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December 5, 2018

Frontier Oil Sands Mine Project
Joint Review Panel
c/o Canadian Environmental Assessment Agency
22nd Floor
160 Elgin Street
Ottawa, Ontario
K1A 0H3

Via email: Frontier.Review@ceaa-acee.gc.ca

Attention: Alex Bolton, Chair

Dear Mr. Bolton:

Re: Teck Resources Limited ("Teck") Frontier Oil Sands Mine Project (the "Project")
CEAA Reference No. 65505; Final Argument - Athabasca Chipewyan First Nation

On behalf of Athabasca Chipewyan First Nation ("ACFN"), please find enclosed the Final Argument of Athabasca Chipewyan First Nation in the Joint Review Panel Hearing of Teck Resources Ltd. Frontier oil sands mine project, dated December 5, 2018.

Yours truly,
WOODWARD & COMPANY LAWYERS LLP
<Original signed by>

Eamon Murphy

EM:jz

Enclosure: as set out in body of letter

cc: Lisa Tsessaze, Director, ACFN IRC <email address removed>

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Final Argument of the
Athabasca Chipewyan First Nation
in the Joint Review Panel Hearing of
Teck Resources Ltd
Frontier oil sands mine project

OSCA Application No. 1709793, EPEA Application No. 001-247548,
Water Act File No. 00303079;
CEAA Reference No. 65505, AER Application No. 1709793

December 5, 2018

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1. Introduction

1. On September 27th 2018, the Athabasca Chipewyan First Nation (ACFN) advised the Joint Review Panel (the “Panel”) that it had reached a Participation Agreement with Teck Resources Ltd (“Teck”), and as such does not oppose the approval of Teck’s applications to construct, operate, and reclaim the Frontier oil sands mine project- *Oil Sands Conservation Act* Application No. 1709793, *Environmental Protection and Enhancement Act* Application No. 001-247548, *Water Act* File No. 00303079, Canadian Environmental Assessment Agency Reference No. 65505 and Alberta Energy Regulator Application No. 1709793 (the “Project”).
2. However, ACFN continues to advocate for changes to the way the Crown considers section 35 rights in relation to applications such as Teck’s. In short, the Crown must honour Treaty 8 by conducting meaningful consultation and regulating this Project and the oil sands in a manner that allows the continued exercise of ACFN’s rights.
3. ACFN’s evidence is clear that, since first contact with European settlers, there has been a continuous string of infringements that have impaired ACFN members’ ability to live off the land and carry out land-based practices that are essential to their culture and livelihood. While ACFN gave its solemn promise to the Crown to share its lands, the Crown has continuously breached its reciprocal constitutional obligations. ACFN signed Treaty 8 to protect its members’ way of life as “rights”; yet, the Crown has not held up its side of the relationship and the Crown’s solemn promises have gone unfulfilled, or worse, have been broken.
4. Oil sands development in the region is the latest example of the on-going impairment of ACFN’s rights and has demonstrated the indifference of the Crown – particularly Alberta, but also Canada – towards adequately assessing proposed projects, consulting with First Nations, properly regulating the oil sands, dealing with the cumulative impacts of oil sands development, and - ultimately - protecting ACFN’s rights.
5. The Frontier Project will expand the oil sands, introduce new Project-specific impacts that affect ACFN’s rights, and add to the cumulative effects on ACFN’s lands and rights. ACFN has worked with Teck to mitigate Project-specific impacts through the Participation Agreement. However, there is much work left for the Crown to facilitate Teck’s mitigation of Project-specific impacts and address the cumulative impacts of oil sands development in the region. ACFN urges this Panel to ensure that this work is done in a timely and robust manner with the full engagement of ACFN.

2. Agreement with Teck

6. ACFN and Teck negotiated a Participation Agreement in good faith. Teck was a willing partner in coming to an agreement and as a result ACFN has a respectful relationship with Teck.
7. As Chief Adam stated, ACFN signed the Participation Agreement with Teck as a means for ACFN members to take their future into their own hands. As ACFN has learned over the past 100 years –

they cannot trust the government to protect ACFN's rights.¹ Further, based upon their experience in previous hearings, particularly the Jackpine Mine Expansion Project, where the governments ignored the recommendations of the Joint Review Panel, ACFN felt it was necessary to get involved in the decision-making for the Frontier project and craft the mitigations and monitoring plans for the mine.²

8. From the agreement came a joint submission that ACFN and Teck submitted to the Panel in the first week of the hearing.³ The submission was intended to alert the Panel to the Project-specific mitigations Teck has committed to, and to provide concrete input into the Panel's report and decision. These mitigations are referred to as "Mitigation and Management Commitments" in the Joint Submission. Therefore, where appropriate, ACFN asks that they be included by the regulators as approval conditions.
9. The second purpose of the joint submission was to identify areas that both Teck and ACFN have agreed to come together to ask for certain actions by the Crown. These are referred to in the joint submission as "Requested Recommendations". Crown action in these areas is either necessary to facilitate Teck's Mitigation and Management Commitments (for example, the Biodiversity Stewardship Area or a framework for caribou restoration and wildlife habitat offsets) or to mitigate regional and cumulative effects of oil sands development that Teck alone cannot address (for example, human health and migratory bird studies, or amending the Surface Water Quantity Management Framework (the "SWQMF")).
10. During the hearing, the Panel had some questions about whether the "Requested Recommendations" in the joint submission were intended to be approval conditions. From ACFN's perspective, the answer is yes. These recommendations should be included in the Panel's report, in the AER approval conditions, and recommendations to Canada as federal approval conditions. There are a number of Crown actions that are necessary for this Project to be carried out in a way that does not further impair ACFN's traditional lands and the exercise of ACFN's rights.
11. ACFN views the Panel recommendations as a fundamental part of the regulatory process. In Jackpine, Alberta and Canada largely ignored the recommendations, with Alberta claiming they did not need to implement the recommendations.⁴ The Jackpine recommendations would have helped address the concerns that ACFN had with the Jackpine Mine Expansion Project and the cumulative impacts of oil sands development. Implementation of those recommendations would have also ensured that the process itself is credible. Therefore, if this Project is approved, ACFN asks that this Panel outline for the Crown, in the clearest terms possible, what is required from them to minimize the impacts of project-specific and cumulative impacts of oil sands development

¹ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2016.

² CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2016.

³ CEAA Doc #571, *From the Athabasca Chipewyan First Nation and Teck Resources Limited to the Joint Review Panel re: Environmental Management Objectives, Commitments, and Recommendations* ("ACFN-Teck Joint Submissions")

⁴ CEAA Doc #498, Appendix F, *ACFN letter to ACO re: Proposed Jackpine Mine Expansion Project – ACFN Concerns* (2017), pdf pg 552-553.

on ACFN's rights. ACFN expects that the Crown will respect the Panel's direction.

12. The Panel asked ACFN whether it would still consider Teck's site specific mitigation measures to be adequate or appropriate if the Crown did not implement the recommendations that ACFN/Teck provided.⁵ ACFN is satisfied that Teck has done – and will do - what it can to address the effects of the Project as well as the Crown's failure to implement Panel recommendations in the past and the uncertainty that the Crown will implement this Panel's recommendations.
13. However, ACFN is frustrated and disappointed with the entire regulatory regime: the environmental assessment process, the panel hearings, and the day-to-day regulation (or lack thereof) of the oil sands. The environmental process in Alberta considers only a subset of ACFN's concerns in a very rudimentary fashion. At each hearing, ACFN brings the same or similar concerns: water, birds, caribou, buffalo, community health, to name a few. The only difference is that each time ACFN returns before a panel, the problems are worse and more difficult to address.
14. While Teck has committed to some important site-specific mitigations, ACFN concerns also require strong and immediate action from the regulator. Teck's commitments are a necessary first step that may inspire action from other companies, but government action is required to ensure that all development in ACFN territory - past, present and future - supports the continued exercise of ACFN's rights.

3. ACFN's Land Use

15. The oil sands, including the Frontier Project, are located within ACFN territory. ACFN are Dënesųliné – “the original people”.⁶ Before the Treaty was signed in 1899, the territory of ACFN's Dené ancestors was massive – it stretched from the Birch Mountains in the west to Manitoba, covered approximately 70% of Saskatchewan, reached into the Northwest Territories and Nunavut, and south to Cold Lake, Alberta. ACFN's Dené ancestors had unrestricted access to this land.⁷
16. Within this area, there were a number of Dené groups who had their own areas where they typically concentrated their movements. The heart of ACFN's territory was the Peace Athabasca Delta, and so they were known to other Dené as the *K'ái Tailé Dené* – “the people of the land of the willow”. This more concentrated territory consisted of the area around Lake Claire and Lake Mamwai, the Peace Athabasca Delta, to the Namur Lake and the Birch Mountains, Fort McKay, and Janvier, the Richardson Backcountry and into Saskatchewan. ACFN members were spread out throughout this area, using and living off all of these lands, and then would meet for a big gathering once a year at Lake Athabasca, east of Fort Chipewyan.⁸
17. It is important to remember that ACFN's territory includes the place where Teck has proposed its

⁵ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2192.

⁶ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2088.

⁷ CEAA Doc #498, Appendix H - *Will say of Raymond Cardinal* (“Will say of R. Cardinal”) at pdf pg 13, para 50.

⁸ Will say of R. Cardinal, pdf pg 13, para 51.

Frontier mine. ACFN members have designated the area as a “ACFN Cultural Protection Area” called “*k’es hochela nene*” (the Poplar Point Homeland). Homeland zones are

“specific areas that are of critical importance to past, present, and future practice of ACFN rights. ... each zone is integral and necessary to the meaningful practice of rights by ACFN members within core traditional lands. The deepest levels of consultation and accommodation ...[are] ... required within the ‘homelands. ACFN envisions that this would be accomplished through co-management of sub-regional planning and shared decision-making authority with the Crown regarding any future developments or designations within these zones.”⁹

18. Indeed, generations of ACFN members grew up and lived along the Athabasca River, including adjacent to Teck’s proposed Project, and would set nets in the River and hunt, fish, and trap in the proposed Project Area.¹⁰
19. Poplar Point reserve (Chipewyan 201G) is located on the Athabasca River - only 16km from the Project Area - and Point Brule reserve (Chipewyan 201F) another 4km down the river. A number of ACFN families lived at these locations long before they became reserves and would hunt, trap and fish on the both sides of the Athabasca River including in the proposed Project Area.¹¹ ACFN still has a number of cabins on these reserves that ACFN members use seasonally as staging points for ACFN members to hunt, trap and fish in the area and to host community gatherings.¹² None of ACFN’s reserves have running water, electricity, all-weather roads, or postal service so only a few members currently live there year-round. ACFN seeks to further develop these reserves and add the necessary infrastructure so that more of its membership can live there year-round and continue to access ACFN’s territory, including burial sites, sacred sites, and homeland zones.
20. Today, ACFN’s members use the Poplar Point Homeland area, including the proposed Project Area, for a variety of land use purposes: hunting moose and buffalo, fishing in the inland lakes, and harvesting plants, berries, and medicines (sweetgrass, rat root, mint tea, cat-tails, smudges).¹³

3.1 Importance of an intact, useable land base

21. Land and continued ability to access land is important to ACFN’s members for a number of reasons:
 - i. **Healthy & affordable food.** Despite concerns with contamination from oil sands development, traditional foods – from the land – are still the preferred, healthiest, and most affordable food available to ACFN members, particularly those living in remote communities

⁹ CEAA Doc #498, Appendix F - *ACFN Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan*, at pdf pg 272.

¹⁰ CEAA Doc #498, Appendix H - *Will say of Edouard Trip de Roche* (“Will say of E. Trip de Roche”) at pdf pg 34, paras 4-7.

¹¹ Will say of E. Trip de Roche at pdf pg 35, paras 16-19 ; CEAA Doc #498, Appendix H, *Will say of Marvin L’Hommecourt* (“Will say of M. L’Hommecourt”), at pdf pg 55-58, paras 4,6, 8-11, 13-22.

¹² Will say of M. L’Hommecourt pdf pg 58-59, paras 23-30; Will say of R. Cardinal, at pdf pg 9, para 21

¹³ CEAA Doc #498, Appendix H – *Will say of Roy Ladouceur* (“Will say of R. Ladouceur”), pdf pg 70, paras 10, 12-14; Will say of R. Cardinal, at pdf pg 10, paras 26-27.

like Fort Chipewyan.¹⁴ Fishing from inland lakes, collecting berries and bird eggs, and hunting are still the primary ways that ACFN members try to feed their families.

- ii. **Identity.** ACFN land users note that hunting, fishing, camping, gathering food and medicines on ACFN land forms part of what it means to be ACFN¹⁵ and that the ability to use the traditional knowledge of their ancestors to provide for themselves and others is seen as an essential part of being a Dené person.¹⁶
- iii. **Inter-generational connection.** It is important to ACFN members to continue the way of life and practices that have been a part of their families for hundreds of years. This provides a connection to previous generations. Indeed, the medium is the message, as land use is the “what” and “how” current land users pass on and protect ACFN traditional knowledge, culture and ways of being to future generations. Land use links generations and ensures continuity of ACFN culture.¹⁷
- iv. **Living by ACFN Values (Dené Law).** Land use engenders key ACFN values of sharing, respect, and stewardship, which includes taking only what you need, looking after the land and using everything you take. ACFN elders emphasize these values to youth but their teachings only become real when they are lived out on the land. Sharing and land use are particularly mutually reinforcing as ACFN members derive a sense of pride from making a kill because they can return to their families and feed them. Once people are connected to the land and feel proud to be contributing to their community, they continue to live these values they have been taught.¹⁸
- v. **Touching the sacred.** Many land users find a sacred and spiritual experience in their land use. Their connection to the land, the traditional foods, and the spiritual aspects of the land are necessary to fulfill themselves as Dënesųliné.¹⁹ Some find the land itself to be sacred, especially the places where they have memories or where their ancestors came from.²⁰ Others feel a spirit in the animals who live on the land, such as the buffalo or eagle, and are keen to ensure that future generations experience the presence of these animals.²¹
- vi. **Respite from the developed world.** The land is sanctuary for ACFN members; a place to obtain peace and quiet, find balance, and to renew oneself. During residential school, ACFN children would run away to the bush for days as an escape.²²

¹⁴ Will say of M. L’Hommecourt, pdf pg 59, paras 33-35.

¹⁵ Will say of R. Cardinal, at pdf pg 10, para 31.

¹⁶ CEEA Doc. #498, Appendix H - *Will say of Morgan Voyageur* (“Will say of M. Voyageur”), pdf pg 4, para 31.

¹⁷ Will say of R. Cardinal, pdf pg 10, para 31.

¹⁸ CEEA Doc. #498, Appendix H - *Will say of Jonathan Bruno* (“Will say of J. Bruno”), pdf pg 39, para 12.

¹⁹ Will say of R. Cardinal, pdf pg 10, para 33.

²⁰ Will say of J. Bruno, pdf pg 42, para 29.

²¹ CEEA Doc #498, Appendix H, *Will say of Julie Mercredi* (“Will say of J. Mercredi”), pdf pg 17, para 24.

²² Will say of J. Mercredi, pdf pg 17, para 25.

- vii. **Language.** There is an important and unique relationship between the land and the Dené language. ACFN members find that being on the land encourages them to speak Dené and note that some Dené words that refer to the land that have special meaning and cannot be translated. Actively using these words on the land helps to keep the language alive.²³
22. Morgan Voyageur summarized the importance of continued access to land when he said:
- “I feel a great sense of duty to take the knowledge that I have accumulated from the Elders and pass it along to my children. ... This sense of duty is so strong because after growing up in the city ... I knew nothing about the land. I feel like the ability to take care of yourself and others from the land is an essential part of your identity as a Dené person. When I arrived in Fort Chipewyan not knowing how to practice the traditional knowledge of my ancestors, I felt like I lacked an identity. I don’t want my kids to feel like that. Being Dené is something they should be proud of.”²⁴

4. Treaty 8: Unfulfilled Promises

23. In outlining what ACFN expects from this regulatory process, the Panel, the governments, and Teck, it is important to refer back to what ACFN was promised at the signing of Treaty 8 in 1899.
24. The Panel heard Elder René Bruno, one of ACFN’s oldest members, provide evidence about what ACFN was promised in the Treaty. René Bruno is the closest this Panel will get to first-hand evidence about the Treaty. His stories come from people who were present at, and participated in, the signing of the Treaty, and who used signed copies of the Treaty to advance ACFN’s rights before the government. This proximity to the Treaty is unique in Canada and provides significant value in understanding the relationship between ACFN and the Crown.
25. René Bruno’s grandfather was Alexandre Laviolette, the first chief of ACFN, who negotiated and signed the Treaty. His great-uncle was Jonas Laviolette, the second chief of ACFN, who was present at the signing of the Treaty. René’s mother was also present at the signing of the Treaty; at 9 years old she could speak 4 languages – Dené, Cree, English and French - and was able to understand what was going on.
26. As he was growing up and when he was a young man, René was told many stories about the Treaty by his grandfather, great-uncle, and mother as well as other Elders and translators who were present at the Treaty. These stories included how ACFN signed the Treaty after four long days of negotiation and what was promised to ACFN. The promises included that:
- i. ACFN’s territory will continue to belong to ACFN - it will never be taken away from them;²⁵
 - ii. Money paid annually to ACFN is not to buy the land of ACFN but to use the land – it is simply

²³ Will say of J. Mercredi, pdf pg 17, paras 26-27.

²⁴ Will say of M. Voyageur, pdf pg 4, paras 29 and 31.

²⁵ CEAA Doc. #498, Appendix H - *Will say of René Bruno* (“Will say of R. Bruno”), pdf pg 31, para 13.

“rent” for the use of the land;²⁶

- iii. There would be no restrictions on the ability of ACFN to use the land for hunting, trapping, and fishing;²⁷
 - iv. ACFN would share the land with the Crown, but the Crown would ask ACFN for permission to use or disturb the land;²⁸
 - v. ACFN will not have to pay anything for the use of the fish, the animals, and the timber, or any land-tax because the land is ACFN land.²⁹
 - vi. ACFN is responsible for their lands, the government is in charge of the settlers, and ACFN and the government are equal;³⁰
 - vii. The uniform that the Chief was given signifies that ACFN would have power just like the government.³¹
27. Mr. Bruno was told that these promises were the words of Queen Victoria herself and that as long as the sun is shining, Lake Athabasca is flowing, the grass is growing, the Treaty is not to be broken.³²
28. Mr. Bruno is 84 years old, and he testified that throughout his life the Crown – both Canada and Alberta – has not honoured the sacred Treaty promises.³³ The Bennett Dam and oil sands water withdrawals have reduced water levels in the Peace-Athabasca Delta (“PAD”) – drying up the Peace River and the PAD and destroying the trapping industry. The oil sands developments have also contributed to the drying up of the Athabasca River and introduced pollution into the Delta.
29. Treaty 8 is enshrined in section 35 of the *Constitution Act of Canada 1982*. Section 35(1) says:
- The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.
30. Practically speaking, this means that ACFN’s treaty rights are the first stopping point for any analysis of the application before this panel. As constitutional rights, they must take priority over every other right that relates to the land, including leases and licenses. This means the panel must consider:
- a) what ACFN’s treaty rights are; and
 - b) how ACFN’s treaty rights are affected by Teck’s project
- before considering any other factor, such as whether the regulatory requirements of an

²⁶ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2026.

²⁷ Will say of R. Bruno, pdf pg 31, para 14.

²⁸ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg. 2026-27

²⁹ Will say of R. Bruno, pdf pg 31, para 15.

³⁰ Will say of R. Bruno, pdf pg 31, para 14.

³¹ Will say of R. Bruno, pdf pg 31, para 14.

³² CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg. 2028

³³ Will say of R. Bruno, pdf pg 32-33, paras 21-22, 32

application have been met.

31. For additional context on the rights in Treaty 8, the courts, and other decision-makers, have been helpful. In *R v Badger*, the Supreme Court of Canada considered Treaty 8 and noted the importance to the Indians of the right to hunt, fish and trap. The court cited the Treaty Commissioners, who wrote:

"We pointed out ... that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them ...

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed.... we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it."³⁴

32. Courts have also considered what Treaty promises were made about the continuation of livelihood and potential impacts to Treaty rights. This is important in understanding the meaning of the terms "taking up" and "mining" as they appeared in the Treaty. The Supreme Court of Canada in *R v Badger* noted that:

"Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights."³⁵

33. In its consideration of mining impacts to Treaty 8 rights, the B.C. Court of Appeal in *West Moberly v British Columbia (Chief Inspector of Mines)* elaborated further, saying:

"I interject to point out that 'some white prospectors [who] might stake claims', to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools. That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures."³⁶

34. The Indian Claims Commission also looked at the promises in Treaty 8 and said:

"In our view, no reasonable interpretation of Treaty 8 could allow either the Government of Canada or a provincial government to destroy the ability of a First Nation to exercise its treaty harvesting rights or to alter fundamentally the environment upon which those activities were based."³⁷

³⁴ *R. v. Badger*, [1996] 1 S.C.R. 771, ("*R. v. Badger*") para. 39

³⁵ *R. v. Badger*, para. 55

³⁶ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII), para 135.

³⁷ CEAA Doc #498, Appendix C - *Indian Claims Commission Decision, March 1998, Athabasca Chipewyan First Nation Inquiry: WAC Bennett Dam and Damage to Indian Reserve 201*, pdf pg 81.

35. These statements suggest that – as today - the rights guaranteed under Treaty 8 were of critical importance to ACFN’s ancestors in 1899 and that none of the parties to the Treaty would have ever contemplated – let alone agreed to - the scale of resource extraction activities in the Athabasca region nor the impact of these activities on ACFN’s rights.
36. However, in the 40 years of landscape-scale extraction activities in the oil sands, Alberta and Canada have never consulted ACFN about how to square the promises in Treaty 8 with the scale and impact of the extraction activities on the ground. In fact, oil sands regulatory hearings to date have focused almost exclusively on whether applicants have met the technical rules for approval, with scant attention being given to Treaty rights. This is contrary to what is contained within the Treaty and the legal priority that must be given to constitutional rights. In effect, industrial projects are burdens on the rights guaranteed by section 35, and this Panel must take great care to ensure that the treaty rights of ACFN (and others) can continue to exist notwithstanding the approval of a project.

5. History of Infringements

37. In deciding what recommendations and conditions to make, the Panel must be cognizant of over 150 years of infringement and encroachment by settlers, missionaries, governments, and industry on ACFN territory and rights. The oil sands is simply the latest in a steady progression of infringements of ACFN’s Aboriginal and Treaty rights and their ability to practice their way of life in their territory. ACFN councilor Raymond Cardinal provided a useful summary of this history in his evidence,³⁸ paraphrased briefly:
 - i. **Treaty 8.** With the stroke of a pen, the signing of Treaty 8 in 1899 limited ACFN’s territory in the eyes of the Crown, defined ACFN’s rights, and granted powers to the Crown over the land. A number of the things that ACFN was promised were not captured in the written version of the Treaty. Regardless, the Treaty promises, both written and unwritten, have not been honoured while the “taking up” clause has been relied upon to do things – like strip-mine huge areas of territory - that were never dreamed of when the Treaty was struck.³⁹
 - ii. **Creation of Provinces.** When Canada created the provinces and territories between 1870 and 1905, it meant that ACFN now had four governments to deal with – Canada, Alberta, Saskatchewan, and the Northwest Territories. This meant four governments regulating their lands, extracting resources, three of whom ACFN didn’t sign a treaty with.
 - iii. **Wood Buffalo National Park.** In 1922, Canada established Wood Buffalo National Park and then expanded the Park in 1926. All of that land was part of ACFN’s territory; Canada took it and restricted who could use it. Those who wanted to stay in the Park had to join the Cree Band. This forced many Dené people out of their traditional areas and denied them access to

³⁸ Will say of R. Cardinal, pdf pg 13-14, paras 49-59.

³⁹ See also CEAA Doc #498 Appendix I - *Patricia McCormack, The People of the Mikisew Cree First Nation, Athabasca Chipewyan First Nation, and the Northern Bison* (“MCFN, ACFN, and Bison”), pdf pg 508.

the Park – and all of its resources - for almost 80 years.⁴⁰ ACFN still cannot hunt buffalo in the Park and still feel unwelcome in many parts of Park.

- iv. **Traplines.** In the 1920-1930s, there was an influx of white trappers encroaching on ACFN's territory.⁴¹ Around the 1940's the Government of Alberta divided the province, including ACFN land, into traplines. However, the registered traplines – including those on ACFN land - were given away to white settlers, who did not let ACFN members use what the trappers now considered to be “their” land. ACFN signed an agreement with Alberta in 1935 to reserve land for ACFN to hunt and trap on, but this agreement was never honoured.
 - v. **Missionaries and Residential Schools.** Throughout this time, missionaries were taking Indigenous children and putting them in residential schools. This had a significant negative impact on ACFN's language and culture, ruined the lives of many children, tore apart many families, and forced them to move off the land to Fort Chipewyan.
 - vi. **Bennett Dam.** In the late 1960s, the Bennett Dam was built and drastically depleted the amount of the water flowing into the Peace Athabasca Delta from the west. This destroyed the trapping industry and made many parts of the Delta inaccessible for hunting, trapping, fishing, and gathering.⁴²
 - vii. **Oil Sands.** In the 1960-70s the oil sands started. This industry has destroyed more and more of ACFN territory and the habitats of animals that they depend on, taken what remaining water gets into the Delta, and caused pollution that makes animals and people sick. All of these problems have become much worse in the past 30 years, when the scale of development has accelerated.
38. The result of this litany of infringements is that ACFN has struggled to retain their language, culture, way of life, identity, and economic self-sufficiency. ACFN members can no longer sustain themselves through the exercise of their Treaty rights - as they were promised. This history necessitates that today's decisions are made in a manner that respects ACFN's Aboriginal and Treaty rights. ACFN and other local Indigenous communities have demonstrated that they are a resilient people but this does not give the Crown permission to continue to violate their rights.

6. Flawed Government Policies and Regulations

39. In the face of this history of infringements and the on-going impacts of oil sands development to ACFN's territory and people, the Alberta government has failed ACFN on a number of fronts. In relation to balancing industrial development with the continued exercise of ACFN's Rights, Alberta has offered ACFN two flawed processes: the Lower Athabasca Regional Plan (LARP) and the

⁴⁰ See also CEAA Doc #498 Appendix I - *Patricia McCormack, Research Report, An Ethnohistory of the Athabasca Chipewyan First Nation* (“Ethnohistory of ACFN”), pdf pg 166-170.

⁴¹ CEAA Doc #498, Appendix B, *Letter to Department of Indian Affairs*, pdf pg 5.

⁴² CEAA Doc #498, Appendix C, *Indian Claims Commission, Athabasca Chipewyan First Nation Inquiry: WAC Bennett Dam and Damage to Indian Reserve*, pdf pg 80.

Alberta Consultation Office (ACO). These processes are like twin carousels. Once ACFN realizes they are not getting anywhere with one process, the government suggests they take their concerns to the other process. But ACFN just spins in circles there, too. ACFN is being taken for a ride on these carousels and it costs them time, effort, and money. And each time ACFN ends up right where they started: without any protection for their Treaty rights as they watch their territory being eroded by continued development.

40. Alberta has also failed to properly manage wildlife that have significant subsistence, cultural, and spiritual value to ACFN— namely the Ronald Lake Buffalo Herd and woodland caribou - ignoring both ACFN’s valid concerns and legal requirements, thereby delaying action until serious risks are manifest.
41. Finally, Alberta has consistently avoided participating in, and appearing before, environmental assessment hearing panels such as this one, leaving decision-makers with unfilled evidentiary gaps and ACFN with no means to compel answers to critical questions.

6.1 Lower Athabasca Regional Plan

42. As Lisa Tsessaze submitted in her evidence, there are significant deficiencies in LARP and its frameworks – the tool that Alberta purports to ensure responsible development.⁴³ This is not due to lack of effort on ACFN’s part: ACFN has worked with Alberta since 2008 to ensure that LARP considers ACFN’s rights. In their 2010 LARP submission, ACFN identified those areas that were of critical importance to ACFN members for exercising their Treaty rights, mapped them as “ACFN Homeland Zones”, and provided them to Alberta.⁴⁴
43. ACFN also sought to ensure that LARP would include a management plan for Indigenous Land and Resource Use and, together with the Mikisew Cree First Nation (MCFN), developed a proposal for a Traditional Land and Resource Use Plan.⁴⁵ This Plan would have allowed Alberta to ensure the ACFN’s Rights were accommodated while development progressed through the Lower Athabasca region.
44. Throughout 2010 and 2011, ACFN provided Alberta with advice, discussion papers on co-management, and recommendations for LARP. Despite ACFN’s hard work, it became apparent early in the process that Alberta was not going to incorporate ACFN input into LARP, nor would LARP respect Indigenous rights. For example, in a 2010 letter to Alberta, ACFN noted that Alberta had not responded to requests to develop the data and information (including thresholds) required to properly assess and accommodate s.35 rights in the LARP and that none of the processes referenced by the Regional Advisory Council (RAC) used a rights- based focus.⁴⁶ The RAC itself was constituted primarily of industry and government representatives, not First

⁴³ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2098-2099.

⁴⁴ CEEA Doc #498, Appendix F – *Athabasca Chipewyan First Nation Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan* (2010), pdf pg 273.

⁴⁵ CEEA Doc #498, Appendix F - *Proposal to Develop ACFN and MCFN Traditional Lands and Resource Management Plans* (2010), pdf pg 39.

⁴⁶ CEEA Doc #498, Appendix F – *First Nations letter to Land Use Secretariat* (2010), pdf pg 18.

Nation representatives.

45. Despite promises by Alberta that LARP would balance a healthy environment with economic interests and that it would recognize ACFN homelands, when LARP was legislated in 2012, it essentially paved the way for the development of ACFN lands. It failed to recognize ACFN homelands or the Traditional Land and Resource Use proposal and did nothing to provide any certainty for ACFN regarding the continuing exercise of their Treaty rights.⁴⁷ This was the best opportunity Alberta has had to balance present and future development with the protection of Indigenous rights and they squandered it.
46. As a result, in 2013, ACFN, along with 6 other Indigenous communities, requested a review of LARP. Alberta appointed a review panel and, in June 2015, the Review Panel released its report. The Panel's findings were highly critical of LARP. The Review Panel found that LARP's inability to address impacts to rights directly and adversely affected ACFN and other aboriginal communities.⁴⁸ The Panel recommended, among other things, that Alberta:
 - develop an Indigenous traditional land use management framework by 2017,⁴⁹
 - complete and implement all the other proposed management frameworks,⁵⁰
 - complete a regional baseline health study focused on First Nations, Métis and other Aboriginal groups by 2017;⁵¹ and
 - complete range plans for woodland caribou.⁵²
47. Alberta sat on the report for almost a year before releasing it, and then did nothing.⁵³ To date, none of the Review Panel's recommendations have been accepted or completed by Alberta.
48. In light of LARP's obvious flaws, and the highly critical Review Panel report, ACFN asked federal and provincial decision-makers in 2016 to stop relying on LARP until LARP is brought to an acceptable and functional standard that is compliant with the Constitution of Canada.⁵⁴ ACFN's request has been effectively ignored.
49. In the spirit of making the best of bad situation, ACFN returned to the table this year with three other Athabasca Region First Nations ("ARFN") in an attempt to fix LARP. The group provided Alberta with several recommendations on improving LARP, including changes to policy and environmental management frameworks. It also provided two proposals to develop the missing Traditional Use Plan, also known as a "Cultural Framework". Alberta has not acted on the

⁴⁷ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2100-2101.

⁴⁸ CEAA Doc #498, Appendix G - *Review Panel Report 2015 Lower Athabasca Regional Plan*, ("LARP Review Panel Report") pdf pg 237.

⁴⁹ LARP Review Panel Report, pdf pg 306.

⁵⁰ LARP Review Panel Report, pdf pg 319.

⁵¹ LARP Review Panel Report, pdf pg 324.

⁵² LARP Review Panel Report, pdf pg 333.

⁵³ CEAA Doc #498, Appendix F – *ACFN letter to Minister McKenna re LARP (March 4, 2016)*, pdf pg 486.

⁵⁴ CEAA Doc #498, Appendix F, *ACFN letter to Minister McKenna re Lower Athabasca Regional Plan (2016)*, pdf pg 486; *ACFN letter to Premier Notley and Minister Phillips (2016)*, pdf pg 501

ARFN's proposals.

50. Six years after its implementation, LARP still has frameworks that are incomplete. Alberta has stated repeatedly to ACFN that many ACFN concerns about LARP would be addressed through the Biodiversity Management Framework ("BMF").⁵⁵ This framework is not complete and ACFN have not seen a draft of the BMF since 2014 - at that time there were no indicators, thresholds or limits of importance to Indigenous communities including with respect to bison, caribou and birds.⁵⁶ The framework for the management of wetlands is also incomplete. ACFN Homeland Zones remain without any regulatory indicators, thresholds or limits that could help protect ACFN member rights and the flora and fauna they rely upon.
51. Of those LARP frameworks that are complete, none are adequate. Of particular impact to ACFN are the management frameworks for surface water quality and quantity, both of which utterly fail to mitigate the impacts of oil sands development or respect Treaty rights. ACFN's concerns with these frameworks are discussed in more detail below.
52. The incomplete and inadequate nature of LARP might not be a problem if it was an insignificant policy. Unfortunately, LARP is at the front and centre of industrial development decisions in north-eastern Alberta. Project proponents routinely rely on compliance with LARP to support development applications. Provincial and federal decision-makers regularly rely on LARP and its frameworks to make decisions. Joint Review Panels have relied on LARP and its frameworks to mitigate the impacts of the oil sand developments.⁵⁷ The Alberta Consultation Office also relies on LARP. In their "interim" report on consultation adequacy, the ACO told ACFN that:

*"with respect to ACFN's broader cumulative impact concern, a Project-specific consultation process may not be the appropriate forum to address general cumulative impact issues. Alberta encourages ACFN to raise these broader concerns through Lower Athabasca Regional Plan (LARP) enhancement and implementation items such as landscape management plans, caribou range plans, the proposed Biodiversity Management Framework, and other environmental management frameworks."*⁵⁸
53. In summary, LARP remains fundamentally flawed. It fails to respect ACFN's Treaty rights or mitigate the cumulative effects of oil sands development in the region. Alberta has ignored the concerns and advice of Indigenous communities concerning the development of LARP for a decade. It has also ignored the recommendations of a statutory Review Panel that it commissioned. The use of LARP in regulatory processes erodes ACFN's faith in the ability of such processes to guide development decisions in its region.

⁵⁵ CEEA Doc #498, Appendix F – Minister Phillips letter to Chief Adam re LARP (undated), pdf pg 497-498.

⁵⁶ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2101.

⁵⁷ 2013 ABAER 011, CEEA Reference No. 59540. *Report of the Joint Review Panel – Shell Canada Energy Jackpine Mine Expansion Projection, Application to Amend Approval 9756 Fort McMurray Area July 9, 2013* ("Jackpine JRP Report") at para 1487.

⁵⁸ CEEA Doc #478, *From the Alberta Consultation Office to Athabasca Chipewyan First Nation and the Alberta Energy Regulator re: Athabasca Chipewyan First Nation Aboriginal Consultation Report* ("ACO Report"), at pdf pg 50.

54. ACFN submits that this Panel cannot rely on LARP or its frameworks – as they are currently drafted - for the purposes of making decisions under the *Environmental Protection and Enhancement Act* (EPEA), Water Act, or *Oil Sands Conservation Act* (OSCA) and making recommendations to the federal government.

Requested Recommendations

55. As such ACFN recommends that, if the Project is approved, the Panel set the following approval conditions:
- a) By the end of 2020, Alberta shall substantively implement the recommendations made by the 2015 LARP Review Panel.
 - b) By the end of 2020, Alberta shall develop and implement a biodiversity management framework, created in consultation and collaboration with ACFN and other Indigenous groups.
 - c) By the end of 2020, Alberta shall develop and implement a Traditional Land and Resource Use Plan, created in collaboration with ACFN and other Indigenous groups.
 - d) By the end of 2020, Alberta shall develop and implement a Cultural Framework, created in collaboration with ACFN and other Indigenous groups.

6.2 Mitigation & Consultation

56. Alberta's consultation process does not meaningfully mitigate ACFN's concerns, and in this case Teck has had to do substantial work to fill the gaps. Alberta treats consultation more like a "check-box" than a constitutional duty. In the rare case where Alberta agrees that ACFN's rights will be impacted by a proposed development, it does not offer to mitigate and accommodate ACFN rights or compensate ACFN for impacts to rights.
57. Alberta's check-box approach is an extremely narrow and incorrect view of the Crown's consultative role: the honour of the Crown requires that Alberta consult on the impact of cumulative effects and accommodate impacts where necessary. This has not happened.
58. In March 2018, following an unproductive meeting with the ACO, ACFN wrote a letter to Richard Feehan, the Minister of Indigenous Relations, to outline ACFN concerns with the consultation process. The letter is found in our submissions to the Panel but the key points are worth repeating here:
- i. The ACO relies on a consultation policy that is more than a decade out-of-date and the ACO's practices do not reflect the present state of the law on consultation. The ACO stated several times that they were "bound by Alberta's 2005/2007 consultation policy and guidelines". This is plainly wrong - policy never trumps the law. Alberta should be embarrassed by such a flagrant lack of compliance with the law.
 - ii. Although some aspects of consultation can be delegated to industry, the ACO has delegated all of the consultation process to industry. ACO's only role appears to be one of document review. This is not consistent with the law. Teck has done what it can, but Alberta is legally

required to do much, much more.⁵⁹

- iii. Consultation to date has been a one-way street, with ACFN providing all of the information and input to Alberta. The law requires the Crown to determine the depth of consultation based on a First Nation's strength of claim. The ACO has provided ACFN with absolutely no feedback about Alberta's understanding of ACFN's rights, including any sort of assessment about the strength of ACFN's claims. This is not compliant with the law.⁶⁰
- iv. The ACO's process remains inflexible and impoverished: while Teck first proposed its Project on November 14, 2010, the ACO met with ACFN about the Project once – on March 2, 2018 – and would not commit to any further meetings.
- v. The ACO, and Alberta generally, treat ACFN's constitutional rights as an adjunct to environmental issues, believing that any effects on ACFN's traditional resources and land use can be addressed by mitigations to environmental effects, instead of considering the impact of the Project on ACFN's rights. This is contrary to the law.⁶¹
- vi. The ACO's consultation process is unclear. ACFN still does not understand how ACFN's input was taken into account by the provincial Crown, nor does ACFN understand how the ACO assesses other Alberta government department's responses to ACFN's concerns. Indeed, the ACO's view that ACFN will not bear any site-specific effects from the Project is mystifying and it is not clear how the ACO could reach that conclusion.⁶²
- vii. The ACO is not a "one-stop shop" for consultation with First Nations. Instead, its mandate is much narrower than that: it is responsible for the consultation process in respect of certain legislative decisions relating to the Project (the *Water Act* and *Environmental Protection and Enhancement Act*) but is legislatively unable to consult about the *Oil Sands Conservation Act (OSCA)*. Therefore, although the ACO has provided a decision on consultation adequacy, that decision is incomplete.⁶³
- viii. ACFN has not been consulted about the *OSCA* decision. The decision under *OSCA* requires an assessment of whether the Project is in the public interest. According to the Supreme Court of Canada in its *Clyde River* decision, the duty to consult with Indigenous groups gives rise to a special public interest that supersedes other concerns associated with the public interest.⁶⁴ Failure to consult with respect to the *OSCA* leaves a significant gap in Alberta's consultation process because, if properly assessed, the deficiencies in LARP might be addressed, including implementation of a traditional land and resource use plan.

⁵⁹ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (CanLII), paras 558-559.

⁶⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), para 64.

⁶¹ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII) ("*Clyde River*"), at para 45.

⁶² CEEA Doc #675 *From the Aboriginal Consultation Office to Athabasca Chipewyan First Nation and the Alberta Energy Regulator re: Athabasca Chipewyan First Nation Aboriginal Consultation Office Hearing Report*, ("ACO Final Report") pg 2.

⁶³ See *Athabasca Chipewyan First Nation v Alberta*, 2018 ABQB 262 at paras 10-11, where the ACO claimed it "manages consultation for the Crown". It clearly cannot do so as it is legislatively restricted from carrying out fulsome consultation.

⁶⁴ *Clyde River*, para 40.

- ix. Further, the ACO’s consultation process does not assess cumulative effects, despite the fact that project-specific impacts can exacerbate cumulative effects and the context of cumulative effects is important to understanding project-specific impacts. The ACO has clearly stated that they do not have a mandate to assess cumulative effects, and Alberta is vague about how cumulative effects are addressed. LARP is inadequate for this purpose (as shown by the 2015 LARP Review Panel recommendations) and the existing regional tables (Ronald Lake Bison Herd Technical Team, and Woodland Caribou range planning) are not appropriate forums for those discussions. This is contrary to the law on consultation set out by the Supreme Court of Canada in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*⁶⁵
 - x. Alberta has not addressed the recommendations made by the Joint Review Panel at the Jackpine Mine Expansion Project hearing in 2013.⁶⁶ The ACO has taken the position that the recommendations are non-binding on Alberta.⁶⁷ This is deeply concerning as ACFN was encouraged by Alberta to participate in the Jackpine hearing to voice the very concerns that the Joint Review Panel recommendations address. Further, the same regional concerns – related to water quality and quantity, migratory birds, buffalo, caribou, health – are still at issue 6 years later at this hearing. All of these regional issues will be impacted by the Teck Project, yet – again - Alberta refuses to address them.
59. The ACO’s recent Hearing Report - which found that consultation is adequate - is the culmination of this inadequate and unlawful consultation process.⁶⁸ The ACO provides little to no analysis and reasons for their decision. As such, it is patently unclear how the ACO failed to find any site-specific sites requiring avoidance or mitigation when ACFN has documented historic and current use of the Project area.
60. Just as concerning is that for the “Broad Concerns” that ACFN raised – including LARP, the Surface Water Quantity Management Framework, Biodiversity Management, non-implementation of Jackpine Joint Review Panel recommendations, and the impacts on the Ronald Lake Bison Herd – the ACO found that these concerns were taken “into account” but were “more appropriately considered in forums other than the project specific consultation process”, encouraging ACFN to “continue to engage with Alberta”, and “recommend[ing] that the AER consider this evidence”. These statements are vague, unsupported, and unhelpful.
61. The abject failure of Alberta to consult on the Project is offset only by the inordinate lengths that Teck took to attempt to address ACFN’s concerns

⁶⁵ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (CanLII), para 42.

⁶⁶ CEAA Doc #498, Appendix F - *ACFN letter to CEAA re federal responses to Jackpine JRP Recommendations* (2018), pdf pg 717; CEAA Doc #498, Appendix F - *ACFN review of GoA Responses to Jackpine JRP Recommendations*, (2017), pdf pg 723

⁶⁷ CEAA Doc #498, Appendix F, *ACFN letter to ACO re: Proposed Jackpine Mine Expansion Project – ACFN Concerns* (2017), pdf pg 552-553.

⁶⁸ ACO Hearing Report.

6.3 Wildlife Management

62. Alberta and Canada have failed to manage certain populations of buffalo and woodland caribou in a manner that is compliant with the law, respects ACFN's Aboriginal and Treaty rights, and facilitates the survival of these animals. This is a problem because these populations- the Ronald Lake Buffalo Herd and woodland caribou in the Red Earth and Richardson herds – have significant value to ACFN and are located in, or use, Teck's proposed Project area. While Teck has done what it can to mitigate Project-specific impacts to these populations, immediate action is required from the provincial and federal Crown to ensure the survival of these species.

6.3.1 Ronald Lake Buffalo

63. The Ronald Lake Buffalo Herd (RLBH) is a population of genetically pure wood bison that is “naturally founded” within ACFN territory. The Herd continues to reside in part of its historical range, in close proximity to ACFN's Poplar Point and Point Brulé reserves. The Herd is predominantly found on the west side of the Athabasca River, ranging from the south-east corner of Wood Buffalo National Park to the northern-most oil sands mines and into the Birch Mountains.
64. ACFN has a specific Treaty right to hunt buffalo because buffalo have always had a central role in ACFN's distinctive Dené culture.⁶⁹ The RLBH has particularly significant value to ACFN because it is the only population of wood buffalo in the region that is disease-free, accessible, and can be legally hunted.⁷⁰ ACFN has hunted and managed buffalo in their territory, including the Herd, as long as anyone can remember, through selective harvesting and controlled burning to create preferred buffalo habitat.⁷¹ Many elders, particularly those who grew up at Poplar Point and Point Brulé, recall being “raised on buffalo”.⁷² Hunting buffalo provides significant food for the community – particularly in the winter - and engenders key Dené Laws of stewardship, respect, and sharing. The RLBH also provides an opportunity for the generation and transmission of Indigenous knowledge.⁷³ If not for a self-imposed ban to allow the herd to recover following years of unregulated hunting, ACFN members would continue to hunt the RLBH today, participating in an unbroken history of land use that stretches back to the last ice age.
65. The Herd used to range as far south as Fort McKay, however, oil sands development in the past 30 years has caused the herd's range to contract northwards.⁷⁴ Until just recently, Alberta did not recognize the RLBH under the *Wildlife Act*, leaving them unlisted and open to unregulated hunting. Alberta's apparent rationale was that the Herd was “an introduced species” – migrants from Wood Buffalo National Park - and may carry bovine diseases.⁷⁵ This was contrary to the Indigenous knowledge that ACFN presented to Alberta that the Herd was a population of wood

⁶⁹ CEEA Doc #498, Appendix F- *ACFN letter to ECCC re Treaty Right to Hunt Bison*, pdf pg 541

⁷⁰ CEEA Doc #498, Appendix G - *Cultural Importance Summary to Support the Imminent Threat Assessment of the Ronald Lake Bison Herd* (“RLBH Cultural Importance Summary”), pg 2.

⁷¹ RLBH Cultural Importance Summary, pg 4.

⁷² RLBH Cultural Importance Summary, pg 8.

⁷³ RLBH Cultural Importance Summary, pg 12

⁷⁴ RLBH Cultural Importance Summary, pg 15.

⁷⁵ CEEA Doc #498, Appendix F- *ACFN letter to ASRD re The Need to Protect Bison* (2009), pdf pg 340

buffalo that had always been distinct from the populations in the Park and had not shown any signs of disease.

66. For years, Alberta's management solution was to allow unregulated hunting of the RLBH. Not only was this unnecessary, but it led to trophy hunters removing unsustainable numbers of the Herd each year. Alberta's Fish and Wildlife officers actively encouraged trophy hunters to hunt the Herd and some officers, like Trevor Sellin, were seen by ACFN land users hunting the buffalo themselves.⁷⁶ When Alberta finally did disease testing in 2013-14, they found that the RLBH was genetically pure and disease free. It still took until 2016 for Alberta to list the RLBH as a "subject animal" under the *Wildlife Act*, protecting it from non-Indigenous hunting within a designated zone. By 2016, after years of unrestrained hunting, the RLBH population was down to around 75 animals.⁷⁷
67. Throughout this time, ACFN did what it could to protect the Ronald Lake buffalo. ACFN advocated to Alberta for the Herd's protection.⁷⁸ In 2012, ACFN released "*Nih boghodi: We Are Stewards of the Land – an ACFN stewardship strategy for woodland caribou, barren-ground caribou, and wood bison*". This strategy called for legislated protected and stewardship zones for buffalo and caribou with varying levels of objectives in each zone. These objectives ranged from no new industrial developments, ACFN consent in decision-making to habitat restoration and co-management to implementing thresholds for industrial disturbance.⁷⁹ In 2014, ACFN established the Guardian program to patrol ACFN territory, monitoring hunting and other land uses. In 2016, ACFN released the "Bison Declaration" that imposed a ban on its own members from exercising their Treaty right to hunt the Ronald Lake buffalo.⁸⁰ Most recently, in 2017-18, after several years requesting a protection order, ACFN participated in the Imminent Threat Assessment of the Ronald Lake Buffalo to support a federal Protection Order on the Ronald Lake buffalo.⁸¹
68. ACFN is not alone in seeking better protection for the Herd: in 2013, the Jackpine Joint Review Panel recommended an expeditious "federal recovery strategy for wood bison" and that "critical habitat for bison be identified in the federal recovery strategy to provide context for decisions on future oil sands development in the oil sands region"⁸². Neither has occurred.
69. The Frontier Project is located directly within the RLBH range and will affect the Herd. Indeed, Project activities, such as exploratory drilling (seismic and auger) starting in 2006, have already disturbed them and shifted their range north.⁸³ If built, the mine would destroy certain RLBH

⁷⁶ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2097.

⁷⁷ Will say of R. Ladouceur, pdf pg 72, para 25.

⁷⁸ CEAA Doc #498, Appendix F- *ACFN letter to ASRD re The Need to Protect Bison* (2009), pdf pg 340; CEAA Doc #498, Appendix F- *GoA letter to ACFN re Ronald Lake Bison Herd* (2013), pdf pg 475.

⁷⁹ CEAA Doc #498, Appendix D - *Nih boghodi: We Stewards of the Land – An ACFN stewardship strategy for thunzea, et'then and dechen yaghe ejere (woodland caribou, barren-ground caribou, and wood bison)* ("*Nih boghodi*"), pdf pg 791-793

⁸⁰ RLBH Cultural Importance Summary, pg 22.

⁸¹ RLBH Cultural Importance Summary, pg 1.

⁸² Jackpine JRP Report, Recommendation 48, pg 378.

⁸³ CEAA Doc #163, Project Update, pdf pg 114; CEAA Doc #498, Appendix I – *Petr Komers and Brian Kopach, Utilizing Athabasca Chipewyan First Nation Indigenous Knowledge and western scientific approaches to study habitat availability and population*

habitat, create sensory disturbances (noise and smell) that would deter the Herd's use of habitat adjacent to the Project, and ACFN is concerned it would cut off access to undisturbed habitats west and south of the Project.⁸⁴ Without adequate mitigation, the Project risks driving the Herd north into Wood Buffalo National Park – increasing the possibility of hybridization and exposure to bovine diseases – or west over the Birch Mountains – into unfamiliar and potentially unsuitable territory for the Herd and out of range of ACFN hunters.⁸⁵ Without the mitigations proposed below, the Project risks the viability of the Herd.⁸⁶

Mitigation and Management Commitments:

70. Because the RLBH is of such importance to ACFN, Teck has committed to the following RLBH Objectives:

“Restoring and maintaining a healthy, stable and self-sustaining Ronald Lake Bison Herd ("RLBH") of sufficient size and stability to support ACFN biodiversity objectives, ACFN traditional and cultural uses {including harvesting}, and the cultural relationship between ACFN and the RLBH (the “RLBH Objectives”).”⁸⁷

71. To work towards meeting the RLBH Objectives, ACFN obtained a number of mitigation and management commitments from Teck to protect the herd from Project-specific impacts. These commitments are found at section 1.2 of the Joint Submission.

72. Teck will:

- a) work collaboratively with ACFN through Participation Agreement implementation with respect to Teck's wildlife mitigation, monitoring, and adaptive management plans, including those that pertain to RLBH;
- b) include restoration of high-quality bison habitat as quickly as reasonably possible as a key reclamation objective;
- c) establish policies restricting employees from conducting any hunting while employed by Teck;
- d) establish policies regarding use of roads to avoid collisions with RLBH and other wildlife; and
- e) participate in and support regional initiatives regarding management of the RLBH, including working collaboratively on those Crown strategies and plans set out below.⁸⁸

Requested Recommendations

73. However, Teck does not set policy or regulation and therefore Crown action is required to facilitate the survival of this population. To ensure a chance of reaching the RLBH Objective, ACFN

viability for the Ronald Lake Bison Herd (“RLBH Habitat & Viability Report”), pdf pg 57-58.

⁸⁴ RLBH Habitat & Viability Report, pdf pg 36-37; Will say of R. Ladouceur, pdf pg 71-72, paras 20-23.

⁸⁵ RLBH Habitat & Viability Report, pdf pg 37-38; Will say of E. Trip de Roche, pdf pg 37, para 31; Will say of M. L’Hommecourt, pdf pg 62, paras 56-57.

⁸⁶ RLBH Habitat & Viability Report, pdf pg 37-38.

⁸⁷ ACFN-Teck Joint Submissions, s.1.1.

⁸⁸ ACFN-Teck Joint Submissions, s.1.2.

and Teck have identified a number of recommendations for Crown action that, if the Project is approved, ACFN asks this Panel to set as approval conditions. These recommendations are found in section 1.3 of the Joint Submissions.

74. Teck and ACFN are jointly support the following Crown actions:
- a) by 2019, Alberta will implement a complete ban on hunting RLBH by non-Indigenous hunters;
 - b) by 2020, Alberta and Canada will identify and protect, by legally effective means, a sufficient area of adequate and contiguous critical habitat for the RLBH to survive and increase beyond current population levels within ACFN territory. The establishment of the Biodiversity Stewardship Area may contribute towards the fulfillment of this condition. ACFN will have a decision-making role in the development and governance of this protected area;
 - c) by 2020, Alberta and Canada, in consultation with ACFN and other interested Indigenous communities will finalize key provincial and federal strategies and initiatives for management of the RLBH, including the:
 - i. provincial Bison Management Plan;
 - ii. Parks Canada bison disease transmission management plan; and
 - iii. federal Recovery Strategy and Action Plan for Wood Bison;
 - d) by 2020, Alberta and Canada will formalize a co-management and shared decision-making role for ACFN in the management of the RLBH, including those provincial and federal strategies and plans noted above; and
 - e) by 2020, Alberta and Canada will develop and implement criteria to track and validate the health, stability and sustainability of the RLBH, including:
 - i. population numbers and demographics;
 - ii. mortality, disease, and human interactions with the RLBH; and
 - iii. the quality and quantity of habitat, including critical habitat.⁸⁹
75. From ACFN's perspective, it is imperative that the RLBH Objective is met. Therefore, ACFN urges the Panel to accept these mitigation commitments and recommendations, as well as any others that the Panel might deem necessary.

6.3.2 Woodland Caribou

76. Alberta and Canada have also failed to manage woodland caribou across the province. Two populations of woodland caribou are particularly important to ACFN because they are located within ACFN territory and use the Project Area: the Red Earth population and the Richardson population.

⁸⁹ ACFN-Teck Joint Submissions, s.1.3.

77. Caribou have very significant subsistence, cultural, and spiritual value to ACFN because the livelihood and survival of ACFN's ancestors was based on harvesting caribou.⁹⁰ For this reason, ACFN are traditionally known as the *Etthen Eldeli Dené* – “caribou eaters” – and would use caribou for meat, clothing, shelter, tools, thread, drum skins, and many other products.⁹¹ Some of ACFN's elders who are still alive today grew up at a time when they still used caribou for these purposes.
78. The Government of Alberta's range maps suggest that Project is located between the ranges of these two caribou populations, however, ACFN members have observed caribou crossing across the Athabasca River just north of the Firebag River, in the Project Area, and in the Birch Mountains.⁹² ACFN is concerned the Project would block this movement corridor, destroy caribou habitat, and deter them from using habitat adjacent to the Project.
79. As with the RLBH, ACFN has done what it can to protect woodland caribou. In 2010, ACFN made submissions to the federal statutory review of the *Species at Risk Act (SARA)* Standing Committee on woodland caribou.⁹³ Also in 2010, ACFN demanded an emergency protection order under s. 80 of the *SARA* for woodland caribou in northeastern Alberta. In 2011, ACFN judicially reviewed the Minister's failure to post a Recovery Strategy in the time allotted under *SARA* and the decision that there were no imminent threats to the national survival of boreal caribou in Canada.⁹⁴ The Minister's decision was set aside and sent back for reconsideration.⁹⁵ Also in 2011, ACFN made recommendations to Alberta to include concrete protections for caribou within LARP.⁹⁶ ACFN also reviewed the Proposed Woodland Caribou Policy for Alberta and provided comments to Alberta.⁹⁷ The 2012 *Nih boghodi* stewardship strategy also applies to woodland caribou.⁹⁸ ACFN does not exercise their specific Treaty right to hunt woodland caribou because they are “Threatened” under the *SARA*.
80. ACFN made submissions before the Joint Review Panel at the Jackpine Mine Expansion hearing in 2012 about caribou and the Panel responded with a number of Recommendations for Crown action on protecting to caribou, including:

Recommendation 43 - The Panel recommends the Government of Alberta, in consultation with the Government of Canada and interested Aboriginal groups in the oil sands area, produce a range plan for caribou in the designated critical habitat of the Richardson Range as soon as possible. This range plan should outline specific steps for

⁹⁰ CEAA Doc #498, Appendix D - *Footprints on the Land – Tracing the Path of the Athabasca Chipewyan First Nation* (“Footprints on the Land”), pdf pg 305-3066.

⁹¹ *Footprints on the Land*, pdf pg 303.

⁹² Will say of R. Ladouceur, pdf pg 74, para 34; CEAA Doc #498, Appendix H - *Will say of Freddie Marcel* (“Will say of F. Marcel”), pdf pg 26, para 16.

⁹³ CEAA Doc #498, Appendix G- *Supplementary Submission of Athabasca Chipewyan First nation to the Federal Review of the Species at Risk Act*, pdf pg 100.

⁹⁴ *Adam v. Canada (Environment)*, 2011 FC 962 (CanLII)

⁹⁵ *Adam v. Canada (Environment)*, para 74.

⁹⁶ CEAA Doc #498, Appendix F - *Additional Recommendations of ACFN and MCFN with Respect to LARP (June 3, 2011)*, pdf pg 330-331.

⁹⁷ CEAA Doc #498, Appendix F – *Re: Proposed Woodland Caribou Policy for Alberta*, pdf pg 348.

⁹⁸ *Nih boghodi*, pdf pg 786.

providing immediate action to reverse the current level of disturbance, as prescribed in the federal recovery strategy. These steps should include direction for ensuring that indirect effects (e.g., increased predation resulting from nearby land clearing) on already significantly disturbed populations such as the Richardson Range are minimized or avoided.⁹⁹

Recommendation 46 - The Panel recommends that the Government of Alberta work in cooperation with [Environment Canada] towards the expeditious completion of range plans for caribou in the oil sands region to ensure that immediate action occurs as prescribed in the federal recovery strategy.¹⁰⁰

81. As with RLBH, both Canada and Alberta have not complied with the law in their efforts to protect woodland caribou. Range plans for woodland caribou in the oil sands region and across Alberta are still incomplete.

Mitigation and Management Commitments: Caribou

82. Because Woodland Caribou are of such importance to ACFN, Teck has committed to the following Caribou Objectives:

“restoring and maintaining healthy, stable and self-sustaining Woodland Caribou Herds in the Red Earth and Richardson ranges (collectively the "Caribou") of sufficient size and stability to support ACFN biodiversity objectives, ACFN traditional and cultural uses (including harvesting), and the cultural relationship between ACFN and the Caribou (the "Caribou Objectives").”¹⁰¹

83. As the first steps to meeting the Caribou Objectives, ACFN obtained a number of mitigation and management commitments from Teck to protect the local herds from Project-specific impacts. These commitments are found at section 2.2 of the Joint Submissions.

84. Teck will:

- a) work collaboratively with ACFN through Participation Agreement implementation with respect to Teck's wildlife mitigation, monitoring, and adaptive management plans, including those that pertain to Caribou;
- b) direct progressive reclamation of the Project with a view to restoring high-quality Caribou habitat in the Project area as quickly as reasonably possible;
- c) participate in caribou habitat restoration projects and opportunities to restore linear features outside the PDA in the ranges of the Red Earth and Richardson ranges, to be informed by Teck's collaboration with ACFN on Teck's biodiversity management planning processes;
- d) establish policies restricting employees from conducting any hunting while employed by Teck;

⁹⁹ Jackpine JRP Report, Recommendation 43, pg 378.

¹⁰⁰ Jackpine JRP Report, Recommendation 46, pg 378.

¹⁰¹ ACFN-Teck Joint Submissions, s.2.1.

- e) establish policies regarding use of roads to avoid collisions with Caribou and other wildlife; and
- f) participate in and support regional initiatives regarding management of Caribou, including working collaboratively on those Crown strategies and plans set out below.¹⁰²

Requested Recommendations: Woodland Caribou

85. Again, Crown action is required to facilitate the survival of these populations. As such, to meet the Caribou Objectives, ACFN and Teck have identified a number of recommendations for Crown action that, if the Project is approved, ACFN asks this Panel to set as approval conditions. These recommendations are found in section 2.3 of the Joint Submissions.

86. Teck and ACFN are jointly support the following Crown actions:

- a) By 2020, the implementation of critical Provincial and Federal management plans regarding woodland caribou in northeastern Alberta, particularly the Red Earth and Richardson range herds, that will advance the federal goal of 65% undisturbed habitat, including:
 - i. provincial Woodland Caribou range protection plan; and
 - ii. the federal Recovery Strategy and Action Plan for Woodland Caribou; and
- b) a co-management role for ACFN in the development and implementation of the abovementioned Crown management plans related to the woodland caribou;
- c) by 2020, the development and implementation of a conservation offset program to allow Teck, as prioritized through collaboratively developed biodiversity management plan, to participate in the reclamation of linear disturbances in caribou habitat outside of the Project Area; and
- d) by 2020, the development and implementation of criteria, indicators and thresholds to track and validate the health, stability and sustainability of the Caribou, including:
 - i. population numbers and demographics; and
 - ii. the quality and quantity of habitat, including critical habitat.¹⁰³

6.3.3 Biodiversity Stewardship Area

87. The Biodiversity Stewardship Area (BSA) is an initiative that has been advanced by MCFN and supported by Teck. ACFN also supports the concept because ACFN believes that a buffer zone is necessary between Wood Buffalo National Park and oil sands development and that additional protected area in this region is necessary to conserve undisturbed habitat for local species as well as places for ACFN members to exercise their Rights. ACFN is grateful for Teck's support for the BSA, however, contrary to Teck's understanding,¹⁰⁴ it does not perceive the BSA to be a mitigation

¹⁰² ACFN-Teck Joint Submissions, s.2.2.

¹⁰³ ACFN-Teck Joint Submissions, s.2.3.

¹⁰⁴ CEAA Doc #575, Hearing Transcript Volume 5: September 29, 2018, pg 1086.

for Project-specific impacts, such as those to RLBH, caribou, or migratory birds.

88. The ACFN-Teck Joint Submission describes the BSA Objectives as follows:

“Establishing, in a timely way, a permanently protected area (the "Biodiversity Stewardship Area" or "BSA") under legislation or other legally effective means that is sufficient in size, ecological capacity and habitat quality to support ACFN biodiversity objectives, the exercise of ACFN Aboriginal and Treaty Rights, and the culturally important relationships between ACFN and local wildlife, including the RLBH (the "BSA Objectives"), through creation of the Biodiversity Stewardship Area consistent with boundaries set out in the attached map.”¹⁰⁵

89. ACFN agrees that the protection of additional habitat for these species is critical amidst the large-scale disturbance in the lower Athabasca region and may support the culturally important relationships between ACFN and local wildlife. However, the BSA is still in its preliminary stages and ACFN does not have sufficient information to know whether the BSA will be large enough or contain the requisite quality and types of habitat to satisfy the BSA Objectives. That is, the BSA is necessary but not sufficient to achieve these objectives. Therefore, like Teck, ACFN does not consider it to be a Project-specific mitigation.

Mitigation and Management Commitments:

90. Teck has made the following commitment in furtherance of the BSA Objectives:

91. Teck will:

- a) commit its Twin Lake leases and northern-most portion of Lease 840 to the Biodiversity Stewardship Area (the "BSA Leases") by formally transferring or conveying the BSA Leases to a Regulatory Authority for the purpose of permanently protecting the Biodiversity Stewardship Area once the Authority has established an appropriate mechanism for establishing the BSA.

Requested Recommendations

92. ACFN notes that Teck’s leases will only contribute a portion of the proposed BSA; more leases will need to be relinquished by lease-holders and retained by the Crown for the purposes of conservation. Therefore, Teck and ACFN are jointly support the following Crown actions to support the BSA Objectives:

- a) By 2020, the establishment of the Biodiversity Stewardship Area as a legislated protected area, taking steps to consolidate, purchase, or otherwise transfer the leases in this area to the BSA;
- b) a joint management and shared decision-making role for ACFN in the governance of the BSA; and

¹⁰⁵ ACFN-Teck Joint Submission, s.5.1.

- c) incorporation in the BSA legislative and regulatory means to protect RLBH, Caribou, and migratory bird critical habitat to support the RLBH, Caribou, and Migratory Bird Objectives.

6.4 Alberta's Failure to Attend the Hearing

93. Alberta has consistently refused to appear at environmental assessment hearings, leaving significant gaps in the evidence. During Canada's evidence and subsequent cross-examination, significant issues were raised that remain inadequately addressed due to Alberta's failure to attend the hearing. In particular, Canada's witnesses were unable to fully address questions relating to the following issues, instead referring to the questions as being within Alberta's knowledge or jurisdiction:
- i. the application and functioning of the Surface Water Quality Management Framework,¹⁰⁶
 - ii. the potential for amendments to the Surface Water Quality Management Framework,¹⁰⁷
 - iii. the establishment of the Biodiversity Stewardship Area (BSA),¹⁰⁸
 - iv. the status of a potential conservation agreement for the Ronald Lake Bison Herd under s. 11 of SARA,¹⁰⁹
 - v. the status of a potential conservation agreement for caribou under s. 11 of SARA,¹¹⁰
 - vi. the availability of health services in Fort Chipewyan,¹¹¹
 - vii. the designation of key wildlife biodiversity zones,¹¹²
 - viii. the designation of safe landing areas for the whooping crane,¹¹³
 - ix. the management of commercial fisheries in the region,¹¹⁴ and
 - x. the Alberta Ambient Air Quality Objectives.¹¹⁵
94. Alberta's failure to attend this hearing has left the Panel and the parties, including ACFN, without meaningful answers to a number of significant questions. The ACO's Hearing Report does not fill in these gaps.

¹⁰⁶ CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018, at pg 3244 – 3245.

¹⁰⁷ CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018 at pg 3246.

¹⁰⁸ CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018 at pg. 3288.

¹⁰⁹ CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018 at pgs 3289 – 3290.

¹¹⁰ CEAA Doc #655, Hearing Transcript Volume 17: October 24, 2018, at pgs 3665 – 3666.

¹¹¹ CEAA Doc #655, Hearing Transcript Volume 17: October 24, 2018, at pg 3576.

¹¹² CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018, at pg 3324.

¹¹³ CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018, at pg 3329.

¹¹⁴ CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018, at pg 3353.

¹¹⁵ CEAA Doc #650, Hearing Transcript Volume 16: October 23, 2018, at pg 3482.

7. Additional Key Areas of Importance

7.1 Fish

95. ACFN members have noticed significant changes to the amount, type, and health of fish they catch in their territory. At the Old Fort reserve (on the south shore of Lake Athabasca) ACFN members used to be able to catch large quantities of a variety of fish: jackfish, pickerel (walleye), goldeye, suckers, and whitefish. Julie Mercredi, who grew up at Old Fort and still fishes there, spoke about the drastic changes in the fishery. She said it doesn't matter where she sets her nets, all she has been able to catch in the last 3 years are small goldeyes.¹¹⁶
96. The story is similar across ACFN territory. ACFN members are having similar problems catching fish at Jackfish Reserve and Quatre Fouche River.¹¹⁷ ACFN members used to catch whitefish at Jackfish Lake for making dryfish. This Lake used to support a commercial fishery with large, 50-60ft fishing boats and lots of families making a living. Now, all that ACFN members catch are little goldeyes, which are not good for making dryfish. There has also been a decline in walleye. Numbers have been particularly depleted in the last four years.¹¹⁸
97. The quality of fish that people catch has also changed. For example, the flesh of whitefish is usually firm and flakey. Now, it is mushy and no longer flakes apart.¹¹⁹ Lots of fish now have growths on them. Julie Mercredi recalls setting nets on the Athabasca River at Poplar Point reserve in 2008 and 2009 and found problems with about half of the fish that she caught.¹²⁰ She described some fish had little lumps on their bodies which would ooze liquid when pressed. Other fish had little white spots on their organs and oddly coloured and wrinkled spots on their livers. She didn't eat any of them. Most ACFN land users don't fish out of the Athabasca River any more. In 2014, Morgan Voyageur caught 30 walleye - 25 of them had growths on them.¹²¹ The growths looked like giant pimples – white and full of pus - and their gills were purplish, not the usual bright red. He refused to feed those fish to his dog.
98. ACFN members are concerned that the large-scale increase in oil sands operations has caused the decline in fish and aquatic health and water quality. They recall changes taking place almost immediately after the oil sands started. First, the little black beetles on the surface of the river were gone.¹²² And then they started to see oil slicks and balls of foam on the river. Around 1976, in the winter, there was an oil spill at Suncor. The ice trapped the oil and it poured out into Lake Athabasca in the spring.¹²³ Still today, ACFN members see patches of oil, foam and scum along the shores and surfaces of waterbodies across their territory. The presence of foam and scum has

¹¹⁶ Will say of J. Mercredi, pdf pg 15, para 9-10

¹¹⁷ Will say of J. Mercredi, pdf pg 15, para 11.

¹¹⁸ Will say of M. Voyageur, pdf pg 5, para 40.

¹¹⁹ Will say of J. Mercredi, pdf pg 16, para 12.

¹²⁰ Will say of J. Mercredi, pdf pg 16, para 13.

¹²¹ Will say of M. Voyageur, pdf pg 6, para 40.

¹²² CEAA Doc #498, Appendix H, *Will say of Alice Rigney* ("Will say of A. Rigney"), pdf pg 21, para 22.

¹²³ Will say of A. Rigney, pdf pg 21, para 22.

increased on the water in the last 10 years or so¹²⁴ and no one drinks water from the land anymore – land users all haul water with them when they go out onto the land.¹²⁵ This limits the distance ACFN members can travel, how much they can hunt, and makes land use even more expensive.

99. ACFN members are worried about eating contaminated fish and have changed their diets and habits as a result. Morgan Voyageur used to eat at least 1 fish a week but now consumes approximately 1 fish a year.¹²⁶ He doesn't even try to catch walleye anymore, instead going to inland lakes to harvest trout. Trout is not the preferred fish of ACFN but more and more members are doing this to substitute the fish species they have lost. Now, if they want whitefish, ACFN members have to go into Saskatchewan in the middle of winter.
100. The Frontier Project will destroy fish habitat in the Project area and create emissions that will contribute to declining water quality in the region. Teck has recognized that ACFN places great value in the ability to exercise their Treaty right to fish and has committed to the following Fish Objectives:

“ensuring that mitigation and compensation for Project impacts to fish habitat are implemented in a manner that is locally and cultural appropriate and supports ACFN Aboriginal and Treaty rights to harvest fish in ACFN territory (the "Fish Objectives").”¹²⁷

Mitigation and Management Commitments

101. To work towards the Fish Objectives, ACFN obtained a number of mitigation and management commitments from Teck. These commitments are found at section 8.2 of the Joint Submissions:
102. Teck will:
- a) work collaboratively with ACFN through Participation Agreement implementation with respect to Teck's mitigation, monitoring, and adaptive management plans, including those that pertain to fish and fish habitat;
 - b) use best available information to identify fish habitat within the lower Athabasca River basin that can be replaced, restored, or enhanced by Teck, to the satisfaction of ACFN, for Teck to create fish habitat compensation units and advance the Fish Objectives;
 - c) design the water intake to minimize entrainment and impingement of fish;
 - d) as approved by Regulatory Authorities, implement fish habitat mitigation and compensation measures to advance the Fish Objectives within ACFN harvesting areas identified collaboratively with ACFN in lieu of, at least in part, the fish habitat compensation lake;

¹²⁴ Will say of J. Mercredi, pdf 16, para 13.

¹²⁵ Will say of M. Voyageur, pdf pg 3, para 26; Will say of A. Rigney, pdf pg 22, para 29; Will say of E. Trip de Roche, pdf pg 35, para 14.

¹²⁶ Will say of M. Voyageur, pdf pg 7, para 44.

¹²⁷ ACFN-Teck Joint Submissions, s.8.1.

- e) engage ACFN on Teck's Complimentary Measures Program to identify opportunities for Teck funding for ACFN led initiatives to enhance fish productivity and habitat in ACFN's harvesting areas; and
- f) undertake regular monitoring of fish habitat, fish tissue quality (including mercury levels), fish species diversity and benthic biodiversity in ACFN harvesting areas.¹²⁸

Requested Recommendations

103. However, Crown action is required in the approval of an offsetting plan. As such, to meet the Fish Objectives, ACFN and Teck have identified the following Crown actions if the Project is approved:

- a) By 2019, constructive engagement between the Department of Fisheries and Oceans, Teck, ACFN, and other interested Indigenous communities regarding the acceptability of identifying fish habitat mitigation and compensation measures to achieve the Fish Objective in lieu of, at least in part, the currently proposed fish habitat compensation lake.¹²⁹

104. Canada has stated that it would respect the outcome of consultation between Teck and Indigenous groups.¹³⁰

105. In addition, ACFN makes the following independent recommendations:

- a) By 2020, Canada must undertake a comprehensive study of fish populations, health, and habitat in the lower Athabasca River system (including the Athabasca River, its tributaries, and Lake Athabasca) to understand the status and viability of fish species in the region as well as the impact of oil sands industry and the effectiveness of current habitat offsetting measures on these species; and
- b) By 2020, Canada and Alberta must start working with ACFN to create suitable habitat for those species of fish that are disappearing from the Lake, particularly walleye, jackfish and whitefish.

7.2 Water Quality

106. Fish health and water quality are intimately connected, however, poor water quality has broader effects to ACFN: lack of confidence in water quality means that one doesn't drink water from the land anymore. Land users resort to hauling water with them when they go out onto the land.¹³¹ The need to carry potable water limits how far ACFN members can travel, and therefore, how much they can hunt. This also makes land use even more expensive.

107. Teck has recognized the importance of water quality to ACFN and has committed to the following Water Quality Objectives:

“Having water quality in the Athabasca River, Ronald Lake Watershed, and the Peace

¹²⁸ ACFN-Teck Joint Submissions, s.8.2.

¹²⁹ ACFN-Teck Joint Submissions, s.8.3.

¹³⁰ . CEAA Doc #655, Hearing Transcript Volume 16: October 23, 2018, pg 3250.

¹³¹ Will say of M. Voyageur, pdf pg 3, para 26; Will say of A. Rigney, pdf pg 22, para 29; Will say of E. Trip de Roche, pdf pg 35, para 14.

Athabasca Delta to a quality that can support ACFN biodiversity objectives and the exercise of Aboriginal and Treaty Rights (the "Water Quality Objectives")."¹³²

Mitigation and Management Commitments

108. To work towards this Water Quality Objectives, ACFN obtained the following mitigation and management commitments from Teck. These commitments are found at section 4.2 of the Joint Submissions:

Teck will:

- a) work collaboratively with ACFN through Participation Agreement implementation with respect to development and implementation of mitigation, monitoring, and adaptive management plans related to water quality, including:
 - i. sampling sediment in addition to water as a means to monitor sediment quality;
 - ii. ensuring appropriate monitoring during Construction, to monitor any contaminant spikes in the Athabasca River;
 - iii. ensuring monitoring and sampling protocols accurately assess constituent loads during the rising and falling hydrograph limbs, such as through more frequent discharge and concentration measures throughout the freshet period;
 - iv. supporting greater understanding of the variability in aerial deposition rates and snowmelt, both spatially and temporally across each watershed within the Local Study Area by conducting snow survey and watercourse sampling conducted collaboratively with ACFN when snow is melting in each watershed in the Local Study Area;
 - v. monitor surface and groundwater as a means to inform water quality planning; and
 - vi. meet or exceed all regulatory approval conditions regarding water quality and water discharge.¹³³

Requested Recommendations

109. Again, Teck can only attempt to address ACFN's water quality concerns with relation to the Project. ACFN's concerns are much broader and require a regional response from Alberta to attain the Water Quality Objectives and tackle the cumulative effects that arise from all oil sands operators. Unfortunately, the relevant framework under LARP is inadequate for this task. The Surface Water Quality Management Framework has several flaws, however, its most glaring is that Alberta tests and monitors water quality at only a single location downstream of the oil sands. It is unclear how frequent samples are taken.

110. It is difficult to understand how Alberta can rely on a single site to provide water quality information for an entire river system and delta where water quality is a function of a variety of

¹³² ACFN-Teck Joint Submissions, s.8.1.

¹³³ ACFN-Teck Joint Submissions, s.4.2.

factors that are different and variable throughout the Delta.

111. In comparison, the Oil Sands Monitoring program monitors water quality at (at least) 7 sites downstream of the oil sands.¹³⁴ Seven sites across a massive river and delta system is still far too few, however, it's an improvement over LARP. Remarkably, the data from this program is not incorporated into the Surface Water Quality Management Framework.¹³⁵
112. ACFN also has more robust water quality sampling than Alberta. As described by Bruce Maclean, the ACFN Community Based Monitoring program collects weekly water samples at 5 sites in the PAD, recording water temperature, conductivity, dissolved oxygen, pH, salinity, ORP and turbidity, as well as Indigenous Knowledge Indicators of water health.¹³⁶ ACFN also does quarterly testing in the PAD for a number of contaminants.¹³⁷ This data is analyzed by labs accredited by the Canadian Association for Laboratory Accreditation (CALA) and assessed using the Canada Council of Ministers of the Environment (CCME) Water Quality Index (WQI) Calculator.¹³⁸ ACFN data is also not incorporated into the Surface Water Quality Management Framework.
113. It is evident that Alberta must do more to improve the monitoring of water quality downstream of the oil sands. Therefore, Teck and ACFN are jointly support the following Crown actions in respect of the Water Quality Objectives:
 - a) by 2020, Alberta must revise the Lower Athabasca River Surface Water Quality Management Framework (SWQ_LMF) to expand the number of monitoring sites and frequency of monitoring events as determined jointly by ACFN and local Indigenous communities; and
 - b) by 2020, incorporate an Indigenous caucus in the Joint Oil Sands Monitoring Plan, and revise the SWQ_LMF to incorporate water quality monitoring results from the ACFN and other Indigenous community CBM programs and ensure that the CBM program has sufficient capacity to carry out this work.
114. ACFN also makes the following independent recommendation for Crown action in respect of the Water Quality Objectives:
 - a) Timely and effective integration of CBM, OSM, and SWQ_LMF water quality monitoring data into the management of oil sands operations to respond to adverse changes in downstream water quality as they arise.

7.3 Migratory Birds

115. ACFN has observed changes to migratory birds as the oil sands have developed and expanded. Only 30 years ago, there were thousands and thousands of birds that would fly over the region

¹³⁴ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3246.

¹³⁵ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3247.

¹³⁶ CEEA Doc #498, Appendix H- *Will say of Bruce Maclean* ("Will say of B. Maclean"), pdf pg 46, paras 13-17.

¹³⁷ Will say of B. Maclean, pdf pg 46-48, paras 18-24

¹³⁸ Will say of B. Maclean, pdf pg 47 and 49, paras 21-23, 25.

twice a year.¹³⁹ In the past, these birds relied on the Athabasca River and the Peace Athabasca Delta for stopover habitat; if there was low water there, they would use the inland lakes.¹⁴⁰ ACFN hunters could take as many as they wanted, though they would only ever take what they needed.¹⁴¹ There were good hunting spots on the south shore of Lake Athabasca and all over the Delta and hunters would make their harvest in a couple of days.

116. Now, so much of the oil sands area has been developed that fewer migratory birds travel along the Athabasca River corridor. The birds appear to travel to the east or to the west and ignore the Delta. Many ACFN members have friends or relatives who live in Fond du Lac or Black Lake in Saskatchewan and High Level in Alberta.¹⁴² These communities are getting ducks and geese that they never used to get before – the same types of birds that ACFN no longer sees.
117. For the few birds that still make their way over the Delta, it is increasingly hard to harvest them because the hunting spots have dried up. Hunters have to go further and further from home, which takes more money, time, and effort.¹⁴³ In the past 4 years, hardly anyone has caught enough birds to feed their families.¹⁴⁴ ACFN land users are also finding it more difficult to find bird eggs where they used to collect them.¹⁴⁵ This interferes with the traditional way of life of ACFN members who can no longer hunt, the impacts of which reverberate through the community because there are fewer birds to share and healthy foods are becoming polluted or lost from the community's diet.
118. While ACFN has observed dramatic changes to migratory birds in the oil sands region and the PAD – including declines to flock sizes, altered migration routes and timing, and changes to diversity, distribution and habitat use – western science is only beginning to understand the link between these changes and industrial development along the Athabasca River corridor.¹⁴⁶ The problem is that there is only limited information available regarding current population status or long-term trends in breeding, migrating, and moulting waterbirds, or how anthropogenic landscape changes influence migratory waterbird populations and habitat use.¹⁴⁷ That is, no one has carried out sufficient monitoring or studies of the impacts of oil sands to migratory birds to understand the extent and magnitude of effects to bird health and populations.

¹³⁹ Will say of J. Bruno, pdf pg 42, para 27.

¹⁴⁰ Will say of R. Cardinal, pdf pg 12, para 46.

¹⁴¹ Will say of J. Bruno, pdf pg 42, para 27.

¹⁴² Will say of J. Bruno, pdf pg 42, para 28; Will say of M. Voyageur, pdf pg 5, para 38.

¹⁴³ Will say of M. Voyageur, pdf pg 5, para 39.

¹⁴⁴ Will say of J. Bruno, pdf pg 42, para 27.

¹⁴⁵ Will say of J. Mercredi, pdf pg 16, para 15.

¹⁴⁶ CEEA Doc #498, Appendix I - Sarah Hectenthal and Megan Thompson, *Written Submission to the Joint Review Panel Regarding the Proposed Frontier Oil Sands Mine Project - Assessment of Effects on Migratory Waterbirds* ("ACFN Migratory Bird Report"), pdf pg 624.

¹⁴⁷ ACFN Migratory Bird Report, pdf pg 629.

119. What is understood is, despite ongoing attempts to manage and mitigate risks, migratory birds in Alberta continue to be impacted by oil sands mines via exposure to contaminants and changes to the quality and quantity of food and habitat resources, both at local and regional levels.¹⁴⁸
120. Indeed, industrial waterbodies (including tailings ponds) now cover more than 124 km² (12,402 ha) in the oil sands region.¹⁴⁹ It is estimated that 200,000 migratory birds land on these industrial water bodies annually and are directly exposed to contaminants.¹⁵⁰ Although the reported number of mortalities at tailings ponds is less than 200 annually, the detection accuracy for oiled and dead birds remains uncertain and reported numbers of bird deaths are likely underestimated.¹⁵¹ Existing data suggests that annual mortality may be as high as 100,000 birds each year.¹⁵²
121. Contact with industrial waterbodies can also result in adverse sub-lethal and chronic effects which can affect a bird's survival, health, and fitness.¹⁵³ Although the birds may fly off, these birds may experience numerous effects on health and fitness – of varying degrees of severity – none of which are currently monitored or fully understood.¹⁵⁴
122. Unfortunately, current mitigation methods depend on unproven technologies. Bird deterrents and progressive reclamation do not appear to be effective at protecting migratory birds.¹⁵⁵ It comes as no surprise that available data indicates that migratory birds in the western boreal forest region, which includes the oil sands area, are seeing downward trends.¹⁵⁶
123. The concern about project-specific and cumulative impacts of oil sands to migratory birds is not new. ACFN and other Indigenous communities have raised this concern in other forums and it has been acknowledged by previous Joint Review Panels. The Joint Review Panel for the Jackpine Mine Expansion Project hearing made several recommendations relating to migratory birds on the following issues:
- The need for more information on the effects of exposure to tailings ponds to migratory bird reproductive health or behavior and potential resulting health effects of consumption of hunted birds by local people;¹⁵⁷
 - the need for conservation offsets to mitigate both project and cumulative effects to migratory birds as well as to other components of the environment and Aboriginal traditional uses;¹⁵⁸

¹⁴⁸ ACFN Migratory Bird Report, pdf pg 616.

¹⁴⁹ ACFN Migratory Bird Report, pdf pg 639.

¹⁵⁰ ACFN Migratory Bird Report, pdf pg 632.

¹⁵¹ ACFN Migratory Bird Report, pdf pg 641.

¹⁵² ACFN Migratory Bird Report, pdf pg 642.

¹⁵³ ACFN Migratory Bird Report, pdf pg 643.

¹⁵⁴ ACFN Migratory Bird Report, pdf pg 642-643.

¹⁵⁵ ACFN Migratory Bird Report, pdf pg 652 and 660.

¹⁵⁶ ACFN Migratory Bird Report, pdf pg 629.

¹⁵⁷ Jackpine JRP Report, Recommendation 25, pg 376.

¹⁵⁸ Jackpine JRP Report, Recommendations 36, 52, and 76, pg 377, 379, and 382.

- the collection of additional detailed baseline data on the distribution and abundance of species at risk and migratory birds (before additional site disturbance and during Project construction, operation and after closure) to corroborate the proponent's predictions;¹⁵⁹
- the collection of baseline data, monitoring and reporting on any future changes to the distribution and abundance of species at risk and migratory birds in the oil sands region, with the data made available for future environmental assessments by proponents in the oil sands region;¹⁶⁰
- studies to estimate abundance, density and carrying capacity of the oil sands region for migratory birds;¹⁶¹

124. To ACFN's knowledge, none of these recommendations were carried out and, 6 years later, we are still faced with critical threats to migratory birds.

Requested Recommendations

125. ACFN has worked with Teck to develop recommendations that we seek as approval conditions should the Project proceed. These are found at section 9.3 of the ACFN-Teck Joint Submission:

- a) By 2020, that Alberta develop, and implement a wetland offset program to allow Teck and other parties to offset migratory bird habitat loss and/or protect existing natural wetland habitats currently used by migratory water birds as stopover and breeding habitat outside of the Project Area and within the mineable oil sands region (MOSR);
- b) By 2020, Alberta and Canada, with the participation of ACFN, Indigenous communities, and oil sand operators as appropriate, develop criteria, indicators and thresholds to track and validate the health, stability and sustain ability of migratory birds, including:
 - i. population numbers and demographics;
 - ii. mortality, and contacts with industrial waterbodies;
 - iii. the quality and quantity of habitat, including critical habitat; and
 - iv. quantitative thresholds related to bird contacts on industrial waterbodies;
- c) By 2020, Alberta and Canada, with the participation of ACFN, Indigenous communities, and oil sand operators as appropriate through the Joint Oil Sands Monitoring Program (JOSMP), conduct broader studies, monitoring, and tracking of the health, stability and sustainability of migratory birds including short and long-term regional migratory bird studies to:
 - i. assess the acute and chronic impacts of oil sands development to migratory birds;

¹⁵⁹ Jackpine JRP Report, Recommendation 38, pg 377.

¹⁶⁰ Jackpine JRP Report, Recommendation 41, pg 378.

¹⁶¹ Jackpine JRP Report, Recommendation 54, pg 379.

- ii. support development of criteria and thresholds to track and validate the health, stability and sustainability of migratory birds; and
 - iii. support improved regional planning and management of migratory bird health and viability; and
- d) by 2019, Alberta and Canada include ACFN and other interested local Indigenous communities, in the Oil Sands Bird Contact Monitoring Program, with industry funding to facilitate this participation as necessary.

126. In addition, ACFN seeks the following independent recommendations:

- a) By 2020, Alberta and Canada, with the participation of ACFN, Indigenous communities, and oil sand operators as appropriate through JOSMP, conduct broader studies, monitoring, and tracking of the health, stability and sustainability of migratory birds including:
- i. baseline studies on stopover habitat use by migratory waterbirds in the MOSR (at minimum in the LSA), prior to Project construction in order to provide a baseline for effects monitoring during the Project lifetime and measure success of reclamation;
 - ii. assessment of lethal and sub-lethal impacts on wild migratory bird health and fitness associated with exposure to contaminants, including long-term studies of single and/or multiple OSPW-related toxin exposures in order to detect latent, subtle, or cumulative effects of toxin exposure;
 - iii. development of a consistent, science-based multivariate framework for assessing the composition and toxicity of external industrial waterbodies at mine sites in relation to risks to birds in order to provide an evidence-based evaluation of the potential risk to migratory birds posed by industrial waterbodies at a mine site;
 - iv. development of quantitative targets, benchmarks, or thresholds of bird deterrent performance that would be used to trigger management action should mitigations be ineffective;
 - v. implementation of annual independent performance reviews and development and enforcement of clear and effective consequences should quantitative targets, benchmarks, or thresholds of deterrent performance not be met;
 - vi. studies of the cumulative effects of inhalation contaminant exposure for migratory birds resulting from waterbirds flying through emission plumes or landing on tailings ponds and exposed to airborne toxicants (including hydrogen sulfide, sulfur dioxide, nitrogen dioxide, ozone and particulate matter) using ecologically relevant endpoints;
 - vii. monitoring of broad scale and long-term changes to migration routes in the MOSR. To assist this data collection, oil sands operators should be required to monitor the number of waterbirds migrating over the PDA in spring and fall; and

- viii. monitoring of the long-term health of reclaimed wetlands – and the migratory birds that use them - to determine if they are comparable to natural wetlands in terms of functionality and health and to incorporate results into regulatory approvals and Project reclamation plans.

7.4 Water Quantity

127. As you have seen in ACFN’s evidence, and as is summarized above, sufficient water quantity in the Athabasca River and the PAD is essential for ACFN to exercise their Treaty rights and continue their way of life in their territory.
128. Unfortunately, there isn’t sufficient water in the Athabasca River to permit safe navigation down the River and through the PAD throughout much of the year. According to ACFN members, this is the most significant impact they have experienced from oil sands development.¹⁶² While the Bennett Dam and climate change have also contributed to low water in the Delta, water levels in the southern part of the Delta are predominantly linked to flows on the Athabasca River.¹⁶³
129. Further, ACFN members observed the decline in the Athabasca River and tributaries when oil sands development started and saw that decline accelerate in step with oil sands expansion. Indeed, Raymond Cardinal recalls that between 1970 and 1975 was the last time that ACFN had regular, traditional river breakups on the Athabasca River.¹⁶⁴ A break-up happens where there is so much ice frozen on the river and so much water flowing behind it that the ice doesn’t melt away in the spring, it breaks up into pieces that float down the River and jam up at narrow parts of the River.¹⁶⁵ This causes the water behind the jam to rise and flood the areas along the Athabasca River, providing traditional foods and medicinal plants with needed water. Since the early 1970s, there's only been a few such break ups that resulted in flooding.
130. In the past 20 years – as oil sands expansion increased - the decline in water has been even more drastic.¹⁶⁶ Now, travel along the Athabasca River for much of the open water season is dangerous. In the past, ACFN members were able to travel anywhere on the Athabasca River without having to worry about hitting the bottom. Now, when they travel the River to hunt and fish, particularly from July through the fall, the River is so shallow that they have to alter their course constantly, following the main channel and the strongest part of the current. This makes using the River extremely dangerous because you have to read the currents carefully to avoid hitting a sandbar.¹⁶⁷ This is also an easy way to break a boat motor, which can be prohibitively expensive to fix.¹⁶⁸

¹⁶² Will say of R. Cardinal, pdf pg 11, para 36.

¹⁶³ CEEA Doc #498, Appendix I - *Martin Carver, Indigenous Navigability of the Lower Athabasca River: Alberta’s SWQMF & Teck’s Effects Assessment* (“ACFN Hydrology Report”), pdf pg 10; Will say of R. Bruno, pdf pg 33, para 29.

¹⁶⁴ Will say of R. Cardinal, pdf pg 11, para 37.

¹⁶⁵ Will say of R. Cardinal, pdf pg 11, para 37.

¹⁶⁶ Will say of R. Cardinal, pdf pg 11, para 38.

¹⁶⁷ Will say of R. Cardinal, pdf pg 11, para 38.

¹⁶⁸ Will say of R. Bruno, pdf pg 32-33, para 27.

131. Sticking to the main channels also means that ACFN River users can't go ashore when and where they want, or gain access to back-channels where the best hunting spots are located. Lisa Tsessaze recounted that, just two weeks before the hearing, she could not harvest a moose along the river because of low water levels.¹⁶⁹ That is food that Lisa was not able to provide for her family.
132. Travel in the Delta has become similarly difficult – at some points inaccessible. ACFN members used to travel in small boats through the Delta; it was so expansive and accessible that they could spend a whole day travelling in the back-channels, synes, and little lakes in the Delta. They would hunt for ducks, beaver, moose, and other animals, trap muskrat, fish, and pick berries.¹⁷⁰ Now, all of that is impossible. Many places in the Delta have been dry for so long that grasses and willows have grown over. This means permanent changes – the willows prevent boat access even if water comes back for a season and also prevents skidoo travel when the Delta freezes.¹⁷¹
133. The restrictions on access do not only affect small boats. ACFN members used to run 50-60ft boats into Jackfish Lake in the southern Delta to for commercial fishing.¹⁷² These were large, heavy boats that required significant water quantity to use. This is impossible now as well: the water is too low and too warm, the lake is full of weeds, and the fish are gone.¹⁷³
134. Jackfish Lake – also known as Richardson Lake – is one part of the PAD where changes in water flow have been particularly severe. This is because when the Athabasca River is high, the current flows into Jackfish Lake. When the River drops, the current switches and flows out of Jackfish Lake and into the River.¹⁷⁴ Jackfish Lake is where many ACFN families were born, raised, and spent most of their time throughout the year – hunting, trapping, fishing, picking berries. Now, you can only get into Jackfish Lake by boat in June and July, for a just a couple of weeks when the water comes up.¹⁷⁵
135. The importance of the inability of ACFN members to get into Jackfish Lake cannot be understated. It has a tangible impact on ACFN members. René Bruno, who was born at Jackfish, stated “I really miss Jackfish Lake; it hurts me not to go there”.¹⁷⁶ When thinking about all the places that she can't get to anymore, Alice Rigney, who grew up at Jackfish, also stated that “the one that hurts the most is Jackfish Lake”.¹⁷⁷ There used to be ACFN gatherings at Jackfish but very few people use the area anymore – this is an impact that has hit the entire community.
136. The ironic part is that Jackfish Lake is part of Chipewyan 201 (Jackfish Reserve) – a reserve set apart for the exclusive use by ACFN members. Now, even ACFN is excluded.

¹⁶⁹ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2105.

¹⁷⁰ Will say of R. Bruno, pdf pg 33, para 28; Will say of J. Bruno, pdf pg 42, para 25.

¹⁷¹ Will say of R. Bruno, pdf pg 32, para 26.

¹⁷² Will say of J. Bruno, pdf pg 42, para 24.

¹⁷³ Will say of J. Bruno, pdf pg 42, para 25.

¹⁷⁴ Will say of R. Bruno, pdf pg 33, para 29.

¹⁷⁵ Will say of A. Rigney, pdf pg 22, para 30; Will say of R. Bruno, pdf pg 33, para 29.

¹⁷⁶ Will say of R. Bruno, pdf pg 33, para 29.

¹⁷⁷ Will say of A. Rigney, pdf pg 22, para 30.

137. The impacts are not limited to Jackfish Reserve. There is also not enough water coming down the Athabasca River to allow ACFN members to use its Old Fort Reserve (Chipewyan 201A). The part of the PAD where Old Fort Reserve is located is also fed by water from the Athabasca River.¹⁷⁸ There used to be lots of little creeks and small lakes that were all connected; they have all dried up because there is not enough water coming from the Athabasca River to fill them. This prevents ACFN members from getting into hunting areas, including areas where their parents used to hunt.¹⁷⁹ It also forces boaters to take potentially dangerous routes across Lake Athabasca to get back to Fort Chipewyan because they cannot skirt around the Lake via the creeks.¹⁸⁰
138. The water levels in Lake Athabasca and the Desrochers River (which are otherwise maintained by a strong Athabasca River) also have dropped which means that Flett Lake, north of Fort Chipewyan, and the other lakes around it have also dropped.¹⁸¹ ACFN members can no longer get into Flett Lake or trap there anymore, which is a major loss to families who traditionally used that area.
139. The effects of low water in the Athabasca River even reach the ACFN community in Fort Chipewyan. The fall of 2015 was so dry and the river so low that Lake Athabasca receded and boats could not get into the harbour in Fort Chipewyan for several days. The main dock was inaccessible by boat, as evidenced by the photographs found in Bruce Maclean and Jonathan Bruno's will-say statements.¹⁸² Some land users were stranded until the water rose enough to get back to the community. This had never happened before in Fort Chipewyan and could be dangerous in emergency situations if other transportation routes are blocked.
140. Scientific monitoring corroborates the observed decline in water flows in the Athabasca River and the PAD over the last 40 years, which is impairing the exercise of Treaty rights and eroding ACFN's culture and traditional way of life.¹⁸³

7.4.1 Mismanagement by Alberta and Canada

141. The problem of low water quantity in the lower Athabasca River system can be characterized as "death by a thousand cuts". Each oil sands operator claims that because they only take a "small" amount of water out of the Athabasca River they are not responsible for downstream impacts on ecology and navigation. Meanwhile, the total amount of water withdrawn is significant and growing.
142. Operators frequently point to compliance with the appropriate regulations set by Alberta when responding to concerns about low water quantity. Unfortunately, the applicable water use rules do not adequately address the cumulative effects of oil sands development. It is for this reason that ACFN has focused its evidence in this hearing on the problems with the *Surface Water*

¹⁷⁸ Will say of J. Mercredi, pdf pg 16, paras 16-17.

¹⁷⁹ Will say of J. Mercredi, pdf pg 16, para 17.

¹⁸⁰ Will say of J. Mercredi, pdf pg 17, para 20.

¹⁸¹ Will say of J. Bruno, pdf pg 38, para 2.

¹⁸² Will say of J. Bruno, pdf pg 41, para 18; Will say of B. Maclean, pdf pg 50, para 32.

¹⁸³ CEAA Doc #498, Appendix F, *ACFN-MCFN Community Based Flow and Depth Monitoring in the PAD* (2016), pdf pg 573.

Quantity Management Framework (SWQMF or the “Framework”) and made several recommendations for the Crown regarding amendment of this Framework.

143. Government failure to properly manage water quantity goes back to the start of the conversation around “in-stream flow needs” in the lower Athabasca Region. Since 2004, ACFN has been fighting for the implementation of thresholds for in-stream flow needs in the Athabasca River to ensure that there was enough water in the Athabasca River to support the exercise of Treaty rights.¹⁸⁴ To date, the Crown has expressed little interest in protecting Indigenous navigation. As such, ACFN developed its community-based monitoring (CBM) program to measure water flow and depth in the Athabasca River system and presented reasonable options to both Alberta and Canada regarding in-stream flow needs.¹⁸⁵ ACFN provided countless hours of substantive input into development of the Framework. Two of ACFN’s most significant contributions are:
- *As Long as the Rivers Flow – Athabasca River Knowledge Use and Change* (2010)¹⁸⁶ and
 - *ACFN-MCFN Community Based Flow and Depth Monitoring in the PAD* (2016).¹⁸⁷
144. There are a number of parties with a role in the regulation of water withdrawals on the Athabasca River. Transport Canada has a role to play in because “navigation” is a federal constitutional responsibility and River is a “navigable water” under the *Navigation Protection Act*. Fisheries and Oceans Canada (DFO) has a role to play because “inland fisheries” are a federal constitutional responsibility and the River supports Indigenous and recreational fisheries. Alberta Environment and Parks (AEP) has a role to play because provinces have the authority to manage residential and industrial water withdrawals from surface and groundwater sources. Alberta’s role has been delegated by AEP to the Alberta Energy Regulator with respect to water withdrawals by oil sands operators.
145. Unfortunately, none of these government departments have managed or regulated the Athabasca River adequately or appropriately. They have failed to provide ACFN with the certainty that they can, and will continue to be able to, practice their rights on the River and in the PAD.
146. Transport Canada is aware that ACFN and other Indigenous communities navigate the Athabasca River in order to practice Treaty protected rights to hunt and fish.¹⁸⁸ ACFN has advised Transport Canada that ACFN considers navigation of the River and other waterways in ACFN territory to be a Treaty right itself.¹⁸⁹ Transport Canada has further known, for at least 6 years, that ACFN was experiencing issues with navigability on the Athabasca River. Indeed, in its 2012 submission to the Joint Review Panel at the hearing for the Jackpine Mine Expansion project, Transport Canada acknowledged that ACFN and other Indigenous communities had concerns with navigation in the

¹⁸⁴ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2105.

¹⁸⁵ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2105-2106.

¹⁸⁶ CEEA Doc #498, Appendix D, pdf pg 186.

¹⁸⁷ CEEA Doc #498, Appendix F, pdf pg 573.

¹⁸⁸ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3267.

¹⁸⁹ CEEA Doc #498, Appendix F - *ACFN letter to Minister Garneau*, pdf pg 566; CEEA Doc #498, Appendix F - *ACFN response to Transport Canada*, pdf pg 746.

region and acknowledged that a study was needed to understand the problem.¹⁹⁰ Transport Canada conceived the study as the “*Lower Athabasca River Navigation Knowledge Gap Study*” and described 5 objectives.

- i. Identify main areas of concern by consulting users of the Lower Athabasca River. The study will identify knowledgeable individuals in the area and summarize their views.
- ii. Collate and review historical sediment data, hydrologic data, past navigation charts and dredging information, and recent bathymetric data.
- iii. Survey the river bathymetry at key locations identified.
- iv. Conduct an analysis at each of the key locations to determine how changing flows will affect water levels, channel characteristics, and navigability.
- v. Prepare a report summarizing the data, analysis, and conclusions.

Transport Canada believes the proposed Study will increase scientific and sociological understanding of the impacts of water withdrawals on navigation in the lower Athabasca River and the Peace Athabasca Delta.”¹⁹¹

147. This study was not completed. A similar study is currently underway. However, it too is incomplete.¹⁹² ACFN has been trying to get Transport Canada to assess navigation on the Athabasca River for the past 6 years and the agency is just getting to it now – too late to be of any value to this hearing process. (The absence of this information has also been a detriment to the on-going regulation of oil sands water withdrawals as Alberta approves operators’ *Water Act* license renewals without an understanding of the impacts of water withdrawals on navigation in the lower Athabasca River and the Peace Athabasca Delta.)
148. As a result, Transport Canada was not able to offer this Joint Review Panel any information on the current state of navigation on the Athabasca River or the cumulative effects of water withdrawals by oil sands industry. Nor has the department provided any information about the impact of the Frontier Project on navigation as its assessment will not be conducted until after this Joint Review process is concluded.
149. It is not clear whether Transport Canada’s future assessment will provide any meaningful assessment of the impact the Frontier Project will have on navigability. Section 5 of the *Navigation Protection Act (NPA)* compels an assessment of whether a “work” such as a river water intake (RWI) is “likely to substantially interfere with navigation”.¹⁹³ An RWI can cause such interference in one of two ways: 1) the physical structure of the RWI blocking boat travel, and 2) the function of the RWI – withdrawing water – removing too much water for boats to travel in. Transport Canada’s assessment of the Frontier Project under the *NPA* – including the Project’s

¹⁹⁰ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3258-60, 3262-63.

¹⁹¹ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3261-62.

¹⁹² CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3263-64.

¹⁹³ *Navigation Protection Act*, RSC 1985, c N-22 (“*Navigation Protection Act*”), s.5.

contribution to cumulative effects – will fall short of Transport Canada’s statutory responsibilities as it will only consider physical structure of the RWI. It will not assess the water withdrawing function of the RWI.¹⁹⁴ Although Transport Canada suggests that its assessment may take place under the proposed *Canadian Navigable Waters Act*, this legislation is not yet in force; it is unclear when it will come into force, and no one has seen a navigation assessment under the proposed act to know whether it will be adequate.

150. Not only is Transport Canada absent for the purposes of assessing navigability and project-specific and cumulative impacts, but it is also absent from the applicable water withdrawal regime. Transport Canada was not involved in the design or implementation of the Framework or the Aboriginal Navigation Index under the Framework.¹⁹⁵ And, despite having the power to create regulations under s.28(1)(c) of the *NPA* respecting water levels and flow necessary for navigation,¹⁹⁶ Transport Canada has not established any measures for the protection of Indigenous navigation on the Athabasca River from the effects of low-flow.¹⁹⁷
151. Transport Canada has completely abdicated its constitutional responsibility to protect navigation on the Athabasca River. The agency’s submissions to the JRP are inadequate and incomplete. It has not provided any information to assist this Panel in understanding the state of navigation, cumulative impacts of oil sands develop, or Project-specific impacts. It has not provided any recommended mitigations to reduce Project and cumulative impacts.¹⁹⁸ It did not send anyone to the hearing with a background in hydrology.¹⁹⁹ Therefore, its submission should be given little or no weight. ACFN further requests that this Panel direct Transport Canada to engage with Indigenous communities - immediately and with specific and timely objectives - to assess the state of and impacts to navigation on the Athabasca River and ensure that all current and future regulations respect and protect Indigenous navigability.
152. In summary, Transport Canada has failed Indigenous communities by drafting a set of water management rules that do not protect Indigenous navigation and specifically fail to protect ACFN’s Treaty rights.

7.4.2 Problems with the SWQMF

153. Alberta has also failed Indigenous communities. The Surface Water Quantity Management Framework could provide regulations that adequately protect ACFN navigation of the Athabasca River and supporting tributaries. However, it does not.²⁰⁰ As Dr. Martin Carver stated in his expert evidence, the Framework fails to protect Indigenous navigability for several reasons.
154. First, the weekly triggers are too low to protect navigability. Indigenous knowledge and 8 years

¹⁹⁴ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3254.

¹⁹⁵ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3256.

¹⁹⁶ *Navigation Protection Act*, s.28(1)(c); CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3258.

¹⁹⁷ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3257.

¹⁹⁸ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3255.

¹⁹⁹ CEEA Doc #650, Hearing Transcript Volume 16: October 23, 2018, pg 3253.

²⁰⁰ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2158.

of water quantity data collected by the ACFN /MCFN CBM program have determined that access to ACFN territory for the exercise of Treaty rights starts to become challenging at a flow rate of 1600 m³/s (the Aboriginal Base Flow) and is completely impaired at 500 m³/s (the Aboriginal Extreme Flow, or AXF).²⁰¹

155. However, the Framework permits a flat water withdrawal rate of 29 m³/s throughout the entire open water season (June 11 to Oct 28) while the weekly triggers in the Framework only start to reduce water withdrawals when the river flow rate is around 110 m³/s.²⁰² This is well below the AXF of 500 m³/s and long after navigability in the River and across the Delta has been drastically impaired.
156. Even when the lowest threshold of 87 m³/s is triggered, the Framework still permits operators withdraw water from the Athabasca River at a rate of 4.4 m³/s.²⁰³ This withdrawal amount has a disproportionately large impact on water levels when flows are that low. This “cut-off exemption” was included to prevent issues with pipes freezing in the winter, and therefore, should not be necessary in the open-water season.²⁰⁴
157. Second, the Framework acknowledges the concept of AXF and refers to the leading science on its quantification, but then arbitrarily sets the threshold at a low level (300m³/s) despite overwhelming evidence to the contrary.²⁰⁵
158. Third, the Framework permits industry to take a higher water withdrawal during the fall to fill storage ponds so as to reduce withdrawals during the winter.²⁰⁶ This provides some protection to fish during the winter (when freezing and reduced flows can leave little water for fish), but it also reduces the River volumes available in the fall, when river flows are naturally low and when water is necessary for ACFN members to travel their territory to hunt moose.
159. Fourth, the Framework is based on a one-point analysis; it only monitors water levels at one point on the River (Poplar Point) and ignores the variety and complexity of sites throughout the Delta and the 213 km of river downstream of Fort McMurray.²⁰⁷
160. Fifth, the long-term/adaptive management trigger for navigation – known as the Aboriginal Navigation Trigger – does not actually provide any protection for Indigenous navigation. In part, this is because the Aboriginal Navigation Index (the “ANI”) - the indicator that measures the long-term changes in flow and navigation - is unsubstantiated and inadequate. There are a number of flaws with the ANI:

²⁰¹ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2148-2150.

²⁰² ACFN Hydrology Report, pdf pg 12; CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2153-2154.

²⁰³ CEAA Doc #599, *From the Athabasca Chipewyan First nation to the Joint Review panel re: Hearing Presentation Impacts to the Indigenous Navigability of Lower Athabasca River* (“ACFN Hydrology Presentation -slides”), pg 10.

²⁰⁴ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2153

²⁰⁵ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2154-2155

²⁰⁶ ACFN Hydrology Report, pdf pg 15; CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2150.

²⁰⁷ ACFN Hydrology Report, pdf pg 15.

- i. It sets “zero navigability” at 300 m³/s, a point that did not have any scientific justification when it was set and has since been demonstrated to be invalid by ACFN/MCFN CBM data.
- ii. It excludes negative values. When flow drops below 300 m³/s, all index values are set to zero instead of being given a negative value. This means that when flows are at their worst, they are not being tracked and evaluated appropriately.
- iii. The ANI that is used in the trigger is averaged over 10 weeks, so it fails to capture short-term (ie weekly) changes/declines in flows when ACFN members experience lost navigability.²⁰⁸

161. The test to trigger a response under the Framework also ignores the state of navigability:

- i. the focus of the test is on how much change is brought about by oilsands withdrawals and arbitrarily uses 10% as the limit of concern;
- ii. the current state of navigability or of the ecosystem is of no concern in this trigger’s evaluation; and
- iii. the long-term trend of navigability is also of no relevance.²⁰⁹

162. If – in the unlikely event – the test demonstrates that an exceedance does occur, the response is an assessment of various navigability-related factors, rather than an alteration of upstream water withdrawals to try to improve navigability.²¹⁰

163. Sixth, for both the weekly triggers and the adaptive management trigger, significant impacts to navigability from oil sands can occur before anything is triggered or any management action occurs.²¹¹

164. Dr Carver found that, as a result of these flaws, an operator’s compliance with the Framework does not mitigate or avoid impacts to Indigenous navigability on the lower Athabasca River during the fall hunting season.²¹²

7.4.3 Amendments to the SWQMF

165. Dr Carver suggests the following amendments to the Framework. These suggestions form the basis of ACFN’s recommended approval conditions:

1) New Weekly Triggers.²¹³ Two new weekly triggers are required to protect navigability in the open water season. The first occurs at the flow rate of 700 m³/s. When water flows reach this threshold, operators must scale back their withdrawals so that the total withdrawal from the Athabasca River is no more than 20 m³/s. The second trigger occurs at the flow rate of 500 m³/s.

²⁰⁸ ACFN Hydrology Report, pdf pg 14-15; CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2155

²⁰⁹ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2156

²¹⁰ ACFN Hydrology Report, pdf pg 15; CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2157.

²¹¹ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2160.

²¹² CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2160-2161.

²¹³ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2162.

When water flows reach this threshold, all operators must completely cut-off withdrawals – with no exemptions.

2) A newly configured Navigability Index within the Navigability Trigger.²¹⁴ The Aboriginal Navigability Index should be amended to move the “zero value” from 300 m³/s to the 500 m³/s, which is where a complete loss of navigability actually occurs. The ANI should also be amended to incorporate negative values in order to accurately capture the full range of navigation issues and add validity to the 10-week mean.

3) Effective application of the Navigability Index within the Navigability Trigger.²¹⁵ When the Navigation Index triggered, there must be a clear, effective, and immediate management responses that support Indigenous navigability. Additional factors should be taken into account including:

- annual trends in navigability;
- Weekly variability in navigability;
- Magnitude of oilsands water withdrawals;
- climate change; and
- recent CBM findings from field monitoring.²¹⁶

4) Monitoring, verification and reporting of performance outcomes.²¹⁷ To ensure that the Framework is based on robust science, reflects actual navigation conditions, and responds adequately to navigability issues, the Framework must be amended in the following ways:

- i. Provide support for community-based monitoring and inclusion of CBM data into the SWQMF. The CBM program conducts the most regular, frequent, and widespread flow and depth monitoring in the lower Athabasca River and PAD. Their program is robust and generates reliable data on water quantity. The Framework should include this data in developing, updating, refining indicators, limits and triggers. A foundational principle of the Framework is that it “Incorporates Flexibility and Adaptability”, so it should incorporate credible information on ecological and navigation knowledge gaps, wherever it comes from.²¹⁸ To date, Alberta has been unwilling to do this.
- ii. Incorporate reliable hydrometric monitoring downstream of oilsands into the SWQMF. The Water Survey of Canada station at Fort McMurray is currently the only hydrologic gauge that is incorporated in the Framework. It is located upstream of oil sands river water intakes and hundreds of kilometers away from where navigability impacts occur. A hydrologic gauge downstream of the oil sands would provide important information about river flows after the oil sands have taken their fill and allow for a more nuanced

²¹⁴ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2162.

²¹⁵ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2162-2163.

²¹⁶ ACFN Hydrology Presentation -slides, pg 24.

²¹⁷ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2163-2164.

²¹⁸ Government of Alberta (2015) *Lower Athabasca Region: Surface Water Quantity Management Framework for the Lower Athabasca River* (“SWQMF”), pg 9.

understanding of the relationship between flow rates on the Athabasca River and navigability impairments and lost access throughout the river system and in the PAD. The downstream gauge would only need to monitor low flows (ie. below 1600m³/s), which is technically feasible and would provide reliable data.²¹⁹

- iii. Require independent verification of industry reporting of withdrawals. There is currently no independent mechanism to verify how much water oil sands operators are withdrawing from the Athabasca River. Accountability and transparency are the hallmarks of good governance and ACFN expects this to be included in an amended Framework.
- iv. Require public reporting of industry water use and monitoring data. Again, this goes to ACFN's expectation of accountability and transparency in the Framework.
- v. Require an annual report on the state of Indigenous Navigability in order to support the understanding of local Indigenous communities and the broader public regarding water use, management, and challenges in the lower Athabasca River system and PAD.

166. As noted above, and by Lisa Tsessaze in her evidence, ACFN has spent considerable time and resources attempting to develop rules for managing water use along the Athabasca River that respected Treaty rights and urging Alberta to amend the Framework because it failed to respect Treaty rights. Unfortunately, Alberta refuses to modify the Framework to protect ACFN Rights, so ACFN requests that this Panel make the necessary recommendations to amend the Framework to protect ACFN rights and create certainty for the continuation of ACFN's rights.

7.4.4 Alignment with Other Parties

167. ACFN is not alone in its concerns with the Framework, and ACFN's recommendations align with those of other Parties.

168. For example, Parks Canada is concerned with Athabasca River flows because the Athabasca River feeds the PAD, which is part of Wood Buffalo National Park and comprises one of the "outstanding universal values" of the Park. Parks Canada notes in its August 31st submission to the Panel that:

*"As determined through SEA process, the desired outcomes of the PAD are currently not being achieved, due in large part to a reduced quantity of water in the PAD. As a result, any Project activities (i.e. water withdrawals, modification of flows etc.) that could adversely affect the existing condition of the PAD is problematic from a cumulative effects perspective."*²²⁰

169. Parks Canada further submitted that the Framework is not an effective mitigation measure for

²¹⁹ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2163.

²²⁰ CEEA Doc #489, *From the Government of Canada (Environment and Climate Change Canada, Health Canada, Transport Canada, Parks Canada, Fisheries and Oceans Canada, Natural Resources Canada, and Whole-of-Government) to the Joint Review Panel re: Hearing Submission Filing (Note: Document Update September 19, 2018 to include Addendum See Reference Documents #547 and #548) ("Federal JRP Submission")*, pdf pg 459.

Project impacts and will not protect to the OUV of WBNP:

“...Parks Canada does not agree with Teck's use of SWQMF as a mitigation measure, as it does not provide protection of the OUV. The SWQMF acknowledges gaps in ecological knowledge, mostly in the PAD.... In addition, use of the Aboriginal Navigation Index within the SWQMF would not be effective as a mitigation measure to prevent effects on flows, because the trigger for management action is calculated after the effect has already occurred and results in investigation, not mitigative actions.... As a result of the SWQMF not being developed to protect PAD ecosystems and not including mitigation for Indigenous access, the SWQMF as it is designed right now cannot be relied on to protect the WBNP OUV.”²²¹

170. In order to mitigate impacts to Aboriginal rights and adverse environmental effects to the WBNP federal land and OUV, Parks Canada recommended to the Panel that:

“...Teck not be permitted to withdraw water from the Athabasca River when the flow rates at the Athabasca below the McMurray Station are below the Aboriginal Extreme Flow of 500 m³/s”²²²

171. Under cross-examination by counsel for Teck, Parks Canada agreed that the Framework needs to be amended, noting that the water quantity problem on the Athabasca River is:

“...a bigger problem than just one company and that's why we state that we recommend that the Surface Water Quantity Management Framework be amended to be protective of the OUV before it is applied to this project ... that is a better approach to ... managing water quantity because it can be more complex and address all the different water withdrawals and address all those components”²²³

172. MCFN has also stated that *“the Surface Water Quantity Management Framework cannot be treated as a mitigation measure for effects of any oil sands project on water quantity and Mikisew navigation”²²⁴* and recommended that Alberta *“cease water withdrawals in the open-water period when discharge in the Athabasca River drops below the Aboriginal Extreme Flow (500 m³/s at Fort McMurray WSC gauge)”*.²²⁵

7.4.5 Differences between ACFN’s Independent Recommendations, the ACFN-Teck Joint Conditions and Recommendations, and Teck’s Submission

173. We must clarify here ACFN’s position on the ultimate needs for regional management of water quantity, with respect to the ACFN-Teck Joint Condition regarding Frontier water quantity management.

²²¹ Federal JRP Submission, pdf pg 460.

²²² Federal JRP Submission, pdf pg 461

²²³ CEAA Doc #655, Hearing Transcript Volume 17: October 24, 2018, pg 3494.

²²⁴ CEAA Doc #497 *Cover Letter and Hearing Submission – August 31, 2018*, (“MCFN Hearing Submission”) pdf pg 18.

²²⁵ MCFN Hearing Submission, pdf pg 48.

174. When cross-examining Parks Canada, counsel for Teck asked whether it would be more prudent for the Panel to rely upon the agreed upon conditions that ACFN and Teck and MCFN and Teck agreed upon after “extensive discussions” rather than the ACFN and MCFN recommendation of a hard cut-off for water withdrawals at 500m³/s.
175. This statement requires some clarification. Counsel for Teck, Mr. Ignasiak did not specify the agreed upon conditions he was referring to, but he – no doubt – was referring to Teck’s commitment at section 3.2(d)(i) in the ACFN-Teck Joint Submission that Teck will:
- “d. use the Aboriginal Extreme Flow (500m³/s) as measured immediately upstream of the RWI as a key monitoring indicator and performance threshold, by:
- i. Planning water withdrawals to avoid or minimize water intake, including where feasible stopping or reducing water intake, when Aboriginal Extreme Flow (500m³/s) conditions exist”²²⁶
176. ACFN worked hard with Teck in crafting the Mitigation and Management Commitments and Requested Recommendations in the Joint Submission related to water quantity. However, the commitments and joint recommendations were unable to address the cumulative and regional nature of ACFN’s concerns.
177. The important word in this commitment is “where feasible”. Teck has indicated to ACFN that their water-use efficiency and storage pond capacity means they are better placed than all other oil sands operators to try to meet this threshold. Teck has also indicated that perfect compliance with the 500 m³/s threshold is not currently economically or technically achievable.
178. However, similar to Canada, ACFN agrees that preserving the ecologic function and navigability in the PAD requires all oil sands operators to respect the 500m³/s threshold. Therefore, ACFN would ultimately like to see the Framework amended to require that all oil sands operators - including Teck- completely shut of their river water intakes when the river flow reaches 500m³/s during the open-water season. Oil sands operators would be expected to adjust their operations so that they are able to take this action whenever it is required.
179. The Framework needs to be amended because the adherence of one oil sands operator to the 500m³/s cut off would not be enough to address the cumulative effects of all oil sands water withdrawals. However, as Dr Carver observed, if Teck alone were to adhere to this cut-off, it would be an important step in a long-term solution and would set a precedent for other operators to learn from and follow. Indeed, we understand that achieving consistent compliance with the 500 m³/s threshold will require industry wide innovation and commitment. It was for this reason that the ACFN-Teck Joint Submission recommended the following approval condition to ensure that the best available water use expertise and technology is shared with all operators:
- “by 2020, advance improved water use efficiency in the oil sands by facilitating the sharing and implementation of best-in class water use expertise and technology between all oil*

²²⁶ ACFN-Teck Joint Submissions, s.3.2(d)(i).

sands operators"²²⁷

Mitigation and Management Commitments

180. Teck is aware that the water quantity in the Athabasca River and PAD is important to ACFN and committed to:

"Supporting natural water quantity flows in the Athabasca River and the Ronald Lake Watershed, to enable ACFN members to navigate these waterbodies and access adjacent ACFN reserves, territories, and the Peace Athabasca Delta at their pleasure; and support ecological needs in the Athabasca River, Ronald Lake Watershed, and the Peace Athabasca Delta (the "Water Quantity Objectives")."²²⁸

181. To work towards this Water Quantity Objective and attempt to address Project-specific impacts to water quantity, ACFN obtained the following mitigation and management commitments from Teck. These commitments are found at section 3.2 of the Joint Submissions:

182. Teck will:

- a) work collaboratively with ACFN through Participation Agreement implementation with respect to development and implementation of mitigation, monitoring, and adaptive management plans related to water quantity;
- b) install hydraulic gauges on the Athabasca River, immediately upstream of the River Water Intake (RWI) and downstream of the Project;
- c) measure and share water intake data with Regulatory Authorities and ACFN;
- d) use the Aboriginal Extreme Flow (500 m³/s) as measured immediately upstream of the RWI as a key monitoring indicator and performance threshold, by:
 - i. planning water withdrawals to avoid or minimize water intake, including where feasible stopping or reducing river water intake, when Aboriginal Extreme Flow (500m³/s) conditions exist;
 - ii. using the off-stream storage pond during low flow periods;
 - iii. filling up the off-stream storage pond during high-flow periods;
 - iv. demonstrating continual improved performance on water intake by decreasing water consumption over the life of the Project; and
 - v. advising ACFN and relevant Regulatory Authorities regarding Teck water withdrawal management actions;

²²⁷ACFN-Teck Joint Submissions, s.3.3(f).

²²⁸ ACFN-Teck Joint Submissions, s.3.1.

- e) conduct baseline monitoring of water levels and in-flow hydrology of the Ronald Lake Watershed and associated watercourses where Teck will use flow-splitters;
- f) design and operate flow-splitters to maintain pre-Construction hydrology as informed by baseline measurements and regular monitoring of indicators and thresholds of the Ronald Lake Watershed; and
- g) engage with ACFN through the implementation of the Participation Agreement to continually review best available technology and water management practices, and implement ACFN-Teck consensus recommendations to reduce water intake and improve water management performance so as to achieve the Water Quantity Objectives.²²⁹

Joint Recommendations

183. ACFN has worked with Teck to develop recommendations it seeks as approval conditions if the Project is approved. These are found at section 3.3 of the ACFN-Teck Joint Submission. Teck and ACFN are jointly support the following Crown actions:

- a) by 2020, reconfigure the Lower Athabasca River Surface Water Quantity Management Framework (SWQMF) Aboriginal Navigation Index so that it is zero at the Aboriginal Extreme Flow {500 m³/s}. Retain negative values of the index in calculations and decision-making. Consider renaming it the Indigenous Navigability Index;
- b) by 2020, amend the SWQMF's Aboriginal Navigation Trigger to be a proactive and effective advanced-warning system in support of Indigenous navigability. In it, include:
 - i. considerations of long-term (multi-annual) and short-term (daily, weekly, seasonal) changes in navigability;
 - ii. explicit effective management interventions should navigability loss occur due to oil sands withdrawals; and
 - iii. close collaboration with ACFN and other Indigenous groups to identify and verify issues requiring management action;
- c) by 2020, incorporate flow monitoring data from existing or new hydrometric monitoring stations downstream of the oil sands region into the SWQMF to verify available water for Indigenous navigability and to improve understanding of navigability dynamics. Focus discharge measurements on flow rates below the ABF (1600 m³/s);
- d) by 2020, provide long-term support to Indigenous-led community-based monitoring ("CBM") programs and work closely with First Nations, under an active adaptive management approach, to incorporate CBM data and Indigenous knowledge concerning navigability and its thresholds into SWQMF decision making;

²²⁹ ACFN-Teck Joint Submissions, s.3.2.

- e) by 2020, require all oil sands operators to take regular and frequent measurements of surface water and groundwater use and make this data available to Indigenous communities and regulatory authorities, on this basis or upon reasonable request to support navigability and Indigenous land use activities.

ACFN's Independent Recommendations

184. As noted above, while the above conditions and recommendations are critically important steps, they are insufficient to fully address ACFN regional and cumulative concerns regarding water quantity management. Therefore, ACFN also requests the following independent recommendations be adopted as approval conditions should the Project be approved:

- a) By 2020, Alberta shall revise the Lower Athabasca River Surface Water Quantity Management Framework to:
 - i. limit cumulative water withdrawals from the Athabasca River to no more than 20 m³/s when the flow rate reaches 700 m³/s; and
 - ii. prohibit all water withdrawals from the Athabasca River when flows are below the Aboriginal Extreme Flow of 500m³/s,
as measured at Fort McMurray, during the open water season;
- b) By 2020, Alberta shall revise the Lower Athabasca River Surface Water Quantity Management Framework to require all oil sands operators to only fill water storage ponds during high flow periods (>600m³/s), as measured at Fort McMurray;
- c) By 2020, Alberta shall revise the Aboriginal Navigability Index (ANI) in the Lower Athabasca River Surface Water Quantity Management Framework to reset the “zero value” from 300 m³/s to the 500 m³/s and incorporate negative values;
- d) By 2020, Alberta shall revise the Lower Athabasca River Surface Water Quantity Management Framework to establish clear, effective, and immediate management responses that support Indigenous navigability. Additional factors should be taken into account including:
 - Annual trends in navigability;
 - Weekly variability in navigability;
 - Magnitude of oilsands water withdrawals;
 - Climate change; and
 - Recent CBM findings from field monitoring
- e) By 2020, Alberta shall revise the Lower Athabasca River Surface Water Quantity Management Framework to
 - i. Provide support for community-based monitoring and inclusion of CBM data into the SWQMF and include CBM data in developing, updating, refining indicators, limits and triggers within the Framework
 - ii. Incorporate reliable hydrometric monitoring downstream of oilsands into the SWQMF.

- iii. Require independent verification of industry reporting of withdrawals.
- iv. Require public reporting of industry water use and monitoring data.
- v. Require an annual report on the state of Indigenous Navigability in order to support the understanding of local Indigenous communities and the broader public regarding water use, management, and challenges in the lower Athabasca River system and PAD.

185. ACFN expects the Crown will take the Panel’s recommendations on this subject more seriously than the Recommendations of the Joint Review Panel for the Shell Jackpine Mine Expansion hearing. Two recommendations in Jackpine related to water quantity and remain relevant and unfulfilled today:

Recommendation 5 - The Panel recommends that the Governments of Canada and consider the precautionary cut-off flow approach to address impacts of water withdrawals during extreme low-flow conditions, and potential impacts on navigation. (Water Withdrawal from the Athabasca River)²³⁰

Recommendation 67 -The Panel recommends that [Environment Canada] in collaboration with [Alberta Environment and Sustainable Resource Development] conduct joint research, in collaboration with the interested Aboriginal groups, and report on the causes of the perceived drying of the Athabasca oil sands region and the PAD and that Aboriginal concerns on this issue be considered in any Phase 2 water allocations. (Effects on Aboriginal Traditional Land Use, Rights, and Culture)²³¹

8. Additional Commitments and Recommendations

186. The Agreement between ACFN and Teck also addressed the following topics:

- North Pit Development (s.6);
- Climate Change (s.7);
- Community Based Monitoring and Information Sharing (s.10);
- Health (s.11);
- Air Quality (s.12);
- Bridge (s.13);
- Tailings (s.14);
- Reclamation (s.15);
- Access and Traditional Use Management (s.16); and

²³⁰ Jackpine JRP Report, Recommendation 5, pg 373.

²³¹ Jackpine JRP Report, Recommendation 67, pg 381.

- Heritage Resources (s.17).

187. For each topic, Teck has made mitigation commitments to ACFN. These, like the other mitigation commitments that Teck has made, are contractually binding on Teck. However, should the Project be approved, it is important that such commitments are reflected as regulatory approval conditions; ACFN encourages the Panel to consider this where appropriate.

188. For some of these topics, Teck and ACFN have developed recommendations for Crown actions that are necessary for the mitigation of regional and cumulative issues. These recommendations are worth stating in argument as they round out ACFN's broader argument that the both levels of the Crown – but particularly Alberta – must engage in the management and regulation of the oil sands in a manner that truly respects Aboriginal and Treaty rights and the environment systems on which Indigenous communities, Albertans, and Canadians depend. Should this Project be approved, ACFN requests that the following recommendations be reflected as approval conditions:

189. **Community Based Monitoring and Information Sharing.**

- a) The development and operationalization of a multi-stakeholder monitoring committee - comprised of ACFN, local Indigenous communities, and provincial and federal regulatory authorities- to oversee Project-specific monitoring, follow-up compliance verification, and adaptive management over the lifecycle of the Project.

190. **Health.**

- a) Starting in 2020, the implementation of a Crown -led 10-year community health baseline study commencing upon Project approval, with follow-up monitoring occurring every five (5) years; and
- b) Teck will work cooperative with ACFN, other Indigenous communities, and the Crown on conduct of the study, including an offer to provide funding consistent with regional industry participation and funding.

9. Aboriginal Perspective

191. To make decisions that affect the Aboriginal and Treaty 8 rights, a decision-maker must understand the perspectives of rights-holders. This is consistent with the promise made to ACFN's ancestors at the signing of Treaty 8 that "we would share the land, but if ... a big development was to happen, [the Crown was] to ask us for our permission"²³² as well as with the current efforts to advance reconciliation.

192. This Panel must ensure that it carefully incorporates ACFN's perspective into its report and decision. In this hearing, the Panel has heard from several ACFN members about Dené Law, which

²³² CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2027.

is a clear expression of ACFN's perspective. Elder Alice Rigney²³³ and others described this perspective in their will-say statements, and Lisa Tsessaze²³⁴ eloquently described Dené Law as follows:

- I was always told to be respectful of everyone and everything around me. To watch what I say. Respect is a law for Dené people. It is how we live our lives and is a central part of our culture and spiritual practice;
- The Dené have a strong relationship with the land. This law of respect means that Dené people are taught to take care of the land, to take only what we need, and to use everything we take;
- When I travel over the waters, I pay respect to the water by making an offering. When I harvest animals or pick berries, I pay my respect by making an offering;
- We are responsible for this land and its inhabitants. We are stewards of the birds and the buffalo and the water and the air; we feel pain and guilt and grief when the animals are treated with disrespect.
- The Crown's failure to listen to our knowledge, their failure to protect the buffalo, and the disrespect shown by their staff to the buffalo creates a lack of trust between ACFN and the Crown. The buffalo sustained our Dené ancestors for thousands of years. We need to bring back that love and respect, we need to reconcile that relationship with the buffalo
- To respect the land, we must protect it. We are taught to respect the land and the land will take care of us, the land will provide;
- This is the way I live my life and the values I teach my children. It is the way Dené people have lived for centuries.²³⁵

10. Conclusion

193. It is ACFN's duty as Dënesųliné to care for the earth and its inhabitants. ACFN takes this responsibility very seriously – the continued existence of ACFN's way of life depends on it.

194. To sustain Dënesųliné culture, ACFN members need traditional plants. They need clean and sufficient waters. They need healthy and plentiful animals: bison, caribou, moose, birds, fish. Those traditional resources require a clean environment to sustain them.

195. However, over the past 40 years, ACFN's land, water, and air have been degraded by the cumulative impacts of oil sands development. ACFN has no certainty that their children will enjoy the same land use practices as previous generations; they have no certainty that their

²³³ Will say of A. Rigney, pdf pg 23, paras 32-36

²³⁴ Will say of L. Tsessaze, pdf pg 65, paras 10-18; CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2093-2094.

²³⁵ CEAA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2093-2094.

children will be able to exercise their Treaty rights.

196. Therefore, in the same way that Teck has come to this hearing to obtain regulatory certainty that their mine can proceed, ACFN has come to this hearing to obtain “Treaty certainty”. That is, to ensure that Crown and the Panel take action to guarantee that ACFN’s Treaty rights will be protected in the face of existing and expanding oil sands development.
197. As Chief Adam stated, ACFN is not anti-development, but development must be done right.²³⁶ To this day, there are no credible or effective government systems, frameworks, or protections in place to responsibly assess or manage the cumulative effects of development in this region, and especially not to mitigate those cumulative impacts on ACFN rights.
198. The Crown has a legal and moral duty to honour the Treaty and implement immediate measures to protect ACFN’s hunting, trapping, fishing, and gathering rights on ACFN lands forever – as long as the sun shines, the grass grows, and the Lake is here.

²³⁶ CEEA Doc #604, Hearing Transcript Volume 10: October 15, 2018, pg 2017.