

Via Email

November 12, 2015

Fort Chipewyan Metis Local 125**Attention: Ora Campbell/Fred Fraser**

Dear Madam and Sir:

**RE: Request for Regulatory Appeal by Fort Chipewyan Metis Local 125 (FCML)
Canadian Natural Resources Limited (CNRL)
Application OSE140059
Location 084-088-7-9W4M
Request for Regulatory Appeal No. 1828882**

The main issue in this case is whether FCML is directly and adversely affected by the Alberta Energy Regulator's (AER) decision to authorize CNRL to enter on and occupy lands for the purposes of conducting an oil sands exploration (OSE) program under the *Public Lands Act* (the PLA Decision). The AER has considered FCML's request for a regulatory appeal filed under section 38 of the *Responsible Energy Development Act (REDA)* and has decided to dismiss the Regulatory Appeal Request because FCML is not a person that is or may be directly and adversely affected by the Decision.

Legislation

The applicable provisions for regulatory appeals are found in Division 3 of Part 2 of the *REDA*. 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. [underlined emphasis added]

"Appealable decision" is defined in section 36 of the *REDA*. Specifically relevant to this regulatory appeal is section 36(a)(iii):

36(a)(iii) A decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 121 of the *Public Lands Act*, if that decision was made without a hearing. [underlined emphasis added]

"Eligible person" is defined in section 36 (b)(i) of the *REDA* to include a person referred to in section 36 (a)(iii).

In order to be an "eligible person" and for the PLA Decision to be an "appealable decision" under section 36(a) (iii) of *REDA*, FCML must be a person who would otherwise be entitled to submit a notice of appeal of the PLA Decision under section 121 of the *Public Lands Act* (PLA), if that decision was made without a hearing.

Section 121(1) provides that:

121(1) A notice of appeal of a prescribed decision may be submitted to an appeal body by a prescribed person in accordance with the regulations [underlined emphasis added].

A “prescribed decision” is defined in section 211 of the *PLAR*. Specifically, section 211(a) provides that the issuance of a disposition under the PLA is a decision that can be appealed. A disposition is defined broadly to include PLA instruments that grant or convey estates or interests in land or that grant ‘any other right or interest in respect of Crown land’. The PLA Decision is an authorization issued pursuant to section 20 of the PLA, is captured under the definition of disposition, and is therefore a “prescribed decision” under section 121 of the *PLA*.

Section 212(1) of *PLAR* identifies persons who can appeal a “prescribed decision”:

212 (1) The following persons have standing to appeal a prescribed decision:

- (a) A person to whom the decision was given;
- (b) A person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision.

Section 212(2) states that “a person referred to in subsection (1)(a) or (b) is a prescribed person for the purposes of a section 121 of the PLA”.

Analysis

In order to be a person with standing to appeal the PLA Decision, section 212(1) of the *PLAR* requires that FCML be either (a) a person to whom the decision was given; or (b) a person that is directly and adversely affected by the decision.

In the AER’s view FCML is not a person to whom the PLA Decision was given under Section 212(1)(a); the decision was ‘given’ to CNRL. Section 212(1)(a) does not refer to a person who receives a copy of the decision or notice of the decision pursuant to s. 7.2(2) of the AER’s *Rules of Practice (Rules)*. By way of comparison, section 91(1)(i) of the *Environmental Protection and Enhancement Act (EPEA)* specifies that a person who ‘receives a copy of a [reclamation] certificate or amendment’ [emphasis added] is entitled as of right to file an appeal under *EPEA* as well as under section 36(a)(i) of *REDA* in relation to energy resource activities. The difference in wording between these enactments is in the AER’s view purposeful. If the intention was to allow for persons who receive *copies or notices* of the prescribed decision under section 212(1) of *PLAR* to have an automatic right of appeal, the legislation would have been drafted that way, similar to section 91(1) of *EPEA*.

Therefore, in order to be a person with standing to appeal a “prescribed decision” FCML must demonstrate that it is a person that is or may be directly and adversely affected by the PLA Decision pursuant to section 212(1)(b) of the *PLAR*. Some of the grounds raised in FCML’s request for regulatory do not directly address this issue. For example, FCML has raised general criticism and dissatisfaction with the AER’s decision on the FCML’s Statement of Concern No. 29403 filed on Application 140059 (the SOC decision). The SOC decision was not made under an energy or specified enactment and is not an appealable decision pursuant to the *REDA*. As such, these are not grounds that are relevant to the AER’s consideration of the request for regulatory appeal and the AER has only considered those grounds that address the issue of how FCML or its members are or may be directly and adversely affected by the PLA Decision.

The factual part of the test set out by the Court of Appeal of Alberta in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*¹ provided guidance on what an aboriginal group must demonstrate in order to meet the factual part of the directly and adversely affected test:

[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 discussions and provision of exact wellsite 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 us 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 AER finds that the FCML has provided no “hard” or specific information in its regulatory appeal request about the locations where FCML members hunt, trap, fish, or carry out other traditional activities in relation to the OSE program boundary. Hence, the FCML’s submissions do not establish a sufficient “degree of location or connection” between the work proposed and the activities of FCML and its members, and do not demonstrate that the FCML is or may be directly adversely affected by the CNRL’s OSE program.

FCML’s map of its deemed traditional territory shows a 160 km radius surrounding the community of Fort Chipewyan. It has asserted that because the OSE program is within this radius, there is a *prima facie* case that FCML is directly and adversely affected. However, the deemed territory identified encompasses a large tract of northern Alberta and extends into the Northwest Territories and east into Saskatchewan. As indicated in the *Dene Tha’* decision, the AER is not ‘compelled...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.’ Hence, the fact that the OSE program is located within the large tract of land that the FCML refers to as its deemed territory does not, without further factual connection, establish a *prima facie* case of direct and adverse impact.

FCML indicated that it has registered trappers in the OSE program area and asserted that its members use ‘the west bank of the Athabasca River’ and that traditional activities take place ‘in the area of’ or ‘within and adjacent to’ or ‘proximal to’ the OSE program area. It also identified that there are trapping and wildlife areas, trails, and different cabins in and around the OSE program boundary that are used by FCML members for traditional purposes. However, very little hard information was provided about the specific locations in this territory where FCML members hunt, trap, fish, or carry out other traditional activities in relation to the OSE program. FCML also stated that its members use lands in the same area as Registered Fur Management Agreement 1275 (RFMA). The AER notes that the southwest corner of the RFMA overlaps with a portion of the OSE program area. However, the RFMA is approximately 55,400 hectares in size, overlapping nine different townships. It is not clear from FCML’s

¹ *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68.

submissions what specific areas within the RFMA are used by FCML, or the proximity of these areas to the OSE program area.

Where FCML has provided some information about locations of traditional activities in relation to the program area, no potential for direct and adverse effect has been demonstrated due to the distances between the two. For example, FCML indicated that the program boundary is 'within 3.5 km of the nearest cabin used for hunting and trapping staging'. Even if the identified cabin and associated trapping and staging areas are used by FCML members for traditional harvesting, it is located 3.5 km from the nearest OSE boundary, which in the AER's opinion is too far away to directly and adversely impact the FCML members.

FCML also stated that 'portions of the OSE program are near the Athabasca River where land use activities [are] within 1km'. However, this statement does not indicate specifically what areas in the OSE program FCML is referring to, where it carries out traditional activities along the west bank of the Athabasca River, or the nature of the 'land use' activities referred to. On the information before it, the AER is unable to conclude that FCML activities said to be taking place one kilometer away from an unidentified location or locations in the OSE program boundary are or may be directly and adversely affected by the OSE program. Further, it is CNRL's proposed OSE program activities and infrastructure authorized under the PLA decision that would be the source of impacts and not the program boundary itself and these sources have not been identified. Hence, the one kilometer distance in FCML's statement above may not provide an accurate reflection of the distance between the FCML's land use activities and areas impacted within the OSE program boundary. Also, throughout its submission FCML identifies the southern portion of the RFMA as a focal point for where its members carry out traditional activities. The nearest well sites in the southern portion of the RFMA are approximately nine (9) km away from the Athabasca River which is too far away to have an adverse impact on FCML's land use activities.

In its submissions, FCML has cited evidence provided at a hearing of an oilsands exploration program for Teck Resources Ltd. (Teck) as establishing that FCML is directly and adversely affected by CNRL's winter drilling program. However, in assessing that and other evidence at that hearing, the AER panel found that the effects associated with Teck's OSE Program would be 'localized, temporary, and of short duration'.² Also of note is the fact that in the Teck decision, the OSE program at issue was located in a different area of the RFMA than CNRL's OSE program, and was entirely within the area of the RFMA. In contrast, only a small southern portion of the RFMA area, approximately 38 hectares, overlaps with the northern portion of the OSE program in the present case. The fact that only 38 of the 55,400 hectares in the RFMA overlap with the OSE program suggests that any impacts to the RFMA 1275 area would be even more localized than what the panel was considering in the Teck decision. Accordingly, the Teck decision does not assist the FCML in demonstrating the potential for direct and adverse effects arising from CNRL's OSE program.

It is also unclear from FCML's submissions which members carry out traditional activities in the RFMA. Notably, the registered trapline holder under the RFMA is himself not a member of the FCML. His son, who is 'registered as the junior trapper' according to FCML, is described as 'having ancestry to Fort Chipewyan' but is not specifically identified as a member of the FCML community. One individual is identified as an FCML member who has 'expressed rights to RFMA trapline 1275' and married, made her livelihood and raised children in that area, but this does not assist the AER in identifying whether or where in the RFMA that member or other members exercise traditional activities at specific locations in relation to the OSE program area. Further, it was noted by the AER in the Teck decision that there was no evidence at the hearing that any members of FCML 125 other than the trapline holder's immediate family used RFMA 1275. The extent of traditional use of the RFMA area by FCML members was found to be unclear in the Teck hearing³ and it remains unclear in the present case given the reasons above

² AER decision 2013 ABAER 017 at para 112.

³ AER decision 2013 ABAER 017 at para 110.

and considering FCML's acknowledgment that the trapline is used by the registered holder and his family for commercial purposes.

Regarding FCML's concerns about accurate figures, distances for specific land use features, and areas in the OSE program not being provided to it at the time of the statement of concern deadline, CNRL has indicated that such information was later provided in the form of shape files and this was available to FCML in advance of the filing of its request for regulatory appeal. Thus FCML has had an opportunity to review and incorporate this information into its regulatory appeal request submissions.

As indicated in the SOC decision, no water withdrawals are authorized under the PLA decision and the applicable PLA application notification requirements had been met by CNRL, hence neither of these are relevant grounds for the AER to consider in the regulatory appeal request. FCML's concern about its lack of input into the Lower Athabasca Regional Plan is outside of the scope of the PLA decision and also not a relevant consideration.

For the foregoing reasons, the AER finds that FCML is not a person who is or may be directly and adversely impacted by the PLA Decision as contemplated under section 212(1)(b) of *PLAR*. As such, the PLA Decision is not an 'appealable decision' and FCML is not an 'eligible person' pursuant to the *REDA*. Accordingly, the AER has decided to dismiss the request for regulatory appeal in accordance with subsection 39(4)(c) of *REDA* on the basis that it is not properly before the AER.

Sincerely,



Doug Boyler, P.Eng.
Chief Operations Engineer



Greg Gilbertson,
Senior Advisor



Stephen Smith,
Senior Advisor

cc: Lawson Lundell LLP – JoAnn P Jamison