

Via Email

May 13, 2020

Boughton Law Corporation

Lawson Lundell LLP

Attention: Tarlan Razzaghi

Attention: John Olynyk

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

www.aer.ca

Dear Counsel:

**RE: Request for Regulatory Appeal by Fort McKay First Nation (Fort McKay)
Canadian Natural Resources Limited (Canadian Natural)
Application Nos.: *Oils Sands Conservation Act (OSCA)* Application No. 1912603, and
Environmental Protection and Enhancement Act (EPEA) Application No. 014-00149968
(collectively, the Applications)
Approval Nos.: *OSCA* Approval No. 9725H, and *EPEA* Approval No. 00149968-01-03
Locations: Townships 96 and 97, Ranges 11, 12, and 13, west of the 4th Meridian
Regulatory Appeal No.: 1924230 (Regulatory Appeal)**

The Alberta Energy Regulator (AER) has considered Fort McKay's request under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the AER's decision to approve *OSCA* Approval No. 9725H and *EPEA* Approval No. 014-00149968 (collectively the Approvals). The Approvals relate to the construction and operation of a High Temperature Paraffinic Froth Treatment Project (HTPFT Project) within Canadian Natural's Horizon oil sands mine and processing plant.

The AER has reviewed Fort McKay's submissions and the submissions made by Canadian Natural.

For the reasons that follow, the AER has decided that Fort McKay is not eligible to request a regulatory appeal in this matter. Therefore, the request for a Regulatory Appeal is dismissed.

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]

Reasons for Decision

There are three components to section 38:

- (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.

1. In Accordance with the Rules

The request for a regulatory appeal was filed in accordance with the *Alberta Energy Regulator Rules of Practice*.

2. Appealable Decision

The applicable *REDA* provisions for the regulatory appeal request is:

- 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 *EPEA*

Under section 91(1) of *EPEA*, as modified by the *Specified Enactments (Jurisdiction) Regulation*, 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 amended the existing *EPEA* approval pursuant to an application made by Canadian Natural under section 70(1)(a) of *EPEA*, and Fort McKay submitted a statement of concern (SOC) in respect of that application. The decision to approve the application was made without a hearing. Therefore, the decision to issue the *EPEA* approval is an appealable decision.

OSCA Approval

The *OSCA* approval was issued under a resource enactment and without a hearing. Therefore, the decision to issue the *OSCA* approval is an appealable decision.

3. 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 the *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 Fort McKay is a person directly and adversely affected by the decision to issue the *OSCA* Approval and a person directly affected by the decision to issue the amendment decision to the *EPEA* Approval are the principal questions to be decided in relation to Fort McKay's request for regulatory appeal. 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 the *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 (Energy and Utilities Board)*, 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 in 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 the *REDA*:

¹ *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456

[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. (Emphasis added)

The *Dene Tha'* approach has been confirmed in a subsequent decision of the Alberta Court of Appeal with respect to the assessment of whether a person is directly and adversely affected as contemplated under the *REDA*. The court outlined in *O'Chiese First Nation v. Alberta Energy Regulator*² the following:

[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 OCFNCA³ does not mean that the Approvals "directly and adversely" affect the O'Chiese First Nation.

Alberta Environmental Appeals Board and court decisions that discuss the "directly affected" test in the Specified Enactments are consistent with the factual test from the *Dene Tha'* decision. Those decisions indicate that when assessing the directly affected status of a person one must consider how the person will be individually and personally affected. Information about 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, are important factors. The closer these elements are connected (their proximity), the more likely the person is directly affected.

Fort McKay submits that it is an eligible person because it is directly and adversely affected by the appealable decisions and has previously submitted an SOC. Fort McKay submits that its members will be affected by the Approvals issued for the HTPFT Project. Specifically, it states the AER's decision fails to adequately assess and reasonably address Fort McKay's concerns with the project resulting in unaddressed potential direct and adverse effects to its treaty and Aboriginal rights and interests and members' health. Fort McKay submits that the project is in an area that Fort McKay uses to exercise its Treaty and aboriginal rights, including trapping, fishing, gathering, hunting, cultural and spiritual purposes. Specifically, Fort McKay said there were potential impacts of the project on its treaty and

² *O'Chiese First Nation v. Alberta Energy Regulator*, 2015 ABCA 348 (leave to SCC denied).

³ This refers to the O'Chiese First Nation Consultation Area.

aboriginal rights with respect to air quality and deposition, odours, noise, light pollution, water use, mine plan, tailing management, reclamation, human and ecological health and safety. Fort McKay also submitted that there would be potential impacts on more than 90 traditional land use locations within a 2 km radius of the Horizon mine; and potential impacts of the changes to the mine, tailings management, reclamation and closure plans on 38 traditional land use locations at the Horizon Mine.

The AER notes that there is no evidence suggesting Fort McKay does not have the Aboriginal and treaty rights it asserts and Canadian Natural does not take issue with the assertion. Therefore, the AER accepts, for the purpose of the current decision, that Fort McKay has those rights.

In its submissions, Fort McKay does not claim to use the land within the Horizon mine today. Instead, it submits the HTPFT project is located within an area that had been actively used by Fort McKay in the past and Fort McKay plans to use the area after reclamation. Fort McKay asserts that Canadian Natural has not properly understood the meaning of “Current” Traditional Land Use, indicating that its concerns are with the potential impact of the Project on adjacent lands as well as its return to the Project lands upon land reclamation in the foreseeable future.

In response, Canadian Natural submits that while the HTPFT Project will increase bitumen production at Horizon, it will be constructed entirely within the existing footprint of the Horizon central processing facility (CPF), an area within which the exercise of traditional land uses has not been possible since 2004. The project will operate within *Water Act* boundaries and its existing approved *Water Act* licence. As a result, Canadian Natural states that there will be no incremental impacts on terrestrial or water resources or on traditional land uses. Canadian Natural does submit that an air quality assessment prepared for the project demonstrates that the HTPFT Project is expected to in result in a detectable change in air quality within one kilometre of the Horizon boundary, although Canadian Natural submits that this will have only a negligible influence on maximum concentrations of selected odours compounds in the study area.

Fort McKay disputes Canadian Natural’s claims that the Project will not result in “incremental” impacts that will contribute to cumulative impacts on terrestrial or water resources or traditional land uses as a result of the Project’s air emissions. It provides that Canadian Natural’s own air quality assessment concludes that the Project will cause a detectable change in the air quality within one kilometer of the Horizon Mine boundary. This one-kilometer range extends over Canadian Natural’s proposed North Pit Extension project, which is available for traditional land use “today” and is documented in the Fort McKay’s traditional land use study completed for the North Pit Extension, in Canadian Natural’s possession. Because an Environmental Impact Assessment (EIA) has not been conducted for the Project, and because the updated mine, tailings and reclamations plans have not been produced, Canadian Natural cannot substantiate its claims that the project will have negligible impacts to argue that Fort McKay is not an eligible person.

The AER notes that Fort McKay did not file the traditional land use study it refers to in its submissions, on the record for this regulatory appeal application.

Fort McKay also makes the assertion that the AER concluded already that Fort McKay may be directly and adversely affected “by the underlying activity as the Appeal Decision clearly states that Fort McKay’s Statement of Concern was considered and the conditions imposed to purportedly address those concerns”.

Fort McKay’s assertion that the AER previously determined Fort McKay may be directly and adversely affected by the decision on the applications is incorrect. Simply deciding that Fort McKay’s concerns in its SOC have been adequately addressed by conditions in the Approvals does not mean the AER found that Fort McKay may be directly and adversely affected. One of the factors the AER may consider when deciding whether to conduct a hearing on an application is whether the objection raised in a SOC filed in respect of the application has been addressed to the satisfaction of the Regulator⁴. There is no requirement that a determination must be made as to whether the SOC filer may be directly and adversely affected by the decision prior to deciding that concerns have been addressed to the satisfaction of the AER. Furthermore, a determination of whether a person has demonstrated that the person may be directly and adversely affected by an application is another factor to determine whether or not to conduct a hearing. There is nothing in the SOC disposition letter that demonstrates this determination was made when the AER decision maker determined a hearing was not necessary to consider Canadian Natural’s applications.

Fort McKay has raised concerns that a number of errors were made in the decision to issue the Approvals, such as the failure to require an EIA and a Category 3 Amendment Application for the Project. The issue at this stage of the regulatory appeal process is whether Fort McKay is directly and adversely affected by the issuance of the *OSCA* approval and directly affected by the amendments to the *EPEA* approval. A mere assertion that the AER’s decision is inadequate or fails to take certain action does not constitute evidence of direct and adverse effect to Fort McKay. These are not relevant considerations to determine the direct and adverse effect of the AER’s decisions on Fort McKay.

Fort McKay states that its submissions demonstrate that it will be affected by the AER’s decision to issue the Approvals; however, none of the information provided by Fort McKay in its application identifies that its members actually conduct the exercise of their Treaty and Aboriginal rights at any locations within or in proximity to the area on which the HTPFT Project is to be located. Fort McKay makes general statements that the HTPFT Project will be located within an area that had been actively used by Fort McKay members to exercise its treaty and aboriginal rights including trapping, fishing, gathering, hunting, cultural and spiritual purposes. Fort McKay’s submissions leave unanswered the question of what land uses occur in what locations, and for what purposes, or how those land use activities may be affected if the HTPFT Project is developed.

⁴ Section 7(b) of the *Rules of Practice*.

Fort McKay's concerns about potential impacts to its rights when the lands on which the HTPFT Project is to be located are reclaimed and available for Fort McKay's use, were previously considered in Canadian Natural's Horizon application, which was the subject of an Alberta Energy and Utilities Board/Government of Canada Joint Review Panel hearing in 2004, resulting in EUB 2004-005. As outlined by Canadian Natural no new land disturbance will occur as a result of the HTPFT Project.

Fort McKay's submissions do not demonstrate that Fort McKay's traditional land use at a specific site or in proximity to the Project lands could be directly and adversely affected by the approvals, or that a member's use of natural resources may be impacted by the HTPFT Project in a way that results in a direct and adverse effect on that member. While Fort McKay's submissions were extensive, they did not contain the detail needed to demonstrate a degree of location or connection between the Approvals and the asserted impacts on Fort McKay members that demonstrates a potential for the Approvals to directly and adversely affect a Fort McKay member. As a result, the AER cannot conclude that the issuance of the OSCA approval may or will directly and adversely affect Fort McKay and/or its members, or that the issuance of the EPEA amendment may or will directly affect Fort McKay and/or its members.

Conclusions

For the foregoing reasons, the AER finds that Fort McKay is not "an eligible person" as required by section 38 and defined in section 36(b) of the *REDA* and Fort McKay has failed to meet the second requirement for a regulatory appeal of the decision to issue the amendments to the EPEA approval and the decision to issue the OSCA approval. Accordingly, Fort McKay has not met the requirements for a regulatory appeal and the AER has decided to dismiss the request for regulatory appeal.

Sincerely,

< *Original signed by* >

Sean Sexton
Vice President, Legal

< *Original signed by* >

Elizabeth Grilo
Senior Advisor, Regulatory

cc: Michelle MacDonald, Canadian Natural
Anita Sartori, Canadian Natural
Jim Coady, Boughton Law
Toni Hafso, ACO