

Joint Review Panel

Established to review the Jackpine Mine Expansion Project

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October 17, 2012

Sent By Electronic Mail Only

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AND TO INDIVIDUALS AND GROUPS THAT FILED COMMENTS OR SUBMISSIONS IN RESPONSE TO THE NOTICE OF HEARING AND BACKGROUNDER

**Re: Jackpine Mine Expansion Project (the "Project")
CEAR Reference Number 10-05-59540
Interested Parties Participation in the Hearing
Presentation of New Evidence**

The Joint Review Panel (Panel) has considered your letter dated October 4, 2012, concerning the entitlement of parties to participate at the hearing (the Hearing) for the Project, as well as the presentation of new evidence at the Hearing. The Panel provides the following response for your client's information and for the benefit of the individuals and groups who filed comments or submissions in response to the Panel's Notice of Hearing and Backgrounder. This letter contains the Panel's decisions on entitlement to participate in the Hearing.

Entitlement to Participate at the Hearing

As you are aware, the Minister of the Environment, Canada and the Energy Resources Conservation Board entered into an agreement to establish the Joint Review Panel for the Project dated September 13, 2011 (the Agreement). Article 4.4 of the Agreement provides:

"The Joint Review Panel hearing shall be public and the review will provide opportunities for timely and meaningful participation by the public, including Aboriginal persons and groups. Hearing participants will not be required to satisfy the test under subsection 26(2) of the *Energy Resources Conservation Act*. The Joint Review Panel shall conduct its hearing in accordance with the ERCB's *Rules of Practice*. The Joint Review Panel will, however, attempt to make the review process as accessible as reasonably possible for individuals or groups who are not represented by legal counsel or who may lack experience with the quasi-judicial nature of the hearing process".
(emphasis added)

A further reference to public participation is set out in subsection 2(c) under Part II (Scope of the Environmental Assessment) of the Terms of Reference, as follows:

"The assessment shall include a consideration of the factors listed in paragraphs 16(1)(a) to (d) and subsection 16(2) of the *Canadian Environmental Assessment Act*, namely comments from the public, including Aboriginal persons and groups, that are received during the joint review".

The Agreement was subsequently amended by the parties by written agreement dated May 30, 2012, to allow the Panel to coordinate its review process with the review process for the Pierre River Mine Project, if the Panel determines that the review would benefit from a coordinated review process. The Agreement was amended again by the parties by written agreement dated July 18, 2012, to reflect the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012) being proclaimed in force. In this regard, Article 4.2 was amended as follows:

"The Joint Review Panel shall conduct its review in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act, 2012* and in the Terms of Reference attached as an Appendix to this Agreement and that were fixed and approved by the Federal Minister of the Environment and the ERCB".

It is important to note that the above-noted provisions of Article 4.4 of the Agreement and subsection 2(c) of the Terms of Reference respecting public participation in the Panel's proceeding, including the Hearing, were not amended.

We understand that section 126 of CEAA, 2012 provides that an assessment by a review panel commenced under the process established under the former *Canadian Environmental Assessment Act* is continued under CEAA, 2012 and that "an agreement or arrangement ... entered into under subsection 42(2) of the former Act, in respect of the project, ... is considered to have been entered into under section 40 of [CEAA, 2012]". However, the Agreement and attached Terms of Reference continue to require the Panel to provide opportunities for timely and meaningful participation by the public, including Aboriginal persons and groups, at all stages of the environmental review process, including the Hearing. In the Panel's view, these provisions of the Agreement have applied from the outset of the review process and continue to apply in this proceeding now that it is continued under CEAA, 2012.

As you correctly point out in your letter, subsection 2(2) of CEAA, 2012 defines "interested party" as a person that a review panel determines: (i) is directly affected by the carrying out of the designated project; or (ii) has relevant information or expertise. Subsection 43(1)(c) also provides that a review panel must, in accordance with its terms of reference, hold hearings in a manner that offers any interested party an opportunity to participate in the environmental assessment. We understand that the purpose of these provisions is to allow a review panel to conduct an appropriately focused project review. The question whether rights vested under the former CEAA does not, however, determine entitlement to participate in the Hearing: the issue is simply whether the interested party test under CEAA, 2012 is met at the time the Panel decides that question for a particular person or group.

In summary, a particular individual or group's entitlement to participate in the Hearing will be determined by the Panel using the interested party test in CEAA, 2012. Any party that meets the directly affected test is entitled to participate. Similarly, any party that has information or expertise that is relevant to the Panel's terms of reference is entitled to participate. In the Panel's view, the participation requirements in the Agreement (which were not amended after CEAA, 2012 came into force) do not conflict with the interested party test in CEAA, 2012. The Agreement and the statute operate in harmony. The public participation provisions of the Agreement serve to inform the Panel's opinion and decision about who is an interested party, i.e. who is directly affected or has information or expertise that is relevant to the Panel's review. This approach is reflected in the Backgrounder that accompanied the Notice of Hearing dated August 17, 2012:

"All parties who might be directly and adversely affected by the Application and any other party who is interested in the Environmental Impact Statement/Application and can contribute to the proceeding may participate in the hearing, subject to the directions of the Panel". (emphasis added)

The Panel's Decisions on Entitlement to Participate

In the Panel's opinion a large number of individuals or groups that filed written comments with the registry did not provide all (or any) of the information required in a Hearing submission, as set out in the Notice of Hearing and Backgrounder. In addition, some written comments that may meet the requirements of a Hearing submission also indicated the submitter would not be attending the Hearing, or it was unclear from the comments if the submitter would attend the Hearing.

The Notice of Hearing and Backgrounder clearly stated that to participate in the Hearing a person or group must do two things. First, they must file a written submission by October 1, 2012 containing:

- the participant's contact information,
- the nature and scope of their intended participation,
- the facts the participant proposes to show in evidence,
- the reasons why the Panel should decide in the manner the participant proposes, and
- (if relevant) any attempts to resolve issues relating to the project with Shell Canada Energy.

The second requirement is to attend the Hearing and register their participation.

The Panel Secretariat responded to 28 individuals or groups whose written comments either indicated that the filer was providing a written submission only, or did not indicate if the filer intended to participate in the Hearing. The Secretariat restated the participation requirements established by the Panel and asked for clarification whether the individual or group that submitted the comments intended to register and participate in the Hearing. The Panel understands that the Secretariat received some responses to its requests for clarification but that most of the requests were unanswered.

Based on a review of the written comments or submissions filed with the registry and any responses provided to the Panel Secretariat, the Panel has determined that each of the following

parties has filed a submission that appears to comply with the Panel's requirements, has indicated an intention to register and participate in the Hearing, and in the Panel's opinion meets the interested party test in CEEA, 2012:

- Government of Canada;
- Regional Municipality of Wood Buffalo;
- Oil Sands Environmental Coalition;
- Athabasca Chipewyan First Nation;
- Fort McKay First Nation;
- Métis Nation of Alberta Region 1;
- Fort McMurray #468 First Nation;
- Mikisew Cree First Nation;
- Syncrude Canada Ltd;
- Clint Westman;
- Sierra Club Prairie;
- Keith Stewart; and
- Donna Deranger.

The Panel notes that some of the submissions filed by these interested parties contain information that goes beyond the scope of the Project and the scope of the factors to be considered, is therefore not relevant, and will not be heard or considered by the Panel. If necessary, the Panel will provide more specific direction on this point directly to the interested parties whose written material included information outside of the scope.

In addition to the foregoing, the Panel has decided that Anna Zalik and Isaac Osumu Osuoka meet the interested party test in relation to the portion of their joint submission that discusses operations in the Athabasca Oil Sands Area or impacts from those operations. In the Panel's opinion, information about operations in other parts of the world (e.g., Nigeria) is not relevant to the Panel's review and therefore will not be considered in the Hearing in any substantive way.

Although Ecojustice filed a written submission (jointly with Earthjustice), its representative has clarified that Ecojustice's participation in the Hearing will be as counsel to the Oil Sands Environmental Coalition and not as an interested party.

Finally, although TOTAL E&P Canada Ltd. did not file a written submission, it did provide a letter stating that it wished to reserve the right to cross-examine any parties at the Hearing and to make submissions or arguments in response to issues potentially affecting its interests. The Panel has decided that TOTAL E&P Canada Ltd. is an interested party and accepts in principle its proposed participation.

Any other person or group not addressed above is not, at this time, considered by the Panel to be an interested party.

The Panel wishes to provide further comments and direction to interested parties. A number of Hearing submissions, from both interested parties and others who do not qualify as an interested party, address the impacts of projects or operations far removed from the Athabasca Oil Sands Area. The Panel has decided that such information is not relevant to its review and will not be

considered in the Hearing. In addition, some of the projects identified by interested parties (e.g., Northern Gateway Pipeline, Keystone XL Pipeline) are at the application stage (or pre-application stage) and are being (or will be) reviewed by other regulators. The Panel does not intend to allow evidence on or discussion about those projects.

Presentation of New Evidence

The Notice of Hearing and Backgrounder issued in this proceeding set out deadlines for filing submissions. The final date for submissions by all interested parties was set as October 1, 2012. The Backgrounder accompanying the Notice of Hearing stated:

"If you wish to file a submission or submit evidence at the hearing, you must file your submission no later than **October 1, 2012**".

Following this statement, the Backgrounder set out a list of items that a Hearing submission must contain (summarized on page 3 hereof). It concluded the list with the following additional requirements:

"Your submissions must also include a copy of all the documentary evidence that you intend to present and/or rely on at the hearing (including, but not limited to, a copy of all expert reports) and a summary of any other evidence you intend to present".

It is clear from the Notice of Hearing and the Backgrounder that the Hearing is where evidence on the record will be tested. Procedural fairness requires a party to indicate in advance of the Hearing the position it will take in the Hearing and the evidence it will present and rely upon. The *Energy Resources Conservation Board Rules of Practice*, which applies in this proceeding, works to ensure procedural fairness and must be strictly observed by participants, including that evidence be filed and served prior to the Hearing as directed by the Panel. The Panel agrees with Shell Canada Energy that, as a general rule, participants must not attempt to introduce new information after the deadline for filing information has passed. Interested parties will therefore not be allowed to introduce new evidence in the Hearing (i.e., information that is not revealed in the party's Hearing submissions) without first obtaining leave to do so from the Panel.

Yours truly,

{original signed by}

Jim Dilay
Joint Review Panel Chair