Via Email

March 15, 2021

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Fort McMurray Métis Local Council 1935

Attention: Debbie Bishop, Counsel

Canadian Natural Resources Limited

Attention: Shailaz Dhalla, Counsel
John Olynyk, Counsel

Dear Sir et Mesdames:

RE: Request for Regulatory Appeal by Fort McMurray Métis Local Council
Canadian Natural Resources Limited (CNRL)
Application Nos.: 1925574 *Oil Sands Conservation Act* (OSCA); 016-001-49968 and 004-0028044 *Environmental Protection and Enhancement Act* (EPEA); 005-00228047, 001-00457221, and 001-00457222 *Water Act* (WA)
Approval Nos.: 9725I OSCA; 00149968-01-05 EPEA; 00457221-00-00, 00457222-00-00 & 00228047-00-03 WA
Location: CNRL Lease 24 Integration Project
Request for Regulatory Appeal No.: 1932350

The Alberta Energy Regulator (AER) has considered the February 17, 2021 request of Fort McMurray Métis Local Council 1935 (McMurray Métis), under section 39(2) of the *Responsible Energy Development Act* (REDA) for a stay of the AER's Approval Nos. 9725I OSCA; 00149968-01-05 EPEA; 00457221-00-00, 00457222-00-00 & 00228047-00-03 WA issued to CNRL, on January 18, 2021 (Decisions). The Decisions are the subject matter of the above-noted request for regulatory appeal, filed by the McMurray Métis on February 17, 2021.

For the reasons that follow, the AER denies the McMurray Métis' request for a stay of the Decisions.

REASONS FOR DECISION

Under section 38(2) of REDA, the filing of a request for regulatory appeal does not operate to stay an appealable decision. The AER may, however, grant a stay on the request of a party to the regulatory appeal under section 39(2) of REDA.

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR MacDonald*.[1] The onus is on the requester for the stay to demonstrate that they meet each of the following criteria:

[1] *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*).

1. **Serious question to be tried** – Based on a preliminary assessment of the merits of the case, they have an arguable issue to be decided at the requested appeal.
2. **Irreparable harm** – They will suffer irreparable harm if the stay is not granted.
3. **Balance of convenience** – The balance of convenience favours granting a stay.[2]

1. Serious Question

The first step in the test requires the stay requester to establish that there is a serious issue to be tried. The applicant has to demonstrate that there is some basis on which to present an argument on the requested appeal. This is a very low threshold. The stay applicant need only show that the requested appeal is not frivolous or vexatious.

For this part of the test, the McMurray Métis have submitted that:

- delay by the AER in issuing a response to a Request for Regulatory Appeal deprives the appellant of any opportunity to have their say before the AER or the Court of Appeal if so, required before the proponent has acted on its approvals.
- granting a short stay of the Approvals and holding a regulatory appeal in short order is required to give meaning to the regulatory appeal process.
- The AER's decision to grant the approvals without a hearing appears to be based largely on a misunderstanding that the concerns of McMurray Métis have been heard and addressed by previous decision-making and consultation processes.
- The AER came to the conclusion that the integrated application would have less impact on McMurray Métis than the two original projects. Such a decision should not have been made without hearing from those that are potentially affected by the approvals.
- Open and transparent decision-making is in the public interest and achieving it on a balance of convenience favors the stay.

Some matters brought up by McMurray Métis may raise serious questions to be tried and as such the AER is satisfied the first step in the stay test has been met. This conclusion in no way predetermines the disposition of the request for regulatory appeal or the issues that would be the subject of a hearing on the regulatory appeal, should it be granted.

2. Irreparable Harm

The second step in the test requires the requester for the stay to establish that they will suffer irreparable harm if the stay is not granted. Irreparable harm will occur if the stay requester will be adversely affected by the conduct the stay would prevent if the applicant ultimately prevails on the regulatory appeal. It is

[2] *Ibid* at 334.

the nature of the harm and not its magnitude that is considered. The harm must be of the sort that cannot be remedied through damages (i.e., monetary terms) or otherwise cured.[3] As noted by the Alberta Court of Appeal, irreparable harm is "of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the [stay] would be a denial of justice."[4]

The Federal Court of Canada has described the onus that rests upon the stay applicant to meet the irreparable harm test as follows:

> The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied.
>
> That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*.[5]

For this part of the test the McMurray Métis submitted that because they have not been consulted and their land use has not been considered with respect to impacts and potential reclamation, irreparable harm is done to them if this project is approved without hearing.

CNRL submitted that McMurray Metis' reply has fundamentally failed to address the requisite elements of the stay test, and that merely suggesting there might be irreparable harm, without providing any support or justification for it, does not establish irreparable harm.

The concerns raised by McMurray Metis with regard to the second step of the stay test mostly relate to the substantive merits of the regulatory appeal and not to the nature of the irreparable harm that they will suffer if stay is not granted, as required by the stay test. McMurray Metis have not adduced clear and non-speculative evidence that irreparable harm will follow if their stay request is denied. Consequently, the AER finds that the second criterion of the stay test has not been met.

3. Balance of Convenience

As explained above, an applicant for a stay must satisfy each element of the three-part test for the stay to be granted. The McMurray Métis have failed to satisfy the second part of the test (demonstrating irreparable harm), so consideration of the third part of the test (balance of convenience) is not necessary.

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[3] *Ibid* at 341.
[4] *Ominayak v Norcen Energy Resources Ltd*, 1985 ABCA 12 at para 31, citing *High on The Law of Injunction*, 4th ed, vol 1 at 36.
[5] *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29 and 30 [citations omitted] [emphasis in the original].

CONCLUSION

The stay request is dismissed because the McMurray Métis have failed to demonstrate they will suffer irreparable harm if the stay is not granted.

The AER will provide its decision on the request for regulatory appeal in due course.

Sincerely,

<Original signed by>

Sean Sexton
VP, Law

<Original signed by>

Elizabeth Grilo
Senior Advisor, Regulatory

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Andrew Hannah
Senior Advisor, Licensee Management

cc: Jody Butt, Aboriginal Consultation Office
Michelle MacDonald, CNRL
Anita Sartori, CNRL