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Our File: 142-526

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Via E-mail (RegulatoryAppeal@aer.ca)

Alberta Energy Regulator
AER Law Branch
Suite 1000, 250 - 5 Street SW
Calgary, Alberta T2P 0R4

Attention: Ms. Sara Roth, Regulatory Appeals Coordinator

Dear Ms. Roth:

Re: Response to Regulatory Appeal Request Nos. 1913250 and 1913252 Filed by Elizabeth Métis Settlement ("EMS")
Imperial Oil Resources Limited ("Imperial")
***Environmental Protection and Enhancement Act* Approval No. 73534-01-02 ("*EPEA* Approval")**
***Oil Sands Conservation Act* Approval No. 8558MM ("*OSCA* Approval")**
Cold Lake Expansion Project ("CLEP")

1. We are counsel to Imperial in connection with the above-referenced matter. We received notice of two regulatory appeal requests on September 13, 2018, filed on behalf of EMS (the "**Requests**") in relation to the Alberta Energy Regulator's ("**AER**") issuance of the *EPEA* Approval and the *OSCA* Approval (collectively, the "**Approvals**") for the CLEP. For the reasons set out below, Imperial submits that the AER should exercise its discretion under the *Responsible Energy Development Act* (the "***REDA***") to dismiss the Requests. Imperial notes that the reasons for requesting regulatory appeal are identical in the Requests; therefore, unless otherwise expressly noted, Imperial's comments below are directed at both of the Requests.

2. EMS also requested a stay of the Approvals in its Requests. By letter dated September 14, 2018, Imperial agreed, subject to several qualifications, to delay construction of equipment and facilities associated with the CLEP for a period of 100 days or until the AER determines whether the Requests will proceed to a hearing, whichever is shorter.[1] As a result, while Imperial submits that EMS has not met the test applied by the AER to determine whether a stay is appropriate,[2] Imperial

[1] See Imperial Letter re Requests for Regulatory Appeal by Elizabeth Métis Settlement Nos. 1913250 & 1913252, dated September 14, 2018 ("**Voluntary Delay Letter**") [**Attachment 1**].
[2] *RJR-MacDonald Inc. v Canada*, [1994] 1 SCR 311 at paras 46-48 [**Authority 1**].

does not address EMS's request for a stay in detail in this response. Imperial reserves it right to do so if necessary.

I. OVERVIEW

3. The Requests seek a regulatory appeal of the AER's decision to issue the Approvals, which relate to Imperial's CLEP. The CLEP aims to develop roughly 50,000 barrels of bitumen per day in the Grand Rapids formation using SAGD technology within Imperial's existing Cold Lake in-situ oil sands project. The CLEP is located within Imperial's existing Cold Lake lease area.

4. Imperial filed *Environmental Protection and Enhancement Act* ("***EPEA***") application no. 013-73534 and *Oil Sands Conservation Act* ("***OSCA***") application no. 1854138 (collectively, the "**Applications**") with the AER on March 10, 2016, for the CLEP. Imperial also filed an environmental impact assessment ("**EIA**") for the CLEP, as required under *EPEA*. The AER deemed the EIA complete on March 29, 2017 and approved the Applications on August 14, 2018. The Approvals amend the existing *OSCA* scheme and *EPEA* approvals for the Cold Lake in-situ oil sands project to include the CLEP.

5. In their Requests, EMS asks the AER to reverse their decision and deny the Approvals or, in the alternative, revise the Approvals to add conditions related to further engagement with EMS. As noted, EMS also requested a stay of the Approvals. Imperial voluntarily agreed to suspend construction.[3]

6. The assertions and concerns set out in the Requests can be summarized as follows:

(i) The AER erred in its finding that the EIA was complete because the EIA did not include certain information required by s 49 of *EPEA*. The AER further erred in making a determination of the Applications when the EIA was not complete.

(ii) The AER erred in making a determination of the Applications when the consultation requirements of AER Directive 056: *Energy Development Applications and Schedules* ("**D056**") were not met by Imperial.

(iii) The AER erred in failing to hold a hearing as mandated in the *AER Rules of Practice* (the "***Rules***") where Imperial made no efforts to resolve the concerns set out in EMS' statement of concern ("**SOC**") and where EMS raised questions of constitutional significance in its SOC. The failure by the AER to hold a hearing was a breach of natural justice.

(iv) The decision to grant the Applications was contrary to the purposes of *EPEA* as set out in section 2.

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[3] See Voluntary Delay Letter, *supra* note 1 [**Attachment 1**].

7. EMS also attaches to the Requests its SOC filed in relation to the CLEP, which includes Traditional Land Use ("**TLU**") information and raises general concerns about the CLEP. As discussed further below, all of the concerns raised in the SOC have been previously raised with and addressed by Imperial, including through proposed mitigation measures, where appropriate.

8. Imperial submits the Requests should be dismissed for the following reasons:

   (i) EMS has not provided any facts to support the reasons for requesting regulatory appeals and, in any event, the asserted reasons for regulatory appeal in the Requests are without merit.

   (ii) The information provided by EMS does not establish that it is "directly and adversely affected" or "directly affected" by the issuance of the *OSCA* Approval and the *EPEA* Approval, respectively; EMS has not established it is an "eligible person" who can request a regulatory appeal pursuant to the *REDA*.

9. Imperial's position is discussed in detail below.

II. FACTUAL BACKGROUND

10. Imperial has been consulting EMS on the Applications since June 2015. Between June 2015 and September 2018, Imperial engaged EMS on the CLEP on numerous occasions including by way of emails, phone calls, letters, and meetings between EMS and Imperial. Detailed descriptions of Imperial's engagement with EMS can be reviewed in the record of consultation ("**ROC**") log for the CLEP.[4] Imperial sent the ROC log to EMS for review and did not receive any comments back from EMS. Some of the facts relevant to the Requests are set out below.

11. On June 3, 2015, Imperial initiated consultation with EMS by sending a notification letter providing information on the CLEP. Imperial invited EMS to contact them if they wanted additional information or to discuss the CLEP further.

12. On August 11, 2015, Imperial notified EMS that they had submitted proposed terms of reference ("**TOR**") to the AER for the EIA report. Imperial informed EMS that the TOR were available for review, and that any comments would have to be submitted to the AER before October 1, 2015. While a number of interested parties commented on the proposed TOR, EMS did not. The AER finalized the TOR on December 14, 2015. Imperial developed its EIA report in accordance with the final TOR and submitted the report to the AER in March 2016.

13. On May 31, 2016, EMS filed a SOC with the AER, asserting potential adverse effects to its Aboriginal rights and interests.

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[4] See Imperial – Cold Lake Expansion Project – Elizabeth Métis Settlement (EMS) ROC Log (April 2015 to October 16, 2017) ("**ROC to 2017**") [**Attachment 2**]; Imperial Cold Lake Expansion Project – Engagement Summary – Elizabeth Métis Settlement (October 20, 2017 to September 2018) ("**ROC 2017 to 2018**") [**Attachment 3**].

14. On June 1, 2016, Imperial met with several EMS consultation staff members and their legal counsel at the EMS offices. Imperial provided updates on the CLEP. The parties also discussed engagement, the historical resources impact assessment, and capacity funding. EMS requested capacity funding for a TLU study, technical review, and engagement support. Imperial indicated it would respond to this request upon receiving a proposal from EMS.

15. On August 3, 2016, EMS sent a letter thanking Imperial for engaging EMS on the CLEP, and proposing a consultation capacity and negotiation agreement to address EMS' requests for a TLU study, third-party technical review of the Applications, and consultation capacity funding. EMS also provided a scope and budget for a TLU study, as well as an estimate on consultation funding costs. EMS requested that these items be discussed at a meeting scheduled for August 9, 2016.

16. On August 5, 2016, Imperial filed a response to EMS' SOC with the AER and provided the response to EMS. This filing responded to all of the concerns raised in EMS' SOC.[5]

17. On August 9, 2016, Imperial met with EMS consultation staff, councilors, and legal counsel at the EMS offices. The parties discussed a number of items related to the CLEP. EMS indicated it did not believe Imperial's response to EMS' SOC was adequate.

18. On September 29, 2016, Imperial provided a project update, and requested a summary of EMS' key site-specific concerns, indicating that Imperial would like to collaborate with EMS to resolve any remaining concerns from EMS' SOC. Imperial also informed EMS that it would need to sign a capacity funding agreement in order for Imperial to provide funding for a TLU study and a technical review.

19. On November 22, 2016, EMS' legal counsel communicated that EMS would accept Imperial's offer to fund a joint technical review, but that a joint Métis TLU was unacceptable. EMS' legal counsel proposed a compromise on a joint TLU with the Métis settlements that was acceptable to EMS.

20. On February 7, 2017, Imperial accepted the TLU study proposal from the November 22, 2016 letter from EMS' legal counsel. On March 20, 2017, Imperial confirmed the funding amounts for the TLU study, confirmed that funds had been earmarked for a joint technical review, and offered to draft a capacity funding agreement.

21. On March 29, 2017, Imperial notified EMS that the EIA was deemed complete by the AER and that Imperial was now awaiting a decision on regulatory approval. Imperial also provided an update on the CLEP, and requested a meeting with EMS to discuss site-specific concerns and potential mitigation measures.

22. On June 30, 2017, Imperial informed EMS that it intended to submit the contact reports with EMS to the Aboriginal Consultation Office ("**ACO**") as part of Imperial's consultation adequacy

[5] See Imperial Letter re Elizabeth Métis Settlement May 31, 2016 Statement of Concern, dated August 5, 2016 [**Attachment 4**].

application. Imperial also re-iterated it would like to discuss site-specific concerns and mitigation measures, and suggested setting a meeting.

23. On October 20, 2017, in anticipation of submitting the ROC logs to the ACO, Imperial submitted the complete EMS ROC log to EMS for review. EMS did not provide any comments on the ROC log.

24. On December 12, 2017, EMS provided a copy of its TLU study to Imperial and the AER.

25. On August 14, 2018, the AER issued the Approvals. On the same day, the AER sent a letter to EMS advising that the concerns raised in EMS' SOC had been addressed to the AER's satisfaction and further, that the AER was not going to hold a hearing to consider the Applications.[6]

26. On September 13, 2018, EMS filed the Requests with the AER.

III. THE REQUESTS SHOULD BE DISMISSED PURSUANT TO THE PROVISIONS OF THE *REDA*

A. The Reasons for Requesting Regulatory Appeal are Without Merit

27. EMS grounds its requests for regulatory appeal on alleged deficiencies in the EIA and consultation process, as well as in the AER failing to hold a hearing that EMS claims was mandatory.

28. Section 39(4) of *REDA* states:

> (4) The Regulator may dismiss all or part of a request for regulatory appeal
>
> (a) if the Regulator considers the request to be frivolous, vexatious or without merit...

29. In a letter decision on a request for regulatory appeal, the AER outlined the test it applies for determining if such a request is "without merit". The AER stated:

> The determination whether an application should be dismissed as "without merit" is a screening or gatekeeping function. This function should be used in very clear cases where this is no reasonable basis in the evidence for proceeding to the next stage, which is the regulatory appeal.
>
> The test for "without merit" is similar to the test for an application for summary judgement in the courts. In *P. (W.) v. Alberta*, the Court of Appeal commented on the state of the law on summary judgements applications:
>
> > Summary judgment is therefore no longer to be denied solely on the basis that the evidence discloses a triable issue. The question is

[6] See AER Letter (email) re Imperial Oil Resources Limited, *OSCA* Application No. 1854138, *EPEA* Application No. 013-73534, SOCs No. 30310 & 30311, dated August 14, 2018 ("**AER No Hearing Letter**") [**Attachment 5**].

> whether there is in fact any issue of "merit" that genuinely requires a trial, or conversely whether the claim or defense is so compelling that the likelihood that it will succeed is very high such that it should be determined summarily. [7]

30. For the reasons set out below, Imperial submits the reasons for regulatory appeal advanced by EMS have no reasonable prospect of success and are therefore without merit. The concerns raised in the Requests were raised in EMS' SOC. The AER considered these concerns and determined they had been addressed to the satisfaction of the AER. On this basis, the AER exercised its discretion and determined that a hearing was not required to address the concerns set out in EMS' SOC. No new information has been provided by EMS that suggests the AER erred in making this decision. Indeed, EMS has not provided *any* evidence in support of the Requests, let alone evidence that provides a reasonable basis to proceed to the regulatory appeal stage.

31. The reasons for regulatory appeal advanced by EMS are addressed in turn below.

(a) Imperial's EIA was completed per *EPEA* requirements (Regulatory Appeal Reasons 1 and 2)

32. EMS claims that information required to be included in an EIA, as outlined in s 49 of *EPEA*, is not included in Imperial's EIA. Specifically, EMS asserts information required under ss 49(b), (d), (e), (f), (h), and (l) of *EPEA* was not included. EMS argues that the AER erred in its finding that the EIA was complete and further erred in proceeding with the Applications when the EIA was incomplete.

33. Imperial notes that it did include information in the EIA that directly addresses ss 49(d), (e), (f), and (l) of *EPEA* and, to an appropriate degree, ss 49 (b) and (h). Given the nature of the CLEP (i.e., expansion of an existing project), analyses of the site selection procedure (49(b)) and alternatives to the proposed activity (49(h)) were appropriately not expressly included in the final TOR. Given that this is an expansion of an existing activity, there would be no merit to considering site selection or alternatives to the proposed expansion. The site is determined by the location of the existing activity and the existing lease boundaries, and there are no other feasible "alternatives to" to expand the scope of the existing activity other than the CLEP. Moreover, Imperial submits that s 49 of *EPEA* provides the AER with discretion to determine the contents of an EIA report required to be prepared under the act. Further, EMS had the opportunity to comment on Imperial's proposed TOR, which defined the content of the EIA, but did not do so.

34. Information addressing *EPEA* ss 49(d), (e), and (f) can be found in volume 2, s 15 of Imperial's EIA. EMS asserts that descriptions of cultural impacts, their significance on Métis traditional land use, and mitigation measures were not included in the EIA. Section 15.4.10 of Imperial's EIA identifies Métis historical land uses, while s 15.5.1.11 sets a baseline against which project impacts to Métis are

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[7] AER Letter Decision re Request for Regulatory Appeal and Stay by Mike Richard; Grizzly Resources Limited, dated October 11, 2016 a p 2 (**"Grizzly Decision"**), citing *Mis v Alberta (Human Rights & Citizenship Commission)* 2011 ABCA 212, and *P (W) v Alberta,* 2014 ABCA 404 at para 26 [**Authority 2**].

then considered in ss 15.6 and 15.7. Sections 15.6 and 15.7 also include corresponding mitigation measures for identified impacts.

35. For example, in s 15.6 of Imperial's EIA, potential impacts to Métis blueberry harvesting are identified. The use of best management practices, including protection of information and intellectual property, adherence to traditional knowledge protocols, and ongoing engagement with the affected communities, among others, are identified as possible mitigation measures.[8] The EIA concludes that, after mitigation, residual project effects to harvesting and harvesting areas, and TLU sites and use, are low.[9]

36. EMS also asserts that Imperial's EIA failed to include information on a "program of public consultation as required by s 49(l)." Volume 1, s 4 of Imperial's EIA is dedicated to Aboriginal and public engagement. This section specifically identifies EMS as one of the Aboriginal Communities engaged during the application process.[10]

37. Finally, EMS suggests that the EIA did not include an analysis of the site selection procedure for the CLEP (49(b)) or consideration of alternatives to the proposed activity (49(h)). The CLEP is an expansion of Imperial's existing Cold Lake in situ oil sands project and will be located entirely within the existing Cold Lake lease. The CLEP is not a greenfield development where issues regarding overall site selection for the project would potentially be relevant. Accordingly, there was no need to include an analysis of the site selection procedure in the final TOR or the EIA. That said, Volume 2, s 3.4 of the EIA sets out the constraints planning approach utilized by Imperial for the CLEP. The constraints planning approach involved identifying and mapping environmentally sensitive areas and then locating project facilities away from areas of higher sensitivity and preferentially in areas of lower sensitivity. In addition, Volume 1, s 3.2.1.2 of the EIA sets out the site selection criteria for the CLEP central processing facility.

38. Imperial notes that "alternatives to" the project have been described as "the functionally different ways to meet the project need and achieve the project purpose."[11] In this case, a consideration of alternatives to the proposed activity would require an analysis of alternative ways to extract the bitumen from the subsurface. Again, as this is an expansion of an existing project that uses in-situ extraction (the only viable extraction option for the resource), a discussion of alternatives would not have been valuable or had any bearing on the AER's decision. Imperial notes that the EIA does, however, include a discussion of alternative recovery technologies, including CSS, SAGD and solvent-assisted SAGD.[12]

39. Section 49 of *EPEA* is clear that an EIA must be prepared in accordance with the final TOR issued by the AER. The standard information that would normally be included in an EIA is listed in

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[8] Imperial Environmental Impact Assessment, v 2 s 15, p 15-44 and 15-52 ("**EIA**") (online:<link>) [**Attachment 6**].
[9] EIA, *supra* note 8 at v 2, s 15, p 15-55 and 15-60 (online:<link>) [**Attachment 6**].
[10] See EIA, *supra* note 8 at v 1 , s 4, p 4-5 (online:<link>) [**Attachment 6**].
[11] Canadian Environmental Assessment Agency, Addressing "Need for", "Purpose of", "Alternatives to" and "Alternative Means" under the *Canadian Environmental Assessment Act*, updated November 2007 at p 2 (online:<link>) [**Authority 3**].
[12] See EIA, *supra* note 8 at v 1, s 1.4.4, p 1-17 to 1-18 (online:<link >) [**Attachment 6**].

s 49, but a discretionary power is reserved to the Director to determine the final EIA information requirements. Section 49 of *EPEA* states:

> An environmental impact assessment report must be prepared in accordance with the final terms of reference issued by the Director under section 48(3) and shall include the following information *unless the Director provides otherwise*... [13]

40. Case law confirms that the AER has broad discretion to design the EIA process as it sees fit, provided the purposes of *EPEA* are upheld and legislated decision making processes are complied with.[14] The AER is not required by *EPEA* to issue final TOR that include all factors set out in s 49. By extension, an EIA prepared by a proponent is not required to include all information listed in s 49 of *EPEA,* provided it addresses the requirements of the final TOR.

41. In this case, the AER followed the requirements of *EPEA*, including issuing the proposed TOR for public comment and issuing the final TOR.[15] The AER acted within its statutory discretion when it issued final TOR that did not include terms specifically addressing the information requirements in ss 49(b) and (h) of *EPEA*. Per s 49, the final TOR ultimately determined the required contents of Imperial's EIA.

42. Imperial prepared the EIA for the CLEP in accordance with the final TOR. After review, the AER issued supplemental information requests to Imperial seeking further information. Once the AER determined that the EIA, including additional information provided by Imperial, adequately addressed the information requirements in the final TOR, the AER issued a decision pursuant to s 53 of *EPEA* that the EIA was complete. Again, this process was all in accordance with *EPEA* and the AER did not commit any error in determining the EIA was complete or proceeding with a determination of the *EPEA* application on that basis.

43. It should be noted that EMS is effectively arguing that the final TOR were deficient in that they did not include all elements of s 49 of *EPEA.* EMS could have raised this issue at the TOR stage, but did not do so.

44. For the foregoing reasons, Imperial submits that the assertions of EMS that the EIA was incomplete, and that the AER erred in proceeding with the Applications when the EIA was incomplete, are without merit.

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[13] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 49 (emphasis added) ("***EPEA***") [**Authority 4**].
[14] *Castle-Crown Wilderness Coalition v Flett,* 2005 ABCA 283 at para 55 ("***Castle-Crown Wilderness Coalition***") [**Authority 5**], followed in *Pembina Institute v Alberta (Director, Northern Region, Environment and Sustainable Resources Development),* 2013 ABQB 567.
[15] *EPEA*, *supra* note 13 at s 49 [**Authority 4**].

(b) Imperial consulted with EMS on the Applications throughout the application process (Regulatory Appeal Reason 3)

45. EMS suggests that the AER erred in proceeding with the Applications when Imperial had not met the consultation requirements of D056. Imperial notes that the Applications were not submitted to the AER pursuant to D056[16] and that, accordingly, the consultation requirements in D056 do not apply. Further, even if D056 applications had been submitted, Draft Directive 023: *Oil Sands Project Applications* (pursuant to which the *OSCA* application was submitted), states:

> Stakeholder involvement programs followed by an applicant in connection with any oil sands project application or amendment submitted under this directive will satisfy the participant involvement requirements for any related subsequent *Directive 056* licences for wells, pipelines, and facilities.[17]

46. As noted in the Factual Background section above, the ROC logs demonstrate extensive engagement between Imperial and EMS on the CLEP. For example, Imperial provided project-specific information to EMS, responded to requests for further information, and met with EMS to discuss their specific concerns in addition to responding in writing. Imperial also provided capacity funding to EMS for engagement as well as a TLU study.

47. It is unclear what specific elements of D056 that EMS is arguing were not met by Imperial, but for the foregoing reasons, Imperial submits that this reason for regulatory appeal is without merit.

(c) Hearings are not mandatory (Regulatory Appeal Reasons 4, 5 and 6)

48. EMS argues that the AER erred in failing to hold a hearing "when the considerations set out in s 7 of the *Rules* mandate that a hearing be conducted." Specifically, EMS asserts that Imperial made no efforts to resolve the issues set out in EMS' SOC, contrary to s 7(c) of the *Rules*. EMS further asserts that the AER erred in granting the Applications without a hearing when "questions of constitutional significance" were raised in EMS' SOC. Finally, EMS suggests that the AER's failure to hold a hearing was a breach of "Natural Justice".

49. Imperial notes that it did make efforts to resolve the concerns set out in EMS' SOC. As noted in the Factual Background section above, Imperial provided a response to EMS' SOC addressing every concern raised. Further, when EMS indicated it was not satisfied by the response, Imperial endeavored to make further efforts to resolve such concerns.

50. Even if Imperial had not made efforts to resolve the concerns raised by EMS, which Imperial expressly denies, the AER was not obligated to hold a hearing in the circumstances. Except where a hearing is required under an enactment (which is not the case here), the AER has discretion to determine whether a hearing is required to consider an application, and was well within its statutory

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[16] The *OSCA* Approval application was submitted pursuant to the *OSCA* and *Draft Directive 023: Oil Sands Project Applications*. The *EPEA* Approval application was submitted pursuant to *EPEA* and the *Guide to Content for Industrial Approvals Applications*.
[17] At p 9.

mandate to decide a hearing was not necessary in this case.[18] As discussed above, the AER has broad discretion to determine its processes.[19]

51. Importantly, s 7 of the *Rules* states, "[t]he Regulator *may* consider *any* of the following factors when deciding whether or not to conduct a hearing....".[20] Section 7(c) of the *Rules* (i.e., whether the applicant and any parties that submitted SOCs have made efforts to resolve the issues in dispute) is only one of the factors the AER may consider when determining whether to hold a hearing. Further, whether or not such efforts have been made is not determinative of the matter. As noted, the AER's decision to hold a hearing is a discretionary one in the circumstances and EMS is incorrect when it suggests the considerations in s 7 of the *Rules* "mandate that a hearing be conducted".

52. Under s 7 of the *Rules,* the AER may also consider whether the objection raised in a SOC has been addressed to the satisfaction of the AER.[21] Indeed, in its letter to EMS, the AER set out in considerable detail the reasons for its decision that the concerns outlined in EMS' SOC have been addressed.[22] The AER concluded:

> [b]ased on the foregoing, the AER is satisfied that the concerns outlined in your SOCs have been addressed to the satisfaction of the AER through Imperial's responses and proposed mitigation measures, and through standard and project-specific conditions included in the approvals.[23]

53. The AER also "decided that a hearing is not required under an enactment, or necessary, to further consider the concerns outlined in [EMS'] statements of concern." The AER acted fully within its discretion in making its decision that a hearing was not required in light of the facts. EMS clearly disagrees with the AER's decision in this regard, but this does not mean the AER erred. For these reasons, this reason for requesting regulatory appeal is without merit.

54. EMS also claims a hearing was required because "questions of constitutional significance were raised" in its SOC.[24] There is no legislative or administrative law requirement for the AER to hold a hearing whenever a party raises a constitutional question in a SOC. In fact, the AER has approved an application without a hearing despite constitutional concerns being raised in a SOC, and that decision withstood judicial review.[25] Accordingly, this reason for requesting regulatory appeal is without merit.

55. Finally, EMS asserts that the AER breached principles of "Natural Justice" when it failed to hold a hearing. The basis for EMS' argument in this regard is unclear, but, as described above, the

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[18] See *Responsible Energy Development Act*, RSA 2012, c R-17.3, s 33 and 34 ("***REDA***") [**Authority 6**]; *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013, s 7 ("**Rules**") [**Authority 7**].
[19] *Castle-Crown Wilderness Coalition* at para 55 [**Authority 5**]; see also *REDA*, *supra* note 18 at s 61 [**Authority 6**].
[20] *Rules*, *supra* note 18 at s 7 (emphasis added) [**Authority 7**].
[21] *Ibid* at s 7(b) [**Authority 7**].
[22] See AER No Hearing Letter [**Attachment 5**].
[23] *Ibid* at p 2 [**Attachment 5**].
[24] Elizabeth Métis Settlements Reasons for Requests for Regulatory Appeals at para 6.
[25] *O'Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA 348 [**Authority 8**].

AER acted well within its discretion when it determined a hearing was not required to consider the Applications. It is trite law that a hearing is not necessary in order to achieve procedural fairness or natural justice. EMS has provided no argument based on the relevant case law to suggest that a hearing was required in this case. Accordingly, there was no apparent breach of principles of natural justice and this reason for requesting regulatory appeal is without merit.

(d) The AER's decision on the Applications was consistent with s 2 of *EPEA* (Regulatory Appeal Reason 7)

56. EMS argues that the decision to grant the Applications was contrary to the purposes of *EPEA* as set out in s 2. As with its other proposed reasons for requesting regulatory appeal, EMS does not provide any factual support for this assertion.

57. Imperial notes that *EPEA* does not apply to the *OSCA* Approval and, accordingly, this reason for requesting regulatory appeal is not relevant to that approval.

58. As set out above, the EIA was prepared in accordance with the final TOR issued by the AER and was deemed complete. The *EPEA* Approval application was developed and submitted in accordance with *EPEA* and relevant policy documents. There is no evidence to suggest that the AER's issuance of the *EPEA* Approval was inconsistent with the purposes of *EPEA*. Accordingly, this reason for requesting regulatory appeal is without merit.

B. EMS has Not Provided Evidence it is an "Eligible Person" for the Purposes of Requesting a Regulatory Appeal

59. In addition to Imperial's position that the Requests should be dismissed in accordance with the *REDA* as being without merit, Imperial submits that EMS has not provided evidence to demonstrate it is an "eligible person" for the purposes of requesting a regulatory appeal. While Imperial does not think it is necessary for the AER to make a determination on the Requests on the foregoing basis because, as stated above, the reasons for requesting regulatory appeal are without merit, Imperial sets out the reasons in support of its position below.

60. The term "eligible person" is defined in section 36(b) of the REDA.[26] In order to be an eligible person for the purpose of the Requests, EMS is required to demonstrate that it is a person who is "directly and adversely affected" by the issuance of the *OSCA* Approval and "directly affected" by the issuance of the *EPEA* Approval. The AER has noted that the factual test to be applied in either case is effectively the same.[27]

61. Guidance regarding the information requirements to demonstrate a party is "directly and adversely affected" or "directly affected" is provided in a number of court and AER decisions. In *Dene Tha' First Nation v Alberta (Energy and Utilities Board)* ("**Dene Tha'**"), the Alberta Court of

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[26] *REDA, supra* note 18 at s 36(a)(iv) refers to "a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing" [**Authority 6**].

[27] AER Letter Decision re Request for Regulatory Appeal Samson Cree Nation; Encana Corporation, dated July 22, 2016 at p 4-5 ("**AER Samson Cree Decision**") [**Authority 9**].

Appeal provided the following guidance on the degree of connection required to establish a direct and adverse effect:

> 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. [Emphasis added] [28]

62. In *Dene Tha'*, the Court emphasized that the question of direct and adverse effect is a question of fact, with the onus on the party seeking to participate to bring forward the facts and "hard information" upon which it wishes to rely.[29]

63. Recent AER decisions continue to support the use by the AER of the analysis set out in Dene Tha' to determine whether a party has established that it is "directly and adversely affected" by a decision of the AER.

64. In a Letter Decision dated July 22, 2016, the AER denied the Samson Cree First Nation's ("**SCFN**") requests for regulatory appeals of a number of approvals issued to an operator under the *Water Act* and *EPEA*, finding SCFN failed to identify specific locations where its members might be affected, or specific ways in which they might be affected by the proposed project. [30]

65. In the decision, the AER found that SCFN's concerns that the proposed project was wholly within its traditional territory; that the proposed project would impact the use of SCFN's traditional sites and resources; and that the project would impact the exercise of Aboriginal rights in the project area, to be general in nature, "leaving unanswered the questions of which of its members are acting in what locations and for what purposes, and how they or the resources they rely on might be affected by the Project or elements of it". The AER found the extensive submissions submitted by SCFN describing its Treaty and Aboriginal rights, and the ways in which those rights are exercised, to be insufficient to establish a degree of location or connection with the proposed project.

66. Imperial does not challenge the existence of EMS' asserted Aboriginal rights; however, EMS has not provided specific factual evidence of the nature required by the above noted decisions to demonstrate that it is directly and adversely affected or directly affected by the AER's issuance of the Approvals. In particular, while EMS has provided in its SOC, substantial details about its asserted rights, and its concerns about potential impacts of the CLEP, EMS has not provided evidence to show which members are active in which specific locations and for what purposes, and what elements or facets of the activities authorized by the Approvals might affect them or their resources. Further, Imperial has submitted a detailed response addressing the concerns raised in EMS' SOC.

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[28] *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para 14 [**Authority 10**].
[29] *Ibid* at para 18 [**Authority 10**].
[30] AER Samson Cree Decision, *supra* note 27 at p 6 [**Authority 9**].

67. Based on the foregoing, Imperial submits that EMS has not demonstrated it is an eligible person for the purposes of requesting a regulatory appeal and the AER should therefore dismiss the Requests.

IV. CONCLUSION

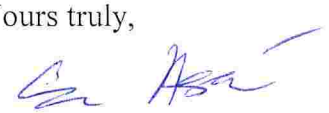
68. In view of the operation of the relevant provisions of the *REDA*, as outlined above, Imperial respectfully requests the AER dismiss the Requests on the following grounds:

(i) The asserted reasons for regulatory appeal in the Requests are without merit.

(ii) The information provided by EMS does not establish that it is "directly and adversely affected" or "directly affected" by the issuance of the *OSCA* Approval and the *EPEA* Approval, respectively; EMS has not established it is an "eligible person" who can request a regulatory appeal pursuant to the *REDA*.

We trust the foregoing to be in order. Please contact the undersigned if you have any questions.

Yours truly,



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