

July 11, 2018

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

By e-mail only

www.aer.ca

Athabasca Chipewyan First Nation

**Attention: Meghan Dalrymple, Regulatory and Industry Relations
Manager, ACFN IRC**

Dear Ms. Dalrymple

**Re: Decision on Participation of Athabasca Chipewyan First Nation
Proceeding 361 Syncrude Canada Ltd. – Mildred Lake Extension Project
Applications 1820856, 00263298-005, 00363203-001, 00000026-034, MSL0352, MSL170423
and MSL170430**

On May 25, 2018, the AER issued a notice of hearing, setting out the process for filing a request to participate in the hearing of Syncrude Canada Ltd.'s (Syncrude) applications associated with the Mildred Lake Extension Project (the project). I am writing to communicate the panel's decision regarding a request to participate filed on June 14, 2018 by Athabasca Chipewyan First Nation (ACFN).

Section 34(3) of the *Responsible Energy Development Act* states that: "...a person who may be directly and adversely affected by the application is entitled to be heard at the hearing." In addition, the *Alberta Energy Regulator Rules of Practice* (Rules) give the hearing panel discretion to grant participation status to persons whose participation will materially assist the panel in deciding the matter that is the subject of the hearing, who have a tangible interest in the matter and whose participation will not materially delay the proceedings or repeat or duplicate evidence.

ACFN's Request

ACFN's June 14th request to participate states that its rights and interests may be directly and adversely affected by the AER's decisions on the applications for the following reasons:

- ACFN asserts constitutionally protected rights pursuant to Section 35 of the Constitution Act, 1982 and pursuant to the terms of Treaty 8 to practice its traditional lifestyle, including by hunting, gathering, trapping and fishing.

- The site of the proposed MLX project is a high-priority area for ACFN. Despite its proximity to the existing Mildred Lake Project and other development, the area is a mixture of boreal forest, muskegs, wetlands, and lakes that provide habitat for culturally important animals, fish, and plants.
- It is also on the MacKay and Athabasca Rivers, which are critical transport routes, a source of drinking water (in the case of the MacKay River), and sites for passing on traditional knowledge and ACFN culture.
- It is one of the few remaining intact land use areas near Fort McMurray, where more than half of ACFN's members live.

ACFN commissioned a traditional land use study for the MLX project which was included in its request to participate (the ACFN Knowledge and Use Summary for the Mildred Lake Project, December 16, 2016). The Knowledge and Use Summary identifies site-specific traditional land use within the MLX project footprint (radius of 250 m from disturbed land), the local study area (radius of 5 km) and the regional study area (radius of 25 km). Within the project footprint it identified:

- Small game and moose kill, butchering, and processing sites
- Trap lines
- Blueberry and cranberry harvesting areas
- A burial site and historical cabins sites along the rivers
- Teaching areas for passing knowledge and skills to youth
- Drinking water collection sites
- Trails, hunting routes, and watercourses “critical for spring hunting, fishing, and beaver trapping”
- “Exceptional” woodland caribou habitat
- Black bear denning areas, and
- Muskrat habitat

ACFN states that the Knowledge and Use Summary provides only a sample of ACFN traditional use in the vicinity of the MLX project and is based on a review of pre-existing studies and datasets, none of which had been prepared for MLX or the Mildred Lake Project specifically. This was supplemented with map interviews of 6 ACFN members known to use the project area. ACFN submits that the Knowledge and Use Summary is therefore far from a comprehensive description of all site-specific traditional use in the MLX area.

ACFN notes that the MLX West Extension directly occupies a stretch of the MacKay River, and the East Extension comes within 1 km of the Athabasca River.

ACFN states that waterways are critical transportation routes for its members. Much of ACFN's traditional territory can only be realistically accessed by boat. The MacKay and Athabasca Rivers are particularly important rivers. Oil sands projects' massive water withdrawals have lowered water levels across the Athabasca River watershed, making it increasingly difficult and unsafe to travel by boat.

ACFN submits that oil sands development has contaminated rivers and groundwater to a considerable extent, reducing the quantity and quality of fish and potable water. ACFN members no longer consider it safe to harvest from the Athabasca River downstream of Fort McMurray.

ACFN states that Aboriginal and Treaty harvesting rights are meaningless if there are no resources to harvest. Given the enormous scale of oil sands development in ACFN's traditional territory, any further destruction of wildlife and plant habitat is keenly felt. Clearing the MLX site will destroy the traditional resources identified in the project footprint. The MLX's local and regional effects, including airborne contaminants and pollutants, noise, smell, and traffic will further undermine ACFN's members' confidence in traditional resources, particularly medicinal plants and berries, and diminish sense of place and the experience of being on the land.

ACFN states that spending time on the land, consuming wild foods, and sharing resources with elders and community members are all significant parts of ACFN's distinctive culture. As members experience increasing difficulty accessing harvesting areas, finding resources to harvest, feeling a sense of place and connection to the land, and trusting that resources are safe to consume, this way of life increasingly unravels.

The Knowledge and Use Summary identified a burial site in the immediate vicinity of the MLX project. ACFN submits that disturbance of this site would be a dramatic adverse effect on ACFN's rights and culture. ACFN states that it is essential that Syncrude implement appropriate mitigation measures in consultation with ACFN, such as modifying the project footprint, ensuring that the area is not cleared, and minimizing noise at the site.

ACFN also submitted that if the panel did not find that it may be directly and adversely affected by the AER's decision on the MLX project, the project's potential effects on its Aboriginal and Treaty rights are a compelling interest that still merited its participation in the hearing. ACFN submitted that because its evidence on this issue cannot be obtained elsewhere; its participation will materially assist the AER, and will not repeat or duplicate the evidence presented by other parties.

Syncrude's Response

In its June 28th response to the requests to participate, Syncrude acknowledged that ACFN is an Indian Band registered in accordance with the Indian Act, is a signatory to Treaty 8, and holds constitutionally protected rights under section 35 of the Constitution Act, 1982. As a result, Syncrude states that ACFN likely meets the first branch of the standing test. However, Syncrude submits that ACFN has failed to provide sufficiently detailed information to meet the second branch of the standing test and therefore should not be granted standing in the proceeding.

Syncrude notes that the Knowledge and Use Summary included in ACFN's request to participate was funded by Syncrude. Syncrude reviewed and responded to the Knowledge and Use Summary in March 2017. Syncrude submitted that the Knowledge and Use Summary does not speak to specific impacts of the MLX Project to ACFN members (e.g. current or recent use), but rather describes general and/or regional environmental concerns. Some of the key points of Syncrude's response to ACFN included:

- a request for additional information from ACFN to supplement the Knowledge and Use Summary, to support discussions regarding project mitigation;
- a request for additional information from ACFN regarding the geographic distribution of ACFN membership;
- a request for additional details from ACFN related to the 17 items tallied under the heading "# of values in Project footprint", including item description, specific location, and timeline;
- confirmation that the MLX Project will have no impacts on water quantity, water quality, or fisheries within neither the MacKay nor the Athabasca rivers;
- a request for additional details from ACFN regarding the habitation items within the LSA, including item description, specific location and proximity to the MLX Project, as well as the timeline during which the habitation type has been in use;
- confirmation that Alberta Culture & Tourism databases and additional field surveys completed to support the Historical Resources Impact Assessment for the MLX Project do not indicate the presence of any burial site within the Project footprint;
- a request for additional information from ACFN with regards to 4 cultural or spiritual areas identified by ACFN within the project footprint, including the burial site;
- a request for additional details from ACFN regarding 9 cultural or spiritual areas reported by ACFN members as being present in the LSA. Syncrude advised it is unclear regarding proximity

to the MLX Project footprint for these items and expected impacts of the MLX Project on those features; and

- a request for additional details from ACFN regarding trails and a hunting route identified by ACFN members within the project footprint.

Syncrude stated that it made numerous attempts to engage in discussions with ACFN and obtain information on potential project-related impacts but due to the overall lack of information provided by ACFN and its failure to engage fully with Syncrude at no time in the engagement process did Syncrude receive any information to suggest that ACFN may be directly and adversely affected by the AER's decision in relation to the applications.

Syncrude stated that the Knowledge and Use Summary and Syncrude's response to that summary were included in the extensive engagement record that Syncrude provided to the Aboriginal Consultation Office (ACO) when Syncrude submitted its request for consultation adequacy. Syncrude submits that the February 23, 2018 ACFN ACO Report included as part of Syncrude's June 28th submission summarizes ACFN's concerns and Syncrude's responses to those concerns regarding: habitation, access, plant harvesting, cultural sites, hunting and impacts to potential historical and cultural resources. Syncrude notes that in response to each of these areas of concern, the ACO documented (among other things) that Syncrude provided funding for the ACFN Knowledge and Use Summary and that Syncrude's requests for further information from ACFN were not responded to by ACFN. Syncrude submits that the ACO Report provides the ACO's independent assessment that ACFN has not raised site specific concerns or identified potential adverse impacts of the MLX Project on the continued exercise of Treaty rights and traditional uses. Syncrude encourages the AER panel to come to the same conclusion.

Syncrude notes that ACFN's request to participate submission alternatively asserts that ACFN has a substantial interest in the AER's decision that merits participation in the hearing. Syncrude argues that ACFN has merely asserted but has not demonstrated how its evidence will materially assist the AER, how it will not unnecessarily delay the hearing, and how it will not repeat or duplicate evidence presented by other parties. Syncrude submits that ACFN's request to participate provides no alternative basis to allow participation and the AER panel should decline to do so.

The Panel's Decision

Having regard for the submissions of ACFN and Syncrude, the panel finds that ACFN may be directly and adversely affected by the project and is entitled to participate in the hearing. The panel's reasons are as follows:

- The panel accepts that ACFN holds constitutionally protected rights under Section 35 of the Constitution Act, 1982, and Treaty 8 rights. The project is located within the Treaty 8 area and ACFN's traditional territory.
- ACFN members currently reside in the Fort McKay and Fort McMurray areas.
- Syncrude's EIA concludes that some traditional uses will be adversely affected by the project.
- Syncrude's argument that ACFN should not be provided participation rights for the hearing relies largely on the view that the information provided by ACFN is not sufficient to satisfy the second branch of the test resulting from *Dene Tha' First Nation v Alberta (Energy and Utilities Board)* whereby First Nations must demonstrate "[s]ome degree of location or connection between the work proposed and the right asserted...". However the panel finds that the information provided by ACFN is sufficient to demonstrate the necessary degree of connection. Specifically, the Knowledge and Use Summary prepared by ACFN identifies numerous site specific values within the regional study area, local study area and development area associated with the project. The panel acknowledges that there is some uncertainty about the location of some reported values (such as the burial site) and it is not clear that all reported values represent current uses; however these are issues that can be explored at the hearing.
- Under the AER's Rules of Practice the test for participation is whether there **may be** direct and adverse effects, not whether such effects are certain.
- The panel cannot simply adopt the ACO's conclusions and use them as the basis for denying participation rights to ACFN. The panel does not know what information the ACO relied on to make its determination. Furthermore, the panel must make its participation decision based on all of the information before it when deciding if a requester may be directly and adversely affected. For the reasons outlined above, the panel found that some of the information provided indicates ongoing use of the project area by ACFN members and the potential for the project to directly and adversely affect this use. The panel also notes that the ACO report identified a number of comments or concerns provided by ACFN that the ACO found to be suggestive of site-specific concerns regarding potential impacts of the proposed project on the continued exercise of Treaty rights and traditional uses, but that the ACO found these concerns were not spatially-specific enough to constitute site-specific concerns. Finally, the panel notes that the ACO determined that consultation was adequate pending the outcome of the AER process. The ACO confirmed that in the event the AER calls a hearing, the ACO intends to attend and observe the hearing.

The panel also finds that ACFN has a tangible interest in the subject matter of the hearing by virtue of the project being located in ACFN's traditional lands and in an area where ACFN holds rights under Treaty 8. ACFN argued that its' Aboriginal and Treaty rights are a compelling interest that merits its participation in the hearing and that ACFN's evidence on this issue cannot be obtained elsewhere. ACFN also stated that its participation will materially assist the AER and will not repeat or duplicate the evidence presented by other parties. As a result, the panel believes ACFN's participation in the hearing may materially assist the panel with matters that are the subject of the hearing including the following:

- The assessment of potential project effects on traditional land use, Aboriginal and Treaty rights: The assessment provided by Syncrude in its environmental impact assessment is based on third party resources developed for other purposes and not project-specific assessments involving potential affected Indigenous groups. ACFN's participation in the hearing will provide the panel with a more complete understanding of the nature and scope of potential project effects on traditional land use and Aboriginal and treaty rights.
- Potential project effects on various environmental resources important to Indigenous communities: ACFN has been participating in the review of the project for several years and has completed and submitted a technical review of the project. ACFN's participation in the hearing will provide the panel with additional insights into the potential environmental effects of the project.

Subject to directions or rulings issued by the panel, ACFN has been granted full participation rights in the hearing

Sincerely,



Elaine Arruda
Hearing Coordinator

cc: Bernard Roth and Laura Estep, Dentons LLP
Vince Biamonte, Sarabpreet Singh and Stephen McCarthy, ACO
Meighan LaCasse and Alison Doebele, AER