

January 5, 2015

LARP Review Panel
c/o Land Use Secretariat
9th Floor, Centre West Building
10035 – 108 Street N.W.
Edmonton, AB T5J 3E1

VIA EMAIL: LUF@gov.ab.ca

Dear LARP Review Panel:

**Re: Review of Lower Athabasca Regional Panel
Information Request #9 Directed to the Crown**

We write on behalf of Fort McKay First Nation in reply to the Crown's response to Information Request #9 (IR 9).

Panel's Jurisdiction to Issue IR 9

We disagree with the Crown's position that IR9 falls outside of the Panel's jurisdiction, and again oppose the Crown's narrow interpretation of the function of the Panel in conducting this review of LARP. We disagree with the Crown that because IR9 relates to responses to Information Request #4, it is improper. We confirm that the concerns raised in our letter of November 14, 2014 were not to raise an issue with the Panel's jurisdiction to issue IR9 but to ensure the parties' expectations with respect to the review process were met. Both Information Request #4 and IR9 relate to the matters raised by Fort McKay's Application for a Review of LARP, notably, the prioritization of oil sands development in the region without the management tools and measures in place to protect Fort McKay's rights and interests from the impacts of such development. Fort McKay's Application also raised concerns with the Crown's delay in developing these tools. The Crown's response to both Information Request #4, as described in our response of December 1, 2014, and IR9 confirm Fort McKay's concerns.

We disagree with the Crown's narrow interpretation of the Panel's jurisdiction as merely determining whether Fort McKay is directly and adversely affected by LARP. As submitted in Fort McKay's Reply to the Crown's response to Fort McKay's submissions of August 25, 2014, the Panel has broad jurisdiction in order to fulfill its mandate to determine whether the regional plan meets the purposes and objectives of the *Alberta Land Stewardship Act*, which includes respecting and not infringing on rights and interests and meeting the reasonable foreseeable needs of current and future needs of Albertans, including aboriginal peoples (ALSA at s.1). Therefore, contrary to the Crown's view, we submit that the Panel has the requisite jurisdiction to issue IR9, including to seek information and clarification on how

the LARP as a whole functions and how the Crown is meeting its obligations under LARP. This includes a review of the initiatives and organizations referenced in LARP's Progress Report of LARP (2013), some of which are also referenced in the content of LARP itself.

Fort McKay disagrees with the Crown's position that the Panel has somehow denied it the rights granted by Rule 31 of the *Rules of Practice for Conducting Regional Reviews*. Rule 31 is not to ensure a party can prevent information being put before the decision-maker based on its own interests and views. Rather Rule 31 allows the Crown to provide reasons for why the information *cannot* be provided. This contemplates situations in which the information request actually does not exist or is protected by some kind of privilege.

Crown's Response to IR9

1. Completion Dates of LARP's Management Frameworks

Air Quality Management Framework:

Fort McKay agrees with the Crown that the Air Quality Management Framework has been in effect since September 2012. The Crown's response directs the Panel to a link to access the framework. A review of the framework confirms that it sets thresholds for NOx and SO2 based upon Alberta's Ambient Air Quality Objectives. The Crown in response to IR9 fails to describe how the Air Quality Framework addresses the concerns raised by Fort McKay in its Application for a Review of LARP. Fort McKay submits that the Air Quality Management Framework implemented in LARP fails to meet the purposes and objectives of the *Alberta Land Stewardship Act*, S.A. 2009 c.A-26.8, and fails to meet the fourth outcome of LARP of managing air and water to support human and ecosystem needs as it:

- Establishes "triggers" which means it does not assist in meeting the objective of integration of economic, environmental and social considerations at the "development planning and approval stage of decision making" but rather is reactive to impacts having already occurred when management objectives are limited (see pg. 23 of LARP) (para. 32 of Fort McKay's Application);
- contains no limits for any substances other than NOx and SO2;
- is not a comprehensive framework for managing air quality to protect human health (para. 41 of Fort McKay's Application);
- fails to consider odour impacts on Fort McKay despite impacts on Fort McKay's health (paras. 61-62 of Fort McKay's Application) ;
- sets thresholds based upon Alberta's Ambient Air Quality Objectives, which are not based on health outcomes but incorporate other considerations such as economics of air pollution control technology, are outdated, and do not reflect the World Health Organization's criteria for ambient air quality that has been adopted by other countries. (para. 101 of Fort McKay's Application).

While the Air Quality Management Framework in its introduction states that the Crown developed it using input from aboriginal peoples, Fort McKay submits that much of its input was not incorporated into the framework.

Surface Water Quality Management Framework

Fort McKay agrees with the Crown that the Surface Water Quality Management Framework has been in effect since September 2012. The Crown's response also provides the Panel with a link to access the framework, which confirms that the framework sets thresholds for provincial indicators for the Athabasca River only, at one monitoring location at Old Fort.

The Crown fails to describe how the Surface Water Quality Framework addresses the concerns raised by Fort McKay in its Application for a Review of LARP. Fort McKay submits that the Surface Water Quality fails to meet the purposes and objectives of the *Alberta Land Stewardship* and fails to meet the fourth outcome of LARP of managing water to support human and ecosystem needs as it:

- It only considers thresholds for the Athabasca River despite the numerous other water bodies Fort McKay uses and exercises its constitutional rights in the region, including the MacKay River, Ells River and Gardiner and Namur Lake (paras. 32; 47; 51-52 of the Application);
- Relies on one monitoring station at Old Fort to detect cumulative water quality changes over 200 km downstream of development will likely not detect any impacts in time to protect the lower Athabasca River ecosystem from serious water quality impacts, which means that LARP's objective to achieve its Vision by using a cumulative effects management approach to achieve its outcomes (page 23 of LARP) is not satisfied by the framework.
- Does not measure for oil sands substances such as polycyclic aromatic compounds and naphthenic acids.

While the Surface Water Quality Management Framework in its introduction states that the Crown developed it using input from aboriginal peoples, Fort McKay submits that much of its input was not incorporated into the Framework.

Biodiversity Management Framework

The Crown claims that it anticipates the Biodiversity Management Framework will be submitted for approval in early 2015. Given that the Crown began consultation on the framework in June 2014, and at this time introduced a highly conceptual framework, it is unclear why it has taken the Crown so long after the target date in LARP to develop a framework. The Crown's response also provides the Panel with a link to access the draft framework.

The Crown fails to describe how the Biodiversity Management Framework addresses the concerns raised by Fort McKay in its Application for a Review of LARP or how it ensures Fort

McKay can exercise its constitutional rights near its Reserves (LARP at p.29). The draft framework confirms that the framework currently does not incorporate traditional land use objectives or requirements into the framework such as by setting thresholds for populations of cultural keystone species that will support a harvestable supply for Fort McKay or any First Nation or establishing locations where traditional land use may occur in reasonable proximity to aboriginal communities (See Terms of Reference for LARP for this requirement at page 18). Fort McKay submits the draft framework's objectives and indicators are insufficient to protect Fort McKay's exercise of constitutional rights.

Tailings Management Framework

The Crown claims that it anticipates the Tailings Framework will be submitted for approval in early 2015. Fort McKay is skeptical about this proposed date given that the information and draft Fort McKay reviewed in the summer of 2014 showed the Crown was at the early stages of its development. Fort McKay submits the current draft does not protect Fort McKay's health and constitutionally protected rights and will not adequately manage and minimize risk of tailings as it currently fails to recognize the risks to local communities in tailings failure, tailings-associated air quality issues, and loss of traditional territory (including culturally important muskeg areas) that are critical to Fort McKay and fails to consider impacts of tailings to impact the community's right to enjoyment of reserve lands, as odours and dust associated with tailings treatment are reaching the community.

Surface Water Quantity Management Framework

The Crown claims that it anticipates the Surface Water Quantity finalized in early 2015, which is three years after the timeline set in LARP and Fort McKay is concerned that even this deadline will not be met given the Crown's history with delayed timelines.

Ground Water Management Framework

The Crown claims that the Ground Water Management Framework was completed and implemented in 2012. The Crown provides the Panel a link to access the framework and claims that the Crown will "continue to refine triggers and limits." The Framework currently contains interim measures and no limits. Fort McKay submits progress in developing the framework has been slow. There have been no annual reports on its progress to date. The preservation and enhancement of aboriginal and treaty rights is not explicitly stated as an objective of the framework and the framework does not directly consider direct or indirect traditional uses of water. Groundwater resources protected under the framework are limited and do not consider all ground waters. While the framework states the stakeholder feedback was considered, it remains unclear to Fort McKay how its input was considered and integrated into framework.

Progressive Reclamation Strategy

The Crown does not provide a completion date for a progressive reclamation strategy and Fort McKay is not aware of any efforts taken on this strategy despite having repeatedly advised the Crown of its interest in developing reclamation standards necessary to restore traditional land use to disturbed lands. Currently, it is Fort McKay's experience that project proponents do not engage in progressive reclamation but instead leave disturbance on their lease sites un-reclaimed for the life of the project.

2. Ground Water Management Framework

Fort McKay recognizes that the information request is an administrative error and refers the Panel to #3.

3. Ground Water Management Framework

With respect to monitoring network of ground monitoring stations, the Crown's response confirms that the network is not yet complete, which again confirms Fort McKay's concerns with LARP that it is prioritizes oil sands development without key measures and tools in place to manage the environmental and social consequences of such development or deliver on the stated intention of managing cumulative effects. We also refer the Panel to our response at #1.

4. Ongoing Implementation of Air Quality Management Framework and Surface Water Management Framework

Please see response at #1.

5. Air Quality Management Framework Results - 2012 Annual Report

The Crown's response states there are total of 15 air monitoring stations in the region; confirms WBEA plays a central role in air monitoring in the region; and confirms only SO₂ and NO₂, which are currently elevated and expected to decrease, are being monitored despite other industrial contaminants in the region. This confirms Fort McKay's concerns that:

- LARP's air quality management is not comprehensive as it does not manage the full breadth of industrial pollutants in the region; even with monitoring of the pollutants there is no management response as thresholds and limits for the pollutants are not included in the framework;
- Air quality in the region is already deteriorating in the region from SO₂ and NO₂, and LARP's reactive management response, do not assist in meeting the objective of integration of economic, environmental and social considerations at the "development planning and approval stage of decision making" (see pg. 23 of LARP);
- The limited number of stations monitoring is not capturing all areas potentially affected, which means there may be trigger level or limit exceedances in a region that the air monitoring system does not detect; and

- Air quality monitoring is almost entirely dependent on Wood Buffalo Environmental Association for its monitoring, which is currently operating on emergency funding at risk of closing. See articles Tabs 1 and 2.

6. Surface Water Quality Framework – 2012 Annual Report

The distance of the Old Fort monitoring station nearly 150km downstream of Fort McKay and most industrial development has been a key concern of Fort McKay with the Surface Water Quality Management Framework. It is Fort McKay's position that this single station is insufficient to detect cumulative effects for the lower Athabasca River and the region. There are numerous inflowing tributaries from undeveloped landscapes that can dilute industrial effects upstream, where cumulative effects are more likely to be detected.

The Crown claims that the other stations at Firebag and Fort McMurray are also monitoring surface water in the region. However, it is Fort McKay's understanding that that this monitoring does not trigger a management response under the Framework, even though triggers and limits for these locations could easily be developed with the existing information being collected and be incorporated into the Framework. The Crown states that monitoring is occurring monthly at Old Fort. However, Fort McKay submits that this frequency is insufficient to capture unplanned releases. For example, if there were a tailings spill or other incident, the timing of sampling at Old Fort might result in the Province missing the plume.

7. Time Lags in Reporting on Air Quality and Surface Water Quality Management Frameworks Results – 2012 Annual Report

The Crown's response confirms a significant lag in time in the analysis, reporting and management response of results of the frameworks. The frameworks do not adequately protect Fort McKay's health and constitutional rights or meet outcome 4 of LARP to manage air and water that support human and ecosystem needs as a time lag of two years between sampling and reporting and two-three years for a management response after sampling prevents the Crown from identifying source of a trigger or managing the impacts in an effective manner.

8. Regulatory Details Plan for Monitoring and Reporting

Fort McKay submits that the Crown's response to question number 8 is non-responsive to IR9 as the response simply repeats the content of LARP while the Panel's question was for the Crown to describe how it intends to meet the obligations set out in LARP. In any event, the monitoring, evaluating and reporting process contemplated by the Crown's response fails to meet the Crown's obligations under section 48 of the Regulatory Details Plan. For example, the Crown says that Designated Minister will report on the indicators set out in Table 1, which are each quantifiable. However, from the LARP 2013 Progress Report, no such quantification occurred for the indicators of Outcome 7: the inclusion of aboriginal peoples in land use planning, or the status of biodiversity indicators with respect to Outcome 3. Additionally, section 48 of the Regulatory Details Plan requires the Designated Minister to establish plans and programs to monitor the status of each indicator and *evaluate the effectiveness of each strategy* and LARP requires "rigorous" evaluation (LARP at p.65). The Crown's response does not provide how it

has established *programs* that will evaluate the effectiveness of each strategy, and therefore the Panel has no information before to conclude that it has.

9. 2013 LARP Progress Report - Alberta Environmental Monitoring, Evaluation and Reporting Agency (AEMERA)

The Crown's response with respect to AEMERA's role and functions in confirms AEMERA's monitoring is currently not protective of Fort McKay's rights and interests as its function has not been integrated into the project assessment and approval process. Without the existence of thresholds relevant to the exercise of treaty and aboriginal rights, and the integration of such thresholds and existing monitoring data into land use planning and project approvals, monitoring is ineffective in incorporating cumulative impacts on Fort McKay's treaty and aboriginal rights and traditional land use in oil sands development planning and approval.

10. Canada Alberta Oil Sands Environmental Monitoring Information Portal

Fort McKay submits that the monitoring of contemplated by the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring fails to provide meaningful information on the impact of oil sands development on Fort McKay's health and treaty and aboriginal rights and traditional land use as the technical aspects of the monitoring program have not incorporated the needs of aboriginal peoples and their continued exercise treaty and aboriginal rights and traditional land use.

11. Monitoring, Evaluation and Reporting Initiatives and Programs – Page 19 of LARP

Fort McKay again submits that without the existence of thresholds relevant to the exercise of treaty and aboriginal rights, and the integration of such thresholds and existing monitoring data into land use planning and project approvals, LARP's monitoring is not protective of Fort McKay's health and treaty and aboriginal rights. Further, if established thresholds are exceeded by operating projects, an unspecified management response may be required. Once projects are developed and monitored, the management options will be limited. Therefore, Fort McKay submits that LARP's objective of integration of economic, environmental and social considerations at the "development planning and approval stage of decision making" is not satisfied (see pg. 23 of LARP).

Sincerely,



Tarlan Razzaghi
Barrister and Solicitor

cc: Witek Gierulski: Witek.Gierulski@gov.ab.ca

Keltie Lambert counsel to Cold Lake First Nation: klambert@wittenlaw.com
Mark Gustafson counsel to Mikisew First Nation: MGustafson@jfklaw.ca
Jenny Biem counsel to Athabasca Chipewyan First Nation:
jenny@woodwardandcompany.com
Will Randall: will.randall@gov.ab.ca
Jodie Hierlmeier: jodie.hierlmeier@gov.ab.ca