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June 16, 2023

Alberta Energy Regulator
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4

Attention: Aimée Hockenbull

**Re: Request for Reconsideration No. 1942728 of McClelland Lake Wetland Complex (MLWC)
Operational Plan for the Fort Hills Oil Sands Project by Alberta Wilderness Association
(AWA)
Suncor Energy Operating Inc. (SEOI) Response to AWA Reply dated June 9, 2023**

Dear Ms. Hockenbull:

On May 9, 2023, AWA filed submissions in support of its request for reconsideration of the MLWC Operational Plan (AWA Submission). On May 31, 2023, SEOI, on behalf of Fort Hills Energy Corporation (FHEC) filed its response to the AWA Submission (SEOI Submission). On June 9, 2023, AWA submitted its reply to the SEOI Submission (AWA Reply). These submissions were provided in accordance with the Alberta Energy Regulator's (AER) procedural letter issued April 18, 2023 (AER Letter).

SEOI acknowledges and respects the process set out in the AER Letter. However, upon review of the AWA Reply, SEOI would like to raise a significant procedural issue. Specifically, the AWA Reply introduces a significant amount of new information not previously introduced or referred to in this proceeding (the New Information). The following documentation was attached to and heavily relied upon in the AWA Reply and had not, to SEOI's knowledge, been placed on the record of this proceeding by AWA or SEOI prior to the AWA Reply:

1. Meeting notes with SEOI dated February 23, 2010;
2. Presentation to the Oil Sands Multi-stakeholder Panel dated September 27, 2006;
3. Letter to Victor Choy and Sheila Chernys dated September 2, 2008;
4. “Memorable McClelland Lake Wetlands” dated June 2016;
5. Lindsay Report (May 29, 2023);
6. Locky Report (dated May 31, 2023);
7. Wieder Report (dated May 24, 2023); and
8. Vitt/House Report (dated Nov 28, 2022).

Several of these documents also contain further references.¹ Additionally, Appendix F to the AWA submission includes reference to the Lindsay report and attaches a YouTube video and commentary.

In regulatory and court proceedings, as a matter of procedural fairness, new evidence cannot be introduced in a party’s reply submissions. For example, the AER’s Manual 003 contemplates that new evidence should not be presented at a hearing unless specific permission was received to do so:

Your evidence must be in the submissions you filed before the hearing. The filing dates are in the letter sent to participants. To allow parties a fair chance to prepare for the hearing, new evidence may not be introduced during the hearing unless you have asked for and received permission from the hearing panel.²

At a trial or similar hearing on the merits, parties must follow strict rules regarding reply evidence, including that the reply evidence cannot introduce new evidence and must respond to only those matters initially raised.³ These rules were not followed here. The New Information: i) attempts to confirm evidence presented in the AWA Submission;⁴ ii) raises new items that were not previously highlighted;⁵

¹ For example, the Lindsay Report includes 10 references, the Locky Report includes 26 references, the Wider Report contains 5 references, and the Vitt/House Report contains 61 references.

² AER Manual 003: Participant Guide to the Hearing Process, December 2020, p 7.

³ *Lockridge v Ontario (Director, Ministry of the Environment)*, 2013 ONSC 6935, para 14, citing John Sopinka et al, *The Law of Evidence in Canada*, 3rd ed. (Toronto, ON: LexisNexis, 2009), at pp. 1165-68 confirms that the rules for adducing reply evidence at a trial or similar hearing on the merits include: 1) case splitting – reply evidence cannot simply confirm the evidence presented in the party’s case at chief; 2) new issues – the reply evidence cannot introduce new evidence, it must respond to only those matters raised by the defendant; 3) unanticipated need – the replying party can only offer evidence that it could not have anticipated as being relevant when it presented its case in chief; and 4) new evidence that was not previously available may be permitted with the court’s discretion.

⁴ See, for example, AWA Reply, p 7, citing the Lindsay Report regarding observational data model calibration.

⁵ See, for example, AWA Reply, p 10, citing the Lindsay report regarding impacts of climate change.

iii) offers evidence that was easily anticipated as being relevant when the AWA Submission was filed;⁶ and iv) introduces new information without requesting permission to do so. Above all, the New Information introduces an element of “unfair surprise” and denies SEOI the opportunity to test and respond to it.

It is an accepted practice of administrative and regulatory law that parties be given an opportunity to test and respond to the evidence presented. The reason that evidentiary deadlines are imposed is to ensure as a matter of procedural fairness that parties have an opportunity to test and respond to the evidence on the record.⁷ The AWA Reply denies SEOI of that opportunity. If fresh evidence were permitted at the reply stage of a regulatory proceeding, the party filing the fresh evidence may gain a significant and unfair procedural advantage given that such evidence would go “untested”.

The AWA Reply provides no reason why the New Information could not have been filed in the AWA Submission. SEOI also notes that AWA commissioned and filed the New Information a very short time after the AWA Submission (including the three new consultant reports) – and one of AWA’s main arguments supporting its request for reconsideration is that it took an exceedingly long time to commission and finalize the evidence supporting the AWA Submission. In the event AWA commissioned these new consultant reports prior to the AWA Submission, AWA should have requested permission from the AER to file them after the May 9, 2023 deadline for the AWA Submission.

Given all the above, SEOI requests that the AER disregard the New Information in its entirety and not give any weight to it in making its decision on whether this reconsideration should proceed to Phase 2. In the alternative, if the AER decides to consider the New Information, SEOI requests that it be given an appropriate opportunity to respond to the New Information.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Robi", with a long horizontal flourish extending to the right.

Michael Robinson, SEOI

cc: AWA

⁶ New Information is dated within approximately 3 weeks after the AWA Submission, or prior to that date, and so could reasonably have been prepared and filed with the AWA Submission.

⁷ North Montney Mainline Variance Proceeding, NEB Ruling No. 8, [A89917-1](#).