

August 27, 2010

Our File: P-10-1028

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Re: Nexen Inc. *Water Act* Notice of Application (file: 00267465 application: 001-00267465 and 001-00267466)

Dear Minister and Director,

The Environmental Law Centre (“ELC”) submits this statement of concern regarding the applications of Nexen to build a water pipeline to the Long Lake Project from the Clearwater River under s.109(1) of the *Water Act*.

The project proposed by Nexen at this time significantly differs from the original project. Accordingly, this is an important opportunity for the Minister to re-consider, using the powers under the *Water Act* whether the project is still in the public interest. Moreover, this is an important opportunity for the Director to consider whether there is sufficient information on environmental effects, and whether the potential environmental impact merits rejection of the application in light of the difference between this proposal and the original application made to the ERCB.

The ELC requests that the Minister consider the overall environmental impacts of a policy to allocate fresh surface water from the Clearwater River to oilsands projects. We also ask that the Director request further information sufficient to evaluate the environmental effects of this application.

- i) The need to address the potential cumulative impacts of fresh surface water withdrawals for oil sands projects in the region.
- ii) Inadequate information is provided to assess the specific impacts of this application.

We ask that the Minister should order that no further surface allocations take place for oil sands projects in the Clearwater River until the cumulative impacts of doing so are

assessed.

Introduction: The Environmental Law Centre is directly affected

The ELC is pleased to provide you with the following statement of concern. The ELC is a charitable organization incorporated in 1982 to provide information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies, and legal processes protect the environment.

Section 109(1) of the *Water Act* provides that if notice is provided under section 108(1) any person who is "directly affected by the application or proposed amendment" may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.¹

The Environmental Law Centre is directly affected by the issuance of these approvals. The determination of whether or not a party is directly affected must be flexible and depend on the circumstances of each case.² In assessing whether a person is directly affected, the proper question is whether there is a potential for an effect on the interests of the person. The effect does not have to be unique in kind or magnitude. Property interests are not a pre-requisite to establishing that someone is directly affected.³

The Environmental Law Centre is directly affected because it has a genuine interest in matters relating to the application of environmental laws and policies in Alberta. This interpretation of the directly affected test is consistent with longstanding practice in interpreting this phrase, also found in s.18.1 (1) of the *Federal Courts Act*.⁴ In the case of the *Federal Courts Act* there is longstanding jurisprudence establishing that a person is "directly affected" when the test for public interest standing is met.

The test for public interest standing is set out by the Supreme Court of Canada in *Canadian Council of Churches v. Canada*⁵ and it requires that a person must have a genuine interest to have standing under the *Federal Courts Act*. A person will have a genuine interest where they demonstrate a real and continuing interest in the issue at stake. They will also have a genuine interest when they have experience and expertise with respect to the subject matter being addressed that will assist a decision maker.⁶ It has been held that the purpose of interpreting "directly affected" to include those who make court applications in the public interest is an interpretation that is consistent with protecting the constitutional precepts of the rule of law and democratic accountability.⁷ It

¹ *Water Act*, R.S.A. 2000, c.W-3

² *Logan v. Director of Air and Water Approvals* (EAB: Appeal No. 95-002)

³ *Gadd v. Cardinal River Coal* (www.eab.gov.ab.ca/judicial/cardinal%20JR.pdf)

⁴ R.S.C., 1985, c. F-7 section 18.1(1) provides for judicial review by "anyone directly affected by the matter in respect of which relief is sought".

⁵ [1992] 1 S.C.R. 236

⁶ *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.), *Harris v. Canada*, (2000), 256 N.R. 221 (F.C.A.)

⁷ *Sierra Club*, *ibid.*

has also been noted that environmental groups in particular, are often the only parties with the expertise to bring broad environmental issues before decision-makers.⁸

In this instance the Environmental Law Centre is the best-positioned entity to bring these issues to the attention of the Director and the Minister. The Environmental Law Centre has a real and continuing interest in the robust administration of the *Water Act* and the *Environmental Protection and Enhancement Act*.⁹ The centre has participated in numerous consultations, presented a wide range of submissions to government and provided information to the public on process issues in environmental approvals and assessments in Alberta for nearly three decades. The ELC has commented extensively on oil and gas, land use, and water allocation issues in the Athabasca region for many years. One of the specific goals of the ELC is to ensure that environmental laws in Alberta are effective at protecting healthy aquatic ecosystems.

The nature of the application by Nexen merits policy attention from the Minister

Albertans have not yet had the opportunity to comprehensively assess of the use of fresh surface water for the purpose of oil sands projects in the Clearwater River. The lack of an overall planning or management framework for withdrawals from the Clearwater River is a major concern. The Clearwater River does not fall under a water management plan, there is no water conservation objective for it and accordingly the existing, potential or cumulative effects on the its aquatic environment are unknown.

Nexen's applications are precedent setting as they represent a new approach to water withdrawals for similar projects in the region. There are no other similar withdrawal licences on this portion of the Clearwater River. Whether or not oil sands operators should be utilizing fresh surface water in this area is a policy decision that should reflect recreational, heritage, environmental and overall energy policy considerations. It is not a purely administrative decision that should be made by the Director.

The Clearwater River should be managed in accordance with clear ecological and recreational objectives. These objectives must be determined at a policy level, and reflect public participation and social dialogue. Instead decision to approve or reject this specific application is being made in a policy vacuum.

If at a later date, land use planning and cumulative effects assessment determine that a reduction in allocations from Nexen is necessary to achieve ecological outcomes the Director does not have a blanket power under the *Water Act* to amend the authorizations. It is therefore essential to assess fully the impacts of both this policy decision about oil sands water use and the specific consequences of this application at this time.

⁸ *Ibid.*

⁹ R.S.A. 2000, c, E-12

1) The Minister should order that using fresh water from the Clearwater River for oil sands is not in the public interest until there is a water management plan.

Approving the application in this context undermines Alberta's commitments to effective cumulative effects management and will inevitably prejudice future opportunities for water management in the Clearwater River, including the achievement of regional land use framework objectives. We submit that it is not in the public interest to prejudice future planning and management of the Clearwater River. The Minister has the power under the *Water Act* to so decide, as does the Director to determine that now is not the time to approve withdrawals from the Clearwater River.

Under the *Water Act*, the Minister may form an opinion regarding whether or not a proposed activity or diversion should not proceed because it is not in the public interest. In such case, the Minister may order that no approval or licence be issued in respect of the proposed activity, diversion or work or for a class of activities, diversions or works.¹⁰ A decision to refuse the requested applications by Nexen because they are not in the public interest may be effected by a Minister's Order under s.34(2).

Section 34(2) allows the Minister to order that no further surface water allocations be made for oil sands projects. We ask that the Minister use the power in this provision to order that no further surface water allocations be made for oil sands projects from the Clearwater River until there is a water management plan and a cumulative effects assessment for the Clearwater Rivershed.¹¹

¹⁰ *Water Act*, *supra* note 1, s.34

¹¹ The Director also has the power under s.53(1) of the *Water Act* to determine that no further allocation should be made in a geographical area. The Director may decide that applications for licences are not to be accepted by the Director for a specified period of time. In making this decision, the Director may consider the existing, potential or cumulative effects on the aquatic environment (s.53(3)(b)).

2) The application should not be approved without sufficient information on environmental impacts of this specific proposal

Potential impacts to sensitive aquatic species and any available mitigation measures are unknown

We submit that fisheries impacts, particularly to Arctic Grayling are impacts that warrant further consideration and that further, the nature of the proposed activity, which is the use of fresh surface water for oilsands extraction, merits an impact assessment.

The Nexen application indicates that the proposed water intake is in a location used by Arctic Grayling, a species listed as “sensitive” in Department of Sustainable Resource Development assessments. The Arctic Grayling population on the Clearwater River is shown as having suffered from declines in the latest status assessment by the Alberta Conservation Association.¹² This population is described as “all but lost.”¹³ The report also notes that Arctic Grayling populations in this region “would be vulnerable to an increase in exploitation pressure.” and that “development of landscape models that examine the cumulative impact of human disturbances for grayling may... provide a better understanding of the potential risks of development scenarios...” It is not known whether impacts from the proposed water intake for Long Lake would be reversible.

The Nexen application identifies a number of potential impacts to Arctic Grayling, including sedimentation damage to fish and fish habitat, removal of vegetation resulting in flow changes that may alter fish habitat and flow alterations from the intake itself that may “alter species composition”, as well as fish impingement and entrainment in the water intake.¹⁴ The application does not describe specific impacts to Arctic Grayling or other fish species, the magnitude of the impacts or how they will be mitigated. The effectiveness of the proposed mitigation measures specifically for Arctic Grayling and the ultimate impact on other fish in the Clearwater river remains unknown and un-assessed.

It is our submission that this type of very preliminary overview of potential impacts is not sufficient to establish that the proposed water intake in the Clearwater river has acceptable impacts on aquatic habitat. It also does not establish that the cumulative impacts of this project are acceptable, as it does not take into account other pressures on this aquatic habitat. Accordingly, the novel nature of the proposed activity and the potential environmental impacts of this activity merit an assessment.

The proponent Nexen will likely be required to conduct a federal environmental assessment, triggered by fisheries and navigable waters matters as Nexen has applied for

¹² Jordan Walker, *Status of the Arctic Grayling (Thymallus arcticus) in Alberta*, (Alberta Conservation Association: 2005) at 6.

¹³ *Ibid.* at 7

¹⁴ Nexen application Appendix A at 11

permits which trigger federal assessment requirements.¹⁵ Such an assessment should also be provided to the Minister and the Director before any decision is made.

Nexen makes largely unsubstantiated claims about the merits of using water from the Clearwater River in comparison to alternatives

Nexen argues in its application that the proposed intake will have acceptable environmental impacts, and that it is preferable to an expanded well from an environmental perspective. In table 3 of Nexen's Alberta Environment application, Nexen asserts the disadvantages of well expansion in comparison to a water intake from the Clearwater River. However, these disadvantages appear to relate primarily to cost, not environmental benefits. The absence of an assessment that compares these options means that a true answer to this question from an environmental benefits perspective is not available. Nexen should be required to support these assertions with a full assessment prior to the issuance of any more approvals.

An Environmental Assessment would properly investigate company claims that a pipeline is preferable from an environmental perspective compared to the alternative of expanding the groundwater well. This claim by Nexen is controversial, and no full assessment has ever taken place. This is the very issue that the public was unable to participate in before the ERCB, because the project that was before the ERCB did not include withdrawals from the Clearwater.

The Director may request further information, including an environmental impact assessment that addresses cumulative impacts

In considering an application for an approval or licence, the Director may consider any existing, potential or cumulative effects on the aquatic environment that result or may result from the diversion of water, operation of a works or provision or maintenance of a rate of flow of water or water level requirements.¹⁶ The Director has the power to determine that the applications be refused on the basis of those potential impacts under s.51(4)(b) and 38(2)(b).

Accordingly the Director should consider whether there is sufficient information on potential cumulative effects on the aquatic environment. The onus is on the applicant to provide sufficient information on aquatic impacts.

To obtain this information, the Director may require an applicant to submit any additional information the Director considers necessary within any time period required by the Director.¹⁷

¹⁵ Nexen has applied for permits under the *Navigable Waters Protection Act* and the *Fisheries Act*, both of which trigger a federal environmental assessment.

¹⁶ *Ibid.*, s.51(4).

¹⁷ *Ibid.* s.50(2), s.37(2).

The use of fresh water for the Long Lake project is a significant alteration from the project approved by the ERCB. When the ERCB considered whether the Long Lake project was in the public interest, the project did not include the use of surface water from the Clearwater River. The ERCB did not have evidence before it on this aspect of the project or the impacts they entail. Although the issue of water sourcing was raised in the application, Nexen stated that no fresh surface water would be used. This was among the factors before the ERCB in determining that the project was in the public interest.

We submit that the potential cumulative aquatic impacts have been insufficiently assessed, and that these effects merit further information from the applicant. Without further information on potential aquatic impacts the Director will not fully understand the cumulative aquatic impacts of the use of fresh surface water from the Clearwater River in this application.

We request that the Director should require an environmental impact assessment. Section 41 of the *Environmental Protection and Enhancement Act (EPEA)* permits the Director to order an environmental assessment where the potential environmental impacts of a proposed activity warrant further consideration. Further, section 47 permits the Minister to order an EIA because of the nature of a proposed activity.¹⁸

Sound management: the existing approval should be “clawed back” by an equivalent amount

The applicant Nexen asserts that it will not use more water by virtue of switching from saline groundwater to fresh surface water.¹⁹ If this is the case, then if any further approvals are granted, the original groundwater allocation should be cancelled or clawed back by 17,000 cubic metres per day. It is not in the public interest to allow allocation holders to accumulate allocations that they do not plan to use.

¹⁸ R.S.A. 2000, C. E-12

¹⁹ Nexen *Water Act* Application (at 1) states that Nexen will continue to use a combined daily average diversion of 17,000m³/d for both the source wells and the Clearwater River.

Conclusion

The ELC requests that the Minister consider the overall environmental impacts of a policy to allocate fresh surface water from the Clearwater River to oilsands projects. We also ask that the Director request further information sufficient to evaluate the environmental effects of this application.

- i) The need to address the potential cumulative impacts of fresh surface water withdrawals for oil sands projects in the region.
- ii) Inadequate information is provided to assess the specific impacts of this application.

We ask that the Minister should order that no further surface allocations take place for oil sands projects in the Clearwater River until the cumulative impacts of doing so are assessed.

At such time as alternatives are assessed and an appropriate water management plan for the Clearwater is in place, Nexen could reapply and provide a full impact assessment for the Director's consideration.

Yours truly,

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