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**ATHABASCA CHIPEWYAN FIRST NATION  
INDUSTRY RELATIONS CORPORATION**

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February 1, 2010

Alberta Environment  
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Environmental Relations  
111 Twin Atria Building  
4999 – 98 Avenue  
Edmonton, AB T6B 2X3

**Attention: Alvaro Loyola, Senior Advisor, Aboriginal Relations**  
**[Fax: 780 427-7824]**

Shell Canada Energy  
400 – 4<sup>th</sup> Avenue S.W.  
P.O. Box 100, Station M  
Calgary, AB T2P 2H5

**Attention: John Abbott, EVP Heavy Oil** [Fax: 403-269-8031]

Dear Mr. Loyola and Ms. Jefferson:

**Re: Shell Canada Ltd. – Jackpine Mine Expansion and Pierre River Mine Project**  
**EPEA Application File #s: 001-00245358, 005-00153125, 006-00153125**  
**Water Act File #s: 00245489, 00186157 (“the Application”)**

I am writing in reply to Mr. Loyola’s letter to Nicole Nicholls dated January 6, 2010, as well as in reply to Mr. Abbott’s letter to Nicole Nicholls dated January 29, 2010. As Mr. Loyola notes in his letter, Minister Renner indicated, in a letter dated August 24, 2009, that Mr. Loyola would be providing a more detailed response to a number of questions and issues raised in a letter that Nicole Nicholls sent to the Minister on August 7, 2009. While I appreciate Mr. Loyola’s response, I do note that we have been waiting for this response for five months. This is of concern to the Athabasca Chipewyan First Nation (“ACFN”), as the letter of August 7<sup>th</sup> raised a number of important questions related to how the Application will be dealt with, particularly in relation to the issue of

consultation. ACFN is concerned that our questions have still not been answered in a satisfactory manner.

I also wish to communicate ACFN's view that the Application remains incomplete for the following reasons:

1. Shell has still not answered a number of questions that ACFN and its technical advisors have been asking through our technical review process – a separate letter outlining the deficiencies in the technical responses will be sent to Shell and AENV in the near future;
2. Although Shell has agreed to fund a supplementary Traditional Use Study (“TUS”), there remain certain outstanding issues related to the TUS, including conclusion of a traditional knowledge sharing agreement. In our view, the supplemental TUS is an important part of the application process and we are still trying to finalize various issues with Shell which will allow for the supplementary TUS to be carried out. Without AENV and Shell having that information, the Application remains incomplete; and
3. As discussed more fully below, there are a number of outstanding consultation-related issues that need to be addressed in respect of the Application, including issues concerning the collection of information necessary to properly assess the potential impacts (direct, indirect and cumulative) of the Application on the Treaty 8 rights of ACFN.

### **The Consultation Process for the Application**

I begin by noting that ACFN recently received a copy of a document entitled *Jackpine Mine Expansion & Pierre River Mine Aboriginal Consultation Plan – January, 2010* (the “Consultation Plan”). As far as I am aware, ACFN was not consulted on this document. We have a number of concerns about the Consultation Plan, including the following:

- Shell's approach to consultation has not been developed by seeking input on ACFN's procedural concerns specifically and ACFN's desired approach to consultation generally
- In particular, the Consultation Plan does not address how ACFN's input on matters such as TUS, TEK, socio-economic issues and potential direct, indirect and cumulative impacts on ACFN's ability to meaningfully exercise its Treaty 8 rights (now and in the future) will be substantially considered and addressed – the Consultation Plan lacks criteria, thresholds or measures to addressing such impacts, nor does it even contain a set of principles or objectives by which such consultation can be measured

- It does not require Shell to consult with ACFN on additional information that may be required to be collected to properly assess potential direct, indirect and cumulative impacts of the Application on ACFN's Treaty 8 rights
- Although the Consultation Plan refers to various regional initiatives, the Crown continues to ignore ACFN's input within those processes, namely, the failure of those processes to set out a mechanism by which impacts to the exercise of ACFN's Treaty 8 rights will be addressed
- Shell's continued use of the word "Aboriginal stakeholder" appears, in our view, to minimize the fact that ACFN has constitutionally-protected rights which must be addressed

**ACFN would be pleased to meet with Shell and AENV to discuss how the Consultation Plan could be changed to address ACFN's issues and concerns related to consultation, at least in terms of issues which are within the ability of Shell to address.**

In Mr. Loyola's letter, he refers to consultation being carried out pursuant to *Alberta's First Nations Consultation Guidelines on Land management and Resource Development* (hereinafter, "the Guidelines"). As Mr. Loyola well knows, ACFN and many other First Nations in Alberta have rejected those Guidelines.

He also states that in July, 2007, AENV reviewed and accepted Shell's consultation plan for the Application. As noted above, so far as I understand, ACFN was not consulted on the July, 2007 consultation plan nor on the January, 2010 consultation Plan.

Mr. Loyola also notes, among other things, that (in his view) Shell is best suited to carry out the procedural aspects of consultation for the Application; that ACFN has the opportunity to have Shell include issues of concern within the...EIA...for the project; that proponents are required to implement strategies for avoidance or mitigation in relation to the project; and that AENV will assess the adequacy of consultation in accordance with the Guidelines. Mr. Loyola also notes that "AENV expects that the concerns identified by First Nations throughout the process of consultation to be discussed and considered fairly and reasonably."

At the same time, the January, 2010 Shell consultation Plan states the following with respect to consultation:

"As the Duty to Consult with impacted Aboriginal communities rests with the Crown, and Shell has been and will be undertaking various procedural aspects of crown consultation activities, Shell has met with and will continue to meet and correspond with those Crown agencies having responsibility for consultation. Shell has been and will continue to provide information on potential impacts, issues of concern, Aboriginal viewpoints, and possible need for accommodation to the appropriate Crown agencies...The aim of Shell's consultation program is to

ensure that any Crown decisions regarding Shell's projects will be made based on a full consideration of impacts to relevant Aboriginal rights, and – where appropriate – accommodation of those rights." (emphasis added)

This position is essentially repeated in Mr. Abbott's letter, where he states, among other things:

"...while Shell is in the best position to carry out these procedural aspects of the duty to consult, as ACFN rightly points out, it is the Crown who must discharge the duty to consult."

Mr. Abbott also points out that consultation is an ongoing process, rather than a discrete event.

ACFN's fundamental concern about the consultation process is that there is a lack of clarity with respect to the obligations and duties of Shell and AENV with respect to carrying out consultation related to the Application. Both AENV and Shell refer to a delegated model of consultation. However, it is not clear, as between the two, who is responsible for doing what, in relation to addressing ACFN's procedural and substantive issues and concerns related to the Application. The failure of Shell and AENV to seek input on the Consultation Plan only exacerbates this problem. The failure of AENV to actually engage in consultation and, instead, to rely on Shell to do so, or to act as a sort of "referee" makes things untenable, considering that Shell's primary objective, which is to obtain approval of their project, may conflict with their responsibilities to consult.

Mr. Abbott asserts, among other things, that "good examples" of Shell's efforts to consult ACFN include the funding of a TLU/TEK study in respect of the Application, and that Shell's EIA currently incorporates TLU/TEK information. In addition to the difficulties noted earlier, another problem with Shell's approach is that there are no defined baseline data, no standards, thresholds or criteria by which either Shell or AENV are actually required to address this information. Moreover, Shell's approach to "consultation" is extremely narrow in scope. Consultation with ACFN is not satisfied simply by examining TLU/TEK information. There is a need, for example, to carry out and integrate the results of a separate traditional socio-economic study.

ACFN needs to know how its concerns – both procedural and substantive – will be addressed and by whom. Vague references by Shell and AENV to procedural aspects of consultation being carried out by Shell do not address this issue. Rather, ACFN feels as though it is being stuck in the middle of a tug-of-war between Shell and AENV.

An additional concern of ACFN about the Application, which was communicated to Shell and AENV some time ago through our comments on the draft Terms of Reference ("TOR") for the Application, is that there is a distinct lack of data, criteria or thresholds upon which to assess the potential direct, indirect and cumulative impacts of the Project on ACFN's ability to meaningfully exercise their Treaty 8 rights now and in the future. AENV declined to include a number of measures in the TOR to deal with this important

issue. These are the kinds of procedural issues that the Supreme Court of Canada said must be seriously considered and substantially addressed in the *Mikisew* case. ACFN's concerns have not been seriously considered or substantially addressed on these issues.

In the Consultation Plan, Shell asserts that the “aim of Shell’s consultation plan is to ensure that any Crown decisions regarding Shell’s projects will be made based on a full consideration of impacts to relevant Aboriginal rights...” (emphasis added) Mr. Abbott also makes a number of comments about ACFN’s assertions in this regard in his letter:

“With respect, Shell has prepared EIAs that allow for an assessment of impacts to Treaty and Aboriginal rights on two levels. First, we have assessed the potential impacts from the projects on various biophysical and socio-economic receptors and indicators. The exercise of most, if not all of ACFN’s Treaty and Aboriginal rights, relate either directly or indirectly to the availability of, and impacts to these receptors and indicators. Secondly, we have done specific impact assessment of ACFN’s ability to hunt, fish, trap and pick berries. The second level of impact assessment considered information from Aboriginal Communities on species of traditional importance, and as such, should provide ACFN with an understanding of potential impacts.”

The above-quoted passage demonstrates the fundamental misunderstanding that Shell brings to the Application. We note that:

- The “various biophysical and socio-economic receptors and indicators’ included in the EIA are based upon principles of biodiversity and ecosystem integrity and not on parameters of aboriginal use or values. The socio-economic assessment which is included in the EIA is based upon an assessment of mainstream economic activities and not on the First Nation’s traditional and cultural social economy. These various biophysical and socio-economic receptors and indicators cannot capture the impacts on the Treaty 8 rights. An impact assessment on the First Nation should be based on a methodology which specifically assesses the rights of the ACFN membership.
- AENV declined to include in the TOR a number of measures that would have contributed to the assessment of potential impacts on ACFN section 35 rights;
- In the absence of specific data, measures, thresholds and criteria to assess impacts on those rights, it is difficult to understand Shell’s assertion that they have been assessing such impacts
- The regulatory process does not require, or fund, ACFN’s ability to gather the kind of specific information that would contribute to an assessment of such impacts – see comments in the appendices on lack of a traditional resource use plan – the regulatory process also uses a “disturbed baseline” approach, which means that the true impacts to ACFN’s ability to meaningfully exercise their rights is never truly measured or understood

- The approach that Shell is permitted to take in developing information is insufficient to address the ability of ACFN to meaningfully exercise their rights now and in the future – **see discussion in appendix to this letter on problems with current assessment approach**

AENV and Shell have not consulted with AENV on the development of measures, criteria, and approaches to assessing potential impacts of the Application on ACFN's ability to exercise their Treaty 8 rights. With respect, Mr. Abbott appears to assume that Shell's approach is sufficient. **ACFN would be pleased to meet with Shell and AENV to discuss this important issue.**

While Shell may take the position that the TOR for the Application do not require such analysis, or that Shell has already done a proper analysis, the reality is that consultation and information-gathering obligations are not confined to the contents of a set of TOR, nor can one simply assume that the assessment of potential impacts to constitutionally-protected Treaty rights can be satisfactorily carried out through the current TOR. The duty to consult invokes the honour of the Crown and requires that the concerns of First Nations – both procedural and substantive – must be seriously considered and substantially addressed. To the extent that the duty to consult is delegated to proponents such as Shell, then the proponent must deal with these issues. In short, the duty to consult – whether carried out by Shell, AENV, or both – cannot be properly discharged through adherence to a project-specific stakeholder-based TOR. Unfortunately, there is no clear process, beyond the regulatory review process for the Application, by which ACFN's issues and concerns can be addressed.

Since the Alberta Consultation Guidelines do not make clear what issues can or cannot be delegated, this raises the larger question of which of ACFN's issues and concerns will be dealt with by AENV, which will be dealt with by Shell, and which will not be dealt with at all.

Set out below, in Appendix "A" are a number of questions which ACFN sees as being important to determining the potential impacts of the Application (direct, indirect, cumulative) on ACFN's ability to meaningfully exercise its Treaty 8 rights now and into the future. For each question, we would appreciate knowing whether AENV or Shell will provide a response. We ask that AENV and Shell indicate, by checking the appropriate box, which of them will respond to the question or information request, as well as providing the actual response. Where either AENV or Shell decline to answer the question or request, please explain why, in writing. Where AENV or Shell are of the view that the question has already been answered, could you please indicate (in writing) where ACFN can find the response.

Once we receive those responses, ACFN would be happy to meet with AENV and Shell to discuss these issues in more detail. **If you have any questions as to why we have sought a particular response, please let us know and we will provide an explanation.** As

noted earlier, responses to these and other questions are needed before AENV can deem the application complete.

### **Traditional Resource Use Plan**

Further to Mr. Loyola's request, set out as Appendix "B" to this letter is a discussion of what AENV would see as constituting a Traditional Resource Use Plan. We would be happy to meet with AENV to discuss this concept in more detail. In our view, the carrying out of such a Plan is necessary to determine the potential impacts of the Application on the exercise of ACFN's Treaty 8 rights.

We look forward to receiving your responses.

Sincerely yours,

<original signed by>

Lisa King  
Director

- cc. ACFN Chief and Council  
The Honorable Jim Prentice, Minister of the Environment  
Chris Powter, Alberta Environment  
Dan McFadyen, ERCB  
Linda Jefferson, Shell  
Don Crowe, Shell  
Shawn Denstedt, Osler Hoskin & Harcourt LLP  
Robert Freedman, Janes Freedman & Kyle LLP

## APPENDIX "A" – ACFN QUESTIONS AND INFORMATION REQUESTS

ACFN QUESTION OR INFORMATION REQUEST <sup>1</sup>	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>Is there any dispute as to whether ACFN as Treaty 8 rights<sup>2</sup> within the vicinity of the Application?<sup>3</sup></p> <p>What lands have been taken up in the vicinity of the Application?</p>				
<p>Has any preliminary assessment of the strength of ACFN's claims (Treaty 8 rights) been conducted: (a) within the vicinity of the Application; and (b) throughout those parts of ACFN's Traditional Lands where industrial development has taken place, is being contemplated (such as where tenures have been granted and applications for development have been made)? What information, guidelines or policy was looked at in making this assessment?</p>				

<sup>1</sup> For any question of information request where either or both of AENV and Shell are of the view that ACFN should be providing this information, please explain the reason for your view, the funding made available to ACFN to collect this information, and whether or not any such information request was made of ACFN and the date of that information request.

<sup>2</sup> ACFN maintains that it has both Treaty and Aboriginal rights protected by section 35 of the *Constitution Act, 1982*. For purposes of these questions and information requests, "Treaty 8 rights" or "rights" are defined as the right to hunt, fish, trap and gather.

<sup>3</sup> For purposes of these questions and information requests, "vicinity" is defined as a 40 km radius from the outer perimeter of both the Jackpine and Pierre River project footprints.

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>Has Shell or AENV identified on a map the activities associated with any existing, planned, or reasonably foreseeable oil and gas forestry, pipelines, and conventional oil and gas activities including, but not limited to, infrastructure, roads, gates, (a) within ACFN's Traditional Lands; and (b) within the vicinity of the Application?</p>				
<p>Can Shell or AENV provide information on where, based on Alberta's regulatory framework, it would be considered unsafe or safe for ACFN members to exercise their Treaty 8 rights within the vicinity of the Project and throughout their Traditional Territory?</p>				
<p>What steps have been taken to determine the extent to which industrial development within ACFN's Traditional lands, which has already been authorized by the Crown, has already deprived ACFN of a meaningful opportunity to exercise their Treaty 8 rights? In answering this question: (a) how is "meaningful opportunity" defined? (b) has Alberta or Shell carried out any consultation with ACFN to determine the ecosystem/environmental/socio-cultural conditions required to sustain ACFN's ability to meaningfully exercise their rights throughout their Traditional Lands and in the vicinity of the Application?</p>				
<p>What steps have been taken to determine the extent to which approval of any oil sands projects that have already been approved and/or applied for within ACFN's Traditional Lands would deprive ACFN of a meaningful ability to exercise their Treaty 8 rights?</p>				

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>Is either AENV or Shell of the view that there is already increased human and financial hardship and expense to ACFN members to exercise their Treaty 8 rights by their preferred means and in their preferred locations as a result of industrial development within their Traditional Lands?</p>				
<p>Has either Shell or AENV assessed what specific lands and associated resources (wildlife, fish, water, plants, air quality, access routes) ACFN requires to carry out its Treaty 8 rights now and in the future? If so, what specific information was assessed?</p>				
<p>Has Shell or AENV identified any lands within ACFN's Traditional Lands, based on the answers to the questions above, which will permit ACFN to meaningfully exercise its Treaty 8 rights now and in the future? If the answer is yes, what criteria was used to make this determination? Was use of lands by other First Nations, Métis and other persons considered in terms of current uses and future needs?</p>				
<p>What provincial and federal permits, licenses and approvals have been applied for both within ACFN's Traditional Lands and within the vicinity of the Application, which have not yet been approved?</p>				
<p>What is the justification for not requiring a pre-disturbance (pre-1965) baseline in the TOR?</p>				

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>Has an assessment been undertaken of the impacts of grants of tenure throughout ACFN's Traditional Lands and within the vicinity of the Application, to determine the actual or potential impacts of those grants of tenure on ACFN's ability to meaningfully exercise their Treaty 8 rights now and in the future. If so, what information was assessed?</p> <p>Are there any regional or local benchmarks or targets in place to assess the impacts of industrial activities on the Treaty 8 rights of ACFN? If so, how, specifically, are they aimed at assessing impacts on ACFN Treaty 8 rights? To the extent that benchmarks, targets or measures will be developed through LARP, how are they specifically aimed at assessing impacts on ACFN's Treaty 8 rights.</p> <p>To the extent that Shell has undertaken an analysis of cumulative impacts or effects, how were such impacts or effects specifically related to ACFN's ability to meaningfully exercise their Treaty 8 rights?</p> <p>In carrying out the analysis above, what specific projects were included in the analysis? Were projects which do not, themselves, trigger an assessment under EPEA or CEEA included? Were projects beyond those approved or being considered within the next six months included? To what extent did Shell analyze potential, actual, or reasonably foreseeable activity on tenures which have already been granted? To what extent did Shell or AENV include in any such analysis the "win and work" requirements for tenures under Alberta legislation and regulations?</p>				

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>Will the following information be gathered by Shell or AENV as part of the decision-making process for the Application, including assessment of potential impacts (direct, indirect and cumulative) on ACFN's ability to exercise their Treaty 8 rights:</p> <ol style="list-style-type: none"> <li>1. Fixed sites – cabins, camps, communities, historical trails, graves, trap lines, spiritual sites (through information-sharing protocol with ACFN);</li> <li>2. Amount of land already taken up for development in ACFN Traditional Lands;</li> <li>3. Amount of land within Traditional ACFN Lands proposed to be taken up for development;</li> <li>4. Qualitative and quantitative information on current and historical traditional ACFN exercise of Treaty 8 rights:               <ol style="list-style-type: none"> <li>(a) Main species hunted, fished, gathered and trapped for food and domestic purposes and uses made of those species;</li> <li>(b) Locations and access routes currently used for obtaining those species;</li> <li>(c) Changes from 40, 20 and 10 years ago in locations and access routes used and costs associated with obtaining those species/items, based on such changes, both qualitative and quantitative;</li> <li>(d) Associated financial, social and cultural costs and impacts related to those changes;</li> </ol> </li> </ol>				

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
5. Locations within Traditional Lands currently used for spiritual and cultural practices (location disclosure subject to confidentiality agreement); (a) Changes in location from 40, 20, and 10 years ago and reasons for change;				
6. Information on traditional economic pursuits, such as: (a) Animals, plants, medicines, used for barter or trade;				
(b) Change in such activities from 40, 20 and 10 years ago and reasons for change;				
(c) Estimated costs of purchasing goods previously traded or bartered, or obtained through non-barter or trade;				
7. Current forest and mineral resources gathered and used by ACFN; (a) Changes in such uses from 40, 20 and 10 years ago and reasons for such changes				
8. Socio-economic information: (a) Current ACFN demographics – age, family units, education, sex, private sector employment, FN public sector employment, self-employment; (b) Changes in demographics from 40, 20 and 10 years ago; (c) Predicated demographics in 10 and 20 years based on current information				

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>9. Income</p> <p>(a) Amount and sources from wage economy, traditional pursuits</p> <p>(b) Changes in amounts and sources of income from 40, 20, and 10 years ago;</p> <p>(c) Number and percentage of individuals and families receiving social assistance;</p> <p>(d) Changes in numbers and percentage of social assistance recipients from 40, 20 and 10 years ago;</p>				
<p>10. Expenditures:</p> <p>(a) Expenditures by ACFN on food, housing, travel and recreation;</p> <p>(b) Changes in expenditures from 40, 20 and 10 years ago and reasons for such changes;</p>				
<p>11. Resource sector employment</p> <p>(a) Current number of ACFN members employed in resource sector including specific jobs and incomes and whether employment is full-time, part-time or seasonal;</p> <p>(b) Changes in such employment from 40, 20 and 10 years ago and reasons for such change;</p> <p>(c) Current number of ACFN members being employed within Traditional Lands and vicinity of Application;</p>				

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>12. Cumulative Impacts on ACFN Traditional Lands and Treaty 8 rights:</p> <p>(a) Amount (quantity and percentage) of potential forestry and oil and gas deposits within ACFN Traditional Lands;</p> <p>(b) Amount (quantity and percentage) of lands within ACFN Traditional Lands currently leased for forestry and oil and gas exploration and development;</p> <p>(c) Percentage of tenures developed within ACFN Traditional Lands in past 10 years;</p> <p>(d) Amount of land within ACFN Traditional Lands taken up for other developments (i.e., converted from natural vegetation);</p> <p>(e) Amount of ACFN Traditional lands no longer available for exercise of Treaty 8 rights because of direct, indirect and cumulative impacts of existing, planned and reasonably foreseeable development;</p> <p>(f) Identification of all linear corridors (pipelines, transmission lines, roads, seismic lines) within Traditional Lands and vicinity of Application;</p> <p>(g) Estimated size of area of direct and indirect disturbance to wildlife relied upon by ACFN in Traditional Lands and vicinity of Application, and description of methodology for such information;</p>				

*Question 12 continued on next page*

ACFN QUESTION OR INFORMATION REQUEST	AENV WILL RESPOND AND ACTUAL RESPONSE	SHELL WILL RESPOND AND ACTUAL RESPONSE	REASONS FOR DECLINING TO RESPOND	LOCATION OF EXISTING RESPONSE
<p>(h) Other Tenure Holders:</p> <ul style="list-style-type: none"> <li>i. Identification of all other tenure holders within the vicinity of the Application, including exploratory leases or tenures;</li> <li>ii. Size of area held by other tenure holders within the vicinity of the Application</li> </ul>				

## APPENDIX “B” – ABORIGINAL AND TREATY RIGHTS ASSESSMENT AND TRADITIONAL RESOURCE USE PLANS

Further to Mr. Loyola’s request, set out below are what we consider to be the elements of a Aboriginal and Treaty Rights Assessment and a Traditional Resource Use Plan (TRUP) for the Athabasca Chipewyan First Nation (“ACFN”). ACFN would be pleased to discuss these concepts, including required funding and information requirements, in more detail with AENV.

### Background

Current EIA process does not analyze potential impacts of development from a Treaty rights perspective. The ACFN Treaty Rights are based upon their traditional livelihood and culture. Environmental studies conducted as part of the EIA process do not capture the impacts on their cultural ecosystem and the socio-economic studies do not even identify the ACFN as an entity to be studied. The needs of ACFN to exercise their rights in a meaningful and viable fashion are not studied from an ACFN perspective. These gaps in data are an impediment to meaningful decision making and often slow down regulatory processes

ACFN is concerned that the current regulatory review process for the Shell Jackpine Mine and Pierre River Mine Applications will not properly examine potential impacts to ACFN’s Treaty 8 rights. Some of the reasons are set out below.

- Social and cultural indicators are not linked and applied in an EIA Application to the assessment of impacts to the exercise of a First Nation’s rights. For example, an Application will indicate potential changes to plants or animals and the Proponent will set out mitigation measures; however, consideration needs to be given to what that change means to the traditional resource user (the direct, indirect and cumulative impact to their livelihood, their ability to teach the next generation how to exercise the right, and the ability to have places to exercise the right that are not heavily impacted by development). Without consideration of these issues, the true ability of ACFN harvesters to exercise their rights is not assessed.
- The EIA included in these project applications does not seek to understand or consider the impacts on the ACFN cultural ecosystem, nor has Alberta or Shell sought to fully understand this information. Neither the ACFN livelihood nor their cultural ecosystem have been linked to the very things the EIA is supposed to assess such as water quality, air emissions, increase in noise, impacts on plants and animals and how all of this is in fact holistically connected.
- The methodologies in project-specific impact assessments are largely inadequate for elucidating the key relationships among socio-cultural and ecological aspects that support the meaningful practice of rights.
- There is no attempt in the Applications to assess the true impact of development from the Projects, and other developments within ACFN’s Traditional Lands, on their ability to exercise their rights given the large cumulative infringements in the region. What attempt has been made by AENV or Shell to truly discern, as cases like *Sparrow* and *Van der Peet* require, the aboriginal perspective of the rights at stake in terms of assessing impacts?
- There is often an assumption that “mitigation” means giving jobs to First Nation members or taking fairly minor steps such as re-planting vegetation that will be lost. There is no discussion of the social and cultural impacts to the First Nation of taking up yet more of their lands, or removing more places where they can practice their rights and teach the next generation. There is an assumption that there will always be “other places”, animals, plants, waters and resources

where this can be done which is contrary to the Mikisew decision. This is why there is a need to look at the tenures that have already been granted in the vicinity of the Project, both within ACFN's Traditional Lands and extending to and surrounding an ACFN reserve, because a project-specific approach ignores the fact that there will likely be development on many of those tenures likely destroying the ability of the First Nation to use the reserve for traditional purposes.

Set out below are some other things that are not typically examined in EIA Applications nor in assessing potential impacts of development, but need to be examined/assessed as part of the duty to consult:

- **Impacts of existing disturbance:** impacts on Treaty rights are already adversely impacting ACFN's Treaty 8 rights in many parts of their Traditional Lands. What we do not learn from EIAs is how the addition of disturbance (both project specific and other foreseeable projects) affects the already diminished exercise of Treaty rights. EIAs start with the "existing environment" as a baseline, but no one has assessed how much of a First Nation's ability to exercise Treaty rights is already affected. Past EIAs have not included an infringement/adverse impact assessment on rights and hence, we do not know the effect of the additional infringement/adverse impact to something unknown.
- **Fragmentation affecting Treaty rights:** the fragmentation of the landscape also affects Treaty rights, not just the clearing of an area. Fragmentation can only be assessed if the connections in the full cultural ecosystem are assessed.
- **Disturbances by all industry activities:** most small projects, including exploration, camps, roads and even pilot projects do not trigger an EIA or require a cumulative effects assessment. These projects are, in turn, not usually shown on the disturbance maps shown in EIAs with the result that the predicted cumulative effects (on Treaty rights and anything else) are underestimated. This omission brings into question the reliability of the entire cumulative effects analysis.
- **Mitigation measures:** are usually project specific and it may be assumed that such mitigation measures are sufficient; however, they do not address potential direct, indirect and cumulative impacts on Treaty 8 rights
- **The need to access traditional areas to practice Treaty rights:** there is no assessment or requirement that would deal with the disruption of travel/ability to access parts of the Traditional Territory – gates, infrastructure, project footprints, etc.

### **Traditional, Cultural and Socio-Economic Assessment**

The shortcomings of the current EIA and TOR system can only be remedied by conducting a proper impact assessment on Aboriginal and Treaty rights. There has been some discussion of the problems with the current EIA and traditional land use study methodologies above. This section will provide some suggestions for conducting impact studies that capture the impacts on Treaty rights and socio-cultural ecosystems.

The nature of Aboriginal communities in the Treaty 8 area requires analysis of two inter-related socio-economic systems, 1) what could be called traditional activities and 2) mainstream socio-economic activities. In order to capture these activities the assessment requires two associated foci: 1) a thorough traditional land use and activities study integrated with; 2) a socio-economic conditions study. Although

some information on each of these areas is included in current practices, the current EIA process (beginning with the Terms of Reference that guide the assessment) does not specify that links amongst these areas are made, especially with respect to an assessment of rights.

### **Socio-Economic Analysis**

The primary failure of the current methodology is that socio-economic studies are conducted based upon an urban or rural region without identifying the aboriginal and treaty rights holders' conditions. Since the First Nations and Métis groups have different rights each group requires a separate study to identify the specific effects on that particular group. For example if the large development projects are preventing a First Nation from maintaining its language or traditional knowledge, that will not be relevant or important to non-native residents of Fort McMurray or Fort Chipewyan who are typically included in socio-economic study statistics associated with a typical SEIA.

Because of the differences in value systems and the Aboriginal legal rights, a socio-economic assessment must assess the relative importance of traditional practices and their relationship with mainstream social and economic activities. For the study to be used in the mitigation and compensation processes of consultation, quantification of changes in social and economic activities must be included. For example, the study should indicate the portion of time spent on traditional activities versus mainstream activities and how the portion has changed over time. A socio-economic study of a rights bearing community:

- 1) Must include and be limited to members of the First Nation or Métis community who are rights holders.
- 2) Should include typical as well as traditional issues. Examples:
  - a. Time spent in wage earning activities versus time spent on the lands hunting and gathering. (time and income, employment, activities).
  - b. Level of education in schools versus knowledge about traditional pursuits (traditional knowledge).
  - c. Consumption of traditional foods versus store bought foods.

In addition, the ACFN has the right to determine how they will exercise their rights over time. This requires, in addition to the proper impacts analysis on traditional lands and socio-economic conditions, a Traditional Resources Use Plan.

### **Purpose and Objectives of a Traditional Resources Use Plan (TRUP)**

The purpose of the traditional resource use plan would be to provide credible, sufficient and reliable information on the land and resource needs of ACFN for the meaningful exercise of their Treaty 8 rights within their Traditional Lands now and into the future. Consideration of this information will lead to a more credible system of decision making which integrates FN information, and would ACFN, Industry and the Crown in making decisions about land and resource development.

Specific objectives are:

- Create a vision for what constitutes the meaningful practice of ACFN Treaty 8 rights currently and in the future;
- Identify what resources are integral to the meaningful practice of ACFN Treaty 8 rights;

- Determine the socio-cultural, ecological and economic conditions (including thresholds of acceptable change) that support the meaningful practice of ACFN Treaty 8 rights for each identified resource currently;
- Predict the socio-cultural, ecological and economic conditions that support the meaningful practice of the rights into the future;
- Identify key drivers of change and impacts to the resources and the conditions supporting ACFN use of the resource;
- Recommend land and resource management strategies that would ensure the continued meaningful exercise of ACFN Treaty 8 rights (e.g., protected or conservation areas; hunting restrictions; setbacks; timing windows; etc.)
- Integrate the information into an appropriate management tool format (e.g., GIS; planning documents) for use by decision-makers.

### **Time Frame to develop a TRUP**

We estimate that this would take approximately one year of full time work by a dedicated team of experts to complete. This would ensure that there is sufficient time to conduct interviews, including community surveys, collect and analyze data, present data. Please note that the five month delay in your response to our questions should not be held against ACFN. This process would include the proper traditional land use assessment and the socio-economic assessment outlined above.

### **Project Team**

The development of the TRUP would require guidance from and participation of the ACFN community in an interdisciplinary research exercise. An ACFN committee would be formed to guide provide input into key research stages, to work closely with the interdisciplinary research team to understand the ACFN issues of concern, to advise on liaising with the remainder of the ACFN community and on the selection of participants for workshops, interviews (and possibly fieldwork).

We anticipate that an interdisciplinary research team consisting of people with social science, landscape ecology, wildlife ecology, plant ecology, land and resource planning and project management expertise would be key to successful completion of the TRUP.

### **Required Information**

A large variety of information will need to be collected, including, but not limited to:

- Key resources on which ACFN relies: fish, wildlife, vegetation, plants
- Information on the use of the resources: food, social, ceremonial, commercial, spiritual uses, cultural uses
- Specific information on the demographic conditions associated with the use and harvest of resources:
  - Number of, and demographics of, ACFN members that utilize certain types of resources and amount that is used (the measure of use must be specified – household, individual, etc.)

- Resource pooling and sharing – are there relationships of reciprocity and exchange amongst ACFN members and non-ACFN members that contribute to the use of the resource?
- Demographic information on who is harvesting
- Specific information on the harvesting of each resource (including differentiation amongst harvesting preferences for different uses of the same resource, if applicable):
  - amount harvested
  - timing of harvest (when is a resource harvested?)
  - preferred places for harvesting
  - preferred methods for harvesting
  - impediments experienced to harvest, if any
- Ecological requirements for each resource
- The socio-cultural and economic conditions required to harvest those resources, including:
  - Remoteness / Privacy
  - Aesthetics (visual, noise, odour)
  - Lack of contamination
  - Safety and risk
  - Access
  - Economic conditions (time available for harvest; costs associated with access)
  - Impacts of tenure grants – availability of lands and corridors
  - Multi-generational considerations (e.g., is it safe to bring children?)
- Key issues affecting resource harvest (ecological, socio-cultural and economic) currently
- Key issues that could affect resource harvest in the future
  - E.g., abundance of resource and competition for resources as a result of growing First Nations and non-First Nations populations in the region
- Thresholds of acceptable change for conditions sustaining each resource
- “Best Management Practices” and culturally-appropriate management practices

## Methods

Some of the required information may be available as part of existing data sets; however, much of the information (especially quantitative information and detailed work on “conditions” or preferences) has not yet been collected. We will leave it up to the Project Team to detail the most appropriate methods for collection of information. However, we expect that there will be a variety of interviews, surveys and focus groups that would be required. Field work may also be required. Modelling would be required to examine possible future scenarios and to inform community work on thresholds identification.