

# O'CHIESE CONSULTATION OFFICE

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January 20, 2015

## By Email

Brett Maracle, Panel Manager  
Canadian Environmental Assessment Agency  
160 Elgin Street, 22nd Floor, Ottawa ON K1A 0H3  
[RobbTrend@ceaa-acee.gc.ca](mailto:RobbTrend@ceaa-acee.gc.ca)

Dear Mr Maracle,

**RE: Robb Trend Coal Mine Expansion Project – O'Chiese First Nation Comments on Agreement to Establish a Joint Review Panel for the Robb Trend Coal Mine Expansion Project Between the Minister of the Environment, Canada -and- the Alberta Energy Regulator, Alberta (Draft Agreement)**

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O'Chiese First Nation has significant concerns with the Draft Agreement to establish a Joint Review Panel for the Robb Trend Coal Mine Expansion Project. O'Chiese First Nation is extremely concerned with the Canadian Environmental Assessment Agency's (the Agency) incorporation of the Alberta Energy Regulator's (the AER) test for standing at public hearings into the Draft Agreement. O'Chiese First Nation is also concerned that the onus for the identification of effects arising from the proposed project is not made clear in the Draft Agreement.

**1. Section 34(3) of REDA in the Terms of Reference attached as Appendix 1 to the Draft Agreement (Terms of Reference) will unnecessarily restrict the participation in the hearing of Aboriginal groups who hold Treaty rights**

The Terms of Reference indicate in clause 14 of Part V, at page A7 that:

the public hearing shall provide opportunities for timely and meaningful participation by the public, including Aboriginal persons and groups, in accordance with CEAA 2012 and subsection 34(3) of REDA. (Emphasis added)

The wording of this clause will place an additional burden on Aboriginal groups, and specifically O'Chiese First Nation as the test for directly and adversely affected in Section 34(3) of REDA is more restrictive than the test for "interested party" in CEAA 2012.

**a. The provisions of CEAA 2012 with respect to an "Interested Party"**

CEAA 2012 sets out in section 43(1) that: a review panel must, in accordance with its terms of reference,

(c) hold hearings in a manner that offers any interested party an opportunity to participate in the environmental assessment.

“interested party” is defined in section 2(1) of CEAA 2012 as:

Any person who is determined, under subsection (2), to be an “interested party”.

Section 2(2) of CEAA 2012 states:

One of the following entities determines, with respect to a designated project, that a person is an interested party if, in its opinion, the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise (Emphasis added)

Although the definition of “interested party” in CEAA 2012 includes both those directly affected, and those who have relevant information or expertise, the test in subsection 34(3) of REDA only includes parties who “may be directly and adversely affected”. Because Section 43(1) of CEAA 2012 makes a review panel’s terms of reference controlling with respect to participation in any hearings held pursuant to CEAA 2012, incorporation of subsection 34(3) of REDA in the Terms of Reference will have the effect of restricting the ability of interested parties to participate by subjecting them to the more restrictive test in section 34(3) of REDA.

**b. The Terms of Reference require that interested parties meet the test in subsection 34(3) of REDA**

For ease of reference, clause 14 of Part V of the Terms of Reference is reproduced again:

the public hearing shall provide opportunities for timely and meaningful participation by the public, including Aboriginal persons and groups, in accordance with CEAA 2012 and subsection 34(3) of REDA. (Emphasis added)

Subsection 34(3) of REDA sets out that:

**34(3)** If the Regulator conducts a hearing on an application, a person who may be directly and adversely affected by the application is entitled to be heard at the hearing.

The AER has interpreted the test for determining who “may be directly and adversely affected” to require Aboriginal groups to submit “hard evidence” demonstrating “actual use of land and other resources in the program area by its members and a potential for those to be directly

affected”<sup>1</sup> by the proposed development. Page 4 of the AER’s recent letter decision<sup>2</sup> in November 2014 (attached) elaborates, stating:

In *Dene Tha’*, the court indicated that an Aboriginal group that asserts it may be directly and adversely affected by development or activity proposed in an application before the Regulator needs to provide “hard information” to the Regulator about locations where rights are exercised and how the members may be affected:

There had been discussions and provisions of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were within the reserve. The First Nation must know, or be able to easily learn, where its members hunt and trap. None of that hard information was provided to the board.

To assist the Agency in understanding the AER’s test, the relevant passage from Alberta Court of Appeal’s decision in *Dene Tha’ First Nation v. Alberta (Energy and Utilities Board)*<sup>3</sup> is reproduced below:

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)

With respect, the highlighted passage represents the impoverished and corrosive view of the relationship between the Crown and Aboriginal peoples that the Agency will incorporate into the public hearing process through the test in section 34(3) of REDA. The suggestion that “anyone anywhere in Alberta” could assert a “possible aboriginal or treaty right” is incorrect. Contrary to the Alberta Court of Appeal’s suggestion that “anyone anywhere in Alberta” could assert “possible” Aboriginal or treaty rights, it is only Aboriginal groups who can assert them. Further, the Crown claims title to the land in Alberta through the numbered treaties which the Crown signed. Treaty rights are not contingent rights that require evidence of exercise prior to being protected or respected by the Crown. Treaty rights are concrete, and extend throughout the tract surrendered.

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<sup>1</sup> November 18, 2014 Alberta Energy Regulator Letter decision, Request for Regulatory Appeal by Mikisew Cree First Nation Location: SE-6-100-11-W4 to NW33-101-12-W4 Regulatory Appeal No. 1802855 at page 4.

<sup>2</sup> November 18, 2014 Alberta Energy Regulator Letter decision, Request for Regulatory Appeal by Mikisew Cree First Nation Location: SE-6-100-11-W4 to NW33-101-12-W4 Regulatory Appeal No. 1802855

<sup>3</sup> 2005 ABCA 68 at para 14.

Requiring “hard information” on how Treaty rights are exercised as a pre-condition for hearing participation is a perversion of the relationship between the Crown and Aboriginal groups, and contrary to the terms of the Treaties. The Agency must reject the AER’s approach to Aboriginal and Treaty rights.

**c. Suggested revision to the Terms of Reference**

O’Chiese First Nation suggests that the requirement that the public hearing be held in accordance with subsection 34(3) of REDA be removed, and the following wording be adopted:

the public hearing shall provide opportunities for timely and meaningful participation by the public, including Aboriginal persons and groups, in accordance with CEEA 2012. Hearing participants will not be required to satisfy the test under subsection 34(3) of REDA.

This wording was adopted from the “Draft Agreement to Establish a Joint Review Panel for the Pierre River Mine Project between the Minister of the Environment, Canada and The Energy Resources Conservation Board, Alberta”, January 25, 2012. It is not clear why the Agency is currently proposing adopting the language of the Alberta regulator, when the Agency has previously avoided the application of the provincial test in proceedings under CEEA. The suggested wording will ensure that the objectives of CEEA 2012 are not obstructed by the AER’s test for standing at public hearings.

**2. It should be clear in the Terms of Reference that the onus for identifying the effects of the project on Aboriginal and Treaty rights that rests with the Crown has been delegated to the Proponent and not to First Nations**

In *Grassy Narrows* the Supreme Court of Canada made clear that it is the responsibility of the Crown to identify the effects of its decisions on Aboriginal and Treaty rights and communicate its findings to those affected.

Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns.<sup>4</sup>

Despite this clear requirement, the language of the Terms of Reference is permissive, stating in Part II, A that:

The Joint Review Panel may use this information to make conclusions and recommendations that relate to the manner in which the Project may adversely impact asserted or established Aboriginal or Treaty rights as described by Aboriginal persons or groups.

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<sup>4</sup> *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 at para 52.

O'Chiese First Nation suggests that the above passage be modified to read:

The Joint Review Panel shall use this information to make conclusions and recommendations that relate to the manner in which the Project may adversely impact asserted or established Aboriginal or Treaty rights as described by Aboriginal persons or groups.

This suggested change will ensure that the Draft Agreement and Terms of Reference reflect the requirement that the Crown identify effects and communicate them to affected Aboriginal groups.

### **3. Conclusion**

O'Chiese First Nation looks forward to the receipt of feedback on how its comments and advice were considered by the Agency, in accordance with the Aboriginal Consultation Plan for the above mentioned project.

Yours Truly,

<original signed by>

for  
Connie Tuharsky  
General Counsel, O'Chiese First Nation

CC: Chief and Council  
Andrew Scott, Consultation Coordinator  
Phyllis Whitford, Treaty Manager

Enclosure: (1) November 18, 2014 Alberta Energy Regulator Letter decision

**Via Email**

November 18, 2014

Mikisew Cree First Nation  
Government and Industry Relations  
206 – 9401 Franklin Avenue  
Fort McMurray, AB T9H 3Z7

Calgary Head Office  
Suite 1000, 250 – 5 Street SW  
Calgary, Alberta T2P 0R4  
Canada

[www.aer.ca](http://www.aer.ca)**Attention: Melody Lepine, Director**

Dear Madam:

**RE: Request for Regulatory Appeal by Mikisew Cree First Nation (Mikisew)  
SilverWillow Energy Corporation (SilverWillow)  
Application Nos. 1790335; 1790386; 1790679; (Applications) Licence No. 23038 (Licence)  
Location: SE-6-100-11-W4 to NW 33-101-12-W4  
Regulatory Appeal No. 1802855 (Regulatory Appeal)**

The Alberta Energy Regulator (AER) has considered the request of Mikisew under section 38 of the *Responsible Energy Development Act (REDA)* for a regulatory appeal of the above-noted licence issued to SilverWillow (Licence). The AER has reviewed Mikisew's submissions and also considered the submissions of SilverWillow.

For the reasons that follow, the AER has decided to deny Mikisew's request for regulatory appeal.

The applicable provision of *REDA* states:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [underlining added]

Relevant to this matter, "appealable decision" is defined under section 36(a)(iv) of *REDA* as:

A decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing.

The AER notes that in its July 16, 2014 request for a regulatory appeal, Mikisew provided lengthy submissions regarding what it considered to be "problematic findings" in the AER's Notice of Decision. However, those findings and the submissions made in regard to them do not relate to the actual Notice of Decision, but to the AER's letter of June 16, 2014 which was sent to Mikisew along with the Notice of Decision. That letter related to the AER's considerations in exercising its discretion to not hold a hearing to consider the Applications. The June 16, 2014 letter is not an appealable decision. The decision to approve the Applications and issue the Licence is an appealable decision and the subject of this letter is whether Mikisew is a person eligible to have a regulatory appeal of that decision.

"Eligible person" is defined in section 36(b)(ii) of *REDA* as:

A person who is directly and adversely affected by a decision referred to in clause 36(a)(iv).

The AER is of the view that Mikisew does not meet the definition of an eligible person as it does not appear that Mikisew is directly and adversely impacted by the decision to issue the Licence.

The factual part of the test set out by the Court of Appeal of Alberta in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*<sup>1</sup> provides guidance on what indicates that a person may be directly and adversely affected. The AER must consider whether there is a “degree of location or connection” between the work proposed and the person and whether that connection is sufficient to demonstrate the person may be directly adversely affected by the proposed activity.

The submissions of the parties in connection with the Regulatory Appeal were voluminous.

Mikisew stated that its members exercise constitutionally protected treaty rights and aboriginal rights to carry out traditional activities on lands within and adjacent to the exploratory drilling program area (the program). These activities include harvesting and other rights based activities. Mikisew stated that there will be impacts and potential impacts to the exercise of its rights from what it characterizes as the “extensive disturbance throughout the winter drilling program”. It stated:

- Trapline - The program area is located “in the trapline” of a Mikisew member. Fragmentation and harm created by the “trapline” will impact that member;
- Caribou – SilverWillow plans to locate its new camp in an area where Mikisew traditional knowledge holders report seeing caribou. This presents a threat to Mikisew’s right to hunt because harm to caribou habitat could make the land unable to sustain caribou. Caribou are culturally important to the Mikisew. Living Mikisew members have seen caribou in the centre of the program area and less than one kilometre from proposed drill sites. As a species at risk, even a small destruction of the habitat of the caribou can lead to devastating effects to their population and severe direct and adverse impact to Mikisew’s rights;
- Bison – Mikisew traditional knowledge holders have identified the entire area of exploratory activity as being critical bison habitat for the Ronald Lake herd. This is the only herd members are allowed to hunt in their traditional territory and the only place they are permitted to hunt the bison is the area around the Project. The herd’s existing habitat is crucial and any further impact to its habitat “has significant direct and adverse impact on Mikisew’s rights” because it may lead the herd to be unsustainable because its habitat is already severely depleted. Program activity occurs in winter which is the preferred season for harvesting bison. Mikisew has not been able to review Silver Willow’s data which contradicts Mikisew’s. Silver Willow has not explained the methodology for gathering its data or how it has incorporated that data into its claims of no impact. Silver Willow has relied on Alberta’s data; however, this data is limited and does not address how industrial development may impact the herd (including herd movement because of Teck). Also, Silver Willow has not incorporated Mikisew traditional knowledge data. Mitigation proposed by Silver Willow must be inadequate because Silver Willow did not engage Mikisew;
- Moose – The project will have a direct adverse effect on moose habitat, movement and abundance and the ability of Mikisew members to access habitat areas resulting in diminished opportunity to harvest moose. Mikisew traditional knowledge holders say the lease area overlaps moose habitat. Moose and the presence of their habitat near habitation and/or access routes are important for the exercise of Mikisew rights. Moose kill sites exist near portions of the program site. Moose populations have declined in some areas used by Mikisew members. Members say this is because of damage to habitat. Noise forces moose to move. Mikisew is concerned about the impact of clearing of high quality habitat for moose and habitat fragmentation from clearing and barriers from road and drill sites;
- Cabin – There is a Mikisew cabin less than one kilometre from portions of the program;

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<sup>1</sup> *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68.

- Proposed protected area - The entire program area is within the area Mikisew designated as requiring protection when it made a submission for the Lower Athabasca Regional Plan;
- Peace Athabasca Delta and the Wood Buffalo National Park – These are important areas for the exercise of Mikisew’s right and its culture. The proposed work will be around and over creeks and other tributaries flowing into the Wood Buffalo National Park. Tributaries flowing into the park are critical trapping area for Mikisew and support the resources on which Mikisew members rely in the park;
- Inadequate information/funding – Silver Willow has not provided Mikisew with sufficient information about aspects of the project nor has it worked with Mikisew to identify impacts. Silver Willow has not undertaken the required studies to properly inform itself of the impacts to Mikisew’s rights;
- Impacts to water quality;
- Access restrictions (including those caused by safety concerns) – SilverWillow must block access to the leased area. Preventing access is not just fences and gates. It also includes rendering the land unusable through clear-cutting, pollution or noise that renders use impossible. Increased human and industrial presence during work will greatly reduce opportunities to exercise rights. Safety concerns around shooting in the presence of workers and activity exacerbate loss of access;
- Impacts to culture, heritage, identity and traditional knowledge – Mikisew requires intact healthy ecological areas and forests to have a healthy practice of and continuation of its culture. The AER must adequately consider the extent of the programs direct and adverse impact on Mikisew’s community, culture, heritage, and identity. The Birch Mountains are culturally significant and may contain burial sites;
- Noise levels – Mikisew is concerned about increased noise levels from the program. Industrial noise can impact wildlife and impacts the exercise of rights by removing the sense of solitude and connection to the land that underpins Mikisew’s harvesting rights;
- Impacts to resources (species) upon which harvesting rights depend. Mikisew has concerns about impacts to habitat, and abundance and quality of resources such as fish, wildlife, birds, waterfowl, medicines and other vegetation. Living Mikisew members have noted moose, bear, woodland caribou and wood bison sites within the program area. These “site-specific values” are instances that anchor the wider practice within a particular landscape. The sites are only a tiny portion of the area actually required for the meaningful practice of the Mikisew’s rights;
- Infrastructure increase – the program will require increases in infrastructure in the project area which could increase the risk of predation to caribou, moose and bison. Members have noted increased wolf populations which they believe are because of the increase in roads and clearings from exploratory programs;
- Contamination from leaks of drilling fluid and disposal of drilling fluids – This could impact the habitat of rare species Mikisew members rely on;
- Impacts to vegetation – The program area includes a large berry harvesting area. Mikisew is concerned about impacts on harvesting and consumption of plants because of destruction of traditional plant species; contamination of plants; avoidance of harvesting and plants; and loss of access to gathering area;
- Impacts of the program are not low – Impacts remain long after the drilling has stopped. There will remain many clear cut areas, the forest will be fragmented, there will be enhanced noise levels and there will be increased use of roads. This will lead to a disturbance to the environment long after the winter drilling is complete so that impact is more than low. The program and its effects cannot be separated from the larger SAGD project; and



- Consultation by SilverWillow was inadequate – SilverWillow has not adequately engaged with Mikisew and this will result in SilverWillow not working with Mikisew to utilize locations, timing and access that will reduce impacts. Even if SilverWillow does work to alter drilling sites for mitigation purposes, this will not mitigate most of the adverse impacts.

The AER accepts that Mikisew members may be entitled to exercise rights on or in proximity to program lands, assuming they are public lands and have not been put to a use that is incompatible with the exercise of Aboriginal rights. SilverWillow takes no issue with Mikisew's treaty and aboriginal rights. However, the AER does not consider that Mikisew has demonstrated actual use of land and other resources in the program area by its members and a potential for those to be directly affected by the program.

In *Dene Tha'*, the court indicated that an Aboriginal group that asserts it may be directly and adversely affected by development or activity proposed in an application before the Regulator needs to provide "hard information" to the Regulator about locations where rights are exercised and how the members may be affected:

There had been discussions and provisions of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were within the reserve. The First Nation must know, or be able to easily learn, where its members hunt and trap. None that hard information was provided to the Board....

Mikisew says its submissions demonstrate it will be affected by the program. However, none of the information provided identifies that its members conduct traditional use activity at any specific locations within the program lands. The submissions do not demonstrate Mikisew traditional land use at a specific site or in proximity to the program could be directly and adversely affected if the program proceeds, or that a member's use of natural resources may be impacted by the program in a way that results in direct and adverse effect on the member. While Mikisew's submissions were voluminous, they did not contain the detail needed to demonstrate a degree of location or connection between the program and the asserted impacts on traditional land users that demonstrates a potential for the program to directly and adversely affect a Mikisew member. As a result, the AER lacks sufficient information to conclude the program may or will directly and adversely impact Mikisew and/or its members. For example, to simply say that living members have noted ungulate kill sites within or near the program area does not tell the AER if Mikisew members are currently harvesting in the area and where they are harvesting. As well, Mikisew's statement that a berry harvesting area exists somewhere in the program area does not tell the AER how Mikisew is directly and adversely affected by the decision. The AER notes that SilverWillow has indicated that it will move aspects of the program, such as drill sites, to avoid traditional use sites if it is advised where such sites exist.

Mikisew says a cabin is located within 1 kilometre of the program area but no details are provided regarding the use of that cabin. Similarly, no information about burial sites is provided other than a suggestion there might be sites in the program area.

The AER finds that Mikisew has not demonstrated direct harm to it because of impact to wood bison. Mikisew submitted that the Ronald Lake Wood Bison would be affected by the program because the program site is critical habitat for the species and destruction of the habitat will harm the wood bison. Mikisew says this will in turn lead to direct and adverse impact to harvesting by Mikisew members of the wood bison. In support of this assertion, Mikisew says "living members" have seen bison on the program site. The AER values and always considers traditional land use information from First Nations; however, in

this instance no information is provided as to when the bison were seen, how many were seen or how often. In contrast, current information from Alberta Environment and Sustainable Resource Development which was developed with industry and First Nations indicates the program site is in the order of 10 to 15 kilometres from the portion of the bison range closest to the program site. In light of this information, the AER is not persuaded the program site will result in loss of bison habitat or that the wood bison, and in turn the Mikisew, will be harmed by the program. While Mikisew's submission refers to bison kill sites on the program site, no details are provided about when or where these were observed. Further, Mikisew's submission also indicates Mikisew members are only allowed to hunt the bison in an area outside the program site.

With regard to caribou and Mikisew's submission that the decision will result in impacts to caribou which will in turn result in impacts to Mikisew, the AER is not satisfied the caribou will be impacted by the decision. The AER notes that Mikisew's primary concern regarding caribou is related to construction of the new camp by SilverWillow. However, SilverWillow has now advised that it will not be constructing that new camp. The AER notes that only a small portion of the program overlaps caribou range and that SilverWillow has a

Caribou and Ungulate Protection Plan which was developed utilizing Government of Alberta information regarding caribou range and it will utilize best practices for caribou ranges. As well, the AER notes that various synergies and early in early out practices will be utilized. All of these factors satisfy the AER there will be only minimal or no impacts to caribou and thus no direct adverse impacts to Mikisew in relation to the decision.

As noted above, Mikisew stated the program is located "in" the trapline of one of its members and that member would be directly and adversely affected by the program. However, no trapline holder has indicated he has concerns with the program. In any event, the AER notes that the right to harvest fur commercially under a Registered Fur Management Area (RFMA) is a personal right that belongs to the holder. The RFMA does not extend rights to or engage the rights of the Aboriginal group to which an RFMA holder belongs.

The AER notes that SilverWillow has complied with the AER's consultation requirements under *Directive 056* and that the AER has no jurisdiction to consider the adequacy of the Crown's consultation with Mikisew. In respect of the Crown's duty to consult Mikisew in relation to the program, the AER notes that on January 15, 2014, Alberta Environment and Sustainable Resources determined that consultation with Mikisew regarding the program was adequate.

In its July 16, 2014 request for regulatory appeal, Mikisew indicated that it did not have the funding to "properly review the adverse impacts of the Project on its members' rights" and its submission potentially underestimated Mikisew's use of the Project area and its vicinity. However, Silver Willow agreed on June 11, 2013 to provide funding for Mikisew's scope of work to review the program and that review was provided to Silver Willow. Whether or not that is the case, the AER must base its decision as to whether Mikisew is entitled to a regulatory appeal upon the submissions provided and cannot wait to process Mikisew's request until some indeterminate time in the future when Mikisew may have further information to support its request.

The AER further notes that all of the assertions made by Mikisew that it will be directly and adversely impacted by the program are predicated on the assumption that the disturbance will be extensive and long lasting. The AER finds that is not the case. The activity is temporary (105 days in total), of short duration at each drilling site (3 - 4 days), and conducted during winter conditions which serves to minimize impacts. The clearing required for temporary access roads associated with the wells will be 60 hectares or less which is relatively small. Other clearing has already been authorized by the letter of authority issued by the

AER in March of 2014. Mitigation plans are in place regarding wildlife, including caribou and ungulates, and watercourses. Reclamation of sites will occur concurrently with work performed. These will serve to minimize habitat loss and fragmentation and disturbance from humans and other predators as a result of the program. Existing roads will be utilized for access.

A camp does not form part of the application for which the regulatory appeal is requested and SilverWillow has advised that it is going to be utilizing an existing camp. Considered in their entirety, the mitigation plans, ongoing nature of reclamation, timing of program activity (i.e. during winter time) and use of existing roads, combined with the temporary and geographically small nature of the project, lead the AER to conclude the information provided demonstrates environmental impacts resulting from the program will be minimal. This fact, combined with the lack of site specific information from Mikisew, does not allow the AER to conclude Mikisew is or will be directly and adversely affected by the program.

The AER is satisfied that given the short duration of drilling at any site (3 – 4 days), any noise from the site activities will have minimal environmental impacts. Further, the AER notes that *Directive 038* sets out permissible noise levels for energy activities on lease sites. There is no information to indicate that SilverWillow has or will not be able to maintain noise levels within the permissible sound levels in *Directive 038*. The available information does not persuade the AER that this level of noise will directly and adversely impact Mikisew.

The AER notes that the program area is 30 – 50 kilometres from the southern boundary of Wood Buffalo National Park, 50 – 70 kilometres from Lake Claire and 65 – 85 kilometres from the Peace Delta on the Athabasca River. Given these distances and the fact the program will be conducted under frozen ground conditions for a short period, the AER is satisfied the program will not have environmental (including water) impacts to these areas. Even if there were to be environmental impacts to these areas, it is hard to see how any resulting impact to Mikisew could be seen as being directly caused by the AER's decision on the application.

The impacts of the program should not be considered with those of any subsequent application by SilverWillow for a SAGD project that may or may not be filed by SilverWillow. Because the program is exploratory in nature and the results are not known, there is no certainty SilverWillow will subsequently apply for approval of further activities at these locations. If and when SilverWillow applies for further activities at the site, the AER will issue notice of the application and Mikisew will be afforded an opportunity to raise concerns about potential impacts and have those concerns considered by the AER at that time. To the extent Mikisew is concerned about cumulative effects, the Lower Athabasca Regional Plan is the appropriate instrument for addressing regional cumulative effects of oilsands development.

In conclusion, the AER has decided that despite the large volume of information submitted by Mikisew, the information provided is general in nature and does not demonstrate the degree of location or connection between the program and the rights or traditional land uses asserted by Mikisew to satisfy the directly and adversely affected test. The information available does not evidence any Mikisew land uses within or in close proximity to the program area. The AER concludes that Mikisew has not demonstrated that the AER's decision to issue the Licence will directly and adversely affect the Mikisew, and the request for regulatory appeal is dismissed.

In its submissions, both Mikisew and SilverWillow have referred to the Teck Resources Limited (Teck) decision<sup>2</sup> which, like this matter, related to a winter oil sands evaluation program. While the subject of the Teck decision may be similar to the subject of this matter, the AER has not relied on the Teck decision in making its factual findings in respect of the Regulatory Appeal. Further, the AER notes that in that case objecting parties demonstrated (and the applicant did not dispute) that the project area was located within the Ronald Lake Bison Herd's home range. That is very different from the information before the AER in this matter.

The AER is aware that in its submission SilverWillow acknowledged the program may have minor impacts to Mikisew. However, despite these apparent inconsistencies, SilverWillow's submissions, taken as a whole, persuaded the AER that Mikisew has not demonstrated direct and adverse impacts resulting from issuance of the Licence sufficient to cause the AER to conclude it should grant the Regulatory Appeal.

For the foregoing reasons, the AER finds that Mikisew does not meet the definition of an "eligible person" as it is not directly and adversely impacted by the AER's decision to approve the Applications and issue the Licence. Accordingly, the AER has decided to dismiss the request for regulatory appeal. Given this result, it is not necessary to decide Mikisew's request that the Licence be stayed pending disposition of the Regulatory Appeal.

Sincerely,

<original signed by>

Patricia M. Johnston, Q.C.  
Executive Vice President Law and  
General Counsel

<original signed by>

Doug Boyler, P.Eng.  
Chief Operations Engineer

<original signed by>

Stephen Smith  
Vice President  
Tailings Regulatory Management Initiative

cc: SilverWillow Energy Attn: J. Cam Bateman, Vice President Projects

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<sup>2</sup> Teck Resources Limited: Application for Oil Sands Evaluation Well Licences Undefined Field, October 21, 2013, 2013 ABAER 017