

April 18, 2024

Matt Hulse, Susanne Calabrese, &
Zachary Biech
1810 – 801 6th Ave. SW
Calgary, AB T2P 3W2
Tel: 604-685-5618 ext. 255
Email: mhulse@ecojustice.ca
scalabrese@ecojustice.ca
zbiech@ecojustice.ca
File No.: 2196

By Email: soc@aer.ca

Attention: Ayan Solomon
Alberta Energy Regulator
Statement of Concern Team
Regulatory Applications

**RE: Jackpine Mine Project Integrated Renewal Application
Environmental Protection and Enhancement Act Application No. 023-00153125
Water Act Application Nos. 019-00205433, 002-00329253, 011-00186157 and 002-00329252
Reply to CNUL response to Statement of Concern No. 32476**

We provide the following in reply to the response by Canadian Natural Upgrading Ltd. (CNUL) dated March 22, 2024 to the statement of concern (SOC) filed by the Alberta Wilderness Association (AWA) and the Keepers of the Water (Keepers) on behalf of the Athabasca River Basin regarding the Jackpine Mine Integrated Renewal Application (the “Application”).

Overall, CNUL’s response advances a narrow interpretation of “person” that is not supported by law and misinterprets the authority of the AER to recognize the Basin as a person for the purposes of this proceeding. Further, CNUL seeks to downplay the very real direct and adverse impacts on the Basin from the Jackpine Mine; impacts that its own Application acknowledges. CNUL’s response to the substantive concerns raised in the SOC continues to deny the Alberta Energy Regulator (AER) adequate information about the risks and impacts associated with the Jackpine Mine.

As such, it remains the case that the AER can and should recognize the Athabasca River Basin as a “directly and adversely affected person” for the purpose of this proceeding and take steps to address the concerns about the Application that are advanced in the SOC.

CNUL’s narrow interpretation of “person” is not supported by the law

CNUL claims that the Athabasca River Basin is not a person because there is no legal basis for the AER to expand the definition of “person” to include the Athabasca River Basin. To support this position, CNUL cites a definition in Black’s Law Dictionary that the term “person” means a “human being” and that any other additional categories of meanings that can be ascribed to “person” must be expressly identified in legislation. Therefore, since the *Interpretation Act* has not identified non-human environmental entities such as a river basin, the definition of “person” cannot include the Athabasca River Basin.¹

¹ See CNUL’s letter to the AER dated 22 March 2024 (“CNUL Response”), pg. 4.

With respect, this is a misleading and unduly limited interpretation. There are multiple definitions of “person” in Black’s Law Dictionary. CNUL failed to mention another – and more expansive - definition, which states that a person is:

“An entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being.”²

This definition is broad enough to capture a non-human entity, such as a river basin. As noted in the SOC, river basins have been recognized by law in a number of jurisdictions around the world (including in Canada) as having many of the same rights as human beings. This definition also aligns with other definitions of “person” that are similarly expansive. For example:

- The **Legal Information Institute** defines “person” as, “in a legal context, a person is able to act in their own right, possessing legal rights and liabilities.”³ This definition also notes that the term “person” includes both a natural person (a living human being), and a legal person (an entity).
- **Barron’s Canadian Law Dictionary** defines “person” as “in law, an individual or incorporated group having certain legal rights and responsibilities. This has been held to include foreign and domestic corporations.”⁴ This definition also notes that there are artificial persons (a legal entity, not a human being, recognized as a person in law to whom legal rights and duties may attach) and natural persons (a human being that has the capacity for rights or duties).

Further, CNUL has not provided any support for its contention that the Legislature must list the additional categories of meaning for every word that it seeks to define. We are not aware of such a rule of statutory interpretation. To the contrary, CNUL’s position contradicts the decision of the Legislature to use the word “includes” when defining “person” in the *Interpretation Act*. As noted in caselaw, the term “includes” serves to enlarge the meaning of words and not to limit them.⁵

As such, the meaning of “person” is not limited to the non-human entities listed in the definition in the *Interpretation Act*, but includes other types of non-human entities. As the SOC demonstrates, it is appropriate to recognize the Athabasca River Basin as a “person” because it meets all the requirements of the statute.

² *Black’s Law Dictionary*, 11th ed, *sub verbo*, “person”.

³ *Legal Information Institute*, *sub verbo*, “person”, accessed [online](#).

⁴ *Barron’s Canadian Law Dictionary*, 6th ed, *sub verbo*, “person”.

⁵ *Warkentin Building Movers Virden Inc (cob Warken Building Movers) v. Latrace*, 2021 ABQB 297 at para 15 (discussing the term “including” and stating the definitions “make it clear that these words are terms of extension, designed to enlarge the meaning of preceding words, and, not, to limit them”);

Bank of Greece (Canada) v Katsikonouris, [1990] 2 SCR 1029 at para 13 (reviewing rules of statutory interpretation and definitions of the word “including” to find that these “made it clear that these words are terms of extension, designed to enlarge the meaning of preceding words, and not, to limit them”);

British Columbia Human Rights Tribunal v Schrenk, [2017] SCJ No 62 at para 36 (discussing the definition of the word “person” modified by the word “includes” and finding “[b]ecause the definition ‘includes’ these individuals and entities, it is explicitly not limited to them.”)

The AER has the authority to recognize the legal personhood of the Basin

CNUL asserts that determining whether the Basin has legal personhood is a policy argument best addressed by the Government of Alberta and that a decision by the AER to recognize the Basin as a person would have “palpable shifts in creating and administering legal policy” and “massive legal, policy and procedural implications.”⁶

With respect, CNUL’s concerns are exaggerated and ignore the true nature of the request. The SOC does not seek substantive rights for the Basin, which we agree would involve broader policy considerations that are more appropriate for a court or a legislature. Instead, the SOC seeks a procedural right for the Athabasca River Basin to make a submission to the AER in the review of the Jackpine Application. This requires the interpretation of the definition of the term “directly and adversely affected person.” This is not a “significant leap” for the AER, but a routine legal question that is squarely within the AER’s purview.

The only “shift” or “implication” at hand is that the Athabasca River Basin’s concerns would receive direct consideration from the AER in these particular proceedings. The AER would proceed with its review of the Renewal Applications according to its usual process, which includes deciding who qualifies as a directly and adversely affected person. There is no substantive change to the ordinary course of the AER’s exercise of its duties.

CNUL has not articulated the “massive legal, policy, or procedural implications” that would arise from granting standing to the Basin in this proceeding. Instead, CNUL’s response indicates an underlying unease that the recognition of the Athabasca River Basin as a directly and adversely affected person would impose additional obligations on CNUL. This is not a valid concern. In making an application to renew its licences and approvals, CNUL is already required to comply with legal requirements in EPEA, the *Water Act*, and other relevant legislation. The participation of the Athabasca River Basin as a legal person in this proceeding simply seeks to ensure that CNUL meets these existing legal obligations.

Direct and adverse effects on the Basin are demonstrated

CNUL claims that, even if the Athabasca River Basin were to be considered a “person”, it has not been demonstrated that the Basin is directly and adversely affected by the Renewal Application.⁷

With respect, it is difficult to understand how CNUL can claim that the Athabasca River Basin does not meet the threshold of “directly and adversely affected” for the purposes of this proceeding. The direct nature of the impacts are established by the fact that the Jackpine Mine is located within the Athabasca River Basin and because the Mine has a number of direct physical interactions with the Basin, including that the Mine:

- withdraws water directly from the Athabasca River,
- diverts water directly from the Muskeg River watershed,
- releases water from sedimentation ponds containing contaminants of concern directly into the Muskeg River watershed, and

⁶ See CNUL Response, pg. 5.

⁷ See CNUL Response, pp. 5-7.

- emits contaminants of concern directly into the local airshed.

The Application provides evidence of these impacts and seeks to obtain the AER's approval for the Mine to continue operating over the next 10 years, during which time the Mine will continue to have these direct impacts on the Basin.

These impacts are not only direct but are also adverse as they change the Basin from its natural state and interfere with its ability to carry out its natural functions. The withdrawal and diversion of water by the Mine reduces the volume and flow of water in the Basin, thereby impairing the ability of the Basin to provide dependent ecological systems and river users with sufficient water. The introduction of contaminants of concern by the Mine reduces the water quality of the Basin, which impairs the ability of the Basin to support healthy ecological systems. These impacts work cumulatively with similar impacts from other oil sands projects in the region.

When the Jackpine Mine Expansion Project was approved, the review panel concluded that the Project would have "significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity."⁸ The location of these effects is within the Basin. The Application itself provides evidence of instances where local and regional air or water quality thresholds in the Basin have been exceeded in recent years, in part due to the contaminants released by the Mine. The SOC provides evidence that the impacts of oil sands industry – for example, on air quality - are more adverse than the industry reports. The SOC requests that the Application provide additional information to fill gaps that otherwise prevent the AER from determining the true nature of the Mine's direct and adverse impacts on the Basin.

The fact that oil sands projects, such as the Mine, have adverse impacts on environmental entities, such as the Basin, is part of the reason that Alberta's regulatory regime imposed an environmental assessment regime and requires periodic licence renewals: to identify, mitigate, and/or avoid adverse impacts that exceed certain standards and thresholds.

CNUL demonstrates the need to recognize the Basin as a directly and adversely affected person

CNUL's response demonstrates an absence of public engagement on this Application. This affirms the need to recognize the Basin as a directly and affected person in these proceedings in order to fulfill public-participation goals of the EPEA and the *Water Act* and support public accountability in the AER's decision-making.

The cases and letter decisions that CNUL provided to demonstrate the law on standing simply illustrate how the "directly and adversely affected" test currently excludes Indigenous communities and public interest organizations from voicing their concerns in the regulatory process for oil sands projects, including with respect to the interests of the Athabasca River Basin.

The "stakeholder engagement" that CNUL described failed to name any of the Indigenous groups that CNUL engaged and did not provide any dates, agendas, notes, or explanation of whether this

⁸ Decision 2013 ABAER 011: Shell Canada Energy, Jackpine Mine Expansion Project, Application to Amend Approval 9756, Fort McMurray Area, accessed [online](#), para 9.

engagement addressed the impacts of the Jackpine Mine and the Application on the Athabasca River Basin.

Further, to our knowledge, there has only been one other statement of concern filed, by a person living in Edmonton. Due to the restrictive nature of the “directly and adversely affected test,” it is likely that her SOC will not be accepted.

As such, it is imperative for AER to recognize the Athabasca River Basin as a directly and adversely affected person for the public interest in the Athabasca River Basin to be adequately reflected in this proceeding – as there will be no other stakeholders (as is often the case) that will be able to submit their concerns about this Application.

CNUL’s responses to concerns identified in the SOC demonstrate need for further review of the Application

Below, we provide a short reply to CNUL’s responses to the concerns identified in the SOC. Overall, CNUL’s responses indicate a preference to ignore the requirements of the EPEA Guide, provide as little information as possible, ignore evidence that conflicts with its conclusions, and assume that the world has not changed since the Mine last underwent an EIA. This undermines the ability of the AER and the public to understand and assess the impacts of the Mine in recent years and in the upcoming 10-year term of the requested approvals.

Inaccurate air quality data. CNUL’s refusal to compare their air quality data with the He et al study – not to mention undertake similar monitoring itself – indicates a concerning desire to ignore a peer-reviewed study that calls into serious question the accuracy of the data on which CNUL’s relies. For an operator that claims to take a “best practices approach to sustainable development”, it is concerning that CNUL would not take this opportunity to ensure they are relying on accurate information and, if not, to improve their air quality monitoring and management.

Failure to compare against baseline data and original EIA predictions. CNUL’s refusal to compare current data against baseline data and original EIA predictions deprives the AER and the public of the ability to compare observed data of current environmental conditions with the original EIA predictions. This makes it difficult to understand whether the Mine is operating as expected and whether the original predictions are still valid. The fact that the Application is not seeking any updates or amendments does not alleviate the need to undertake this important check-in.

Exclusion of the Athabasca River. CNUL claims that a hydrological analysis is not necessary because the Application evaluated water use against the Surface Water Quantity Management Framework (SWQMF). However, this section of the Application was much less detailed than the sections describing the hydrology of the Muskeg River, Jackpine Creek, Muskeg Creek, and Kearl Lake. CNUL fails to explain why a similar level of analysis is not required for the Athabasca River, particularly when there are serious and well-documented concerns that the SWQMF does not adequately protect navigability on the Athabasca River.

Outdated water flow predictions. As noted in the SOC, we regard comparison with EIA predictions as good practice. However, for a hydrological system as complex and important as the Athabasca River, CNUL should welcome the opportunity to undertake updated modelling to confirm whether its original

EIA predictions are still accurate and to help ensure the AER has up-to-date predictions into the future. An updated model would supplement, not negate, the comparison with the original EIA predictions.

Emerging influences and environmental pressures. Climate change has accelerated since the Mine originally underwent an EIA, in ways that may not have been predictable at that time. Given the magnitude of this crisis and its ability to affect the Mine's operations and exacerbate its impacts, an updated climate assessment is essential for the AER to accurately understand the risks and impacts associated with climate change.

Substances generated at the facility – air emissions. CNUL's response continues to ignore the specific information requirements in the EPEA Guide, for example, to include the "characterization, including their nature, fate and transport (physical, chemical or biological properties or characteristics), and potential effects on the environment." This information does not appear in the Application. The Application also fails to include any information about carbon dioxide emissions, which is listed in Appendix E of the EPEA Guide and are emitted directly from the Mine.

Discrepancies in water volumes. We welcome CNUL's corrections to the discrepancies in water volumes and the unexplained increase in water use in the Application. However, the quantity of these errors is concerning and raises the question of how many other errors are in the Application that we did not identify. Indeed, we were only able to identify the discrepancies in water volumes because they were internally inconsistent; that is, we had something to compare these numbers with. The Application does not allow the same type of comparison for the majority of CNUL's other data and conclusions, making it difficult to trust their accuracy.

Failure to conduct a cumulative effects assessment. CNUL fails to provide a valid reason for not providing a cumulative effects assessment as it seeks the approvals it needs to extract Alberta's natural resources for another 10 years. Instead, CNUL opts to ignore provincial guidance, provide the bare minimum amount of information, and rely on a cumulative effects assessment that is almost two decades old. This further belies CNUL's claim to apply a "best practice approach to sustainable development."

Requested water rights for renewal. CNUL warns that if reclaimed water was not available and withdrawal allocations were reduced, it would have to limit production and closure activities. However, despite its stated commitment and ability to use reclaimed water, CNUL does not provide any evidence to suggest that reclaimed water will, in fact, not be available in the future. Further, CNUL does not otherwise justify why Alberta's water management regime should not more closely align water allocations and actual use volumes or promote a more accurate understanding of water availability and hydrologic impacts by requiring up-to-date assessment and approval of the Mine's additional freshwater requirements – if they become necessary in the future.

Inadequacy of LARP and its frameworks. While LARP may not fall within the mandate of the AER, it is incumbent on the AER – and CNUL – to recognize that LARP and its frameworks have failed to provide an adequate and comprehensive cumulative effects management framework as promised by Alberta. Despite this, LARP continues to be relied upon by the AER and oil sands operators to justify continued operations and new projects. The AER should take what actions it can to help ameliorate the inadequacies of LARP, including through conditions attached to project approvals and licences.

Conclusion

CNUL's advances a narrow interpretation of "person" that is not supported by law and misinterprets the authority of the AER to recognize the Basin as a person for the purposes of this proceeding. Further, CNUL seeks to downplay the very real direct and adverse impacts on the Basin from the Jackpine Mine; impacts that its own Application acknowledges. CNUL's response to the substantive concerns raised in the SOC continues to deny the AER adequate information to assess the risks and impacts associated with the Jackpine Mine.

The AER has the authority to recognize the Athabasca River Basin as a "directly and adversely affected person" for the purpose of this proceeding and should do so to advance the purposes of EPEA and the *Water Act*. We respectfully request that the AER require CNUL to revise the Application to address the information gaps that are identified in the SOC.

Sincerely,



Matt Hulse
Barrister & Solicitor



Susanne Calabrese
Barrister & Solicitor



Zachary Biech
Barrister & Solicitor

cc. Anne Umpleby, CNRL, anne.umpleby@cnrl.com

Shailaz Dhalla, Lawson Lundell, sdhalla@lawsonlundell.com