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PLEASE REPLY TO EDMONTON OFFICE

November 20, 2020

DELIVERED VIA EMAIL
laura.friend@nrcb.ca

Natural Resources Conservation Board
9940-106 St NW Fl 4
Edmonton AB T5K 2N2

Attn: Laura Friend

Dear Madam:

**Re: Alberta Transportation - Springbank Off-Stream Reservoir Project
NRCB Application No. 1701**

We are counsel to Alberta Transportation in relation to the above captioned Application. We have reviewed the Natural Resources Conservation Board (“**NRCB**” or “**Board**”) Notice of Pre-Hearing Conference issued October 5, 2020 (“**Notice**”). Further to the direction contained in the Notice, please accept this correspondence as Alberta Transportation’s written submission.

1. Regulatory History

Alberta Transportation proposes to construct the Springbank Off-Stream Reservoir (“**Project**” or “**SR1**”). The Project is intended to address flood mitigation for both the City of Calgary and other downstream communities. The Project Application was submitted to the NRCB on November 3, 2017.

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As part of the Application, an Environmental Impact Assessment (“**EIA**”) was prepared in accordance with terms of reference established by the NRCB and Alberta Environment and Parks (“**AEP**”). The EIA was also submitted to the Canadian Environmental Assessment Agency, now the Impact Assessment Agency of Canada (“**Agency**”), because the Agency determined that an environmental assessment of the Project was required under the *Canadian Environmental Assessment Act, 2012*. The federal environmental assessment is being carried out by the Agency, not a review panel, and is proceeding separate from but in parallel with the provincial environmental assessment.

On March 26, 2018, Alberta Transportation submitted a revised EIA. Alberta Transportation subsequently received Supplemental Information Requests (“**SIRs**”) from AEP.¹ Alberta Transportation has responded to the majority of these SIRs and is currently finalizing responses to the remaining SIRs, which were issued by AEP on November 4, 2020. Alberta Transportation expects these final SIR responses to be submitted to AEP very soon, certainly before the end of the year. Alberta Transportation is hopeful that AEP will deem the EIA complete shortly after that.

2. Summary of Submissions

(a) Overview

The Notice requested comment from interested parties, Indigenous groups and the Proponent on preliminary and procedural aspects of the NRCB’s public review. Comment was specifically requested with regards to the following:

- (i) major issues to be examined at the hearing;
- (ii) the appropriate scope and jurisdiction of the NRCB’s review;
- (iii) location, hearing format, and deadlines associated with the hearing and pre-hearing steps;
- (iv) hearing procedures; and
- (v) other matters

Alberta Transportation’s views on each of these matters is set out below. Alberta Transportation reserves the right to comment further on each of these or any further matters that may arise following written or oral submissions from any party.

¹ Alberta Transportation also received SIRs from the Agency. All federal SIRs have been responded to.

(b) Major Issues

As noted above, Alberta Transportation has prepared an EIA for the Project, in accordance with AEP's Terms of Reference and the Agency's Guidelines for Preparation of an Environmental Impact Statement. Alberta Transportation acknowledges that issues which were required to be addressed by Alberta Transportation in the EIA are appropriate for consideration and review by the NRCB at the hearing. Alberta Transportation will review the written submissions of interested parties and reserves the right to respond at the Pre-hearing Conference with respect to specific issues that may not properly fall within the scope of the hearing.

Alberta Transportation believes it may be useful to provide submissions with respect to the Board's consideration of the issue of alternatives. Through the consultation it has conducted on the Project, Alberta Transportation is aware that certain stakeholders have questioned the selection of SR1 over alternatives, in particular an in-stream dam at McLean Creek ("MC1").

Alberta Transportation's position is that the selection of SR1 over MC1 or any other alternative is not an appropriate issue for consideration by the Panel. Put simply, the NRCB does not have jurisdiction to make a decision as to whether that selection was appropriate. The Board's jurisdiction is to conduct a public interest assessment of the project that has been selected, namely SR1.

The provincial Terms of Reference for the Project required Alberta Transportation to conduct a socio-economic assessment as part of the EIA. Part of the socio-economic assessment is the collection of "Baseline Information", including: "Describe the project alternatives considered for flood mitigation". The Terms of Reference also required Alberta Transportation to refer to AEP's *Guide to Preparing Environmental Impact Assessment Reports in Alberta* ("Guide"). The Guide states the following with respect to the consideration of alternatives in an EIA:

Proponents must clearly outline alternatives to the Project or components of the Project that were considered and discuss environmental performance, safety and the technical and economic feasibility of the alternatives.

Alberta Transportation submits that discussion in the EIA of alternatives such as MC1 is, as the Terms of Reference state, in the nature of "baseline information" or context intended to assist the NRCB in its review of SR1. Notwithstanding, Alberta Transportation went to considerable lengths to include information regarding MC1 in its environmental assessment of SR1.

The role of the NRCB in the upcoming hearing is to consider whether Alberta Transportation carried out an appropriate and adequate assessment of alternatives as per the provincial Terms of Reference. Alberta Transportation is confident that it has. The role of the NRCB is not to consider and decide whether Alberta Transportation should have selected a different location for a flood control project on the Elbow River.

(c) Scope and Jurisdiction

Alberta Transportation acknowledges that the *Natural Resources Conservation Board Act* (“NRCBA” or “Act”) gives the NRCB jurisdiction to determine whether water management projects that require an environmental impact assessment under the *Environmental Protection and Enhancement Act*, such as SR1, are in the public interest having regard to their social, environmental, and economic effects.

As stated above with respect to the issue of alternatives, Alberta Transportation submits that it is beyond the Board’s jurisdiction to assess whether a different location ought to have been selected by the Government of Alberta. Related to that, it is beyond the scope of the hearing for the Board to consider whether the Government of Alberta ought to have pursued a different project to provide additional functions, such as drought management, fire control and recreational opportunities.

(d) Location of Hearing, Format, Timing and Deadlines

Alberta Transportation is mindful of the impacts associated with the ongoing COVID-19 pandemic and the corresponding public health guidelines concerning social distancing and limited gatherings. For these reasons, Alberta Transportation is agreeable to proceeding by way of a virtual hearing.

Should the Board feel an in-person hearing is feasible, Alberta Transportation proposes that a venue in Calgary be selected, such as the Alberta Utilities Commission Hearing room. The selection of a Calgary venue is appropriate given the project location (i.e. 15 km west of the city) and purpose (i.e. flood mitigation for the City of Calgary). Further, it should be easier to find a Calgary venue that would have adequate room for social distancing, along with the technical capabilities necessary for the conduct of a hearing (i.e. strong internet and sufficient bandwidth).

Assuming the hearing is not in-person because of COVID-19, Alberta Transportation suggests that having a topic-based hearing may be appropriate, for at least the Proponent’s evidence. That is, the hearing would consist of discrete “topic sessions” (e.g., engineering/dam safety; water quality and fish; etc.). This would allow for smaller witness panels, which would be more feasible for a virtual hearing than large panels. Alberta Transportation notes that the joint federal-provincial (Alberta Energy Regulator) review panel hearing into the Grassy Mountain coal project, which is currently underway, is following a topic-based format.

Alberta Transportation proposes an oral hearing format conducted in accordance with the NRCB’s normal hearing procedures, including the following:

- (i) Written submissions from registered parties (parties granted standing by the NRCB in its Prehearing Conference decision), including rebuttal submissions from Alberta Transportation, filed in advance of the hearing. Alberta Transportation suggests that participants other than the Proponent be required to file written submissions 4 weeks in advance of the hearing, and that Alberta

Transportation be permitted to file rebuttal submissions 2 weeks before the commencement of the hearing.

- (ii) Direct evidence given under oath by registered parties. Direct evidence should be limited to adopting written submissions and providing a high level summary of those written submissions.
- (iii) Cross-examination by registered parties of other registered parties.
- (iv) Final argument from registered parties, including reply argument from Alberta Transportation.

Consistent with the NRCB's past practice, Alberta Transportation is of the view that information requests between the parties is not warranted. Since 2018, Alberta Transportation has received two rounds of SIRs from the NRCB, three rounds of SIRs from AEP and two rounds of SIRs from the Agency. The responses to these SIRs are available on the public record of the Board's proceeding or will be soon. The information gathering phase of the environmental assessment of SR1 is now concluded and the hearing phase is beginning. Therefore, further information requests are not required and would not be appropriate.

Regarding timing, Alberta Transportation is prepared to proceed with the Hearing in February 2021, as suggested by the Board in its September 23, 2020 letter to interested parties.

(e) Procedures

As noted, Alberta Transportation proposes that the normal NRCB hearing procedures be followed, as set out in part in the NRCB Fact Sheet *Hearing Procedure Under the NRCBA*. Alberta Transportation requests the following procedures also be confirmed or implemented:

- (i) time limits be established for both direct evidence and cross-examination;
- (ii) only parties adverse in interest may cross-examine;
- (iii) oral closing argument at the close of the evidentiary portion of the hearing.

(f) Other Matters: Standing

Alberta Transportation reserves the right to comment on requests for standing made by any party at the Pre-Hearing conference. Alberta Transportation also reserves the right to comment on any request for advance funding at the Pre-Hearing.

Regarding standing, Alberta Transportation acknowledges that section 8(2) of the NRCBA states that the Board shall grant standing to persons who may be directly affected by a proposed Project. The Board has considered the question of who meets the "directly affected" test for standing in several past proceedings. Generally speaking, the NRCB

considers whether the potential effect on the person is different, special or unique from effects on the general public.

The NRCB has adopted a “closeness test” to determine if a person is directly affected by a project. The closeness test requires an uninterrupted chain of cause and effect between a potential intervener and a project. The closeness test was set out in the Pre-Hearing Decision Report in the Agrium Products Inc. Extension of a Phosphogypsum Storage Area proceeding, as follows:

Proximity to a proposed project is not a single determining factor but it is an important one. In determining whether or not an intervener is or may be directly affected, there must be evidence acceptable to a reasonable person that:

- a) a plausible chain of causality exists;
- b) an effect would probably occur; and
- c) the effect would not be trivial,

before a potential effect can be considered to have been established.²

It is not enough for an intervener to simply express concern that there is some chance they could be directly affected. There must be a reasonable and foreseeable chance that the individual or group will be directly affected.³ The appropriate test is whether the intervener has established on a balance of probabilities that they may be directly affected.

Alberta Transportation accepts that landowners and residents within or adjacent to the Project Development Area meet the test for standing. With regard to Indigenous persons and groups, Alberta Transportation accepts that any groups whom the Aboriginal Consultation Office identified as requiring consultation meet the test.

Alberta Transportation also notes that pursuant to Section 8(2) of the Act, the NRCB has discretion to grant standing to “other persons it considers necessary”. Further, Alberta Transportation has reviewed the NRCB’s *The Board Review Process under the NRCBA – Process Guide* and is aware that as per section 8.5 of the Guide the Board has, in practice, “extended status to most parties who have expressed intent to file a submission with the Board.”

Having regard to that, Alberta Transportation takes the following positions with respect to the granting of standing to persons or parties who may not meet the test of being directly affected by the Project:

² *Report of Pre-Hearing Meeting on Preliminary and Procedural Matters: Agrium Products Inc. – NRCB Application No. 03-01* (December 17, 2003), pg. 3

³ *Supra* note 3 at pg. 4

- (i) Standing may be granted to persons or entities who are located downstream from the Project site as they will directly benefit from the flood control delivered by the Project and thus have a tangible interest in the matter.
- (ii) With regard to persons or entities located upstream of the Project site, Alberta Transportation submits that they may not meet the directly affected test. However, should the Board consider that such persons have a tangible interest in the Project, Alberta Transportation would not object to them being granted standing.

Finally, should the Board exercise its discretion to grant standing to persons or parties who are not directly affected by the Project but whom the Board believes have a tangible interest in the Project, the participation of such persons should be subject to the condition that their participation will materially assist the Board in carrying out its review and will not unnecessarily delay the hearing or repeat or duplicate evidence presented by other parties.⁴ Where the Board exercises its discretion to grant a participant less than full participation rights, Alberta Transportation would not object to such persons being permitted to provide unsworn statements setting out their interests and concerns.

3. Closing

Alberta Transportation looks forward to providing additional comments during the oral portion of the Pre-Hearing Conference.

Yours truly,



RONALD M. KRUHLAK

RMK/MCB/ecm

⁴ This is the test applied by the Alberta Energy Regulator as per section 9 of the AER's Rules of Practice.