October 31, 2018

DLA Piper (Canada) LLP

Attention: Peter S. Jull, Q.C.

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

www.aer.ca

Dear Sir:

RE: Request for Regulatory Appeal by O'Chiese First Nation (OCFN)
Shell Canada Limited (Shell)
Application Nos.: 1824440; 1824441
Well Licence Nos.: 0475456; 0475457
Location: 15-04-41-08W5M
Regulatory Appeal No. 1831586 (Regulatory Appeal)

It has recently come to our attention with the departure of an employee that the AER has not dispositioned your request for a regulatory appeal concerning the above noted well licences. We sincerely apologize for the delay.

The Alberta Energy Regulator (AER) has considered OCFN's request under section 38 of the *Responsible Energy Development Act* (*REDA*) for a regulatory appeal of the AER's decisions to issue well licences 0475456 and 0475457. The AER has reviewed OCFN's submissions and the submission made by Shell. For the reasons that follow, the AER has decided that OCFN is not eligible to request a regulatory appeal in this matter. The request for a regulatory appeal is therefore not granted.
The applicable provision of *REDA* in regard to regulatory appeals is section 38, which states:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

"Appealable decision" is defined in section 36 of the *REDA*. Specifically relevant to this regulatory appeal is section 36(a)(iv):

36(a)(iv) a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing,

"Eligible person" is defined in section 36 (b)(ii) as a person who is directly and adversely affected by a decision referred to in clause 36 (a)(iv).

Reasons for Decision

The well licence applications were filed pursuant to the *Oil and Gas Conservation Act*, which is an energy resource enactment as defined under the *REDA*, and were approved without a hearing. Those decisions are therefore each an "appealable decision." In order for OCFN to be eligible for a regulatory appeal it must have met the filing requirement in the *Alberta Energy Regulator Rules of Practice* (*Rules*) and be a person who is directly and adversely affected by the AER's decisions to issue the well licences. The AER has determined that the decision is an appealable decision and that OFCN met the filing requirements set out in the *Rules*. However, the AER does not find that OFCN is "a person who is directly and adversely affected".

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The factual part of the test set out by the Court of Appeal of Alberta in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*[1] provides guidance on what indicates that a person may be directly and adversely affected. The AER must consider whether there is a "degree of location or connection" between the work proposed and the person, and whether that connection is sufficient to demonstrate the person may be directly adversely affected by the proposed activity.

In *Dene Tha'*, the Court also provided guidance on what an Aboriginal group must demonstrate in order to meet the factual part of the directly and adversely affected test:

> [14] It was argued before us that more recent case law on prima facie infringement of aboriginal or treaty rights changed things. But the Board still needed some facts to go on. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a possible aboriginal or treaty right. Some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the Board.
> . . . .
>
> [18] There had been discussions and provision of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were to be within the reserve. The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta.
>
> [19] The First Nation also contended before us it had no duty to tell the Board specifics, and that the Board should have frozen all development while deciding the question. We cannot agree, and have seen no authority, constitutional or otherwise, requiring such a logical impasse.

Additional guidance is provided in a decision of the Alberta Environmental Appeals Board, wherein it summarized the case law on "directly affected" as follows:

> [28] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a prima facie case that he or she is directly affected. [2]

The OCFN is a Treaty No. 6 First Nation. OCFN stated that the lands upon which the wells are located are Crown lands that are subject to the terms of Treaty No. 6 and the rights of the OCFN recognized by the *Natural Resources Transfer Agreement*. The OCFN also stated that the AER failed to consider cumulative impacts on the OCFN.

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[1] Dene Tha' First Nation v Alberta (Energy and Utilities Board), 2005 ABCA 68.
[2] Tomlinson v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Evergreen Regional Waste Management Services Commission (03 April 2013), Appeal No. 12-033- ID 1 (A.E.A.B.).

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The OCFN stated in its request for regulatory appeal that no identification of impacts on Aboriginal and Treaty rights had taken place. The OCFN also stated that the AER failed to comply with the directions in Energy Ministerial Order 105/2014, specifically that it failed to require Shell to include information in its well licence applications about the potential adverse impacts of the requested licenses on existing Aboriginal and Treaty rights of the OCFN.

The AER has found that OCFN has not provided the "hard information" that is needed in order to establish that the First Nation or its members are directly and adversely affected by the AER's decisions to issue the well licences. In fact, the OCFN takes the position that it is not required to provide any detailed information about impacts. In paragraphs 6 and 7 of its reply submission, the OCFN states:

> 6. Shell is developing its Rocky Exploration Project in O'Chiese First Nation's traditional territory, less than 20km from O'Chiese Indian Reserve 203. It is submitted that this is a sufficient degree of location or connection to allow the AER to determine that O'Chiese First Nation is directly and adversely affected by Well Licences 0475456 and 0475457.
>
> 7. O'Chiese First Nation should not be required to approve the recent exercise of its Treaty rights within the project area because the Crown has already recognized the Treaty rights of O'Chiese First Nation in the project area. The approach advocated by Shell would incorrectly consider established Treaty rights as though they were merely asserted rights.

The AER has decided that the information provided in this regulatory appeal request does not demonstrate the degree of location or connection between the well licences and a potential for direct and adverse impacts on the OCFN or its members to establish that the OCFN is an "eligible person" under section 38 of the *REDA*. OCFN has merely asserted rights without detailing how they are connected to locations within or in proximity to the surface locations of the wells, which is not sufficient as stated by the Court in *Dene Tha'*. Further, the position taken by OCFN was rejected by the Court of Appeal in *O'Chiese First Nation v. Alberta Energy Regulator*, 2015 ABCA 348. In this decision the Court found that a mere assertion was not sufficient to establish that a person was directly and adversely affected, and that evidence of "directly and adversely affected" must be adduced.

> [37] The O'Chiese First Nation argued that its treaty rights would be directly and adversely affected by any development undertaken within the OCFNCA; the argument being that once a development had taken place, its traditional treaty rights are lost over the area of the development.
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> [38] In other words, the O'Chiese First Nation's position is that there is no requirement whatsoever upon it to adduce any specific evidence to show how the Approvals affected it. The argument is that the Approvals, as a matter of law, "directly and adversely" affect the O'Chiese First Nation's rights by the mere fact that both its reserve and the lands covered by the Approvals are situated within the OCFNCA. This court was advised that the O'Chiese First Nation took no action by way of judicial review to contest the decisions of the Aboriginal Consultation Office referred to paragraphs 8 and 16 above.
> …
>
> [42] However, that duty does not inform the requirements of the relevant legislation that some party in the position of the O'Chiese First Nation must be "directly and adversely affected" by a decision of the

> AER as a pre-condition to be accorded a regulatory appeal. The O'Chiese First Nation, having chosen to adduce no evidence to show how it would be directly and adversely affected by the Approvals cannot now seek regulatory appeals therefrom.
>
> [43] A decision of the AER can, as a matter of fact, "directly and adversely" affect a party such as the O'Chiese First Nation. Whether it does so or not is to be considered by the AER in light of the evidence properly adduced before it.
>
> [44] What is equally clear however is that the phrase "directly and adversely" is not automatically engaged as a matter of law on the facts of this case. In other words, the mere fact that the developments in question are located within the OCFNCA does not mean that the Approvals "directly and adversely" affect the O'Chiese First Nation.
>
> [45] Had the Legislature intended that a party in the position of the O'Chiese First Nation have the right to a regulatory appeal any time an Approval is granted to a development located within that party's area of consultation, it would have been easy enough for the Legislature to so provide. The fact that there is no such legislation to that effect strongly tells against the argument now being advanced on behalf of the O'Chiese First Nation.

None of the information provided by OFCN shows if or how its members are present or active at locations within or in proximity to the surface locations of the wells approved by the AER. OCFN's submissions leave unanswered the question of what land uses occur in what locations, and for what purposes, or how those may be affected if the wells are developed. The onus to provide evidence that OCFN is directly and adversely affected is OCFN's, and OCFN has not provided any information beyond general unspecific assertions to demonstrate how it believes it may be directly and adversely affected by the well licences.

Ministerial Order 105/2014

The OCFN also states that Shell's applications did not include information about the potential adverse impacts of the applications on the OCFN's existing Treaty and Aboriginal rights, contrary to the requirement set out in Ministerial Order 105/2014 (MO). The AER understands that the MO does not apply to applications under the *Oil and Gas Conservation Act*: it only applies to applications under the specified enactments. This is provided on the first page of the MO, under the heading "PURPOSE:"

> This Direction applies to "applications" to the AER for "energy resource activity" "approvals" under "specified enactments", all as defined in REDA ("energy applications"). [underlining added]

As a result, the OCFN's argument that the AER's failure to insist that Shell's applications document impacts on Aboriginal and Treaty Rights is not assisted by the MO. The MO does not apply to the well licence applications.

Failure to Consider the Rocky Exploration Project as One Project

The OCFN submitted that the AER failed to require Shell to combine all of Shell's applications related to its Rocky Exploration Project. The OCFN stated that it is clear that the public land dispositions are part of an overall scheme to develop what Shell has described as its "Rocky Exploration Project". The OCFN also stated that, in discharging the obligations to consider the potential adverse impacts of the approvals on the Aboriginal and Treaty rights and traditional uses of the OCFN, the AER should consider the well

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licence applications in the context of all of Shell's Rocky Exploration Project applications, as a single energy resource project.

The AER notes that it has the discretion under s. 30(2) of *REDA* to combine applications where the AER considers it appropriate; however, it is not required to do so.

> 30(2) An application under an energy resource enactment or a specified enactment in respect of an energy resource activity may be combined with any other application under an energy resource enactment or a specified enactment in respect of an energy resource activity and considered by the Regulator jointly or separately, as the Regulator considers appropriate.

The AER allows the proponent of a project to determine if any applications should be combined and considered as one project.

Conclusions

For the foregoing reasons, the AER finds that OCFN is not directly and adversely affected by the AER's decisions to issue well licences 0475456 and 0475457, and therefore, OCFN is not an "eligible person" as defined by section 36(b)(ii) of REDA:. Accordingly, OCFN has not met the requirements for a regulatory appeal and the AER has decided not to grant the request for regulatory appeal.

Sincerely,

<*original signed by*>

Marcus Ruehl,
Senior Advisor, Authorizations

<*original signed by*>

David Helmer,
Director, Industry Operations

<*original signed by*>

Jason Veness,
Senior Advisor, Indigenous Engagement

cc: Shell Canada Limited – David McGillivray