

Via Email Only

April 16, 2018

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**Attention: John M. Olynyk &
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Attention: Tarlan Razzaghiwww.aer.ca

Dear Sir and Madams:

**RE: Request for Regulatory Appeal by Fort McKay First Nation (FMFN)
Canadian Natural Resources Ltd. (CNRL)
Application No.:1869003; AER Decision 20171218A Approval No. 9752E
Location: 18-096-11W4
Request for Regulatory Appeal No. 1905407 (Regulatory Appeal)**

The Alberta Energy Regulator (AER) has considered FMFN's request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's decision to approve CNRL's tailings management plan. The AER has reviewed submissions from both FMFN and CNRL.

For the reasons that follow, the AER has determined FMFN is not eligible to request a regulatory appeal in this matter. Therefore, the AER hereby denies the request for a Regulatory Appeal.

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 term "eligible person" is defined in section 36(b)(ii) of REDA to include:

a person who is directly and adversely affected by a decision [made under an energy resource enactment]...

Reasons for Decision

FMFN is seeking regulatory appeal of the AER's decision of December 18, 2017 (Decision) approving CNRL's tailings management plan (TMP) application for the Horizon Oil Sands Processing Plant and Mine (Horizon) under its *Oil Sands Conservation Act*, RSA 2000, c. O-7 (*OSCA*) Commercial Scheme Approval No. 9752E (Horizon Approval). ***The Decision is an amendment to the existing Horizon Approval. The scope of the amendment is limited to terms and conditions relating to the tailings management plan submitted by CNRL.***

FMFN advances two grounds for regulatory appeal: non-compliance with Directive 085: *Fluid Tailings Management for Oil Sands Mining Projects* (D085) and a breach of natural justice. However, prior to embarking on any analysis of the grounds of appeal, FMFN must first establish it is an eligible person for the purposes of a regulatory appeal under REDA.

As stated above, an “eligible person” is a person who is directly and adversely affected by a decision of the AER. Where the appeal is based on a direct and adverse effect on a person or group, the mere fact there will be a project on off-reserve lands subject to the duty to consult will not alone meet this threshold. The First Nation must offer evidence – not just bare assertions – of that direct and adverse effect.

In *O’Chiese First Nation v. Alberta Energy Regulator*¹, the First Nation did not establish that its rights would be directly and adversely affected **by the approvals**. The AER acknowledged the First Nation had Treaty and Aboriginal rights in the area, but said that the evidence filed by the O’Chiese First Nation did not establish that its rights would be directly and adversely affected by the approvals. The AER’s decision was upheld by the Alberta Court of Appeal and leave to appeal was denied by the Supreme Court of Canada².

The O’Chiese First Nation’s argument conflated the Crown’s duty to consult with the language in REDA governing regulatory appeals.

FMFN’s submission makes a similar assertion. FMFN submits the following factors to support its assertion that it is an eligible person:

- FMFN’s residential community is located directly downstream of Horizon and CNRL's tailings ponds are 20km northwest of FMFN's main settlement
- FMFN has common law and treaty rights to the use and enjoyment of its Reserves and residences. It also has usufructuary rights to its traditional lands for the exercise of Treaty rights
- Horizon is located within an area that had been actively used by FMFN. The traditional land use information available shows Horizon has been the location of approximately 38 areas for traditional harvesting and related activities, another 29 within 1 km and another 28 within 2 km. Restoring FMFN traditional land use after closure of the Horizon Mine is essential to FMFN continuing traditional land use in its traditional territory
- Horizon intersects three FMFN traplines
- Fishing and related activities in the vicinity of Horizon have been adversely affected by Horizon
- FMFN members do not trust the quality of the resources in the Athabasca River and its tributaries due to the pollution from Horizon
- The location of the Horizon Mine for future traditional land use and the proximity of the Horizon Mine to the community makes the ongoing operation of the Mine a key concern to FMFN
- FMFN is directly and adversely affected by the failure to require reclamation plans
- Horizon is a major contributor of air contaminants to the local airshed and has a very significant impact on Fort McKay’s air quality. Fort McKay is plagued with frequent episodic odour events

It is not a question of what effect CNRL’s Horizon may have on FMFN’s rights. The question for the purposes of s. 36(b)(ii) of REDA is what effect, if any, do the **amendments** to the Horizon Approval (and the resulting consequential changes to CNRL’s activities) have on FMFN.

FMFN has failed to identify any specific direct and adverse impacts the Decision has had on any of the above factors. The Decision authorizes implementation by CNRL of a tailings management plan. The Decision addresses such topics as setting thresholds under Directive 085, ready to reclaim (RTR) criteria,

¹ *O’Chiese First Nation v. Alberta Energy Regulator*, 2015 ABCA 348

² *O’Chiese First Nation v. Alberta Energy Regulator, et al.*, 2016 CanLII 32302 (SCC)

providing updated plans, information, models etc. on tailings technology, placement etc. Namely, it deals with how tailings are managed *on the existing approved mine site footprint*.

This is an existing mine and no new lands outside of CNRL's lease will be used or impacted as a result of the TMP amendments. There are no changes to CNRL lease boundaries.

The Horizon Mine is located on Crown land and the potential impacts to air, land and water etc. were previously assessed as part of the review of the original oilsands mine application by the joint review panel. The use of CNRL's main technologies were either already approved or contemplated prior to the TMP amendments. These include tailings ponds, water capping and tailings treatment.³

The TMP amendments confirm that CNRL may continue already approved activities. There are no discernible changes to the 'already assessed and approved' risks or impacts of Horizon arising from the approval of CNRL's TMP. And there are no new or different environmental effects that have not already been assessed and approved.

The Decision authorized CNRL to increase production of synthetic crude oil (SCO) from about 232 000 barrels per day (bpd) to about 250 000 bpd. However, no changes to the Horizon oil sands processing plant were required for this increase in production. Further, there is no change arising to air emissions or air quality from the Decision. In addition, no additional stationary or mobile combustion equipment was approved by the Decision.

Consequently, the AER did not amend any *Environmental Protection and Enhancement Act* (EPEA) approval terms and conditions, including air emission limits, as a result of the TMP.

No water release is permitted by the Decision. There is no change arising from the amendments to the quality of the Athabasca River and its tributaries.

FMFN asserts that it is directly and adversely affected by the failure of the TMP to require a reclamation plan.

Directive 085, which sets out the application requirements for tailings management plans, does not require reclamation plans. Reclamation plans are administered under EPEA. The Decision is confined to amendments to the Horizon Approval, which is issued under the *Oil Sands Conservation Act* (OSCA). Reclamation plans are out of scope of the TMP application. The Decision does not address a reclamation plan because CNRL's EPEA approval was not under consideration in the review of CNRL's TMP and the AER cannot require a reclamation plan under an OSCA approval. Further, the Decision explicitly states that it is not authorizing changes to CNRL's reclamation plan (life of mine closure plan)⁴.

FMFN provides no evidence on how the Decision on the TMP will impact traplines, fishing, traditional land uses etc. FMFN only makes general statements that Horizon is located within an area that had been actively used by FMFN, that Horizon intersects three FMFN-held traplines and fishing and related activities in the vicinity of Horizon have been adversely affected by Horizon. No evidence was provided of how the management of tailings will impact these activities and uses.

³ EUB Decision 2004-005

⁴ Decision *supra*, para. 235

FMFN Reply Submission

In its reply to CNRL, FMFN supplemented its claim as an eligible person. FMFN contends that the determination of eligibility must be informed by the unique context of oilsands tailings and the Government of Alberta's policy direction to the AER.

After relating a history of the evolution of oilsands tailings and their management, together with the scale and associated risks, FMFN submits that "(t)he Decision's inadequacies in requiring compliance with Directive 85 poses unacceptable risks to Fort McKay that requires redress through this regulatory appeal process."

Similarly, FMFN argues that the objectives and purposes of the *Tailings Management Framework*, the *Land Use Framework* and the *Lower Athabasca Regional Plan* inform the interpretation of "eligible person". Consequently, "(t)he failure for (*sic*) the Decision to take mandatory action to adequately and fully meet these objectives to mitigate impacts of Horizon's tailings on Fort McKay, directly and adversely affects that (*sic*) it entitled it to a regulatory appeal."

These contentions are essentially an attempt by FMFN to transform an argument concerning the merits of the Decision into a basis for finding FMFN is directly and adversely affected by the Decision. The issue is whether FMFN is directly and adversely affected by the amendments to the Horizon Approval arising from the Decision. A mere assertion that the Decision is inadequate or fails to take mandatory action does not constitute evidence of direct and adverse effect to FMFN. These are not relevant considerations to determine the direct and adverse effect of the Decision on the FMFN.

There are some additional subordinate arguments that warrant addressing. For instance, FMFN also asserts that many of the assumptions in the 2002 environmental impact assessment (EIA) that are critical parts of the success of the TMP application have since changed from the original EIA and have not been the subject of the TMP Review.

By way of example, FMFN raises the air emissions of new mine fleet used to accomplish the mature fine tailings reduction mine plan (MFTRMP). FMFN disagrees with CNRL that there are no changes in the environmental impacts, including air emissions. FMFN does not agree that there is no additional mobile combustion as a result of the increased production and change in mine fleet. FMFN cites the "(a)ddition of a more selective mine equipment fleet for thinner ore and interburden zones (3 – 25 m³ backhoes, 13 - 218 tonne haul trucks, various support equipment)."

There are two responses to this argument. First, as noted above, there is no change arising from the amendments to air emissions or air quality. No additional stationary or mobile combustion equipment was approved by the Decision. Second, the MFTRMP, including the change to the mine fleet cited by FMFN, was approved in 2015 as an experimental scheme. The Decision did not amend this authorization. The approval merely authorized continuation of the experimental scheme *as a pilot*.

FMFN also asserts the Decision approves changes that are not aligned with the 2002 EIA assessment, including a tailings and closure plan that is based on proceeding with the proposed Northeast Pit Extension and reliance on the MFTRMP.

As indicated in response to the previous argument, the MFTRMP is currently approved as an experimental scheme. The Decision authorized the continuation of the scheme as a pilot until September 30, 2022. Should CNRL decide to move to a commercial scale it must apply for an amendment to all applicable approvals.

As for the northeast pit extension, FMFN agrees the Decision does not itself approve the extension, but argues its inclusion in the volumes profile without adequate review of the environmental effects raises procedural fairness concerns. Putting aside the fact that any concerns with the northeast pit extension can only be addressed when CNRL applies for approval of the northeast pit extension, procedural fairness issues are not relevant to the issue of FMFN's status as an eligible person for the purposes of the request for Regulatory Appeal. Further, the Decision prohibits CNRL from placing tailings in any deposit without written authorization.

Based on the above, the AER has concluded FMFN has failed to establish that it has been directly and adversely impacted by the Decision. As a result, the AER hereby dismisses the request for Regulatory Appeal.

Sincerely,

<original signed by>

Patricia M. Johnston, Q.C., ICD.D.
Executive Vice President, Law and General Counsel

<original signed by>

Shelley Youens
Director, Industry Operations