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June 4, 2012

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Dear Sir or Madame,

RE: Notice of Application Teck Resources Limited Frontier Oil Sands Mine Project Athabasca Oil Sands Area; Canadian Environmental Assessment Agency Public comment Period on Environmental Impact Assessment Report; Energy Resources Conservation Board Oil Sands Conservation Act Application No. 1709793; Alberta Environment and Water Environmental Protection and Enhancement Act Application No. 001-00247548 Water Act File No. 00303079

On behalf of Athabasca Chipewyan First Nation (ACFN), the ACFN Industry Relations Corporation (IRC) is submitting this statement of concern (SoC) in respect of Teck's Frontier Mine (the Project) application (ERCB Application No. 1709793; EPEA Application No. 001-00247548; WA File No. 00303079). ACFN's preliminary comments on the Teck Frontier Project Integrated Application (IA) are attached.

The Project is located within the traditional territories of ACFN, in close proximity to ACFN's Poplar Point Reserve (IR 201G) and Point Brule Reserve (IR 201F), and within lands that are used by ACFN members for a number of traditional purposes and for the exercise of Treaty 8 and aboriginal rights. The Project, both alone and together with other industrial development, will have a direct and adverse effect on ACFN's Treaty 8 rights and traditional uses, ACFN's use

and enjoyment of its reserve lands, as well as on the registered trapping rights of some of ACFN's members. ACFN is gravely concerned that the Project will result in a number of impacts to the well-being of its membership.

Based on our review there are serious gaps and flaws in the proponent's IA, such that a proper and full consideration of the impacts to our First Nation have not been adequately identified and assessed. In our view, the IA cannot be deemed complete until such information has been developed and included. ACFN has a number of additional concerns about the IA and associated approvals, and requests that the IA and associated approvals not be approved until such time as the concerns expressed herein are addressed properly.

It should be noted at the outset that the concerns expressed in this SoC are necessarily incomplete, as ACFN's project-specific traditional use study is not yet complete. Further, as ACFN has advised both Alberta and Canada on numerous occasions, the scientifically credible and culturally appropriate information regarding the land and resource required by ACFN for the meaningful exercise of Treaty 8 rights now and into the future, is not yet in place.[1] It is unfortunate that both Canada and Alberta have declined to work with ACFN to gather such information. Until the requested information - which is necessary to understand the land and resource uses, interests and rights of ACFN - is in place, a full understanding of the impacts of this Project upon ACFN's rights and interests, including a complete listing of ACFN's concerns, will not be possible.

This SoC includes the following sections:

1. background information about ACFN and the nature of its rights that are at stake;
2. Treaty 8 - applicable legal principles;
3. preliminary concerns of the Nation regarding the Project;
4. an overview of the results of the technical review;
5. a description of some of the direct and adverse impacts of the Project on ACFN; and
6. ACFN's proposed disposition of the IA

1. Background on ACFN's Rights

ACFN is an Athabascan-speaking Dene people. We call ourselves Dené sułine ("people of the land"). ACFN is an Aboriginal group within the meaning of section 35 of the ***Constitution Act, 1982***, and holds Treaty and aboriginal rights. As can be seen from the attached map, the

[1] In a letter to Alberta Environment and Shell Canada on December 18, 2009, ACFN asked whether the parties were prepared to work with and fund ACFN, prior to any project approvals on the Jackpine Mine Expansion and Pierre Rive Mine projects, on developing a TLRUMP in order to determine the resources on which ACFN relies to exercise their rights. Subsequent to that letter, Alberta Environment requested more information on the TLRUMP concept, and ACFN provided a brief proposal as an appendix to a letter dated February 1, 2010 to Alberta Environment and Shell Canada. A full proposal was provided by Lisa King and M. Lepine on Sept 20, 2010 to Alvaro Loyola, AENV and Sheila Risbud, CEAA; and ACFN and MCFN provided a revised proposal, per government requests, on November 14, 2011.

proposed Project is within ACFN's Traditional Lands and since prior to the signing of Treaty 8 in 1899, the ancestors of what is now ACFN have lived in the vicinity of the Project and used the surrounding lands to sustain their mode of life. For thousands of years, and continuously to the present day, ancestors and present members of ACFN have lived and sustained themselves, their families and their community in the Traditional Lands of ACFN in northern Alberta and in the vicinity of the proposed Project by hunting, trapping, fishing and gathering, carrying out their distinctive way of life, and passing down their culture for countless generations. The land sustains ACFN and is at the heart of their culture, traditions, identity, spirituality and rights. While carrying out their traditional harvesting activities, many older ACFN members also pass down their knowledge and skills to younger ACFN members. The imparting of traditional harvesting knowledge and skills is essential to the survival of ACFN's culture and its distinctiveness as a people. It is clear that as development increases, it is becoming more difficult for ACFN members to hunt, fish, trap and gather.

It is in this context that Chief Allan Adam, in ACFN's April 20th, 2009 submission to the House of Commons Committee on Environment and Sustainable Development (attached) said that:

> It is important for you to understand the nature and severity of the impacts of industrial activity on our rights and on our communities. We have traditionally relied on the land and water to sustain ourselves and to carry out our livelihood. That is what was promised to us in Treaty 8: that we would be able to continue to live and exist as we had before we entered into Treaty. Industrial development has caused adverse impacts to our rights, to our health, and to the environment and ecosystem on which we rely.
>
> To name some examples, that development has taken away lands on which we rely, it has caused the fragmentation of wildlife; it has adversely affected the quality and quantity of wildlife and fish; it has blocked our access to our Traditional Lands; it has depleted water bodies; and it has largely destroyed the delta of the Peace and Athabasca Rivers. As more of our lands are taken up for development, there are fewer and fewer places where we can take our children and grand-children to teach them our culture and way of life. Without a sufficient land base to exercise our rights and pass down our culture, we slowly lose our ability to be ACFN people. While this may be hard for non-Aboriginal people to understand, for us these issues are critical to our survival.

ACFN's Traditional Lands radiate north, east, west and south from the Peace-Athabasca Delta, including the Lower Athabasca River and lands to the south of Lake Athabasca, extending to the lands around Fort McMurray and Fort MacKay. As can be seen from the attached map, the Project is within an area ACFN has identified as the *k'es hochela nene* (Poplar Point Homeland). ACFN homeland zones are identified as areas of critical importance to past, present, and future practice of ACFN use and rights. They are the places where ACFN history, culture, and livelihood are most firmly rooted. The homeland zones are presented as the places ACFN members are most likely to rely on, and require priority access to. As ACFN's population continues to rapidly grow, the resources needed to sustain the use practice and rights will also increase. The Project is also located within the Athabasca River Critical Waterway Zone. Critical waterway zones

recognize the integral importance of water quality and quantity to the ACFN membership and their practice of rights. These interconnected zones extend 5km on either side of waterways that are critical for the practice of ACFN rights.[2]

ACFN has eight reserves set aside for the use and benefit of its members: Chipewyan No. 201 and 201A-201G inclusive. These reserves are all located downstream of the proposed Project. ACFN's I.R. 201 is located wholly within the Peace-Athabasca Delta, five others (I.R. 201A through 201E) are located on the south shore of Lake Athabasca and on the eastern edge of the Peace-Athabasca Delta, and the other two are located on the Athabasca River at Poplar Point (201G), approximately 20 km away from the proposed Project, and Point Brule (201F), approximately 35 km away from the proposed Project. ACFN's reserves were selected in large part because they provided or were located in close proximity to valuable resources that supported the exercise of ACFN's Treaty Rights. For example, the Poplar Point Reserve is under a migratory waterfowl flyway and is near the Athabasca River, the Ronald Lake Bison Herd Range, woodland caribou habitat, fur-bearer habitat, and a moose migration corridor. These reserves were established as part of Canada's obligations under Treaty 8, and in response to rapid encroachment by settlers into ACFN's traditional lands.[3]

ACFN members hold traplines in the vicinity of the proposed Project: RFMA's 2863 and 445. While an RFMA is held by an individual, it provides a resource used by the wider community and is frequently important to the collective use and rights of the First Nation as a whole – extending far beyond the commercial use of the RFMA for the purpose of trapping. Member-held traplines represent unique resources for ACFN use and rights practice, and remain a focal point for traditional land use

The majority of ACFN's 1,024 registered members reside in Fort Chipewyan, Fort McKay, Fort McMurray, Fort Smith, and Edmonton. Members of ACFN continue to hold the rights guaranteed by Treaty 8, including hunting, trapping, gathering and fishing rights. ACFN members actively exercise their Treaty rights and carry out their traditional activities, as their ancestors have for generations, within the vicinity of the Project.

2. Treaty 8 Rights

A. Overview

Treaty Rights of ACFN are understood to include, but are not limited to, hunting, fishing, trapping and gathering for sustenance and livelihood purposes. The full practice of these rights reasonably includes, and is not limited to, access to sufficient lands and resources in which the rights can be exercised. "Sufficient" refers not only to quantity but quality, and is evaluated from the perspective of what is required to fulfill not only subsistence requirements, but also cultural needs, of the First Nation now and into the future. Determining what is "sufficient" encompasses a suite of interconnected tangible and intangible resources that underlie the

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[2] ACFN. 2011. Athabasca Chipewyan First Nation Advice to the Government of Alberta on the Lower Athabasca Regional Plan. November 22, 2011. On file with the ACFN IRC, Fort McMurray, AB.

[3] Indian Claims Commission, Athabasca Chipewyan First Nation Inquiry, Decision dated March 1998 at pages 20-21.

meaningful practice of rights. These "resources" include, but are not limited to:

- Routes of access and transportation;
- Construction and habitation of cabins and other infrastructure
- Water quality and quantity;
- Healthy populations of game in preferred harvesting areas;
- Cultural and spiritual relationships with the land;
- Abundant berry crops in preferred harvesting areas;
- Traditional medicines in preferred harvesting areas;
- Timber in preferred harvesting areas;
- The experience of remoteness and solitude on the land;
- Feelings of safety and security;
- Lands and resources accessible within constraints of time and cost;
- Sociocultural institutions for sharing and reciprocity; and
- Spiritual sites.

B. "[T]he guarantee that hunting, fishing and trapping rights would continue ..."

ACFN entered into Treaty No. 8 (the "**Treaty**") at Fort Chipewyan in 1899. The Treaty guaranteed ACFN's hunting, fishing and trapping rights in support of sustaining our traditional livelihood, in return for which ACFN promised to share the land and resources with the Crown. The rights secured under the Treaty, as modified by the *Natural Resources Transfer Agreement*,[4] were elevated to constitutional status with the enactment of s. 35 of the *Constitution Act, 1982*.

In entering into this Sharing Agreement, ACFN was assured that its way of life would not be changed and that it would be protected. This understanding of the Treaty is firmly entrenched in Canadian law. Pursuant to the Treaty, the Crown promised reserves and other benefits including, most importantly, the following rights of hunting, trapping, and fishing:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have <u>right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered</u> as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[5]

The oral promises made when the Treaty was agreed to are as much a part of the Treaty as the written words.[6] In *Re Paulette et. al. and Registrar of Titles*, Justice Morrow of the Northwest Territories Supreme Court considered the *viva voce* evidence of numerous Treaty 8 beneficiaries

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[4] *Natural Resources Transfer Agreement, 1930* [Alberta], Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26, para. 12.

[5] See *e.g. Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 2, quoting from the *Report of Commissioners for Treaty No. 8* (1899), at p. 12 [underscore added].

[6] *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, paras. 52, 55; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 29.

who were alive at the time Treaty 8 was signed in deciding whether the Plaintiff First Nations could register a caveat with the Registrar of Titles of the Northwest Territories as part of an aboriginal rights claim. Although Justice Morrow's grant of this caveat was overturned, his assessment of the evidence was not and deserves note:

> Throughout the hearings before me there was a common thread in the testimony – that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing and trapping rights. To me, hearing the witnesses at first hand as I did, many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of the lands was not affected. [7]

In a number of decisions, the Supreme Court of Canada has quoted from the Commissioners' reports of the Treaty negotiations, and has relied on the following excerpts (among others) as capturing the oral promises made to Treaty signatories:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. 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.
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> ...
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> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed ... [W]e 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.
>
> We assured them that the treaty would not lead to any forced interference with their mode of life.[8]

See also:

> Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are now.[9]

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[7] *Re Paulette*, (1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.) at p. 33; rev'd (1975) 63 D.L.R. (3d) 1 (N.W.T.C.A.); [1977] 2 S.C.R. 628. [underscore added].

[8] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39 [underscore added]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 26; see also: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, para. 54.

[9] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 55 [underscore added].

The oral promises made by the Treaty Commissioners leave no doubt that "the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties".[10]

Similarly, based on its comprehensive research into the history of First Nations' treaties in Canada, the Royal Commission on Aboriginal Peoples concluded that:

> First Nations would not consider making a treaty unless their way of life was protected and preserved. This meant the continuing use of their lands and natural resources. In most, if not all the treaties, the Crown promised not to interfere with their way of life, including their hunting ... practices ... First Nations [shared their lands] on the condition that they would retain adequate land and resources to ensure the well-being of their nations.[11]

The Supreme Court of Canada has confirmed on many occasions that the principal emphasis of Treaty 8 was on the preservation of the Indians' traditional way of life.[12]

Further, it has been explicitly recognized that fundamentally altering the environment upon which the exercise of treaty rights is based would be a breach of ACFN's Treaty 8 rights:

> 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.[13]

The promise in the text of Treaty 8 that the Indians could continue their "usual vocations of hunting, trapping, and fishing" further reinforces the conclusion that the aboriginal signatories would be able to continue carrying out these activities as freely as before. "Vocation" connotes an activity to which one is seriously dedicated. A hunting and trapping vocation is only possible if there are adequate, accessible hunting and trapping grounds populated by sufficient wildlife.

In balancing the Crown's "taking up" powers with Treaty rights, it is important to recognize the expectations of the Crown and Aboriginal signatories to the Treaty. As described by the Supreme Court of Canada in ***R. v. Badger***:

> Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the

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[10] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39.

[11] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,* Vol. 1. (Ottawa, Supply and Services Canada, 1996) at 174 [emphasis added].

[12] *R. v. Horseman*, [1990] 1 S.C.R. 901 at paras. 12 & 28 (*per* Wilson J., dissenting on other points) and at paras. 47-49 (*per* Cory J.); *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 26.

[13] Indian Claims Commission, March 1998, *Athabasca Chipewyan First Nation Inquiry: WAC Bennett Dam and Damage to Indian Reserve 201* at p. 77.

Treaty. 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. For example, one commissioner, cited in René Furmoleau, O.M.I., As Long As This Land Shall Last, at p. 90, stated:

> We are just making peace between Whites and Indians - for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices.[14]

Commenting on the above passage, the B.C. Supreme Court in ***West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*** noted:

> 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.[15]

The same can be said, with even greater force, of the massive development of oil sands and conventional oil and gas resources presently occurring on ACFN traditional lands.

C. Treaty 8 Protects Traditional Resources and Traditional Places

An additional historical factor of importance was the recognized need for government action to protect traditional resources. As described by the Supreme Court of Canada in ***R. v. Horseman***:

> ... it must be remembered that Treaty No. 8 itself did not grant an unfettered right to hunt. That right was to be exercised "subject to such regulations as may from time to time be made by the Government of the country". This provision is clearly in line with the original position of the Commissioners who were bargaining with the Indians. The Commissioners specifically observed that the right of the Indians to hunt, trap and fish as they always had done would continue with the proviso that these rights would have to be exercised subject to such laws as were necessary to protect the fish and fur bearing animals on which the Indians depended for their sustenance and livelihood.
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> Before the turn of the century the federal game laws of the Unorganized Territories provided for a total ban on hunting certain species (bison and musk oxen) in order to preserve both the species and the supply of game for Indians in

[14] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 55 and 56 [emphasis added].
[15] 2010 BCSC 359, paras. 134-35 [emphasis added].

> the future .... Even then the advances in firearms and the more efficient techniques of hunting and trapping, coupled with the habitat loss and the over-exploitation of game, (undoubtedly by Europeans more than by Indians), had made it essential to impose conservation measures to preserve species and to provide for hunting for future generations.[16]

The Crown's right and duty to implement laws for the protection of wildlife species and habitat that First Nations rely on for the exercise of their rights was important context for the Treaty, and is reflected in its written and oral terms.[17]

Fundamentally, the Treaty guarantees to ACFN the continued meaningful ability to carry out its traditional activities, on its traditional lands, *in perpetuity.* In the words of the Supreme Court of Canada, "a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation".[18]

In this light, the Treaty cannot be interpreted as simply providing a general right to hunt *for food.* Rather, the Treaty more specifically protects ACFN members in their ability to hunt the same species that have traditionally sustained their people and their culture for generations, according to traditional ACFN patterns of land use and occupation.

The B.C. Supreme Court directly considered this issue in *West Moberly First Nations.*[19] The First Nations in this case, beneficiaries of Treaty 8, challenged three approvals relating to exploratory mining work on the basis of the potential impacts on an already decimated boreal caribou herd. The proponent and the provincial government argued that the Treaty protected a general right to "hunt meat" and not a specific right to hunt caribou in the affected portion of the First Nations' territory.[20]

After reviewing the oral and written promises comprising the Treaty, the Court disagreed:

> ... [T]he Court is required to take into account West Moberly's treaty protected right to hunt, including the traditional seasonal round, and the impact of these decisions upon that right. Here, **I conclude that treaty protected right is the right is to hunt caribou in the traditional seasonal round** in the territory effected [*sic*] by the First Coal Operation.[21]

On appeal, British Columbia, the proponent *and Alberta* (as an intervener) all argued that the chambers judge had erred by interpreting the Treaty as protecting the right to hunt a specific

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[16] *R. v. Horseman*, [1990] 1 S.C.R. 901 at paras. 63-64 [emphasis added].
[17] ACFN retains its Treaty Right to hunt in perpetuity, in spite of any restriction on hunting for the purpose of preserving the species and providing hunting for future generations.
[18] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 47 [emphasis in original].
[19] 2010 BCSC 359.
[20] See above, para. 37.
[21] See above, para. 63 [emphasis added].

species (i.e. boreal caribou) in a specific location (the proposed project area).[22] The majority of the B.C. Court of Appeal affirmed the chambers judge on this point:

> ... [W]hile specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a "continuity in traditional patterns of economic activity" and respect for "traditional patterns of activity and occupation". The focus of the analysis then is those traditional patterns.
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> ...
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> **The chambers judge did not err in considering the specific location and species of the petitioners' hunting practices**.[23]

West Moberly First Nations offers an extensive judicial discussion of the scope of Treaty 8, the oral promises made to its signatories, and the application to traditional hunting practices of preferred species.

The same reasoning applies with equal force to ACFN's rights under Treaty 8. The Treaty guarantees ACFN the right to hunt preferred species such as bison, moose, woodland caribou and waterfowl, *in perpetuity*, as part of ACFN's traditional patterns of activity and occupation.

Although the Crown has authority under the Treaty to "take up" lands for certain purposes, this power is subject to important constitutional limits.

In ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, the Supreme Court of Canada held that the Treaty, at core, protects the right to *meaningfully* exercise traditional hunting practices. The unanimous Court stated:

> *Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of continuity in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines ...
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> ...
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> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential

[22] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, paras. 56-74.
[23] See above, paras. 137, 140. See concurring reasons at para. 169.

action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.[24]

In ***Mikisew***, the Supreme Court of Canada also held that in assessing the effects of development on treaty rights, one must look not only at the impact where the development is physically located (i.e. the "footprint" of the Project), but also the broader landscape and resources that may be "injuriously affected". As the Court made clear, at paras. 3 and 15 respectively,

> The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant.
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> The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills on to the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

As discussed above, the "meaningful right to hunt" necessarily includes the right to hunt traditional resources on ACFN traditional lands according to traditional patterns of activity and occupation.

In our view, the Province of Alberta cannot constitutionally infringe the Treaty by depriving ACFN of the "meaningful" opportunity to exercise its Treaty right to secure traditional resources, such as bison and drinking water, within its traditional lands. This follows from the long-standing body of law holding that the Provinces cannot lawfully infringe treaty rights.[25] In our view, even the Federal Government could only authorize such a fundamental breach of the Crown's Treaty commitment – compromising the very meaning and value of the rights secured under the Treaty – with the consent of the affected First Nation.[26]

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[24] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, paras. 47-48 [emphasis added].

[25] See *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, paras. 43, 51-55.

[26] The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 envisioned the need for "'full consent of [the] aboriginal nation on very serious issues" (para. 24). See also paras. 30, 40, 48.

We also note that the extirpation of the local populations of traditional resources (i.e. bison) that support the exercise of ACFN's Treaty rights would amount to an effective *extinguishment* of the Treaty right to hunt bison. Although ACFN members would retain the right to hunt bison throughout Treaty 8 territory even if local populations were extirpated, as the Supreme Court of Canada has noted, *location matters*. ACFN's Treaty 8 right to hunt bison includes the ability to hunt bison in those locations where it has traditionally hunted bison – i.e. within *its* traditional lands and in the vicinity of the Project.[27] Since the entrenchment of s. 35 in the *Constitution Act, 1982*, both levels of government, Federal and Provincial, have lacked the constitutional authority to *extinguish* treaty rights.[28]

3. Preliminary Concerns About the Project

A joint ACFN and MCFN scoping meeting was held February 14, 2012, to inform the technical review, and attended by Teck. At this meeting, ACFN members were vocal in the expression of concerns about the Project and the Proponent's EIA.

For example:

- *"Do you put in your report that you do not affect us at all? Can you actually say that you have no impact on Ft. Chip? You are telling us that you have no impact on Ft. Chip and that is in your EIA. The air quality is going to hit Lake Claire, the Athabasca River. We haven't even mentioned the groundwater. This river basis is huge. You guys are unbelievable and how can you come in here and tell us that you will not have an impact on us. That's not just human life, it's the water, the land, the fish, the birds. This is a serious thing you are doing here. It's not just your words, it's the word "negligible" you have it on paper. I can't believe your scientists would actually put that on paper. Why are you here, if you aren't having an impact on us? To actually say you aren't going to have an impact on us." (ACFN Community Member, February 14, 2012 Scoping Meeting)*
- *"Chromium is pure toxic; it was in paint on a McDonald's cup and it was such a small amount compared to what is in our air and water but they took it out of production immediately because its so toxic. That's just chromium. There is another they don't talk about. You guys are way too close that river. There is a wild buffalo herd running around there right now, where are they going to now? What are your plans for all these things? There are caribou running around in there, these are going extinct, they are going to be gone between Cold Lake and Ft. McMurray, if you put another mine in it will destroy those caribou in your area. The bison are there too. All kinds of companies tell us they will give us information, you submit your EIAs to government and after the fact you come sit down and talk to us, everybody here needs to know the impacts that this is going to have when you are gone and only my grandchildren and great-grandchildren are still here... You have people like you coming up, beautiful, nice people to come up talk to our Elders. Would you come here to talk to our people and make friends with them if you weren't getting paid? They*

[27] *Mikisew Cree, infra* note 44 at para. 47; West Moberly, *supra* note 17 at para 63 (BCSC) and *supra* note 22 at para. 23.
[28] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, para. 11; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 28.

bring you here for a reason because I know what those tailings ponds do. I worked in those places. The cumulative effects of those tailings ponds are unbelievable. That is why there is so much chromium in this water, so much in the silt, it's proven. Now you want to propose a mine right next to the river: 'in theory this wall will work, in theory these pumps work.' I've seen these pumps fail. You should just leave the land the way it is. Leave the buffalo and the caribou. Who is going to pay? Not you, but the people in Ft. Chip because of that water and how close it is. I'm not that educated but I know the effects of these things and these places. We know what is going on, we aren't stupid. Whatever you are proposing is not good enough. Whatever is in your EIA is not good enough without coming to us. We need to understand the effects of what is happening here, the effects on bison, wildlife, human health, you have to think about you are representing and doing and what you are doing to us. I sure did, that is why I don't work where I used to work anymore. You have to think about the impact you are having." (ACFN Community Member, February 14, 2012 Scoping Meeting)

- *"No matter how well you operate, some chemicals will end up in the river; our concern is the health of the people in Fort Chip. We are people living in fear here for our lives. Forty-fifty years ago, we didn't have worries like that. Since companies have come in with their projects, things have changed, our people are dying from different types of cancer and disease, where it comes from, we don't really know but we are always blaming industry for that. I don't think there is any need for that. Any company that starts a project like this one, if we come to you and say you are polluting our water and destroying our land, its up to you to correct the problem and do something about it. Fix the problems you are causing to the land and the water. I'm 75 now and thirty years from now, I'll be long gone, I have sons, grandchildren and great-grandchildren, those are my concerns, after I'm gone, I'll probably go down to my grave worrying about them, that is not a good thing to worry about. When you are raising kids, you want to give them the best you can so they can grow up and be somebody. When you are raising children living in this condition, you can't help but wonder and worry for them. If you have a problem with the operation, whatever the problem, fix it and things will work better." (ACFN Community Member, February 14, 2012 Scoping Meeting)*
- *"Talking about emissions and how far it carries, air emissions ... can travel for many, many miles. I worked at Suncor in 1970, we built Tar Island Dyke. They were already processing oil, I couldn't stand that smell. As the weather gets colder, the stronger the smell. I used to wonder how far it would carry... two years later, I was in the Delta trapping muskrats in late November. One day I was setting traps and there was a south wind, that same smell from Suncor (the only oil company then) came and I could smell it, it was 280 km away, but I could smell it. When the weather is cold, that smell carries many miles. Same thing as the groundwater, it ends up in the water one way or another. The emissions in the air turn into snow at minus 30 or minus 40. I've seen that at Syncrude. The spring runoff from that ends up in the river. We have to use that same water here for the community town water. How safe it is, I don't know, they say its good, I don't know. There are so many people buried here. Every company that comes into this area, tells us the same thing you are telling us here. Maybe I'm just wasting my time listening to the same thing over and over and over,*

and still there is nothing done to solve the problem. We are people here living in fear for our lives, and our children's and our grandchildren's and great-grandchildren's. What will it be 30 years from now – will there be any life for our people? Some companies are looking at 75 years down the road. It's been 40+ years since Suncor started upgrading and even Suncor alone did a lot of damage to the air and water, then Syncrude got in in the 70s. Now there is how many? Shell, Husky, CNRL all in that same area and more coming. Will there be anybody left in 75 years to wonder what happened to us. It's sad to say, it's just the way things are happening. I'm just so concerned for my grandchildren and great-grandchildren, I don't know what kind of life they will have unless things change for the better. So, the company produces oil and makes lots of money. This is our traditional land, your project is right on our traditional land, you are right across from our reserve... All these things are happening and we bring it up time and time again, but nothing changes. I'm concerned. When you do a presentation like that and you tell us that there will be no problem in the future, it's not so. We will be more content and have a better relationship in the long term if you tell us straight that there will be a problem, because we know it will... I don't know what will come out of it, nothing good has ever come out from industry on our behalf. Sure, some people have jobs, but not as good as the jobs as those people that come in from the south. Our people get the lowest rate that is offered and are the first ones that are laid off. This is our land, this is our traditional land, we were here before any white man came into this area and when you guys are all done and gone, we will still be here if there is anybody left."
(ACFN Community Member, February 14, 2012 Scoping Meeting)

On the basis of concerns raised during that scoping meeting, and incorporating concerns that have long been expressed by the Nations with respect to other ongoing and proposed development, the following is a preliminary list of community concerns regarding the proposed Teck Frontier project. This list of concerns was provided to our technical reviewers in order to assist them in focusing their review on priority areas for the Nation.

- Outright alienation from Project Area for four to five decades during operations and for an unknown number of decades after closure. When the land is destroyed it creates a void that cannot be filled.
- Reclaimed site will not look the same or have the same complex of terrain, habitats and stream configurations. Reclamation cannot restore the land to the way it was.
- Contamination concerns on reclaimed land as well.
- Ability for wildlife to re-colonize the reclaimed site.
- Displacement for additional area of preferred/accessible part of traditional territories due to avoidance practices related to general disturbance, safety and solitude concerns, and health concerns about contaminants in animals, fish, plants and water.
- Proximity of project to ACFN's Poplar Point (IR 201G) and Point Brule (IR 201F) Reserves.
- Project footprint is in proximity to ACFN Traplines 2863 and 415. Traplines are not just commercial ventures – they are areas that represent a locus of use for Nation members above and beyond the trapline holder. Concern that the Project could impact traditional use of these areas.

- Proximity of Project to Athabasca River (water quality) – potential for water contamination due to failure of tailings containment facility to prevent surface and/or groundwater contamination.
- Potential for contaminants, including chromium, to enter the air (and be deposited into the water and onto foods animals consume) through evaporation from tailings ponds.
- More water withdrawals from Athabasca River and resulting impacts to ability to navigate the River and the Peace Athabasca Delta for traditional use purposes.
- Safety concerns regarding use of segment of Fort Chipewyan winter road.
- Removal of bison habitat and proximity to bison populations harvested by ACFN members.
- Changes in water flows and quality to Ronald Lake and ultimately Lake Claire.
- Cumulative destruction of moose habitat.
- Air quality (aesthetic) and concerns about human and non-human health. IA has only considered standard threshold guidelines for human health risk, not how visual changes (e.g. dust and emissions) and odour will impact Nation members.
- Noise – affects the experience of peaceful enjoyment / solitude that is important to use of the land. IA has only considered standard threshold guidelines for human health, not how noise will impact Nation members.
- Odours – Concern that odours will increase on traplines, on Reserve lands, and in the community of Fort Chipewyan. Nation members note that oil sands odours can already be detected in Fort Chipewyan and the Peace Athabasca Delta.
- Visual – Concern that light from oil sands operations will be visible at traplines and on Reserve lands at night. Nation members note that lights from oil sands operations are already visible as a glow on the southern horizon at night in the vicinity of ACFN's Poplar Point Reserve and that this light is an indicator of encroachment, contributing to feelings of despair and impacting the experience of remoteness and solitude on the land.
- Navigation at and near proposed Athabasca River bridge and lower reaches of tributaries, particularly Redclay, Big, Asphalt, and Eymundson creeks.
- Cumulative effects, especially uncertainties around climate change
- The characterization of impacts as "negligible" in the IA was noted by Nation members as particularly contentious especially with regards to water, air quality, and human health issues.
- The Nation members noted that they have been providing input and knowledge into project after project and that there has been no change in outcomes, with the same impacts being increasingly experienced. Nation members noted that they feel that their input has been disregarded and that consultation is an empty process.
- No real benefit has accrued to the Nation's as a result of oil sands development. Even the jobs that are created are not as good as those provided to people "from the south" as Nation members are lower paid and the first to be laid off or fired.
- There are a number of socioeconomic issues that go unrecognized and need to be dealt with. Elders and other sectors of the community do not benefit from oil sands projects. There is uncertainty about what benefits will be achievable in the future and whether those benefits are worth the risk of ongoing environmental contamination and destruction of traditional lands.

- Nation members are extremely worried about what life will be like for their grandchildren and great-grandchildren.
- Health concerns in Fort Chipewyan including increased rate of cancers.

ACFN is also concerned by the lack of a clear process to assess and address impacts on its rights, interests, culture, and community well-being. ACFN has a number of questions that are not being addressed in the IA or in the regulatory review process. These issues and concerns go to the lack of a process in the TOR or otherwise to address the potential impacts of the Projects on our constitutionally-protected rights, interests, culture and community well-being. If either Alberta or Canada's position is that such issues are not properly the subject matter of an EIA, that does not make the issues go away. They still need to be dealt with.

In particular, we note the following process concerns:

- It is unclear to us by what process the Crown will carry out its constitutional duty to consult with us and seek to address and accommodate our concerns in relation to the Projects.
- It is unclear to us what steps have been taken by the Crown to make a preliminary assessment of the strength of our claims in the vicinity of the Projects.
- It is unclear to us whether the Crown and ACFN have a common understanding of the scope of ACFN's rights.
- It is unclear whether Crown is prepared to carry out consultation outside of any public hearing that may be held in relation to the Project - or indeed whether the Crown would even deign to attend any such hearing - in respect of assessing the potential impacts of the Project on our section 35 rights. If the Crown is prepared to do so, we need to know how any such consultations would be integrated into the environmental assessment process for the Projects i.e. what are the legislative or regulatory means by which the results of any such consultation would be integrated into the EA process.
- It is unclear to us what steps the Crowna is taking itself, to analyze the potential direct, indirect and cumulative impacts of the Project on our Treaty rights and with respect to the social, economic, environmental and cultural impacts of the Projects on our community, rather than simply relying on Teck to do so.
- It is unclear to us whether the Crown is prepared to consult with us on the potential direct, indirect and cumulative impacts of the Project on our Treaty rights and with respect to the social, economic, environmental and cultural impacts of the Project on our community prior to any approval of the Project.
- It is unclear whether the Crown, Teck and other companies are prepared to work with us to identify and properly assess, prior to progressing with this application and in a scientifically credible manner, the cumulative impacts of all existing and reasonably foreseeable development specifically as it affects our Treaty and aboriginal rights.
- It is unclear whether the Crown is prepared to consult with us, prior to any approval of the Project, on the development of credible and detailed reclamation measures for land,

water, air, wildlife, habitat, vegetation and other important matters on a local and regional basis.

- It is unclear whether the Crown is prepared to implement rigorous monitoring and assessment programs, on a regional basis, that will ensure that our First Nation's key resources and lands do not fall below the levels required to sustain our Treaty and aboriginal rights.
- It is unclear to us whether the Crown or Teck have taken any steps to determine the extent to which industrial development already authorized by the Crown has already deprived ACFN of a meaningful opportunity to exercise our rights, particularly within the vicinity of the Project.
- It is clear to us that Alberta is not prepared to work with us on the impacts of the grants of tenure to other companies on our ability to exercise our rights in the vicinity of the Project and in other parts of our Traditional Lands. We are unaware of any other process that would address these specific impacts.
- It is clear to us that Alberta is not prepared to work with us to determine how the grants of tenure in our Traditional lands, and the existing, planned and reasonably foreseeable development that has been approved or is being proposed to be carried out pursuant to those tenures, can be done in a way to ensure that ACFN has a meaningful opportunity to exercise our rights, particularly in the vicinity of the Project. We are unaware of any other process that would address these specific concerns.
- It is clear to us that Alberta is not prepared to work with us on the development of a Traditional Land and Resource Use Management Plan to determine the resources on which we rely and will rely in the future to exercise our rights and to secure protection of the same, prior to any approval of the Project. In our view Alberta is required at law to make itself aware of the information that the Plan would have produced. Has Alberta delegated its responsibility to any other parties? If so, to whom?
- It is unclear to us whether the Crown is prepared to consult with us, prior to any approval of the Project, to implement regional targets for our First Nations key resources on which we rely to preserve our Treaty and aboriginal rights.
- It is not clear to us whether the Crown has heeded our identification of critical lands that should be protected from further developments, including lands within the vicinity of the Project, and whether the Crown will take this critical step towards ensuring that our First Nation retains a meaningful opportunity to exercise our Treaty and aboriginal rights.
- It is unclear to us by what process and upon what criteria the Crown will determine the adequacy (or lack thereof) of the Proponents' consultation with us on the Projects.

We ask these questions and raise the points above because they go to fundamental issues about consultation and about the protection of our section 35 rights. We seek Alberta Environment and Water's and the Canadian Environmental Assessment Agency's answers to these important questions. If AEW and CEAA cannot answer these questions, we ask that you

forward them to those within the Governments of Alberta and Canada who can provide answers. We suggest that the application should not move forward absent comprehensive answers to these important queries.

ACFN is in the process of conducting a traditional use study specific to the project; it is expected that additional concerns will be forthcoming upon completion of that study. ACFN also expects to conduct additional community engagement on the project; such activities will also raise additional concerns. Finally, ACFN intends to approach Teck regarding a socio-cultural assessment that will provide information to fill several of the gaps identified in the technical review report. The technical concerns that emerged as a result of the technical review of the Proponent's IA report are summarized below.

4. Review of the Proponent's Integrated Application

ACFN, in conjunction with the Mikisew Cree First Nation, conducted a technical review of the IA, attached to this SoC. The overarching purpose of the review was to critique the IA with respect to the question: "What does it mean for ACFN and MCFN Treaty and Aboriginal rights and overall well-being?" Taking this key question as the basis for the review, the Nations undertook a review process that involved both a team of technical experts, as well as a community-level working group consisting of ACFN and MCFN members. The main objective of the technical review was to examine the sufficiency of the IA relative to the AENV and CEAA terms of reference, bearing in mind the key concerns, issues and areas of focus requested from the community working group.

The technical review revealed many information gaps of great concern. It is clear to ACFN that the IA is not yet in compliance with either the AENV or CEAA Terms of Reference, and it certainly does not provide sufficient information to support a credible assessment of Project impacts upon the ACFN's rights, interests, community, and well-being. The results of the Nations' technical review are detailed in the joint ACFN and MCFN Technical Sufficiency Review of Teck Resources Ltd. Integrated Application for the Frontier Oil Sands Project (the "Technical Review"). Although the Technical Review is provided under separate cover, it forms part of and should be read in conjunction with this Statement of Concern.

5. Direct and Adverse Impacts to ACFN's Rights

A. Applicable Legal Principles

ACFN respectfully submits that in considering whether the Applications have the potential to directly and adversely affect the rights of ACFN, the following legal principles ought to be taken into account.

(a) Section 35(1) of the *Constitution Act, 1982* is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

(b) Any limitations which restrict the rights of First Nations under a Treaty must be narrowly

construed: *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41.

(c) When considering the direct and adverse environmental impacts of the Applications on ACFN's rights, the term "environment" must be construed broadly and includes the cumulative impacts of a project and other facilities to be developed in the future on those rights: *Dene Tha' First Nation v. MOE et al*; 2006 FC 1354, at para. 34.

(d) The potential negative derivative impacts of a project must also be taken into account: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para 32.

(e) The injurious affection that a project causes on the exercise of rights within the vicinity of that project must be taken into account: *Mikisew, supra* at paras. 15, 44, and 47.

Whether termed "cumulative", derivative" or "injurious affection", it is submitted that in considering ACFN's concerns, it is not enough to consider only the impacts caused by the footprints of the proposed Project – although it is submitted that the evidence presented here demonstrates such direct and adverse impacts on the rights of ACFN from the footprint of the proposed Project. The case law referred to above clearly indicates that the impacts of development on Aboriginal and Treaty rights are felt within a far larger area than the direct footprint of a project. That is equally true in respect of the potential effects of the Applications on ACFN's rights.

ACFN's Traditional Lands are increasingly taken up by bitumen mines and associated plant facilities, in-situ wells, pipelines and facilities, gas wells, seismic lines, oil exploration wells and associated seasonal access, and sumps, borrow pits, camps, road ways and pipelines associated with these activities. Industrial activity on ACFN Traditional Lands is unrelenting and has already adversely affected ACFN's rights and interests. [29] ACFN is extremely concerned about the ever-increasing adverse impacts of development, including potential further oil sands developments, on their rights, mode of life and well-being within their Traditional Lands.

The construction of bitumen-producing facilities, such as the proposed Project, on lands that are actively used for hunting, trapping, fishing and the gathering and harvesting of plants and timber, which is the case here, will inevitably have a direct and adverse effect on those traditional, land-based activities. The question is therefore not whether ACFN's Treaty 8 and registered trapline rights will be directly and adversely affected, but by how much. The severity of those impacts depends on a number of factors, including the importance of the rights to ACFN, and the extent to which ACFN's traditional lands have already become unavailable for the exercise of those rights.

The Project is located near an historical ACFN village site and burial grounds, in close proximity to ACFN reserve lands (a distance within which disturbance from noise, odours and visual effects could be experienced), and within an area still considered to be "safe" for the harvesting of traditional resource – i.e. not too polluted. A number of ACFN members actively hunt, trap,

[29] Athabasca Chipewyan First Nation Integrated Knowledge and Land Use Report and Assessment for Shell Canada's Proposed Jackpine Mine Expansion and Pierre River Mine; CEAR Registry # 10-05-55540 Document # 88, located online: http://www.ceaa.gc.ca/050/documents_staticpost/59540/51434/ACFN.pdf. For convenience, has been attached to this Statement of Concern.

fish and gather plants and domestic timber in the areas encompassed by the proposed Project, as well as engaging in cultural and spiritual practices. They exercise their rights to obtain needed food and medicinal ingredients, shelter, and also for their spiritual well-being. While carrying out their traditional harvesting activities, many older ACFN members also pass down their knowledge and skills to younger ACFN members. The imparting of traditional harvesting knowledge and skills is essential to the survival of ACFN's culture and its distinctiveness as a people.

As mentioned, ACFN is currently completing a traditional use study specific to this Project. However, sufficient evidence exists to confirm that the lands covered by and surrounding the Project footprint are heavily used for the exercise of ACFN's Treaty and aboriginal rights, and that any further industrial development in this location would have direct and extremely adverse impacts on same. The following resources are attached to this SoC for convenience:

(a) Map, ACFN Reserves and Traplines in relation to Teck Project

(b) Map, ACFN Cultural Protection Areas

(c) Athabasca Chipewyan First Nation Integrated Knowledge and Land Use Report and Assessment for Shell Canada's Proposed Jackpine Mine Expansion and Pierre River Mine;

(d) Athabasca Chipewyan First Nation Integrated Knowledge and Land Use Report and Assessment for Shell Canada's Proposed Redclay Compensation Lake, May 3, 2011;

(e) Affidavit # 1 of Raymond Cardinal, filed in Action No. 0803 17419, 2009;

(f) Affidavit # 1 of Marvin L'Hommecourt, filed in Action No. 0803 17419, 2009;

(g) Affidavit # 1 of Archie Cyprien, filed in Action No. 0803 17419, 2009; and

(h) Athabasca River Use and Traditional Ecological Knowledge Study 2010.

ACFN's Treaty rights stand to be directly and adversely impacted in a number of ways by the Project, including but not limited to the following.

(a) Alienating members from lands and waters upon which they currently exercise their Treaty rights for several decades at minimum, and in ACFN's view, likely forever as there is no evidence that oil sands mines can be reclaimed to a state compatible with traditional use.

(b) Destroying ACFN's ability to transmit to future generations place-specific traditional knowledge regarding those lands from which ACFN will be alienated.

(c) Reducing the flow in the Athabasca River and the lower reaches of its tributaries and thereby interfering with ACFN's ability to use same as travel routes for accessing hunting, fishing and trapping locations and areas, and for travel between seasonal settlements and reserve lands. Impediments to the ability of ACFN members to access these waterways and changes to aesthetic and sensory conditions associated with the waterways, such as the associated bridge and proposed intake structure, could have direct and adverse impacts on ACFN members' abilities to continue to use these

waterways for their customary ways of practicing their rights.

(d) Reducing the quality and quantity of traditional resources (i.e. moose, bison, woodland caribou, medicines) available to ACFN members through habitat destruction and air, water, light, and noise pollution.

(e) Reducing the use-ability of lands for traditional purposes within a large radius of the Project due to air, water, light and noise pollution.

(f) The Project is in proximity to the Richardson Backcountry, an area of significant ACFN use and interest. Any impact, whether direct, indirect or cumulative, to this important area, could adversely impact ACFN's use of the area currently and in the future.

(g) Increasing road and air traffic adversely impacting on wildlife through direct mortality and stress, and it also poses an ever-present disturbance and threat to ACFN members, which in turn, affects ACFN's preferred land use practices.

(h) Habitat for key traditional resources such as moose, bison and waterfowl will be destroyed.

(i) Tailings ponds and other industrial water features associated with the Project will result in the direct mortality or contamination of waterfowl.

(j) The Project will contribute to real or perceived contamination of the Athabasca River, with tailings facility located so close to the river. This will impact ACFN member's willingness to exercise their right to fish downstream.

(k) Impacts to the Peace Athabasca Delta through a reduction in the quality and quantity of water in the Athabasca River, where ACFN members hunt, fish and trap.

(l) Impacts to important fisheries resources, such as Ronald Lake.

(m) Emissions will be noxious and will likely make it difficult for some members to breathe at times, and will reduce the overall use of the area by ACFN members.

(n) The Project will contribute to an already overwhelming level of cumulative impacts.

(o) Non-aboriginal recreational use of the area will result in a loss of the quality of remoteness and will increase pressure upon traditional resources in the surrounding areas.

(p) Quality of animals and vegetation lessened.

(q) The proposed Project would be constructed and operate in circumstances where ACFN has already been deprived of significant portions and key areas of its Traditional Lands.

The Project would interfere with ACFN members' ability to use and enjoy their traplines, for substantially the same reasons listed above.

The Project would substantially interfere with ACFN's use and enjoyment of its reserve lands. ACFN's right to use and enjoy its reserve lands stands to be directly and adversely impacted in a number of ways by the Project, including but not limited to:

(a) declining water levels, which impede and sometimes prevent members' access to

reserve lands (particularly to I.R. 201, 201C, 201E, 201F and 201G)

(b) the perceived and/or measurable contamination of Athabasca River water, which has decreased the utility of downstream reserves by functionally eliminating sources of usable drinking water and by reducing ACFN members' willingness and ability to harvest fish in nearby waters. [30]

(c) significant noise and light pollution at Poplar Point (201F) and Point Brule (201G)

(d) significant air pollution, including odours and particulate matter or 'dust'

(e) increased trespass and vandalism at Poplar Point 201(F0 and Point Brule (201G)

6. Overall Conclusion and Recommendation

Information gaps and additional assessment of impacts to ACFN rights and well-being is required in order for the IA to be deemed complete. Without this information the Crown will not have sufficient information in hand to inform consultation or to adequately discharge its statutory obligations.

ACFN's Treaty 8 rights, traditional ways of life, and well-being stand to be directly and severely adversely affected by the Project; however, the IA report submitted by the Proponent does not contain information about ACFN's treaty rights and a number of direct and adverse effects that the Project may have on ACFN's Treaty 8 rights remain unaddressed. The Proponent and the Governments of Canada and Alberta lack sufficient information at this point to deem the EIA report complete.

ACFN strongly requests that Alberta deem the EIA incomplete until Teck provides:

- Works with ACFN to determine the current and future needs in respect of traditional resource use;
- Provides full and complete answers to the Supplemental Information Requests made in the Nations' Technical Review;
- Provides full and complete answers to Canada's Supplemental Information Requests;
- Integrates ACFN's project-specific Traditional Use Study into the IA in a meaningful manner;
- Assesses the effects of the Project and the Planned Development Case on the Delta and implementation of an independent and scientifically rigorous monitoring program for the Delta, in consultation with affected First Nations to address this issue;
- Provides independent and scientifically rigorous evidence that the natural eco-sites and wetlands destroyed by the Project can be replicated during reclamation; and,
- Provides funding and support for a community-led SEIA for ACFN and the community of

[30] Candler, C. Rachel Olson and Steven DeRoy. (2010). *As long as the rivers flow: Athabasca River knowledge, use and change*. Edmonton, AB: Parkland Institute, University of Alberta.

Ft. Chipewyan. For further information please see the appended review report of the SEIA prepared by Firelight Group.

ACFN also strongly suggests that Alberta and Canada cannot move forward with the applications for the Project until:

- a full and proper assessment of the impacts to ACFN's treaty and aboriginal rights have been fully identified, characterized and accommodated;
- Thresholds and limits have been identified in a Traditional Land and Resource Use and Management Plan, and implemented to ensure that ACFN is able to exercise its Treaty 8 Rights in its traditional lands, in perpetuity;
- ACFN's recommendations on the Lower Athabasca Regional Plan, as set out in the following submissions, be integrated into that Plan:
  - ACFN Advice to the Government of Alberta on the Lower Athabasca Regional Plan, Submitted November 22, 2010;
  - Co-Management and the Lower Athabasca Regional Plan Discussion Paper Submitted by ACFN to the Land Use Secretariat, January 24, 2011; and
  - Final Submissions of ACFN and MCFN on the Draft Lower Athabasca Regional Plan, Submitted June 3, 2011ACFN and MCFN's recommendations, including the maintenance of an Aboriginal Base Flow, as set out in the Nations "Review of the Phase 2 Framework Committee Recommendations: Synthesis Report" have been adopted and implemented;
- Implementation, through consultation with ACFN, of independent and scientifically rigorous regional monitoring programs that test EIA predictions, monitoring he quality and quantity of water in the Athabasca River, including between Fort McMurray and Old Fort, and that monitor the cumulative impacts of regional development upon human health.

For all of the reasons listed above, ACFN currently opposes the Applications. Given that ACFN's constitutionally –protected rights are at stake, and given the rapidly diminishing ability of ACFN members to exercise their rights within their Traditional Lands, it is submitted that the Applications should not be approved. We also reserve the right to bring forward further concerns as they arise.

Sincerely,

<original signed by>

Lisa King

Director, ACFN IRC

Cc ACFN Chief and Council

Amanda Black, ERCB – <email address removed>
Ian Mackenzie, TECK - <email address removed>
Janais Turuk, TECK – <email address removed>