

February 21, 2024

By email only

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

www.aer.ca

MLT Aikins LLP
Attn: Jessica Buhler

Bennett Jones LLP
Attn: Martin Ignasiak, KC

**Re: Statement of Concern 32255
Summit Coal Inc. Mine 14
Coal Conservation Act 1945552 and 1945553
Environmental Protection and Enhancement Act 001-00496728
Water Act 001-00496729
Lac St. Anne Métis Community Association Confidentiality Request**

Dear Madam and Sir:

The Alberta Energy Regulator (AER) has now considered the request of the Lac Ste. Anne Métis Community Association (LSAMCA), submitted on September 9, 2023, under section 49(3) of the *Alberta Energy Regulator Rules of Practice (Rules)* for confidentiality (Confidentiality Request) over redacted portions of a report containing a desktop study and maps identifying its members' current and historical traditional land use in the area of Mine 14 (Report), an underground coal mine proposed by Summit Coal Inc. (Summit) in the above identified applications (Applications). The LSAMCA proposes to submit an unredacted version of the Report in support of Statement of Concern 32255 (SOC), which it filed on August 28, 2023, in respect of the Applications.

The AER has also considered Summit's response to the Confidentiality Request, submitted on January 10, 2024, and the LSAMCA's reply, submitted on January 18, 2024.

The Report discusses the LSAMCA's current and historical use for traditional purposes of the lands and resources within 5 km of the Mine 14 Permit area. The LSAMCA describes the Report as follows:

The Report contains scientific and technical geographical and biological information regarding the location of certain species. The Report's information is also commercial or financial in that LSAM [Lac Ste. Anne Métis] members use this traditional

knowledge to sustain themselves as a way of life. The Report discusses patterns of traditional and contemporary use of specific locations and trails for hunting, fishing, gathering, and incidental activities. This information also includes references to the species available at what time of the year and in which location. The Report describes a specific access road which is used as a hunting trail. The Report also refers to the presence of historical and cultural sites within the vicinity of the project, including old cabin remains, village sites, food caches, burial sites, and a cemetery. The Report includes maps and photos, some of which are of easily recognizable locations. The maps indicate the exact locations of traditional use and occupancy points, harvesting areas and traditional use access routes/trails.

The LSAMCA provides the following reasons for the Confidentiality Request:

- 1) The Report reveals information that could be used by others in ways that are inconsistent with the value of that information to the LSAM. The Report reveals information, such as hunting, gathering, and fishing locations and/or harvesting times, that could be used by others in a way that results in harm to the competitive position of the LSAM harvesters.
- 2) Publication of the Report could also cause undue financial hardship to the LSAM. If the public were to become aware of the timing and location of its traditional hunting, trapping, gathering, and fishing locations, these areas may become overharvested, leading to a loss of LSAM's abilities to practice its Métis Aboriginal rights in its traditional territory. If this were to occur, the ability of LSAM members to support themselves via their traditional lifestyle would be lost, resulting in undue financial loss.
- 3) Publication of the Report could also result in public interference with the cultural and historical sites referred to in the Report, or could interfere with LSAM members' ability to visit, pay homage to, or practice their spirituality at these sites.

Summit opposes the Confidentiality Request on the grounds that it is inconsistent with the *Rules*, creates unnecessary administrative burden, and serves no purpose. Summit also reiterates its view that the LSAMCA has not established that it may be directly and adversely affected by the Applications. Summit's position is summarized in the concluding remarks to its January 10, 2024, submission as follows:

LSAMCA has seemingly applied a series of haphazard redactions to a report that may have been used for a different project than the one at issue in this Application. LSAMCA has made general, vague statements about potential harm but has not met the onus of showing how the *Rules* apply to each of these redactions.

Summit says that it is hard to understand how any of the information in the Report can be confidential given the low resolution of the figures and the high-level and general nature of the statements therein. Summit states that most of the redacted information is not of a commercial,

financial, scientific, or technical nature. Summit submits that the LSAMCA has not explained how release of the specific redacted information in the Report would cause the harms the LSAMCA has identified and does not provide any evidence of how such harms could be reasonably expected.

In reply, the LSAMCA submits that the AER should ignore Summit's arguments that the LSAMCA is not directly and adversely affected by the Applications. The LSAMCA states the only issue before the AER is whether LSAMCA has satisfied the requirements of section 49 of the *Rules of Practice*.

The LSAMCA also submits that the AER should ignore Summit's speculation regarding the content of the redacted portions of the Report. The LSAMCA states that it has described the redacted portions and to go into any greater detail would defeat the purpose of the confidentiality request. The LSAMCA further states that it has identified the specific harms and how they could occur if the redacted information were publicly released.

Finally, the LSAMCA submits that the alleged "administrative burden" that may result from the AER granting the Confidentiality Request does not outweigh the potential harm to the LSAMCA should the redacted information be made available on the public record.

For the reasons that follow, the AER has decided to grant the Confidentiality Request.

Reasons for decision

It is a fundamental premise of the AER's decision making process, and a requirement under section 49(1) of the *Rules*, that all documents filed in respect of a proceeding be placed on the public record. Public disclosure in the name of procedural fairness and transparency is the overriding general principle reinforced in subsection 49(1) of the *Rules*.

The AER also recognizes the legitimate need, when established, of a party to protect confidential or sensitive information where disclosure of that information is likely to result in harm to such party's competitive, financial, or personal interest, and such harm outweighs the benefit to the public interest of disclosure. Exceptions to disclosure will only be granted in the clearest and most compelling cases, and will be limited to those situations where the party requesting confidentiality has positively and demonstrably met the criteria established under subsection 49(4). A confidentiality ruling is highly fact and situation specific.

The AER agrees with the LSAMCA that the only matter before it here is whether the Confidentiality Request should be granted, which does not require a determination of whether

the LSAMCA may be directly and adversely affected by the AER's decision on the Applications. The AER must first decide whether to grant the LSAMCA's request for confidentiality before it can assess the SOC and the Report, along with the other statements of concern filed in respect of the Applications, and determine whether to hold a hearing.

Under section 49(3) of the *Rules*, a request for confidentiality must "(b) briefly describe (i) the nature of the information in the document that is the subject of the request, and (ii) the reasons for the request, including the specific harm that might result if the document were placed on the public record." The AER is satisfied the Confidentiality Request meets these requirements.

The LSAMCA submitted its request under section 49(4)(b) of the *Rules*. Accordingly, the AER has considered whether the information contained in the redacted portions of the Report falls under the category of information that, if disclosed, "could reasonably be expected (i) to cause significant harm to the competitive position of a party, or (ii) to result in undue financial loss or gain to any person or organization."

The AER has determined that the redacted portions of the Report, as described in the Confidentiality Request and the LSAMCA's January 18, 2024, submission, contain information that meets the criteria in section 49(4)(b) of the *Rules*. In particular, it is reasonable to expect that disclosure on the public record of the redacted information, maps, and figures in the Report could cause an increase in competition for resources at the locations identified, as argued by the LSAMCA, which could result in significant harm to the LSAM community's competitive position or result in undue financial loss to LSAM's members who rely on the traditional knowledge to sustain themselves. Further, the AER is mindful of the cultural sensitivity around disclosure of traditional land use activities and their locations. The AER is therefore prepared to grant confidentiality over the redacted portions of the Report, subject to the limitation below.

The AER is currently considering whether a hearing should be held on the Applications, which includes consideration of statements of concern filed in respect of the Applications. If a hearing is set down, participation in such a hearing would be determined by a hearing panel based on information submitted in response to a notice of hearing. Accordingly, at this time, the AER grants confidentiality over the redacted portions of the Report only for the purpose of considering the SOC and deciding whether a hearing should be held, without prejudice to the LSAMCA's ability to later request confidentiality of the information for the purposes of the hearing, should one be held.

The AER asks that the LSAMCA file the confidential unredacted Report by no later than March 15, 2024.

The AER also expects the LSAMCA to provide the unredacted Report to Summit, provided Summit files an undertaking stating that Summit will hold the unredacted Report in confidence and use it only for the purpose of this proceeding. The unredacted Report will not be placed on the public record.

Sincerely,

<Original signed by>

Stephanie Latimer
Vice President and Associate General Counsel, Law Branch

cc: Tracy L. Friedel, LSAMCA
Shaun McNamara, Summit
SOC@aer.ca