

Via Email

March 31, 2016

Prowse Chowne LLP

Lawson Lundell

Attention: Debbie Bishop**Attention: JoAnn P. Jamieson**

Dear Counsel:

**RE: Request for Reconsideration and Regulatory Appeal by Fort McMurray Metis Local 1935 (FMML)
Canadian Natural Resources Limited (CNRL) Gregoire Oil Sands Exploration Project
Application: OSE 140048 (the Application)
Authorization: OSE 140048 (the Authorization)
Location: Townships 84-88, Ranges 7-9 W4M
Regulatory Appeal No. 1826564 (Regulatory Appeal)**

The Alberta Energy Regulator (AER) has considered FMML's request under section 42 of the *Responsible Energy Development Act (REDA)* for a reconsideration of the AER's decision of February 26, 2015 to not hold a hearing to consider the Application (the No Hearing decision) and the decision of the same date to approve the Application and issue the Authorization pursuant to section 20(1) of the *Public Lands Act (PLA)*. It has also considered your request pursuant to section 38 of *REDA* for regulatory appeal of those decisions. In considering these requests, the AER considered the March 25, 2015 letter from Prowse Chowne LLP sent on behalf of FMML and all attachments thereto, the reply of Lawson Lundell LLP dated May 8, 2015 sent on behalf of CNRL, and Prowse Chowne's response to that reply dated May 15, 2015

For the reasons that follow, the AER has decided that it will not conduct a reconsideration of the decisions and that FMML is not eligible to request a regulatory appeal in this matter. Therefore, the request for a reconsideration and a regulatory appeal is dismissed.

Preliminary Issue – Additional Information

As part of FMML's March 25, 2015 request for reconsideration and regulatory appeal, it submitted information not previously provided by it to the AER. That information included a letter to FMML from the Government of Alberta Aboriginal Relations dated November 19, 2014 and Prowse Chowne's response to that letter dated December 10, 2014. Amongst other things, that letter had attached to it maps indicating traditional land use areas.

In its reply, CNRL's counsel indicated its objection to the AER considering this "additional information" because it relates to the Crown's consultation with FMML, a matter over which the AER has no jurisdiction, and because it is highly prejudicial to CNRL for the AER to consider this information. In response, FMML submitted that: 1) it thought the Aboriginal Consultation Office (ACO) would give the AER the additional information because ACO and AER have an obligation to share information under the Joint Operating Procedure; 2) the additional information is credible evidence; and, 3) the evidence is relevant and may change the AER's decision on the Gregoire Oil Sands Exploration Program.

FMML acknowledges that it did not provide this information to the AER until it applied for reconsideration and regulatory appeal, though it had the information prior to the making of the decisions

which it now asks the AER to review. Those seeking to participate in the AER's consideration of applications should file a Statement of Concern (SOC) and support that SOC with any information they possess relevant to the issues in the SOC including information that demonstrates they may be directly and adversely affected by the subject energy developments. While the AER may consider new information at the regulatory appeal stage, it is improper to save such information for the regulatory appeal process. To do otherwise creates a situation unfair to project proponents, an abuse of the AER's regulatory appeal provisions and a waste of the AER's resources in considering information that should have been provided at the SOC stage.

The AER acknowledges that FMML believed the information would be provided to the AER by the ACO. The additional information was not provided to it by ACO and ACO had no obligation to provide the additional information to the AER. The decisions were made based on the information provided by FMML and CNRL. In the circumstances, the AER has considered the additional information.

Reconsideration

The AER has authority to reconsider its decisions pursuant to section 42 of *REDA*. That section states:

The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision. [underlining added]

As indicated by section 42, it is at the AER's sole discretion to reconsider a decision made by it. That section is not intended to and does not provide any additional appeal mechanisms beyond those provided in sections 38 and 45 of *REDA*. Given the appeal processes available under *REDA*, and the need for finality and certainty in its decisions, the AER will only exercise its discretion to reconsider a decision under section 42 in the most extraordinary circumstances and where it is satisfied that there are exceptional and compelling grounds to do so. Mere disagreement with a decision is not sufficient.

The additional information submitted with FMML's March 25, 2015 request for reconsideration and regulatory appeal does not demonstrate any error in the No Hearing Decision nor does it demonstrate an error in the decision to approve the Application. Further, no extraordinary circumstances are disclosed.

Having reviewed your request for a reconsideration, the AER has determined that this is not an appropriate case to exercise its discretion under section 42 of *REDA* to reconsider the decisions.

Regulatory Appeal

The applicable provision of *REDA* in regard to regulatory appeals is section 38, which 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. [underlining added]

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

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.

"Eligible person" is defined in section 36(b)(i) as a person referred to in clause 36(a)(i),(ii) or (iii); and in section 36(b)(ii) as "a person who is directly and adversely" affected by an appealable decision as defined in section 36(a)(iv).

Reasons for Decision

i. No Hearing Decision

FMML has requested a regulatory appeal of the No Hearing Decision. The decision to not go to a hearing was made under *REDA*. As per sections 36 and 38 of *REDA*, the only decisions that can be regulatory appealed are decisions made under the energy enactments, the specified enactments and any other decision or class of decisions described in the regulations (which does not include decisions as to whether to go to a hearing or not). Accordingly, the No Hearing Decision is not an appealable decision and the request for a regulatory appeal of that decision is denied.

ii. Authorization Decision

In order for the decision to issue the Authorization to be an “appealable decision” under section 36(a)(iii) of *REDA*, FMML must be a person who would otherwise be entitled to submit a notice of appeal under section 121 of the *PLA* and the decision must have been 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.

A “prescribed decision” is defined in section 211 of the *Public Lands Act Regulation (PLAR)*. Specifically, section 211(a) provides that the issuance of a disposition under the *PLA* is a decision that can be appealed. Therefore the decision to issue the public land dispositions would be considered a “prescribed decision” in section 121 of the *PLA*.

Section 212(1) of *PLAR* provides 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, who 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 section 121 of the Act”. FMML is not a person to whom the AER’s decision was given: the decision was given to CNRL. Therefore, to have standing to appeal a “prescribed decision”, FMML must demonstrate that it is a person who is directly and adversely affected by the AER’s decision to issue the Authorization.

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 provides guidance on what indicates that a person may be directly and adversely affected. The AER must consider whether there is a “degree of location or connection” between the work proposed and the person, and whether that connection is sufficient to demonstrate the person may be directly adversely affected by the proposed activity.

FMML submitted that it is directly and adversely affected by the AER’s decision to approve the OSE program. It claims that the program is located in an area (Gregoire Lake) where there is ongoing traditional land use by FMML members and that members have homes or cabins that intersect the program location. It has also provided maps purporting to depict the location of the program which are overlaid with shapes that it says show areas of land use values and trails. While the maps show areas

¹ 2005 ABCA 68.

of values and trails, they do not identify site specific locations where FMML members carry on activities or explain how these activities will be impacted by the program.

FMML asserts that it has Métis rights which allow it to conduct traditional activities in the vicinity of the OSE program. CNRL does not challenge that assertion. Therefore the AER accepts, without deciding the issue, that FMML has those rights.

In *Dene Tha'*, the Court of Appeal of Alberta provided guidance on what must be demonstrated 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.

FMML states its submissions demonstrate that it will be affected by the Authorization. While FMML asserts the above uses in the project area, the information provided does not demonstrate the specific sites where those uses occur and is insufficiently specific to demonstrate possible impact. All that is provided are maps showing large areas of “values” of land use, wildlife and habitation and of trails and transit routes. No additional detail is provided. No information is given about specific sites within those areas and no information is given about frequency of use of areas proximate to the program footprint of trails. Further, little or no information is provided about how the project will impact the asserted use of the lands by FMML members. The FMML’s assertions of use proximate to the program footprint are not born out with specific information.

As indicated in *Den Tha'*, what is needed is reliable information indicating that the lands proximate to the program footprint are actually being used by FMML members for particular purposes, and those land uses will not be possible if the projects proceed. FMML’s assertions of traditional land uses were general in nature, leaving unanswered the question of what land uses occur in what locations, and for what purposes. FMML’s submissions, including the additional information, do not contain the detail needed to demonstrate a degree of location or connection between the program and the asserted impacts on traditional land users that demonstrates a potential for the Authorization to directly and adversely affect a FMML member. As a result, the AER cannot conclude that the issuance of the Authorization may or will adversely impact FMML and/or its members. The fact that the OSE program is located in an area that overlaps vast areas where TLU values and transportation values were

identified, does not demonstrate FMML is directly and adversely affected by the decision to issue the Authorization for the OSE program.

Conclusion

For the foregoing reasons, the AER finds that FMML has not demonstrated it may be directly and adversely affected by the AER's decision to issue Authorization OSE 140048. Accordingly, FMML has not met the requirements for a regulatory appeal and the AER has decided to dismiss the request for a Regulatory Appeal in accordance with Section 39(4) of *REDA*.

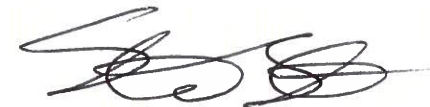
Sincerely,



Nancy Barnes,
Director Oil and Gas



Doug Boyler, P.Eng.
Chief Operations Engineer



Stephen Smith,
Senior Advisor