also asserts that these groups have rights pursuant to Treaty 8 to hunt, trap, fish and collect traditional medicines and conduct other Indigenous cultural activities within their traditional lands which specifically include the area of T93 and T94, R10-12W4M (i.e. the project area). The request states that these traditional lands have been extensively and directly affected by this ongoing project and will be further extensively and directly

affected by the Mildred Lake Extension Project. Concerns include the lack of restoration to date of lands associated with the project and the destruction of habitat for various species of importance for subsistence purposes and the continued practice of Aboriginal rights.

Syncrude's Response

In its June 28th letter to the panel, Syncrude noted that the request to participate from the Fort McMurray Band does not comply with the technical requirements set out in subsection 9(2) of the AER Rules. The request does not: (1) enclose a copy of the Original Fort McMurray First Nation's late-filed Statement of Concern or provide an explanation why the Fort McMurray Band did not file a Statement of Concern (if the groups are different); (2) provide the nature and scope of the Fort McMurray Band's intended participation (unless the participation is intended to be limited only to the presentation of evidence by Elders and by Dr. David Schindler, which is not clear); or (3) address the Fort McMurray Band's efforts, if any, to resolve issues associated with the proceeding directly with Syncrude.

Syncrude acknowledged the Fort McMurray Band's assertion of certain Treaty and Aboriginal rights in the area, but stated that it is unable to conclude that the Fort McMurray Band has such rights. Syncrude therefore submits that the Fort McMurray Band does not meet the first branch of the standing test resulting from *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*. Syncrude acknowledges the Fort McMurray Band's concerns related to the lack of formal recognition of Indigenous rights for its members but submits that this concern is not directly related to Syncrude or the MLX Project. Syncrude submits that the second branch of the *Dene Tha'* test is also not satisfied, noting that the request to participate does not provide any information about how the Fort McMurray Band's asserted rights may be affected by the Mildred Lake Extension Project, or any detailed information of the nature required by *Dene Tha'*. In Syncrude's view, the request expresses limited generic concerns about wildlife and wildlife habitat and stress to traditional livelihood that could be said about another oil sands project or industrial activity.

The Panel's Decision

The panel finds that the Fort McMurray Band has not demonstrated it may be directly and adversely affected by the project or how its participation in the hearing will materially assist the panel. The panel's reasons are as follows:

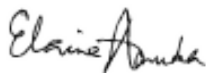
- The request to participate does not satisfy the information requirements outlined in the Rules.
- The Fort McMurray Band is not recognized as a rights bearing group by Alberta or Canada and the panel does not consider that the Fort McMurray Band has demonstrated it has the rights it

asserts. The first part of the test in *Dene Tha* does not have application to the test for participation articulated in section 9 of the Rules. *Dene Tha* was decided under a different legislative regime which required a person seeking participatory rights to demonstrate they had a legal right which may be directly and adversely affected by a decision. Under the REDA and the Rules, a person seeking to participate in a hearing does not need to demonstrate they have a right known in law that may be directly and adversely affected. The question is simply whether the requester is directly and adversely affected. However, where the requester asserts that they may be affected because they have a legal right which is directly and adversely affected, the existence of the right is a question the panel must address. In this matter, the Fort McMurray Band's submissions do not demonstrate that things it says are affected, its treaty and constitutional rights, exist.

- The hearing for the Mildred Lake Extension project is not the appropriate venue to seek a confirmation of the rights asserted.
- Even if the Fort McMurray Band had the rights it asserts, it has not provided sufficient information to demonstrate how those asserted rights or its use of the lands in the project area may be directly and adversely affected or how its members may otherwise be directly and adversely affected by the project. Specifically, the Fort McMurray Band has not provided sufficient information to demonstrate the degree of location or connection between the proposed project activities and its use of the lands to justify its participation in the hearing.

For the reasons set out above, the panel has denied the Fort McMurray Band's request to participate in the hearing regarding Syncrude's Mildred Lake Extension project.

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