Alberta Energy Regulator

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Via Email

December 20, 2018

Owen Law

**Attention: Tom Owen**

Imperial Oil Resources Ltd.

**Attention: Brad Gilmour**
**Bennett Jones LLP**

Dear Sirs:

**RE: Request for Regulatory Appeal by Elizabeth Métis Settlement (EMS)**
**Imperial Oil Resources Limited (Imperial)**
**Approval Nos.: 73534-01-02 (*EPEA*) and 8558MM (*OSCA*);**
**Cold Lake Expansion project (CLEP)**
**Request for Regulatory Appeal Nos.:1913250 and 1913252**

The Alberta Energy Regulator (AER) has considered EMS' requests under section 38 of the *Responsible Energy Development Act* (*REDA*) for a regulatory appeal of the AER's decision to approve Approval Nos.: 73534-01-02 and 8558MM (the Approvals). The Approvals relate to an expansion of Imperial's Cold Lake thermal oil sands In-Situ recovery and will increase bitumen production on the existing project. This phase of the project involves construction of a central processing facility, solvent-assisted steam assisted gravity drainage (SAGD) well pads and other well pads, roads, pipelines, and powerlines to connect wells to the central processing facility and pipeline connections for natural gas, diluent supply, diluted bitumen shipping, water supply, and water disposal, and borrow source areas (the expansion project).

The AER has reviewed EMS's submissions and the submissions made by Imperial.

For the reasons that follow, the AER has determined that EMS is an eligible person under section 38 of REDA. Therefore, the requests for regulatory appeal are granted for the reasons stated below.

The applicable provision of *REDA* in regard to regulatory appeals, section 38, 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]

The test has three components:

(a) the decision must be an appealable decision;
(b) the requester must be an eligible person; and
(c) the request must be filed in accordance with the rules.

The requests were filed in accordance with the AER's *Rules of Practice*. Accordingly, the other components of the test are discussed below in relation to EMS' regulatory appeal requests.

## 1. Appealable Decision

The applicable *REDA* provisions for the requests are:

- Section 36(a)(i): a decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 91(1) of the *EPEA* if that decision was made without a hearing;

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

### Section 91 Environmental Protection and Enhancement Act (*EPEA*)

Under section 91(1), a notice of appeal may be submitted by the following persons in the following circumstances:

(a) where the [Regulator] issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

> (i) By the approval holder or by any person who previously submitted a statement of concern in accordance with the [*REDA* and its regulations and rules] and is directly affected by the [Regulator's] decision, in a case where notice of the application or proposed changes was provided under the [*REDA* and its regulations and rules],

The AER's decision to issue the *EPEA* approval amendment is an appealable decision.

### Oil Sands Conservation Act (*OSCA*) Approval

The AER's decision to issue the energy resource enactment (i.e. *OSCA*) approval is an appealable decision.

## 2. Eligible Person

For energy resource enactment decisions, an eligible person is a person who is directly and adversely affected by a decision made under an energy resource enactment without a hearing (section 36(b)(ii) *REDA*). For the decision to issue an *EPEA* approval amendment, an eligible person is a person who previously submitted a statement of concern in response to public notice and who is directly affected by the AER's decision (section 36(b)(i) *REDA*).

As *REDA* makes clear, only an 'eligible person' (i.e. a person who is directly and adversely affected / directly affected) can request a regulatory appeal.

### Directly and Adversely Affected/Directly Affected

Whether EMS is a person who is directly and adversely affected/directly affected by the AER's decisions to issue the approvals is the principal question to be decided in relation to EMS' requests for regulatory appeals. A preliminary matter to address is whether the phrases "is directly affected" and "is directly and adversely affected" import a different test—a more onerous test—than the test under section 34(3) of *REDA*, which uses the phrase "may be directly and adversely affected."

The AER's approach in cases such as this, where the development or activity in question has not yet occurred and therefore the actual impacts are not yet known, is to take the position that the phrases "is directly and adversely affected" or "is directly affected" do not require certain proof that the person will be affected. This is consistent with the direction from the courts in the decision of *Court v. Alberta Environmental Appeal Board*[1]. What is required is reliable information in the regulatory appeal request that demonstrates a reasonable potential or probability that the person asserting the impact will be affected

In *Dene Tha' First Nation v. Alberta*[2], the Court of Appeal of Alberta provided guidance on what an aboriginal group must demonstrate in order to meet the factual part of the directly and adversely affected test. Although the decision concerns the test under subsection 26(2) of the former *Energy Resources Conservation Act*, the AER considers it to be reliable guidance on the question of what information is needed to show that a person may be directly and adversely affected/directly affected, i.e., on the factual question that arises under section 36(b) of *REDA*:

> [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 discussion and provision of exact well site 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 use 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.

The *Dene Tha'* decision indicates that a person or group that asserts that he or she may be directly and adversely affected by the AER's decision on an application must demonstrate a degree of location or connection with that application, or its effects, in order to bring himself or herself within the bounds of the legislative provision. The test in *Dene Tha'* remains applicable with respect to the assessment of whether a person is directly and adversely affected as contemplated under *REDA*, as has been confirmed in a subsequent decision of the Alberta Court of Appeal[3].

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[1] *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456
[2] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68
[3] *O'Chiese First Nation v. Alberta Energy Regulator*, 2015 ABCA 348 (leave to SCC denied)

EMS submits that it is an eligible person, having previously filed statements of concern in respect of the expansion project applications and because it has identified site-specific impacts of the expansion project that would directly and adversely affect EMS and its members. EMS asserts that it has Métis rights which allow it to conduct traditional activities in the vicinity of the expansion project. Imperial does not challenge EMS' assertion of rights. Therefore the AER accepts, for the purpose of the current decision, that EMS has those rights.

Information provided by EMS in the May 30, 2016 Traditional Use Study (TUS) has been included and referred to in its regulatory appeal requests, and indicates overlap between the expansion project area and the use of parts of the area by certain EMS members for hunting, gathering, trapping, and fishing. EMS indicates in its regulatory appeal requests that these activities by its members are ongoing and continuous. The TUS maps show site-specific hunting and gathering activities that would be disturbed or impacted by expansion project infrastructure and activities proposed in the application, specifically areas identified in the application as potential sites for SAGD well pads and borrow sources.

The Environmental Impact Assessment (EIA) for the expansion project confirms that it will affect large areas of high and good quality animal habitat, including habitat for some species specifically identified by EMS as species which they hunt in the expansion project area. The EIA also confirms some Metis harvesting activities will be impacted by the removal of preferred blueberry harvesting areas. As the TUS was submitted after the Applications and the EIA were filed, the mitigation measures proposed in the EIA and the Applications do not directly address EMS' site-specific concerns about impacts to its hunting, gathering, and trapping activities. Imperial's response to EMS' statement of concern and TUS refers back to the overall expansion project mitigations proposed in the Applications but also does not directly address EMS' site-specific concerns, other than to commit generally to further engagement with EMS about its concerns with the expansion project. The information provided by Imperial in response to the regulatory appeal requests does not rebut EMS' assertion that its site-specific hunting, gathering, and trapping activities might be directly and adversely impacted, nor does it demonstrate that such impacts will be avoided, minimized or mitigated to such an extent that there is no reasonable potential or probability that EMS will be directly and adversely affected by the expansion project.

## Conclusion

The AER has decided that EMS has demonstrated it may be directly and adversely affected by the Approvals that are the subject of its regulatory appeal requests. Given this decision, it is unnecessary to address Imperial's arguments that the regulatory appeal requests are frivolous, vexatious or without merit. As a result, EMS is an eligible person under section 38 of *REDA*. As the regulatory appeal is properly before it, the AER will conduct a hearing of the regulatory appeal of the Approvals.

## Stay

On September 13, 2018, Imperial voluntarily agreed to delay construction of equipment and facilities associated with the expansion project for a period of 100 days. One of the additional terms upon which Imperial agreed to the stay was that it would lapse upon the AER's decision on EMS' regulatory appeal requests.

The parties have both asked to make further submissions on the stay of the appealable decisions, if required. As the AER is closed during the week of December 24th for Christmas break, it cannot expedite the decision on the stay. In addition, the stay decision is clearly of great importance to both parties and the AER wants to provide for a fair and fulsome submission process in that regard. In light of the finding above that EMS is directly and adversely affected by the expansion project Approvals, the AER does not wish the stay request to be compromised or made moot should Imperial begin construction or other

operations under its approvals early in 2019. The AER also notes Imperial's comments in its application that it intends to commence construction in 2019, and the AER does not want to unduly delay Imperial's business decisions regarding project commencement.

As per section 39(2) of *REDA*, the AER has broad discretion to stay an appealable decision on any terms or conditions:

> 39 (2) The Regulator may, on the request of a party to a regulatory appeal, stay the appealable decision or part of it on any terms or conditions that the Regulator determines

The AER feels that a short-duration, interim stay of the Approvals is the best mechanism to ensure fairness and certainty of the stay decision timing for both parties. The AER believes that a short-term stay pending final determination of the full stay request will not prejudice Imperial, and will ensure that EMS is not prejudiced by Imperial commencing construction and operations.

For these reasons, and because of the discretion in section 39(2) of the *REDA* to stay a decision on any terms and conditions, the AER has decided to temporarily stay Approvals 73534-01-02 (*EPEA*) and 8558MM (*OSCA*) until **January 25, 2019,** pending its final decision on the stay request. For greater clarity, this interim stay applies to construction and activities within Imperial's Cold Lake expansion project area as identified in Appendix B of its *OSCA* Commercial Scheme Approval 8558M. It does not apply to activities outside of this area that are preparatory or incidental to construction.

The AER directs the parties to file submissions regarding the stay request as follows:

Elizabeth Metis Settlement: January 8th, 2019

Imperial Oil Resources Ltd: January 15th, 2019

The AER will make a final decision on the stay request on or before January 25th, 2019.

Sincerely,

*<original signed by>*

Anita Lewis,
Senior Advisor, Closure & Liability

*<original signed by>*

Marcus Ruehl,
Senior Advisor, Authorizations

*<original signed by>*

Paul Ferensowicz,
Senior Advisor, Industry Operations