

September 21, 2018

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**Re: Pre-hearing Meeting Decision
Proceeding ID 361
Syncrude Canada Ltd. (Syncrude)
Mildred Lake Expansion Project (MLX)**

The Alberta Energy Regulator (AER) held a prehearing meeting in Calgary, Alberta on September 12, 2018, before commissioners Alex Bolton (presiding), Parand Meysami and Christine Macken.

The prehearing meeting was convened to consider the issues to be addressed at a hearing and to address procedural matters. The meeting was attended by Syncrude Canada Ltd. (Syncrude), Fort McKay First Nation (Fort McKay), Athabasca Chipewyan First Nation (ACFN), and Mikisew Cree First Nation (Mikisew).

This letter is the panel's decision on items addressed at the prehearing meeting.

Scope of the Hearing

In a letter to the parties dated July 30th 2018 (Appendix A), the panel proposed that the following items would be out of scope for the hearing:

- The Aurora North Mine and Aurora Tailings Management Plan
- Adequacy of Crown consultation
- The adequacy of the Lower Athabasca Regional Plan (LARP) and any existing sub-regional plans under LARP
- Cumulative effects that do not arise from, or are not caused by the proposed MLX project.

Parties' Submissions

Syncrude agreed with the scope of the hearing as outlined in its July 30th letter and proposed that there would be value in determining scope early. It suggested the parties want to know what is relevant, and knowing the scope in advance could help parties prepare for the hearing and it provides a road map in the

event objections related to the relevance of evidence arise. However, Syncrude indicated that the panel does not have to make a decision on excluding issues from the scope of hearing at this point.

In written submissions and at the prehearing, ACFN, Fort McKay and Mikisew said it is premature to narrow the scope of the hearing before all of the evidence has been submitted. They proposed that the panel should remove the list of out of scope items identified in its July 30th letter. Rather than excluding items in advance, they said the panel should determine the value of evidence after it has heard all the evidence.

Fort McKay said that removing the exclusion list should be a substantive and not merely an administrative exclusion, and that the panel has to remain open to hearing evidence and argument on the relevance of all issues. Mikisew suggested that if the panel is considering excluding any items prior to the hearing, there should be a process for parties to make submissions on the appropriateness of such exclusions.

ACFN, Fort McKay and Mikisew expressed the view that the list of in scope items in the Panel's July 30th letter was appropriate and that item 7 from that list is sufficient to allow parties to make submissions on any items they consider relevant.

Fort McKay and Mikisew asked for clarification on the term cumulative effects as used in the July 30th letter. ACFN proposed that the panel determine the scope of cumulative effects after receiving and evaluating the evidence. They also said clarification is needed on whether effects from 'proposed projects' or 'planned development' is included.

With respect to the adequacy of LARP, ACFN said that any limitations in LARP also limit how cumulative effects, relative to projects like MLX, are addressed. They proposed that the adequacy of LARP is within scope and the parties should be able to make submissions on the issue. It would be up to the panel to determine the value of such evidence.

Having heard the views of the other parties, Syncrude agreed that all of the evidence could be submitted, and that it would be appropriate for the panel to determine scope after assessing the evidence. Syncrude also said that in making such determinations the panel is bound by its statutory legislation and provisions in the Responsible Energy Development Act (REDA) governing Crown consultation with aboriginal peoples.

Panel's Decision

The panel agrees with the parties that the list of in scope items identified in its July 30th letter is sufficient and should not be narrowed at this time. The panel will not further narrow the scope of the hearing before considering all of the submissions and evidence. The panel also agrees to remove the exclusion list.

That said, the panel is cognizant of section 20 of the Responsible Energy Development Act (REDA) which requires the Regulator to act in accordance with any applicable regional plan, and section 21 of REDA which states that the Regulator has no jurisdiction to assess the adequacy of Crown consultation.

The panel recognizes that the effects of approved and planned projects were unintentionally omitted from the description of cumulative effects in Item 5 in the list of in scope items in the July 30th letter. Item 5 should have read:

5. Cumulative Effects that may arise from, or be caused by the proposed MLX project when considered in combination with the effects of existing, **approved and planned development projects**. This includes cumulative effects on the participants' Aboriginal and Treaty rights and traditional land uses, to the extent those effects may arise from, or be caused by the proposed project.

This description is consistent with the Final Terms of Reference for the Environmental Impact Assessment for the MLX project¹, which directs the applicant to refer to the Guide to Preparing Environmental Impact Assessment Reports in Alberta (the Guide)². The Guide directs proponents to address three development scenarios – Baseline Case, Application Case and Planned Development Case. According to the Guide, in developed areas such as the Regional Municipality of Wood Buffalo, the Baseline Case includes the effects resulting from existing and approved projects or activities. The Application Case includes the effects from the Baseline Case plus the effects of the project. The Planned Development Case includes the effects from the Application Case plus other projects which are reasonably expected to occur.

The panel is also guided by section 49 of the Environmental Protection and Enhancement Act, which states that an environmental impact assessment report must be prepared in accordance with the Final Terms of Reference. This section also requires that an environmental impact assessment report contain information including:

a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations.

¹ Exhibit 1.01 – MLX Application Binder 1(Tabs 1-29), Tab 17 2014-12-15-Syncrude Application – Volume 1 – Attachment 1 – Final Terms of Reference, PDF p. 403 – 426.

² Cumulative Effects Assessment in Environmental Impact Assessment Reports Required under the Alberta Environmental Protection and Enhancement Act <http://aep.alberta.ca/land/programs-and-services/environmental-assessment-EIAs/documents/CumulativeEffectsEIAReportsUnderEPEA-A.pdf>

Another relevant document is *Cumulative Effects Assessment in Environmental Impact Assessment Reports Required under the Alberta Environmental Protection and Enhancement Act*. In that document cumulative effects are defined as:

the changes to the environment caused by an activity in combination with other past, present, and reasonably foreseeable human activities.

Page 2 of that document contains a statement that a cumulative effects assessment component of an EIA should look for *effects of past, present and future developments and activities that might interact with the effects of the proposed project.*

The panel will accept submissions and hear argument on items 1 to 7 described in the July 30th, 2018 letter, with the following clarification to item 5 in that letter:

5. Cumulative Effects that may arise from, or be caused by the proposed MLX projects when considered in combination with the effects of existing, **approved and planned development projects**. This includes cumulative effects on the participants' Aboriginal and Treaty rights and traditional land uses, to the extent those effects may arise from, or be caused by the proposed project.

Procedural Matters

Finding no disagreement among the parties on many of the procedural items, the panel has limited its determination to the following items:

Application for Advance Costs

Syncrude and the participants informed the panel that they would make efforts to agree among themselves on advancement of costs. ACFN said it would make an application for advanced costs only if it can't reach agreement with Syncrude.

The panel is of the view that January 19th, 2019 is too late to consider applications for advance costs. Should the parties be unable to reach agreement and require a decision from the panel, they are directed to file such applications as soon as possible and no later than November 1st, 2018. However, the panel notes that an advance of funds does not guarantee that the AER will make a final cost order in the amount of an advance of funds or amounts beyond the advance award.

Hearing Submissions and Schedule

Fort McKay requested that the hearing schedule provide an opportunity for the participants to provide reply to Syncrude's reply submissions (i.e. sur-reply).

Syncrude told the panel it has made its case in the substantive submissions and in responses to extensive information requests that are already on the record for this proceeding. It is not their intent to file reply submissions unless they are needed to respond to intervenors' submissions. Syncrude suggested there is no need to decide on the need for sur-reply at this stage. Should Fort McKay or any other participant feel that Syncrude has improperly introduced new evidence in its reply submissions, it can raise a concern at that time and the panel can determine whether they should be allowed an opportunity for sur-reply evidence.

The panel confirms that the onus is on an applicant to make the case that its project meets all regulatory requirements and is in the public interest. Sur-reply may be appropriate in instances where a reply submission contains new evidence that does not arise from the submissions of the participants. The panel will determine the need for any sur-reply submissions if and when such an instance arises, and after hearing from the parties on the issue.

Witness panels and CVs – disclosure and timing

Fort McKay noted it is Syncrude's intent to provide the names of its witness panels and CVs when it files reply submission on December 14th.

Rule 9(2) (b) and (c) of the *AER Rules of Practice* state that submissions must include any expert reports and evidence, and a list of witnesses the applicant intends to present to speak to any expert evidence. The panel directs Syncrude to provide those names and CVs with its October 4th, 2018 submission. Syncrude will have the opportunity to amend the list when it files its reply submission. Other participants are also required to include the list of their expert witnesses and their CVs with their submissions.

Sitting panels by topic

The chair explained the panel's intent in soliciting input on this topic. Given the complexity of the MLX project, the panel believes it may lead to a better understanding for the panel to hear all the evidence on a topic at one time. In particular, expert panels on the tailings management plan could sit back to back. In this fashion, the panel and the parties may get a more robust understanding of all the issues and concerns related to tailings management.

Syncrude expressed its intent to sit one witness panel that would cover all issues and did not see any efficiency associated with sitting panels by topic. Fort McKay stated it is too early to decide the need to sit panels by topic, but that it is leaning favourably towards this option. Both Mikisew and ACFN agreed it is too early to make a determination on this matter. They said they are in favour of sitting expert witness panels by topic however this decision should be made after all the submissions are filed.

The panel may provide further direction on this topic after it has reviewed all of the submissions and when it provides the detailed schedule for the hearing.

Opening statements and direct oral evidence

The panel finds it useful to have a summary of pre-filed written submissions as part of each participant's oral direct evidence. The panel also agrees with the parties that any PowerPoint presentation used with direct oral evidence should be provided a minimum of 1 day in advance of the presentation.

Providing parties with a list of standard terms and approval conditions

The panel had solicited the parties' views on the merits of providing them with a list of standard terms and approval conditions under the Oil Sands Conservation Act, Environmental Protection and Enhancement Act, Water Act and Public Lands Act prior to the hearing.

The parties agreed it would be useful to have this list however they had different views on the timing. Syncrude felt it would be useful to provide the list after all submissions are filed, whereas the participants would welcome the list as early as possible and preferably before submissions are filed. Mikisew requested that the AER provide additional clarity on how the AER sees using those standard terms and conditions and that the AER allow parties to make submissions on the merits of utilizing such materials once the parties have had an opportunity to review the list.

The panel chair clarified for the parties that standard conditions include those conditions that would be applied to a project of this type that does not go through a hearing. The conditions are provided for information only and do not limit the panel's ability, in the event the project is approved, to modify or add conditions that the panel determines are necessary. Similarly, providing these conditions does not limit the parties' ability to explain in their submissions why various conditions are not adequate or relevant or to suggest additional or alternative conditions.

The panel will provide the list of standard terms and approval conditions by October 15th. Participants will have the opportunity to comment on the conditions, including providing their views on how the panel should use the conditions, as part of their submissions.

Location of the hearing

The hearing will be held in Fort McMurray. A determination on the feasibility of holding a portion in Fort Chipewyan will be made following the closure of the Teck Frontier hearing. The panel believes there could be some learning from logistics associated with the Teck Frontier hearing that would inform our decision.

Information received during site visits

The panel received submissions on site visits; in particular views and concerns about how information received by the panel during the visits would be entered onto the record for the hearing.

There was agreement among the parties that the purpose of site visits is not to collect evidence. Site visits by the panel to communities of Fort McKay and Fort Chipewyan, and to the Syncrude Mildred Lake site, are to help familiarize the panel with the characteristics of the respective areas.

The parties agreed that the following information could be entered into the hearing record:

- Route maps of the Panel's aerial tour and site and community visits
- Written summaries representatives of Syncrude, Fort McKay First Nation and Mikisew Cree First Nation provide to the panel to identify site features.

The panel's letter to the parties dated September 12th, 2018 summarizing the procedural measures agreed to by the parties at the hearing is attached (Appendix B) to this decision. The parties agreed that the procedural measures are sufficient safeguards for a fair process.

<original signed by>

A. Bolton
Presiding Hearing Commissioner

<original signed by>

C. Macken
Hearing Commissioner

<original signed by>

P. Meysami
Hearing Commissioner

cc: Meighan LaCasse, AER Counsel
Alison Doebele, AER Counsel
Elaine Arruda, AER Hearing Coordinator

Appendix A



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Via e-mail only

July 30, 2018

Dentons LLP
Attention: Bernard Roth and Laura Estep

JFK Law Corporation
Attention: Mark Gustafson and Mae Price

Athabasca Chipewyan First Nation
Attention: Meghan Dalrymple

Boughton Law
Attention: Tarlan Razzaghi

Suncor Energy Inc.
Attention: Jason Heisler

Dear Sir/Madam:

**Re: Proceeding ID 361
Syncrude Canada Ltd.
Mildred Lake Expansion Project (MLX)**

The Alberta Energy Regulator (AER) hearing panel assigned to this proceeding has considered next steps in this matter and has asked me to communicate the following proposal for your consideration:

Hearing date

The panel is considering beginning the hearing during the week of November 20, 2018 in Fort McMurray, Alberta. The panel anticipates the hearing will require up to three weeks. Please advise as to your availability during this time.

Scope of the hearing

The panel would like to hear from the parties as to their views on the scope of the hearing.

The AER's jurisdiction is defined by the *Responsible Energy Development Act* and the legislation it administers. In order to meet the AER's obligations and fully discharge its mandate, the panel proposes to consider and hear evidence on the matters set out below:

1. The Tailings Management Plan for the Mildred Lake Mine (existing and MLX), including management of froth tailings from the Aurora North Mine treated at the Mildred Lake site, and, compliance with Directive 085, Fluid Tailings Management for Oil Sands Mining Projects.
2. Economic and social effects of the proposed MLX project.
3. Effects of the proposed MLX project on the environment.

4. Effects of the proposed MLX project on Aboriginal and Treaty rights and on traditional land use.
5. Cumulative effects that may arise from, or be caused by the proposed MLX project when considered in combination with the effects of existing projects. This includes cumulative effects on the participants' Aboriginal and Treaty rights and traditional land uses, to the extent those effects may arise from, or be caused by the proposed project.
6. Compliance with the requirements of LARP, including any sub-regional plans, in accordance with section 20 of REDA.
7. Others issues that are relevant and material to the panel's determination in respect of the proposed project.

The following matters are outside of the scope of this proceeding or the AER's jurisdiction, and will not form part of the issues in the hearing and the panel will not hear evidence or submissions relating to them:

1. The Aurora North mine and the Aurora Tailings Management Plan.
2. Adequacy of Crown consultation. As per section 21 of REDA, the AER has no jurisdiction with respect to assessing the adequacy of Crown consultation.
3. The adequacy of LARP and any existing sub-regional plans under LARP.
4. Cumulative effects that do not arise from, or are not caused by the proposed MLX project.

Hearing submission schedule

The panel considers that the following deadlines for submissions to be appropriate for a November 20th, hearing date:

Syncrude's Submission	August 17, 2018
Participant's Submissions	September 28, 2018
Syncrude Reply Submission	October 31, 2018

Information Requests

The panel intends to initiate an information request (IR) process for this proceeding and proposes the following deadlines:

IRs from participants to Syncrude	August 31, 2018
Syncrude responses to IRs	September 14, 2018
IRs from Syncrude to participants	October 9, 2018
Participant's responses to IRs	October 23, 2018

The panel may direct parties to file additional information that it considers necessary to permit the full and satisfactory understanding of the issues in the proceeding.

Deadline for motions

All pre-hearing motions, including those related to constitutional questions and Notices of Questions of Constitutional Law (NQCL) must be submitted by November 6, 2018.

inquiries 1-855-297-8311
24-hour
emergency 1-800-222-6514

Site Visit and Prehearing Meeting

The panel anticipates a site visit and a prehearing meeting will occur between September 4th and 14th. The parties are asked to provide their availability to attend the prehearing meeting during the period of September 4th to the 14th, 2018. The panel suggests that the prehearing meeting take place in Calgary at Govier Hall.

The agenda for the prehearing meeting will follow at a later date, and may include the following:

1. Issues to be discussed at the hearing;
2. To decide any matters that may aid the simplification of the proceeding; and
3. Time estimates for direct evidence, cross examination and closing argument.

Proposed schedule

Syncrude's Submission	August 17
IRs from Participants to Syncrude	August 31
Site Visit and Prehearing Meeting – dates to be confirmed	September 4 – 14
Syncrude's Responses to IRs	September 14
Participant's Submissions	September 28
IRs from Syncrude to participants	October 9
Participant's Responses to IRs	October 23
Syncrude Reply Submission	October 31
Deadline for motions (including NQCL)	November 6
Start of hearing	November 20

Please provide your responses to the above process steps and deadlines by no later than **12:00 pm (MST) on August 3, 2018**.

If you have any questions contact me at 403-297-7365 or at hearing.services@aer.ca.

Sincerely,



For
Elaine Arruda
Hearing Coordinator

cc: Meighan LaCasse, Alison Doebele, AER
Vince Biamonte, Sarabpreet Singh and Stephen McCarthy, ACO

Appendix B



September 12, 2018

By e-mail only

Dentons LLP
Bernard Roth and Laura Estep

JFK Law Corporation
Mark Gustafson and Mae Price

Olthuis, Keeler, Townshend LLP
Larry Innes and Christopher Evans

Boughton Law
Tarlan Razzaghi

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**RE: SITE VISITS
PROCEEDING ID 361
SYNCRUDE CANADA LTD. (SYNCRUDE)
MILDRED LAKE EXPANSION PROJECT (MLX)**

The hearing panel assigned to proceeding 361 has asked me to convey the following decisions regarding the community and the site visits planned for September 14, 2018.

The panel is planning to proceed with the Fort McKay community and Mildred Lake site visits (aerial and ground components) on September 14, based on the agreement of all parties during the prehearing meeting conducted on September 12, 2018. There was agreement among the parties that the purpose of the site visits is not to collect evidence and that the procedural measures outlined by the panel in its letter dated September 10, 2018 and discussed at the prehearing meeting are sufficient.

These procedural measures include:

- Allowing participants to identify areas/features that the panel should view and incorporating these into their site visits.
- Inviting participants to accompany the panel during the ground component of the site visits.
- Maps of the aerial and ground routes will be provided to all parties.
- All portions of the site visits will be limited to visual observation only.
- Parties will be permitted to point out factual, points of reference (e.g. names of buildings, key features or components of the community and MLX project.)
- The site visits are not an opportunity to provide commentary or engage the panel on matters that will be the subject of the hearing. Interaction between the parties and the panel will be limited to identifying features and points of reference. Where clarification questions are required, they may be asked through counsel for the panel. Parties should not ask questions directly of other parties during the site tour.

As indicated previously; the panel accepts that site visits to Fort McKay and the Mildred Lake Extension project (MLX) would be helpful in familiarizing the panel with the characteristics of the area. The visit will consist of a bus tour of the community and MLX.

The panel also accepts that a site visit to Fort Chipewyan and the Peace Athabasca Delta would be helpful in familiarizing the panel with the features of the region. Details of this site visit will be finalized in the coming weeks.

Syncrude and Fort McKay are asked to provide the written summaries for the site visits of the Mildred Lake Site and the community of Fort McKay, respectively, **no later than September 13, 2018 at 6:00 pm (MDT)**. The panel also requests Syncrude and Fort McKay to provide hard copies of these written summaries to parties on September 14, at the site visits. The panel will work with Mikisew to establish an appropriate deadline for the written summary for the visit to Fort Chipewyan as details for this site visit are confirmed.

At the pre-hearing meeting, the parties also agreed that the following may be entered into the hearing record:

- route maps of the panel's aerial tour and site visits.
- the written summaries representatives of Syncrude and Fort McKay First Nation provide to the panel in advance of the site visit to identify site features.

In regard to Syncrude's request for permission for five Syncrude representatives to attend the Mildred Lake site visit, the panel is prepared to accommodate this request. Given that Syncrude is hosting the Mildred Lake site visit, having five attendees is reasonable. Also, the panel would like to advise Fort McKay and Mikisew that when they host their community visits, up to five representatives from their communities may attend.

Sincerely,



Elaine Arruda
Hearing Coordinator

cc

Meighan LaCasse and Alison Doebele, AER
Vince Biamonte, Sarabpreet Singh, Stephen McCarthy, ACO
Jason Heisler, Suncor Energy Inc.