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BY E-MAIL ONLY

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APPLICATION NO. 1701718 (Application)
ATHABASCA OIL CORPORATION
ATHABASCA OIL SANDS AREA
LEDUC TAGD PILOT PROJECT (Project)
OBJECTION NO. 27945

Dear Ms. Buss:

The Alberta Energy Regulator (AER/Regulator) has considered the submissions of the Community of Fort McKay (Fort McKay), which includes the Fort McKay First Nation (FMFN) and the Fort McKay Métis Community (Fort McKay Métis), as contained in the letters dated November 5, 2012, March 11, 2013, and September 6, 2013. The AER has also considered the Application and related correspondence from and between Fort McKay and Athabasca Oil Corporation (AOC). For the reasons that follow, the AER has decided that it will not set the application down for a hearing.

Where a statement of concern is filed in respect of an application, section 33 of the *Responsible Energy Development Act (REDA)* requires the Regulator to decide, in accordance with the *Alberta Energy Regulator Rules of Practice (Rules of Practice)* and subject to section 34, whether to conduct a hearing on the application. Section 34 requires the Regulator to conduct a hearing on an application if a hearing is required under the energy resource enactments, the regulations or the rules. Otherwise, the Regulator may make a decision on an application without conducting a hearing. The legislation does not mandate that a hearing be held in these circumstances.

Where there is no mandatory requirement to hold a hearing, section 7 of the *Rules of Practice* provides that the Regulator may make a decision on an application without a hearing if:

- the person filing a statement of concern has not demonstrated that the person may be directly and adversely affected by the application;
- the Regulator considers the statement of concern to be frivolous, vexatious or without merit, or
- the Regulator determines that the objection raised in the statement of concern has been addressed.

The AER decides whether an application will be set down for a hearing or decided without a hearing on a case-by-case basis, taking into account the specific facts and circumstances of each application and any statement of concern filed in connection with it. In this matter the AER does not consider that Fort McKay may be directly and adversely affected by the Application.

In the decision *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* 2005 ABCA 68, the Court of Appeal of Alberta stated:

[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. (*underlining added*)

The information provided in the submissions dated November 5, 2012, March 11, 2013, and September 6, 2013, does not clearly indicate how Fort McKay would be directly and adversely by the Application. The provided information regarding the Project and Fort McKay's activities and exercise of its asserted rights provides insufficient factual detail or information to assist the AER in determining whether Fort McKay may be directly and adversely affected. There must be a connection between Fort McKay (including rights asserted, activities conducted or otherwise) and the Project in order to show possible direct harm. The extent or degree of connection necessary to show possible direct harm is a question of fact for the AER. The general information provided about the exercise of rights, particularly given the large area in which Fort McKay says its rights are exercised and the relatively small Project footprint proposed in the Application, suggests there is no basis for finding there could be direct and adverse effects to Fort McKay. A connection between the alleged activities, even if they are carried out in and around the Project area, and the Project has not been shown.

The statement that the Project will directly and adversely affect the land use rights of Fort McKay must be supported by sufficient information to demonstrate possible direct and adverse impact. The statement that community members utilize the Project area and the area affected by the Project for hunting, trapping and gathering does not provide that necessary information. The reference to "traditional use sites within close proximity to the Project" and to "[S]pecific sites where moose and furs have been identified [within] .5 km to 1.5 km of the disturbance foot print proposed for the project" does not assist the AER. It is not necessary to provide the names of community members conducting activities or exercising Fort McKay's rights. However, without information providing further detail regarding where the sites are located and when they have been and are utilized, the AER cannot conclude these sites demonstrate the Application could directly

and adversely affect Fort McKay. None of these statements demonstrate ongoing activities or exercise of Aboriginal rights sufficiently proximate to the proposed Project so as to persuade the AER there could be impact to Fort McKay caused by the AER's decision in this matter.

The AER notes that the referenced Environmental Impact Assessment (Dover OPCO 2011) which predicts the decline and extirpation of the caribou and the moose in the area also indicates the extirpation will occur irrespective of this application.

Further, the AER is not persuaded that access to the Project will cause impact to Fort McKay. The access road, the Dover West Road, is subject to a closure order so that only industry will use it. The nature of the Project is such that any associated linear disturbances will be minimal in number and size and so the AER does not consider that these will cause increased hunting or recreational access so as to affect Fort McKay.

The distance of the Fort McKay trapper's cabin from the Project (3.5 km) along with the minimal nature of any linear disturbances from the Project, persuades the AER that the Project will not lead to vandalism or other impacts to that cabin.

In regard to Fort McKay's right to use and enjoy its reserve lands, the AER notes that the information before it does not demonstrate that this Project, which is an amendment to an existing approval for an experimental scheme, will impact the reserve lands. Concerns presented are general and do not demonstrate how the Application will cause direct harm to the reserve lands, including from odours, pollution, noise or other nuisances. The AER notes that the Project will be relatively small in size utilizing minimal equipment and will be located 70 km from Fort McKay. Fort McKay submitted the distance between the Namur Lake Reserve and the Project was 16 km; however, the information before the Regulator demonstrates the distance from the boundary of the Namur Lake Reserve to the boundary of the Project area is actually 20.1 km. The AER is satisfied the Project will not have adverse impacts on Fort McKay's reserve lands or its rights in relation to those lands.

The AER also notes that the right to commercially harvest pursuant to the RFMA #21 is not held by Fort McKay as a community; rather, it is a right held by an individual who has not objected to the Application. In any event, the AER is satisfied the Project will not impact the licence holder's rights under the RFMA or otherwise directly and adversely impact them. No information is provided regarding the licence holder's current use of the RFMA nor is any detailed information regarding use of the area provided. Without this information, the AER cannot determine if there could be possible direct and adverse impact to the RFMA holder from the Project. Further, a registered fur management licence does not confer on its holder an exclusive right to the land; additional activities are permitted in the same area.

With regard to the suggestion that the RFMA indicates an area of traditional use by community members, as noted above, the information available does not persuade the AER this Project could impact such use.

The AER is satisfied the Project will not impact Fort McKay's rights to hunt, fish and harvest in accordance with the law.

Further, the general statements regarding consultation do not persuade the AER that Fort McKay may be directly and adversely affected by the Application. As well, the AER notes that it does not have jurisdiction with regard to Crown consultation.

The AER has before it only very general information regarding how Fort McKay says it might be adversely and directly impacted by the Project. This information does not persuade the AER such impact is a possibility. For this reason, the AER exercises its discretion and will not hold a hearing to consider the Application. As the Application satisfies applicable regulatory requirements, the AER will approve the Application.

Please be advised that *REDA* and the *Responsible Energy Development Act General Regulation* outline the requirements applicable to appeal to the Court of Appeal on a decision made by the AER. Please refer to Part 2, Division 5 of *REDA*.

If you have any questions, please contact Ken Hale, application coordinator, by phone at 403-297-8405 or by e-mail at Ken.Hale@aer.ca.

Yours truly,



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Manager
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